

Alert | Antitrust Litigation & Competition Regulation



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Distribution Agreements in the EU: Changes After VBER and Accompanying Guidelines are Revised

The EU's Vertical Block Exemption Regulation (VBER) allows suppliers in certain cases to restrict active sales. The VBER and accompanying Guidelines on Vertical Restraints of the European Commission (Guidelines), dated from 2010, are currently under evaluation, with the EU Commission having published its long-awaited Draft VBER and Draft Guidelines on 9 July 2021. The VBER and Guidelines needed to be revised given the growth of online sales and shifts in consumer behaviour across the EU.

Exclusive and Selective Distribution: Significant Changes for Businesses

With exclusive distribution, a supplier grants a territory or a customer group exclusively to one distributor. The Draft VBER still allows active sales (i.e., use of advertisements and promotions) and prohibits passive sales (i.e., responding to unsolicited requests or orders from individual customers). In addition, the draft introduces a new concept of “shared exclusivity,” which means that exclusivity also can be granted to two or more distributors who in turn will benefit from the same protection under the VBER. Under the Draft VBER, suppliers also are allowed to “pass on” active sales restrictions to the exclusive distributor’s customers. Furthermore, the Draft VBER explicitly allows the restriction of active and passive sales by an exclusive distributor to unauthorised distributors into a territory where the supplier operates a selective distribution system – which restriction can also be passed on to the customers. This shows a more flexible approach towards the co-existence of multiple distribution structures.

With selective distribution, a supplier sells goods or services only to selected distributors (and retailers) based on specified criteria. These distributors in turn do not sell such goods or services to unauthorised distributors (or retailers) within the territory reserved by the supplier. The current VBER prohibits geographic restrictions on all levels in a selective network. The Draft VBER, however, allows active sale restrictions by selective distributors or the exclusive distributor's customers into an exclusive territory or customer group. Also, under the Draft VBER, the supplier could restrict a selective distributor's customers from making active or passive sales to unauthorised distributors located in the selective distribution territory, and these restrictions can now be extended ("passed on") to the selective distributor's customers. As online distributors and brick-and-mortar distributors have different characteristics, the Draft Guidelines no longer require selective suppliers to impose the same or equivalent criteria to these distributors, as long as these restrictions do not, directly or indirectly, aim to prevent buyers or their customers from selling their goods or services online.

There is no explicit reference contemplated as regards passive sales and public procurement; addressing this would provide more clarity at the EU level as to tendering procedures. A procurement procedure should always be considered as permitted passive sales (see our previous blog post on this issue, [Vertical Agreements: Permitted Passive Sales and Public Procurement in the EU](#)) given the intent of the public procurement regulation in Europe. After all, a procurement procedure is a call for competition that should ensure equal treatment and where every bidder should have an equal chance to make an offer.

Parties should consider preparing to adjust their existing distribution agreements in the EU to fully benefit from the new regime once the final version of the new VBER is adopted.

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