



COMPETITIVE MARKETS AND CONSUMER WELFARE

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THE EUROPEAN COMMISSION'S NEW VERTICAL BLOCK EXEMPTION REGULATION

On 1 June 2022, the European Commission's new Block Exemption Regulation for vertical agreements and the related Guidelines on Vertical Restraints entered into force.

This article describes the main changes and clarifications resulting from the European Commission's recently completed evaluation of the rules governing vertical agreements. The article is aimed at practitioners with prior knowledge of the rules on vertical agreements.

The main changes and clarifications concern:

- 1) Parallel distribution
- 2) Parity obligations
- 3) More flexible distribution systems
- 4) A new definition of suppliers of online intermediation services

- 5) Modernised rules on restrictions of online sales
- 6) Tacitly renewable non-compete obligations and new guidance on:
- 7) Agency agreements
- 8) Resale price maintenance
- 9) Sustainability objectives

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Background to the rules on vertical agreements and their amendment

On 10 May 2022, the European Commission adopted the new Vertical Block Exemption Regulation¹ ('VBER') and the related Guidelines on Vertical Restraints ('Vertical Guidelines').

The new rules entered into force on 1 June 2022. The rules regulate 'vertical agreements' between undertakings and are therefore also referred to as the 'vertical rules'.

'Vertical agreements' are agreements between undertakings, each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain. This could be a manufacturer and a retailer who enter into an agreement on what the retailer can buy, sell or resell.²

Vertical agreements may have negative effects on the market³ and contain restrictions that violate the prohibition of agreements restricting competition laid down in the Treaty on the Functioning of the European Union ('TFEU') Article 101(1).⁴

An example of vertical agreements that would – typically – be prohibited under Article 101(1) of the TFEU are agreements on resale price maintenance ('RPM'), where a supplier, for example, sets minimum or fixed prices for its distributors' resale.⁵

Another example is vertical market sharing agreements, where the supplier restricts the territory into which or the customers to whom distributors are allowed to resell the goods ('resale restrictions').⁶

However, some vertical agreements with negative effects on the market may also have positive effects on the market⁷ and may be considered, on a case-by-case basis, to be exempted from the prohibition in Article 101(1) TFEU, if they satisfy the four cumulative conditions in Article 101(3) TFEU:

(i) the agreement must produce efficiencies in that it contributes to improving the production or distribution of goods or services or promotes technical or economic progress;

(ii) the agreement must allow consumers a fair share of the resulting benefits;

(iii) the agreement must not impose on the undertakings concerned restrictions that are unnecessary to attaining these objectives; and

(iv) the agreement must not allow the undertakings concerned to eliminate competition in respect of a substantial part of the goods or services concerned.

In the VBER, the European Commission defines a number of categories of vertical agreements/restrictions which can be presumed to fulfil these four cumulative conditions, and which the VBER therefore exempts⁸, *a priori*, from the prohibition laid down in Article 101(1) TFEU, provided that some specific conditions are met, see below.

Thus, for the vertical agreements covered by the VBER, the European Commission has assessed that the efficiencies provided by the agreements can be assumed with sufficient certainty to outweigh any anti-competitive effects.

However, exemption under the VBER presupposes that the following three cumulative conditions ('the general block exemption conditions') are all met:

(i) neither party's market share may exceed 30% on the relevant selling and buying market⁹; (ii) the agreement must not contain any specified 'hardcore' restrictions of competition¹⁰, which have the effect of precluding the *entire agreement* from being covered by the VBER; and

(iii) the agreement must not contain any specified 'non-exempt' or 'excluded' restrictions of competition¹¹, which lead to the exclusion of the *specific restriction* from the VBER.

The VBER thus creates a safe harbour for these categories of agreements which are exempted from the prohibition laid down in Article 101(1) TFEU where the general block exemption conditions are fulfilled.

The Vertical Guidelines provide guidance on how to interpret and apply the VBER, and how to assess agreements falling

¹ 'Commission Regulation (EU) 2022/720 of 10 May 2022 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' and Communication from the Commission C(2022) 4238 of 28 June 2022 'Guidelines on vertical restraints'.

² See Article 1(1)(a) VBER and paragraphs (56)-(58) of the Vertical Guidelines.

³ See section 2.2 of the Vertical Guidelines for examples of the negative effects on the market that vertical restraints in particular can result in.

⁴ Section 6(1) of the Danish Competition Act contains a prohibition which corresponds in substance to and must be interpreted in accordance with Article 101(1) TFEU.

⁵ See Article 4(a) VBER and section 8 below.

⁶ See Article 4(b), (c), (d) and (e) VBER.

⁷ See section 2.1 of the Vertical Guidelines for examples of the positive effects on the market that vertical restraints in particular may produce.

⁸ See Article 2(1) VBER.

⁹ See Article 3 VBER.

¹⁰ See Article 4 VBER. The above examples of agreements that would typically be prohibited under Article 101(1) TFEU reflect the 'hardcore' restrictions of competition set out in Article 4 VBER.

¹¹ See Article 5 VBER. Unlike Article 4, however, the rest of the vertical agreement remains covered by the VBER, if the specific restriction, such as a non-compete obligation exceeding a duration of five years, can be severed from the rest of the agreement.

outside the safe harbour on a case-by-case basis in accordance with Article 101(1) and (3) TFEU.

The previous 2010 Vertical Block Exemption Regulation and Vertical Guidelines¹² have undergone an extensive review process.

While the structure of the block exemption has been preserved, some material amendments have been made. In addition, the European Commission has made structural changes and added several sections on new themes to the Vertical Guidelines, which have grown significantly in size.

