Assonime comments on

draft revised Vertical Block Exemption Regulation and Vertical Guidelines

General remarks

We thank the Commission for the opportunity to provide comments on the draft Vertical Block Exemption Regulation (VBER) and Vertical Guidelines (VGL) published in July 2021.

Commission Regulation 330/2010 and the accompanying Guidelines of Vertical Restrains have provided the legal framework for the assessment of compatibility of vertical agreements with Article 101 TFEU for a decade. The VBER safe harbour for vertical agreements not exceeding the market share thresholds and not containing hardcore restrictions has been a crucial tool for legal certainty as to the compatibility of distribution strategies with EU competition law.

However, as emerged in the evaluation phase of the review, both market developments during the last decade and the evolution of the case-law require an update of the VBER and VGL.

Consistently with the principles of the EU better regulation agenda, the overall objective should be to ensure that the legal constraints on vertical agreements, such as those between suppliers of goods and services and their distributors, do not go beyond what is necessary and proportionate to ensure the protection of effective competition in the EU.

As to market developments, in the last decade the main trend has been the **growth of e-commerce**, which provides formidable opportunities for the expansion of sales.

As shown in the 2017 Commission Sector Inquiry, online price transparency leads to increased price competition, both online and for brick and mortar shops.

Compared to the old brick and mortar environment, free riding on investments carried out for either physical or online sales has become easier and more frequent, although in most cases maintenance of both sales channels is necessary for an efficient distribution strategy, in the ultimate interest of consumers.

In this challenging context, with a lively interbrand competitition in most markets, suppliers need to develop a consistent multichannel (or 'omnichannel') strategy for the market positioning of their brands. For such economic reasons, in recent years common commercial strategies include a trend towards vertical integration or at least dual distribution, as well as a pro-active use of selective distribution agreements and of vertical arrangements aimed to preserve incentives to invest both for offline and online sales.

Since 2010, the **role of online platforms** for the marketing of products and services has become so important to make it indispensable to clarify how the VBER and VGL framework should apply to the platform economy. A closely related issue concerns how to define markets when platforms are involved. Hopefully, the ongoing revision of the market definition notice will provide the much needed guidance on this aspect not only for national competition authorities but also for national courts.

As to legal developments, first of all the VBER and VGL should incorporate the indications emerging from important **judgments issued by the ECJ** in the last decade concerning the interpretation of the key notions of restriction by object and hardcore restriction, stressing the relevance not only of the *Pierre Fabre*, *Expedia* and *Coty Germany* judgments, but also of *Cartes Bancaires*.

A further challenge results from divergent approaches among Member States to the application of competition rules to online restrictions. The current revision provides the opportunity to promote more **uniformity throughout the EU**, in particular by means of the VBER which is legally binding for national competion authorities and national courts.

The possibility of **withdrawal of the benefit of the block exemption** if, in a particular case, an agreement or set of agreements has effects which are incompatible with Art. 101(3) is an important tool to adjust the scope of the safe harbour whenever needed in a particular economic and legal context, whilst preserving a reasonably broad application of the VBER.

1. VBER architecture and economic approach

The overall architecture of the VBER remains unchanged in the Commission proposal. More radical changes would have entailed a learning process and non negligible adaptation costs, highly undesirable in the context of the post-pandemic recovery. Also on substantive grounds, we appreciate the **choice to maintain the standard approach of new generation block exemption regulations** (market share thresholds + hardcore restrictions + excluded restrictions + declaration of non application + withdrawal pursuant to Art. 29 Reg. 1/2003). This approach combines a focus on the economic effects of the agreements in the application of Article 101 with a legal framework which simplifies the assessment of such agreements by means of legal presumptions, i. e. the VBER safe harbour.

VBER (recitals 4-9)

Within this framework, recitals 4-9 of the draft VBER, explaining the economic rationale for the approach remain of the utmost importance.

