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This newsletter provides a brief overview of recent regulatory updates in EU competition law and presents more details about one of last year's major developments: the new EU vertical block exemption regulation and guidelines on vertical restraints.

1. Recent Updates on regulatory reforms in EU competition law

In the following, we have summarized recent major legislative developments in the area of EU antitrust law. Some of the new rules have already entered into force, and others will enter into force this year:

- [The new vertical block exemption regulation and vertical guidelines](#) entered into force on 1 June 2022. As described below in detail, a new regulation and guidelines for contracts and other agreements between business operators that are active at different levels of the supply chain (in vertical relationship) were adopted in order to take into account recent changes across industries (e.g., digitalization and the growing importance of sustainability).
- [The European Commission published \(on 1 March 2022\) and received market feedback \(from 1 March 2022 to 26 April 2022\) on drafts of its revised horizontal block exemption regulations on research & development and specialization agreements, as well as its revised Horizontal Cooperation Guidelines](#) with the aim of adapting the current rules to economic and societal developments in areas such as the digital economy and the green transition. The Block Exemption Regulations constitute a valuable tool for companies, since they create a safe harbour for certain categories of horizontal agreements, thereby exempting them from the application of Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU"). The process of finalizing the horizontal rules will continue this year.
- [The Digital Markets Act \("DMA"\)](#) entered into force on 1 November 2022 and will start to apply in May 2023. The DMA regulates big tech platform services (online search engines, online social networking services, etc.) that meet certain turnover and user thresholds. The DMA introduces a series of obligations that such "gatekeepers" will need to implement, *inter alia*, related to interoperability and data portability. The DMA also imposes certain "don'ts," such as a prohibition on self-preferencing and parity clauses. In the event of noncompliance, the European Commission can impose fines and penalties, and even behavioural or structural remedies in the event of systematic infringements.
- [On 8 November 2022, the European Commission launched a public consultation on its draft revised Market Definition Notice, which serves to define the boundaries of competition between companies.](#)

The aim of the draft revised Market Definition Notice is to provide more transparency and legal guidance, for example, regarding market definition in digital markets (e.g. “multi-sided markets” and “digital ecosystems”) and innovation-intensive markets.

- On 3 October 2022, the European Commission adopted an [Informal Guidance Notice](#), which allows businesses to seek informal guidance when assessing the legality of their actions under EU competition rules in cases presenting novel or unresolved questions, including crisis and emergency situations.
- Most recently, on 28 November 2022, the EU adopted the [Foreign Subsidies Regulation \(“FSR”\)](#) which aims to tackle subsidies granted by non-EU countries that have a distortive effect on the internal market. The FSR entered into force on 12 January 2023 and will start to apply in the second half of 2023. The new rules introduce two notification-based tools: First, a merger control with a mandatory filing for certain M&A concentrations involving foreign subsidies, and second, a mandatory filing for certain bids in public procurements involving foreign subsidies. In addition, a general tool will allow the Commission to investigate other types of market situations on its own initiative, for example, where it suspects that foreign subsidies distort competition. If the Commission finds that subsidies are distortive, the Commission can impose redressive measures, ask for commitments, or prohibit the concentration or the award of the public procurement tender contract.

These regulatory developments in the antitrust area show that the EU legislators were particularly busy last year, with a focus on the digital economy and the implementation of the Green Deal. It will be crucial for companies to keep track of the complex, fast-moving regulatory reforms that have been and will be introduced in the coming months.

2. The new EU Vertical Block Exemption Regulation and Vertical Guidelines

(1) Overview

The revised Vertical Block Exemption Regulation (“new VBER”)¹ and new Vertical Guidelines relating to the Vertical Block Exemption Regulation² (“new Guidelines”) were adopted by the European Commission on 10 May 2022 and entered into force on 1 June 2022. The new VBER replaced the old VBER and Vertical Guidelines, which dated from 2010.

