

Summary of the replies of the national competition authorities of the European Competition Network provided during the targeted consultation for the impact assessment of the review of Regulation (EU) No 330/2010

The European Commission (“Commission”) is currently carrying out an impact assessment for the review of Regulation (EU) No 330/2010 (Vertical Block Exemption Regulation, “VBER”) and the related Guidelines on Vertical Restraints (“Vertical Guidelines”).

On 23 October 2020, the Commission published an inception impact assessment (“IIA”) setting out different policy options for the areas of the current rules that, based on the results of the evaluation phase, may require changes. Considering that the national competition authorities of the European Competition Network (“NCAs”) have extensive experience in applying the VBER, and whereas they frequently exchange their views within a dedicated Working Group of the European Competition Network, the Commission decided to gather feedback from the NCAs on the possible impact of the policy options set out in the IIA and other areas to be further analysed during the impact assessment phase. A similar consultation took place during the evaluation phase of the VBER review. The Commission conducted this targeted consultation through a dedicated online questionnaire inviting all NCAs to share their experience and views.

20 NCAs replied to the targeted consultation for the VBER review impact assessment.¹

The purpose of this summary is to give an overview of the replies received from the NCAs, and outline their main points and views, without reference to specific points raised by NCAs or individual views expressed by them. Therefore, in the following, reference is made generically to “NCAs”, and only where NCAs expressed diverging views, both sides of the argument are presented.²

This summary follows the structure of the online questionnaire used for the public consultation, which mirrored the policy options and other issues set out in the IIA.

Section I of this summary deals with the replies of the NCAs on questions regarding the policy options for the four areas identified during the VBER evaluation as possibly requiring changes, namely (a.) dual distribution, (b.) active sales restrictions, (c.) specific indirect measures restricting online sales, and (d.) parity obligations. Section II deals with other issues explored during the impact assessment for the review of the VBER. Section III includes additional points and views submitted by NCAs during the consultation period.

¹ 19 national competition authorities of the Member States and one national competition authority of a Contracting Party to the EEA Agreement provided feedback.

² The contributions received from the NCAs cannot be regarded as the official position of the Commission and its services and thus do not bind the Commission.

I. Policy options

a. Dual distribution

NCA considered that the exception for dual distribution set out in Article 2(4) of the VBER should in principle be maintained but that this exception should be adapted notably in light of the growth of e-commerce and the increase of direct sales by manufacturers.

According to NCA, removing the exception for dual distribution entirely is likely to have a negative impact on legal certainty and the harmonized application of the VBER across the EU. In this respect, some of the NCA highlighted the pro-competitive effects and efficiency gains related to dual distribution.

In their replies to questions about a possible limitation of the scope of the exception for dual distribution, NCA supported a policy change to ensure that vertical agreements between competitors only benefit from the VBER in instances where horizontal concerns are unlikely to arise. In fact, a number of NCA stated that they have experience with concrete instances where dual distribution scenarios currently exempted by the VBER raise horizontal concerns. More specifically, most of the NCA supported the introduction of a market share threshold to take into account the horizontal concerns that can arise in instances of dual distribution. Only very few alternatives to a market share threshold were suggested, such as the introduction of a threshold relating to the size of the manufacturer's direct sales.

A number of NCA argued that in any case further guidance on the scope of the exemption under Article 2(4) of the VBER would be warranted, including on the interplay between the Vertical Guidelines and the Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements³, and the application of Article 2(4) of the VBER to hybrid platforms.

In light of their relatively limited case experience with dual distribution involving wholesalers and importers, NCA provided mixed feedback on whether the scope of the exception for dual distribution should be extended to cover them. Some NCA stated that in their view the differences between manufacturers on the one hand and wholesalers and importers on the other hand are not significant. Therefore, these NCA supported an extension of the exception for dual distribution pursuant to Article 2(4) of the VBER to both wholesalers and importers. Other NCA considered that the incentives of wholesalers and importers are not comparable with the incentives of manufacturers, or stated that the extension of the exception for dual distribution is likely to have a negative impact on competition on the market.

³ Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements Text with EEA relevance OJ C 11, 14.1.2011, p. 1

b. Active sales restrictions

NCAAs provided mixed feedback in their answers to the questions dealing with a possible softening of the current approach to active sales restrictions. As a general remark, a few NCAAs noted that the impact of such policy changes would also depend on the distinction drawn between active and passive sales under the revised VBER and the revised Vertical Guidelines.

Some NCAAs stated that the rules on active sales restrictions should remain unchanged, while other NCAAs stated that these rules should be at least simplified in the VBER and clarified in the Vertical Guidelines. A few NCAAs supported the policy option proposing to allow a combination of exclusive distribution at wholesale level with selective distribution at retail level, while other NCAAs indicated that they did not have sufficient experience with such a combination to express an informed view. Furthermore, some NCAAs stated that a combination of exclusive distribution at wholesale level with selective distribution at retail level is likely to have a negative impact on various parameters of competition, in particular cross-border trade. It was also considered that changes to the rules on active sales restrictions would have an impact on competition enforcement.

Some NCAAs supported the policy option to allow restrictions of active and passive sales from outside a selective distribution system to unauthorised distributors located within the territory where selective distribution applies. They argued that such a policy change would help realise efficiencies generated by selective distribution, increase legal certainty, and enhance the harmonised application of competition rules across the EU. Other NCAAs stated that further protection of selective distribution systems is likely to have a negative impact on cross-border trade.

In their answers to the questions on active sales restrictions, a few NCAAs addressed additional points that in their respective view would require clarifications under the revised VBER and the revised Vertical Guidelines, such as franchising and territorial supply constraints.

c. Specific indirect measures restricting online sales

As regards dual pricing (i.e. charging the same distributor a higher wholesale price for products intended to be sold online than for products to be sold offline) and the equivalence principle (i.e. imposing criteria for online sales that are not overall equivalent to the criteria imposed on brick-and-mortar shops), a majority of NCAAs supported maintaining the status quo, which classifies dual pricing and breaches of the equivalence principle as hardcore restrictions.

The NCAAs submitted that block exempting dual pricing would not take into account the harm that dual pricing can have on competition to the detriment of consumers, in particular where dual pricing may lead to a de facto ban of online sales. In this context, NCAAs argued that it is also not sufficiently certain that dual pricing would typically fulfil

the four conditions of Article 101(3) TFEU. Furthermore, they argued that, if dual pricing was no longer considered a hardcore restriction, it would be difficult to show in practice that an individual dual pricing practice has anti-competitive effects. A few NCAs pointed to potential benefits of dual pricing, for instance that it allows suppliers to consider effectively the cost structure of brick-and-mortar shops, that it incentivises these shops to invest in their on-site customer services, and/or that it can prevent online retailers from free-riding on those investments.

In their replies, NCAs acknowledged that the equivalence principle is difficult to apply in practice. However, they also noted that breaches of the equivalence principle can have similar anti-competitive effects as dual pricing. In addition, it was indicated that the question of whether the equivalence principle applies only to selective distribution or to all types of distribution systems would require clarifications under the revised VBER and the revised Vertical Guidelines.

d. Parity obligations

A majority of NCAs indicated that they had experience or knowledge of instances where parity obligations raise competition concerns. Some NCAs referred to concerns about parity obligations relating to indirect sales/marketing channels (e.g. other platforms or intermediaries), whereas other NCAs referred to concerns about parity obligations relating to both direct (e.g. own website) and indirect sales/marketing channels.

As regards concerns about parity obligations more generally, NCAs indicated that they arise notably because parity obligations may soften competition and facilitate collusion between platforms or intermediaries. Additionally, NCAs noted that parity obligations may foreclose entry or expansion by new or smaller intermediaries.

