

"DRAFT REVISED VERTICAL BLOCK EXEMPTION REGULATION AND VERTICAL GUIDELINES"

**POSITION PAPER OF INTESA SANPAOLO
TO THE COMMISSION'S CALL FOR CONTRIBUTIONS***

Intesa Sanpaolo would like to thank the Commission for the opportunity to provide a call for contribution on the draft revised Vertical Block Exemption Regulation¹ (*infra* also, "the VBER") and the Notice providing Guidelines on vertical restraints² (*infra* also, "the Vertical Guidelines"). As a stakeholder, Intesa Sanpaolo is pleased to participate in the process of revising rules on vertical agreements and would like to share some short relevant points with the Commission hereof.

For almost a decade, the VBER³ and the Vertical Guidelines⁴, currently in force, have been the essential point for the regulation of vertical agreements, which are concluded between two or more parties, who are not acting at the same level of the production, supply and distribution chain in relation to the agreement⁵. However, since the adoption of the VBER and the Vertical Guidelines, a lot of things have changed in the business of companies, such as the advent and widespread of the internet, which has deeply modified our society and economy⁶.

Intesa Sanpaolo believes that the VBER and the Vertical Guidelines are very important tools for companies to provide self-assessment on their vertical agreements, because they provide legal certainty and cost-effective compliance. In fact, Article 101 (1) TFEU⁷, regarding the prohibition of restrictive agreements, is also applicable to such contracts. Moreover, they are also relevant for National Competition Authorities (*infra* also, "NCAs") in Member States, because they set out a procedural framework for transparent and harmonized application of European Union (*infra* also, "EU") competition law. Intesa Sanpaolo expects that the Commission will also take into account the characteristics of the financial sector in reviewing the rules on vertical agreements, as detailed below.

1

* The current paper has been written in September 2021 by the *Antitrust Affairs – DC Institutional Affairs*. For further details, please refer to: Irene de Angelis (irene.deangelis@intesasanpaolo.com).

¹ Commission Regulation (EU) .../... of XXX on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, Draft, OJ C 359, 07.09.2021, p.1–11.

² Communication from the Commission, Commission Notice, Guidelines on vertical restraints, Draft, OJ C 359, 07.09.2021, p.12–87.

³ Commission Regulation (EU) N. 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices OJ L 102, 23.4.2010, p. 1–7.

⁴ Guidelines on Vertical Restraints, 2010/C 130/01, OJ C 130, 19.5.2010, p. 1–46.

⁵ VBER, Article 1, paragraph 1, letter (a).

⁶ Article "How the Internet Has Changed Everyday Life" by Zaryn Dentzel, from the book "Change: 19 Key Essays on How the Internet Is Changing Our Lives" for Open Mind BBVA, 2014 ([link](#)).

⁷ In the same way, Summary of the contributions of the National Competition Authorities to the evaluation of the Vertical Block Exemption Regulation (EU) No 330/2010, p. 1 ([link](#)).

This contribution will be structured in three sections: 1. Agency agreements; 2. Informal guidance; 3. Conclusions.

This paper represents the position of Intesa Sanpaolo on specific issues and it does not intend to be a comprehensive study on the matter.

1. Agency agreements

The draft revised Vertical Guidelines maintains the current decisive factor in defining an agency agreement for the application of Article 101 (1) TFEU: the financial or commercial risk borne by the agent⁸ in relation to the activities for which it has been appointed as an agent by the principal⁹. As a consequence, all obligations imposed on the agent in respect of the contracts concluded and/or negotiated on behalf of the principal under an agency agreement fall outside the scope of Article 101(1) TFEU, as far as the agent does not bear any, or only insignificant, of the financial or commercial risks related to the contracts concluded and/or negotiated on behalf of the principal, concerning market-specific investments for that field of activity, and in relation to other activities required by the principal to be undertaken in the same product market¹⁰.

The Vertical Guidelines, although not binding, generally increase legal certainty and clarity for companies. However, Intesa Sanpaolo believes that some provisions, concerning the treatment of agency agreements, do not properly capture the distinction between the independent traders and the agents acting on behalf of a supplier, especially with regard to the specific characteristics of the financial sector.

In particular, it can be understood that the Vertical Guidelines mainly refer to agency agreements for the distribution of physical products. However, the revised version of the document still does not deal with contracts for the promotion and placement of financial, banking or insurance products, which are particularly widespread in markets in which banks operate. In this context, according to Intesa Sanpaolo, the Vertical Guidelines should include, for competition law purposes, a clear separation between the "independent distributor" and the **"agent/promoter/dealer" of financial, banking or insurance products**. Indeed, the entity promoting or placing such products should not be confused with the legal qualification of "independent distributor" under EU competition law, but it should be **assimilated to the "genuine agent" under competition law**, according to the criteria set out by the Commission.

Intesa Sanpaolo believes that this clarification should be included in the Vertical Guidelines, similarly to the approach taken in the same Commission's Communication with regard to

⁸ According to the Vertical Guidelines, paragraph 27, an "agent" is defined as a legal or physical person entrusted with the power to negotiate and/or conclude contracts on behalf of another person ('the principal'), either in the agent's own name or in the name of the principal, for the: i. purchase of goods or services by the principal, or ii. the sale of goods or services supplied by the principal.

⁹ Lexis® PSL Competition Practice Note, Agency under EU Competition Law ([link](#)).

