EuroCommerce for retail & wholesale

Position paper

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Vertical Block Exemption Regulation and Guidelines – EuroCommerce views on the Commission proposed drafts

EuroCommerce welcomes the opportunity offered by the European Commission to comment on the draft Vertical Block Exemption Regulation and Guidelines ('VBER' and 'VGL') published on 9 July 2021.

EuroCommerce represents the retail and wholesale sector in Europe. Our members are active as distributors in the supply chain as buyers, sellers and resellers to other businesses (industry or retail) or end users (consumers) online, offline and omnichannel. The VBER and VGL are an indispensable source for shaping and adapting the vertical relations of our members with their suppliers and customers as they provide the necessary legal certainty.

Key messages

- EuroCommerce stresses the importance of strong competition in the Single Market as the best way of achieving global competitiveness and ensuring that both business customers and consumers continue to have a wide choice of innovative and affordable products and services; this includes the need for consistent enforcement of competition rules by the European Commission and National Enforcement Authorities;
- EuroCommerce believes the vertical rules have worked well but need adaptation, in particular to a digital environment, in which consumers interact with businesses through online, offline and omnichannel options;
- EuroCommerce reiterates the importance for retailers and wholesalers to set their own prices freely and welcomes the Commission's continued strong stance against any kind of direct or indirect resale price maintenance, including minimum advertising prices that legally or functionally limit the freedom of retailers and wholesalers to set prices;
- EuroCommerce notes the growing development of dual distribution setups by suppliers, who are becoming direct competitors to their distribution networks and welcomes the proposal to clarify provisions on exchange of information in such circumstances;
- vertical restraints which damage the integrity of the single market, including territorial supply restrictions, should be considered hardcore restrictions and not benefit from any exemption;
- EuroCommerce is concerned that some of the revised rules on selective and exclusive distribution systems allow an unjustified use of such systems to the detriment of consumers and the integrity of the single market;
- EuroCommerce emphasises the importance of supporting offline sales efforts; however is concerned about possible unintended effects of the proposals on dual pricing;
- EuroCommerce reiterates the importance of marketplaces in today's economy and their use by consumers and warns against allowing unjustified restrictions on their use and possible detrimental impact in particular on SMEs; EuroCommerce questions the reasons to exclude online marketplaces with a hybrid role from the VBER, which will lead to greater legal uncertainty for both the marketplaces and their business users.

1. Dual distribution

1.1. The Commission proposes a number of changes in the Regulation and the Guidelines in relation to dual distribution, mainly due to the increase of dual distribution in the EU. EuroCommerce agrees with the Commission's analysis that dual distribution scenarios have become more prominent due to digitalisation over the past 10 years and increased even further as a result of the COVID-19 pandemic. Brand suppliers are investing heavily in their own direct-to-consumer channels via their own web shops, platforms, subscription models or other means to help them stand out, establishing a direct relationship with consumers and competing directly with their distributors.[1] This may raise competition concerns in particular in relation to information exchange. We further raise the need for clarification in relation to application of the rules in franchise systems and welcome the suggested clarification in relation to importers and wholesalers.

Information exchanges

1.2. The Commission proposes to assess information exchange in the context of dual distribution as a horizontal exchange under the Horizontal Guidelines. This is also reflected in the context of the current review of the horizontal guidelines[2].

1.3. In our view, however, two conditions should be met to ensure a sufficient degree of legal certainty:

(a) the Horizontal Guidelines should provide clear and concrete examples of what type of information (as well as the age and level of aggregation) **may be** exchanged in a dual distribution context for the purposes of a proper functioning of the vertical relationship between the supplier and the distributor (e.g. information necessary for campaign planning, quantities, timing or logistical details). The guidelines should also clearly identify what information **cannot** be shared in such a situation, even if it is intended to ensure the proper functioning of the vertical agreement (such as future prices and discounts).

(b) The Vertical Guidelines should at least include a clear statement stressing the need to ensure a level playing field in dual distribution scenarios.

1.4. Some further comments in relation to dual distribution and franchise systems are included in Section 5 of this paper below.

