

UKRAINE: VERTICAL BLOCK EXEMPTION REGULATION EXPECTED TO BE ADOPTED

Ukrainian competition law currently lacks guidance on various legal questions, including vertical restraints; legal uncertainty exists even with regard to clauses regularly used in distribution agreements in other jurisdictions. It is therefore a welcome development that the Antimonopoly Committee of Ukraine (the "**AMC**") is working on a draft Vertical Block Exemption Regulation (the "**Draft Regulation**"). It is doing so in view of the requirements under the Association Agreement between Ukraine and the European Union.

The Draft Regulation was recently published on the official website of the AMC. On 7 July 2017, public discussions of the document with the authority took place.

The Draft Regulation sets forth the conditions under which a vertical agreement (*e.g.*, a distribution agreement) can benefit from the block exemption. If a vertical agreement satisfies these conditions, it is deemed to be covered by the Draft Regulation and lawful without the need for prior approval by the AMC. Should a vertical agreement not satisfy the conditions for the block exemption, clauses which appreciably restrict competition would be unlawful and prohibited unless the AMC grants an individual exemption for the clauses concerned (unlike EU competition law, Ukrainian law does not provide for a system of "self-assessment" of restrictive clauses).

Pursuant to the Draft Regulation, the following vertical agreements containing vertical restraints are, in principle, exempted from the prohibition of anti-competitive agreements:

- vertical agreements if the market shares of both parties, the supplier and the buyer, do not exceed 30% on the market in which they sell and purchase the contract goods, respectively; and
- vertical agreements between an association of undertakings and its members or suppliers if (i) all members of the association of undertakings are retailers and (ii) no individual member of the association has Ukrainian group turnover exceeding EUR 25 million in the previous financial year.

Ancillary restraints related to the assignment or use of intellectual property rights and subcontracting agreements under certain conditions are, in principle, also covered by the Draft Regulation.

While the Draft Regulation in principle provides a block exemption for vertical agreements under the conditions set forth above, the block exemption shall not apply in case of "hard-core" vertical restraints and certain other vertical restraints:

- If a vertical agreement contains a "hard-core" vertical restraint, the entire vertical agreement concerned would not benefit from the Draft Regulation. "Hard-core" vertical restraints include, *inter alia*, resale price maintenance (with an exception for maximum and recommended prices), certain territorial and customer restrictions, the restriction of active and passive sales to end-users by members of a selective distribution system, and the restriction of cross-supplies between members of a selective distribution system.
- In addition, certain other vertical restraints are also not covered by the Draft Regulation (the remainder of the vertical agreement concerned would however benefit from the block exemption if the agreement contains any vertical restraint belonging to this category). This category of clauses includes, *inter alia*, non-compete clauses (the duration of which is indefinite or exceeds five years (subject to exceptions)), and obligations on a buyer not to manufacture, purchase, sell or resell goods after termination of the agreement (again, subject to exceptions).

The Draft Regulation also contains rules on agency agreements as well as vertical agreements between competing undertakings (the latter are only covered by the Draft Regulation if they are non-reciprocal and meet certain additional requirements). Furthermore, if parallel networks of similar vertical restraints cover more than 50% of the relevant market, the AMC may issue a resolution on the non-applicability of the block exemption to vertical restraints on the market concerned.

According to the current plan, the AMC will adopt the Vertical Block Exemption Regulation no later than the end of 2017. We will keep you updated.

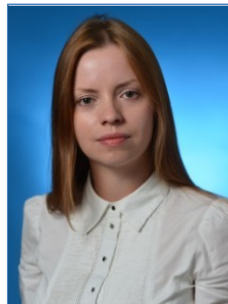
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