



Restrictions of Competition in Distribution

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Companies often have an interest in binding their distribution partners in certain ways in order to secure their position in the market. In doing so, they usually restrict competition. In contrast, the principle of free competition applies in the EU, and restrictive measures by companies are generally not permitted. Therefore, the EU in principle prohibits all agreements, decisions and concerted practices that are anti-competitive and distort the internal market (Article 101(1) Treaty on the Functioning of the European Union / TFEU). However, an exception exists for certain types of agreements if they are beneficial to consumers. Nevertheless, it is problematic that each individual agreement and act must be assessed individually. This leads to a high degree of legal uncertainty, which is reflected in a high level of effort and risk for companies.

The block exemption regulations

In order to increase predictability and legal certainty, the European Commission adopts block exemption regulations (Art. 103 TFEU), thereby setting out the conditions under which certain types of agreements in certain market sectors are in principle deemed to comply with competition law. For such agreements, a BER creates a kind of "safe harbor". In total, there are currently six block exemption regulations, concerning:

specialization agreements, research and development agreements, insurance sector, technology transfer agreements, motor vehicle spare parts and vertical agreements.

The new Vertical Block Exemption Regulation 2022

On June 1st, 2022, the EU has updated the Block Exemption Regulation on Vertical Agreements (Vertical Block Exemption Regulation) accompanied by the new Vertical Guidelines.

The new Verticals Block Exemption Regulation, like the previous one, creates an exception to the principle of prohibition of restrictions of competition for certain vertical agreements, i.e. between undertakings operating at different levels of the production, supply and distribution chain.

The updated version of the regulation includes several changes that may require or allow companies to adjust their distribution models.

Unlike other block exemption regulations, the Vertical Block Exemption Regulation applies irrespective of the sector. The prohibition of restrictions of competition in vertical agreements does not apply if none of the parties exceeds a market share of 30 % on the relevant



sales and purchase market. However, this de minimis rule does not apply to the infringement of hardcore restrictions (Article 2 of the Verticals Block Exemption Regulation).

If the contract contains a hardcore restriction, the whole contract is excluded from the block exemption and individual assessment becomes necessary.

As a result, if a contract contains such an agreement, this may render the contract as a whole invalid. Companies should therefore review their existing contracts and adapt them if necessary; new contracts should be drafted in a legally compliant manner.

In addition, the Vertical Block Exemption Regulation contains a list of so-called "grey clauses" which must be examined in an individual assessment (Art. 5 Vertical Block Exemption Regulation). However, the exclusion from the block exemption does not extend to the entire contract, but only concerns the individual clause. Grey clauses should also be checked regularly and adjusted if necessary.

The most important innovations of the Vertical Block Exemption Regulation are presented below. This serves as an overview and does not replace individual advice.

Most important innovations: scope

Dual distribution

Where a supplier sells its goods both through independent distributors and directly, it may well be in competition with its distributor.

Under the old Verticals Block Exemption Regulation, vertical agreements between competitors were generally excluded from the block exemption and had to be assessed individually. Dual distribution, on the other hand, was permitted by the Vertical Block Exemption Regulation.

With the new regulation, dual distribution remains in principle exempt. However, particular caution applies to dual distribution in the context of the provision of online intermediary services (OIS), e.g. through hybrid platforms, and to the exchange of certain information between suppliers and buyers.

Main innovations on hardcore restrictions

OIS

Operators of *online intermediation services (OIS)* are considered suppliers under the new regulation. Price, territorial and customer restrictions imposed by a dual-distributing OIS provider on the customers of its services are now considered hardcore restrictions and are therefore prohibited.

Dual pricing

Under the old Vertical Block Exemption Regulation and its guidelines, so-called "dual pricing" was a core restriction. A supplier (e.g. wholesaler) was therefore not allowed to charge different prices to customers for online sales and for stationary sales.

From the perspective of the European legislator, the protection of online trade in this respect is no longer necessary and dual pricing is now permitted. A change of the own distribution structure is accordingly possible.

It should be noted, however, that price differences must be proportionate to the cost differences between online and offline channels. The aim of pricing policy must therefore not be to restrict sales to certain territories or customers or to virtually prevent the use of the Internet.

