

Revision of EU competition rules regarding the assessment of vertical agreements

■ LEGAL ALERT

Introduction

On 1 June 2022, the new Vertical Block Exemption Regulation (2022/720) adopted by the European Commission (“**VBER**”) comes into force. The new VBER supersedes the regulation that has been in place for the past twelve years, and together with new guidelines from the EU Commission (the “**EC**”), partially revises the antitrust rules for the assessment of vertical agreements between undertakings. The undertakings have 1 year (until the end of 31 May 2023) to adjust their agreements and practices to the new VBER in respect of the latter’s new provisions which are more restrictive than those of the previous VBER.

The new VBER is accompanied by new guidelines published by the EC (the “**Vertical Guidelines**”), which aim to facilitate the undertakings in their assessment of their agreements, including those that fall outside the automatic exemption.

The basic mechanism of the VBER remains the same – the automatic exemption (i.e. safe harbour) from the prohibition of anticompetitive agreements

provided in Article 101(1) of the Treaty on the Functioning of the European Union (“**TFEU**”) applies to vertical agreement if:

- i. the market shares of a supplier / buyer on the relevant market on which it sells / purchases contracted goods or services is not above 30%; and
- ii. the agreement does not contain what is known as hardcore restrictions, i.e. restrictions on the undertaking’s business activity as set out in the VBER.

When an agreement falls outside of the automatic exemption this does not mean that it automatically infringes competition law. Rather it is then subject to individual assessment under the general principles of EU competition law (Article 101 TFEU).

Below we summarize the most important changes in the new VBER as compared to the previous regulation.

Changes in distribution systems and in the protection of distributors

The VBER partially liberalizes the rules for conducting distribution and provides more flexibility for undertakings to build distribution systems, but does so in moderation.

Extension of the definition of exclusive distribution

The VBER allows for what is known as “shared exclusivity”. The situation where a given territory or customer group is assigned not only to one, but up to five distributors is also considered an exclusive distribution system that may benefit from the automatic exemption. In practice, this makes it possible to extend the protection of individual distributors.

Active vs. passive sales

The VBER includes the definitions of both terms and clarifies the boundaries between them. For example:

- although the use of websites is still generally considered as a type of passive sales that cannot be restricted, certain website configurations might be considered as active sales and thus capable of being restricted;
- passive sales include participating in public tenders (regardless of their form) and responding to invitations to tender by non-public entities.

Combining different distribution systems and passing on restrictions to customers

The VBER still does not extend its regulation to a combination of selective and exclusive distribution systems within the same territory. However, it explicitly allows for the combination of the two above systems in different territories and enables the supplier to:

- restrict selective distributors and their direct customers from actively selling into territories / to a group of customers, covered by an exclusive distribution system;
- restrict exclusive distributors and their direct and indirect customers’ active and passive sales to unauthorized distributors in the territory covered by the selective distribution system.

In addition, the VBER allows for the above restrictions to be imposed on distributors operating under an open-ended (free) distribution system.

Lack of requirement to use equivalent criteria in selective distribution

The Vertical Guidelines change the EC’s previous approach and indicate that a supplier may impose different (i.e. non-equivalent) criteria on online and offline distributors in a selective distribution system. The EC has concluded that online sales no longer need such strong protection. However, the differentiation of the criteria cannot have as its object the

effective restriction of online sales.

In addition, the Vertical Guidelines provide that a selective distribution system benefits from the exemption irrespective of the type of product covered and the type of criteria used for the selection of distributors.

Changes in respect of the effective use of the Internet

The VBER explicitly introduces a new type of hardcore restriction that prevents the application of the automatic exemption, i.e. *preventing the effective use of the Internet by the buyer or its customers to sell contracted goods or services*. Until now, this issue was only regulated in the guidelines.

This clause is of a general nature and the Vertical Guidelines specify in more detail the types of such restrictions. In principle, some of the proposals are consistent with the EC’s previous approach.

It is worth mentioning that the restriction of the use of an entire specific online advertising channel was indicated as a hardcore restriction, e.g.:

- preventing the use of online price comparison tools or the use of paid advertising through search engines;
- preventing a distributor from using a supplier’s trademark or brand name on a website.

Some partial restrictions in this respect may be allowed.

The Vertical Guidelines also clarify that the exemption applies to restricting the use of ecommerce marketplaces by distributors as long as this restriction does not effectively block the usage of the entire online sales channel.

Clarification of the rules concerning agency

The Vertical Guidelines clarify the use of existing rules regarding circumstances when Article 101(1) TFUE does not apply to agency agreements.

One of the newly analysed aspects is the situation where a given undertaking is simultaneously acting on behalf of a given supplier as an agent for certain products and as an independent distributor of other products. Generally, the EC allows for this distribution model subject to the following conditions:

- the independent distributor must have the real freedom to establish an agency relationship. For example, a supplier cannot impose an agency relationship upon the threat of termination or deterioration of the terms of the distribution relationship;
- a supplier cannot force an agent to act as an independent distributor unless the nature of that distribution fulfils the conditions of an agency relationship.

The EC emphasizes that it will restrictively analyse such situations to avoid a situation in which suppliers seek to misuse agency relationship to impose resale prices inconsistent with the VBER.