Extension of the rules to importers and wholesalers

1.5. EuroCommerce welcomes the extension of the dual distribution exemptions as provided under the VBER and VGL to importers and wholesalers: the Commission own evaluation study confirmed our view that there was no compelling evidence for the exemption not to apply to transactions involving two distributors, including one that is an importer or a wholesaler, since

[1] As an illustration, Nike's fiscal year ending in May 2021 saw a 32% increase in direct-to-consumers sale (compared to a 12% growth in sales to wholesalers). In March 2021, Adidas presented its growth strategy where DTC is projected to account for half of the net sales by 2025. DTC models can be developed organically or through acquisitions. According to retail week in 2020, Unilever had acquired no less than 29 DTC companies since 2015 (source: retail week here). In February 2021, Nestlé acquired the recipe kit company SimplyCook in the UK, its fourth acquisition in four years to go DTC.

[2] See https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13058-Horizontal-agreements-between-companies-revision-of-EU-competition-rules/public-consultation_en.

the situation is very much same as when a manufacturer competes with a retailer.

Conclusions

EuroCommerce would suggest the following changes to the draft rules:

- The HGL should provide clear and concrete examples of what type of information (as well as the age and level of aggregation) can and cannot be exchanged in a dual distribution context (including in franchise relationships)
- The Vertical Guidelines should contain a clear statement stressing the need to ensure a level playing field in dual distribution scenarios

2. Providers of online intermediation services

2.1. The new draft rules define providers of online intermediation services as suppliers for the purposes of the VBER and VGL and state that platforms with a hybrid function (i.e. that act both as a retailer and marketplace operator) fall outside of the scope of the VBER.

2.2. We would seek clarification as to whether the Regulation and Guidelines define providers of online intermediation services as suppliers only **of such intermediation services**, or also as suppliers in all other vertical relationships, for example when sourcing products or providing products or services which consumers purchase on such platforms.

2.3. EuroCommerce believes that there is no basis for excluding the retail activities of intermediary services providers from the draft VBER or to treat them differently than any other dual distributor. The current text creates legal uncertainty in contradiction with the objective of the VBER and could unduly discriminate hybrid platforms by imposing on them - and on all of their contractual partners, such as suppliers – the obligation to self-assess all restrictions imposed e.g. by a brand owner for distribution of its products. This would be especially burdensome for SMEs which do not have the means to conduct such self-assessment.

2.4. As a result, we believe the text should be amended to ensure that the retail activities of hybrid platforms and their contractual partners are not unduly excluded from the VBER: such platforms should be in the same position as other actors under dual distribution under art 2 VBER.

Conclusions

EuroCommerce would suggest the following changes to the draft rules:

- A clarification on the definition of platforms as suppliers
- platforms with a hybrid function should be covered by the Block Exemption Regulation

3. Resale price maintenance (RPM)

3.1. EuroCommerce welcomes the Commission's strict stance on RPM against any suppliers' attempt to limit the freedom of retailers to set their own prices independently and the further clarification included in the draft guidelines. The DG COMP e-commerce enquiry showed that digitalisation had led to greater price transparency, and as a result made it easier for manufacturers to

monitor, seek to influence, or even enforce, prices on retailers;[3] in fact, the majority of infringements which have taken place in the past ten years related to RPM.

3.2. We however remain concerned with some of the suggested drafting.

Minimum advertising price

3.3. The Commission introduces the concept of Minimum Advertising Price Policies ('MAPs') which prohibit retailers to set advertising prices below a certain amount set by the supplier. The Guidelines note in para. 174 that MAPs may amount to RPM *in some instances*. The ambiguous wording raises issues of legal uncertainty and creates the risk of being interpreted as a policy change on RPM.

3.4. Indeed, while the draft Guidelines would allow retailers to communicate that the final price could differ from the advertised price in the presence of MAP, retailers have obligations under consumer law preventing them from misleading consumers.

3.5. Additionally, prices on the shelf and online constitute advertising prices within the meaning of the EU Price Indication Directive. Differentiating between advertising prices and retail prices is hence hardly possible in practice. Even with a narrow interpretation of the term "advertising price", i.e. without including the regular price display on the shelf, legal and binding requirements for advertising prices would de facto amount to a ban on highlighting sales prices in shops to promote sales. This would correspond to a de facto ban on price advertising if the retailer continued to set the sales prices autonomously even below the manufacturer's specifications for advertising.