VGL (§§ 5-20)

The same holds for the initial paragraphs of the VGL on the applicability of Article 101 to vertical agreements (§§5-7) and on the effects of vertical agreements (§§ 8-20). We warmly welcome the **shift of the section on the economic assessment of vertical agreements in the first part of the VGL**.

Within this section of the draft VGL:

- the acknowledgement that the assessment of vertical agreements under Article 101 'must take into account all relevant parameters of competition", including product quality and innovation (§8) is especially important;
- the same holds for the clear statements which recognize that a reduction of intra brand competition is by itself unlikely to lead to negative effects for consumers if inter-brand competition is strong (§17, § 19);
- § 16 indicates that there is a large degree of substitutability between the different vertical restraints, meaning that the same inefficiency problem can be solved by different vertical restraints although the negative effects on competition may differ. However, we suggest **not to overestimate the degree of substitutability of vertical restraints**: in concrete situations, taking into account transaction costs, incentives etc., the use of different restraints to address a specific efficiency issue may not be neutral in terms of costs and effectiveness.

2. Vertical agreements between competitors and dual distribution

VBER, Article 2, §§ 4-6

Appropriately, the draft VBER confirms that in principle the safe harbour does not apply to vertical agreements between competing undertakings. The reason is that, in general, in such situations the concerns of anticompetitive effects relating to the horizontal dimension of the relationship prevail over the need to simplify the assessment of vertical agreements not containing hardcore restrictions and not exceeding the market share thresholds.

What is more controversial is the proposal to redefine the exception to this general principle. So far, pursuant to the 2010 VBER, the Article 2(1) exemption applies to non reciprocal vertical agreements between competing undertakings in cases of **dual distribution**, in particular when the supplier is a manufacturer and a distributor while the buyer is a distributor and not a competing undertaking at the manufacturing level.

The **draft VBER restricts the scope of the exception for dual distribution**. By means of a quite complicated formulation (which might be streamlined), the proposal entails that in cases of dual distribution, when the aggregate market share of the parties in the relevant market at retail level exceeds 10%, although the market share thresholds of Article 3 are respected, the exemption should **not cover exchange of information between the supplier and its distributors**. Such exchange of information should be assessed 'under the rules applicable to horizontal agreements' (Art. 2, paragraph 5).

Moreover, apparently in line with the approach of the de minimis notice and of the *Expedia* judgment, Article 2, paragraph 6, of the draft VBER states that the exception for dual distribution 'shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object to restrict competition between the competing supplier and buyer'.

<u>The proposal to assess the exchange of information between the supplier and its distributors, whenever the supplier is also active on the retail market, according to the rules concerning the exchange of information between competitors, raises serious concerns.</u>

As illustrated in the introductory remarks, the increasing use of direct online sales by suppliers and, therefore, also of dual distribution, has economic reasons related to the search for efficient multichannel distribution strategies and there is no evidence of an anticompetitive impact of such market developments in Europe.

Although in principle a supplier which also sells directly online is a competitor of its distributors at the retail level, introducing a rigid and suspicious approach to the vertical exchange of information between supplier and distributors in cases of dual distribution seems to overlook the economic reality: not only the context is one of intrabrand competition, but the supplier even when it sells directly online, should still be able to deal with its distributors in an effective way.

The proposal apparently neglects the fact that, whereas the exchange of information between competitors is not a necessary component of economic conduct, the exchange of information between a supplier and its distributors on aspects relating to the purchase, sale or resale of the contract goods or services is the norm, not the exception, and is required by the economic relationship between the parties. Assessing this exchange of information according to the Horizontal guidelines would severely hamper legal certainty and the effectiveness of the operation of distribution networks in all cases of dual distribution.

The impact of this change would be huge, since currently most suppliers in Europe directly sell their products online and therefore fall within the dual distribution category. Any uncertainty, for instance concerning the possibility to recommend prices, would strongly discourage the use of dual distribution. Many suppliers would be led to consider the shift to a wholly integrated distribution model, with a negative impact on intrabrand competition.

