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**EU revised Vertical Block Exemption Regulation and Vertical Guidelines**

**Submission to European Commission on marketplace ‘*cherry-picking*’ practices**

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**17 September 2021**

## 1. SUMMARY

- (1) On 9 July, the Commission published drafts of the revised Vertical Block Exemption Regulation (***Draft Regulation***) and revised Vertical Guidelines (***Draft Guidelines***). One of the key goals of the review was to adjust the VBER and the accompanying Guidelines to the online platform economy and provide businesses with up-to-date guidance for an environment re-shaped by the growth of e-commerce and online platforms.<sup>1</sup>
- (2) We welcome the recognition of the importance of online marketplaces as an important sales channel for suppliers, retailers and end users.<sup>2</sup> In particular, both the Draft Regulation and Draft Guidelines make clear that online marketplaces enable new ways of doing business and are of particular importance to smaller distributors, for whom they are essential to reach customers.<sup>3</sup>
- (3) While both legislative proposals recognise that restrictions on the use of online marketplaces (***marketplace restrictions***) are allowed only when a specific set of requirements is met, they fail to establish clear boundaries for restrictions which clearly fall outside the scope of what is allowed. This is particularly the case where a supplier restricts the use of an online marketplace, but uses that marketplace itself or permits select distributors to use that marketplace to distribute its contract goods or services. Such restrictions are neither appropriate nor necessary, and are particularly harmful to small and medium-sized enterprises (***SMEs***) for which online marketplaces are often an essential distribution channel to reach customers.
- (4) As such, in order to achieve its objectives, and in the interest of protecting smaller distributors, the revised regulatory regime should expressly prohibit such platform “cherry-picking” practices. To that end, we would suggest slightly revising the current wording of paragraph 319 to clarify the boundaries within which marketplace restrictions can be applied. We also believe it is necessary to amend the wording of paragraph 315, in order to emphasise the necessary qualitative nature of marketplace restrictions. As currently framed, paragraph 315 is ambiguous and risks legitimising purely arbitrary restrictions.

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<sup>1</sup> 1.1.(4) Draft Regulation, paragraph 1.1.(4): “online platform economy [...] plays an increasingly important role in the distribution of goods and services and where vertical agreements between undertakings may not be easy to categorise under the concepts traditionally associated with vertical agreements.” See also: Explanatory Guidelines to the draft Regulation which outlines that one of three objectives was to provide “stakeholders with up-to-date guidance for a business environment reshaped by the growth of e-commerce and online platforms, and ensuring a more harmonised application of the vertical rules across the European Union”.

<sup>2</sup> Draft Guidelines, paragraph 314.

<sup>3</sup> Draft Guidelines, paragraph 320 and Draft Regulation, paragraph 10.

## 2. ONLINE MARKETPLACES CRUCIAL FOR 99% OF BUSINESSES IN EUROPE

- (5) The Draft Guidelines recognise that “[o]nline marketplaces have become an important sales channel for suppliers and retailers, providing them with access to a large number of customers, as well as for end users”.<sup>4</sup>
- (6) This is confirmed by recent statistics where, in relation to end users, 73% of internet users in the EU shopped online in 2020, with the most popular purchases involving clothes (including sport clothing), shoes or accessories (63% of all online purchases).<sup>5</sup>
- (7) Additionally, for retailers, online marketplaces offer a meaningful improvement in consumer engagement and online traffic.<sup>6</sup> This is particularly true for SMEs – which constitute 99% of all businesses in the EU, and provide 67% of employment in the region<sup>7</sup> – for which online marketplaces are often an essential distribution channel to reach consumers.<sup>8</sup> The Bundeskartellamt concluded similarly in the *Asics* case that many SMEs rely on being present on an online marketplace to reach customers.<sup>9</sup>

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<sup>4</sup> Draft Guidelines, paragraph 314. See also: (i) the Explanatory Note of the draft Regulation which recognises that the platform economy “*plays an increasingly important role in the distribution of goods and services*” and (ii) Commission Staff Working Document, *Evaluation of the Vertical Block Exemption Regulation*, September 8, 2020, SWD(2020) 173 final, which states that “*online marketplaces have made it easier for retailers to access customers*”. This is particularly true for small retailers which may “*with limited investments and effort, become visible to potential customers and sell products to a large customer base and in multiple Member States*”.

<sup>5</sup> Source: Eurostat (online data code: isoc\_ec\_ibuy and isoc\_ec\_ib20).

