NEW OPPORTUNITIES AND THREATS IN SALES: REVISED VERTICAL BLOCK EXEMPTION REGULATION 2022 IN FORCE

I. WHAT IS CHANGING?

The European Commission's Vertical Block Exemption Regulation No. 330/2010 20.04.2010 ("**VBER**"), which was previously potentially applicable to distribution, whereby agreements between manufacturers or suppliers and retailers are exempt from the ban on cartels, ceased to be in force on 31/05/2022, because the original period of validity of 12 years was reached.

As of 01/06/2022, the revised succession regulation, referred to as "**new VBER**" together with the associated guidelines ("**new Vertical-Guidelines**"), came into effect. Distribution systems between manufacturers and retailers with a respective market share of no more than 30% are still exempt from the ban on cartels on a flat-rate basis, unless the agreement contains a hardcore restriction. However, these new versions bring some changes which relax requirements compared to the previous legal situation, but also tighten requirements, which primarily take into account the area of tension between online/offline sales.

II. RESALE PRICE MAINTENANCE

Price specifications and minimum prices (including minimum advertising prices) are still not permitted. However, the new vertical guidelines include some scenarios in which retail price maintenance can lead to efficiency gains and are thus **legally permissible in exceptional cases**:

– introduction of a **new product** by the manufacturer to increase the retailer's sales efforts,
– specification of fixed resale prices for **special offer campaigns** that also benefit consumers (for a duration of two to a maximum of six weeks),
– targeted use of minimum (advertisement) prices **against loss leader offers** and
– to address the problem of customers using **commercial consulting services** before making their purchasing choice, only to end up purchasing the product at a **lower price from a retailer** that does not offer such advice.

By resale price maintenance, such retailers are able to offer such customer consultation services as well.

In addition, drop shipping is now expressly excluded from the prohibition of the price specification to a retailer, provided that it is clear and specified by the manufacturer which retailer is to be invoiced. However, if the end customer chooses the retailer, the manufacturer may still not charge the price to the retailer.

III. SOLE DISTRIBUTION

In the future, exclusive distribution systems may be assigned to up to five retailers in one territory or with respect to a customer group by one retailer, provided that the remaining territories or customers are exclusively assigned to other retailers and/or the manufacturer reserves them for itself or reserves them for its own future sales. This limits the freedom of retailers to actively sell. To protect an exclusive area, language options may also be specified on websites. Passive sales must not be prohibited. In addition, it is now permissible for manufacturers to require their retailers to pass on the active sales restrictions to their customers in order to maintain the manufacturer's distribution system at all levels.

IV. SELECTIVE DISTRIBUTION

The restrictions of the territory or customer group (active or passive sales) in a selective distribution system remain hardcore restrictions. In the future, however, restrictions on selective distributors will be optional, whereby (i) active sales in an exclusive territory will be prohibited, (ii) active and passive distribution to unauthorised distributors in selective distribution territories will be prohibited, and (iii) the distributor's place of business will be restricted. For the avoidance of doubt, selective distribution may be operated in addition to exclusive distribution.

V. ONLINE SALES

Effective online sales: In the case of online sales, the new VBER introduces some practical changes, since it must now be possible for the individual retailers to effectively distribute on the internet at any time. A restriction that prevents retailers from using the internet effectively for sales or advertising channels is not permitted and is a hardcore restriction. In the future, it will be permissible for the manufacturer to specify various criteria for online sales to the retailer in relation to certain online marketplaces, distribution channels and other **quality standards**. Above all, the appearance of the homepage and the presentation of the products can be specified in the future. Likewise, the previous equivalence requirement which affected the requirements for online trade and sales in physical stores will no longer be pursued in the future.

Dual pricing: These will no longer be classified as a hardcore restriction in the future. Manufacturers are now allowed to set different wholesale prices for online and offline sales for the retailer. The goal must be to balance out the retailer's previously different levels of investment in online and offline retail.

Price comparison portals: A manufacturer must not prohibit a retailer from using (or passing on information to) price comparison portals, as this restricts passive sales. Only the ban on not using a specific and explicitly mentioned price comparison portal is permitted. In the case of exclusive distribution systems, however, such complete prohibitions will be permissible in the future in order to prevent other retailers from actively selling to exclusive reserved third party territories/customer groups via the price comparison portals.

Prohibition of online marketplaces: Regardless of the distribution system, it will be permissible in the future to prohibit the use of third-party platforms (e.g. Amazon or ebay), provided that this does not entail or achieve a total ban on internet sales.

VI. ONLINE PLATFORMS/AGENCY SERVICES

In the future, the online platforms and online agency services themselves will count as providers of goods. The new VBER is now also applicable to agreements concluded between agency platforms and dealers. "Wide" price escalation clauses/parity obligations (those clauses that encourage consumers of online agency services not to sell/offer goods or services to end users on more favourable terms that are below other online brokerage services) are thus prohibited. This means that only "narrow" price escalation clauses/parity obligations (those clauses that prohibit a retailer from offering the products cheaper as a supplier) are lawful. However, the warning is also expressly issued that the use of "narrow" price escalation clauses for end customers in concentrated platform markets will result in a withdrawal of the Block Exemption Regulation if the online platform covers a significant proportion of users and no evidence of efficiency gains can be provided.

Hybrid online agency platforms such as Amazon are completely exempt from the scope of the new VBER. This is the case if the provider's own trade is carried out via the platform, while online platform services are also offered to other manufacturers at the same time. Such hybrid online platforms are therefore subject to normal antitrust laws. However, the European Commission has also indicated that it will not primarily take action against vertical agreements between hybrid platforms and retailers, provided the agreements do not contain any intended restrictions on competition and the hybrid platform does not have market power.

VII. DUAL DISTRIBUTION

In dual distribution, the manufacturer distributes its goods both itself or through its own distribution network as well as through independent retailers. A competitive relationship therefore exists between the manufacturer and the retailer only at the trading level. The same now applies in relation to wholesalers or importers and downstream distributors. An exchange of information between them is lawful as long as it is directly related to the execution of the vertical agreement and is necessary for production or sales-related efficiency gains. Information about downstream pricing or sales remains prohibited.

VIII. DURATION OF NON-COMPETE OBLIGATIONS

Previously, a non-compete agreement (often referred to as exclusivity) was only permitted for a maximum period of five years. In the future, these non-compete clauses may also be tacitly extended beyond the five years period, provided that the manufacturer/supplier enables the buyers/retailers to switch manufacturers/suppliers effectively. Reasonable notice periods and non-excessive costs must be provided for this.

IX. COMMERCIAL AGENTS

It is now expressly stated that commercial agents can be compensated differently, including a flat rate percentage. Whether a person qualifies as a commercial agent depends solely on whether that person bears risks with respect to product- and contract-specific services.

X. CURRENT NEED FOR ACTION

Review or optimise your distribution system so that you do not fall into antitrust law traps and can take advantage of new legal opportunities.

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