Therefore, we strongly suggest to revise the proposed treatment of dual distribution in Article 2 of the draft VBER. A possibility would be to maintain the exemption and specify in the VGL which types of exchange of information go beyond the vertical aspect (and therefore are not covered by the VBER) and which types of vertical exchange of information, if any, raise competition concerns and may lead to the withdrawal of the benefit of the block exemption in individual cases.

A distinct issue, which should be more clearly explained in the VGL, concerns the new formulation of the exception for dual distribution when the supplier is a provider of services at several levels of trade (Article 2, paragraph 4, letter b). While the exception in the current VBER covers the situation in which the buyer is either a provider of goods or services at the retail level, the proposal limits the exception to the case in which the buyer is a provider of services. It is not clear whether the reason of the amendment is related to the need to exclude the application of the exception to online platforms or there are different reasons.

VBER, Article 2(7)

The draft VBER states that the exception entailing the **application of the safe harbour to dual distribution, in any case, does not apply where an hybrid platform**, i.e. a provider of online intermediation services that also sells goods or services in competition with undertakings to which it provides online intermediation services, enters into a non reciprocal vertical agreement with such a competing undertaking.

As explained in recital 12 of the draft VBER, in this situation the Commission is concerned of possible restrictions of inter-brand competition. It would be useful to **clarify** in the VGL whether this provision applies only to the situation in which the online platform is a competing supplier of products or also when it acts as a distributor of products competing with the ones supplied by the undertaking to which it provides intermediation services. More generally, for the sake of clarity, we suggest to provide examples of the types of restraints that this new provision is meant to prevent.

3. Hardcore restrictions versus restrictions by object

<u>VGL, §§ 161-169</u>

The revision of the VBER and the VGL provides the opportunity to **clarify the different role of the notions of hardcore restriction and of restriction by object** (RBO) in the application of Article 101. The draft VGL usefully dedicate some paragraphs to this issue, when introducing the topic of hardcore restrictions under the VBER (§§ 161-169). The main difference, pointed out at § 163, is that "a finding of a restriction by object requires an individual assessment of the vertical agreement concerned. In contrast, hardcore restrictions correspond to a category of restrictions under the VBER for which it is presumed that they generally result in harm to competition so that a vertical agreement containing such a hardcore restriction cannot be block exempted pursuant to Article 2, paragraph 1, VBER".

The text of the proposal, however, **may be improved as far as the definition of RBO is concerned**. Paragraph 163 of the draft VGL simply states, in this respect, that "restrictions of competition by object, within the meaning of Article 101(1), are agreements which, by their very nature, have the potential to restrict competition", making reference to the *T-Mobile* judgment, C-8/08, paragraph 31.

This sentence, taken in isolation, may lead the reader to an interpretation whereby it is sufficient that an agreement has the potential to restrict competition in order to consider it restrictive by object. In order to provide a clearer understanding of the notion, we strongly suggest to refer to the *Cartes Bancaires* judgment (C 67/13 P). In *Cartes Bancaires*, the ECJ not only pointed out that the use of restrictions by object should be limited to exceptional and strictly justified circumstances (§58), but also that the key legal criterion is not the mere capability of the agreement to restrict competition, but rather whether the agreement is 'by its very nature' so harmful to competition that an assessment of its effects is not needed (§§ 49 and 57). The rationale is that some types of coordination between undertakings can be regarded by their very nature as being harmful to the proper functioning of normal competition: on the basis of experience, the likelihood of negative effects on competitive variables (eg price, quantity, quality) is so high that it may be redundant to prove in each case that they have an actual or potential negative impact (§ 51). Consistently with the case-law, in assessing whether the agreement reveals a sufficient degree of harm, regard must be had to the content of its provisions, its objectives and the economic and legal context, including the nature of the products and the real conditions of the structure and operation of the markets in question. It would be useful to **recall these crucial features of the notion of RBO in the VGL.**

We also suggest to consider the opportunity to **avoid the reference, in footnote 70 of the draft VGL, to the Staff Working Document 'Guidance on restrictions of competition by object' [SWD (2014)198],** both because it is a working document and not a Commission communication, and because it does not reflect the evolution of the ECJ case-law on this crucial topic, in particular the contribution of the *Cartes Bancaires* judgment, issued in September 2014 whereas the SWD was published in June 2014.

