CORPORATE BRIEFING

The monthly business law briefing

Editorial

In this June 2022 issue of *Corporate Briefing* Liz Barton of Doyle Clayton Solicitors examines the *Hashmi v Lorimer-Wing* [2022] EWHC 191 (Ch) case unless appealed could be a case which causes some problems. It decided that a company with one director only and with the standard model articles cannot take decisions. This will apply to vast numbers of one person companies around this country. In practice no one might raise the issue with most one person companies, but even *Corporate Briefing*'s editor knows of one case where a sole director died and a court order was needed to appoint another director, although in that case the widow of the director apparently appointed herself the day after death as a compromise which was workable but not really compliant with the law. In practice either have more than one director or as the article in this issue rightly recommends make sure the articles permit one director to act alone even if that means on incorporation there are two2directors for a day in order to agree to adopt the new articles which include the right for one director only to take decisions. A better solution might be if either the case were overturned on appeal or the Government changes the Model Articles – article 11(2) so that a quorum can be one director.

Then Ellen Gracey, Rebecca Warder and John McElroy of Hausfeld LLP look at *Greencastle MM LLP v Payne* [2022] EWHC 438 (IPEC) where the court was unhappy about a witness statement that did not follow the latest rules. Witness statements should always be what the witness will say in the witness box and in the witness' own language, but sometimes stray into arguing law or are written by others. This is not permitted. All readers involved in litigation should consider the rules very carefully when helping a witness prepare a witness statement.

For property lawyers the next item is the Solicitors Regulation Authority's new guidance relating to leasehold and Leasehold Reform (Ground Rent) Act 2022.

Finally for those involved with distribution and other "vertical" agreements note the EU's new vertical agreements block exemption 2022/720 and its accompanying vertical guidelines. This issue also covers some bills proposed in the Queen's Speech. The UK will be finalising its own vertical block exemption under the Competition Act 1998 and accompanying guidelines in final form soon (as the UK is no longer within the EU competition law regime). Drafts were published earlier this year. There are likely to be a few differences although for both regulations and regimes the main restrictions banned remain similar to those in the 1967 first EU vertical regulation – no restrictions on price at which the distributor may resell and be careful about export and import bans.

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Company Law

Model Articles of Association: are decisions of sole directors valid and enforceable? – Hashmi v Lorimer-Wing

[2022] EWHC 191 (Ch)

Model Articles – setting up a company

It is very easy to set up a new company in England and Wales, with over 500,000 new companies registered with Companies House each year. Anyone can set up a company in its most basic form and you only need one director and one shareholder (who can be the same person). For the rules (or 'constitution') of the company, a company can register or adopt its own version. However, if the company does not do so, the Companies Act 2006 imposes a standard set of 'Model' articles of association, to ensure there is, at least, a basic set of overriding rules governing the company.

If, therefore, you are the sole director of a company which uses the standard Model Articles, without amendment, you are likely to be in good company with thousands of other registered businesses. However, a previously generally accepted interpretation of certain terms of the Model Articles has now been brought into question by the recent High Court case of *Hashmi v Lorimer-Wing* [2022] EWHC 191 (Ch). The decision suggests that decisions taken by sole directors may be invalid and could therefore be open to challenge.

What is the problem?

The Model Articles include the following regulations under the section entitled "Decision-Making by Directors":

Article 7 (Directors to take decisions collectively):

(1) The general rule about decision-making by directors is that any decision of the directors must be either a majority decision at a meeting or a decision taken … [unanimously by all eligible directors].

(2) If – (a) the company only has one director, and (b) no provision of the articles requires it to have more than onendirector, the general rule does not apply, and the director may make decisions without regard to any of the provisions of the articles relating to directors' decision-making.

Article 11 (Quorum for directors' meetings):

(1) At a directors' meeting, unless a quorum is participating, no proposal is to be voted on, except a proposal to call another meeting.

