Newsletter de PwC Tax & Legal

Distribution and Competition: New European Vertical Agreements Block Exemption Regulation in 2022

The European Commission has launched a public consultation on its draft Vertical Agreements Block Exemption Regulation and the accompanying Guidelines. Companies will be required to adapt their distribution agreements to this new legal benchmark in 2022.

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Ponte en contacto con PwC Tax & Legal:

Alberto Escudero
Partner in charge of the Competition Law practice (Spain)
alberto.escudero.puente@pwc.com

Alejandro Lucena
Lawyer in the Competition Law practice (Spain)
alejandro.lucena.rebollo@pwc.com

On 9 July the European Commission published two draft pieces of legislation that will have a major impact on distribution agreements. These are the draft Vertical Agreements Block Exemption Regulation (the "Draft Regulation") and the accompanying Guidelines. These rules will shape the contractual clauses of a multitude of "vertical" agreements between suppliers and distributors, a category which includes distribution (selective or exclusive) franchise, dealership, resale, marketing, commercialisation, supply and agency agreements, among others.

In both the current and future regulatory framework, distribution agreements that fulfil the conditions set out in the Vertical Agreements Block Exemption Regulation are certain to be compatible with competition rules. Otherwise, they may still be compatible if companies prove that their vertical agreements generate sufficient consumer benefits and efficiencies to compensate for their restrictive effects on competition. The Guidelines accompanying the Block Exemption Regulation serve as a guide for this self-assessment on benefits, efficiencies and the compensation of restrictive effects.

The main developments included in the Draft Regulation and the accompanying Draft Guidelines are summarised below:

1. New limitations on dual distribution.

A dual distribution system is one in which the supplier competes at retail level with its distributors. This is a practice that has proliferated recently, particularly as manufacturers have started selling on-line directly to consumers.

The Draft Regulation will limit the circumstances in which dual distribution systems are safe-harboured: (i) if the combined share of the supplier and distributor is below 10%, compatibility will be assured in the absence of serious competition restraints; (ii) between 10% and 30%, they will have to introduce compliance mechanisms to control exchanges of sensitive information between the supplier and distributors; and (iii) above 30%, compatibility will be more uncertain, and the supplier will have to conduct a self-assessment exercise in the light of the Guidelines.

"The reform aims to update competition regulation in the online commerce area and to ensure its consistent application throughout the EU by national competition authorities.
The main novelties concern dual distribution, parity obligations, e-commerce platforms, distributors' internet sales, allocation of territories to distributors and duration of non-competition clauses"

The Draft Regulation will not block-exempt dual distribution relationships of e-commerce platforms which, in addition to selling directly to consumers, also intermediate sales between retailers and consumers.

2. Restrictions on parity obligations of online intermediary platforms.

Parity obligation (or most favoured nation/customer clause) means the prohibition imposed on the other party to offer third parties lower prices or better trading conditions.

The Draft Regulation will not cover parity obligations imposed on companies by online intermediary platforms when they prevent them from offering lower prices or better conditions through competing platforms.

3. On-line sales by distributors.

According to the Draft Regulation, suppliers must continue to allow distributors (i) to sell online through the distributors' websites; (ii) to advertise on the internet; and (iii) to make use of price comparison websites.

Suppliers may (i) charge distributors with dual prices, depending on whether the distributor will sell on-line or off-line, in certain circumstances; and (ii) prohibit their sales through e-commerce platforms.

The Draft Regulation continues to prohibit resale price maintenance by suppliers to distributors selling on-line. However, suppliers are expressly allowed to use IT tools to track the online resale prices of their distributors.

4. Selective distribution.

A selective distribution system is one in which the supplier undertakes to sell its products only to distributors appointed on the basis of specific criteria, and network members undertake not to resell to unauthorised distributors. Franchises are usually integrated into selective distribution systems.

In order to ensure that the products are only sold within the selective distribution network, the Draft Regulation will allow the supplier to impose an obligation on authorised distributors to prohibit the distributors' customers from reselling to unauthorised operators.

The Draft Regulation continues to allow suppliers to set quality standards for distributors' online sales. The explanatory Guidelines will give greater freedom to suppliers to define these standards for online sales, which no longer have to be "overall equivalent" to the criteria laid down for physical sales by distributors.

5. Exclusive distribution.

Exclusive distribution refers to systems in which a supplier allocates territories or customer groups to distributors. Distributors are prohibited from making active sales to the territories/customers of other distributors. An active sale takes place when, without any prior request from the customer, the distributor approaches the customer by means of a visit, call, e-mail, direct commercial action, etc.

The Draft Regulation will allow the supplier to (i) appoint several (and not only one) distributors in each exclusive territory/customer group; and (ii) oblige the distributor to prohibit its customers from making active sales in the territory/customer group assigned to other distributors.

The Guidelines accompanying the Draft Regulation indicate that suppliers may not prevent distributors from participating in public tenders of administrations located outside their territory, as this is considered passive selling. This provision also applies to open private tenders

Practical advice:

Companies should start assessing the business opportunities and efficiency gains that the new regulation offers in their supply chain and distribution networks.

Companies should schedule a contractual review of their existing distribution agreements to analyse their compatibility with the new Vertical Agreements Regulation.

This review of the rules on vertical agreements is a good opportunity for companies to implement Competition Compliance Programmes that follow the CNMC Guidelines on Competition Compliance published in 2020. They should contain specific control mechanisms relating to their relations with distributors.

6. Non-competition obligation.

Non-competition obligations are those which require the distributor (i) to source exclusively from the supplier; or
(ii) purchase more than 80% of its requirements for the supplied products from the supplier. The Draft Regulation continues to consider these clauses compatible if they last up to five years, but it will no longer require that they be expressly renewed after the fifth year,

allowing tacit extension, under certain circumstances.

7.- Entry into force.

Currently, the draft regulation and guidelines will remain subject to public consultation until 17 September 2021. They are expected to be published by 1 June 2022. The Draft Regulation will replace the existing Vertical Agreements Block Exemption Regulation (EU) 330/2010 on that date.

The Draft Regulation contains a transitional provision, under which companies will have until 31 May 2023 to adapt their agreements to the new regulation. The new Regulation is expected to remain in force until 31 May 2034.