

- Bundesverband E-Commerce und Versandhandel Deutschland e.V. (bevh) -

Position Paper on the Revision of the Vertical Block Exemption Regulation & Vertical Guidelines

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Bundesverband E-Commerce und Versandhandel Deutschland e.V. (bevh) represents the interests of online and mail order retailers active in Germany of all sizes and trade channels (online, multichannel, catalogue, TV shopping, platform dealers and operators). The members of bevh represent more than 75% of the entire industry turnover. In addition, more than 130 service providers from the e-commerce sector are affiliated with our association.

I. General remarks

With the regular update of the Vertical Block Exemption Regulation (VBER), the European Commission wants to take the developments in the market into account. Due to the continued growth of e-commerce during the past 10 years, this year's revision is focusing on its increasing importance. Whereas all the changes are relevant for e-commerce as well, we will focus in our reply on those aspects that are purely e-commerce related and will have the biggest impact on the e-commerce ecosystem.

Whereas we welcome certain clarifications in the guidelines regarding the online environment, we see a clear risk of an unlevel playing field between online and offline stores as some of the suggested changes will not de jure but de facto favour brick-and-mortar retail and in this regard promote an idealized picture of the past that is far from today's reality. These indirect subsidies for the brick-and-mortar sector will not revive stationary retail as the authors might hope but will on the contrary hamper investments in new technologies to make brick-and-mortar shops future-proof. Thus, the European Commission should rather look into how to strengthen the position of e-commerce retailers to make such forward-looking investments more attractive.

Moreover, the European Commission should also take into consideration the changes within the e-commerce sector. Whereas in the past, there were only few producers / brands selling their products directly to consumers online (D2C), their share continues to grow. In Germany for example, such D2C sales reached a share of 2.2% in 2020 accounting for a turnover of € 1.8 billion,

which might sound marginal but represents a growth of 14.5% compared to the previous year.¹ This trend will further persist and producers selling directly to consumers will be the norm in the future. This increase in power and influence has to be taken into account by the European Commission when updating the competition rules for vertical agreements between producers and sellers.

The proposed revision in the draft VBER would likely lead to higher prices and fewer choices for consumers and resellers in the EU by allowing brands to restrict access to online distribution channels. This would particularly harm small and medium sized enterprises (SMEs). With the proposed changes brands could have the tools to effectively exclude their resellers from online distribution, for example by combining marketplace bans (excluding sales of the SMEs through external providers) with dual pricing and removal of equivalence criteria (making the remaining online distribution channels less attractive).

The revised rules will be valid for another 10 years. This is a long period in the digital world that is evolving quickly. Therefore, we call on the Commission to consider all of the potential consequences carefully.

II. Bans on sales on online marketplaces / Requirements for physical stores (paragraph 194)

Requirements that retailers have to have a brick-and-mortar shop as well or to ban them generally from selling on platforms are outdated and do not reflect the development of the retail market. Purely physical retailers would not have been able to survive the pandemic. Moreover, obliging retailers to have a physical shop is just to the benefit of producers who are increasingly selling their products directly to consumers online but want them to have the opportunity to look at their products in a showroom. Instead of financing these showrooms themselves they are outsourcing the related costs to retailers with such requirements: While the retailer will pay the rent for the brick-and-mortar store, consumers will just go there to take a look, profit from the individual advice and then buy directly online at the producer's online shop who will be able to offer the product at a cheaper price. Thus, this provision is unfairly favouring producers and D2C sales.

A general ban on selling on platforms as proposed by the European Commission would basically mean to prevent retailers from using the internet effectively which is a hardcore restriction. Platforms have become an essential part of the e-commerce ecosystem and offer an important infrastructure especially for SMEs to enter the market and to reach more visibility. As such being present on a major platform is an important way of online advertising that should not be

¹ Cf. bevh (2021): Interaktiver Handel. Ergebnisse 2020, p. 34. / bevh (2021): [Jahrespressegespräch 2021, p. 16](#).

neglected. In addition, platforms have also turned into search engines for products. More and more consumers start their product search directly on these platforms.² Thus, a ban on selling on such platforms would deprive a retailer's product from being found online and therefore, also has to be considered as a hardcore restriction.

The Draft Guidelines suggest that suppliers might wish to restrict the use of online marketplaces to *"protect the image and positioning of their brand, to discourage the sale of counterfeit products, to ensure sufficient pre- and post-sale services or to ensure that the retailer maintains direct a relationship with customers"* (Paragraph 315). However, there is no evidence that marketplaces generally have a negative impact on the brand image or the positioning. On the contrary, many marketplaces provide high-quality customer service allowing for direct communication between the customer and the distributor for pre- and post-sale services. In case of concerns regarding specific aspects of the service suppliers could apply specific quality requires to address them. Finally, a marketplace ban does not contribute to discouraging the sale of counterfeit products. In fact, it would have the opposite effect as the brand would prohibit legitimate sellers from selling on marketplaces.