(2) The quorum for directors' meetings may be fixed from time to time by a decision of the directors, but it must never be less than two, and unless otherwise fixed it is two.

(3) If the total number of directors for the time being is less than the quorum required, the directors must not take any decision other than a decision – (a) to appoint further directors, or (b) call a general meeting so as to enable the shareholders to appoint further directors.

At the time the Model Articles were first published in 2008, there was a lot of discussion about the interplay between Model Articles 7 and 11. The industry consensus, buoyed by the guidance issued by the Department of Business, Industry and Skills, was that Model Article 11(2) did not impose a requirement for a minimum number of directors, but simply stated that the quorum for board meetings was two, with Model Article 7(2) confirming that when the company only had one director, the sole director could take decisions without regard to the director decision-making articles (including Model Article 11(2)).

In this case, however, the High Court has determined that the requirement for a quorum of 2 directors as set out in Model Article 11(2), does in fact impose a requirement for the company to have more than one director, meaning Model Article 7(2) cannot be relied on to overrule the other decision-making procedures.

What does this mean in practice?

The effect of this interpretation of the Model Articles is that (where the Model Articles apply without amendment) it calls into question the validity of all decisions made by a sole director. If a dispute were to arise in relation to any decision made by a sole director, the other party to the dispute would most likely raise this issue in support of its claim that the decision is invalid.

This ruling could easily come under further scrutiny and challenge, since there will be large numbers of companies, and sole directors, now potentially finding themselves in breach of these terms in the Model Articles. We will have to watch this space to see if this decision is subsequently overturned or affirmed in later court judgments. The government may also amend the Model Articles to address this apparent anomaly, but any such change would not take effect retrospectively, and would only be for the benefit of new or existing companies adopting the Model Articles after the date of amendment.

What can be done in the meantime?

The findings of this case effectively mean that the Model Articles must always be amended if the company is to have only one director.

To address any potential past breaches, significant past board decisions can be ratified by the company's members.

To prevent further future breaches, one or more additional directors can be appointed, or the articles of the company can be changed to confirm and clarify that there is no requirement for a minimum of two directors.

That said, the practicalities of resolving this issue, by either changing the articles or ratifying past decisions, bring their own challenges… Remember that Model Article 11(3) does not allow a sole director to take any action other than to appoint a new director, so how can a sole director recommend a shareholder resolution to amend the articles or ratify past decisions? Companies will, therefore, need to look at more creative ways to deal with these issues if they want to ensure they can continue to act with just a sole director.

Liz Barton, Doyle Clayton Solicitors

Litigation

Witness evidence ruck in Greencastle v Payne: the Good, the Bad and the Rugby

The new regime for witness statements in the English Business and Property Courts has now been in place for just over a year. The Courts have sanctioned a number of parties under the new rules since Practice Direction (PD) 57AC came into force on 6 April 2021, including in the recent case of *Greencastle MM LLP v Payne* [2022] EWHC 438 (IPEC).

At a pre-trial review in this case, which arose from a popular rugby podcast, the High Court held that the claimant's witness evidence was in breach of PD 57AC. This was on the basis that the evidence contained speculation on matters outside the witness's knowledge, set out mere commentary on documents disclosed by the defendant, and sought to argue the case.

Background

PD 57AC on trial witness statements in the Business and Property Courts makes it clear that a witness statement must contain only evidence as to matters of fact of which the witness has personal knowledge that are relevant to the case, and which need to be proved at trial. Where the witness statement addresses "important disputed matters of fact", the statement must expressly set out the strength of the witness's recollection and how and when this was refreshed by reference to documents. Each statement must enclose a list of any documents the witness has referred to in order to provide the statement. Each statement must be prepared in accordance with the Statement of Best Practice contained in the appendix and any relevant court guide and must include both confirmation of compliance signed by the witness and be endorsed with a certificate of compliance signed by the legal representative.

The new rules also reiterated longstanding good practice including using the witness's own words, avoiding leading questions and avoiding multiple drafts.

