

doing business in europe

changes in european union legislation and their
impact on E.U. member state law

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During the summer months, the necessary relevant changes at the European level for, in particular, suppliers and distributors, founders of legal entities and employers came into force. It is therefore time for these distributors and employers to update their distribution and labor agreements, while it becomes easier for foreign founders of companies to establish themselves in the Netherlands for the first time or expand their presence here.

Introduction

Laws established at a European Union level must be imbedded into the member state's national legislation. New legislation at a European Union law level thus can have large consequences for EU member state law. Especially if the member state's national law up to that moment differed significantly from the European Union law changes, new legislation at a European Union level can have a large impact on the law system of a specific EU member state. An advantage of legislation established at a European Union level is that all EU member states use more or less the same legislation with regard to these cross-border topics. This lowers the threshold for non-European entrepreneurs to do business with European countries and thus creates a pleasant investment climate.

In this article, we discuss three recent European legislation changes, namely (1) the revision of the Vertical Block Exemption Regulation (VBER), (2) the amendment of Directive (EU) 2017/1132 on the use of digital tools and processes in the context of corporate law and (3) the arrival of the Directive (EU) 2019/1152 on transparent and predictable working conditions. The abovementioned changes have had large consequences for the legislation regarding these topics in the Netherlands – and we assume also for other EU member states. In the following, we will discuss the abovementioned three European legislation changes and their impact on Dutch legislation more elaborately.

1. Revised Vertical Block Exemption Regulation (VBER): additional rules regarding the restriction of competition for suppliers and distributors

Agreements between companies that restrict competition are prohibited: the cartel ban. The cartel ban also applies to producers/suppliers who want to make agreements with their distributors. Because of the ban on cartels, some agreements between producers/suppliers and distributors are forbidden. As a result, such agreements cannot be included in distribution agreements. A well-known example of a prohibited agreement in a distribution agreement is the imposition of a fixed resale price.

Some agreements are exempted from the cartel ban because their positive effects outweigh their (competition law) negative effects. These exemptions were previously included in the VBER. However, the European Commission has recently adopted the updated VBER and the accompanying vertical guidelines (VGL). The revised VBER has entered into force as of 1 June 2022. The revised VBER contains a number of new rules for suppliers and distributors. We discuss the most important changes below:

- Information exchange in dual distribution is further restricted

Dual distribution occurs when the supplier sells its goods or services through independent distributors, but is also active at the retail level itself. The growth of online sales (web shops) has greatly increased the phenomenon of dual distribution.

In the revised VBER, the rules for dual distribution have been sharpened. Dual distribution remains permitted if the parties' combined market share on the retail market is no more than 10%. Information exchange between the supplier and the distributor then remains exempt from the cartel ban. If the market share is more than 10% but less than 30%, dual distribution is still permitted. However, in this case stricter rules apply to the extent that information is exchanged between parties: the exchange of information is only exempt from the cartel ban if it is directly related to the performance of the distribution agreement and is necessary to improve the production and distribution of products.

- Dual pricing will be allowed

Suppliers will have more leeway to charge distributors a higher rate for products that will be sold online than the rate charged for products intended for offline sale (dual pricing). However, the price difference must be attributable to a difference in the costs incurred per sales channel. Moreover, the price difference must not be aimed at limiting Internet sales by the distributor.

- Restrictions on Internet sales

The revised VBER prohibits all arrangements in distribution agreements that have as their object the prohibition of Internet sales. Also prohibited is any restriction that effectively prevents customers from using the Internet to sell their products or services online. Some restrictions on Internet sales are still permitted. For example, a supplier may prohibit its distributors from selling through online marketplaces and may require that the distributors who wish to sell online also have a physical store or workshop for the sale of the concerned products.

- More flexibility in exclusive and selective distribution

The revised VBER offers more flexibility in exclusive distribution schemes: suppliers can now designate up to five customers for one customer group or one territory. In addition, the revised VBER makes it easier to operate different distribution systems (open, exclusive or selective) side by side. For example, the distributor (and its customers) can be prohibited from actively selling in areas where the supplier applies an exclusive system. In addition, the distributor (and its customers) may be prohibited from

selling actively and passively to unauthorized distributors in territories where the supplier applies a selective system. This will improve the ability of suppliers to set up closed distribution networks.