While the Draft Guidelines note that in certain circumstances marketplace restrictions fall outside the scope of Article 101(1) TFEU by genuinely satisfying the three cumulative criteria of legitimacy, proportionality and non-discrimination, even the Draft Guidelines also explicitly recognise that in some instances such restrictions clearly go beyond what is necessary and appropriate. As the Draft Guidelines state, this is for example the case *"where a supplier includes the operator of an online marketplace as an authorised distributor in its selective distribution system, or, where it restricts the use of online marketplaces by some authorised distributors but not others, or where it restricts the use of an online marketplace, but uses that marketplace itself to distribute the contract goods or services"* (para. 319). As emphasised by the Commission in the Draft Guidelines, such practices *"appear unlikely to fulfil the requirements of appropriateness and necessity"* (para. 319). In such circumstances the supplier itself clearly acknowledges that the product's characteristics are not such as to require or justify marketplace restrictions. While we still doubt that a broad variety of products require such restrictions at all, we would urge the Commission to make at least this paragraph clearer: In the described circumstances it is not only *"unlikely"*, but simply not possible, that the requirements of appropriateness and necessity are fulfilled.

III. Dual Pricing (paragraph 195)

In our view, the proposed changes on dual pricing carry the biggest risk of favouring the outdated business models of pure brick-and-mortar stores. According to the European Commission, the

² Cf. exeo / Rogator (2017): [Pricing Lab 6.0](#), p. 10.

opportunity to buy products that are resold on different sales channels for different prices could be used to encourage investments of the retailer either in his brick-and-mortar store or in his online shop. However, this provision will be used to promote brick-and-mortar business models only. In practice, producers are still idealizing brick-and-mortar retail and believe that they offer better advice for customers. This is a clear misbelief as we see more and more auxiliary staff working in such stores who only know little (if at all) about the products they are selling and an improved customer service and counselling in online shops.

This tendency of the one-sided promotion of the offline sales channel was also confirmed by decisions of the German competition authority in the past (e.g. in the Gardena, Dornbracht and Bosch Siemens Hausgeräte cases³), where producers tried to make it unattractive for retailers to use the online sales channels. Considering this and the national or regional proposals to save the city centres, it is realistic to expect that this new provision would rather favour brick-and-mortar stores and be to the detriment of online retailers and the uptake of digitalization in retail that would allow retailers to become fit for the future. Offering goods at a cheaper price to stationary retailers forces them to invest into the past instead of investing into the future and new technologies.

Making it more expensive to sell online is especially detrimental for SMEs (especially considering the small margins in e-commerce), will punish those who invested during the pandemic into an online sales channel to survive and will eventually lead to higher consumer prices.

Moreover, it is questionable whether investments by retailers can always be clearly differentiated and attributed to one sales channel: Especially omnichannel retailers may also adopt mixed calculations which makes it difficult to differentiate between the investments in the online and offline sales channel especially as online advertising may also drive consumers to a brick-and-mortar shop or the other way around. In addition, there is a difference between costs and investments. Investments are amortized at one point of time whereas costs are reoccurring on a regular basis. Furthermore, the provision would require retailers to provide evidence of the higher costs of the respective sales channel to the wholesaler / producer. However, this is strategically important data that is commercially highly sensitive and should not have to be shared with the supplier especially in dual distribution cases. In addition, this raises some additional competition concerns as suppliers are also increasingly selling their goods directly to consumers online themselves (D2C). Thus, they could potentially use this opportunity to charge higher prices for online sales by their resellers to be the only ones to be able to sell their products at a cheaper price via the online channel.

³ Gardena B5-144/13, Dornbracht B5-100/10, Bosch Siemens Hausgeräte B7-11/13.

Finally, dual pricing for different sales channels will lead to practical issues and be detrimental to sell overstock. If different purchasing prices are applied depending on the relevant distribution channel, the products are ultimately reserved for a specific distribution channel and the retailer is restricted in his free choice regarding the distribution channel, which would have been dramatic during the various lockdowns during the pandemic. However, the choice of distribution channel must not be restricted. Thus, retroactive bonuses seem to be the possible method for applying different terms and conditions.

Such differentiation between the two channels would also lead to the creation of a new grey market.

IV. Active and passive selling (paragraph 199)

We welcome that the European Commission aims at defining criteria to differentiate between passive and active selling online. However, offering a specific language option in an online shop must not already be seen as sufficient as also other languages than English are spoken in various countries e.g. in Belgium somebody could target the German speaking minority without necessarily targeting German and Austrian consumers. Thus, online sales should only be considered to be actively directed to another country if the language option is at least linked to the offer of shipping to the country in question.