Greencastle v Payne

The underlying dispute in this case related to the claimant's acquisition of the business of a company in administration, JOE Media Ltd. This included the rights to a well-known podcast, "House of Rugby", which had been presented by the three defendants, former England rugby players Mike Tindall and James Haskell and rugby commentator Alex Payne. Following the acquisition, the defendants set up their own rugby podcast series, 'The Good, the Bad and the Rugby'. The claimant brought proceedings alleging passing off, as well as misrepresentations about ownership of the media rights and other intellectual property associated with the House of Rugby podcasts.

The defendants applied for an order striking out various passages of the witness statement of Mr John Quinlan, the claimant's CEO, just before the pre-trial review earlier this year. The defendants claimed that the passages in question:

- contained content of which Mr Quinlan had no personal knowledge;
- set out commentary on documents that Mr Quinlan did not see at the time of the events in issue; and
- argued the claimant's case and did not present evidence of matters of disputed fact that were relevant to issues to be determined at trial.

The following extract from the claimant's witness statement provides an example of what the Court was presented with:

"My suspicions that such touting was being done have been validated by certain documents I have now seen from the Defendants' disclosure…. By way of example, I can see that…"

The claimant argued (among other things), in response, that it was more convenient in terms of case management to let the evidence stand which would avoid unnecessary satellite litigation.

Decision

The High Court concluded that the defendants' objections were well founded and that this was a case of serious non-compliance with PD 57AC. The High Court rejected the suggestion that it was more convenient in case management terms to let the witness statements stand and argue about their significance at trial, the purpose of PD 57AC was to avoid witness statements full of inadmissible and irrelevant material which would lead to protracted cross-examination at trial.

Despite the evidence in question containing the required formal confirmation from the witness, and the requisite certificate from the claimant's solicitor confirming that the new rules had been complied with, the judge expressed "real doubt" as to whether either of them had read PD 57AC or understood its effect and purpose. The Court refused permission for the witness evidence to be relied on at trial and directed the service of a compliant statement.

The High Court stated that attempting to perform surgery on the witness evidence, paragraph by paragraph, would have taken further considerable time that was not available before trial and could leave the remaining parts of the statement incomprehensible and/or less compelling, which could be unfair to the claimant. The Court also concluded that it was right in principle that the claimant bears the burden and costs of identifying the permissible content for the replacement witness statement in the light of the court's indications. The Court noted that while it could have directed that the witness statement be struck out and Mr Quinlan give his evidence orally, Mr Quinlan was the claimant's only witness and this might "create a potentially unfair imbalance between the two parties".

While this was "an egregious case of serious non-compliance with the Practice Direction", the Court decided it would nonetheless be excessively punitive to strike out the witness evidence altogether.

Comment

This decision is another clear indication that the courts will not tolerate breaches of the requirements relating to trial witness statements under the new rules. While there may be some situations where it will be considered more efficient to deal with alleged breaches of PD 57AC at the trial, it should not be assumed that the courts will defer serious issues of this kind to be sorted out at trial. Witness statements must be confined to their proper function, which is to give admissible and relevant evidence of facts within the witness's own knowledge. This case provides an additional insight into the balance which the courts are currently seeking to achieve in navigating the interplay between enforcing the new rules and avoiding being disproportionately punitive in their determinations.

Ellen Gracey, Rebecca Warder and John McElroy, Hausfeld LLP

Property
New Ground Rent Rules – SRA Guidance

The Leasehold Reform (Ground Rent) Act 2022 places introduces changes in the way that affect property purchases involving leasehold dwellings.

The Act comes into effect at the end of June 2020 and the Solicitors Regulation Authority says "if you represent buyers or landlords, you should be aware of the changes it brings in". These include:

If any ground rent is demanded as part of a regulated new residential long lease, it cannot be for more than one literal peppercorn per year. In effect, most future residential leaseholders will not be faced with financial demands for ground rent.