The EU’s VBER system provides for a general exemption from the prohibition set out in Article 101(1) of the TFEU for all types of vertical agreements that meet certain conditions (which establish a “safe harbour”). The VBER and related Guidelines thus are an important tool for suppliers and resellers to use to assess whether they can benefit from the safe harbor rule and whether their activities are compliant with EU competition law, including with regard to agreements that fall outside the safe harbour of the VBER.

The revised rules aim to give clearer, up-to-date rules to businesses and help them to assess the compatibility of their supply and distribution agreements with EU competition rules. Therefore, the new VBER takes particular account of the growing importance of e-commerce and online sales, as well as online marketplaces.

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, see <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R0720&from=EN>

² Guidelines on vertical restraints (2022/ C 248/01), see https://ec.europa.eu/competition-policy/system/files/2022-05/20220510_guidelines_vertical_restraints_art101_TFEU_pdf

Although the new VBER rules already entered into force in June 2022, a one-year transition period, which runs through 31 May 2023, applies with regard to existing agreements (i.e., for agreements that were already in force in June 2022), to permit them to be brought into line with the new rules. However, all other vertical agreements that were entered into after 31 May 2022 have to comply with the new VBER rules as of 1 June 2022.

(2) Summary of the most important changes

The following paragraphs provide an overview of the most important changes companies face as a result of the new VBER and Guidelines.

a. Online restrictions

Whereas the old VBER did not contain any express provisions with regard to restrictions on online sales, the new VBER introduces a new “catch all” hardcore restriction on preventing the effective use of the internet as a sales channel³. It provides that restrictions on online sales are hardcore when they directly or indirectly, in isolation or in combination with other factors, have the object of preventing buyers or their customers from effectively using the Internet to sell the contract goods or services, including restrictions that have the object of preventing the use of one or more online advertising channels in their entirety. The new rules thereby incorporate the case law precedent of the Court of Justice of the EU with regard to online restrictions, in particular *Pierre Fabre* and *Coty*⁴.

However, it is important to note that restrictions on marketplace sales are not hardcore restrictions as long as they only limit the manner in which the buyer may sell online. Given that it can be difficult to assess whether a vertical agreement constitutes a mere (and still permissible) limitation or whether it amounts to a restriction that prevents the effective use of the internet for online sales and, thus, constitutes a hardcore restriction, the Commission has provided further guidance in the new Guidelines.

The new Guidelines give the following examples for hardcore online restrictions (*inter alia*)⁵:

- the requirement that a buyer prevents customers located in another territory from viewing its website or online store or re-routes its customers to the online store of the manufacturer or another seller;
- requiring the buyer to sell the contract goods or services only in a physical space or in the physical presence of specialized personnel;
- requiring the buyer to seek the supplier’s prior authorisation before making individual online sales;
- prohibiting the buyer from using the supplier’s trademarks or brand names on its website or online store;
- prohibiting the buyer from establishing or operating one or more online stores;
- prohibiting the buyer from using an entire online advertising channel, e.g., search engines or price comparison services (but a prohibition on the use of particular price comparison services or search engines generally is not a hardcore restriction, as long as the buyer may use other online advertising services).

³ Art. 4(e) new VBER

⁴ Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l’Autorité de la concurrence* EU:C:2011:649; Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* EU:C:2017:941

⁵ New Guidelines, para. 206.

On the other hand, the new Guidelines also confirm that the following practices, *inter alia*, are eligible to benefit from an exemption⁶:

- requirements intended to ensure the quality or a particular appearance of the buyer's online store;
- requirements regarding the display of the contract goods or services in the online store (such as the minimum number of items displayed, or the way the supplier's trademarks or brands are displayed);
- a direct or indirect ban on the use of online marketplaces;
- a requirement that the buyer operates one or more brick and mortar shops or showrooms, for instance, as a condition for becoming a member of the supplier's selective distribution system;
- a requirement that the buyer sells a minimum absolute amount of the contract goods or services offline (in value or volume, but not as a proportion of its total sales) to ensure the efficient operation of its brick and mortar shop.

b. Dual Distribution

Dual distribution covers situations where the supplier is active both upstream and downstream and thus competes with its independent resellers in the downstream (distribution) market. Dual distribution remains exempt under the new VBER rules⁷ (i.e., exemption for non-reciprocal vertical agreements where the supplier is a manufacturer and a distributor, and the buyer is a distributor, but not active on the manufacturing level).