The purpose of the review was, among other things, to offer undertakings simpler and clearer rules and improved guidance that has been updated with new case law. At the same time, the ever-increasing digitalisation with increased

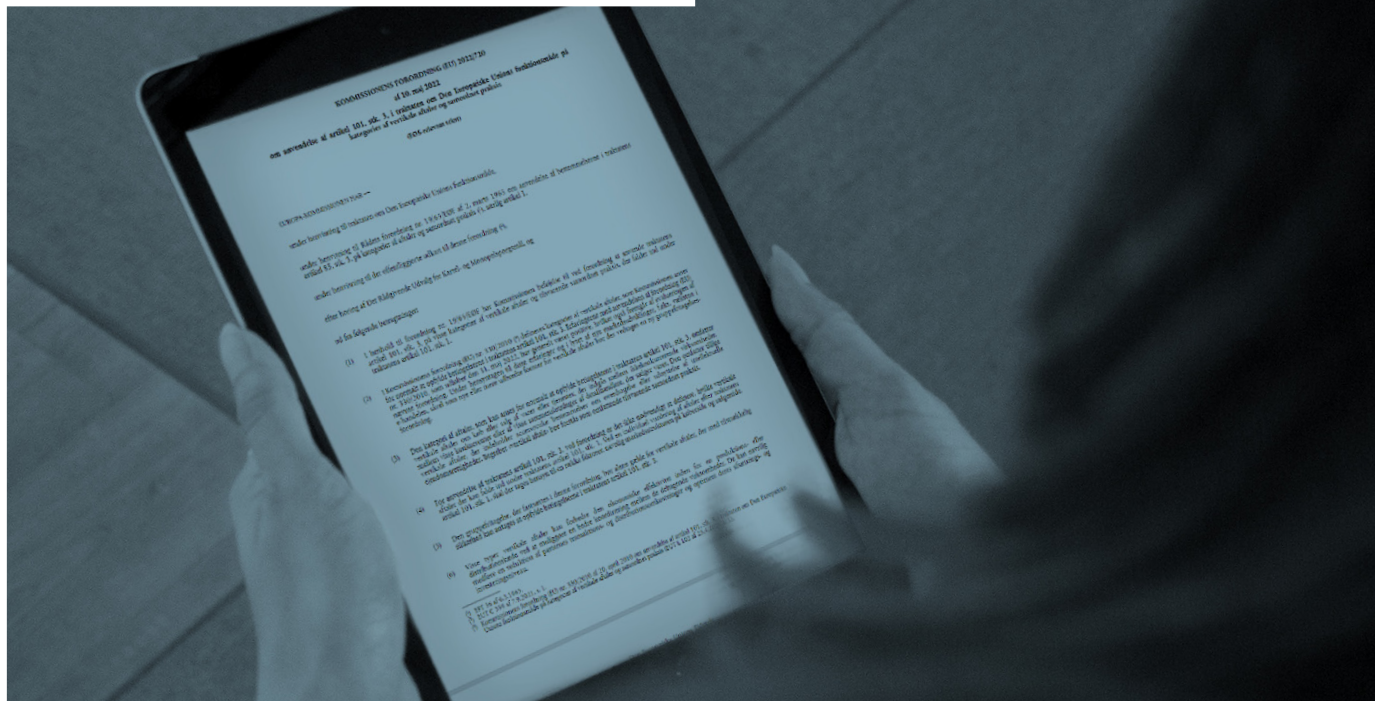
online sales and the emergence of new digital market players such as online marketplaces, price comparison services, search engines, app stores, social media services etc. have been taken into account.

The aim has also been to ensure that the safe harbour is neither too broad nor too narrow, so that the VBER applies only to vertical agreements which can be assumed with sufficient certainty to fulfil the four conditions in Article 101(3) TFEU.

“The revised Vertical Block Exemption Regulation and Vertical Guidelines are the result of a thorough review process. The new rules will provide undertakings with up-to-date guidance that is fit for an even more digitalized decade ahead. The rules are important tools that will help all types of businesses, including small and medium enterprises, to assess their vertical agreements in their daily business.”

*Margrethe Vestager, Commissioner for Competition
10 May 2022*

An overview of the main changes and clarifications is given in Box 1 below, and they are described further in the following sections.



¹² ‘Commission Regulation (EU) 330/2010 of 20 May 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’ and Communication from the Commission of 19 May 2010 on ‘Guidelines on vertical restraints’.

Box 1. Main changes and clarifications in the VBER and the Vertical Guidelines

Theme/vertical restriction	Main changes and clarifications
1. Parallel distribution	<ul style="list-style-type: none"> • The exemption has been extended to cover importers and wholesalers. • The exemption explicitly excludes hybrid platforms' agreements for the provision of online intermediation. • The scope of the exemption has been reduced to exchange of information that is (i) directly related to the implementation of the vertical agreement and (ii) necessary to improve the production or distribution of the contract products.
2. Parity obligations	<ul style="list-style-type: none"> • The exemption has been narrowed, as retail parity obligations between competing platforms are no longer covered, but have instead been added to the list of non-exempted restrictions.
3. More flexible distribution systems and more guidance on resale restrictions (Sales restrictions on customers and territories)	<ul style="list-style-type: none"> • The exemption has been extended to include the possibility of 'shared exclusivity' for up to five distributors per exclusive territory/customer group. • Restricting active sales to protect distributors' exclusive territories/customer group can now be passed on to all the supplier's distributor's direct customers. • The supplier now has the possibility to combine selective and exclusive distribution systems within the EEA, but still not in the same territory. • The exemption provides increased scope for protecting these distribution systems, including against sales from each other. • More guidance in the Vertical Guidelines on both offline and online resale restrictions.
4. Online intermediation services	<ul style="list-style-type: none"> • New definition of online intermediation services. It is now stated that the providers thereof are to be considered 'suppliers' for the purposes of agreements for the provision of such services.
5. Modernised rules on restrictions of online sales	<ul style="list-style-type: none"> • 'Dual pricing' for the same distributor with higher wholesale prices for online sales than offline sales is – as a main rule – no longer considered a hardcore restriction. • The use of different criteria for online and offline sales, respectively, is – as a main rule – no longer considered a hardcore restriction. • New general test for restricting online sales, according to which preventing the buyer's or its customers' effective use of the internet to sell the products constitutes a new hardcore restriction. • More guidance in the Vertical Guidelines on pure online resale restrictions. • Expanded definition of active and passive sales.
6. Tacitly renewable non-compete obligations	<ul style="list-style-type: none"> • The exemption now covers non-compete obligations which are tacitly renewable beyond a period of five years, provided that the buyer can effectively renegotiate or terminate the vertical agreement.
7. Agency agreements	<ul style="list-style-type: none"> • It has been clarified that temporary acquisition of the property in the goods does not preclude the existence of a 'genuine' agency agreement. • New guidance in the Vertical Guidelines on the ways in which the principal can cover relevant risks and costs. • New guidance in the Vertical Guidelines on the conditions under which agents/independent distributors can play a 'dual role' for the same supplier. • New guidance on reimbursement of market-specific investments already made. • It has been clarified that online platforms generally cannot be considered agents.
8. Resale price maintenance	<ul style="list-style-type: none"> • It has been clarified that 'minimum advertised prices' constitute indirect RPMs. • New guidance in the Vertical Guidelines on 'fulfilment contracts'. • It has been clarified that it constitutes RPM for providers of online intermediation services to impose restrictions on the price at which the intermediated goods or services may be sold.
9. Sustainability objectives	<ul style="list-style-type: none"> • It has been clarified that sustainability objectives, depending on the circumstances, may be included as possible efficiencies.

