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Per E-Mail: COMP-VBER-REVIEW@ec.europa.eu

Comments VBER/Vertical Guidelines – HT.6179

Dear Ladies and Gentleman,

First of all, we highly welcome the fact that the current draft of the Vertical Guidelines contains some further clarifications with regard to the agent model in the meaning of antitrust law.

- In the context of this statement, we would like to address a specific question in connection with the agency model and the double role of the dealer acting as an agent and independent dealer (within one relevant market) at the same time, laid down in the current draft of the Vertical Guideline in paragraphs 34 to 37. First of all, we welcome the fact that it is possible to have two roles at the same time (agent + own buy). According to our interpretation, it is crucial that the two roles do not lead to a mixing of the different activities and risks (cf. para 34 of the draft). The spillover effect between the two functions/roles should be avoided. This is either plausible and, in our opinion, correct. However, some aspects when having such double role, are still not clear and further guidance seems appropriate.
- In this statement, we would like to show that the spillover effect does not occur in certain situations, which in our opinion, have not been sufficiently addressed in the draft so far.

- Let us therefore use this opportunity to underline and differentiate between three scenarios, in which a spillover effect will not occur.
 - **Scenario 1:** There is no antitrust risk of "infection of the agency relationship" if a distributor is active at a location A for supplier L as a (classical) distributor and at location B for the same supplier and the same product, as an agent, if these functions are performed on *two different geographic* markets. In such a scenario, no danger of a spillover effect exists. This is because there is no relevant competition between the various markets. So far, we cannot understand why the current draft does not include this dimension of the relevant market, only focussing on the product market. It should be undisputed that market definition has a product and geographic (as well as temporal) dimension. So far, para 36 of the current draft refers exclusively to the product market. In our opinion, this restriction should be abandoned and it should be made clear in the Vertical Guidelines, that if the functions of commercial agent and dealer are performed within different relevant geographic markets, no risk of a spillover effect exists.
 - **Scenario 2:** In our opinion, the simultaneous activity of a distributor as a dealer and commercial agent in the same product and geographically relevant market is also not always "particularly critical", as expressed in para 36 of the draft. This is because spillover effects can be systematically ruled out in our view with certain technical and organisational measures. These measures can be derived from the measures discussed within B2B platforms or if a supplier is doing both, D2C sales and sales via dealers and if the information exchange within the company of the supplier must be restricted; e.g. in a situation, where the sales prices for own buy are inserted by one department, which is separated from the department, which receives the sales prices from the supplier for the agent business, a systematic spillover effect can be ruled out. In addition, if the systems are also separated from the technical perspective (no shared systems), this underlines the previous findings. We therefore ask to clarify that the "particularly critical situation" only exists if the risks arise from the combination of both "roles" in the first place. If there are no spillover effects, there is also no risk of abuse and there is no risk of price alignments. This applies in particular to geographically different markets. In our opinion, different markets also exist if a product is sold offline in a brick and mortar store as a retailer and online as a commercial agent. In our opinion, there are good reasons to argue that separate markets

exists for offline and online distribution and not only strong competitive pressure.

- **Scenario 3:** In our opinion, it can also not be problematic for a retailer to be active in the *same product market*, but for *different suppliers*. This is because these roles can be completely separated from each other. If dealer D sells e.g. lipsticks for supplier A and also lipsticks for supplier B, he can and will treat the roles separately, especially because the pricing for both products does not depend on the price of the other product. D will never adjust the prices for the lipsticks of A on the basis of the prices of B. There is no influence (inadmissible under antitrust law) on the sales prices.

Kind regards

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