V. Equivalence criteria (paragraph 221)

The new provision on equivalence criteria would also feed into this narrative and promote the general trend to subsidize stationary retail instead of making brick-and-mortar stores fit for the future. The proposed changes would allow the introduction of specific requirements for online sales that are not equivalent with those for offline sales. This leads to the risk that much stricter rules will be introduced for online sales, which in turn makes selling online less and less attractive. It is important to note that the current VBER does not require the criteria for online and offline sales to be identical. Instead, they should *“pursue the same objectives and achieve comparable results and that the difference between the criteria must be justified by the different nature of these two distribution modes”*. We thus believe that the current wording should be maintained.

VI. Hybrid platforms (Article 2(7) VBER / paragraphs 91/92)

According to Article 2 (7) of the revised draft regulation so-called hybrid platforms that are retailers and offer intermediation services at the same time would no longer be able to benefit from the

exemptions of the VBER. However, there is no reason for such differential treatment compared to other distributors and no grounds why their retail activities should not fall within the scope because the VBER block exemptions generally continue to apply when competition exists at retail level as Article 2 (4) of the Draft VBER block exempts agreements if "*the supplier is a manufacturer, wholesaler, or importer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing wholesale or import level [...]*". In addition, we believe that the exclusion of online hybrid platforms only would discriminate against the online channel as similar models where a company offers intermediary services on the one hand, but is also a competitor in the sale of goods on the other (e.g., a sales agent with its own retail business (dual role agent), commission business) also exist in the offline world. Moreover, vertical agreements with hybrid platforms also create efficiencies just as agreements with other dual distributors do because platforms help SMEs to gain reach, established retailers and brands to increase their sales and benefit suppliers or resellers. Such sales or distribution agreements are independent from the intermediation service offered by the platform and should thus, continue to benefit from the exemption. The exclusion of online intermediary services with a hybrid function would not only affect the growing number of hybrid retailers, but will also have a significant impact on all resellers who use online marketplaces and all brands supplying hybrid retailers, many of which are SMEs. Each one of them would need to assess their agreements with hybrid retailers on a case-by-case basis. Many brands have their own sales agreement templates, e.g. for selective distribution networks and they have an interest to use them in a consistent manner including towards hybrid retailers. We therefore call on the European Commission to remove the respective provision from the text. However, in case, the Commission decides to maintain the current wording, it should clarify that the exclusion from the exemption applies to vertical agreements for the provision of online intermediation services only.

VII. Dual distribution / information exchange (Art. 2.4 a/b & Art. 2.5)

We do not see any added value in the introduction of a second market share threshold. First, if the market share is below 10%, the de minimis rule would apply anyway. Second, such market share thresholds create legal uncertainty for businesses as it is difficult to define the relevant market and to judge if the data basis is sufficient for a reliable estimation of the market share. This becomes even more difficult the lower the market share gets as it is easier for business to know if they cover more than a third of the market (30%) than just 10%.

We also question that the exchange of information should be subject to different rules than other forms of vertical limitations which are potentially even further reaching. This provision ignores that in the relationship between a supplier and distributor there is an increased interest to exchange sales information for efficiency purposes. In addition, due to the contractual and supply relationship, the supplier is already aware of numerous key performance indicators (e.g. delivered

quantity, rotation speed, cost prices). Thus, the situation of such existing distribution relationships is completely different than in a purely horizontal exchange of information between competitors. In a dual distribution setting, the parties also have other options at their disposal to exclude negative effects of the information exchange (e.g., obligations to set up Chinese walls, etc.). Moreover, e-commerce is highly data driven. Thus, there is more data that can be and needs to be exchanged between distributors and suppliers. We therefore call on the Commission to clarify what information may be exchanged in a dual distribution context to ensure a proper functioning of the supplier and the distributor relationship and what information may not be shared as it would have an anticompetitive effect.

VIII. Agency and the online platform economy (Paragraph 44)

In our view, there is no reason why online platforms should generally be excluded from acting as sales agents and why in an online environment different rules should apply than in brick-and-mortar retail where well-known and long-established agency models exist. Market-specific investments made by online platforms do also not differ from other forms of agency business in which the agent makes the effort on his own initiative to increase sales numbers (e.g. in marketing or software). Moreover, banning online platforms from acting as sales agents, ignores that they can be integrated into the sales structures of the principal in the context of the sales activity and fails to recognize their often two-sided relationships. Finally, there is often also a practical need to use the concept of an agency business (in contrast to merely mediated own sales of the principal), e.g. because of the simplified technical connection, the simplification of the processing procedures via a uniform point of sale, the simplification of billing, increased consumer confidence in the brand of the platform compared to the principals behind it or easier processing of mixed shopping baskets with items from different suppliers, etc.