Landlords will be banned from charging administration fees for collecting a peppercorn rent, closing a possible loophole where a landlord could try to make a monetary charge via another route.

Landlords who require a payment of ground rent in contravention of the Act will face penalties of between £500 and £30,000 enforced by way of a civil penalty regime.

For existing leaseholders entering into voluntary lease extensions after commencement, the extended portion of their lease will be reduced to a peppercorn.

There will only be selected exceptions from this Act. These are tightly defined and include applicable community-led housing, certain financial products, and business leases which are defined by the Act as leases of commercial premises which include a dwelling, use of which substantially contributes to the business purposes.

Further details will follow in due course regarding regulations to specify the form and content of written notices that are required to be exchanged by the landlord and tenant to qualify for the business lease exception. Statutory lease extensions for both houses and flats remain unchanged and are therefore exempt from the provisions of the Bill.

In January 2022 the SRA produced guidance on how solicitors should comply with their regulatory obligations when dealing with leasehold issues which is below:

Advising on leasehold provisions including ground rent clauses

Status

This guidance is to help you understand your obligations and how to comply with them. We may have regard to it when exercising our regulatory functions.

For whom is this guidance produced?

All solicitors and all law firms, their managers and employees particularly those dealing with leasehold conveyancing.

This guidance may be relevant to members of the public who are considering buying or selling a leasehold property.

Purpose of this guidance

To help you understand what our Standards and Regulations require when acting for clients who are buying leasehold properties and to avoid possible breaches of our requirements.

Introduction

We are concerned that clients are not receiving appropriate advice on onerous clauses in leases.

We have seen this arise most frequently in the context of ground rent clauses for newbuild properties. Depending on their wording, such clauses can result in an increase in the ground rent payable by the lessee from a few hundred pounds a year to more than, for example, £70,000 a year, over the course of the first hundred years of a lease. Such clauses can have a significant impact on the lessee due to the unexpectedly high costs and impact on the future value and saleability of the leasehold.

The SRA Standards and Regulations

We expect you to act in accordance with your professional obligations and to provide a competent level of service when dealing with leasehold conveyancing.

Failure to provide competent and independent advice may put you in breach of one or more of the SRA Principles or Code provisions. Our Principles require you to:

- Principle 2: Uphold public trust and confidence in the solicitors' profession and in legal services provided by authorised persons.
- Principle 3: Act with independence.
- Principle 5: Act with integrity.
- Principle 7: Act in the best interests of each client.

You ensure that the service you provide to clients is competent and delivered in a timely manner: Paragraph 3.2 of the Code of Conduct for Solicitors, RELs and RFLs and paragraph 4.2 of the Code of Conduct for Firms.

You maintain your competence to carry out your role and keep your professional knowledge and skills up to date: Paragraph 3.3 of the Code of Conduct for Solicitors, RELs and RFLs and paragraph 4.3 of the Code of Conduct for Firms.

You consider and take account of your client's attributes, needs and circumstances: Paragraph 3.4 of the Code of Conduct for Solicitors, RELs and RFLs and paragraph 4.2 of the Code of Conduct for Firms.

Where you supervise or manage others providing legal services: a) you remain accountable for the work carried out through them; b) you effectively supervise work being done for clients: Paragraph 3.5 of the Code of Conduct for Solicitors, RELs and RFLs and paragraph 4.4. of the Code of Conduct for Firms.

You ensure that the individuals you manage are competent to carry out their role, and keep their professional knowledge and skills, as well as understanding of their legal, ethical and regulatory obligations, up to date: Paragraph 3.6 of the Code of Conduct for Solicitors, RELs and RFLs and paragraph 4.3 of the Code of Conduct for Firms

Our Codes also set out specific requirements which must be followed in respect of any third party who introduces business to you / your firm or with whom you share your fees (Paragraph 5.1 of the Code of Conduct for Solicitors, RELs and RFLs and paragraph 7.1 of the Code of Conduct for Firms).