<sup>6</sup> See submission of the President of the German Federal Cartel Office on the Case *cortexpower.de GmbH vs Deuter Sport GmbH*, 7 July 2016, KZR 3/16, which states at p. 22: “*online distribution today offers the opportunity to explain the use of even the most complex products by providing centralized, professional information (including tutorials in the form of films). An additional advantage of this kind of information is that it is available to the customer not only at the moment of the purchase, but also at a later point when the product is used by the customer for the first time. The provision of advice in online distribution often exceeds similar services in the offline world, which is why many customers are informing themselves online before purchasing the product in a physical store.*”

<sup>7</sup> The statistics published by the European Commission state that: “[SMEs] *are the backbone of Europe's economy. They represent 99% of all businesses in the EU. They employ around 100 million people, account for more than half of Europe's GDP and play a key role in adding value in every sector of the economy.*” (see here: [https://ec.europa.eu/growth/smes\\_en](https://ec.europa.eu/growth/smes_en)). Also, the Annual Report on European SMEs 2020/2021 states that, in 2020, SMEs provided more than 65% of total employment in Europe (the Annual Report is available at: <https://ec.europa.eu/docsroom/documents/46062>)

<sup>8</sup> The Commission has acknowledged in its Online Platforms Communication that, in particular for smaller businesses and micro-enterprises, some online platforms constitute the main point of entry to certain markets. See Online Platforms Communication, page 12 available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0288&from=EN>

<sup>9</sup> See the Bundeskartellamt Case Summary, Unlawful restrictions of online sales of ASICS running shoes, Ref: B2-98/11, 13 January 2016, p. 10, available at [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2016/B2-98-11.pdf?\\_\\_blob=publicationFile&v=2](https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2016/B2-98-11.pdf?__blob=publicationFile&v=2).

- (8) Indeed, as rightly observed by the Commission, “*sales via marketplaces generate a high share of the online revenues of smaller retailers*”.<sup>10</sup> This is because they “*allow retailers to start selling online with lower initial investments*” and “*facilitate cross-border sales and increase the visibility of, notably small and medium-sized, retailers that do not operate their own online shop or are not well known to end users.*”<sup>11</sup>

### 3. RESTRICTIONS ON THE USE OF ONLINE MARKETPLACES

- (9) With the above figures and context in mind, it is clear that marketplace restrictions necessitate very careful consideration as they might significantly restrict a large number of retailers from being able to effectively operate their businesses and access customers.<sup>12</sup> As noted in the Draft Guidelines, marketplace restrictions may result in a “*reduction of intra-brand competition at the distribution level and the foreclosure of distributors, notably small and medium ones, to the extent that distributors are deprived of a potentially important sales channel*”.<sup>13</sup>
- (10) Marketplace restrictions are mostly found in selective distribution agreements and, in general, are deemed to outweigh anticompetitive effects and, therefore, fall outside the scope of Article 101(1) TFEU, when they meet the following three cumulative criteria: (i) resellers are chosen on the basis of objective criteria of a qualitative nature that are laid down uniformly for all potential resellers and not applied in a discriminatory fashion, (ii) the characteristics of the contract goods or services necessitate a selective distribution network in order to preserve their quality and ensure their proper use, and (iii) the criteria laid down do not go beyond what is necessary.<sup>14</sup>
- (11) In other words, as emphasised by Advocate General Wahl, marketplace restrictions must be “*legitimate in the light of the qualitative objectives pursued*”, “*proportionate*”

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<sup>10</sup> Commission Staff Working Document, Preliminary Report on the E-commerce Sector Inquiry, September 15, 2006, SWD(2016) 312 final.

<sup>11</sup> Draft Guidelines, paragraph 314.

<sup>12</sup> Implications of E-commerce for Competition Policy - Note by Germany, 6 June 2018, DAF/COMP/WD(2018)57 which states at paragraph 2 that “*In view of the competitive significance of the internet and its potential to increase efficiencies to the companies’ and the consumer’s benefit, the German Competition*

*Authority (‘Bundeskartellamt’) has to ensure that possible restrictions of e-commerce activities and barriers to competition do not restrict e-commerce in an undue manner.*” The note also emphasises at paragraph 13 that “*competition authorities have an important role to play in reviewing distribution systems. They have to distinguish between restrictions to address legitimate concerns by manufacturers about the quality of distribution and restrictions imposed in order to reduce price pressure from online competition on the merits*”.

<sup>13</sup> Draft Guidelines, paragraph 320.