4. Proposals concerning sales restrictions

New formulation of Art. 4 - VBER Art. 4 (b), (c) and (d)

The draft VBER contains a new formulation of Article 4 on hardcore restrictions, aimed at simplifying the rules concerning restrictions of sales (active and passive sales, sales to unauthorised distributors etc.). The new approach identifies **hardcore restrictions separately for three situations**: where the supplier operates an exclusive distribution system, where the supplier operates a selective distribution system and where the supplier operates neither an exclusive nor a selective distribution system ('third category'). We consider this new formulation as an improvement, since it is less abstract than the previous one and refers to three concrete situations.

Shared exclusivity, VBER Art. 1(1)(g); VGL §§ 100- 104, § 107, §205

The draft VBER introduces more flexibility for suppliers with respect to the organization and protection of their exclusive distribution systems.

First of all, the draft VBER allows to consider as exclusive distribution also the situation of shared exclusivity, where the supplier allocates a territory or customer group to more than one buyer, restricting other buyers from actively selling into the exclusive territory or to the exclusive customer group.

Correctly, the Commission indicates that the economic reason which justifies the exclusive distribution, including the protection from active sales, is the need to secure a certain volume of business that preserves the distributors' investment efforts. Therefore, the number of distributors in a shared exclusivity system should not go beyond what is proportionate to this aim.

From a legal point of view, the VGL indicate that if this is not the case either the Commission or national competition authorities may withdraw the benefit of the block exemption. This is completely reasonable, and in line with the current treatment of exclusive distribution (and mutatis mutandis of selective distribution).

What should be avoided is uncertainty on the scope of application of the safe harbour, i.e. making the application of the exemption dependent on an assessment of whether the number of exclusive distributors is or is not proportionate. To this aim, we strongly suggest not to include the economic rationale of exclusivity in the definition of exclusive distribution system (Article 1, paragraph 1, letter g). The economic rationale can be mentioned in the recitals of the VBER and, of course, also in the VGL, in order to clearly indicate that suppliers should not abuse of this enhanced flexibility.

Passing-on of active sales restrictions **- VBER Art. 4(b)(i), Art. 4(c)(i), Art. 4(d) (i), VGL § 206**

The draft VBER also allows to strengthen the protection of exclusive distribution systems by extending the non hardcore treatment of restrictions of active sales previously applied to distributors to their customers that have entered into a distribution agreement with the supplier or with the party that was given distribution rights by the supplier.

This provision, allowing the passing on of restrictions on active sales, is meant to avoid circumvention of restrictions of active sales by means of the distributors'customers when they have directly or indirectly entered into a distribution agreement with the supplier.

The proposal is welcome. For the sake of clarity, we suggest to include **practical examples** of this situation, for instance with reference to 'framework' distribution agreements involving wholesalers and retailers.

Enhanced protection of selective distribution systems from outside - VBER, Art. 4(b)(ii); Art. 4(d) (ii)

Since selective distribution systems play a very important role in commercialization strategies, we welcome the proposal to strengthen their protection by clarifying that restrictions of sales to unauthorised distributors located in a territory where the supplier operates a selective distribution system for the contract goods or services may be imposed also on distributors operating, in other areas, under different distribution systems, as well as on their customers.

<u>Combination of exclusive distribution at wholesale level and selective distribution at retail level – VGL, §§ 168 and 222</u>

The combination of exclusive distribution at the wholesale level, with the aim to protect the incentive to invest, and of selective distribution at the retail level, aimed at ensuring quality requirements, may have strong economic justifications. Similar arrangements are often used in distribution strategies.

