

No2 - December 2022
Vertical agreements and reforms



New rules to be aware of in many States in addition to the
European reforms already in force or to come

by Louis and Joseph Vogel

2022 and 2023 are very active years in Europe and all around Europe regarding competition and regulation law.

In the EU, the new Block Exemption Regulation on vertical restraints entered into force with its guidelines on June 1, 2022. It involves new constraints (especially regarding dual distribution) but offers also new opportunities for exclusive, selective or free distribution and for the organization of sales on the Internet in general.

The new mini automotive Block exemption is under revision and will enter into force on June 1, 2023.

The EU regulation of platforms has also been very active. After the P to B rules (Platform to Business) to be applied from July 12, 2020, the DMA (Digital Markets Act) will imply new obligations for gatekeepers as from May 2, 2023. And the Digital Services Act (DSA) will also impose platforms new rules regarding their contents as from February 17, 2024.

In parallel to these changes, important reforms have also taken place in many states covered by our network and have to be aware of them.

You will find hereafter a summary of the new vertical BER by

our colleague from Cyprus, Xenia Kantounal, lawyer at Papadopoulos Lycourgos. These new rules have an influence on the regime of vertical restraints in neighbour States.

In the UK, new rules on vertical agreements have been adopted in parallel to the EU BER. It is important to know how they compare to the EU rules, as the devil is the details. Ashley French and Joanna Rae from Shepherd and Wedderburn LLP give us a comparative overview in their article "New rules on vertical agreements in the UK: how do they compare to the EU rules?"

In Turkey, Turkey's communiqué N°2002/2 and EU's vertical BER were largely similar. The issue is now to see how the changes occurred in the EU can have an impact on the Turkish competition law framework. Our colleagues from Paksoy have studied the "Evaluation of vertical Agreements under Turkish competition law" in their article.

In Slovenia, an important and broad reform of Competition law was adopted on September 29, 2022. It entered into force on October 26, 2022 and shall become applicable on January 26, 2023. It implements a unified administrative procedure

for establishing infringements and sanctioning, a simplified merger notification procedure, increased investigation power of the CPA, more international cooperation and better rights of defense regarding access to leniency statement. A study of Maja Cinc and Janja Zaplotnik from Jadek & Pensa gives us a full insight on the reform.

In Romania, the main recent reform concerns the tighter scrutiny of foreign investments. Our colleagues from NNDKP, Anca Diacanu, Oana Popescu and Rares Farcas have prepared an article of the main elements to know about the transactions that will fall under this investments' control, the areas subject to scrutiny and the practical difficulties associated with the new regime.

In Greece, our colleagues Marina Androulakakis and Tamia Patsalia from Bernitsas inform us about an innovative procedure regarding the issuance of a no-action letter for public interest reasons that can offer an interesting solution for undertakings.

CYPRUS

 PAPADOPOULOS
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The new VBER

by Xenia Kantouna

Cyprus is a tertiary-sector heavy economy relying on imports and therefore distribution agreements for most of its material consumption needs. At the same time, the post-pandemic Cypriot consumer seems reluctant to forego the convenience of online commerce, despite the relative accessibility to the physical shop floor thanks to the island's small size. Naturally therefore, vertical agreements govern an important part of economic activity in Cyprus.

The new Vertical Block Exemption Regulation (VBER) which entered into force on 1 June 2022 retains the same analytical framework as the previous VBER but brings substantive changes deemed necessary in light of developments in e-commerce and the need to safeguard the pro-competitive effects of selective distribution systems, as well as stakeholder calls for increased flexibility for offline sales. While the scope of some safe harbours has been narrowed, the new rules continue to offer flexibility

in recognition of those pro-competitive effects vertical cooperation and coordination in principle bring for consumers.

The safe harbour for dual distribution for non-reciprocal vertical agreements has been expanded to include importers and wholesalers. It is a welcome change allowing increased access points into the small and geographically distanced Cyprus market through efficient established channels. We note that in such contexts, the new VBER permits information exchanges between supplier and buyer only where the exchange is directly related to the implementation of the vertical agreement and is necessary to improve the production or distribution of the good in question.

The new VBER also addresses the relationship between OIS providers and OIS buyers. We highlight three welcome changes: firstly, agreements between OIS providers and OIS buyers are excluded from the benefit of the dual distribution safe harbour where the undertakings

compete in the market for the intermediated good. Secondly, the VBER protection is no longer afforded to parity obligations which prevent OIS buyers from offering the intermediated goods to end users under more favourable terms via other competing OIS providers. Finally, protection is likewise not afforded to agreements preventing the effective use of the internet, which expressly constitutes a hardcore online restriction under the VBER.