<sup>14</sup> See Judgments in Cases 31/80 *NV L’Oréal and SA L’Oréal v PVBA* EU:C:1980:289, paragraphs 15-16, T-19/92 *Groupement d’achat Édouard Leclerc v Commission* [1996] ECR II-1961 at paragraph 112; *Metro SB-Großmärkte GmbH & Co. KG v Commission* EU:C:1977:167, paragraphs 20-21; *Case C-439/09 Pierre Fabre Dermo-Cosmetique SAS v Président de l’Autorité de la concurrence* EU:C:2011:649, paragraph 41, and C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* ECLI:EU:C:2017:941 (*Coty*), paragraphs 24 to 36.

and “*applied in a non-discriminatory fashion*”.<sup>15</sup> The same position was confirmed by the Court of Justice.<sup>16</sup>

- (12) As regards the legitimacy of marketplace restrictions, Advocate General Wahl noted that it is necessary to determine whether the restriction at issue “*is objectively justified by the nature of the contract products*”.<sup>17</sup> He emphasised that marketplace restrictions can be justified in circumstances where they are “*likely to improve competition based on qualitative criteria*”, for example, where they “*improve the luxury image of the products concerned*”.<sup>18</sup> This approach is in line with the Draft Guidelines which state that qualitative restrictions would generally be considered to fall outside the remit of Article 101(1) TFEU because it would be assumed that a restriction of intra-brand competition would be offset and outweighed by a meaningful improvement in inter-brand competition.<sup>19</sup>

#### 4. MARKETPLACE ‘CHERRY-PICKING’ PRACTICES

- (13) While the Draft Guidelines note that in certain circumstances marketplace restrictions rightly fall outside the scope of Article 101(1) TFEU by genuinely satisfying the three cumulative criteria of legitimacy, proportionality and non-discrimination, they also explicitly recognise that in some instances such restrictions clearly go beyond what is necessary and appropriate.
- (14) As the Draft Guidelines rightly point out, this is particularly the case “*where a supplier includes the operator of an online marketplace as an authorised distributor in its selective distribution system, or, where it restricts the use of online marketplaces by some authorised distributors but not others, or where it restricts the use of an online marketplace, but uses that marketplace itself to distribute the contract goods or services*”.<sup>20</sup> As emphasised by the Commission in the Draft Guidelines, such practices – which can be collectively described as marketplace ‘cherry-picking’ – “*appear unlikely to fulfil the requirements of appropriateness and necessity*”.<sup>21</sup>
- (15) Indeed, while the Draft Guidelines recognise that “*suppliers may wish [...] to protect the image and positioning of their brand, to discourage the sale of counterfeit products, to ensure sufficient pre- and post-sale services or to ensure that the retailer maintains*

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<sup>15</sup> Advocate General Opinion in *Coty*, paragraphs 98 and 115.

<sup>16</sup> *Coty*, paragraph 43.

<sup>17</sup> Advocate General Opinion in *Coty*, paragraph 115.

<sup>18</sup> *Ibid.*, paragraph 106.

<sup>19</sup> Draft Guidelines, paragraph 134. See also judgments in *Case 26/76 Metro SB-Großmärkte GmbH & Co. KG v Commission* (“*Metro I*”) EU:C:1977:167, paragraphs 20-22; *Case 107/82 Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission* EU:C:1983:293, paragraphs 33, 34 and 73; *Case 75/84, Metro SB-Großmärkte GmbH & Co. KG v Commission* (“*Metro II*”) EU:C:1986:399, paragraph 45; *Case T-88/92 Groupement d’achat Édouard Leclerc v Commission* EU:T:1996:192, paragraph 106.

<sup>20</sup> Draft Guidelines, paragraph 319.

<sup>21</sup> *Ibid.*

*a direct relationship with customers*”<sup>22</sup>, it is hard to see how such justifications could stand up to scrutiny where a supplier has already agreed to use online marketplaces (either itself or through some of its distributors) to sell its products. In such circumstances, any brand protection considerations are entirely implausible as it is clear that the product’s characteristics, brand image or quality, are clearly *not* impacted by presence on an online marketplace. In other words, the supplier itself acknowledges that the product’s characteristics are not such as to require or justify marketplace restrictions (and perhaps even a selective distribution system).

- (16) As such, marketplace ‘cherry-picking’ practices *cannot* possibly be deemed proportionate, non-discriminatory and legitimate in the light of the qualitative objectives pursued. Quite the contrary, such practices are purely arbitrary and entirely unrelated to the quality-based competition. They fail to bring about any efficiencies which could potentially counterbalance material anticompetitive effects and, therefore, cannot qualify for the protection.
- (17) As emphasised by Advocate General Wahl in *Coty*, “*where the characteristics of the product do not require selective distribution or do not require the applied criteria, [...], such a distribution system does not generally bring about sufficient efficiency enhancing effects to counterbalance a significant reduction in intra-brand competition. Where appreciable anticompetitive effects occur, the benefit of the Block Exemption Regulation is likely to be withdrawn.*”<sup>23</sup> In the same manner, the Draft Guidelines should take a clear position on arbitrary marketplace ‘cherry-picking’ practices and explicitly prohibit them.