The current VGL already provide the possibility to combine selective distribution with some protection of wholesalers, when necessary to overcome possible free riding. This situation may in individual cases fulfil the conditions of Article 101(3). The same approach is maintained in the draft VGL, in the example at § 168.

However, in general the combination of exclusive distibution and selective distribution in the same territory is considered hardcore (draft VGL, §222). Many companies argue that this approach is excessively rigid for the combination of exclusive distribution at the wholesale level with selective distribution at the retail level. This combination does not entail a sum of the restrictions: the possibility to limit active sales would remain limited at the wholesale level. We encourage the Commission to further consider whether it is justified to maintain a hardcore treatment (+ possibility of individual exemption) for this business model which is common in many sectors.

5. Restrictions of online sales

One of the main goals of the revision of the vertical package was to **clarify the treatment of restrictions of online sales** in the light of the case-law of the Court of Justice (*Pierre Fabre; Coty Germany*) and **to promote a more uniform approach** throughout the EU to those restrictions which have not yet been addressed by the case law of the ECJ.

<u>VBER, Article 1(1) (n)</u>

The proposal of the Commission is to create a link between restrictions of online sales and restrictions of sales considered hardcore pursuant to Article 4, by means of a new definition included in Article 1, paragraph 1, letter n. The formulation might be simplified, but the idea is that 'as regards selling of goods and services online, a restriction that directly or indirectly, in isolation or combination with other factors, has <u>as its object to prevent the buyers or their customers from effectively using the internet for the purposes of selling their goods or services online or from effectively using one or more online adverstising channels'</u> is a restriction of active or passive sales considered hardcore pursuant to Article 4 VBER.

This solution is welcome. It usefully combines the *Pierre Fabre* and *Coty* case-law, since it considers hardcore the restrictions impeding the effective use of the internet, and not the mere limitation of an online sales channel (such as a third party marketplace).

We respectfully suggest to reconsider the explanation in § 188 of the VGL. With reference to online sales restrictions, the draft text says that a restriction capable of significantly diminishing the overall amount of online sales in the market constitutes a hardcore restrictions of active and passive sales within the meaning of Article 4(b) to (d) VBER but also adds that 'the assessment of whether a restriction is hardcore cannot depend on market specific circumstances or the individual circumstances of one or specific customers'. In our view this **last sentence should be removed**, since the assessment of whether a restriction has as its object to prevent the effective use of the internet cannot be carried out independently of the economic and legal context.

As to restrictions of online advertising, in the absence of a position of the Court of Justice the Commission proposes a more rigid approach, which considers hardcore not only preventing buyers and their customers from effectively using online advertising, but also preventing them from effectively using even a single advertising channel (e.g. price comparison tools).

We invite the Commission to further **consider whether this quite rigid approach to restrictions of the use of each specific type of advertising channels is justified**.

Other provisions concerning online sales – Art. 1(1)(l) VBER, VGL § 195, § 221

The new definition of active sales in the online environment included in Article 1(1)(l) is welcome, since it enhances legal certainty.

Moreover, in light of the market developments in the last decade, we strongly appreciate the new approach in the VGL to the assessment of criteria for selective distribution, which **eliminates the need for equivalence between the online and offline context** (§ 221), as well as the **inclusion in the safe harbour of dual pricing**, when justified by the different investments respectively made online and offline (§ 195).

6. RPM and MAP

<u>VBER, Art. 4(a) and VGL §§170-186</u>

The approach to the assessment of RPM remains broadly unchanged in the VBER and VGL.

The VGL, however, contain some important clarifications, which are crucial to reduce legal uncertainty on what an undertaking wishing to control the market positioning of its products can legitimately do, without hardcore restrictions which would entail the risk of huge sanctions.

Importantly, at § 174 VGL the Commission indicates that **minimum advertised price** (MAP) policies may amount to RPM in specific situations, for instance where the supplier sanctions retailers for selling below the MAP, requires them not to offer discounts or prevents them from communicating that the final price could differ from the MAP. This also implies that, as such, MAP can be lawfully used to protect the image of the product from aggressive price advertising campaigns although the supplier cannot go beyond a mere recommendation.

