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The European Commission has adopted a new Vertical Block Exemption Regulation ('VBER') accompanied by new Vertical Guidelines. This Regulation (EU/2022/720) enters into force on 1 June 2022. This revised VBER is accompanied by revised Vertical Guidelines, which provide guidance on the application of the rules and also help for self-assessment of the individual exemption of those agreements which are not block-exempted under the VBER.

The VBER exempts supply or distribution agreements from the prohibition of restrictive agreements laid down in Article 101(1) TFEU provided they comply with certain conditions. This so-called "block exemption" is meant to create a "safe harbour" for many agreements or practices, whereby they will not be subject to that prohibition and complementary sanctions. If the regulatory block exemption does not apply, an individual exemption is still possible, provided the four conditions in article 101(3) TFEU are met.

Competition rules apply to formal written agreements but also to all forms of agreements, including concerted practices among undertakings. Therefore, even if not formalised in writing, all practices can be subject to examination and sanctions by the European Commission or a national competition authority.

The new rules will not immediately apply to agreements already in force before 1 June 2022 (Reg. 330/2010 remains applicable): these agreements will have to comply with the new rules within one year, i.e. by 1 June 2023.

Application of the new rules requires cautiousness but can offer some opportunities for reshaping or improving distributorship agreements.

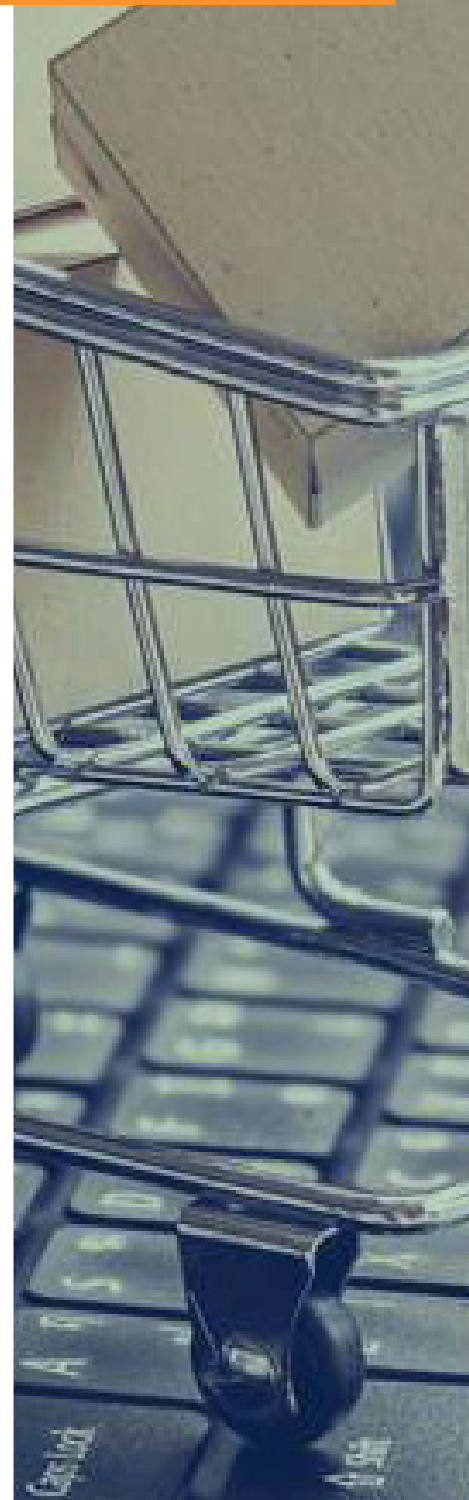
THE SAFE HARBOUR IN THE VBER

According to the European Commission, the main changes to the existing rules focus on adjusting the safe harbour to ensure that it is neither too generous nor too narrow.

On the one hand, the new rules narrow somehow the exemption regarding certain aspects of dual distribution and certain parity obligations. On the other hand, the new VBER enlarges the scope of the exemption regarding certain restrictions on a buyer's ability to make active sales and certain practices relating to online sales.

SUPPLY AND DISTRIBUTION AGREEMENTS

Adapted competition rules as from 1 June!



New practices in the online economy are taken into account, in particular to assess online restrictions and vertical agreements in the platform economy. The Vertical Guidelines provide guidance on particular topics such as selective and exclusive distribution, and agency agreements.

MAIN NOVELTIES IN THE VBER

- **Dual distribution** is when a supplier sells its goods or services through independent distributors but also directly to end customers in direct competition with its independent distributors. Under the new VBER, an exemption is now possible for wholesalers and importers subject to conditions related to the parties and the information exchanged (see Art. 2(4) to 2(6) of the new VBER).
- **Parity obligations** (“Most Favoured Nation clauses” or “MFNs”): retail parity clauses imposed by platforms on the conditions offered on other platforms are no longer block exempted (excluded restrictions: see Article 5(d)). As a consequence, this type of parity obligation must be assessed individually under Article 101(3) TFUE. Other types of parity obligation will continue to benefit from the safe harbour created by the VBER, provided the general conditions for the application of the VBER are met. However, this topic remains delicate, and an individual withdrawal from the block exemption is possible in some hypotheses.
- The new VBER also deals with **active sales restrictions** (limitations of the buyer’s ability to approach individual customers actively). Article 4(b) to (d) includes changes or clarification to the rules on active sales restrictions. For example, selective distribution systems are granted enhanced protection.
- For online sales, the changes relate to **dual pricing** and **the equivalence principle**. Suppliers may now set different wholesale prices for online and offline sales by the same distributor, subject to certain safeguards. In a selective distribution system, the criteria for online sales no longer have to be overall equivalent to the criteria imposed on brick-and-mortar shops because the two channels are inherently different in nature. However, the criteria should not aim at preventing the effective use of the Internet by the distributor or its customers to sell the goods or services.
- **Online sales restrictions:** restrictions on online sales are hardcore in principle (no exemption at all) when they have the object of preventing distributors or their customers from effectively using the Internet to sell the goods or services (this also relates to the use of one or more entire online advertising channels such as search engines or price comparison services). Further guidance is provided, e.g. about translating a website into a language not commonly used in the distributor’s territory (a form of active selling out of that territory), about restrictions linked to the content of online advertising or certain quality standards, and about restrictions of the use of online platforms and price comparison services.



More generally, the new VBER and Vertical Guidelines provide specific rules and guidance relevant to the **platform economy**. They address issues such as:

- agreements entered into by undertakings that qualify as providers of online intermediation services (OIS),
- whether undertakings active in the online platform economy generally qualify as genuine agents (whose agreements fall outside Article 101(1) of the Treaty),
- agreements relating to the provision of online intermediation services ('OIS') where the provider has a hybrid function (thereby also competing as a seller in the relevant market) (focus on digital gatekeepers).

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