3.6. This would mean that price advertising with branded articles would no longer make sense for the retailer, as it would no longer be possible to differentiate oneself through the advertising price. Price advertising with branded articles would then take place much less or that the higher advertising prices would also lead to higher shelf prices due to the necessary price distances and thus be to the detriment of the end consumer. This would be to the disadvantage of small and medium-sized retailers because the minimum advertising prices determined by the manufacturers will in practice correspond to the new shelf prices of the strong retailers - as permanently low prices. While larger retailers could do this and thus prove their efficiency. Medium-sized and small retailers are not in a position to do so and would suffer proportionately more from the change.

3.7. To prevent any possible misunderstanding, we would suggest replacing the wording "may also amount to RPM" in para. 174 with "are a form of RPM", making it explicit in the text that that the Commission is not envisaging any policy change in relation to MAP and that MAP, which is a subset of recommended retail price, is only lawful if it is non-binding. Legalising MAP would furthermore require an impact assessment as it would be a policy change.

3.8. We would also note that in the German version of the draft Guidelines, para. 174 mentions 'minimum price' and not 'minimum advertised price'. We would invite the Commission to ensure consistency among the various versions of the Guidelines.

[3] Report from the commission to the council and the European parliament Final Report On The E-Commerce Sector Inquiry {SWD(2017) 154 Final} Brussels, 10.5.2017 COM(2017) 229 Final.

Assessing possible efficiency enhancing effects of RPM

3.9. We understand the rationale behind para. 182 of the draft VGL providing examples where RPM may lead to efficiencies and where suppliers could therefore put forward concrete evidence to meet the criteria of Article 101(3) TFEU. We are however concerned that the current drafting encourages suppliers to engage in RPM in contradiction with other paragraphs in the draft rules.

3.10. Para. 182(b) of the draft VGL states that RPM for short terms low price campaigns may be necessary "in particular" in uniform-format distribution systems, such as for example franchising, thus suggesting that fixed resale prices within short-term campaigns may be lawful in the context of other distribution systems as well.

3.11. Additionally, in German version of the draft Guidelines, para. 182(b) states that fixed resale prices could always be considered on balance pro-competitive ("Angesichts ihres vorübergehenden Charakters kann die Festsetzung von Festpreisen im Einzelhandel insgesamt als wettbewerbsfördernd angesehen werden").

3.12. We fear that these changes will encourage suppliers to engage in RPM and undermine the statements in paras. 170, 171, 174, 180 and 181 and would hence invite the Commission to:

- keep the current explicit limitation to uniform-format distribution systems, such as franchising;
- clarify that only "in individual cases" such resale prices may be considered on balance pro-competitive. (English: "Given its temporary character, in individual cases, the imposition of fixed retail prices may be considered on balance pro-competitive."; in German: "Angesichts ihres vorübergehenden Charakters kann die Festsetzung von Festpreisen im Einzelhandel in Einzelfällen wettbewerbsfördernd sein.").

3.13. In relation to short-term low-price campaigns under para. 182(b), we would invite the Commission to clarify how frequently the mentioned short-term campaigns of up to 6 weeks could take place, in order to avoid the possibility for suppliers to resort to such campaigns (and hence to RPM) too frequently to the detriment of competition.

3.14. We would also invite the Commission to provide further guidance or alternatively remove the reference in para. 182(c) to RMP leading to efficiencies in the case of "complex or experience" products. We believe this change would lead suppliers to present large parts of their assortment as "complex or experience products", thus leading to legal uncertainty and potential distortions of competition.

3.15. We would also invite the Commission to provide guidance on how retailers may deal with suppliers' claims that a short-term price campaign with fixed retail prices would be exempted by Article 101(3) TFEU, since a retailer would expose itself to a competition law violation by agreeing to such prices without confirmation that the conditions of Article 101(3) are met.

Conclusions

EuroCommerce would suggest the following changes to the draft rules:

- clarify that MAP amounts to RPM (unless it is non-binding)
- ensure consistency between the English and German version of paras. 174 and 182(b)

- provide guidance on what a complex product is under para. 182(c) or alternatively delete "in particular in case of experience or complex products" from para. 182(c)
- provide clarifications on the frequency of short term low price campaigns; provide guidance how retailers may deal with suppliers' claims that a short-term price campaign with fixed retail prices would be exempted by Article 101(3) TFEU

4. Distribution systems

4.1. The Commission proposes to amend Article 4 VBER on hardcore restrictions within the three available distribution systems (exclusive, selective and no distribution system) and include new wording on how these systems work. We recognise as a positive change that the Regulation now provides clear boundaries on what is lawful and what constitutes a hardcore restriction within or without a distribution system.

