COMMENTS OF THE AMERICAN BAR ASSOCIATION ANTITRUST LAW SECTION AND INTERNATIONAL LAW SECTION ON THE EUROPEAN COMMISSION'S CONSULTATION ON THE DRAFT REVISED REGULATION ON VERTICAL AGREEMENTS AND VERTICAL GUIDELINES

September 16, 2021

The views stated in this submission are presented on behalf of the Antitrust Law Section and International Law Section. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

The Antitrust Law and International Law Sections (the Sections) of the American Bar Association (ABA) respectfully submit these comments in response to the European Commission's (the Commission's) consultation (the Consultation)[1] on the proposed revised texts of the Vertical Block Exemption Regulation (Revised VBER) and related Guidelines (Revised VGL). The Sections previously submitted comments on the Commission's Vertical Block Exemption Regulation Consultation Document.[2] The Sections are available to provide additional comments or assistance in any other way that the Commission may deem appropriate. These comments are based upon the extensive experience of the Sections' members in competition law around the world.

The Antitrust Law Section is the world's largest professional organization for antitrust and competition law, trade regulation, consumer protection and data privacy as well as related aspects of economics. Section members, numbering over 9,000, come from all over the world and include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as judges, professors and law students. The Antitrust Law Section provides a broad variety of programs and publications concerning all facets of antitrust and the other listed fields. Numerous members of the Antitrust Law Section have extensive experience and expertise regarding similar laws of non-U.S. jurisdictions. For nearly thirty years, the Antitrust Law Section has provided input to enforcement agencies around the world conducting consultations on topics within the Section's scope of expertise.[3]

The International Law Section focuses on international legal issues, the promotion of the rule of law, and the provision of legal education, policy, publishing and practical assistance related to cross-border activity. Its members total over 11,000, including private practitioners, in-house counsel, attorneys in governmental and inter-government entities, and legal academics, and represent over 100 countries. The International Law Section's 56 substantive committees cover competition law, trade law, and data privacy and data security law worldwide as well as areas of law that often intersect with these areas, such as mergers and acquisitions and joint ventures. Throughout its century of existence, the International Law Section has provided input to debates relating to international legal

[1] European Comm'n, Public consultation on the draft revised Regulation on vertical agreements and vertical guidelines, available at https://ec.europa.eu/competition-policy/public-consultations/2021-vber_en.
[2] Available at https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/march-2021/comments-32621-eu.pdf.
[3] Past comments can be accessed on the Antitrust Law Section's website at: https://www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs/.

policy.[4] With respect to competition law and policy specifically, the International Law Section has provided input for decades to authorities around the world.[5]

I. Dual Distribution

The Revised VBER reflects the Commission's reevaluation of the permissive treatment in the existing Vertical Block Exemption Regulation (Current VBER) of dual distribution reflected in Article 2(4) of the Current VBER in light of what the Commission referred to as the "risk of exempting vertical agreements, where horizontal concerns are no longer negligible and the conditions of Article 101(3) TFEU are not satisfied." The Revised VBER maintains the current approach where the parties' combined market shares are below 10%. Above 10% and up to the 30% market share threshold for application of the Current and Revised VBERs, exchanges of information would not be block-exempted, but would be "excluded restrictions" subject to self-assessment.

The Sections generally support the Commission's approach, subject to two observations. First, the concepts of relevant market and market shares are particularly difficult to apply in the context of mixed online and traditional distribution channels. The Sections encourage the Commission to include guidance on this point in the context of its ongoing review of the market definition notice.

Second, different considerations may apply to exchanges of information in the dual distribution context compared to other contexts, given suppliers' need to manage their overall distribution strategy. The Sections note that the assessment of information exchanges is currently under review in the context of the Commission's review of its horizontal block exemption regulations (HBERs).

The Sections encourage the Commission to provide guidance on the topic of information exchanges in the context of dual distribution systems in the Revised VGL, considering the gap in time between the adoption of the Revised VBER and VGL and any revised HBERs and related guidelines (HGL) (cf., para. 83 Revised VGL). In particular, the Commission could use the Revised VGL to clarify what kinds of communications, particularly in respect of pricing or discounting practices, between a manufacturer engaged in dual distribution and its resellers would be considered lawful under, or in violation of, Article 101(1) TFEU. The Sections consider that this clarification is particularly important in view of: (i) the exclusion in Article 2(6) of the Revised VBER of object restrictions of competition – which may include certain information exchanges – from the scope of the dual distribution exemption; and (ii) the fact that paragraph 87 of the Revised VGL expressly states that the dual distribution exemption should be interpreted narrowly.