1. Parallel distribution

Vertical agreements between competing undertakings are, as a general rule, still not covered by the VBER, see the first sentence of Article 2(4).

However, certain vertical agreements between competing undertakings may¹³ be covered by the VBER in the case of ‘parallel distribution’.

Parallel distribution may, for example, be where a manufacturer sells to a retailer, while at the same time selling (in parallel) to the end user market in competition with the retailer.

However, the vertical agreements covered by the VBER relate primarily to the vertical relationship between the supplier and the buyer – and therefore, within the framework of the VBER, restrictions of the intra-brand competition in the end user market between the supplier and the buyer are accepted.

The rules have now been amended in three areas in terms of parallel distribution:

Firstly, the definition of parallel definition in Article 2(4)(a) and (b) VBER has been extended to cover not only producers/suppliers, but also *importers and wholesalers* (both on the supplier and the buyer side).¹⁴

Secondly, the VBER has been explicitly limited in scope to *not cover vertical agreements for the provision of online intermediation services* where the provider also sells the intermediated goods or services on the relevant market in competition with the undertakings to which they provide online intermediation services (so-called ‘*hybrid platforms*’), see also section 4 below.¹⁵

This should be seen in the light of the fact that hybrid platforms may have an incentive to favour their own sales and otherwise soften competition between undertakings selling products through the platform’s online intermediation services.¹⁶

Thus, agreements by hybrid platforms for the provision of online intermediation services are not covered by the VBER.

However, for these agreements, there is no presumption that Article 101(1) TFEU has been violated, and a case-by-case assessment must therefore be carried out in accordance with Article 101(1) and (3) TFEU.

The European Commission is expected to prioritise cases concerning such agreements primarily if the undertaking has significant market power or if the agreement involves restrictions of competition by object.¹⁷

Thirdly, the European Commission has narrowed the scope of the VBER to cover only information exchange in the context of parallel distribution that fulfils the two conditions in Article 2(5) VBER, according to which the exchange of information must be:

(i) “*directly related to the implementation of the vertical agreement*” and

(ii) “*necessary to improve the production or distribution of the contract goods or services*”.

Both conditions must therefore be fulfilled for the VBER to apply.

Previously, vertical terms on the exchange of information in connection with parallel distribution were not specifically mentioned in the vertical rules and were, thus, covered by the old VBER, provided that the general block exemption conditions were met.

The narrowing of the scope of the VBER in respect of information exchange in the context of parallel distribution was discussed at length in the consultation process and should be seen in particular in the light of the fact that today, parallel distribution is considerably more widespread than in 2010 due to the significant growth of e-commerce and the increased use of the internet.¹⁸

Paragraph (99) of the Vertical Guidelines contains a non-exhaustive list of examples of information that normally meets the new conditions in Article 2(5) VBER and is therefore generally covered by it (‘white list’).

In addition, paragraph (100) of the Vertical Guidelines contains a number of examples of information which do not normally fulfil these conditions and is therefore not covered by the VBER (‘black list’) as set out in Box 2 on the next page.

¹³ See Article 2(4)(a) or (b), and where the vertical agreements fulfil the conditions in Article 2(5)-(7) VBER and otherwise comply with the general block exemption conditions.

¹⁴ ‘Parallel distribution’ was previously defined as non-reciprocal vertical agreements where the supplier was vertically integrated and active both as a producer/supplier and was also present as a distributor at the retail level in competition with independent distributors who were not at the same time competitors at the manufacturing level/at the level where the buyer purchased the products, see Article 2(4)(a) or (b) of the old VBER.

¹⁵ See Article 2(6) VBER and paragraph (104) of the Vertical Guidelines.

¹⁶ See Recital (14) VBER and paragraph (105) of the Vertical Guidelines.

¹⁷ See paragraphs (107)-(109) of the Vertical Guidelines.

¹⁸ See Recital (13) VBER, paragraph (96) of the Vertical Guidelines and the European Commission’s ‘Explanatory note on the new VBER and Vertical Guidelines’ of 10 May 2022, p. 2.

Box 2. ‘White’-listed and ‘black’-listed types of information exchange in vertical agreements between competitors, i.e. vertical agreements where there is parallel distribution covered by the VBER

‘White’ list: Generally covered by the VBER, see paragraph (99) of the Vertical Guidelines:

- Technical information relating to the contract goods or services (e.g. registration, certification, regulatory measures and customer requirements etc.).
- Logistical information relating to production and distribution (e.g. production processes, inventory, stocks, sales volumes and returns); see, however, paragraph (100)(b) of the Vertical Guidelines.
- Aggregated information relating to customer purchases, preferences and feedback etc.; see, however, paragraph (100)(b) of the Vertical Guidelines and Article 4(b), (c) and (d) VBER.
- Information relating to the prices at which the contract goods or services are sold to the buyer at the vertical level.
- Information relating to the supplier’s recommended or maximum resale prices and the prices at which the buyer resells the goods or services; see, however, paragraph (100)(a) of the Vertical Guidelines.
- Information relating to marketing and campaigns etc.; see, however, paragraph (100)(e) of the Vertical Guidelines.
- Aggregated performance-related information communicated by the supplier to the buyer relating to other buyers’ marketing and sales activities (benchmarking).

‘Black’ list: Generally *not* covered by the VBER, see paragraph (100) of the Vertical Guidelines:

- Information relating to the future prices at which the supplier or buyer intends to sell the contract goods or services downstream.
- Customer-specific information, unless the exchange of such information is necessary to enable the supplier or buyer to satisfy the requirements of a particular end user or to provide pre- or after-sales services, including guarantee services etc.
- Information relating to goods sold by a buyer under its own brand name (private label) exchanged between the buyer and a manufacturer of competing branded goods.

As can be seen from Box 2, the exchange of information on the future prices at which the supplier or buyer intends to sell the contract goods or services downstream is covered by the blacklist.¹⁹ This type of exchange of information within the framework of a vertical agreement²⁰ is therefore not, as a main rule, covered by the VBER.