Status of online platforms

The Vertical Guidelines state that internet platforms, e.g. those providing online intermediation services, does not qualify as agents of the undertakings that sell through them. Thus, they are treated as independent undertakings and the general restrictions existing under the VBER apply to such intermediation services. In practice, this approach reduces the ability of these platforms to impose various restrictions on the sale of products by buyers of online intermediation services, e.g. to set a fixed or minimum resale price.

Changes to vertical cooperation between competitors (*dual distribution*)

Similarly to the previous version of the VBER, the exemption applies to vertical agreements between competitors, provided that (i) the competition between them occurs only at the distribution level; and (ii) the supplier is a manufacturer.

The VBER **extends** the exemption for vertical agreements between competitors also to situations where the supplier is an importer or wholesaler, provided that the buyer of the goods does not compete with the supplier at the higher level of trade where it purchases the goods covered by the agreement.

In principle, however, the VBER **limits** the application of the automatic exemption of vertical agreements between competitors.

Limitation on information exchange between competitors

Under the VBER, the exemption no longer pertain to any exchange of information occurring in the context of VBER-covered cooperation between competitors. In the case of such cooperation, the exemption does not cover information exchange that is not:

- directly related to the implementation of the vertical agreement; or
- necessary to facilitate the production or distribution of goods or services covered by the agreement.

The Vertical Guidelines provide for additional directives that allow undertakings to assess whether certain information can be exchanged between them. The Vertical Guidelines also include lists of information that may meet the above criteria as well as information that is generally unlikely to meet them.

Non-application of the VBER to what are known as hybrid platforms

The VBER does not apply (i.e. no automatic exemp-

tion) to agreements for the supply of online intermediation services where the provider of such services competes with its buyer in the relevant market for the sale of the goods or services over which it intermediates (i.e. hybrid platform).

The lack of automatic exemption under the VBER in such a situation does not mean that such cooperation is incompatible with competition law. In the Vertical Guidelines, the EC underlines that it will pay less attention to this type of cooperation as long as it does not involve the most serious infringements of competition law (infringements by object) or the provider of the online intermediation service does not have a strong market position in the area of such services.

Limitation of use of the most favoured nation clauses (“MFNs”)

Parity clauses, or MFNs, are contractual provisions guaranteeing to a party of the vertical agreement that the conditions offered by the other party are no less than the most favourable terms offered to whomever is on the market. Until now, MFNs have benefitted from the automatic exemption if the general conditions for exclusion were met. The VBER has limited this exemption.

The exemption does not apply to clauses preventing a buyer of online intermediation services from offering more favourable conditions to end users via competing online intermediation services. Despite the fact that the exception appears to be rather narrow, it will be widely applicable in practice, as MFNs have been broadly used in various types of online platforms.

The other MFNs, including those concerning sales at the wholesale level or distribution channels other than online platforms, continue to be exempted under the VBER’s general conditions.

Clarification on resale price maintenance (“RPM”)

The Vertical Guidelines clarify the existing interpretation of RPM. The following examples are worth noting:

- imposing minimum advertised prices (“**MAPs**”) – generally, the EC treats MAPs as RPM. However, the Vertical Guidelines provide an exception allowing for the imposition of MAPs if it can be demonstrated that the distributor regularly resells goods below the wholesale price;
- the EC allows for the imposition of resale prices on the distributor if the supplier (i) has already agreed the price with the specific end-customer; (ii) if the independent distributor is chosen by the supplier only for the execution of the agreement between the supplier and the end-customer (known as a fulfilment contract); and (iii) if the

Dual pricing

Until now, the EC has had a restrictive approach to using different prices for products sold online and offline. The Vertical Guidelines provide for a more flexible approach and allow:

- price differentiation based on the buyer's sales channel, provided that the price difference "reasonably" relates to the difference in cost and investment incurred to make sales through online and offline channels; and
- using mechanisms that implement such differentiation.

The Vertical Guidelines emphasize that comprehensive cost analyses are not required in this area.

However, such differentiation cannot have as its object the preventing of the effective sale of products or services to specific territories or customers. The EC gives as an example the use of such prices that makes selling online unprofitable for the buyer or which limit the quantity of products made available for online sales. In addition, it should be emphasized that the EC's lenient approach applies to the price between the supplier and the distributor, and not to the imposition on the distributor of differentiated

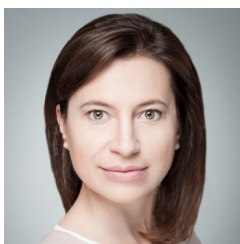
resale prices in the distributor's various sales channels.

Extension of the possibility to use non-compete obligations

As in the case of the previous VBER, only the non-compete provisions imposed on a buyer of goods or services (single branding) that are entered into for an indefinite period of time or exceed 5 years are not exempt. However, the VBER no longer explicitly contains the restriction that such non-compete provisions may not be tacitly renewed after 5 years.

The Vertical Guidelines take a more flexible approach and allow for non-compete obligations that are tacitly renewable beyond a five-year period as long as the distributor can effectively renegotiate or terminate such agreement with a reasonable period of notice and at reasonable cost, so that he has a real opportunity to switch suppliers after 5 years.

CONTACT:



Iwona Her
PARTNER

+48 22 520 4326
IWONA.HER
@RYMARZ-ZDORT.COM



Tomasz Kordala
SENIOR ASSOCIATE

+48 22 520 4225
TOMASZ.KORDALA
@RYMARZ-ZDORT.COM



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