At § 175, the Commission also acknowledges that the **implementation of a price monitoring system** is in itself not sufficient for a finding of RPM, since it may be used by suppliers to increase the efficiency of the supply or distribution chain or for other purposes unrelated to direct or indirect means of achieving RPM.

At § 178, the VGL usefully clarify the criteria for the assessment of **fulfilment contracts** pursuant to Article 101.

7. Excluded restrictions

<u>Non compete obligations - VBER, Art. 5(1)(a), VGL §§ 233-235</u>

As to non compete obligations, the Commission proposes to reduce compliance costs for business by including in the safe harbour also **non compete obligations that are tacitly renewable** beyond a period of five years, provided that the buyer can effectively renegotiate or terminate the vertical agreement containing the obligation with a reasonable notice period and a reasonable cost (§ 234).

This simplification may have a significant positive economic impact on companies. **From the point of view of legal certainty it would be preferable to regulate the case of tacit renewal directly in Article 5 VBER** and not only in the VGL.

Parity obligations - VBER Art. 5(1)(d), VGL § 238

The choice to include into the excluded restrictions retail parity obligations imposed by suppliers of online intermediation services with respect to competing online platforms and to maintain the safe harbor for other parity obligations seems reasonable, in light of their different impact on competition and different scope for efficiency justifications**.**

8. The approach to online platforms

A clarification of how to apply Article 101 to vertical agreements involving online platforms is one of the main goals of the review of the VBER and VGL.

The Commission focuses on platforms providing online intermediation services, as defined in the P2B Regulation. Its approach is based on several provisions.

VBER, Article 1(1)(d), VGL §§ 60-64

First of all, pursuant to Art. 1(1)(d) of the draft VBER, **providers of online intermediation services are considered suppliers**, within the meaning of the VBER, irrespective of whether they are a party of the transaction they facilitate.

Intuitively, this provision is meant to limit the cases in which the safe harbour applies to online platforms by considering their market shares as suppliers of online intermediation services. However, the implications of this provision are not adequately explained in the VBER and in the VGL (§ 60-64). We encourage the Commission to **provide more clarity, also by means of practical examples concerning the impact of this provision**, including on the assessment of market shares in concrete vertical arrangements involving online platforms.

VBER, Article 2(7)

A second provision concerning online platform is Article 2(7) VBER, whereby hybrid platforms are not covered by the exception for the dual distribution (see above, paragraph 2).

VGL, § 44

Moreover, the draft VGL indicate that, on the one hand, since platforms are categorised as suppliers under the VBER, in principle they cannot qualify as agents for the purpose of applying Article 101 and, on the other hand, their economic features typically do not correspond to the notion of agent relevant for the application of Article 101 TFEU.

Some companies suggest that, since platforms provide different services with a different level of involvement and associated risks, the approach of the draft VGL is too rigid. In particular, the consequence of this approach is that, even when the involvement of the platform is de facto equivalent to that of an agent, a brand using online platforms would not be able to set the price of the products sold on its own account through the platform. **Further consideration of the proposal and of its consequences would be useful.**

9. Further remarks

Selective distribution, VGL §§ 129-148

We strongly appreciate both the inclusion in the VGL of the principles of the *Coty* judgment and the way in which the draft VGL succeed in combining reference to the *Metro* case-law with the economic analysis of situations which may justify the withdrawal of the benefit of the block exemption.

De Minimis Notice, VGL § 24

We suggest to **amend the text** as follows:

"(…) This general rule set out in the De Minimis Notice is subject to two exceptions. Firstly, as regards ~~hardcore restrictions, Article 101(1) applies irrespective of the parties market shares.~~ restrictions by object, the de minimis presumption based on market shares does not apply. This is because an agreement that may affect trade between Member State and which has an anticompetitive object may, by its nature and independently of any concrete effect, constitute an appreciable restriction on competition. (…)"