

EC PROPOSALS ON VERTICAL BLOCK EXEMPTION REGULATIONS AND RELEVANT GUIDELINES

Proposals C(2021) 5026 final and C(2021) 5038 final Remarks from

Confcommercio

Confcommercio – Imprese per l'Italia is an Italian organisation representing over 700k partners, including professionals and enterprises of all sizes from the retail and services sectors. Confcommercio welcomes the possibility to present its remarks regarding the two Proposals recently released by the Commission (Proposals C(2021) 5026 final and C(2021) 5038 final) that will be redefining the EU rules on Vertical Block Exemption Regulation together with the relevant Guide Lines.

Confcommercio has already participated in the previous consultation phases ahead of the presentation of the two proposals. In line with those submitted during the last stages, the following remarks are intended to underline some aspects on which the new regulation could be further ameliorated to better respond to the actual needs of the economic operators that we represent.

1.

Except in the case of **distribution in the automotive sector** (see below), Confcommercio considers that the rules on dual distribution (the practice of a supplier to sell both to operators and directly to final customers) should not change. In particular, there should be no limitation for manufacturers or importers to start their e-commerce.

In the **Proposals** released by the Commission, new **restrictions to admitted dual distributions cases are introduced**. In particular, the exemption will only apply to those agreements involving retailers whose aggregate market share in the relevant market at the retail level does not exceed 10% (article 2, paragraph 4, letter a), or, once exceeded the latter threshold, under the condition - among others - that there must be no exchange of information between the parties, which should be assessed “under the rules applicable to horizontal agreements”, and in any case not exceeding the threshold of 30% of the relevant market share (article 3 of the Proposal).

Moreover, the 10% threshold is further reduced compared to the 20% threshold envisaged in the questionnaire drawn up for the previous consultation phase on this matter, thus entailing an even more restrictive change than the Commission itself initially had envisaged. The discipline envisaged under par. 5 of the Proposal also appears likely to complicate the application framework of the regulation further, forcing a cross-evaluation of the agreements based on the rules valid for both vertical and horizontal agreements.

The provisions contained in the previous regulation appear preferable, as these agreements were included within the scope of the VBER with no particular limits. Therefore, the new restrictions are too invasive and should be removed. Alternatively, the relevant share-market threshold should be significantly increased (at least up to 20%) to exclude from the scope of the new article 2, paragraph 5, all those agreements having a minor impact on the market.

In this respect, it should be further underlined that article 2, paragraph 6, already foresees the exclusion from the scope of the exemption for those vertical agreements that, directly or indirectly,

have as their object to restrict competition between the competing suppliers and buyers. The introduction of further limitation to the exchange of information among the operators results therefore as unnecessary.

The **automotive distribution sector** needs partially different considerations. Total exclusion of the sector from any exemption on dual distribution agreements should be foreseen, and the assessment of any similar agreement should be performed case-by-case to verify their conformity to article 101, TFUE.

The automotive sector needs specific and different rules, given the *complexity* of the products, the high level of investments to which car dealers are obliged by producers, and the relevant contractual disparity between the few (big industrial) producers and the dealers, mainly SMEs.

Concerning the distribution through the franchise networks, it is appropriate and necessary not to modify the current dual distribution rules inside the Regulation and in the guidelines. It means to provide for a specific exemption concerning the new rules.

An exemption that did not also include the exchange of information would fail to consider the specificities of franchised networks, as compared to other distribution models, where the essential elements of communication of know-how and commercial assistance services to franchisees are based on information exchange of outlet data between the franchisor and each of its franchisees.

Know-how means experiences, pieces of evidence, tests and is not a static notion. The data collected by the franchisor, through its sales points, are essential to add to the market new models (for example, for new clothing) to choose the restyling of old models to adapt them to the changing consumer preferences. It must consider the taste and preferences of the various retail markets to expand the assortment to complete the product range of the network or to narrow it down to gain specialization for new and different packaging.

To keep the benefits that the consumers can get from a franchising network, the franchisor must have detailed information and data from its franchisee in each sales point. These data can be crossed with those in the sales point, giving a constant update of the franchisor's know-how with the affiliates.

Furthermore, a constant and detailed exchange of information between the franchisor and each franchisee is a basic element to keep the network as cohesive as possible.

