

Subject: HT.6179 - submission for the public consultation on the draft revised Regulation on vertical agreements and vertical guidelines

Date: 17 September 2021

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To Whom It May Concern,

On 9 July 2021, The European Commission published drafts of the revised Vertical Block Exemption Regulation (VBER) and Vertical Guidelines for stakeholder consultation. Koninklijke Horeca Nederland would like to take this opportunity to present our feedback on the proposed changes in order to address a specific issue identified in the evaluation of the current rules. The issue at hand concerns the insufficient legal protection of the VBER for hospitality businesses against the power of beer breweries and/or drink suppliers, especially in the Benelux. Additionally, Hotrec, the umbrella association of hotels, restaurants, bars and cafes in Europe has provided feedback on other proposed changes in the VBER on our behalf.

Koninklijke Horeca Nederland (Royal Dutch Association of Entrepreneurs in the Horeca and related industries) is a branch organization with almost 20.000 members, representing 50 to 60% of all entrepreneurs of the Dutch horeca sector, which includes businesses such as restaurants, hotels, bars-pubs, fast service, clubs and nightlife and recreation parks.

### **The impact of the VBER and VGL on “brewery contracts” in the Netherlands**

“Brewery contracts” are contracts between on the one hand a brewery or a drink supply company and on the other hand a hospitality business whereby the hospitality business is obliged to buy certain or even all drinks (and sometimes other goods and/or services) from the brewery or drink supplier, often even so that the hospitality entrepreneur is obliged to buy a certain number of minimum hectoliters of certain drinks from the brewer or drink supply company. The current guidelines in the VBER and VGL gives room for breweries and drink suppliers in the Netherlands to force hospitality businesses into one-sided contracts with negative outcomes for these hospitality businesses. This has at least to do with article 5 of the VBER, the exclusivity clause, which means the obligation to buy beer (and often other beverages such as soft drinks, wines and spirits and/or other goods or services as well) from a supplier assigned by the brewery or from the brewery itself.

On the basis of this article, practically all breweries and drink suppliers in the Netherlands force hospitality-businesses into very one-sided contracts for purchasing beverages (often with a stipulated minimum amount of drinks/liters) and other products or services (such as insurance, gaming machines, maintenance contracts, etc.) without the possibility to negotiate the best price for these products and services.

In the Netherlands, we estimate that around 75% of hospitality businesses have contracts with a brewery that go beyond just the supply of beer. These contracts for instance entail the lease-lent of equipment for providing beer (taps, cooling, beer tanks etc.), loans for starting the business or the entrepreneur rents the location (real estate) from the brewery. The exclusivity clause of the VBER prevents the hospitality entrepreneurs necessary room for negotiation with the breweries

for a better price and for their own choice of supplier. In The Netherlands 50% of the turnover of a bar is established by the selling of beer. Therefore, the price the entrepreneur has to pay to the brewery indirectly can influence the profitability of the business to a great extent. Moreover, in the case of an owner/letter and tenant relation between brewery and hospitality entrepreneur, the exclusivity clause can last indefinite or 'forever'. This is the case for around 16% of hospitality entrepreneurs in the Netherlands because they rent real estate from a brewery.

In the proposed changes of the VBER and VGL, the Commission does not address these negative consequences of the VBER in the contracts between hospitality businesses and breweries and/or drink suppliers. We argue that at least article 5 of the VBER should be revised to provide sufficient legal protection for hospitality businesses and therefore create a more level playing field.

### **Our proposal: revise at least article 5 of the VBER**

Under the VBER, the exclusivity clause can only last for a period of 5 years, unless, as stipulated under Article 5 paragraph 2, the entrepreneur rents the real estate from the brewery or drink supplier. In case of the latter, the hospitality business is on the premises owned or rented by the brewery or drink supplier, the exclusivity clause in those cases can last indefinite or 'forever'. The relevant parts of the exclusivity clause are set out in article 5 of the VBER.

#### *Article 5*

*1. The exemption provided for in article 2 shall not apply to the following obligations contained in vertical agreements:*

- (a) Any direct or indirect non-compete obligation, the duration of which is indefinite or exceeds five years;*
- (b) Any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services;*
- (c) Any direct or indirect obligation causing the member of a selective distribution system not to sell the brands of particular competing suppliers.*

*For the purposes of point (a) of the first subparagraph, a non-compete obligation which is tacitly renewable beyond a period of five years shall be deemed to have been concluded for an indefinite duration.*

*2. By way of derogation from paragraph 1(a), the time limitation of five years shall not apply where the contract goods or services are sold by the buyer from premises and land owned by the supplier or leased by the supplier from third parties not connected with the buyer, provided that the duration of the non-compete obligation does not exceed the period of occupancy of the premises and land by the buyer.*

We propose at least a revision of this article in two ways. Firstly, the 5-year term in paragraph 1(a) should be reduced to a 3-year term. Three years is time enough to protect the interests of breweries (and other suppliers) and should provide for an established relationship between brewery/drink supplier and business owner for further negotiations.

Secondly and more importantly, paragraph 2 should be completely deleted. In the Netherlands, we see that breweries and/or drink suppliers buy or rent premises to hospitality entrepreneurs with the sole purpose to ensure the indefinite monopoly to supply goods in these businesses. This is a very unfavorable situation for all parties involved.

It has a negative influence on real estate prices, on fair competition and the level playing field between breweries and other suppliers of the hospitality businesses and it is bad for the prices customers have to pay for their consumption.

In short, withdrawing the block exemption for the above mentioned contracts between breweries/drink suppliers and hospitality entrepreneurs by revising article 5, would mean much better and more equal competition. It would mean more room for negotiation and freedom of choice for the preferred supplier by the hospitality entrepreneur, especially relevant for the many SMEs in this sector. We therefore call upon the Commission to included our proposed changes in the continuation of the procedure on evaluating the VBER and VGL.

If you have any further questions for us on this matter, please reach out to us as we are always ready to provide more information.

Sincerely,

Koninklijke Horeca Nederland

Dhr. Hans Kant  
Manager public affairs and advocacy

