

Wolt's response to the EU Commission's public consultation on the revision of the Vertical Restraints Block Exemption Regulation

I. About Wolt

Wolt is a Finnish technology company that operates a restaurant food, grocery, and retail intermediation and delivery marketplace. Our headquarter is in Helsinki and we currently operate in 23 countries and over 200 cities, serving goods from over 75,000 merchants with over 120,000 courier partners. Wolt was founded in 2014 and employs more than 3800 people today in our offices across our markets.

By operating a technology platform, Wolt aggregates demand and supply in a multi-sided market, and thereby not only brings convenience to customers, but also creates economic opportunities for local restaurants, retailers, and independent couriers providing services through Wolt's platform.

II. The instant delivery marketplace sector & the vertical restraints framework

The emergence of instant delivery marketplace platforms has been one most significant developments in online commerce in recent years. Many of these platforms – such as Wolt – initially built their business in the restaurant food vertical, but are rapidly expanding into many areas of retail, including grocery, books, toys, clothing, cosmetics, electronics, home & garden and many others. What instant delivery platforms have in common is that they offer a marketplace platform for locally established restaurants and brick-and-mortar retailers to reach the local customer base within instant delivery reach. Customers discover merchants' inventory, conclude transactions with merchants, and often choose to have products delivered to them by courier services provided by or integrated into the platform. As deliveries are performed on-demand instantly, these marketplace services equip local retailers with hyper-fast delivery, enabling them to remain relevant in competition with cross-border ecommerce service providers.

Instant delivery platforms generally receive income from two main sources: a transaction commission, that the merchant pays on each transaction concluded on the platform, and delivery fees, that customers pay for having goods that they have purchased delivered to them. Platforms thus get compensated for the marketing, advertising, customer support, and payment services that they provide to merchants only if transactions are ultimately concluded on the platform.

Instant delivery platforms compete with a variety of service providers on multiple sides of the market. On the merchant side, platforms compete with (online and offline) marketing, advertising, sales, and delivery services that merchants may use to attract and acquire new customers. On the consumer side, platforms compete with a range of intermediated and disintermediated options to discover and buy food and retail products. For the viability of the

business model, it is thus critical to ensure the attractiveness of the platform ecosystem by establishing a contractual relationship to govern key terms such as those related to third-party inventory supply, service levels, customer experience, delivery experience and pricing (vs direct distribution) through their contractual relationship with merchants.

As in many other relatively recently developed platform sectors, there has been a degree of uncertainty on how established legal frameworks are being applied to new instant delivery platform business models and markets. This holds true also for the application of competition rules. Competition authorities across EU member states have in recent years carried out investigations in the sector and have to some extent taken diverging views on how relevant markets are defined and how existing rules are applied. Authorities have focused in particular on price parity and exclusivity clauses included in platforms' contractual arrangements with their merchant partners. As instant delivery marketplaces further expand into retail verticals, we also expect questions to arise on agreements between manufacturers / brands and retailers using instant delivery marketplace services to distribute their products.

There has also been a degree of uncertainty as to how digital platforms fit in the vertical contractual chain that the Vertical Block Exemption Regulation seeks to address.

We therefore welcome the Commission's initiative to update the vertical restraints framework and thereby provide for further legal certainty also for emerging and developing business models.

III. Comments on the draft Regulation and accompanying Guidelines

The role of online intermediation services

We welcome the specific inclusion of the definition of online intermediation service providers in article 1(1)(d) the revised draft VBER, which also clarifies that online intermediation services providers qualify as suppliers under the VBER. We believe such inclusion will increase legal certainty in the platform economy and is also aligned with established case practice.

While we welcome the Commission's clarification that online intermediary services should be considered to be suppliers for the purposes of the VBER framework even if they are a party to the contract, we note that the current formulation in article 1(1)(d) of the Regulation and paragraph 63 of the guidelines on instances where an online intermediation service is party to a transaction that it facilitates is inconsistent and unclear. Paragraph 63 notes that "a provider of online intermediation services is a supplier under the VBER including where it is party to a transaction that it facilitates". At the same time, at the core of the definition of online intermediation services lies the act of facilitating transactions between platform users. A platform that is party to a contract as a buyer hence cannot by definition be simultaneously providing an online intermediation service and be a buyer. It is therefore unclear how the new rules should be understood in the context of for example a re-sale platforms, that offer a sales channel for third party merchants, but instead of facilitating a transaction between merchants and customers directly, contractually buy the products from the merchants and sell them onwards to customers.

We would hence welcome clarification on this point.

Retail parity agreements

We welcome the clarifications the Commission has aimed to bring in article 5(1)d with regards to retail parity agreements. We believe the Commission has struck the right balance by specifically excluding cross-platform parity agreements from the benefit of the block exemption while ensuring that other types of parity agreements remain to be covered by the framework.

As noted above, instant delivery platforms need to ensure the overall attractiveness of the platform ecosystem for consumers in order to generate sales for their merchant partners and incentivize those transactions to be concluded in order to get compensated for the services they provide. An important way to contribute to those objectives is to require merchants to price their products on the platform on the same or lower level than in their direct distribution. Higher prices on platforms have a direct impact on customer demand, damaging the attractiveness of the platform ecosystem and directly harming merchants through reduced sales.

Such narrow price parity clauses in agreements are hence indeed necessary to attract customers onto the platform and to avoid freeriding by merchants that could otherwise steer customer demand from the platform to their own distribution channel. They are also proportionate in the sense that they do not restrict price competition between different platform providers, unlike cross-platform parity agreements, which prevent merchants from passing lower commission levels of more efficient competitors onto consumers, thereby effectively preventing inter-platform price competition.