The chosen distribution model may also affect whether the conditions are fulfilled. For example, in connection with exclusive distribution, it may be necessary for the parties to exchange information about their sales activities in certain areas or to certain customer groups.²¹

The examples are intended to help undertakings assess whether the conditions in Article 2(5) VBER are fulfilled –

i.e. whether the information exchange in question is covered by the VBER or not. Undertakings must always base the assessment of their fulfilment of the conditions in Article 2(5) VBER on the specific circumstances of their vertical agreement.²²

An agreement can only benefit from the block exemption if it is vertical, for which reason it is necessary to first assess whether there is a ‘vertical agreement’ at all.²³

The definition of a vertical agreement assumes (i) that the undertakings each operate at different levels of the production or distribution chain in relation to the specific agreement or concerted practice which is the subject of the competition law assessment, and (ii) that this specific

¹⁹ See paragraph (100)(a) of the Vertical Guidelines.

²⁰ See the definition in Article 1(1)(a) VBER.

²¹ See paragraph (98) of the Vertical Guidelines.

²² See paragraph (101) of the Vertical Guidelines.

²³ See the definition in Article 1(1)(a) VBER.

agreement or concerted practice relates to the conditions under which the parties may purchase, sell or resell certain goods or services.

In other words, the VBER only applies to those parts of an agreement concluded in the context of parallel distribution which relate to the vertical relationship between the parties.

For example, a provision in a distribution agreement between a vertically integrated supplier and a distributor who are competitors at the retail level, but not at the production level, stipulating that the supplier and the distributor must always charge the same prices for the same products at the retail level would not constitute a vertical agreement but a horizontal price agreement which falls entirely outside the scope of the VBER.²⁴

2. Parity obligations

'Parity obligations'²⁵ require a seller of goods or services not to offer the goods or services to another party or via other channels on conditions (such as price) that are *more favourable than the conditions offered by the seller to the other party*.²⁶

These obligations have been the subject of much discussion in recent years in connection with the so-called hotel booking platform cases across the EU. Specifically, certain platforms had introduced requirements that hotels on the platform were not allowed to offer end users better conditions (e.g. lower prices) on their own website or on other booking platforms than the conditions they offered on that platform.

Previously, agreements on parity obligations were not specifically mentioned in the vertical rules, and the old VBER, thus, covered *all* types of parity obligations, provided that the general block exemption conditions were otherwise met.

This was the case regardless of whether they concerned (i) 'offline' sales/'online' sales, (ii) 'direct'/'indirect' sales channels (supplier's own or through third parties), (iii) con-

ditions for sales to the 'upstream level'/'retail level' (other undertakings or end users, respectively), and (iv) so-called 'wide' or 'narrow' parity obligations (all sales channels or direct sales channels only).

As a new feature, the scope of the VBER has been narrowed to exclude *parity obligations at the retail level between competing platforms (APPAs)* from the VBER, meaning that they are no longer block exempted.

This means that parity obligations used by, for example, a hotel booking platform, where the hotels on the platform are not allowed to offer the end users rooms at lower prices or otherwise on better terms on other booking platforms, are no longer block exempted.

These parity obligations have been added to the list of excluded restrictions in Article 5(1)(d) VBER, as this type of parity obligations is considered likely to weaken competition between platforms and, at the same time, is no longer considered to be able to satisfy with sufficient certainty the conditions of Article 101(3) TFEU.

This means that in future, regardless of market share, these parity obligations will have to be assessed on a case-by-case basis according to Article 101(1) and (3) TFEU.²⁷

3. More flexible distribution systems

The new vertical rules give the supplier increased flexibility in the organisation of its distribution systems, including increased scope for using resale restrictions, i.e. sales restrictions on customers and territories.

In addition, the new rules provide increased guidance on both offline and online resale restrictions.

In the case of *exclusive distribution*, the supplier allocates a territory or a group of customers exclusively to one distributor or reserves the territory or customer group to itself, while restricting all its other buyers within the EU from active selling into the exclusive territory or to the exclusive customer group.

'Active' sales are sales resulting from (a distributor or its direct customers) actively targeting customers by visits, letters, emails, calls or other means of direct communication as opposed to 'passive' sales which results from an unsolicited customer request, see more in section 5 below.

As a *first* extension of the VBER, the supplier now has the option of granting so-called '*shared exclusivity*' to up to five distributors for a given territory or customer group.²⁸

²⁴ Most recently, the Danish Competition Council has made two decisions regarding information exchange in connection with parallel distribution in the so-called *Hugo Boss* cases. Hugo Boss used a parallel distribution system and was thus both a supplier and a competitor to the independent retailers Ginsborg and Kaufmann. The exchange of information at issue in the two cases concerned information from Hugo Boss to Ginsborg and Kaufmann on Hugo Boss' future prices, discounts and quantities for Hugo Boss' own future sales at the retail level. See the Danish Competition Council's decision of 24 June 2020, Information exchange between Hugo Boss and Ginsborg, the Danish Competition Council's decision of 24 June 2020, Information exchange between Hugo Boss and Kaufmann, and the Danish Competition Appeals Board's rulings of 23 June 2021 concerning Hugo Boss Nordic ApS v the Danish Competition Council and Axel Kaufmann ApS v the Danish Competition Council. The decisions have been appealed to the Maritime and Commercial High Court.

²⁵ In practice, parity obligations are referred to in a variety of ways, including 'parity agreements', 'Most Favoured Nation clauses'/'MFNs', 'Most Favoured Customer clauses'/'MFCs' and 'Across Platform Parity Agreements'/'APPAs' etc.

²⁶ See paragraph (356) of the Vertical Guidelines.

²⁷ The European Commission's guidance on case-by-case assessments of this type of parity obligations, and of other types of parity obligations when the market share threshold of 30% has been exceeded are set out in the Vertical Guidelines in the new sections 6.2.4 and 8.2.5.

²⁸ See Article 4(b)(i) VBER.

As the *second* extension of the VBER, the supplier can now also protect exclusive distributors, e.g. in Germany, against *active* sales, not only from distributors located outside the exclusive territory (and regardless of the distribution system used by the supplier in the other territories), but also *their direct customers*.

Thus, under the VBER, the supplier can now oblige the buyer to ‘pass on’ the restriction on active sales to the buyer’s direct (but not subsequent) customers down the distribution chain.²⁹

The new VBER thus gives the supplier better opportunities and greater flexibility to protect exclusive distribution territories and customer groups from *active* resale.