Selective distribution

4.2. Selective distribution systems are important for many SMEs, specialist retailers and wholesalers and can make a significant contribution to efficiency benefits to consumers and guarantee a high level of quality advice.

4.3. In relation to selective distribution, the draft VGL recognise that the block exemption applies regardless of the nature of the product, but when the characteristics of the product do not require the presence of a selective distribution system, such system would not bring about sufficient efficiency enhancing effects and the benefit of the VBER is likely to be withdrawn (para. 136 draft VGL).

4.4. In line with the decision of the Court of Justice in *Coty*[4], we continue to believe that the Guidelines should clearly provide that selective distribution **only** be exempted when the characteristics of the products require it.

4.5. The Commission itself has recognised the increase of the use by suppliers of selective distribution in the last decade, including in cases not justified by the product's characteristics, in order to impose more restrictions on their distributors and retain greater control over their sales channels, and by implication, prices.

4.6. Additionally, we are concerned that over the past decade no use has been made of the possibility to withdraw the benefit of the block exemption on account of the inappropriate nature of the product, meaning that this procedure may not be suitable or effective to address difficulties of this nature. The ineffectiveness of this procedure has been noted by national competition authorities too.[5]

4.7. The draft Guidelines also provide that the qualitative criteria to be appointed as an authorised distributor in selective distribution do not have to be made known to all potential resellers,

[4] *Coty Germany GmbH v Parfümerie Akzente* GmbH ECLI:EU:C:2017:941 paragraphs 24 and following.
[5] Summary of the contributions of the National Competition Authorities to the evaluation of the Vertical Block Exemption Regulation (EU) No 330/2010, available here: https://ec.europa.eu/competition-policy/system/files/2021-04/vber_ncas_summary.pdf.

although transparency in relation to such criteria may increase the likelihood of fulfilling the Metro criteria (para. 134).

4.8. We continue to believe that the Guidelines should at a minimum indicate that the criteria should be disclosed to bona fide retailers upon request.

4.9. This would create a level of transparency that would contribute to the correct and justified application of selective distribution within the framework of the block exemption and assist the Commission and the NCAs in the effective enforcement of the future regime.

4.10. In view of the foregoing, EuroCommerce suggests the VBER and VGL make it explicit that selective distribution system means a distribution system necessitated by the nature of the contract goods or services and where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to a limited or unlimited number of distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system.

4.11. 'Specified criteria' means criteria of a qualitative nature which are specified and applied in a non-discriminatory manner to all the selected distributors, which do not result in the unjustified exclusion of particular sales channels, and which are made available to potential applicants upon demand.

Exclusive distribution

4.12. Exclusive distribution systems are also important for many SMEs, specialist retailers and wholesalers: they can make a significant contribution to efficiency, deliver benefits to consumers, guarantee a high level of quality advice and protect and support the distributors' sales efforts. Exclusive distribution can support entrepreneurship, contribute to employment and in supporting retail contribute to the city centre eco-system.

4.13. In relation to exclusive distribution, EuroCommerce is concerned that the current text could allow 'shared exclusivities', i.e. a supplier reserving for one or a limited number of retailers a certain customer group or territory. This would present a high risk of market partitioning and 'shared exclusivities' could be used as an alternative to unjustified selective distribution as no criteria would need to be defined, especially due to the unclear meaning of the term 'limited'. We would invite the Commission to consider providing a definition of such term so that it is not left up to suppliers, with the risk of a wide interpretation of the concept to the detriment of the integrity of the single market.

However, if the European Commission were to retain this wording in the final legislative texts, two matters would need to be clarified and confirmed accordingly. We are concerned that the proportionality test may lead to legal uncertainty as Article 1(1)(g) of the draft VBER and paras. 102, 107 and 125 of the draft Vertical Guidelines do not provide any further clarification as to how compliance can be established. Furthermore, only paras. 107 and 205 of the Vertical Guidelines contain an indication of the possible sanction in case of failure to comply. Given its importance, it would seem appropriate to have the sanction mechanism confirmed explicitly in the text of the VBER.

