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European Law - News

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Content: Competition law (entry into force of the new vertical block exemption regulations on 1st June 2022; consultation process on horizontal block exemption regulations; liberalisation of the electricity market)

(1) Competition law - New Vertical Block Exemption Regulation and new Vertical Guidelines as well as public consultation on horizontal exemptions

Article 101 paragraph 1 of the Treaty on the Functioning of the EU (TFEU) provides, inter alia, for the prohibition of agreements between undertakings which restrict competition. **Paragraph 3** provides for exceptions to this rule, in particular if they contribute to improving the production or distribution of goods or to promoting technical or economic progress without eliminating competition, while allowing consumers a fair share of the resulting benefit. There is a difference to be made between vertical and horizontal agreements:

A. Vertical Agreements

According to the relevant EU definition, a **vertical agreement** is an agreement or concerted practice between two or more undertakings, each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services.

In order to specify the rules for vertical agreements, the European Commission published the long-awaited new **Block Exemption Regulation for Vertical Agreements ("Vertical Block Exemption Regulation", VBER) on 10 May 2022**. With this regulation, the previous Regulation was replaced as of **1st June 2022**. The new VBER is accompanied by new **Vertical Guidelines**. The new rules and the new interpretation instruments are intended to take especially the increasing e-commerce into account.

The new rules were preceded by an evaluation process and a public consultation. For the contractual practice, the revised VBER and the new Vertical Guidelines now result in the following essential innovations:

- In **dual distribution**, when a supplier sells goods not only through independent distributors, but also directly to end customers in competition with them, an exchange of information remains permissible under certain conditions, but with greater restrictions than before. This also applies to hybrid platforms. On the other hand, an extension of the exemption for dual distribution to wholesalers and importers is now also to be taken into consideration.

- Restrictions with regard to an exemption can also be identified in relation to so-called **parity obligations**. Parity clauses oblige sellers to offer their contracting parties terms that are equal to or better than the terms of third party distribution channels (such as other platforms) and/or the terms of the seller's direct distribution channels (such as its websites). In such cases, too, it is no longer possible to consistently invoke a VBER exemption; the facts must then be examined individually under Article 101 TFEU.

- On the other hand, a VBER exemption can be considered to a greater extent than before with regard to certain restrictions on the possibility of a buyer to actively approach individual customers (**active selling**).

- In addition, **dual pricing systems** are no longer simply considered as hardcore restrictions, e.g. in cases where different wholesale prices are charged to the same distributor for internet and terrestrial distribution and different criteria are set for online and offline distribution in selective distribution systems.

Further details and groups of cases can be found in the Vertical Guidelines as well as in a Summary Note of the European Commission (Internet link: https://ec.europa.eu/competition-policy/system/files/2022-05/explanatory_note_VBER_and_Guidelines_2022.pdf).

B. Horizontal Agreements

Horizontal agreements, on the other hand, concern the relationship between companies at the same level of production or distribution. With regard to such horizontal agreements, on 1 March 2022 the European Commission invited interested parties to submit their comments by 26 April 2022 on **two draft revised Horizontal Block Exemption Regulations (HBERs) - one for research and development (R&D BER) and the other for specialisation agreements (Specialisation).** In addition, the **Horizontal Guidelines** are to be revised. According to the European Commission, companies should be enabled to cooperate more easily in areas such as R&D and production through clearer formulations and the inclusion of new explanations as well as a slight extension of the scope of application of the Specialisation HBER.

R&D agreements that concern completely new products, technologies and processes and **R&D efforts** that are directed towards a specific objective but not yet concretely directed towards a product or technology are, according to the EU Commission's plans, only to be exempted from the EU competition rules if there are sufficient comparable competing R&D efforts. The assessment of the **pursuit of sustainability goals** in agreements is to be included in a new chapter. The explanations, especially on the sensitive issue of **data exchange**, are also to be reworded. It remains to be seen which modifications or additions will be made to the regulatory texts before they become effective.

(2) Competition law - market liberalisation: Judgment of the ECJ of 12 May 2022, Case C 377/20 (Servizio Elettrico Nazionale)

In this case, questions from Italy were submitted to the ECJ against the background of a gradual liberalisation of the electricity market there. In a first step, a distinction was made between customers of the protected market, which mainly includes private individuals and smaller companies, and other customers. The protected market was a regulated system with special price protection. In a second step, the customers of the protected market were to be able to participate in the free market.

In the course of liberalisation, the generation and distribution activities of the former electricity monopoly ENEL were unbundled, with different phases of the distribution process being assigned to different subsidiaries. Following an investigation, the Italian antitrust authority found abuse of a dominant position by subsidiaries, coordinated by their parent company ENEL, over a certain period of time and imposed a joint and several fine. The allegation made was that one of the subsidiaries had attempted to transfer its customers from the protected market area to another subsidiary operating on the free market in an anti-competitive manner. ENEL and the two subsidiaries brought an action and, on appeal, the Italian Council of State referred questions relating to exclusionary practices to the ECJ.

The ECJ considered the interest protected by Article 102 TFEU to be in the well-being of consumers against the background of the prohibition of abuse of a dominant position laid down therein. A competition authority had to prove that conduct by an undertaking in a dominant position was likely to interfere with a structure of effective competition through the use of means or resources which differed from those of normal competition. The possibility of the suitability to restrict competition must also be proven. However, the burden of proof does not go so far as to include proof that the conduct complained of is capable of causing direct harm to consumers. The dominant undertaking, on the other hand, can prove that any exclusionary effect from its conduct is offset or even outweighed by positive effects on consumers.

From the ECJ's point of view, the assessment of an abusive exclusionary practice by an undertaking in a dominant position must be made on the basis of the suitability of that practice to produce anti-competitive effects. In contrast, a competition authority does not have to prove the intention of the undertaking in question to displace its competitors by means other than competition on the merits.

In the event of the loss of a statutory monopoly, an undertaking must refrain throughout the market liberalisation from resorting to such means as it had at its disposal by virtue of its previous monopoly and which are not available to its competitors.

Finally, the ECJ also had to deal with the question of the extent to which the conduct of a subsidiary can be attributed to the parent company: If there is a dominant position of one or more subsidiaries belonging to an economic unit and this position is abused, the existence of this unit is sufficient for the presumption that the parent company is also responsible for this abuse. Here, a presumption effect takes place if at least almost the entire capital of these subsidiaries was directly or indirectly held by the parent company at the relevant time.

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