Moalem
Weitemeyer

Moalem Weitemeyer
Advokatpartnerselskab
Amaliegade 3
DK-1256 Copenhagen

Tel. +45 7070 1505
moalemweitemeyer.com

CVR 3162 7885

THE EUROPEAN COMMISSION HAS SUBMITTED A REVISED DRAFT OF THE VERTICAL BLOCK EXEMPTION LEGISLATION AND VERTICAL GUIDELINES

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In July 2021, the European Commission proposed a revised draft version of the Vertical Block Exemption Regulation ("*VBER*") and a guideline on vertical restraints ("*Vertical Guidelines*").

The current VBER and Vertical Guidelines have been in force for 11 years and will expire on 31 May 2022.

A revision of the VBER and the Vertical Guidelines was launched in October 2018, with a particular focus on identifying necessary updates based on the growing online sales and general market changes.

The conclusions from the revision were that the current VBER and Vertical Guidelines were missing clarity and that they did no longer match the market situation, e.g. in terms of e-commerce and online platforms.

A hearing phase on the revised draft on the VBER and Vertical Guidelines is set to end on 17 September 2021, and the updated legislation and guidelines are planned to enter into force on 1 June 2022.

Current Legislation

A vertical agreement is an agreement between companies on different levels in the production and distribution chain, such as agreements regarding supply and distribution of goods and services ("*Vertical Agreements*").

In general, all anti-competitive agreements are prohibited under Article 101 of the Treaty on the Functioning of the European Union, meaning agreements that if a Vertical Agreement has its object or effect on prevention, restriction, or distortion of competition on the internal market in the EU, it will be prohibited. However, in terms of Vertical Agreements, there is an exemption. If each of the supplier and distributors' market share does not exceed 30% on their respective market, and the Vertical Agreement does not contain a Hardcore Restriction (as described below), the Vertical Agreement will not be prohibited under Article 101 ("*Safe Harbour*").

Hardcore Restrictions (e.g., resale price maintenance, absolute territorial protection, customer allocation), as set out in Article 4 of the VBER ("*Hardcore Restriction*"), are presumed to be so harmful to competition on the internal market in EU that the Vertical Agreement will be ineligible for protection and presumptively unlawful. If an agreement contains a less serious 'excluded restriction,' the specific restriction will be unenforceable, but the rest of the agreement will be maintained.

Proposed Changes

The revised draft proposed by the European Commission contains a number of changes. The main suggested changes are:

<u>Dual Distribution</u>

Dual distribution is the situation where a supplier simultaneously distributes its products or services through an independent distributor but also sells its products or services directly to the end customers. In such case, the supplier will be a direct competitor to the independent distributor. Dual distribution has developed with the growth of online sales.

Currently, dual distribution on the retail market is exempted from the prohibition set out in Article 101 if the general rules as set out in the legislation regarding exemptions are fulfilled (see above under “Current legislation”).

With the proposed revised draft of VBER, dual distribution will only be exempted from the prohibition set out in Article 101 if the supplier and distributor’s aggregated market share at the retail market exceeds 10%. The threshold for the possibility of exemption is a new condition in the revised draft of VBER.

Despite the above threshold of 10% of the market share, the scope of Safe Harbour has been expanded. In case that each of the supplier and distributor’s market share does not exceed 30% on each of their relevant markets, the dual distribution will still be exempt from the prohibition as set out in Article 101.

In the proposed legislation and guidelines agreements related to online sales between suppliers and distributors will be prohibited in case that the supplier and distributor sell the suppliers product as competitors.

“MFN” Clauses” (Most Favoured Nation Clauses)

An MFN clause is a clause according to which the supplier is obligated to offer the same of better conditions to the distributor as those the supplier offers to any other sales and/or marketing channels or distributors. Currently, such clauses are exempted from the prohibition set out in Article 101 (if the general rules in the legislation as described above under “Current Legislation” are fulfilled).

In the revised draft, it is proposed by the European Commission that MFN clauses related to retail obligations by providers of online intimidation services will no longer be exempted from the prohibition, as they are deemed harmful and could have anti-competitive effects on the market. Consequently, such obligation will have to be assessed individually under Article 101.

If the MFN clause is found not to be eligible for exemption from the prohibition set out in Article 101, the MFN clause will be considered invalid, while the remaining agreement will normally remain in force.

Dual Pricing

Dual pricing is the situation where the supplier charges the same distributor a higher wholesale price for products intended to be sold online than products intended to be sold offline, e.g., in physical stores. Currently, such restriction is a huge limitation for the distributors and their customers' online sale, and such restriction has been considered as a Hardcore Restriction with only a limited number of exemptions.

Today the online sale is a well-functioning sales channel, and the European Commission has, based on its evaluation, concluded that dual pricing will no longer be categorized as a Hardcore Restriction. The result is that dual pricing will no longer automatically be deemed as prohibited if the differentiation in the price is made to intensify or reward an appropriate level of investments and relates to costs incurred for each channel, and if the other conditions set out the VBER are fulfilled. This only applies if the restriction does not intent, directly, or indirectly, to prevent distributors or their customers from using the internet for the purpose of selling their goods or services online.

Restriction in Online Sales

The revised draft VBER and Vertical Guidelines provides guiding principles for the assessment of restrictions of online sales to prevent distributors or their customers from effectively using the internet to sell the products online. Such restrictions will generally be prohibited.

The Vertical Guidelines will, in the revised draft, set out specific examples of prohibited restrictions: the use of online platforms and price comparison tools, geo-blocking, or prior approval by the supplier for selling online.

Our Comments

One area that has not changed is the position towards price restrictions. The new VBER retains the current approach in classifying resale price maintenance as a Hardcore Restriction of competition that is presumptively unlawful and can be justified only in exceptional circumstances. On many other types of agreements and restrictions, there has been an obvious need to revise the VBER due to changes in the market and the competitive landscape.

One important element of the revision has been to bring clarification into the legislation, e.g., for those of the articles whose importance has increased over time (e.g., dual distribution relationships). The revised draft of the VBER and Vertical Guidelines will provide a clearer understanding of how to manage the online sales and economy in context of Vertical Agreements and the VBER. Further, a clarification on the Hardcore Restrictions has been made, which will make it easier to imply in the day-to-day work.

The clarification and further guidelines on this matter will, in our view, have the consequence that the costs for business will be reduced to secure compliance with the VBER, as the legislation will be easier to work with, especially for small and medium-sized enterprises.

If you have any questions or require further information regarding any of the above, please do not hesitate to contact us:

Pernille Nørkær
Partner
pernille.noerkaer@moalemweitemeyer.com

Jeanette Kjeldgaard Rasmussen
Associate
jeanette.rasmussen@moalemweitemeyer.com