In the case of *selective distribution*, the supplier undertakes to sell the contract products exclusively to distributors selected on the basis of certain criteria and where these distributors undertake not to sell the products to unauthorised distributors in the territory reserved by the supplier to

operate the system, e.g. Denmark.

As a *third* extension of the VBER, it is now expressly possible for the supplier to *combine selective distribution and exclusive distribution* in the EEA (‘European Economic Area’), as long as it does not take place within the same geographical area of the EEA. Accordingly, the VBER still does not cover a situation where the supplier simultaneously uses exclusive distribution at the wholesale level and selective distribution at the retail level in, for example, Denmark, or where exclusive and selective distribution are used simultaneously at the retail level throughout Denmark.

The new VBER gives the supplier increased freedom to organise its distribution system as the supplier considers it most appropriate, in particular by using different distribution systems in different territories.

As a *fourth* extension of the VBER, it now also gives the supplier *increased scope to protect its exclusive and selective distribution systems*, including against sales from the other. This means that the supplier may require the members of a selective distribution system, e.g. in Denmark, and their

Box 3. More guidance on both offline and online resale restrictions

‘Prohibited’ direct obligations

(paragraph (204) of the Vertical Guidelines):

- prohibition of sales to particular territories (‘where’) or customers (‘who’)
- obligation to refer orders from such customers to other distributors

‘Prohibited’ indirect measures

regarding sales to such customers (paragraph (204) of the Vertical Guidelines), for example:

- requiring the buyer to request the supplier’s prior approval
- refusing or reducing bonuses or discounts
- terminating the supply or limiting or reducing the volumes supplied
- threatening to terminate or not to renew the vertical agreement
- charging a higher price to the distributors for products that are to be sold to such customers
- limiting the proportion of sales made by the buyer to such customers
- preventing the buyer from using additional languages on the packaging or for the promotion of the products
- supplying another product or paying the buyer in return for stopping its sales
- obliging the buyer to pass on to the supplier profits from such customers
- excluding products from a Union-wide guarantee

As a rule, ‘lawful’ obligations

concerning the ‘manner’ (‘how’) the goods or services are to be sold, irrespective of the type of distribution system (paragraphs (207) and (205) of the Vertical Guidelines), such as

- requirements relating to the minimum size and appearance of the buyer’s shop or the presentation of the products
- measures that allow a manufacturer to verify the destination of the supplied goods (differentiated labels, serial numbers etc.) or the performance of audits to verify the buyer’s compliance with other (lawful) restrictions are not in themselves illegal restrictions of competition. However, they may be in connection with other (illegal) conduct (paragraphs (203 and (204) of the Vertical Guidelines).

²⁹ See Article 4(b)(i), Article 4(c)(i)(1) and Article 4(d)(i) VBER.

direct customers, not to *actively* sell to, for example, Germany or to a defined group of customers which the supplier has allocated to a maximum of five exclusive distributors or which the supplier has reserved for itself.³⁰

The supplier also has the possibility to protect its selective distribution systems against *active and passive sales to unauthorized distributors*, located in a territory where the supplier operates a selective distribution system, e.g. Denmark.

The supplier may, thus, restrict its distributors (including exclusive, selective or ‘free’ distributors) and their customers from making *active and passive sales*, regardless of whether these distributors and customers are themselves located within a territory, e.g. Denmark, or – as a new rule – *outside* this territory, e.g. Germany (for example with exclusive distribution) and Sweden (for example with ‘free’ distribution or selective distribution).³¹

Furthermore, Article 4(b) of the old VBER has been restructured into three different groups in the new Article 4(b), (c) and (d) covering each of the distribution categories ‘exclusive distribution’, ‘selective distribution’ and ‘free’ distribution (anything other than selective or exclusive distribution).³²

Finally, the Commission has *expanded on the guidance* in the Vertical Guidelines with examples of indirect measures that are considered to be hardcore or ‘prohibited’ both *offline and online resale restrictions* as well as examples of generally exempted or ‘lawful’ resale restrictions.

Several of the examples are new and codify case law. The Vertical Guidelines thus exemplify and clarify the scope of hardcore restrictions as described in Article 4(b), (c) and (d) VBER.

A comprehensive overview of the examples of hardcore offline and online resale restrictions mentioned in the Vertical Guidelines is given in Box 3 on the previous page.

4. Online intermediation services

It has so far not been entirely clear whether undertakings providing online intermediation services – such as online marketplaces, price comparison services, search engines, app stores, social media services etc.³³ – are to be catego-

rised as ‘suppliers’ or ‘buyers’ under the VBER, which has a significant impact on how, for example, market shares are to be calculated and how possible restrictions of competition are to be analysed from a legal perspective.

It is now specified in Article 1(d) VBER that ‘suppliers’ also include undertakings providing online intermediation services, and that the undertakings selling their goods or services through the online intermediation service are to be considered as purchasers (of the online intermediation service) within the meaning of the VBER.

It would, for example, constitute a hardcore restriction in the form of RPM for an online platform to impose a minimum or fixed sale price on a buyer of the online intermediation services at which the goods or services may be sold.³⁴

Online marketplaces etc. are therefore not ‘buyers’ of the goods or services offered by third parties via the online marketplaces etc. in question.

Article 1(e) VBER has, thus, introduced a *new definition of ‘online intermediation services’* as meaning information society services which allow undertakings to offer goods or services to other undertakings or final consumers with a view to facilitating the initiating of direct transactions between those undertakings or between these undertakings and final consumers. The definition is inspired by definitions in other EU legislation.³⁵

5. Modernised rules on restrictions of online sales

‘*Dual pricing*’, which means charging higher wholesale prices from a distributor for products sold online by the distributor than for products sold offline by the distributor, was considered a hardcore restriction of competition under the previous guidelines.

However, online sales are much more widespread today than in 2010, and dual pricing is now, as a rule, covered by the safe harbour, as the conditions for exemption in Article 101(3) TFEU are presumed to be met “*where the difference in the wholesale price is reasonably related to differences in the investments and costs incurred by the buyer to make sales in each channel*”.³⁶

At the same time, the difference in the wholesale price must not have “*the object of preventing the effective use of the internet by the buyer to sell the contract goods or services to particular territories or customers*”.

³⁰ See Article 4(c)(i)(1) VBER.