The new VBER is the result of a thorough review process with stakeholder comments evidently not falling on deaf ears.

UNITED KINGDOM



SHEPHERD+ WEDDERBURN

New rules on vertical agreements in the UK: how do they compare to EU rules?

by Ashley French and Joanna Rae

Background

On 1 June 2022, both the UK and EU introduced new rules on vertical agreements, providing a safe harbour for certain types of restrictions in vertical distribution agreements. These replace the EU VBER, which was retained at the end of the Brexit transition period under UK law. The retained VBER expired on 31 May 2022. Whilst the CMA and the European Commission worked collaboratively to develop the two sets of rules, they differ in some respects. As such, it will be important for businesses to bear in mind that both sets of rules may apply in parallel to their agreements where they trade in both markets.

UK VABEO

The UK Vertical Agreement Block Exemption Order (VABEO) seeks to ensure that businesses in a 'vertical' relationship with each other are not prevented or disincentivised from entering into agreements that the Competition and Markets Authority (CMA) considers to

be overall beneficial and not anti-competitive. It aims to help businesses determine whether their vertical agreements benefit from the exemption provided by VABEO. Compliance with VABEO will ensure a company can market its products or services without provisions in its distribution agreements infringing competition law, ensuring they are legally enforceable and not subject to potential fines.

The new VABEO largely preserves the existing approach to vertical agreements under the retained VBER, in accordance with the CMA's recommendation. The CMA have published extensive guidance on the application of these new rules.

Key areas of divergence between the UK and EU rules

Whilst the new UK and EU regulations largely follow the same scope, there are some key areas of divergence. We consider some of the key differences between the UK VABEO and the new EU

Vertical Block Exemption Order (VBER) below.

- *Dual Distribution*. In the VABEO, there is an exception for "dual distribution" that grants the benefit of the safe harbour to non-reciprocal agreements between competitors, for example, where the supplier is a manufacturer and distributor of goods, while the buyer is a distributor and not a competing manufacturer. The exception is extended under the VABEO to capture dual distribution agreements between wholesalers and importers. The VBER goes further than this to also prevent hybrid platforms (platforms which provide online intermediation services but also sell goods or services in competition with the customers of the online intermediation services) from relying on the dual distribution exemption.

- *Wide Parity/Most Favoured Nation (MFN) Clauses*. Wide parity clauses that restrict the offering of better terms on any sales channel have been the subject

of multiple investigations in recent years and are now generally viewed as anti-competitive. Under the VABEO, wide parity clauses are to be treated as hardcore restrictions, i.e. terms that are presumed illegal, which cannot benefit from exemption. These hardcore restrictions apply both to online and offline channels. However, this will not apply in business-to-business markets. By contrast, the VBER does not include wide parity retail clauses as a hardcore restriction, but instead regards MFN clauses as excluded from the block exemption, requiring parties to determine if the individual clauses are anti-competitive.

- *Non-compete Obligations.* The VABEO treats non-compete obligations as automatically excluded restrictions and requires that they are assessed on a case-by-case basis if the obligation is indefinite, tacitly renewable beyond five years or exceeds five years. By contrast, the VBER exemption applies to non-compete obligations when they are tacitly renewable beyond five years.

- *Territorial and customer restrictions.* To allow businesses more flexibility in designing their distribution systems, the

VABEO includes new exceptions that permit:

- the allocation of “shared exclusivity” for a particular territory or customer group for a ‘limited number’ (for example, allowing the allocation of one territory to more than one “exclusive” buyer);
- the combination of exclusive and selective distribution networks in the same or different territories; and
- protection for members of selective distribution systems from sales made outside of their territory to unauthorised resellers/distributors in their territory.

The VBER also introduces an exception for shared exclusivity, however this is restricted to five distributors per exclusive territory or customer group, rather than a ‘limited number’. Under VBER, suppliers cannot combine exclusive and selective distribution networks in the same territory.

Transitional period of one year

It is important to bear in mind that there is a transitional period of one year in both the UK VABEO and the EU VBER for agreements, already in force on 31 May 2022, which met the condi-

tions for exemption under the previous rules. Businesses trading in the UK and EU markets may require to consider these new rules as contracts come up for renewal.