You should also be aware of the provisions preventing you from acting where there is a conflict of interest or a significant risk of such a conflict in relation to a matter (Paragraphs 6.2 of the Code of Conduct for Solicitors, RELs and RFLs and Code of Conduct for Firms).

Further, if things do go wrong, we require you to be honest and open with your clients, and if they suffer loss or harm as a result, you should put matters right (if possible) and explain fully and promptly what has happened and the likely impact (paragraph 7.11 of the Code of Conduct for Solicitors, RELs and RFLs and paragraph 3.5 of the Code of Conduct for Firms).

Providing competent advice

Clients rely on your advice on legal documents to enter into legal transactions. This includes ensuring that they understand the meaning and effect of the clauses, and have any risks drawn to their attention. This includes risks of a kind which may be obvious to you but which the client may not appreciate.

You will need to make sure that your client is fully and competently advised that they are purchasing a leasehold interest in the property concerned, and that they understand the implications of this and any material clauses.

This includes explaining to your client the effect over time of clauses which increase the rents payable. Particular features clients may need to understand:

- the exponential effect of clauses which provide for rents to increase periodically by a fixed amount (e.g. doubling)
- where a review operates by reference to a valuation, if there are stated assumptions (which may not always be correct) built into the review mechanism, such as a specific unexpired lease period

We consider that your obligation to provide competent advice would not be discharged solely by:

- describing the "current" rent charges
- referring to the wording as being a "standard clause"
- telling clients to read the lease clauses

Depending on the terms of the lease, clients may also need to be advised of other risks, and the consequences to the client if these do materialise. This includes the risk that a particular ground rent provision is likely over time to cause the lease to be treated as an assured shorthold tenancy under the Housing Act 1988, by virtue of exceeding £250 per annum (£1,000 per annum in Greater London) or otherwise. If this occurs, it will change the nature of the relationship between the client and the freeholder, which could be particularly significant if rent falls into arrears.

With an experienced business client, it may not be necessary to provide the same level of detail as would be required by an inexperienced or vulnerable purchaser, although we would expect that anything unusual or potentially onerous would still be drawn to the client's attention. Where clients specifically request advice to enable them to understand aspects of the lease, you must provide the advice requested.

It may not be within the scope of an ordinary legal retainer to advise on the marketability of a lease in future. However, if you do purport to advise on this, you should ensure that such advice takes into account the effect of any such clauses. Where a valuation on the lease is provided to you, and relies on any incorrect assumptions (for instance, about rents being fixed over time), you should act in the best interests of your client by advising accordingly and correcting the valuer.

Where we receive complaints about a failure to advise appropriately on lease clauses, we apply our Enforcement Strategy in deciding what action to take. Generally, we will not penalise a single negligent act or an omission and will focus on cases where there is evidence of seriously or persistently poor levels of competence demonstrating a pattern of behaviour; an example of which might be an overly mechanical "copy-and-paste" approach to advising. Patterns of concerning behaviour can indicate a failure in systems and controls, or an unwillingness or inability to learn lessons.

However, a single case is capable of demonstrating behaviour falling well below

the standards we require. We are likely to consider matters as more serious where a firm or an individual has knowingly acted outside their competence or has failed to take reasonable steps to update their knowledge and skills, or those of their employees. We will also take into account the harm caused by the individual or firm's actions and the impact this has had on the victim(s).

The SRA guidance goes on to deal with the issue of "referrals and conflicts of interest e.g. saying firms can be on recommended lists of developers as long as they remain independent.

Queen's Speech
Bills

Bills in the Queen's Speech in May 2022 which may be of particular interest to solicitors include:

- Bill of Rights
- Economic Crime and Corporate Transparency Bill
- Brexit Freedoms Bill
- National Security Bill
- Levelling Up and Regeneration Bill
- Draft Mental Health Bill
- Draft Victims Bill

The *Law Society's Gazette* issued the following summary and its comment on each measure are available online at https://www.lawsociety.org.uk/topics/news-articles/queens-speech-what-does-it-mean-for-solicitors-and-the-law-may-2022.

