

A new vertical agreements block exemption – all change?

A new vertical agreements block exemption regulation (“VABE”) came into force on 1 June 2010, along with revised European Commission guidelines on vertical restraints¹. The VABE provides automatic exemption from the EU rules prohibiting anti-competitive agreements to vertical agreements that satisfy the conditions set out in the regulation.

Whilst there has been much discussion about various proposals over the course of the past year, in the end the regulation adopted by the Commission on 20 April 2010 is broadly consistent with the previous block exemption regulation, which expired on 31 May 2010. This reflects the Commission’s findings that the previous block exemption had worked well in practice and therefore the rules did not need to be fundamentally modified.

Changes – a summary

Nevertheless, there have been some changes from the previous block exemption and guidelines. These include the following:

- The application of the 30% market share threshold now applies to the market share of both supplier and buyer.
- A more detailed explanation of the potential competition problems of category management agreements and how they should be assessed.
- A refinement of the assessment of whether a firm is an agent or distributor – the Commission has clarified that only risks taken by the agent in the same product market are relevant when assessing whether an agency is a true agency.

The principal focus of changes in the VABE, however, has been on internet sales – on the application of the VABE to selective distribution networks as they impact on the increasing use of the internet as a retail channel, and on the meaning of “active and passive” sales in an internet context.

Internet sales and selective distribution

Representing a victory for proponents of traditional selective distribution networks, the revised VABE allows suppliers to require that all distributors selling through the internet also operate at least one ‘bricks and mortar’ store. This addresses concerns raised by manufacturers that, for certain products, quality of presentation and the ability to test products are an essential part of the sales experience. However it does not create open season for the removal of all internet only distributors – (i) the characteristics of the product being sold must justify the imposition of the ‘bricks and mortar’ requirement and (ii) the requirement is not permitted if its object is in fact the direct or indirect limitation of online sales by distributors. Exemption may also be withdrawn from selective distribution networks that have the cumulative effect of foreclosing online-only distributors.

In addition, the Commission will treat as hard core (i.e., prohibited) any restrictions on online sales that are not, when viewed overall, equivalent to the criteria imposed on sales from bricks and mortar shops – however, the criteria need not be identical due to differences in the distribution modes. For example, a restriction preventing selective distributors from selling more than a given quantity of contract products to an individual end user, with the aim of preventing sales to unauthorised dealers, may have to be stricter for online sales if it is easier for an unauthorised dealer to obtain those products by using the internet. Specific requirements may also have to be formulated for an online after-sales help desk, so as to cover the costs of customers returning the product and for applying secure payment systems.

Internet sales – active and passive sales

The Commission’s revised guidelines also provide further clarification of the definition of ‘active’ and ‘passive’ sales, in particular as regards use of the

internet. Broadly, active sales are sales that a distributor solicits, through marketing, sales visits etc.; passive sales are unsolicited.

The new guidelines explain that, in principle, every distributor must be allowed to use the internet to sell products. However, a restriction on distributors' use of the internet is acceptable under the VABE to the extent that promotion on the internet, or other use of the internet, would lead to a distributor making active sales into territories or customer groups reserved exclusively for other distributors. For example, online advertisement addressed to specific customers is explicitly recognised as a form of active selling.

In relation to passive selling the Commission considers that having a website, and receipt and processing of an order by a customer following a visit to the website, all constitute passive selling. The guidelines set out examples of hard core restrictions on passive selling involving internet sales. The following are prohibited:

- the distributor agreeing to limit its proportion of overall sales made over the internet – although it is acceptable for the supplier to require the buyer to sell a specified volume of the products off-line to ensure an efficient operation of its brick and mortar shop(s);
- the distributor agreeing to prevent customers located in another territory from viewing its website or to re-route customers to the manufacturer's or other distributors' websites – however, it is acceptable to require the distributor's website to display links to the manufacturer's or other distributors' website;
- the distributor agreeing to pay a higher price for products intended to be resold online than for products intended to be resold off-line – although it is acceptable for the supplier to agree to pay the buyer a fixed fee to support the buyer's off-line or online sales efforts; and
- the distributor agreeing to terminate consumers' transactions over the internet once their credit card data reveals an address that is not within the distributor's exclusive territory.

Transitional period

Parties to agreements that were covered by the previous block exemption as at 31 May 2010, but are not covered by the new VABE, will benefit from a transitional period, in which their agreements will be treated as covered by the VABE until 31 May 2011.

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Endnotes

- 1 Commission Regulation 330/2010 of 20 April 2010 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. OJ L 142, 23.4.2010, p.1; Commission notice - Guidelines on Vertical Restraints, OJ C 130, 19.05.2010, p. 1

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