TD SYNNEX

VBER Consultation

Contribution by TD SYNNEX

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1 Introduction

TD SYNNEX welcomes the possibility to comment on the draft Vertical Block Exemption Regulation ("**Draft VBER**") and draft Vertical Guidelines ("**Draft Guidelines**").

TD SYNNEX (NYSE: SNX) is a global wholesale distributor and solutions aggregator for the IT ecosystem. We're an innovative partner helping more than 150,000 customers in 100+ countries to maximize the value of technology investments, demonstrate business outcomes and unlock growth opportunities. Headquartered in Clearwater, Florida, and Fremont, California, TD SYNNEX' 22,000 co-workers are dedicated to uniting compelling IT products, services and solutions from 1,500+ best-in-class technology vendors. Our edge-to-cloud portfolio is anchored in some of the highest-growth technology segments including cloud, cybersecurity, big data/analytics, IoT, mobility and everything as a service. TD SYNNEX is committed to serving customers and communities, and we believe we can have a positive impact on our people and our planet, intentionally acting as a respected corporate citizen. We aspire to be a diverse and inclusive employer of choice for talent across the IT ecosystem. For more information, visit www.TDSYNNEX.com.

As a technology wholesale distributor, TD SYNNEX is positioned between technology manufacturers (commonly referred to as vendors) and its customers which consist of value-added resellers (VAR), direct marketers, consumer retailers, corporate resellers and managed services providers in a very competitive market, delivering products by an extremely efficient logistics and supply organisation model and provide billions of Euro in credit to resellers. These functions, that are constantly subject to innovation and are used by stakeholders along the value chain in an opportunistic way, make the whole value chain more efficient and assure the availability of IT goods to professional end users and consumers.

As explained in more detail below, TD SYNNEX wants to focus its contribution on two specific issues in relation to which the Draft VBER and Draft Guidelines do not fully cover all relevant scenarios in the vertical supply chain. TD SYNNEX would be very happy to discuss these points in more detail with the Commission and provide precise examples if useful.

2 Fulfilment contracts (para. 178 Draft Guidelines)

TD SYNNEX welcomes the clarification in para. 178 Draft Guidelines that the fixing of resale prices in fulfilment contracts does not constitute illegal resale price maintenance (RPM). However, the Draft Guidelines do not cover all relevant scenarios in the vertical supply chain.

Currently, para. 178 Draft Guidelines is limited to the scenario that an "end user" concludes the "prior agreement" with the supplier. However, it is conceivable that the "prior agreement" may be concluded between the manufacturer and another intermediary who purchases from the buyer (e.g. a retail chain may want to pre-agree the price directly with the manufacturer before purchasing from a wholesaler – currently not covered by the Draft Guidelines) or – in a supply chain with more than two intermediaries – between two intermediaries (e.g. a retail chain considers to pre-agree the price with the wholesaler or importer before purchasing from a sub-distributor – currently not covered by the Draft Guidelines).

As the Draft Guidelines confirm, the VBER applies to vertical agreements between two or more undertakings on "all levels of trade" (para. 3) and "irrespective of their business model" (para. 54). Each of the different vertical relationships in the chain are covered by the Draft VBER and Draft Guidelines. There is no economic or legal reason why this general rule should not also apply to para. 178. In particular, the reasoning why the fixing of the resale price in fulfilment contracts does not constitute illegal RPM also applies to these scenarios: No matter where in the supply chain, if a specific customer of a buyer concludes a prior agreement with a supplier regarding the resale price, the resale price is no longer subject to competition in relation to that customer of the buyer.

In addition, limiting the "prior agreement" to "end users" factually excludes many consumers from the advantages of lower prices in fulfilment scenarios. Consumers will normally not be able to directly reach a "prior agreement" with any supplier. However, consumers benefit if retailers are able to conclude "prior agreements" with suppliers and pass on lower prices to consumers.

In para. 178, the term „reseller" should therefore be added besides the „end user". If the Commission deems necessary, it may also be clarified that the term „supplier" in this context covers any seller in the value chain upstream the retail level (i.e. not only the manufacturer but also wholesalers, importers and any other intermediary reseller)[1].

TD SYNNEX would therefore suggest the following changes to para. 178 Draft Guidelines:

> *"The fixing of the resale price in a vertical agreement between a supplier and a buyer that executes a prior agreement between the supplier and a specific reseller or end user (hereinafter "fulfilment contract") does not constitute RPM where the reseller or end user has waived its right to choose the undertaking that should execute the agreement. In such a case, the fixing of the resale price does not result in a restriction of Article 101(1) since the resale price is no longer subject to competition in relation to the reseller or end user concerned. […] In contrast, where the reseller or end user has not waived its right to choose the undertaking that should execute the agreement, the supplier cannot fix the resale price without infringing Article 4(a) VBER. However, it may set a maximum resale price with a view to allowing price competition for the execution of the agreement."*

3 Vertical agreements between competing undertakings (Art. 2(4) Draft VBER)

TD SYNNEX welcomes the clarification that Art. 2(4) VBER also applies to other suppliers besides the manufacturer. However, the current wording does not cover all relevant scenarios in the vertical supply chain.

First, as already mentioned above, the term "supplier" should be understood to cover any level of trade where B2B sales take place along the vertical retail chain. It should therefore be clarified that besides manufacturers,

[1] The European Commission may consider reintroducing the clarification in para. 2 of the current Vertical Guidelines („The terms 'supplier' and 'buyer' are used for all levels of trade.").

wholesalers and importers, also any other intermediary reseller upstream the retail level is covered by Art. 2(4) Draft VBER.[2]

In addition, the Draft VBER ignores that competition between the supplier and the buyer may not only take place on the retail level but also on any intermediary level of trade between the manufacturing and the retail level. This is for example the case where the manufacturer is also active on the wholesale level (in competition with its wholesalers). Art. 2(4) Draft VBER should cover all situations where the supplier is active on two levels of trade and thereby competes with its buyer on the buyer's level. The aggregate market share threshold should accordingly relate to the respective buyer's level. There is no economic or legal reason why different levels of trade should be treated differently, also in view of the above-mentioned principles in paras. 3 and 54 Draft Guidelines.

TD SYNNEX would therefore suggest the following changes to Art. 2(4) Draft VBER[3]:

> *"The exemption provided for in paragraph 1 shall not apply to vertical agreements entered into between competing undertakings. However, the exemption provided for in paragraph 1 shall apply to all aspects of a non-reciprocal vertical agreement between competing undertakings where:*
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> *(a) the supplier is a manufacturer, wholesaler, or importer and a distributor of goods, while the buyer is a distributor, wholesaler, or importer, and not a competing undertaking at the ~~manufacturing, wholesale or import~~ relevant upstream level, and their aggregate market share in the relevant market at ~~retail~~ downstream level does not exceed [10]%; or*
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> *(b) the supplier is a provider of services at several levels of trade, while the buyer provides its services at ~~the retail~~ a downstream level and is not a competing undertaking at the level of trade where it purchases the contract services, and their aggregate market share in the relevant market at ~~retail~~ downstream level does not exceed [10]%.*

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[2] As mentioned above, this could also be done by reintroducing the clarification in para. 2 of the current Vertical Guidelines regarding the term "supplier".

[3] Paras. 86-88 Draft Guidelines would need to be amended accordingly.