



New rules for vertical agreements

On 20 April, the European Commission (the "Commission") adopted a new block exemption and associated guidelines for "vertical agreements" (i.e. distribution and other supply agreements). The new rules will replace the current block exemption on 1 June 2010. The importance of the vertical agreements regime to companies in all sectors cannot be overstated: the rules have proved to be an indispensable and valuable source for analysing and assessing and compliance position of many commercial agreements. The original block exemption, implemented in 2000, introduced a regime based upon automatic exemption for restrictive agreements where market share thresholds were not exceeded and a limited black list of restrictions were not infringed (such as price fixing, export bans, etc).

Whilst the substantive provisions of the old regime have not been fundamentally modified, there have been a number of key developments in order to reflect market developments (such as the increased buyer power of the big retailers and the evolution of online trade) since the original block exemption. The main change is to the market share thresholds. For an agreement to benefit from automatic exemption, not only the supplier's but also the purchaser's market share must not exceed 30%. This change is clearly motivated by the market power of larger retailers and distributors and will undoubtedly result in an increased and more onerous economic/legal analysis for the parties to a supply agreement. Another key feature of the new regime is the guidance of what types of restrictions to online sales are acceptable. There has been some fine-tuning of the passive/active distinction for online sales and the new guidelines are considered to be "internet friendly". In summary, they limit the ability of suppliers to restrict online sales and provide extensive examples of hardcore restrictions that would remove the benefit of the block exemption from online sales. There is also a new section in the guidelines analysing how the law should be applied to resale price maintenance ("RPM"), i.e. a supplier in some way imposing on a distributor a resale price which is not a maximum or recommended price. In this new section, which supplements the existing (and retained) section on RPM from the old guidelines, the existing rules on RPM are reiterated and its anti-competitive effects clearly enumerated. As with the old guidelines, the new guidelines leave no room for doubt as to the hardcore nature of RPM. In addition, however, the guidelines now set out the various economic benefits (efficiencies) that could potentially apply to the use of RPM for new products or promotions, but only in defined circumstances. It seems that these kinds of efficiencies will not be easy to demonstrate, but this change in the guidelines indicates that such arguments can be made. This is again a clarification of the current situation, but it is significant that the guidelines even hint at more flexibility for a form of restriction which has always been perceived as hardcore.

Despite the similarities with the old regime, there are significant changes and developments in the new rules for vertical agreements. Companies will need to decide whether existing arrangements need auditing to ensure compliance with the new rules on (above all) the purchaser's market share and online trade.

For further details on any of the matters raised in this article, please contact Richard Murphy (DDI: 028 9089 4844 or [Click Here to Email](#))

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