1. Bill of Rights

The Human Rights Act codifies many of the human rights protections we enjoy in Britain today. The Bill of Rights will follow the government's consultation on Human Rights Act reform and see it overhaul the Human Rights Act. The bill will seek to change the relationships between UK courts and the European Court of Human Rights, with consultation proposals suggesting it be put in statute that UK courts are "not required" to follow it but simply "may have regard" for it. The government is also seeking to replace section three of the Human Rights Act with "a more restrictive limitation" on how judges can interpret legislation when it is seemingly incompatible with the European Convention on Human Rights. Furthermore, the government wants to introduce a permissions stage to human rights claims, which would limit the number of cases heard by a court. The bill will also include provisions for the automatic deportation of serious criminals in most legal cases.

2. Economic Crime and Corporate Transparency Bill

Although some measures were pushed through in the last session following Russia's invasion of Ukraine, the home secretary hinted that further legislation would follow. This has come in the form of the Economic Crime and Corporate Transparency Bill. It's likely to be a substantial piece of legislation and will include:

- reform of Companies House, and providing it with more effective investigation and enforcement powers
- powers to seize crypto assets (the principle medium used for ransomware) from criminals, and

- information sharing between businesses on money laundering, to detect and prevent economic crime more effectively

How will this affect solicitors? The Economic Crime Bill will likely mainly affect lawyers with international clients. These lawyers may face increasing pressure to disassociate from their clients as the UK looks into whether the wealth they store is legal or ethical. We're supportive of the legislation as it will help stop criminals holding money in the UK and enhance the transparency of ultimate ownership of UK companies. We're keen to work with the government and provide our expertise to ensure the bill is as effective as possible.

3. Brexit Freedoms Bill

During Brexit negotiations, many EU laws were retained as a compromise in place of new domestic legislation not yet formed. By way of the Brexit Freedoms Bill, the government has committed to new legislation which will allow ministers to repeal or amend old EU laws that are still in effect in the UK.

What are the implications of the bill?

Reforms proposed in this bill are likely to be controversial, and will seek to end the special status of EU law, making it easier to amend or remove it. The Brexit Freedoms Bill will allow the government to use secondary legislation to alter or repeal the parts of EU law that we retained in the Brexit agreement. This will mean it can make changes without the need for full parliamentary scrutiny. While law officers within the government will remain responsible for ensuring that changes are not unlawful, the bill will mean that said changes will not receive a full level of scrutiny from MPs and third parties.

4. National Security Bill

The government has announced it will introduce measures to support security services. The National Security Bill will seek to restrict the ability of convicted terrorists to receive legal aid, and introduce a Foreign Influence Registration Scheme for individuals working on behalf of foreign governments.

5. Levelling Up and Regeneration Bill

This bill will seek to codify the Levelling Up White paper, produced in the last session. It aims to level up the UK and grow the economy in the places that need it most. It will cover:

- a devolution deal, intended to be made by 2030
- a government duty to report annually on the levelling up missions, and
- elements from the now-dead Planning Bill to support regeneration in less prosperous places, potentially including compulsory purchase powers and support for reusing brownfield land

It also has the potential to include other miscellaneous government measures.

6. Draft Mental Health Bill

The government has announced it will publish draft legislation to reform the Mental Health Act. The purpose of the draft bill will be to:

- ensure that patients suffering from mental health conditions have greater control over their treatment and receive the dignity and respect they deserve
- make it easier for people with learning disabilities and autism to be discharged from hospital

7. Draft Victims Bill

The government has said that this bill will put "victims at the heart of the criminal justice system, ensuring their experiences are front and centre of the process". It aims to improve the support victims receive in, and beyond, the criminal justice system – particularly for victims of sexual violence, domestic abuse and other serious offences. It also looks to provide clarity about what victims can and should expect from the criminal justice system.

