

New EU Rules for Distribution and Supply Agreements

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On April 20, 2010, the European Commission adopted a new block exemption regulation covering so-called “vertical” agreements such as distribution and supply agreements (the new Vertical Restraints Block Exemption Regulation or New VRBER). EU block exemptions automatically exempt certain types of agreement from the general ban on anti-competitive agreements in the EU contained in Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) (by applying the exemption provisions in Article 101(3) TFEU).

The New VRBER is highly significant due to the ubiquity of vertical agreements in the EU and the fact that they often contain restrictive provisions (such as exclusivity) which may in principle be considered anti-competitive. Reflecting this, the existing Vertical Restraints Block Exemption Regulation (Old VRBER), which expires May 31, 2010, has been, since it came into force in 2000, probably the most relied upon EU competition law instrument of all.

The New VRBER will apply from June 1, 2010, until May 31, 2022. Agreements in force on May 31, 2010, which do not satisfy the conditions of the New VRBER but which do on that date satisfy the provisions of the Old VRBER, will continue to benefit from the Old VRBER up to May 31, 2011.

Broadly, the New VRBER exempts from Article 101(1) vertical agreements entered into between undertakings which are not competitors, subject to market share limits concerning the goods or services in question, and provided that the agreement does not contain a “hardcore” restriction. The definition of vertical agreements essentially covers the full range of business-to-business purchase and distribution agreements, whether the goods or services are

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resold or used as an input (save in the automobile sector, so long as a separate regime applies there).

The hardcore restrictions are very similar to those contained in the Old VRBER and include in particular resale price maintenance provisions and provisions intended to divide the EU market along national lines. The important exception allowing for a restriction on “active” sales by a distributor into territories or to customers reserved to the supplier or another distributor where exclusive distribution arrangements are being used is retained. “Passive” sales (responding to unsolicited requests) must however always be allowed, regardless of the type of distribution arrangements employed.

The two most significant changes introduced by the New VRBER, as compared to the Old VRBER, and those which attracted the most attention during the consultation period leading up to the adoption of the New VRBER and the notice, concern the market share limits and the treatment of Internet sales.

The commission also published on April 20, 2010, a notice titled “Guidelines on Vertical Restraints.” The notice further explains the application of the New VRBER and the treatment of vertical agreements which fall outside it. It is important to note in this context that a vertical agreement which falls outside the New VRBER is not necessarily illegal, and in particular there is no presumption that this is the case where the market share limits are exceeded. Undertakings will have to consider whether any such agreement contains anti-competitive provisions (such that Article 101(1) may apply), and if so, whether Article 101(3) applies to allow for an individual exemption for the agreement. It will, however, generally be difficult to justify a “hardcore” restriction under Article 101(3).

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Under the Old VRBER, a 30% market share limit on the supplier applied in most cases. Under the New VRBER, in all cases there is a 30% market share limit on the supplier in its selling market(s) as well as a 30% market share limit on the buyer in its purchasing market(s). The commission considers that this change “is particularly beneficial to small and medium-sized enterprises, because they are the most likely (as competitors of the powerful buyer or as a supplier unable to countervail the market power of the buyer) to be harmed by buyer-led vertical restraints.”

The commission faced extensive lobbying in relation to its treatment of Internet sales. The New VRBER itself makes no mention of Internet sales, the issue being dealt with solely in the notice in terms which the commission describes as “Internet friendly.” The key points are:

- “Active” sales are considered by the commission to include approaching a specific customer group or customers in a specific territory through advertisement on the Internet (such as by using territory-based banners on third-party websites) and by sending unsolicited e-mails. Thus, these activities can be restricted in the context of exclusive distribution arrangements without removing the benefit of the New VRBER.
- Sales made from a website are considered to be “passive” sales within the meaning of the New VRBER. Thus, distributors can never be stopped from operating a website from which purchases can be made. Further, and consistent with this, the commission considers that hardcore restrictions include provisions requiring an exclusive distributor: to prevent customers from outside the exclusive territory from viewing the distributor’s website; automatically to re-route such customers; or to terminate transactions over the Internet once a credit card reveals an address outside that distributor’s exclusive territory. In the context of selective distribution, the commission considers the imposition of criteria for online sales which are not overall equivalent to those imposed for sales from brick and mortar shops to be hardcore restrictions.
- The commission further considers that it is a hardcore restriction for a supplier and a distributor to agree to limit the proportion of the distributor’s overall sales made over the Internet, although there can be a requirement for a distributor to sell a certain absolute amount offline, and that it is also usually a hardcore restriction to charge a higher price for products intended to be resold online than for those intended to be resold offline.
- The New VRBER allows a supplier using a selective distribution network to require distributors to have one or more brick and mortar shops, and to conform to the standards required of the distributors’ own websites when using third-party platforms for distribution.

The commission presents the new regime as simple, and at its headline level it is. Companies are free to decide how and on what terms to distribute their products in the EU, provided their agreements do not contain hardcore restrictions and the market shares of the supplier and buyer both do not exceed 30%. Further, approved distributors are generally free to sell on the Internet without any limitation on the quantities, their customers’ location and on the prices.

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However, as ever, “the devil is in the details.” Internet sales practices, as with various other issues in relation to vertical agreements, will continue in many cases to be complex and require significant analysis even where the basic requirements of the New VRBER are met. In this regard, the new regime is the same as the old regime. □

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