

PETERKA PARTNERS

THE CEE LAW FIRM

As of 1 June 2022, the new Vertical Block Exemption Regulations (**VBER**) apply, which bring with them changes to the regulation of customer-supplier relations.

The types of agreements covered by the VBER are agreements between undertakings operating at different levels of the production or distribution chain with a market share of less than 30%. This typically means distribution agreements, agency agreements, franchise agreements, and supply/sub-supply agreements.

These agreements typically contain a number of restrictive provisions relating to supply, distribution, production, and purchases and sales which may be considered anticompetitive and prohibited.

The VBER and its accompanying Interpretative Guidelines lay down detailed rules which, if followed, will ensure that the parties to these agreements do not commit a breach of competition law by entering into the agreement and thus risking a potentially heavy fine from the competition authority. In practice, this is an overview of the provisions that must not be included in agreements (known as “hardcore restrictions”) and the provisions that can normally be included in agreements, as they are exempted from the general prohibition of anti-competitive agreements (“safe harbour”).

The new regulations bring a tightening of the rules by expanding the list of provisions that will now be considered prohibited, and will expand the list of provisions that will now be covered by the safe harbour prohibition and that can be included in agreements.

The tightening of the rules concerns, for example:

- the use of minimum advertised prices, which prohibit a distributor from advertising prices below the level set by the supplier ("MAP") is now considered a prohibited hardcore restriction;
- preventing the effective use of the internet by the distributor or its customers for the purpose of selling goods or services is now considered a prohibited hardcore restriction;
- agency agreements for which newly apply stricter rules for the application of the block exemption (if the agent negotiates transactions on behalf of a large number of principals, the agreement is unlikely to qualify for the block exemption);
- “parity obligations”, i.e., agreements obliging the seller to provide the buyer with the same or more favourable terms than those offered by third parties or by the seller in other places (e.g., on websites) do not fall under the block exemption and must be considered individually;
- a ban on the use of price comparison services (websites or apps); newly a blanket ban on the use of price comparators by a distributor is considered a prohibited hardcore restriction (however, it may be acceptable to impose a ban on the use of a particular price comparator or to restrict the use of price comparators on the basis of certain qualitative requirements);
- agreements between suppliers of goods or services and operators of “hybrid platforms” (where the operator of the online intermediary services is also the seller of the intermediated goods or services) now do not fall under the block exemption and must be assessed individually;

PETERKA PARTNERS

THE CEE LAW FIRM

The relaxation of the rules concerns, for example:

- allowing the imposition of a ban on active sales under the exclusive selective system to direct customers of distributors;
- the supplier's ability to reserve certain territories or customer groups for up to five distributors at the same time (shared exclusivity);
- possibility of setting different conditions for offline and online sales (including the application of different prices, provided that the aim is not to prevent the distributor from effectively using the internet to sell goods, but, e.g., to cover the higher investment involved in using the sales channel);
- agreements on the use of price monitoring and price reporting software;
- extension of the block exemption to (non-reciprocal) vertical agreements between competitors where the customer does not compete with the supplier at the upstream level of the market on which it purchases the contract goods;
- the ability of suppliers under a selective distribution system to restrict all of their distributors and all of their customers from actively and passively selling contract goods or services to unauthorized distributors established in the territory designated for the operation of the selective distribution system;
- the possibility of transferring ownership of the contract goods to the agent on a short-term basis without jeopardizing the application of the block exemption, provided that the agent does not bear any costs or risks associated with the transfer of the property;
- the admissibility of non-compete clauses in an agreement that allows for an automatic extension (beyond 5 years) if the distributor has an effective possibility to change supplier (within a reasonable time and at a reasonable cost).

Since the assessment and responsibility for ensuring that a vertical agreement is not anti-competitive, and therefore prohibited, rests with the contracting parties to the agreement, it is important that suppliers and distributors become familiar with the details of what restrictions can be accommodated and avoided in such agreements and how different distribution systems can be combined. Different rules and restrictions apply to different distribution systems.

The European Commission has given companies until 31 May 2023 to revise existing distribution and customer-supplier agreements concluded before 1 June 2022. We recommend revising existing agreements as soon as possible in order to preserve the benefits of the safe harbour provided by the VBER for vertical agreements.

As every detail is important when assessing vertical agreements, please contact us if you need advice on the interpretation of the new VBER and its application to your agreements.

PETERKA PARTNERS

THE CEE LAW FIRM

The article has been prepared Magda Prchalová. No information contained in this article should be considered or interpreted in any manner as legal advice and/or the provision of legal services. This article has been prepared for the purposes of general information only. PETERKA & PARTNERS does not accept any responsibility for any omission and/or action undertaken by you and/or by any third party on the basis of the information contained herein