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**RECENT
DEVELOPMENTS**
IN THE MERGER CONTROL
SYSTEM IN CHILE - P8

**THE ITALIAN
COMPETITION
AUTHORITY**
INVESTIGATION INTO
GOOGLE - P24

Competition
Law

**THE EUROPEAN
COMMISSION REVIEWS
EU COMPETITION RULES**
FOR DISTRIBUTION AGREEMENTS
UNDER THE VERTICAL BLOCK
EXEMPTION REGULATION - P20

The European Commission reviews EU competition rules for distribution agreements under the Vertical Block Exemption Regulation

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The European Commission ("EC") launched a public consultation seeking stakeholders' views on a wide range of issues regarding the functioning of the EU competition rules applicable to distribution agreements from 18 December 2020 until 26 March 2021.

This public consultation is part of a broader initiative to revise the existing EU Vertical Block Exemption Regulation ("VBER") and its accompanying Vertical Guidelines, which are set to expire on 31 May 2022. The EC is currently assessing the effectiveness of the existing regime, and is further reviewing a number of policy options that would allow reflecting on the growing importance of ecommerce, as well as the evolution of distribution and pricing strategies across the supply chain.

The public consultation will feed into a report consolidating the findings of the impact assessment phase. This will lead to the publication of a proposal on a draft version of the VBER and its accompanying Vertical Guidelines.

The EC's evaluation has established that the VBER and the Vertical Guidelines are still considered relevant and useful instruments, as they facilitate the self-assessment process of vertical agreements. However, the EC takes the position that, although the existing key vertical arrangements themes will remain of critical importance, current rules should accommodate significant digital and market developments to ensure that the regime remains fit for purpose.

Background: Ecommerce as the turning point in an evolving market landscape

For several decades, the EC has had in place a regime, by which it exempted certain categories of distribution agreements from the application of EU competition rules. In 2010, VBER entered into force aiming to foster cross-border trade and online commerce, as well as to promote competition. Under the VBER, distribution agreements are exempted where neither of the parties has a share of more than 30% in the relevant markets. The exemption

applies if the agreement does not include so-called "hardcore" restrictions otherwise the VBER no longer applies. However, the parties can still argue that the pro-competitive effects of the vertical agreement at stake outweigh its negative effects.

In recent years, ecommerce and the emergence of new market players, such as online platforms, have impacted companies' distribution strategies. At the same time, case law and enforcement practices at national and EU level have demonstrated the lack of sufficient guidance and clear rules in areas and sectors strongly affected by ecommerce. By May 2017, the EC's ecommerce sector enquiry report marked a turning point, indicating that it is time to review the VBER.

The EC's consultation: Key areas at the heart of the debate on the VBER review

In the aftermath of the ecommerce sector enquiry, the EC initiated the review of the VBER and its Vertical Guidelines. The first stage of the review process was concluded in September 2020, with the EC gathering evidence on the efficiency of the existing rules. On 23 October 2020, the EC published a roadmap for an inception impact assessment.

For the time being, the EC stressed its focus on a number of key areas, including resale price maintenance,

dual distribution, active sales restrictions, indirect online sales restrictions and parity clauses.

Resale price maintenance (RPM): RPM covers restrictions that set a fixed or minimum resale price to be observed by the buyer. RPM is a hardcore restriction not exempted under the VBER. However, the Vertical Guidelines recognise that supplier-driven RPM may lead to efficiencies under certain circumstances, for instance to achieve an expansion of demand during the launch of a new product. The EC's evaluation demonstrated a lack of coherence in the treatment of RPM rules and their classification as hardcore restrictions. Based on the evaluation phase, it can be expected that the EC will acknowledge the possibility to assess a number of efficiencies under which RPM could exceptionally qualify as pro-competitive.

Dual distribution: This occurs where a supplier sells its goods or services directly to end customers, therefore competing with its distributors at retail level. The evaluation phase has not permitted a clear view on the EC's position with regard to this practice. The EC has notably contemplated on limiting the scope of the current block exemption, thereby requiring an individual assessment for instances of dual distribution. It has further considered extending the exception to dual distribution by wholesalers and/or importers, who do not currently benefit from the exemption.





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Active Sales Restrictions: Buyers should generally be allowed to actively approach individual customers (“active sales”) and to respond to unsolicited requests from individual customers (“passive sales”). For this reason, agreements aimed at restricting the territory into which or the customers to whom the buyer can sell are not exempted under the VBER. Current rules permit restrictions on active sales only in limited cases, which concern active selling to exclusive territories, or exclusive customer groups, or unauthorised resellers in a selective distribution system. The EC is asking for feedback on whether it is necessary to expand the exceptions for active sales restrictions to provide suppliers more flexibility in designing their distribution set-up. Another solution would be to allow restrictions on sales from outside the “selective territory” to non-authorised distributors in a “selective territory”.

Indirect measures restricting online sales: Online sales are generally considered a form of passive sales and restrictions preventing distributors from selling through the internet are not covered by the VBER. One of the identified gaps is that distributors operating through physical outlets (so-called “brick-and-mortar” outlets) are facing increasing pressure due to the substantial growth of ecommerce. The EC proposes to exempt certain online sales restrictions from being considered as hardcore. This covers instances of charging

the same distributor a higher wholesale price for products intended to be sold online than for products sold offline (so-called “dual pricing”), and imposing criteria for online sales that are not overall equivalent to the criteria imposed in brick-and-mortar shops (so-called “equivalence principle”).

Parity obligations (so-called ‘most-favoured nation’ or “MFN” clauses): These types of clauses require a business to offer the same or better conditions to its contracting party as those it offers to any other party, or by the company itself through its direct sales channels. Parity obligations can be agreed at wholesale or retail level, and are currently block exempted under the VBER. The EC is reviewing whether to exclude certain types of sales channels from the exemption of MFN clauses, or whether to exclude MFN clauses in their entirety from the block exemption and opt, instead, for an effects-based assessment.

What does the VBER revision mean for businesses?

The outcome of the on-going public consultation should help gain a better understanding of the future of distribution in Europe, and to anticipate the future form of the EU competition rules taking into account the increasing prevalence of e-commerce in business practices.