Conclusions

EuroCommerce would suggest the following changes to the draft rules:

- The VBER and VGL should provide that a selective distribution system must be necessitated by the nature of the contract goods or services
- The Guidelines should at a minimum indicate that the criteria of a selective distribution system should be disclosed to bona fide retailers upon request
- In selective distribution systems, the supplier selects a limited or unlimited number of distributors selected on the basis of specified criteria. We suggest defining 'specified criteria' means criteria of a qualitative nature which are specified and applied in a non-discriminatory manner to all the selected distributors, which do not result in the unjustified exclusion of particular sales channels, and which are made available to potential applicants upon demand.
- Clarify the meaning of the term 'limited' in relation to shared exclusivity in exclusive distribution

5. Franchise systems

5.1. Franchise systems are a kind of distribution system where exchange of information (such as know-how) is particularly important.

5.2. We are concerned that the Commission's new proposed approach in the new Article 2 of the VBER might be inconsistent with the Commission's rules for franchise systems and would suggest adapting them to ensure the necessary legal certainty for the proper functioning of franchise relationships.

5.3. The draft Guidelines maintain that obligations on the franchisee to communicate to the franchisor any experience gained in exploiting the franchise (para. 82(d) VGL) fall outside the scope of Article 101(1) and that franchise agreements are in general covered by the VBER where both the supplier's and the buyer's market shares do not exceed 30% (para. 151).

5.4. However, draft Article 2(5) VBER would only exempt vertical aspects of franchise agreements, while the exchange of information would be assessed under the (revised) Horizontal guidelines. In fact, the Commission explicitly refers to para. 86-95 VGL in footnote 65 of the VGL.

5.5. We fear that draft Article 2(5) VBER will create a lack of legal certainty for many franchise systems, where the exchange of competitively sensitive information is essential (and indeed where the franchisor has an obligation to pass on to its franchisee system-relevant know-how gained from its own locations and from those operated by other franchisees). Further, the franchisor has a contractual secondary obligation to provide timely information about important matters affecting the franchise system. For these reasons, the CJEU recognized in *Pronuptia* that the franchisor and the franchisee may exchange certain information to ensure the efficient functioning of the system. However, the type of information that must necessarily be exchanged and any limits of information sharing within franchise systems have never been substantiated.

5.6. It is for these reasons that we would ask the Commission to clarify that, consistently with the *Pronuptia* judgment, exchanges of information to ensure the efficient functioning of a franchise system fall outside the scope of Article 101(1) and are exempted from the rules of Article 2 VBER.

We would also ask the Commission to clarify in the Guidelines what type of information may be exchanged in the context of the franchise systems and whether and to what extent mechanisms such as Chinese walls would be sufficient to address concerns on potential anticompetitive effects.

Conclusions

EuroCommerce would suggest the following changes to the draft rules:

- The VBER and VGL should clarify that on the basis of the *Pronuptia* judgment exchanges of information to ensure the efficient functioning of a franchise system fall outside the scope of Article 101(1)
- The VGL should clarify the type of information necessary to the efficient functioning of the franchise systems which falls outside of the scope of Article 101(1)

6. Territorial supply constraints

6.1. The Commission proposes to include new wording to para. 189 tackling certain types of indirect obligations leading to territorial restrictions and hence partially addressing the matter of territorial supply constraints.

6.2. Territorial Supply Constraints ('TSCs') are understood as barriers imposed by private operators (suppliers) in the supply chain, which can affect retailers or wholesalers. These may impede or limit the retailers' or wholesalers' ability to source goods in other EU countries than the one they are based in, and/or prevent them from distributing (i.e. reselling) goods to other EU countries than the one in which they are based. Typically, retailers or wholesalers subject to TSCs are referred to a specific national subsidiary of the supplier. For example, they can be barred from being supplied from abroad or the products may be differentiated to make cross-border supplying impossible. A study by DG GROW[6] confirms the existence and scale of the problems, also highlighted in other studies, including by Benelux or the European Central Bank, and further shows the diverse nature of practices resulting in costs to European consumers at least €14bn.