³¹ See Article 4(b)(ii), Article 4(c)(i)(2) and Article 4(d)(ii) VBER.

³² See also section 6.1.2.3 of the Vertical Guidelines. The purpose of this division into three distribution categories is to make it easier to consult each distribution category and determine whether resale restrictions are covered by the VBER or not. Section 4.6 of the Vertical Guidelines provides a detailed account of each of the three distribution categories and when restrictions are ‘hardcore’ for each distribution system.

³³ See paragraphs (62)-(68) of the Vertical Guidelines.

³⁴ See Article 4(a) VBER and paragraphs (67)(c) and (194) of the Vertical Guidelines.

³⁵ More specifically, Regulation (EU) 2019/1150 of the European Parliament and of the Council, the Platform to Business Regulation on the relationship between digital platforms and their business users (the ‘P2B Regulation’) and Directive (EU) 2015/1535 of the European Parliament on Information Society services, as set out in Recital (11) VBER.

³⁶ See paragraph (209) of the Vertical Guidelines.

According to the Vertical Guidelines, this is particularly the case if the price difference “*makes selling online unprofitable or financially unsustainable, or where dual pricing is used to limit the quantity of products made available to the buyer for sale online*”.³⁷

In the previous Vertical Guidelines, it was considered a hardcore restriction of competition in connection with selective distribution systems if a supplier impose criteria for online sales which were not “overall” equivalent to the criteria imposed for the offline sales, also known as the ‘*principle of equivalence*’.

This principle has also been relaxed, so that *the imposition of different criteria for online or offline sales* is now generally exempted from the prohibition laid down in Article 101(1) TFEU if the general block exemption conditions are fulfilled.

However, an exception also applies here if the difference in criteria has the object of preventing the effective use of the internet by the buyer to sell the contract goods/services to particular territories or customers. The Vertical Guidelines contain a few examples of permitted requirements related to online sales.³⁸

Article 4(e) VBER contains a substantial amendment to the old VBER in the form of a new category of hardcore restrictions relating specifically to online sales restrictions.³⁹ Thus, according to a *new overall test for restricting online sales*, a restriction would be hardcore if the agreement:

... has as its object “*the prevention of the effective use of the internet by the buyer or its customers to sell the contract goods or services, as it restricts the territory into which or the customers to whom the contract goods or services may be sold within the meaning of points (b), (c) or (d) ...*”

However, according to the provision, this is without prejudice to the possibility of imposing on the buyer: (i) “*other restrictions of onlinesales*”, or (ii) “*restrictions of online advertising that do not have the object of preventing the use of an entire online advertising channel*”.

As can be seen, a distinction is made between whether the restriction is linked to online *sales* or online *advertising*.

Various provisions of the Vertical Guidelines now include *more detailed guidance on when resale restrictions* are on online *sales* or online *advertising*.

They also set out a number of examples of when obligations are hardcore or ‘prohibited’ and prevent the “*effective use*” of the internet to sell, and when they are restrictions that “*can*” benefit from the exemption or be ‘lawful’, see Box 4 on the next page.⁴⁰

The Vertical Guidelines provide that an agreement does not have as its object to prevent “*effective use*” of the internet to sell, where the buyer remains free

- (i) to operate its own online store and
- (ii) to advertise online.⁴¹

A comprehensive overview of the ‘prohibited’ or generally ‘lawful’ obligations listed in the Vertical Guidelines is given in Box 4 on the next page.⁴²

As can be seen from Box 4, it follows from the Vertical Guidelines that prohibiting the use of “*an entire*” online *advertising* channel, e.g. advertising via price comparison services, constitutes a ‘prohibited’ obligation, while prohibiting the use of “*certain*” (but not all) price comparison services – as a main rule – constitutes lawful obligations, as the buyer can use other online *advertising* services to raise awareness of its online *sales* activities.⁴³

However, this main rule is not applied if prohibiting the use of “*the most widely used*” advertising services in the online advertising channel concerned, such as price comparison services, means that the remaining services in that online advertising channel are *de facto* not capable of attracting customers to the buyer’s online store.⁴⁴

Moreover, as a main rule, it constitutes a lawful obligation for the supplier to prohibit the buyer from using “*an entire*” online sales channel, such as third-party online marketplaces, as the buyer still has access to *other* online sales channels, such as its own online store.⁴⁵

This codifies the ECJ judgment in the *Coty* case, which, however, only directly concerned the sale of luxury goods within the framework of a selective distribution system. However, each of the examples of ‘prohibited’ and ‘lawful’ obligations, respectively, in Box 4 applies to *all* types of products and distribution systems.⁴⁶

³⁷ See paragraph (209) of the Vertical Guidelines.

³⁸ See paragraph (235) of the Vertical Guidelines.

³⁹ Which the European Commission has based on the judgment of the European Court of Justice (ECJ) of 13 October 2011 in Case C-439/09, *Pierre Fabre*, and ECJ judgment of 6 December 2017 in Case C-230/16, *Coty*. See also Recital (15) VBER.

⁴⁰ See paragraphs (203) and (206)-(210) of the Vertical Guidelines.

⁴¹ See paragraph (208) of the Vertical Guidelines.

⁴² A number of the examples set out in the Vertical Guidelines are new and codify both new Commission and Court case law.

⁴³ See paragraphs (206)(g) and (208) of the Vertical Guidelines.

⁴⁴ See paragraph (206)(g) of the Vertical Guidelines.

⁴⁵ See paragraphs (208)(c) and (336) of the Vertical Guidelines.

⁴⁶ Further guidance on the case-by-case assessment of restrictions on the use of online marketplaces or price comparison services, respectively, to be carried out when the block exemption does not apply, e.g. because the market share threshold of 30% has been exceeded, can be found in the Vertical Guidelines in new sections 6.2.4 and 8.2.5.