Even if guidance on the assessment of information exchanges in this context is deferred to the revised HGL, the Sections recommend that the revised HGL separately discuss the issue of information exchanges in the dual distribution context.

II. Active Sales Restrictions

The Sections support the Commission's decision, reflected in the Revised VBER, to give suppliers more flexibility to combine exclusive and selective distribution in the same or different territories, while protecting selective distribution systems against sales from outside the territory in which the system is operated.

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[4] American Bar Association, International Law Section Policy, *available at* https://www.americanbar.org/groups/international_law/policy/about/.

[5] Past comments can be accessed on the International Law Section's website at: https://www.americanbar.org/groups/international_law/policy/blanket_authorities_initiatives/.

III. Indirect Restrictions of Online Sales

The Sections support the Commission's decision, reflected in the Revised VBER and VGL, to no longer treat dual pricing or a lack of equivalence between online sales and physical stores as a hard-core restriction. The Revised VBER and VGL will give suppliers greater flexibility to incentivize investments, notably in physical stores, by allowing them to differentiate wholesale prices based on the costs of each channel and mitigating the legal uncertainty inherent in the equivalence principle. Online and offline sales channels are inherently different, and it is difficult to assess when a divergence in the criteria used for each channel amounts to a hardcore restriction under the VBER.

IV. Parity Obligations

The Sections note that the Revised VBER and VGL take a more restrictive approach to parity obligations, sometimes also known as Most Favored Nations clauses, or "MFNs". Under the Current VBER, all types of parity obligations are currently block-exempted. Under the Revised VBER, parity obligations causing buyers of online intermediation services not to offer, sell or resell goods or services to end users under more favorable conditions using competing online intermediation services (so-called "wide" or "across-platform" parity clauses) are treated as excluded restrictions and therefore subject to self-assessment.

The Sections submit that this approach will result in legal uncertainty. The Sections note that both wide and narrow price parity clauses may be inspired and justified by significant efficiency considerations and that, in both cases, anti-competitive effects, if any, are likely to arise only if the platform at hand has significant market power. In particular, free-riding on the platform's investment can be a genuine concern for platforms that requires careful evaluation. As a general matter, the Sections believe that the general 30% market share thresholds, coupled with additional guidance in the VGL, are effective in identifying any potentially anticompetitive use of wide and narrow price parity clauses.

The Sections note that the Revised VGL contains some guidance on the assessment of across-platform parity clauses, but this guidance seems insufficiently clear and, in some respects, overly restrictive. Paras. 337-344 provide some guidance on the circumstances in which wide parity clauses may be caught by Article 101(1) TFEU, noting (para. 338) that "key factors are the share of buyers of the online intermediation services that are covered by the obligations; the homing behavior of buyers of the online intermediation services and of end users (how many intermediary platforms they use); the market position of the supplier that imposes the obligation and of its competitors; the existence of barriers to entry to the relevant market for online intermediation services, and the impact of direct sales by buyers of the services."

However, in the Sections' view, the description of each of these factors could and should be expanded. The indication in para. 344 that "restrictive effects will generally only be attributed to the parity obligations of suppliers whose market share exceeds 5%" is problematic because the Sections believe that the 5% market share figure is unrealistically low. The Sections believe that this figure should be increased to at least 10% in line with the Commission's *de minimis* notice.

Equally important, the Sections believe that the Revised VGL should provide clearer guidance on the circumstances (discussed in paras 351-53) in which wide parity clauses may qualify for exemption under Article 101(3) TFEU. The Sections suggest combining the discussions of the application of Article 101(1) TFEU and Article 101(3) TFEU to clarify circumstances in which potential efficiencies may be able to offset each of the risk factors currently discussed in paras. 337-344.

V. Resale Price Maintenance

The VBER Consultation noted that RPM is considered a hardcore restriction under the VBER and a by-object restriction under Article 101(1) TFEU, even though both the current and Revised VGL recognizes that supplier-driven RPM may lead to efficiencies, for example to achieve an expansion of demand during the launch of a new product or to avoid the undercutting of a coordinated short-term low-price campaign in a franchising system.

