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Key Changes by the new Vertical Block Exemption Regulation (EU) 2022/720 to certain categories of vertical agreements and concerted practices

On the 31st of May 2023 the transitional period of the EU Vertical Block Exemption Regulation 2022/720 ("New VBER") ended, and it now applies as well to agreements that were already in force on the date of its entry into force (31.05.2022). The New VBER, introduced following evaluation by the EU Commission of EU Regulation 330/2010 ("VBER"), adopts a revised set of rules regarding exemptions of vertical agreements that meet certain conditions from the prohibition in Article 101(1) TFEU. Its most significant novelties address efficiency, simplicity, and modernization of the VBER and are summarized as follows:

A. Dual Distribution - Exchange of information

Given the increase in the use of dual distribution, i.e. vertical agreements between entities active at the same levels of the production or distribution chain, New VBER introduced a distinction to accommodate direct sales to end-customers by importers while tackling horizontal concerns.

Vertical agreements between competing undertakings in principle do not benefit from the block exemption. However, Article 2(4) of the New VBER expands the exemption to two cases of **dual distribution under non-reciprocal vertical agreements.** These cases involve a supplier of goods or services who also operates at the downstream level, competing with its independent distributors. The first scenario concerns the scheme where the supplier sells the contract goods at multiple trade levels, namely at the upstream level as a manufacturer, importer, or wholesaler and at the downstream level as an importer, wholesaler, or retailer, whereas the buyer sells the contract goods at a downstream level, namely as an importer, wholesaler or retailer, and is not a competing undertaking at the upstream level where it procures the contracted goods. The second dual distribution scheme that is block exempted refers to the scenario where the supplier is a provider of services operating at multiple levels of trade, whereas the buyer provides services at the retail level and is not a competing undertaking at the level of trade where it purchases the contracted services.

Moreover, the exchange of information poses challenges in dual distribution scenarios. While the exchange of information between a supplier and a buyer can generally have pro-competitive effects in vertical agreements, such as optimizing production and distribution processes, it can also raise concerns when it comes to dual distribution. The New VBER addresses this issue by limiting the scope of information that can be exchanged between the buyer and supplier in a dual distribution framework. Only the exchange of information that meets the conditions outlined in Article 2(4) of the New VBER is exempted, and it must be directly relevant to the implementation of the specific vertical agreement and necessary for improving the production or distribution of goods or services. The guidelines accompanying the New VBER provide comprehensive examples of the types of information exchange covered by the regulation.

B. Online Sales/ Online Platforms

Considering the increase in sales and online advertising, *"the prevention of the **effective use of the internet by the buyer or its customers to sell the contract goods or services**"* is seen by the New VBER as a strict restriction, excluded from its scope. This is not the case for other restrictions or requirements imposed on a buyer relating to how the contract goods or services are to be sold online (i.e. minimum number of items displayed, the way the supplier's trademarks are displayed, etc.), the use of particular online sales channels (i.e. marketplaces), the imposition of quality standards (i.e. relating to the quality or a particular appearance of the buyer's online store, etc.). Such restrictions can generally benefit from the New VBER exemption, provided that they do not indirectly have the object of preventing the effective use of the internet by the buyer to sell the contract goods or services to particular territories or certain customers.

When it comes to agreements involving the provision of **online intermediation services** (e.g. e-commerce marketplaces, app stores, price comparison tools, etc.), what is crucial for New VBER is whether the provider of intermediation services is a competing undertaking on the relevant market for the sale of the intermediated goods or services (hybrid function). If not, such agreements merit the New VBER block exemption, as vertical agreements, nevertheless in a dual distribution scenario, they must be assessed individually under Article 101 of TFEU, both in terms of horizontal and vertical restraints.

C. Active sales restrictions

Historically, restrictions on a buyer's ability to proactively reach out to specific customers in a particular territory or customer group have been recognized as strict limitations that prevent the block exemption of relevant vertical agreements.

However, the New VBER introduces a new approach called the "shared" exclusivity system. Under this system, the safe harbor exemption is extended to agreements that include restrictions on active sales by the buyer into a territory or customer group, which are exclusively reserved by the supplier or allocated by the supplier to a maximum of 5 exclusive distributors.

Furthermore, such active sales restrictions in certain territory or customer group (reserved to the supplier or exclusively to a maximum of 5 exclusive distributors) can now be passed on also to the direct customers of the latter. However, such pass-on is not block-exempted further down the distribution chain.

D. Parity Obligations

Parity obligations, also referred to as **Most Favored Nation clauses ("MFNs")**, are obligations that require an undertaking to offer the same or better conditions to its counterparty as those offered on other sales or marketing channels. Under the previous VBER, all Across Platform Parity Clauses (APPAs), namely both wide APPAs (i.e preventing a party to apply better conditions on any platform) and narrow APPAs (i.e preventing a party to apply better conditions on their website) were block exempted, whereas, in recent years, enforcement actions have generally focused on retail parity clauses imposed by platforms relating to the conditions offered on other platforms. The New VBER removed the benefit of the block exemption for wide APPAs that are henceforth to be assessed individually under Article 101 of the Treaty. All other types of parity obligation in vertical agreements can benefit from the block exemption, including, for example, parity obligations relating to the conditions under which goods or services are offered to undertakings that are not end-users. New VBER guidelines provide clarification of the factors to be taken into account during the individual assessment of parity obligations.

E. Non-Compete

Non-compete clauses, where neither the supplier's nor the buyer's market share exceeds 30%, are exempted, provided that their duration does not exceed five years. New VBER goes even beyond applying the same exemption to agreements that are tacitly renewable beyond a period of five years, as long as they allow the buyer to effectively renegotiate or terminate the agreement by giving a reasonable period of notice and at a reasonable cost.

As in the previous VBER, New VBER repeats that quantity forcing, i.e. an obligation or incentive scheme causing the buyer to purchase more than 80% is a form of non-compete arrangement.

Conclusion

Building upon the success of the previous VBER in terms of businesses assessing their compliance with vertical agreements, the New VBER brings about modifications based on experience, the need for clarity, and, most importantly, changes in the market.

As a result, it is highly anticipated that the New VBER will enhance businesses' ability to adhere to antitrust laws, making the process more efficient and comprehensible for all stakeholders.

For further comprehensive guidance regarding the new Vertical Block Exemption Regulation tailored to specific business needs, contact the legal professionals of Your Legal Partners.

Evgenios Fiflis, Associate
evgenios.fiflis@yourlegalpartners.gr

Angelos Sarrigiannis, Junior Associate
angelos.sarrigiannis@yourlegalpartners.gr