TURKISH

Paksoy

Evaluation of Vertical Agreements under Turkish Competition Law

by Togan Turan, Partner

The European Commission’s Vertical Block Exemption Regulation (“VBER”) corresponds to Communiqué No. 2002/2 on the Block Exemption for Vertical Agreements (“Communiqué No. 2002/2”) in Turkey. Communiqué No. 2002/2 basically sets out the main rules to create a safe harbour for certain vertical agreements from the implementation of Article 4 of Law No. 4054 on the Protection of Competition, which is akin to Article 101 of the TFEU in the EU and that prohibits agreements between companies, trade associations and concerted practices that have (or may have) as their object or effect the prevention, restriction or distortion of competition within a Turkish product or services market.

Amendments to VBER and the Possible Impact in Turkey

Before the adoption of new VBER,

Turkey’s Communiqué No. 2002/2 and EU’s VBER were largely similar. Indeed, the Turkish Competition Authority (the “TCA”) revised the market share threshold for companies to benefit from exemption from 40% to 30% in November 2021, due to its deliberate efforts to harmonize the Turkish legislation with the EU.

New VBER, on the other hand, introduced significant amendments on various matters including dual distribution, parity obligations, RPM, active and passive sales, online platforms, etc. While these amendments aim to provide clear and up-to-date guidance, which takes into account the growth of online sales and online players, they will create major gaps with the legislation and practice in Turkey. Remarkable differences will include, among others:

- RPM - The new VBER clarifies

that the imposition of minimum advertised prices (“MAP”) will be treated as an indirect form of resale price maintenance (“RPM”) and it also brings certain justifications for RPM and MAP for efficiency purposes under four examples. In Turkey, on the other hand, RPM has been generally considered as a restriction by object, which consistently results in the TCA rejecting exemption requests. Indeed, in its recent *Philips*¹ and *Groupe SEB*² decisions, the Turkish Competition Board (the “TCB”)³ confirmed that that RPM was a by object infringement, and then it found the existence of the object to interfere with the resale prices of the dealers sufficient to

¹ TCB’s decision dated 05.08.2021 and numbered 21-37/524-258

² TCB’s decision dated 04.04.2021 and numbered 21-11/154-63

³ The TCB is the decision making body of the TCA.

conclude a violation, without further analysing the existence of the effect.

- **Passive sales** – The new VBER gives clear definitions of active and passive sales. While the general distinction between the two has not changed, prohibiting distributors from using a specific search engine or online marketplaces may be now covered by the new VBER. The Turkish competition legislation, however, remains quite inflexible on that front. Indeed, the TCA's rigid attitude concerning passive sales was re-con-

firmed in its recent *BSH* decision⁴, where it took a clear position and refused to grant exemption for prohibiting sales at online marketplaces.

It is still uncertain what the impact of these changes will be on the Turkish competition law framework. Although there are not yet any announcements nor any draft proposal to amend the current legislation, the TCA usually follows the Commission's legislation, as the past practice of the TCA suggests. In this regard, particularly when glob-

al companies will start adapting to new VBER, certain pressure and influence over the TCA would be predictable in the future, as the revised vertical agreements of those companies might no longer comply with the current version of the Communiqué 2002/2. Thus, reformative steps on this front in general and also specifically on the front of motor vehicles sector would be no surprise, considering the existing rules might need revision due to growth of e-commerce and digitalization at some stage.

⁴ TCB's decision dated 16.12.2021 and numbered 21-61/859-423

SLOVENIA

JADEK  PENSA

Adoption of the new Prevention of Restriction of Competition Act – ZPOmK-2 Outline of key changes and their effect in practice

by Janja Zaplotnik, Attorney-at-law, and Maja Cinc, Attorney candidate

On 29 September 2022, the new Prevention of Restriction of Competition Act (“ZPOmK-2”) was adopted in Slovenia. ZPOmK-2¹, which (among others) transposes the EU Directive 2019/1² (“ECN+ Directive”) into the Slovenian legal system, entered into force on 26 October 2022. It shall become applicable on 26 January 2023.

New ZPOmK-2 brings forward some significant regulatory changes to Slovenian competition enforcement landscape. The key changes are outlined below.

1. Unified administrative procedure for establishing infringements and administrative sanctioning

Until now, Slovenia was one of the few EU Member States that had a two-phase procedure in place for competition law infringements.

¹ Prevention of Restriction of Competition Act (in Slovenian: *Zakon o preprečevanju omejevanja konkurence*; Official Gazette of the Republic of Slovenia, no. 130/22 as amended, “ZPOmK-2”).

² Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

Under ZPOmK-1³, the Slovenian Competition Protection Agency (“CPA”) firstly had to establish an infringement in an administrative procedure and was only able to impose a fine in a separate minor offence procedure. Both procedures were subject to separate judicial appeals.

