

ETUC observations to the draft revised Vertical Block Exemption Regulation and the draft revised Vertical Guidelines

The European Trade Union Confederation (ETUC) wishes to share its observations on the draft revised Vertical Block Exemption Regulation (VBER) and the draft revised Vertical Guidelines (VG). The ETUC welcomes the revision as part of the ongoing review of the EU competition legal framework, and believes competition policy should actively contribute to fairer and more sustainable markets. In this regard, the ETUC would like to underline that also social considerations need to be part of the EU ambition for more sustainable competition policies.

The fundamental values, rights, principles and objectives enshrined in the Treaties and the Charter of Fundamental Rights are binding on competition law as on any other policy area. In accordance with Article 3 TEU, the EU shall promote the well-being of its peoples and work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress. In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health', as set out by Article 9 TFEU.

The aim of competition law must not only be to secure low prices for individual consumers, but to also ensure fair and undistorted competition among undertakings in the market. To this end, the fairness of conditions imposed must be assessed not only in terms of their legal form but also with regard to the economic reality of the situation. This is particularly relevant when it comes to social considerations, as labour cannot be subject to the same market dynamics as other factors of production, allowing social rights to be compromised for the lowest price or the highest profit. As stated by the fundamental principle of the ILO – labour is not a commodity.

It should be recalled that practices amounting to aggressive price competition do not in a meaningful way contribute to striking a fair balance between individual consumer interests and broader social concerns. Not only should consumers have access to high quality products and services, but the importance of creating an enabling environment for undertakings to ensure fair working conditions is equally key. It is important that in assessing the permissibility of vertical agreements, due regard is given also to fairness and sustainability in supply chains.

Against this background, the ETUC would like to shed light on some social considerations, in particular in relation to Article 4(a) VBER. Pursuant to this Article, limiting the downstream buyer's ability to determine its sale price e.g. in the form of a minimum sale price, constitutes a hardcore restriction. However, this is without prejudice to the possibility of the upstream supplier to impose a maximum sale price (paragraph (173) VG). While paragraph (184) VG notes that a maximum price in some cases might work as a focal point for resellers or soften competition, this assessment seems limited to situations where maximum prices risk increasing consumer prices.

However, the VG do not assess the potential risks of situations where the imposed maximum price may be remarkably low, thereby putting pressure on the margin of the downstream distributor or service provider rather than on the supplier or upstream undertaking. In order to be able to stay below an imposed maximum price, the downstream undertaking may be inclined to put pressure on labour costs, resulting in a downward pressure on wages of employees and a raise to the bottom among competitors in terms of working conditions.

The negative social impacts of a maximum sale price set at an artificially low level may be relevant for the purpose of Article 101 TFEU when assessing e.g. the relationship between the franchisor and the franchisee (paragraph (152) VG), or between the principal and the agent (paragraph (177) VG), or between the supplier and the buyer under a fulfilment contract (paragraph (178) VG).

In such cases, the social considerations need to be given due regard in the assessment of the degree of legal independence and economic integration. In a situation where prices and other factors of production are controlled by the upstream undertaking, the costs of labour might in fact be one of the only factors the downstream undertaking can control to ensure a margin of profit. In other words, negative social impacts in terms of a downward pressure on wages and working conditions might particularly be the case for downstream undertakings in labour intensive sectors. When it comes to e.g. franchising, these sectors are often also characterised by a few dominant players.

For these reasons, the ETUC calls for the inclusion of social considerations in the application of Article 101 TFEU, giving due regard to the particular circumstances of the case at hand. The situations described above resulting in a risk of downward competition on labour costs may be particularly relevant in cases where downstream undertakings find themselves in a situation of significant imbalance in terms of size and influence over the conditions of the contract. Such an imbalance might result in the upstream undertaking being able to impose abusive contractual conditions with negative social impacts further down in the supply chain. In the assessment of vertical agreements, it is therefore important to consider also the social impacts beyond the consumer interests in its narrowest sense.