In the areas in which the franchisor won't work through an unbundled and constant exchange of commercial data with their affiliates (having crossed the threshold of 10% as decided in the new Regulation) there won't be any possibility to give the franchisee the same initiatives and promotional campaign. In this situation, the franchisor will have a difficult problem keeping the network united. Either the franchisor will accept that only a part of the network can implement its steps (not reaching a common standard), or the franchisor will study solutions (very positive from the side of the consumers). It will decrease the competitiveness of the network in the medium to long term.

2.

As regards sales restrictions in the case of exclusive or selective distribution systems: the proposal expressly includes, among the exceptions applicable to what would otherwise be considered hardcore

restrictions ("hardcore restrictions", as such excluded from the "safe harbour" of the VBER), agreements having as their object "the restriction of active or passive sales by the buyer or its customers to unauthorized distributors located in a territory where the supplier operates a selective distribution system for the contract goods or services" (Article 4(d)(ii)).

This modification seems acceptable, and, hopefully, it will remain in the final version of the Regulation.

3.

Confindustria considers that the Regulation should allow the possibility of setting different prices for online and physical sales (so-called "dual pricing") or, in any case, of applying other conditions.

As a way of example, *dual pricing* can have a fundamental role in the automotive sector to counter *free riding* practices, as the latter agreements can allow car dealers to effectively protect the huge investments in terms of setting up of their premises, managerial and jobs costs, which are considerably higher compared to the costs of on-line sellers. We can do the same evaluation in the sector of the distribution in franchising.

To not discriminate against online operators, the maximum permissible price difference between the prices charged to online and physical operators could still be set. For example, it could be stipulated that the maximum discount applicable to online shops cannot be less than 90% of that applied to physical shops. If necessary, it could be stipulated that online operators are not allowed to distribute all their products through selective distribution systems to exclude online traders in all cases (i.e. such systems could only be used for certain products).

Paragraph 195 of the new Guidelines specifies that "*A requirement that the same buyer pays a different price for products intended to be resold online than for products intended to be resold offline can benefit from the safe harbour of the VBER, in so far as it has as its object to incentivize or reward the appropriate level of investments respectively made online and offline. Such difference in price should be related to the differences in the costs incurred in each channel by the distributors at retail level*". In any case "*where the wholesale price difference has as its object to prevent the effective use of the internet for the purposes of selling online it amounts to a hardcore restriction*", when this ends up with making on-line sales unprofitable or financially not sustainable.

Though favorably evaluating the latter innovation, Confindustria suggests the introduction of a predetermined price differential, under which the relevant agreements should be considered as compliant with the new guidelines, to allow a certain safety margin to companies, that would be thereby exempted by difficult (and questionable) calculations of the relative costs for online and offline channels.

4.

Among the restrictions excluded from the scope of the VBER, that related to "*any direct or indirect obligation causing a buyer of online intermediation services not to offer, sell or resell goods or services to end users under more favourable conditions using competing online intermediation services*" (art. 5, par. 1, lett. d) has been included. This is, for example, the case in which an online platform prevents an operator from offering better conditions for its products or services on a competing platform (so-called "**equality obligations**").

Confcommercio is favorable to the latter provision, as it can promote a level playing field between economic operators. For a deeper protection of the economic operators using online platforms services, it would be useful to extend the exemption foreseen by VBER (accordingly imposing an evaluation case-by-case), also to the parity obligations in retail sector imposed by suppliers of online intermediation services relating to the conditions under which buyers of the services may offer goods or services to end users on their direct sales channels (**'narrow' parity**) (cfr. Guidelines, par. 346).

5.

About the other hard-core restrictions as foreseen by article 4 of the Proposal, those provisions related to the so-called **"resale price maintenance" (RPM)** have not been modified compared to the past (Article 4, lett. a).

Confcommercio, on the contrary, suggests the inclusion of these practices among the exemptions foreseen by the VBER regulation to safeguard the sales network of certain product categories (i.e., musical instruments). This would legitimate introducing a minimum price, at least for those goods distributed through selective channels. Under this circumstance, it should be in any case foreseen to determine the minimum price, establishing, as an example, the selling price could not exceed 30% of the costs for stored products.

For the franchise systems too, it is essential to underline that it is desirable more flexibility concerning the topic RPM because it could give the possibility to the big brands to position themselves on the market for the prices and quality (with a consequent benefit for the consumers).

Alternatively, Confcommercio would support introducing an obligation that clearly indicates, when advertising or promoting the goods mentioned above, the minimum selling price to which retailers are contractually obliged by producers and/or licensees.