Box 4. Extended guidance on pure online resale restrictions
'Prohibited' direct obligations

(paragraph (206) of the Vertical Guidelines):

- Absolute ban on (any) online sales

'Prohibited' indirect obligations

(paragraph (206) of the Vertical Guidelines), for example:

- requiring the buyer to prevent customers located in another territory from viewing or to re-route customers to the website
- requiring the buyer to terminate consumers' online transactions where their credit card data reveal an address that is now within the buyer's territory
- requiring the buyer to sell only in a physical space or in the physical presence of specialised personnel (ECJ judgment of 13 October 2011 in Case C-439/09, *Pierre Fabre*, paragraphs 56-57)
- requiring the buyer to seek the supplier's prior authorisation before making individual online sales transactions
- prohibiting the buyer from using the supplier's trademarks or brand names on its website or in its online store
- prohibiting the buyer from using "an entire" online advertising channel, such as search engines ('online search advertising') (European Commission decision of 17 December 2018 in Case AT.40.428, *Guess*, Paragraphs 118-126) or price comparison services, such as an obligation not to use the supplier's trademarks or brand names for bidding to be referenced in search engines, or a restriction on providing price-related information to price comparison services
- requiring the buyer to sell a certain minimum *absolute amount* of goods or services offline (paragraph (208)(e) of the Vertical Guidelines, *a contrario*)

As a rule, 'lawful' obligations

concerning the 'manner' ('how') the goods or services are to be sold online (paragraphs (208)-(210) of the Vertical Guidelines), such as

- prohibiting the use of "particular" price comparison services or search engines, i.e. *parts* of an online advertising channel (as opposed to "an entire" online advertising channel). See, however, paragraph (206)(g) of the Vertical Guidelines which contains a reservation in relation to the prohibition of the use of "the most widely used" advertising services in the particular online advertising channel, which *may de facto* make it impossible for the buyer to attract customers to its online store
- quality/appearance of the buyer's online store and presentation of goods
- direct or indirect prohibition of the use of online marketplaces (= an online sales channel) (ECJ judgment of 6 December 2017 in Case C-230/16, *Coty*, paragraphs 64-69)
- a requirement that the buyer operates one or more brick and mortar shops or showrooms
- a requirement that the buyer sells a minimum absolute amount offline
- a requirement that online advertising meets certain quality standards or includes specific content or information
- a requirement that the buyer does not use the services of "particular online advertising providers" that do not meet certain quality standards
- a requirement that the buyer does not use the brand name of the supplier in the domain name of the its online store

It is clear that restrictions on both active and passive sales – as a general rule – remain hardcore restrictions of competition covered by Article 4(b), (c) and (d) VBER, implying that the entire vertical agreement cannot benefit from the VBER.

Exclusive distribution is still an exception (which has now been extended), as it remains excluded to protect exclusive distributors from active sales by other distributors into their exclusive territory or to their exclusive reserved customer group.

The distinction between active sales and passive sales therefore remains important for exclusive distribution.

The definitions of the concepts of active and passive sales have now been moved to the definitions in Article 1(l) and (m) VBER and have been extended and updated in both the VBER and the Vertical Guidelines with many new examples, particularly concerning how to categorise advertising via online media, price comparison services, search engines, offering websites with different language options and top-level domains etc.

A comprehensive overview of the general definitions of active and passive sales referred to in the VBER and the examples of active and passive sales set out in the Vertical Guidelines is given in Box 5 on the next page.⁴⁷

⁴⁷ See paragraphs (211)-(215) of the Vertical Guidelines.

Box 5. Updated definition of active and passive sales

Active sales, overall definition:

“Actively targeting customers by visits, letters, emails, calls or other means of direct communication or through targeted advertising and promotion, offline or online, for instance by means of print or digital media ...” (Article 1(l) VBER)

Active sales, examples. Sales resulting from:

- setting up own website or online store with languages that are NOT “commonly used in the territory in which the seller is established” (other than English) and/or with a top-level domain corresponding to a territory other than the one in which the seller is established
- the seller actively choosing to display online advertising in territories or to customers who, based on their particular characteristics, including their geographical location or personal profile, are located outside the territory where the seller is established, e.g. through search engine advertising, on websites, in app stores and on social media
- the use of price comparison services with top-level domain corresponding to territories outside the territory where the seller is established

Passive sales, overall definition:

“Sales made in response to unsolicited requests from individual customers ...” (Article 1(m) VBER)

Passive sales, examples. Sales resulting from:

- setting up own website or online store in a language that is “commonly used in the territory in which the seller is established” (and English) and with a top-level domain that is generic (such as .com, .org and .net) or corresponds to a territory other than the one in which the seller is established
- the customer opting to be kept automatically informed by the seller (newsletters etc.)
- the use of tools or techniques for search engine optimisation of online store visibility/ranking
- offering an app in an app store
- general advertising in the form of sponsored content on the website of a local or national newspaper that may be accessed by anyone
- the use of price comparison services with generic and non-country-specific top-level domain names
- participation in public and non-public procurement

It can be inferred from the rules that online sales are still – generally – considered to constitute passive sales.

However, this has now been further qualified by stating in the Vertical Guidelines that it amounts to passive sales when the language used on the website/in the online store is “commonly used” in the territory where the seller is established and English (as English is commonly understood and used throughout the EU), and when the top-level domain name is either generic or corresponds to the country where the seller is established.

Conversely, it constitutes active sales if, for example, a sale has taken place from a distributor established in Denmark to a customer established in Germany as a result of the distributor using the German language and/or using the top-level domain .de for its online store.

6. Tacitly renewable non-compete obligations

Non-compete obligations⁴⁸ in vertical agreements continue to be covered by the VBER, unless the duration of the non-compete obligation is indefinite or more than five years.⁴⁹

As a new feature, the safe harbour has been expanded in respect of *non-compete obligations which are tacitly renewable beyond a period of five years*, as they are no longer on the list of excluded restrictions in Article 5(1) VBER.

However, this presupposes that the buyer can effectively renegotiate or terminate the vertical agreement, “*within a reasonable period of notice and at a reasonable cost*”, and “*effectively switch its supplier after the expiry of the 5-year period*”.⁵⁰

7. Agency agreements

The Vertical Guidelines contain extended guidance on the assessment of agency agreements.

An agency agreement empowers a legal or natural person to negotiate and/or conclude contracts on behalf of another person (the principal), either in the agent’s own name or in the name of the principal, for the purchase of goods or services by the principal, or the sale of goods or services supplied by the principal.⁵¹

Agency agreements remain completely outside the scope of Article 101(1) TFEU, where the agent bears no significant

⁴⁸ See the definition in Article 1(f) VBER.

⁴⁹ See Article 5(1)(a) VBER.

⁵⁰ See Article 5(1)(a) VBER and paragraph (248) of the Vertical Guidelines.

⁵¹ See paragraph (29) of the Vertical Guidelines.

financial or commercial risks in relation to the contracts concluded or negotiated on behalf of the principal.