Furthermore, the supplier may not impose on its customers that its selling prices must be higher or lower depending on the distribution channel.

Restriction of online sales

Unlike the old Vertical Block Exemption Regulation, the new Vertical Block Exemption Regulation explicitly identifies the prevention of the effective use of the internet by buyers or their customers for the sale of services or goods as a hardcore restriction. Softer measures may be permissible, e.g. those aimed at ensuring the quality of the trader's online shop or requirements according to which the trader must operate one or more bricks-and-mortar shops or achieve a minimum volume of offline sales. This means for companies that such restrictive agreements must be reviewed in the sense of the clarifications of the new



regulation and its guidelines in order to exclude the anti-competitive nature of such an agreement.

Exclusive and selective distribution systems

In the new Vertical Block Exemption Regulation, the rules on exclusive, selective and other distribution systems are structurally more differentiated. In principle, however, the rules remain similar. For instance, a restriction on the place of establishment of the buyer or a prohibition on sales to final consumers by a buyer at the wholesale level are still allowed.

As an innovation, the provider is now allowed to use up to five exclusive distributors in a certain area or for a certain customer group, previously it was only allowed to use one.

It is also of practical importance that the respective permissible restrictions on active or passive sales to protected customer groups or territories can now be extended to the second distribution level (previously only the first). Attention should be paid to the definitions of active and passive sales in the new Vertical Block Exemption Regulation. Particular care should be taken when classifying the operation of websites.

Prohibition of sales via online marketplaces

Already in 2017, the ECJ had clarified that suppliers of luxury goods may prohibit their distributors in the selective distribution network from selling the contract goods via third-party platforms. This is not a prohibited restriction of competition.

The new Vertical Block Exemption Regulation now legally fixes this relaxation of the "equivalence principle" between offline and online sales. Accordingly, the supplier may generally prohibit its dealers from selling via online marketplaces as a sales channel, but not entire advertising channels such as search engines or price comparison websites. This remains an impermissible hardcore restriction.

Exclusive + selective distribution

The new rules continue to allow the combination of selective and exclusive distribution in different territories within the EU (e.g. selective in Spain and exclusive in France). Protection of the different forms of distribution from each other remains permissible, in

particular, restrictions may now also be extended to the second level of distribution. The combination of an exclusive and a selective distribution system in the same territory is still not covered by the block exemption.

Resale price maintenance

Both direct and indirect price maintenance measures vis-à-vis authorized dealers ('second hand') remain prohibited.

If a supplier negotiates directly with the customer, e.g. a retail chain, he is allowed to involve a trader of his choice who delivers the goods to the customer at that particular price. The prerequisite is that the customer is bound to this trader and cannot choose any other trader.

The supplier is also permitted to set maximum selling prices and to make price recommendations.

Main innovations: grey clauses

Non-compete obligations

Non-compete obligations and clauses requiring the buyer to purchase more than 80 % of its total purchases of the contract goods from the supplier are still not exempted if the duration exceeds five years. However, tacitly renewable obligations are now exempted if the buyer can effectively renegotiate or terminate the contract after five years.

Most favoured nation clause

A most-favoured-nation (MFN) clause (or parity obligation) obliges a company to offer its counterparty the same or better conditions than on other sales markets. The old vertical BER provided for a full exemption for all parity obligations.

However, under the new Vertical Block Exemption Regulation, "wide parity clauses" are no longer covered by the block exemption. These are agreements whereby an online platform prevents its trader or supplier from offering the same product on other retail platforms on better terms or at a lower price.



All other parity clauses (relating to the provider's own distribution channel) remain exempt. However, if a platform dictates to its suppliers tight parity clauses covering a significant proportion of users without any evidence of efficiency, the exemption may be withdrawn.

Outlook

Companies, especially those with online sales, should legally review their existing and future distribution agreements.

In addition, despite the complexity of the subject matter, it is recommended to obtain a well-founded picture of the new BER - the changes and clarifications of the new vertical BER and the supplementary guidelines may well open up new possibilities for one's own distribution model.

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