We note that the Commission has specifically acknowledged that narrow price parity agreements are generally efficiency-enhancing and thus covered by the block exemption.

Dual pricing, the principle of equivalence for online and offline sales, and active sales restrictions

The classification of dual pricing mechanisms as hard-core restrictions under article 4 VBER and the principle of equivalence between conditions of online sales and offline sales included in the current VBER framework has been an important driver of competitive online commerce in recent years. It has prevented manufacturers / brands from reducing retail-level competition by imposing restrictive conditions on online sales, and thereby secured healthy competition, service levels, and prices for consumers. This has also allowed new business models to flourish and retailers to develop multi-channel strategies in order to serve their customers flexibly through various channels and based on customer preferences.

We regret that the Commission has taken a step back from this principle in the current draft by no longer qualifying dual pricing as hard-core restriction under article 4 and removing the principle of equivalence from requirements for selective distribution systems.

The Commission justifies the planned change by noting that “online sales have developed into a well-functioning sales channel and therefore no longer needs special protections by qualifying certain indirect measures restricting online sales as hardcore restrictions”. Such assessment fails to recognize that online and multi-channels sales models are constantly evolving.

As noted above, instant delivery players have only very recently emerged as significant sales channels for retail partners. The services of these platforms are used by locally established brick-and-mortar retailers that seek to expand their local customer base by offering an online commerce experience coupled with local on-demand delivery. The emergence of local instant delivery platforms is a broader online commerce trend, in which online sales partially move from items shipped from central warehouses (x-border or nationally) to local on-demand delivery fulfilled by retail shops.

In such a model, retailers thus simultaneously offer the same products through their brick-and-mortar establishment and through instant delivery platforms. Therefore, their costs and investments are the same for both channels. Should their suppliers impose different prices for online sales than offline sales or otherwise impose inequivalent selective distribution criteria, it would be very difficult for them to reach new customers over platforms, hence reducing competition in the retail market.

This same concern applies to the active sales restrictions; online commerce should not be considered to solely compete with brick-and-mortar retail but to also offer a complementary sales channel to brick-and-mortar retailers. These retailers need to be able to invest into their brick-and-mortar establishments while being enabled to effectively compete online through instant delivery platform services. We hence believe the VBER should strike the right balance between incentivizing investment in local retail and cross-territory price competition.

RPMs and fair compensation in platform-enabled work

Many instant delivery platforms partner with self-employed couriers who perform the delivery of products from merchant premises to customers. Such independent platform work has been subject to much societal discussion in recent years and also the EU Commission is currently working on initiatives to ensure that platform workers are duly protected and fairly compensated.

This completely new type of work that comes with unprecedented flexibility has been facilitated by the mobile internet coupled with platform technology. For example, Wolt’s courier partners are completely free to decide when and where to work, or not to work, by simply opening or closing the app on their phone. They have no obligation to work, they can decide to accept or reject individual delivery tasks offered to them, they can unassign from a task even once they did accept it, and they can offer their services on competing platforms at the same time as being on Wolt’s platform. Many of our courier partners are providing their services to us for supplementary income, or they do deliveries during their studies. They provide their services independently, without any supervision by Wolt. It is in our view undoubtedly a good thing that mobile technology has facilitated this new way of working.

At the same time, this poses challenges from the perspectives of traditional labor law and social protections. In many countries, labor laws and social security systems are designed to protect those who are in traditional employment relationships. The kind of flexibility that the platform economy allows for, however, is available only for the self-employed.

Therefore, it is important that platforms take a role in ensuring fair working conditions for those who offer their services over platforms. This includes fair remuneration for couriers.

Broadly speaking, there are generally two main ways of organizing the way in which delivery couriers transact when using the platform:

1. “Sub-contractor model”: Platforms buy the delivery service from couriers and sell it onwards to merchants / customers. Couriers perform their services to the platform based on tasks that are offered on the courier application. Couriers invoice platforms for their service and couriers have no transactional relationship with either the merchant or the customer.
2. “Agency model”: Platforms provide a three-sided marketplace where couriers, merchants, and customer transact with each-other. Couriers provide their service directly to customer and charge them for their service, with the platform acting as the couriers’ agent.

In both models, the platform typically sets the price of delivery. In the sub-contractor model, platforms offer delivery tasks based on a pre-set compensation to couriers. In the agency model, platforms set the delivery price, which couriers charge from the customer.

There has been some uncertainty around whether the delivery price setting by platforms in the agency model amounts to an RPM restriction under the VBER framework. According to some views, couriers – as independent service providers – should freely price their services.

At the same time, the societal expectation towards platforms is to ensure that independent couriers using their services are fairly compensated and generate a decent income. If couriers could freely price their services, they would undercut each-others’ service fees, leading to downward pressure on courier earnings. Such development would be in direct conflict with social objectives set by European policy makers. From the current policy discourse around platform work in Europe, it is evident that self-employed platform workers are a distinct group that needs to be treated differently from other types of small businesses (such as retailers selling on our platform) in order to facilitate initiatives seeking to ensure fair working conditions.

We therefore believe the Commission should increase legal certainty around the pricing of platform-enabled services by recognizing social objectives as part of justified reasons to limit free price competition by solo self-employed platform workers. This would also be in line with the EU Commission’s upcoming initiative on ensuring that EU competition law does not stand in the way of collective bargaining for self-employed.