However, certain adjustments have been made with regard to the scope of dual distribution for which exemptions are available. The new VBER extends the exemption to vertical agreements with importers or wholesalers (at the upstream level) and buyers who are importers, wholesalers, or retailers at the downstream level⁸.

However, the dual distribution exemption does not apply to the provision of online intermediation services when the provider is also a competing undertaking for the sale of the intermediated goods or services⁹.

In addition, the new VBER clarifies that information exchange between the supplier and the buyer in a dual distribution situation remains generally exempt, but only if the information exchange is¹⁰:

- (1) directly related to the implementation of the vertical agreement and
- (2) necessary to improve the production or distribution of the contract goods or services.

In order to provide guidance for assessing these conditions, the new Guidelines set out examples of the types of information exchange that can/cannot be excluded from the safe harbour¹¹. For example, information

⁶ New Guidelines, para. 208.

⁷ With the exception of the provision of online intermediation services by a provider with a hybrid function.

⁸ Art 2(4) new VBER

⁹ Art 2(6) new VBER.

¹⁰ Art 2(5) new VBER.

¹¹ New Guidelines, para. 99 et seq.

relating to the future prices at which the supplier or buyer intends to sell the contract goods or services downstream generally is unlikely to fulfil the two conditions set out above.

c. Online Platforms

The new rules clarify that a provider of online intermediation services (such as e-commerce marketplaces, or online software application services such as online social media services) is treated as a “supplier” with respect to those services, while the seller company that uses the services via online intermediation services is categorized as a buyer (whether or not the latter pays for the use of the online intermediation services)¹². However, the new VBER excludes from the safe harbour vertical agreements relating to the provision of online intermediation services where the provider of the online intermediation services is a competing undertaking in the relevant market for the sale of the intermediated goods or services¹³ (“hybrid online intermediation services”).

In addition, the new Guidelines clarify that vertical agreements entered into by undertakings active in the online platform economy generally are not considered agency agreements that are exempt from Art. 101(1) of TFEU¹⁴.

These clarifications have important consequences for application of the VBER; for example, a supplier/online platform cannot impose hardcore restrictions on undertakings using the online intermediation service.

d. Most favoured nation (MFN) clauses

MFN or parity clauses generally are contract provisions that require a counterparty to offer its goods/services on the same or more favourable terms (price or non-price) as those offered on other sales or marketing channels, such as other platforms. MFNs recently have been under scrutiny by various competition authorities that have distinguished between wide MFNs (or “cross-platform retail parity obligations”) that restrict a counterparty from offering better terms on all of its sales channels and via competing online platforms, and narrow MFNs, which only restrict a counterparty from offering better terms on its own website, but allow the counterparty to offer better terms on competitors’ sites.

The new VBER has been updated in this regard, and excludes the application of the exemption for wide MFNs (across-platform retail parity obligations), i.e., obligations that prevent buyers of online intermediation services from offering, selling or reselling goods or services to end users under more favourable conditions via competing online intermediation services¹⁵.

In addition, the new rules confirm that other types of parity clauses will continue to benefit from the exemption, including wholesale parity obligations and narrow parity clauses¹⁶. However, with regard to the latter, the Commission warns that the exemption may be withdrawn, in particular in concentrated markets where the competition between platforms is restricted by the cumulative effect of parallel networks of similar agreements

¹² Art. 1.1(d) new VBER.

¹³ Art. 2(6) new VBER.

¹⁴ New Guidelines, para. 63.

¹⁵ Art. 5.1(d) new VBER.

¹⁶ New Guidelines, para. 254.

restricting buyers of online intermediation services from selling goods or services to end users under more favourable conditions on their direct sales channels¹⁷.

e. Dual Pricing

Dual pricing allows the supplier to charge different prices to the same reseller for products intended to be resold online or offline. Under the old VBER rules, dual pricing constituted a hardcore restriction.

