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NEW VERTICAL BLOCK EXEMPTION REGULATION - ACT I



Competition, Retail and Consumer Law | 30/05/22 | Alexandra Berg-Moussa Aurélien Micheli

▪ Focus on online sales[1]

Following a public consultation process conducted over several months[2], the European Commission (the "**Commission**") adopted on May 10, 2022 its new Vertical Block Exemption Regulation (the "**Regulation**") [3] and new Guidelines on Vertical Restraints (the "**Guidelines**") [4]. The Regulation comes into force on June 1, 2022 and expires on May 31, 2034. A transitional period with the former vertical block exemption regulation is planned until May 31, 2023[5].

Many of the changes made by the Commission specifically take into account the development of the digital economy, such as the exclusion of hybrid platforms from the benefit of the exemption (1.), parity obligations (2.), the consecration of European case law on the prohibition of online sales (3.), and the easing of restrictions on online sales (4.).

The exclusion of hybrid platforms from the exemption

Agreements relating to the provision of online intermediation services entered by a hybrid platform will no longer benefit from the block exemption[6].

A hybrid platform is one that sells goods or services and competes with the companies to which it provides online intermediation services[7].

According to the Commission, these hybrid platforms do not meet the criteria to benefit from the block exemption because they are likely to favor their own sales and could influence competition between the companies that use their online intermediation services.

The Guidelines clarify that agreements resulting from the provision of online intermediation services are subject to assessment under Article 101 TFEU[8]. Such agreements do not necessarily restrict competition within the meaning of Article 101(1) TFEU or may qualify for an individual exemption under Article 101(3) TFEU.

Finally, the Commission states that in the absence of a restriction by object contained in the vertical agreement and a significant market power held by the hybrid platform, it will not give priority to the enforcement of the legislation against vertical agreements when they are concluded by hybrid platforms[9].

Parity obligations[10]

A parity obligation[11] requires a seller of goods or services to offer those goods or services to its counterparty on contractual conditions that are at least the same as or more favorable than those offered on any other sales channel or on the seller's direct sales channels.

While Regulation n°330/2010 allowed such clauses to benefit from a block exemption if the market share of the parties to the agreement was below 30%, the Regulation has removed the benefit of the block exemption for retail parity obligations imposed between platforms by online intermediation service suppliers[12]. Such parity obligations are now considered "excluded" restrictions and must be assessed individually under Article 101 TFEU.

In contrast, other parity obligations, such as narrow retail parity obligations relating to direct sales channels, are still block exempted[13]. The Guidelines specify that when such obligations are used by platforms that represent a significant share of users (particularly in a concentrated platform market) and there is no evidence of efficiency gains, the benefit of the block exemption may be withdrawn[14].

It must be noted that under French law, parity obligations are already regulated. Article L. 442-3 b) of the French Commercial Code provides that clauses which provide for the possibility "*to benefit automatically from the more favorable conditions granted to competing undertakings by the contracting party*" are null and void.

The prohibition of restrictions on online sales imposed by a supplier

In line with several rulings of the Court of Justice of the European Union[15], the Regulation enshrines the prohibition of restrictions on online sales and online advertising[16].

A restriction on online sales occurs when, directly or indirectly, in isolation or in combination with other factors, an operator implements provisions or mechanisms that seek to prevent buyers or their customers from effectively using the Internet to sell their goods or services.



The Guidelines provide further guidance on the assessment of these hardcore restrictions on online sales, particularly when they result from indirect obligations[17]. For example, the Commission considers that a hardcore restriction on the use of the Internet for the sale of goods or services is:

- when the supplier requires the buyer to prevent customers located in another territory from viewing its website or online store or to re-route customers to the online store of the manufacturer or of another seller (however, obliging the buyer to offer links to the online stores of the supplier or of other sellers does not constitute a hardcore restriction);
- where the supplier requires the buyer to seek prior authorization before making individual online sales transactions; or
- where the supplier prohibits the buyer from using the supplier's trademarks or brand names on its website or in its online store.

The Guidelines further specify that the supplier can impose requirements on the buyer as to the way in which the goods or services are to be sold online, regardless of the type of distribution system, as long as these requirements are not intended to prevent the buyer from effectively using the Internet. This may include restrictions on the use of particular online sales channels such as marketplaces, or the imposition of quality standards for online sales such as requirements for the presentation of goods or services in the online store[18].

Restrictions on online advertising that are intended to prevent the use of one or more entire online advertising channels are also hardcore restrictions.

The Guidelines provide specific guidance as well as practical examples[19].

The easing of restrictions on online sales

The Regulation makes two changes in this regard. The first relates to the practice of dual pricing, which consists of charging the same distributor a higher wholesale price for products intended for online sales than for products intended for physical sales. The second concerns the principle of equivalence, which sanctions the imposition of different criteria for online sales than those applicable to physical sales. The practice of dual pricing and the principle of equivalence no longer constitute hardcore restrictions.

Following the Commission's public consultation, the Commission noted that online sales no longer require special protection compared to physical sales channels.

With regard to dual pricing in particular, suppliers may set different wholesale prices for online and physical sales by the same distributor where the objective is to induce or reward an appropriate level of investment in online or physical sales, provided that this is not intended to restrict sales to particular territories or customers[20].

However, the Guidelines specify that the practice of dual pricing must not have the object or effect the prevention of the actual use of the Internet by the buyer for the sale of goods or services in territories or to customers, which will constitute a hardcore restriction under the Regulation[21].

Moreover, in the context of a selective distribution system, the criteria imposed by suppliers for online sales no longer need to be equivalent to the criteria imposed for physical sales because these two sales channels are, by their nature, different[22].

[1] Act II will be devoted to the protection of distribution networks.

[2] https://ec.europa.eu/competition-policy/public-consultations/2018-vber_en.

[3] Regulation (EU) n°2022/720 of May 10, 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, available in English via the following link : <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R0720&from=EN>.

[4] Available in English via the following link : https://ec.europa.eu/competition-policy/system/files/2022-05/20220510_guidelines_vertical_restraints_art101_TFEU.pdf.

[5] Article 10 of the Regulation.



[6] Article 2, paragraph 6 of the Regulation.

[7] In this regard, the Regulation introduced the definition of online intermediation services, which refers to the concept of information society services within the meaning of Article 1, paragraph 1, point b) of Directive n°2015/1535, b).

[8] Paragraphs 104 to 109 of the Guidelines.

[9] Paragraph 109 of the Guidelines.

[10] Parity obligations are not exclusive to online sales.

[11] Also called « Most Favoured Nation Clauses ».

[12] Article 5, paragraph 1, point d) of the Regulation.

[13] Paragraph 254 of the Guidelines.

[14] Paragraph 259 of the Guidelines.

[15] CJEU, 13 october 2011, aff. C-439/09, Pierre Fabre ; CJEU, 6 december 2017, aff. C-230/16, Coty Germany.

[16] Article 4, point e) of the Regulation.

[17] Paragraphs 203 and following of the Guidelines.

[18] Paragraphs 207 and 208 of the Guidelines.

[19] Paragraphs 203 and following, and 347 of the Guidelines.

[20] Paragraph 209 of the Guidelines.

[21] Paragraph 209 of the Guidelines.

[22] Paragraph 235 of the Guidelines.