6.3. The Commission practice (e.g. in the *AB-Inbev* case[7]) showed that TSCs can also be implemented in highly subtle and automatic ways. In 2014, AB-Inbev changed the packaging of its most popular beer brand in the Netherlands to make it harder to sell these in Belgium, notably by removing the French version of mandatory information from the label, as well as changing the design and size of beer cans. In this way it differentiated products that previously were exactly the same. Such practices enable suppliers to prevent parallel imports and to create differentiated markets where they can charge different prices based on local circumstances leading to higher prices in Belgium.

6.4. EuroCommerce positively welcomes the new examples of indirect obligations listed in para. 189 of the draft Guidelines, which enshrine in writing the experience that the Commission has gathered from enforcement of competition rules to the benefit of the single market. We ask

[6] Study on territorial supply constraints in the EU retail sector, VVA & LE Europe, European Commission, 2020

[7] COMMISSION DECISION of 13.5.2019 AT.40134 - *AB InBev beer trade restrictions* available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/40134/40134_2872_5.pdf.

enforcement authorities to ensure that this sends a clear message to manufacturers of other products and in other sectors that this long-standing fragmentation of the Single Market will need to end, including where such practices are adopted by non-dominant companies.

6.5. However, we would ask the Commission to introduce some clearer language on TSCs, e.g., by providing a definition or a more explicit statement. This would allow undertakings who are subject to such restrictions in reporting unlawful behaviour to national authorities and the Commission, hence allowing for more enforcement.

6.6. We would also ask the Commission to ensure that the new Regulation and Guidelines are consistent in addressing the problem of the fragmentation of the single market by suppliers, especially the market for sourcing. Article 4(d)(iii) states that in situations with no exclusive or selective distribution system, territorial and customer group restrictions are hardcore restrictions, with the exception of a number of scenarios, including restrictions on the buyer's place of establishment. EuroCommerce fears that this exception would provide justifications to suppliers to continue to hinder the existence of a single market for sourcing.

6.7. We would query how the Commission intends to reconcile art 4(d)(iii), which allows suppliers to impose restrictions on the buyer's place of establishment with para. 189 of the Guidelines.

Conclusions

EuroCommerce would suggest the following changes to the draft rules:

- Include a more explicit statement about restrictions which prevent the establishment of a single market for sourcing, by providing a definition of TSCs and clearly spell out that they are a hardcore restriction.

7. Dual pricing

7.1. In the draft Guidelines, the Commission suggests that dual pricing no longer constitutes a hardcore restriction. The Commission is also proposing the elimination of the so-called 'equivalence criteria', with some safeguards to prevent negative effects on competition, namely that the differentiation in pricing between online and offline needs to be appropriate to reward the investment in 'brick-and-mortar' stores and that it cannot amount to a de facto ban on online sales.

7.2. Continuing to invest in and rewarding sales efforts by brick-and-mortar stores is fundamental, especially in the context of the recovery from the COVID-19 pandemic. Consumers are used to use online and offline stores as a single channel. Omnichannel shopping experiences such as 'click-and-collect' have become more prominent, also due to the COVID-19 pandemic even among SMEs.

7.3. EuroCommerce welcomes the Commission's intention to suppliers some degree of flexibility to reward investment in brick-and-mortar stores while guaranteeing safeguards for retailers. We are however concerned that this may be interpreted as an open door to discriminate between online and offline leading to distortions of competition and disciplining of pricing behaviour.

7.4. By simply removing dual pricing from the list of hard-core restrictions, the text would create a complex framework with unintended consequences. For instance, it could prevent resellers from

determining unilaterally which channels to sell through. In fact, by enabling dual pricing, this would mean multi-channel SMEs having to account to brands for their stock and being unable to adjust to customer demand by making the same stock available through all of their sales channels.

7.5. We note that, according to the Commission's summary of the positions of national competition authorities, a majority of NCAs did not favour block exempting dual pricing it is also not sufficiently certain that dual pricing would typically fulfil the four conditions of Article 101(3) TFEU.

7.6. We agree with this assessment: the cost-based approach of the current Guidelines was not satisfactory and EuroCommerce believes a similar approach for the future rules would also be problematic. We would favour a turnover-related support, such as a variable fee, based on the realised offline turnover or otherwise evolving with the offline performance of the distributor, on the condition that the omnichannel buyer is not restricted in the use it makes of the fee and that it does not directly or indirectly discriminates one channel over the other one.