In such cases, the agent and the principal are deemed to constitute one single economic entity in respect of the agreements entered into/negotiated, and in these cases, the agent is often in practice referred to as a 'genuine' agent.

Section 3.2 of the Vertical Guidelines now contain extended guidance on the assessment of agency agreements, in particular in respect of the following:

Firstly, it is made clear that if the agent *temporarily for a very brief period of time acquire the property* in the contract goods while selling them on behalf of the principal in the circumstances, i.e. with no costs and risks associated with the transfer, this does not preclude the existence of a 'genuine' agency agreement.⁵²

Secondly, the Vertical Guidelines provide new guidance on the ways in which the principal can cover relevant risks and costs for the agent to ensure that the agency agreement is 'genuine'.⁵³

Thirdly, the Vertical Guidelines contain new guidance on the conditions under which agents/independent distributors can play a 'dual role' in the same or different relevant markets for the same supplier.

In this connection, it should be emphasized that the agent/independent distributor must have been genuinely free to enter into the agency agreement or an activity as an independent distributor.⁵⁴

Fourthly, the Vertical Guidelines contain new guidance on the reimbursement of market-specific investments already made in connection with an agency agreement with an independent distributor who is already active on the relevant market, which is required for the agent to be considered both as a 'genuine' agent in relation to certain products and as an independent distributor in relation to other products that are distributed/sold for the same supplier.⁵⁵

Fifthly, it has been clarified that *online platforms generally cannot be considered agents*.⁵⁶

8. Resale price maintenance

Resale price maintenance ('RPM'), e.g. in the form of minimum or fixed resale prices, continue to constitute a hardcore restriction of competition. The guidance on this can now be found in one place in section 6.1.1 of the Vertical Guidelines, and the most important changes include:

Firstly, it has now been clarified that '*minimum advertised prices*' ('MAPs') will be treated as an indirect form of RPM and therefore constitute a hardcore restriction of competition.⁵⁷

Minimum advertised prices may, depending on the circumstances, meet the conditions for individual exemption laid down in Article 101(3) TFEU, if these are used to prevent a particular distributor from using the product of a supplier as a 'loss leader', as this may damage the image of the product and undermine the supplier's incentive to invest in quality and brand image.⁵⁸

Secondly, new guidance has been added on the imposition by the supplier of a resale price in connection with the so-called '*fulfilment contracts*', which may, depending on the circumstances, constitute RPM. The assessment depends on whether it is the end user or the supplier who enters into a vertical agreement with a buyer to fulfil a supply agreement previously concluded between the supplier and the final user.⁵⁹

Thirdly, it has now been clarified that it constitutes RPM for providers of online intermediation services to impose restrictions on the purchaser of those services in terms of the price at which the intermediated goods or services may be sold.

For example, the imposition of a fixed or minimum sale price for a transaction facilitated through an online platform would constitute RPM falling within Article 4(a) VBER.⁶⁰

9. Sustainability objectives

'Sustainability' or 'sustainability objectives' are now, as a new feature, mentioned in the Vertical Guidelines. Sustainable development, together with digitalisation and a 'resilient Single Market', are all priority objectives for the EU's policies.

Sustainability objectives may concern, for example, climate change, environmental protection or limiting the use of natural resources.⁶¹

⁵² See paragraph (33)(a) of the Vertical Guidelines.

⁵³ See paragraph (35) of the Vertical Guidelines.

⁵⁴ See paragraphs (36)-(38) of the Vertical Guidelines.

⁵⁵ See paragraphs (39)-(40) of the Vertical Guidelines.

⁵⁶ See paragraph (46) of the Vertical Guidelines.

⁵⁷ See paragraphs (187)(d) and (189) of the Vertical Guidelines.

⁵⁸ See paragraph (197)(c) of the Vertical Guidelines.

⁵⁹ See paragraph (193) of the Vertical Guidelines.

⁶⁰ See paragraphs (67)(c) and (194) of the Vertical Guidelines.

⁶¹ See paragraphs (8) and (144) of the Vertical Guidelines.

Agreements pursuing sustainability objectives (as well as digitalisation or a resilient Single Market) do not constitute a separate category of agreements under the Vertical Guidelines, nor are they treated in separate sections of the Vertical Guidelines.

However, the Vertical Guidelines do contain new guidance on the circumstances under which *sustainability objectives etc. can be included* in the analysis under Article 101(3) TFEU *as possible efficiencies*. For example, sustainability-related criteria in a selective distribution system and the conclusion of non-compete obligations of more than five years' duration in order to allow for depreciation of 'green' investments could constitute efficiencies.⁶²

10. Duration, transitional rule and Danish rules

The new vertical rules entered into force on 1 June 2022 and expire on 31 May 2034, see Article 11 VBER. Thus, agreements concluded from 1 June 2022 onwards must comply with the terms of the new VBER in order to be covered by the block exemption.

By virtue of the transitional provision in Article 10, agreements already in force on 31 May 2022 which do not satisfy the conditions for exemption provided for in the new VBER but which satisfied the conditions of the old VBER, continue to be exempted until 31 May 2023.

Undertakings thus have one year to ensure that their old agreements – possibly subject to amendments – are also covered by the new VBER.

In the case of vertical agreements which have no appreciable effect on trade, i.e. vertical agreements which are exclusively covered by the provisions of the Danish Competition Act, the VBER applies *mutatis mutandis*, under Danish Executive Order No. 1164 of 6 August 2022.

The Executive Order entered into force on 15 August 2022, and all agreements entered into from 15 August 2022 onwards must satisfy the conditions for exemption under this Executive Order.

Under the transitional provision in Section 5 of the new Executive Order, agreements without an appreciable effect on trade that were in force no later than 14 August 2022 and which do not satisfy the conditions of the new Executive Order, but which satisfy the conditions for exemption in the old Executive Order No. 739 of 23 June 2010, continue to be exempted until 31 May 2023. The transitional provision thus follows that laid down in the VBER.

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Links to the new vertical rules

New Vertical Block Exemption Regulation. [See here.](#)

New Vertical Guidelines. [See here.](#)

European Commission press release of 10 May 2022 on the adoption of the new Vertical Block Exemption Regulation and the new Vertical Guidelines. [See here.](#)

Executive Order No 1164 of 6 August 2022 on Group Exemption for Categories of Vertical Agreements and Concerted Practices. [See here.](#)

⁶² See paragraphs (8), (9), (144) and (316) of the Vertical Guidelines.