Our view – supporting measures designed to improve the experience of victims

Law Society President I. Stephanie Boyce says:

"We support measures that are designed to improve the experience of victims in the criminal justice system and improve the way agencies within the system interact and communicate with them, as long as such measures do not impact on a defendant's right to a fair trial."

UK public procurement to be simplified

A new UK Procurement Bill has been included in the Queen's Speech – for the second time, the bill having mentioned in the previous year's Queen's Speech too. This year's said "Government will continue to seize the opportunities of the United Kingdom's departure from the European Union to support economic growth. Regulations on businesses will be repealed and reformed. A bill will enable law inherited from the European Union to be more easily amended. Public sector procurement will be simplified to provide new opportunities for small businesses."

Competition Law

Commission adopts new Vertical Block Exemption 2022/720 Regulation and Vertical Guidelines

The European Commission has adopted in May 2022 the new Vertical Block Exemption Regulation ('VBER') accompanied by the new Vertical Guidelines, following a thorough evaluation and review of the 2010 rules. The revised rules provide businesses with simpler, clearer and up-to-date rules and guidance. The new rules will help them to assess the compatibility of their supply and distribution agreements with EU competition rules in a business environment reshaped by the growth of e-commerce and online sales. The revised VBER and Vertical Guidelines will enter into force on 1 June 2022.

The regulation is numbered 2022/720 and is at *https://ec.europa.eu/competition-policy/antitrust/legislation/vertical-block-exemptions_en*. The UK also has its new equivalent in draft form expected to be in force at the same time.

The EU says on its new regulation "The main changes to the previous rules focus on adjusting the safe harbour to ensure that it is neither too generous nor too narrow. In particular, the new rules:

Narrow the scope of the safe harbour as regards: (i) dual distribution, that is, where a supplier sells its goods or services through independent distributors but also directly to end customers, and (ii) parity obligations, that is, obligations which require a seller to offer the same or better conditions to its counter-party as those offered on third-party sales channels, such as other platforms, and/or on the seller's direct sales

channels, like its website. This means that certain aspects of dual distribution and certain types of parity obligations will no longer be exempted under the new VBER but must instead be assessed individually under Article 101 TFEU.

Enlarge the scope of the safe harbour as regards: (i) certain restrictions of a buyer's ability to actively approach individual customers, i.e. active sales, and (ii) certain practices relating to online sales, namely the ability to charge the same distributor different wholesale prices for products to be sold online and offline and the ability to impose different criteria for online and offline sales in selective distribution systems. These restrictions are now exempted under the new VBER, provided all other conditions for the exemption are met.

The revised VBER rules have also been clarified and simplified, to make them more accessible to those who use them in their day-to-day business. In particular, the VBER rules have been updated as regards the assessment of online restrictions, vertical agreements in the platform economy and agreements that pursue sustainability objectives, among other areas. In addition, the guidelines provide detailed guidance on a number of topics, such as selective and exclusive distribution and agency agreements."

The EU has a six page explanatory note at https://ec.europa.eu/competition-policy/system/files/2022-05/explanatory_note_VBER_and_Guidelines_2022.pdf

When Corporate Briefing's editor first studied competition law as part of her law degree third year option course Trade Competition in the early 1980s it was the EU's 1967/67 first such regulation which was in place. By the time she qualified and went to work in the then EC/Competition Law Department at Slaughter and May the then new regulation 1983/83 was the new regulation. Every ten years since a new version has been produced. The fundamental principles remain largely the same, but the devil is in the detail particularly with internet selling which has been a huge growth area even just in the last ten years. Indeed when the Competition Act 1998 came into force in the UK the UK then had its own vertical block exemption regulation which was later removed and only the EU version has applied since despite Brexit. On 1 June 2022 the new EU version comes into force and probably the UK regulation too. Given how many clients sell to the EU as well as the UK both UK and EU vertical regulations are worth following.

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