The new ZPOmK-2 abolished the aforementioned two-phase system and introduced a unified administrative procedure, which now combines the two phases. The CPA will now be able to establish the existence of the infringement of competition law and impose a fine upon the infringer in the course of the same procedure, by issuing just one decision.

The concept of administrative sanctioning, which was introduced by ZPOmK-2, is a novelty in Slovenian competition enforcement legislation and thus, a completely new concept of imposing sanctions had to be established.

The abolishment of the previous two-phase system, which has been

³ Prevention of Restriction of Competition Act (in Slovenian: *Zakon o preprečevanju omejevanja konkurence*; Official Gazette of the Republic of Slovenia, no. 36/08 as amended, “ZPOmK-1”).

criticised for some time⁴, is expected to reduce the administrative burden on the CPA as well as on the undertakings. Another envisioned benefit of the unified procedure is increased efficiency of the public competition law enforcement. Due to separate appeal procedures; the enforcement procedure was often lengthy and it was not uncommon that a significant amount of time passed between the CPA's infringement and fining decision. As both phases are now combined, it is expected that the infringement cases will be closed sooner.

Even though the ECN+ Directive does not oblige the Member States to have a unified one-phase system, it does require them to ensure effective and uniform enforcement of Articles 101 and 102 TFEU and ensure that National Competition Authorities (“NCAs”) have the power to impose effective, proportionate and dissuasive fines. Since the new unified system is expected to increase the efficiency of the competition law en-

⁴ Among others, it was also criticised by the CPA in its Opinion on the draft proposal of the ZPOmK-2 dated 4. 3. 2020, available in Slovene at: http://www.varsstvo-konkurence.si/fileadmin/varstvo-konkurence.si/pageuploads/Novice/Mnenje_AVK-ZPOmK-2.pdf.

forcement, it is thus also in line with the main goal of the ECN+ Directive (i. e. to empower the competition authorities of the Member States to be more effective enforcers).

Notwithstanding this, open issues remain if administrative sanctioning ensures all the required procedural safeguards of a suspected infringer. We expect challenges of the CPA's infringement decisions before the court due to alleged infringements of rights to a fair trial.

2. Simplified merger notification procedure

The former ZPOmK-1 only recognised one merger control procedure and did not legislate a simplified procedure regardless of the merger's effects. Thus, filing for merger control clearance in Slovenia, even for the most uninteresting cases, took significant amount of time.

The new ZPOmK-2 introduced the long-awaited simplified merger

control procedure for concentrations which have no or only have a minimal impact on effective competition on the relevant markets. Under the new ZPOmK-2, the CPA may assess the concentration under the simplified procedure in the following circumstances:

- no overlap cases - where none of the undertakings concerned are active in the same product or geographical market or upstream or downstream of each other;

- horizontal overlaps that do not exceed 15 % market share - where the undertakings concerned are active in the same relevant product or service market, but their combined market share does not exceed 15 %;

- vertical overlaps that do not exceed 25% market share on each market - where undertakings concerned are active in a market upstream or downstream to each other but the market share of each does not

exceed 25 %;

- the undertaking concerned acquires, together with the other undertakings in the group, sole control of an undertaking over which it already has joint control.

However, even if the concentration falls under the one of the aforementioned criteria, the CPA must nevertheless carry out a full and detailed assessment of the concentration if certain special circumstances are present (inter alia, if some of the undertakings concerned are present in closely related markets; if relevant markets or market shares are difficult to define; if there are high barriers to entry or the market is highly concentrated; if, in case of a JV, there is a likelihood of coordination between the undertakings that remain independent; if the CPA receives substantiated competition concerns about the concentration from third parties, etc.).

ROMANIA



Tighter scrutiny of foreign investments in Romania

by Anca Diaconu, Partner, Oana Popescu, Associate and Rares Farcas, Associate

At the time of adoption of Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union, Romania was one of the Member States already having a screening mechanism in place, providing for the review and authorization of investments from a national security perspective. The developments at EU level have spurred legislative changes, Government Emergency Ordinance no. 46/2022 ("GEO 46/2022") being enacted in April to fit the newly agreed framework. Lacking specific guidelines and with little visibility on the authority's interpretation, the new regime triggered several issues in practice. While amendments to the initially adopted regime are already in the process of being enacted, it seems that these are aiming rather to broaden the scope of the scrutiny, than to address such practical issues.

As per the currently in force pro-

visions, foreign direct investments, as well as new investments made by non-EU investors will undergo screening by the Commission for the review of foreign direct investments, should they concern one of the sectors regarded as sensitive and their value exceed an EUR 2 mil. threshold (although, by way of exception, foreign direct investments with a lower value can also be subject to review and authorization if, by their nature or potential effects, they may impact/ entail threats to national security or public order).