The Sections note that the Revised VBER and VGL maintain the structure of the Current VBER and VGL, although the discussion of RPM has been consolidated and clarified in the Revised VGL (paras. 170-186). The Sections welcome this improvement and clarifications, for example as regards the treatment of RPM in the agency agreement context and the fact that so-called "fulfillment contracts" do not constitute RPM (para. 178).

Nonetheless, the Sections urge the Commission to reconsider the current approach, since treating all RPM as hardcore restrictions almost certainly will deter companies from using RPM even in the circumstances set out in para. 182, which the Commission recognizes may be procompetitive.[6] Treating RPM as a hardcore restriction even in such circumstances dampens incentives to engage in procompetitive RPM, because many companies prefer not to incur the financial and reputational risk of including any hardcore restrictions in their vertical agreements and thereby taking their entire distribution system outside the VBER.

One option to avoid this result would be to include RPM as an excluded restriction, requiring contracting parties to assess the legality of any proposed RPM based on the factors discussed in the Revised VGL. A better option could be to expressly exempt RPM in circumstances in which it is recognized as offering efficiencies. This approach would increase legal certainty especially in an environment where RPM is considered a by-object infringement subject to divergent enforcement policies in different Member States.

VI. Non-compete Obligations

Under the Current VBER, non-compete obligations of an indefinite duration or exceeding five years are excluded from the benefit of the VBER and therefore require an individual effects-based assessment under Article 101 of the Treaty. Non-compete obligations that are tacitly renewable beyond a period of five years are deemed to have been concluded for an indefinite duration. The Sections welcome the approach in the Revised VBER, which block-exempts tacitly renewable non-compete obligations for the duration of the agreement, provided that the buyer can terminate or renegotiate the agreement at any time with a reasonable notice period and at reasonable cost. However, the Sections suggest that the Commission revise para. 234 of the Revised VGL to provide additional guidance on what constitutes a reasonable period of time and/or reasonable cost.

[6] As the Commission will be aware, federal antitrust law in the United States abandoned per se illegality of resale price maintenance in 2007 because "it cannot be stated with any degree of certainty that resale price maintenance always or almost always tends to restrict competition or decrease output." Leegin Creative Leather Products v. PSKS, 127 S.Ct. 2705, 2717 (2007) (internal citation and quotation markets omitted). In so holding, the U.S. Supreme Court observed that "[v]ertical agreements establishing minimum resale prices can have either procompetitive or anticompetitive effects, depending upon the circumstances in which they are formed. And although the empirical evidence on the topic is limited, it does not suggest efficient uses of the agreements are infrequent or hypothetical. As the rule would proscribe a significant amount of procompetitive conduct, these agreements appear ill suited for per se condemnation." Id. at 2717-18 (internal citations omitted).

VII. Sustainability Agreements

The VBER Consultation noted that, in line with the objectives of the European Green Deal, the impact assessment phase of the VBER review should take account of the impact on sustainability objectives of agreements between supply chain operators. The Sections note that the Revised VBER and VGL do not appear to address the relevance of sustainability objectives in the assessment of vertical agreements. The Sections respectfully recommend that the Commission provide such guidance in the VGL, for example in the assessment of the need for RPM in the context of an initiative to promote sustainable supply chains to overcome "first mover disadvantage."

VIII. Impact of the COVID-19 Crisis

The Sections note that the Revised VBER and VGL do not appear to reflect any lessons deriving from the experiences of the Commission and business in responding to the COVID-19 crisis. One such lesson was the need for effective channels of communication between business and antitrust authorities. The Sections commend the Commission for its initiative in creating a special portal for businesses to seek informal guidance on cooperative initiatives in response to the COVID-19 crisis. The Sections encourage the Commission to maintain and expand that communication channel even outside the COVID-19 context and to include relevant guidance in the Revised VGL. Indeed, the Sections note that other authorities launched similar initiatives that appear to have generated significant interest, suggesting that there is scope for further improvement to attract more participation.[7]

IX. Conclusion

The Sections appreciate this opportunity to provide their views on the Revised VBER and VGL and are available for any further consultation the Commission may deem appropriate.

[7] *See*, *e.g.*, Press Release, *The Justice Department and the Federal Trade Commission Announce Expedited Antitrust Procedure and Guidance for Coronavirus Public Health Efforts* (March 24, 2020), available at https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-announce-expedited-antitrust-procedure-and.