Under the new VBER, dual pricing is now block-exempted, as the restriction may incentivize, or reward, appropriate levels of investment made online and offline¹⁸. In fact, the primary aim of this new rule was to address the concern of free-riding, for example, when customers visit a brick and mortar shop to test goods or services or to obtain other useful information on which they base the decision to purchase, but then order the product online from a different distributor.

However, companies have to analyze carefully whether the dual pricing constitutes a hardcore restriction on online restrictions, as outlined above. For example, this would be the case where the difference in the wholesale price makes selling online unprofitable or financially unsustainable, or where dual pricing is used to limit the quantity of products made available to buyers for sale online¹⁹.

f. Exclusive and selective distribution system

Active sales restrictions in exclusive distribution systems relate to limitations on the buyer's ability to approach individual customers actively. These restrictions generally constitute hardcore restrictions, and the old VBER contained only very narrow exceptions to this rule.

The new VBER extends the block exemption to shared exclusivity, allowing a supplier to appoint up to a maximum of five distributors per exclusive territory or for a particular customer group²⁰.

Furthermore, the new rules allow suppliers to obligate their distributors to pass on restrictions on active sales to their customers. The new Vertical Guidelines clarify that the block exemption also applies where a supplier requires its buyers/distributors to restrict their direct customers from actively selling into territories or to customer groups that the supplier has allocated to other distributors, or reserved to itself, on an exclusive basis. However, these pass-ons are not block-exempted further down the distribution chain²¹.

Finally, with regard to selective distribution systems, the new VBER allows suppliers to prohibit buyers and their customers from actively or passively selling to unauthorised distributors located in any territory where the supplier operates a selective distribution system²². Thus, such a prohibition can be exempt regardless of whether the buyers and customers are located inside or outside that territory.

¹⁷ New Guidelines, para. 259

¹⁸ New Guidelines, para 209.

¹⁹ New Guidelines, para 209.

²⁰ Article 4(b)(i) new VBER.

²¹ New Guidelines, para. 220.

²² Article 4(c) (i) (2) new VBER

g. Sustainability

Since sustainability has become a priority objective for the EU, this topic has been taken into account in the new rules.

Although the new Guidelines clarify that sustainability agreements are not a distinct category of agreement under EU competition law, they recognize that sustainability objectives are capable of constituting an efficiency within the Art 101(3) TFEU²³ assessment²⁴. Consequently, vertical agreements containing these sustainability efficiencies, but which do not benefit from the safe harbour of the VBER, nonetheless may still qualify for an exemption under 101(3) of the TFEU.

The new Guidelines also explain that sustainability criteria, such as climate change, protection of the environment, or limiting the use of natural resources, qualify as valid qualitative criteria for purposes of selective distribution systems (for example, a supplier can request that its distributors in a selective distribution system ensure that their goods are delivered in a sustainable manner, such as by cargo bike instead of by motor vehicle)²⁵.

h. Non-competition clauses

Under the old rules, the safe harbour of the VBER did not apply to non-compete clauses that exceeded a five-year period. The new Guidelines now state that non-compete obligations that are tacitly renewable beyond a period of five years can benefit from the block exemption, provided that the buyer can effectively renegotiate or terminate the vertical agreement containing the obligation with a reasonable period of notice and at a reasonable cost, thus allowing the buyer to effectively switch its supplier after the expiry of the 5-year period²⁶.

(3) In Summary

Overall, the new rules have simplified and provided greater flexibility for companies in the design of their distribution models. However, there are also some areas where the new VBER introduces more restrictive rules, for example, with regard to certain MFN clauses. Therefore, companies should check whether their existing contracts are in line with the new rules, but also see whether there are any new business opportunities from which they may benefit.

²³ Apart from the block exemption under the VBER, Art 101(3) TFEU provides that the prohibition under Art 101(1) TFEU shall not apply if certain conditions are met (individual exemption).

²⁴ New Guidelines, para. 9.

²⁵ New Guidelines, para. 144.

²⁶ New Guidelines, para 248.

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