A broad spectrum of transactions will fall under the scope of GEO 46/2022

The types of investment subject to screening are defined broadly (and are expected to be interpreted by the authority in the same manner), as the new screening mechanism will apply to both:

- a. foreign direct investments, referring to *investments of any kind by*

a foreign investor aiming to establish or to maintain lasting and direct links between the foreign investor and the undertaking concerned or the separate organizational unit of that undertaking, to which the funds are made available or will be made available in order to carry on an economic activity in Romania, and which allow the foreign investor to exercise control over the undertaking, and

- b. *new investments, defined as initial investments in tangible and intangible assets located in the same perimeter, linked to the start-up of the activity of a new undertaking (setting up a new location for carrying out the activity for which financing is required, technologically independent from other existing units); an expansion of the capacity of an existing undertaking (the increase of production capacity at the existing site due to the existence of an unmet demand); a diversification of the production of an undertaking into products not previously manufactured*

(obtaining products or services not previously produced in the concerned unit); a fundamental change in the overall production process of an existing undertaking.

Areas subject to scrutiny

In defining the scope of the screening mechanism, GEO 46/2022 merely refers to the Decision 73/2012 of the Supreme Council of National Defense, setting out the areas regarded as sensitive from a national security/ public order perspective, but does not offer further guidance as to their precise scope. Accordingly, the new regime shall apply to investments concerning the following wide-ranging areas, assessed by reference to the criteria laid down by article 4 of the FDI Regulation: security of the citizen and of collectivities; border security; energy security; transport security; security of supply with vital resources systems; critical infrastructure security; security of information and communica-

tion systems; security of financial, tax, banking and insurance activities; security of production and circulation of weapons, ammunition, explosives, toxic substances; industrial security; protection against disasters; protection of agriculture and environment; and protection of privatization operations of state-owned companies or their management.

Practical difficulties associated with the new regime

While establishing harsh sanctions (e.g., fines of up to 10% of the total global turnover derived in the year prior to sanctioning in case of implementation without authorization), GEO 46/2022 leaves certain substantial aspects unresolved which, absent relevant guidance and practice from the authority, have galvanized (persisting) uncertainties in the months following its adoption. By way of example, it is unclear at this point:

- whether or not an investor ulti-

mately controlled by an EU company, but directly or indirectly controlled by a non-EU company is to be considered a foreign investor;

- what methodology will be employed by the authority to determine the value of investments deriving from multifaceted transactions, some of them involving payments unassociated with the investment;

- which entity is to be held liable for implementing investments prior to their approval;

- which steps of a complex investment may qualify as early implementation;

- whether or not internal restructurings fall under the new regime;

- whether or not foreign-to-foreign transactions may be scrutinized in Romania.

GREECE

HCC decision setting out the criteria and conditions for the issuance of no-action letter against multilateral (including vertical) and unilateral conduct for public interest reasons

BERNITSAS

by Marina Androulakakis and Tania Patsalia

By means of this year's amendment to the Greek Competition Act (Law 3959/2011 *on the protection of free competition*, as in force), an innovative, simplified procedure regarding the issuance of a no-action letter for public interest reasons was introduced. Particularly, the HCC Chairman may issue, under applicable Greek competition rules, a letter to interested parties following their request, stating that no enforcement action will be taken against certain multilateral (including vertical) or unilateral conduct when this is justifiable for reasons of public interest, such as sustainable development goals.

Recently, the Hellenic Competition Commission (HCC) issued a decision (Decision 789/2022) laying down the

criteria and conditions for the issuance of the non-action letter, setting out in particular (i) the necessary requirements for the initiation of the process, (ii) the minimum content of the parties' application, (iii) the reasons of public interest that may apply, including the sustainable development goals that the HCC is willing to assess (without, however, excluding the issuance of the letter in case of other public interest reasons outside the HCC's list), (iv) the process to be followed in assessing the parties' application, (v) as well as the content and the process of the issuance of the letter by the HCC Chairman.

Under the HCC decision, the non-action letter is non-binding for the HCC, the latter having the power to re-assess

it at a later stage. Further, it is explicitly provided that the HCC Chairman may, following recommendation from the Directorate General for Competition, revoke a former non-action letter if the HCC obtains knowledge of new facts that may affect in essence the assessment of the behavior, or if the facts change or if issuance thereof was based on inaccurate or misleading data. Finally, the HCC decision also provides further guidance on the operation of a sandbox tool which shall be made available through HCC's website by means of which the interested parties may file their applications.



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