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NEW VERTICAL BLOCK EXEMPTION REGULATION - ACT II

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Act II – Focus on the distribution networks

In addition to the new provisions relating to online commerce and the digital economy[1], the new Vertical Block Exemption Regulation[2] (hereinafter the "**Regulation**") and the new accompanying Guidelines on Vertical Restraints (hereinafter the "**Guidelines**") [3], adopted on May 10, 2022 by the European Commission (hereinafter the "**Commission**"), also amend the legal framework applicable to distribution networks.

Certain provisions of the old regulation[4] have been maintained: a market share of 30% or less remains the determining criterion for the benefit of the block exemption[5] and the imposition of resale prices is still prohibited, with very rare exceptions.

The significant new rules mainly concern the exchange of information in the context of dual distribution, the protection of distribution networks and non-compete obligations.

The framework of the exchange of information in dual distribution

Since 2010, dual distribution, meaning situations in which products or services are sold to end-customers by independent distributors but also directly by the supplier, which is then in direct competition with its own resellers, has grown significantly.

In the case of dual distribution, not all exchanges of information between a supplier and a distributor would necessarily be pro-competitive.

This is the case for exchanges of information are not directly related to the implementation of the distribution agreement or necessary to improve the production or distribution of the goods or services. Such exchanges are therefore excluded from the block exemption[6].

The Guidelines specify that exchanges of information are likely to be exempted when they relate to the following elements in particular[7]:

- technical information relating to the goods or services, such as those that enable compliance with regulatory measures or that allow the goods or services to be adapted to the requirements of the customer;
- logistical information relating to the production and distribution of goods or services at the upstream or downstream levels, such as information relating to the production process, inventory or stocks;
- information related to the prices at which goods or services are supplied to the distributor, and the prices at which they are resold by the distributor[8], provided that the exchange of such information is not used to restrict the distributor's ability to determine its sale price.

In contrast, the exchanges of information between suppliers and distributors are unlikely to be exempted when they involve the following elements[9]:

- future prices at which the supplier or distributor intends to sell the goods or services downstream;
- information relating to identified end-customers, unless it is necessary to satisfy the requirements of a particular end-customer or to implement or monitor compliance with a selective distribution system.

Exchanges of information that do not meet the conditions set out in the Regulation will necessarily be subject to an individual assessment under Article 101(3) TFEU: the companies concerned will have to demonstrate that the positive impact of these practices on the market and consumers outweighs their negative aspects[10].



New rules for protection of the distribution networks

The Commission has restructured the wording on the exceptions to the hardcore restrictions^[11] according to the different types of distribution network: the Regulation now clearly distinguishes between the rules applicable to exclusive distribution, selective distribution and free distribution^[12], which is now expressly referred to in the text.

▪ Exclusive distribution

The Regulation introduces the concept of shared exclusivity, which allows a supplier to grant to multiple distributors – up to five – a territory or group of customers on an exclusive basis, and thereby to restrict the ability of all its other distributors to actively sell on this territory or this group of customers^[13].

The Guidelines specify that this limitation on the number of "co-exclusive" distributors is intended to encourage them to invest in the promotion and sale of the supplier's goods or services (a larger number of exclusive distributors would create a risk of parasitism and free-riding strategy) ^[14].

The definitions of active and passive sales are now formalized in the Regulation^[15]. It specifies that active sales, which follow an "*actively targeting of customers*", include the setting up of a website that targets a specific territory, in particular by using a language commonly used in that territory. Passive sales, which respond to "*unsolicited requests from individual customers*", no longer systematically include online sales: these may therefore be limited by the head of the network, for example to preserve the exclusivity it has granted to its distributors.

▪ Selective distribution

In order to protect selective distribution systems^[16] and limit the circumvention of outside network resale, the Regulation allows suppliers to prevent approved distributors from marketing products outside the territory covered by the network, or to customers that they have reserved or exclusively allocated to other distributors^[17].

These restrictions can also be imposed on direct customers of the distributors and thus be passed on along the sales chain, which should make it possible to better protect the closed nature of selective distribution system and guarantee their effectiveness^[18].

In addition, the Regulation allows a supplier to use different distribution systems in different Member States. For example, a supplier may prohibit its exclusive distributors in France from selling to unauthorized distributors located in Spain, where it has set up and operates a selective distribution system^[19].

Non-compete obligations

The Regulation still considers that non-compete obligations stipulated in vertical agreements of indefinite duration or exceeding a duration of five years are not exempted^[20].

However, the Guidelines clarify that non-compete obligations that are tacitly renewable after the expiration of an initial five-year term can now benefit from the block exemption, provided that the distributor is able to renegotiate or terminate the agreement and thus effectively switch its supplier at the end of that period^[21].

[1] See our first article on the subject: <https://www.august-debouzy.com/fr/blog/1842-nouveau-reglement-dexemption-verticale>

[2] 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/FR/TXT/PDF/?uri=CELEX:32022R0720&from=EN>.

[3] Available in English via the following link : https://ec.europa.eu/competition-policy/system/files/2022-05/20220510_guidelines_vertical_restraints_art101_TFEU_.pdf.

[4] Commission Regulation (EU) n°330/2010 of April 20, 2010.

[5] Article 3 of the Regulation.

[6] Article 2, paragraph 5 of the Regulation.

[7] Paragraph 99 of the Guidelines.



[8] This refers to the recommended or maximum prices communicated by the supplier and the resale price charged by the distributor.

[9] Paragraph 100 of the Guidelines.

[10] Article 101(3) TFEU allows certain agreements that could not be exempted on the basis of a regulation to benefit from an individual exemption, where it is established that it “*contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question*”.

[11] Meaning restrictions of competition that are considered so serious that they cause the entire agreement in which they are included to lose the benefit of the block exemption.

[12] This refers to the situation where a supplier does not operate neither an exclusive distribution system nor a selective distribution system.

[13] Article 1, paragraph 1, point h) of the Regulation.

[14] Paragraphs 120 et 121 of the Guidelines.

[15] Article 1, paragraph 1, points l) et m) of the Regulation.

[16] Selective distribution allows a supplier to entrust the distribution of its goods only to distributors who meet the criteria that is has previously established and that it has chosen to approve.

[17] Article 4, point c), i) of the Regulation.

[18] Paragraphs 223 and 241 of the Guidelines.

[19] Article 4, point b), ii) of the Regulation.

[20] Article 5, paragraph 1, point a) of the Regulation.

[21] Paragraphs 247 to 249 of the Guidelines.