In conclusion, the new rules discussed above mean that current (Dutch) distribution agreements must be checked and made compliant to the new European competition restriction rules.

2. The amendment of Directive (EU) 2017/1132: member states must create the possibility to establish a company entirely online

Currently, founders of a legal entity are required to identify themselves in person. Especially when a legal entity (company) is incorporated from abroad, this obligation may pose a challenge. After all, in that case the founder will have to visit a local notary who can confirm the identity of the founder. Such a visit entails the necessary costs.

By means of the amendment of the Directive (EU) 2017/1132, EU member states must make it possible that a legal entity is established entirely online. This means that the founder will no longer have the obligation to appear in person before the Dutch or - if the legal entity is incorporated from abroad - the local notary. Instead, the founder can identify him/herself via a digital audio-video link and with a digital means of identification. The Netherlands has chosen to start imbedding this new European Union legislation for the establishment of a private company with limited liability (B.V.). Thereafter, the Netherlands may decide to also create a possibility for entirely online establishment for the other legal entities.

3. The arrival of Directive (EU) 2019/1152: transparent and predictable working conditions

For employers, too, things have changed this summer with the arrival of the Directive (EU) 2019/1152. This Directive aims at making working conditions of employees more transparent and predictable. The main changes, as it is implemented in Dutch law, are as follows:

- Information obligation
Under Dutch law, the employer already had to provide certain information to its employees in writing. The employer's obligation to provide information to the employee is now extended. For example, the employer must provide the following information:
 - › the place of work, whereby, if the work is not (mainly) performed at a fixed place, it must be stated that the employee performs the work at several places or is free to determine the place of work;
 - › the employee's entitlement to paid leave;
 - › the duration and conditions of the probationary period (if any);
 - › if the employee's work pattern is entirely or mostly predictable: the length of the standard working day or week, any arrangements (including remuneration) for overtime and, if any, the arrangements for shift changes;
 - › if the employee's work pattern is largely unpredictable:
 - » that the work schedule is variable, the number of guaranteed paid hours and the remuneration for work outside these hours;
 - » the hours and days on which the employee may be required to work;
 - » the minimum notification period before the start of the work as well as the cancellation deadline;

- › the procedure to be observed by the employer and the employee in case of termination of the employment agreement.

Usually, this information is included in the employment agreement or personnel handbook. Although the aforementioned obligations sound comprehensive, it will in many cases be sufficient to include a reference to the relevant law provisions or the applicable collective labor agreement.

- Ancillary activities

An ancillary activities clause is null and void under the new legislation, unless it can be justified on the basis of an objective reason. The employer is not obliged to disclose the justification in advance. The employer may therefore give the objective reason justifying the clause at the time it is invoked. However, if the employer fails to provide such a reason at that time, the clause will nevertheless be deemed null and void. Examples of objective justifications are the health and safety of the employee, the protection of confidentiality of business information or the avoidance of conflicts of interest.

- Mandatory training

For training that the employer is obliged to provide to the employee by law or under the applicable collective bargaining agreement, the employer may not charge the employee for the study costs involved. This means that a study costs clause agreed with the employee is not valid for this mandatory training. In addition, the mandatory training should be regarded as working time and must, as far as possible, be received during working hours.

Conclusion

Depending on what was already included in the law of the different EU member states, the Directive will have less or greater impact for suppliers and distributors, founders of legal entities and employers. We have described the impact of the three aforementioned amended or new EU legislation mainly from a Dutch perspective.

For suppliers and distributors, more flexibility has been created in some respects, while in other areas they are more restricted by the revised legislation. They will have to adjust their distribution agreements accordingly. For foreign entrepreneurs, it has become significantly less burdensome to incorporate a Dutch legal entity, now that the creation of the company can be arranged online. Lastly, the discussed changes with regard to more transparent and predictable working conditions for employees require employment contracts, personnel handbooks and other policies (such as training policies) to be updated by employers.

All in all, the arrival of these changes shows once again that it is good to have all contracts checked from time to time. Not only Dutch, but also European legislation may require an update. 