7.7. In relation to the so called 'equivalence criteria', suppliers should be allowed to apply different criteria as long as those criteria are objective, proportionate, transparent, non-discriminatory and necessary to the specific circumstances. It should be possible to take into account services offered only in a specific sales channel without an equivalent in other sales channels, as long as all sales channels are able to retain a sufficient margin).

7.8. We would ask the Commission to reflect on this point and potentially provide amendments in the final version of the Guidelines.

Conclusions

EuroCommerce would suggest the following changes to the draft rules:

- We are concerned about the unintended consequences of simply removing dual pricing from the list of hard-core restrictions, including the risk that difference in purchase prices in the various channels could lead to foreclosure of one channel or the other. This is particularly important in light of the view of national competition authorities that dual might not satisfy the criteria in Article 101(3) TFEU with sufficient certainty and the risk which could arise of difficulties in the enforcement of the revised rules by NCAs and the Commission
- Consider introducing turnover-related support, such as a variable fee, based on the realised offline turnover or otherwise evolving with the offline performance of the distributor
- Clarify that suppliers should be allowed to apply different criteria as long as those criteria are objective, proportionate, transparent, non-discriminatory and necessary to the specific circumstances

8. Marketplaces and platforms

8.1. Consumers are increasingly shopping online: 10% to 15% of retail sales are online and online is growing fast and increasingly influences consumers' purchasing behaviour. For SMEs, using third party marketplaces is often an important and cost-effective way to be present online and to reach certain customer groups they would otherwise not reach (not even with their own

websites). Restricting the use of third-party platforms is therefore increasingly problematic, as it may restrict, especially in the case of SMEs, access to distinct groups of customers.

8.2. The Commission wants to clarify in para. 317 of the draft VGL its understand of the *Coty* decision, and namely that absolute bans imposed by suppliers on retailers on the use of third-party platforms are block-exempted as long as they do not amount to a de facto total ban on online sales (which is an object restriction). EuroCommerce maintains that general marketplace bans should be prohibited. Given that third party platforms help to reach customers, we consider that an absolute ban amounts to a restriction of competition and hence should be prohibited. Again, lack of enforcement and experience in withdrawing the block exemption entail that anticompetitive conduct might take place to the detriment of consumers, which a stronger stance on the matter could solve. Additional clarifications are included in para. 316 of the draft Guidelines stating that restrictions on the use of a third-party online marketplace would unlikely fulfil the requirements of appropriateness and necessity when:

(i) the operator of the online marketplace is an authorised distributor in a selective distribution system

(ii) the supplier restricts the use of an online marketplace, but uses that marketplace itself to distribute the contract goods or services.

8.3. We see these changes as positive and welcome the clarification that a ban on all sales through online marketplaces is more restrictive than a restriction on the use of particular online marketplaces and that an inconsistent application of marketplace bans outside of the draft VBER may constitute an infringement of competition law.

Conclusions

EuroCommerce would suggest the following changes to the draft rules:

- General marketplace bans should be prohibited and amount to a hardcore restriction

9. Other issues

- **Restrictions of active and passive sales online** (art 1(n)): we welcome the new wording as a positive change as it recognises the importance of the online world for retailers and the freedom of retailers in a selective distribution system.
- **Agency**: we welcome the positive (minor) changes included in the Guidelines.
- **Subcontracting**: we believe that some clarifications are necessary for situations where the manufacturer produces a product according to the specifications of a retailer and the product is sold under a brand of the retailer, even if the retailer does not provide technology or equipment to the manufacturer.
- **Online sales and advertising bans**: we believe that total bans on online sales (may they be actual or de facto) or online advertising should be restrictions by object and hence support the wording in the draft rules.
- **Active and passive sales**: the Guidelines provide that offering a website in another language amounts to active selling (with the exception of English). We would argue that the offer of a

different language does not change the passive character of such selling: it is the end-consumer who is searching and visiting websites without being previously actively targeted by the website provider. We would urge the Commission to reconsider this stance, also in light of consumer law.

- **Parity clauses**: we support the new Commission position on wide and narrow parity clauses in order to bring clarity and consistency in enforcement throughout Europe.

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