¹⁰ Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio v CEPSA* EU:C:2006:784; Case C-279/06 *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL* EU:C:2008:485.

agency agreements and undertakings providing online intermediation services which, in principle, cannot be considered as agents for the purpose of applying Article 101 (1) TFEU¹¹.

Intesa Sanpaolo, therefore, would appreciate this specification in the Vertical Guidelines so that a provision would be introduced stating that, generally and as a rule, a "genuine" agency agreement is involved for relationships concerning the promotion or placement of financial, insurance or banking products, thus falling outside the scope of Article 101 (1) TFEU.

This would be justified by the fact that the promoter or distributor of financial, banking or insurance products **operates as an auxiliary organ** forming an integral part of the principal's undertaking¹². In other words, the parties themselves are effectively considered as a single economic entity¹³, as in the case of the "genuine" agency agreements. Moreover, as clarified in the *CEPSA* case, in EU competition law, the concept of "undertaking" must be understood as designating an economic unit for the purpose of the subject matter of the agreement in question, even if in law the economic unit consists of several natural or legal persons¹⁴. The reason for the concept's being centered around economic activity rather than legal personhood is because not all economic interactions between separate legal entities are capable of having competitive significance, whereas it is possible that economic interactions within the same legal entity can have competitive significance¹⁵.

Furthermore, a promoter or distributor of financial, banking or insurance products is certainly not an independent distributor for the purposes of applying EU competition law, as it **does not usually bear any financial or commercial risks** listed in the Vertical Guidelines, paragraph 29, such as contract-specific risks or risks related to market-specific investments or other activities undertaken in the same product market. The promoter/dealer would, in fact, bear none of the risks set out in the illustrative list of the Vertical Guidelines, paragraph 31, since, for instance, it would not acquire the ownership of the goods covered by the agreement, it would not carry out substantial marketing operations, nor it would assume liability in the event of non-performance of the contract by the customers.

This is especially necessary in the light of the restrictive interpretation given to the distinction between the genuine agent and the independent distributor, which assumes a decisive value regarding the applicability or otherwise of Article 101 (1) TFEU. In fact, the lack of clarity of certain provisions of the Vertical Guidelines has the effect of sometimes requiring to undertakings a full antitrust analysis of promotion agreements of financial products, as a precautionary measure, in order to avoid the risk of violating antitrust law through resale price maintenance, which is still considered as a hardcore restriction under the VBER, even with regard to contracts that would be out of the scope of Article 101 (1) TFEU. Instead, it is important that companies are able to timely and clearly identify the boundary between

¹¹ Vertical Guidelines, paragraph 44.

¹² Case T-325/01 *Daimler Chrysler AG v Commission*, paragraph 86, in which it is stated that an agent, when he works for the benefit of his principal, "*may in principle be treated as an auxiliary organ forming an integral part of the latter's undertaking, who must carry out his principal's instructions and thus, like a commercial employee, forms an economic unit with his undertaking*".

¹³ OECD, Policy Roundtables, Vertical Restraints for Online Sales, 2013, p. 149 ([link](#)).

¹⁴ Case C-217/05 *Confederacion Espanola de Empresarios de Estaciones de Servicio v Compania Espanola de Petroleos SA*, 2006 E.C.R. I-12018, paragraph 40.

¹⁵ Pinar Akman, "Online platforms, Agency, and Competition Law: Mind the Gap", p. 242 ([link](#)).

genuine and non-genuine agency agreements, in order to reduce the costs associated with legal uncertainty.

In this context, some of the **examples provided in the aforementioned illustrative list** would not be applicable at all, not even extensively, to contracts for the promotion or placement of financial, banking and insurance products. Accordingly, Intesa Sanpaolo believes that it should be useful the introduction of examples, which take into account the peculiarities of the banking and financial markets.

Such amendments would also have the effect of helping the NCAs in their assessment of agency agreements¹⁶.

2. Informal guidance

Intesa Sanpaolo believes that a better guidance to **(i)** determine which agency agreements fall outside the scope of Article 101 (1) TFEU and **(ii)** to explain the Commission's methodology is necessary, especially for the antitrust self-assessment that is required to companies¹⁷. However, in order to increase *ex-ante* legal certainty for undertakings and reduce legal costs and other related financial and administrative burdens, **examples** applicable also to the banking sector should be introduced.

Obviously, for the most peculiar cases, the Commission should also provide **guidance on a case-by-case basis**. This procedure should be adapted to the specificities of each case and be voluntary, confidential and limited in terms of time and information to be disclosed, similar to the informal guidance in the agreements submitted by the Commission during the Covid-19 outbreak¹⁸.

4

3. Conclusions

As briefly explained above, Intesa Sanpaolo believes that the draft revised VBER and the Vertical Guidelines provide legal certainty for companies. However, in order to ensure greater clarity, a **revision of the rules on agency agreements**, which would take into account the specific characteristics of contracts for the promotion or placement of financial, banking and insurance products, would be **desirable**.

Intesa Sanpaolo would like to thank the Commission again for the opportunity and is available to further discuss the proposed issues.

¹⁶ Commission Staff Working Document Evaluation of the Vertical Block Exemption Regulation, SWD(2020) 173 final, of 8 September 2020, p. 18.

¹⁷ Miguel De la Mano and Alison Jones, "Vertical Agreements Under EU Competition Law: Proposals for Pushing Article 101 Analysis, and the Modernization Process, to a Logical Conclusion", King's College London, p. 24 ([link](#)).

¹⁸ Communication from the Commission Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak 2020/C 116 I/02.