

Supporting document to the public questionnaire for the public consultation on block exemption Regulation (EU) No 330/2010 of 20 April 2010 and guidelines on vertical agreements
by Vakcentrum, 12 September 2021

A. Introduction

Vakcentrum is the professional sector organization for independent SME retailers, franchisees and associations of franchisees, operating among other activities supermarkets, cheese shops and delicatessens, health and wholefood shops, convenience stores, drugstores, household articles, cooking utensils & tableware, books and toys.

Based in the Netherlands, 3447 GR Woerden, Blekerijlaan 1
Transparency Register: No. 391996534364-56

Vakcentrum is actively concerned with EU policies and legislation regarding the general interests of its members. Vakcentrum is predominantly concerned with the widespread problems and the currently unbalanced EU competition approach to franchise relationships.

VBER and the VGL provide a competition framework for vertical relationships as between the franchisor and its franchisees. They provide an important legal insight in which vertical agreements are allowed and which aren't from a competition point of view. Vakcentrum is grateful for the opportunity to comment on the draft Vertical Block Exemption Regulation (VBER) and Guidelines (VGL), published by the European Commission (Commission) on 9 July 2021 after a comprehensive consultation process. The Commission proposes several changes to the existing VBER and VGL.

Where other organizations, like EuroCommerce, have already also issued comments from a more general point of view, and more specific on the upstream relationship between manufacturer and retailer, Vakcentrum would like to offer specific viewpoints - along the same principles - on the downstream relationship between franchisor and franchisee. Vakcentrum supports many of the comments made by EuroCommerce and SMEUnited

Vakcentrum further welcomes the comprehensive inclusion of the many e-commerce topics in the draft VBER and VGL. Since the adoption of the current Regulation, we have seen new market developments as well as new thoughts on competition and coherence with other EU legislation. Vakcentrum strongly feels that fairness is a part of competition enforcement and policy, in the sense that it should not stimulate unfair business practices. Especially the increased importance of E-commerce warrants consideration of possible new antitrust issues and a pro-active approach from the Commission in order to prevent an increase of UTPS and the aforementioned unbalance.

In this context Vakcentrum likes to refer to the "Follow up to the European Parliament Resolution of 12 September 2017 on the functioning of franchising in the retail sector (2016/2244 INI)". In this document the Commission has stressed that it is committed to ensure the coherent application of the Regulation to franchise.

Vakcentrum recognises the changes proposed by the Commission and seeks to highlight and clarify some competition rules in franchise.

B. Dual distribution

The Commission proposes to expend the scope of the block exemption to more vertical agreements between competing undertakings, however restricts the widening to parties with a market share up to 10%. Above that threshold the block exemption wouldn't comprise exchanges of information. Above 30% aggregate market share the block exemption wouldn't be available at all.

Vakcentrum understands that dual competition scenarios exist in franchise, i.e. the franchisor competes (on and or offline) with franchisees on the consumer market. Franchise is a specific form of distribution and has always enjoyed the safe harbour of the block exemption, up to a market share of 30%, insofar as provisions with possible competition concerns are in fact strictly necessary for the protection of the franchisor's knowhow and the identity and reputation of the franchise and don't concern hard core restrictions.

Vakcentrum however feels it important to recognize that the reciprocal exchange of necessary information (about products, assortments, sales, marketing, etc.) is fundamental to the functioning of a franchise system and should be considered as falling outside Article 101(1). Specific to the exchange of information, this should not be considered different in scenarios of dual distribution, anywhere in the vertical chain. Vakcentrum asks the Commission to clarify this. Also, in relation to possible dual price strategies, that the franchisor has to justify with relevant information on costs.

However, in doing so Vakcentrum would very much like to see explained that the protection provided by VBER can be eliminated when competition by the franchisor would render investment incentives by the franchisee insufficient. The franchisor should always appropriately safeguard these in order to justify protection under VBER, especially in an exclusive distribution system and under the circumstances explained in VGL p. 106-126. Vakcentrum would very much like to ask the Commission to endorse this explanation.

C. Online selling

Vakcentrum agrees that restricting on online selling should be considered hardcore, when the restriction(s) prevent a franchisee to effectively sell online. Franchisees would have to be able to advertise online, only to be restricted by objective and proportionate instructions based on quality requirements on how the products are sold, i.e. the look and feel of the website. The examples in VGL 189 and 192 of contractual restrictions on online selling should also be considered hard core restrictions in franchise, unless these would be strictly necessary for the franchisor to protect its knowhow and the identity and reputation of the franchise. Vakcentrum asks the Commission to clarify this further.

Vakcentrum recognizes a different approach from the Commission to marketplace bans. However, Vakcentrum feels the same criterium as to online selling could apply: a marketplace ban should be considered a hard-core restriction in franchise, unless this would be strictly necessary for the franchisor to protect its knowhow and the identity and reputation of the franchise. In scenarios where the franchisor doesn't provide for a franchise appropriate online sales environment for its franchisees, it would be hard to justify restrictions on the franchisees to operate with third parties on online sales. The same is true for local marketplace initiatives and in situations in which the franchisor himself uses the same third-party marketplace.

D. Retail Price Maintenance

Vakcentrum welcomes the firm stand on RPM. RPM remains a hardcore restriction. Franchisors cannot restrict the freedom that franchisees have to set their own minimum prices, apart from short-term low-price campaigns. However, the actual wording in de the VGL suggests that there could be other circumstances in which RPM may be justified under Article 101 (3). Vakcentrum asks to keep that door firmly closed.

E. Non-compete clauses

Vakcentrum appreciates the Commissions extended view on non-compete obligations, imposed on franchisees who own the franchise location or lease it from third parties. In those situations the franchisor can only profit from the safe harbour provided by VBER in the first five years of the franchise contract. The protection phase can only be prolonged, in the exceptional circumstances that the franchisee is able to effectively terminate or renegotiate the agreement with the franchisor.

Vakcentrum would prefer to see further clarified (fore example. in VGL p. 234) that ‘effectively’ doesn’t mean the meer application of a notice period. Many other aspects, like investments and other contractual and market restrictions can be relevant to determine whether or not the criterium can be fulfilled.

Vakcentrum finally welcomes the firm stand on post contractual non-compete restrictions. These are excluded from VBER. Only in the exceptional circumstance that the franchisor can show that the restriction is indispensable to protect know-how transferred by him, which know how is both significant and useful (indispensable) for the franchisee, a post contractual non-compete could be justified. In that case the restriction must be limited to the point of sale from which the buyer has operated during the contract and limited to a maximum period of one year after termination of the agreement. Vakcentrum would welcome a further clarification on the proportionality of such a restriction. The more important the transfer of franchisor know-how, the more likely the restriction would be allowed for a certain period. One year being the maximum. The length should be proportionate to its purpose. Conversely, short term franchise relationships with generation old family business franchisees would not easily generate such a justification.

Vakcentrum is happy to further explain its points of view and provide concrete suggestions and examples upon request.

Vakcentrum
Blekerijlaan 1
3447 GR WOERDEN
T: +31348419771
I: www.vakcentrum.nl