## 5. PROPOSED SOLUTION

- (18) While, in line with the Commission’s earlier findings,<sup>24</sup> the Draft Guidelines clearly recognise the problem, paragraph 319 of the Draft Guidelines, as currently framed, remains unnecessarily vague, leaving much room for argument. In order to clarify the boundaries within which marketplace restrictions can be applied, we would propose to revise the wording as follows (our suggested amendments are marked in ~~red~~ and blue):

*“[...] where a supplier includes the operator of an online marketplace as an authorised distributor in its selective distribution system, or, where it restricts the use of online marketplaces by some authorised distributors but not others, or where it restricts the use of an online marketplace, but uses that marketplace itself to distribute the contract goods or services, restrictions on the use of such online marketplaces ~~would appear unlikely to~~ do not fulfil the requirements of appropriateness and necessity and, as such,*

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<sup>22</sup> Draft Guidelines, paragraph 315.

<sup>23</sup> Advocate General Opinion in *Coty*, paragraph 16.

<sup>24</sup> See, e.g., the Commission Staff Working Document, Preliminary Report on the E-commerce Sector Inquiry, paragraph 474, which makes clear that marketplace bans are particularly hard to justify in circumstances where a “*manufacturer has accepted the marketplace operator as an authorised seller within its selective distribution agreement or if the manufacturer is itself selling on the marketplace directly to customers*”.

are incompatible with Article 101(3) TFEU and fall outside the application of the Vertical Block Exemption Regulation”.

- (19) In addition to revising the wording of paragraph 319, the Commission should also review paragraph 315 of the Draft Guidelines,<sup>25</sup> in particular, its last sentence (underlined in fn 25), which is highly ambiguous and risks being used as a pretext by manufacturers to unfairly restrict their distributors from selling on *any* online marketplace, simply because marketplaces display their logo on the website. As currently framed, paragraph 315 of the Draft Guidelines risks legitimising purely arbitrary restrictions, which have nothing to do with qualitative requirements and criteria of legitimacy, proportionality and non-discrimination. In order to bring the wording of paragraph 315 in line with the overall approach set out in the Draft Guidelines, the Draft Regulation, and EU competition law more generally, we would suggest revising it as follows (our suggested changes are marked in ~~red~~ and blue):

*“Suppliers may wish to restrict the use of online marketplaces, or other online platforms which connect merchants with potential buyers, by their buyers, ~~for instance~~ to protect the image and positioning of their brand, to discourage the sale of counterfeit products, to ensure sufficient pre- and post-sale services or to ensure that the retailer maintains direct a relationship with customers. The restrictions may ~~range from a total ban on the use of online marketplaces to~~ include the imposition of certain qualitative requirements which the marketplaces must meet. For instance, some restrictions may be necessary to ~~suppliers may prohibit the use of marketplaces on which products are sold by auction, or they may require buyers to use specialised marketplaces, in order to~~ ensure certain quality standards regarding the environment and parameters of the sale of their goods or services. ~~Some qualitative requirements may de facto ban the use of online marketplaces, because no online marketplace is capable of meeting the requirement, for example, where the supplier requires that the logo of the online marketplace is not visible or requires that the domain name of any website used by the retailer contains the name of the retailer's business.~~”*

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<sup>25</sup> Paragraph 315 of the Draft Guidelines states as follows: “Suppliers may wish to restrict the use of online marketplaces by their buyers, for instance to protect the image and positioning of their brand, to discourage the sale of counterfeit products, to ensure sufficient pre- and post-sale services or to ensure that the retailer maintains direct a relationship with customers. The restrictions may range from a total ban on the use of online marketplaces to the imposition of certain qualitative requirements which the marketplaces must meet. For instance, suppliers may prohibit the use of marketplaces on which products are sold by auction, or they may require buyers to use specialised marketplaces, in order to ensure certain quality standards regarding the environment and parameters of the sale of their goods or services. Some qualitative requirements may de facto ban the use of online marketplaces, because no online marketplace is capable of meeting the requirement, for example, where the supplier requires that the logo of the online marketplace is not visible or requires that the domain name of any website used by the retailer contains the name of the retailer's business.”