Furthermore, while many NCAs did not have knowledge of instances where parity clauses create benefits, those NCAs that reported to have such knowledge indicated that these benefits may be created in connection with parity obligations that relate to direct channels. A few NCAs stated more specifically that investment incentives and the prevention of free-riding are among such benefits.

Although many NCAs pointed out that their experience is mostly related to cases involving the hotel booking or food-ordering sector, the majority of NCAs found that competition concerns regarding parity clauses arise independent of the sector. As regards further distinctions between different types of parity obligations, the feedback of the NCAs was mixed in that they did not clearly support one of the possible distinctions mentioned in the online questionnaire (e.g. the distinction between parity obligations that concern the retail and the wholesale level; whether it needs to be considered whether the parity obligation relates to price, inventory, availability or other conditions; whether, if intermediaries are concerned, it is necessary to consider the type of intermediary, i.e. sales intermediaries (e.g. sales platforms) or advertising/marketing

intermediaries (e.g. websites that offer only price comparison); or whether the transactions covered by the parity obligation take place online or offline).

In light of the above, a majority of NCAs supported a removal of the benefit of the block exemption for parity obligations by adding them to the list of excluded restrictions in Article 5 of the VBER. However, NCAs provided mixed feedback on whether all parity obligations or only those related to indirect sales channels should be excluded from the benefit of the block exemption. Some found that a distinction between so-called wide retail parity clauses (which require suppliers to offer the platform the same or better prices and conditions as those offered on any other sales channel) and narrow retail parity clauses (which generally only bind the supplier's direct online channel) is necessary as the latter are, according to them, less likely to raise competition concerns.

II. Other issues explored during the impact assessment for the review of the VBER

a. Efficiencies resulting from resale price maintenance

NCAs stated that they did not have substantial experience or knowledge of instances where resale price maintenance (RPM) led or could have led to efficiency gains. They agreed that RPM should remain a hardcore restriction under the VBER. More specifically, some NCAs argued that RPM is typically not indispensable to realise certain efficiency gains.

However, most NCAs considered that it would be helpful if the revised VGL included more guidance on which practices amount to RPM and on the conditions under which efficiencies can be argued for the use of RPM and the evidence needed for this purpose. More specifically, NCAs suggested providing more examples and further explanations as to how Article 101(3) TFEU can be applied to RPM, for example, to address free-riding concerns.

b. Tacitly renewable non-compete obligations

NCAs indicated that they did not have substantial experience or knowledge of tacitly renewable non-compete obligations. They generally supported block-exempting such non-compete obligations, provided there is a sufficient degree of legal certainty for the undertakings concerned, particularly in that the buyer can terminate or renegotiate the agreement at any time with a reasonable notice period and at reasonable cost.

c. Vertical agreements pursuing sustainability objectives

As regards agreements that pursue sustainability objectives, NCAs noted that, although the discussion has so far centered around horizontal cooperation agreements, sustainability objects are becoming increasingly relevant in the context of supply and distribution systems, and more generally as regards the vertical dimension of agreements between undertakings. However, NCAs stated that they still have little experience with such agreements. Therefore, some of them indicated that it would be useful if guidance

was provided in the Vertical Guidelines, for example, by reference to examples setting out the conditions that a vertical agreement pursuing a sustainability objective would need to fulfil. It was also suggested that sustainability should not only be taken into account as an efficiency gain under 101(3) TFEU but that the revised VBER and the revised Vertical guidelines could also refer to scenarios where agreements that are detrimental to sustainability should be considered as restrictions of competition under 101(1) TFEU, for example an agreement not to communicate on the sustainability performances of the products to avoid competing on this parameter.

d. Impact of the Covid-19 pandemic

NCA's noted that the Covid-19 pandemic has had a significant impact on the economy as such and on distribution models in particular. According to them, it has further amplified the increase in online sales, potentially combined with a lasting shift in consumer preferences. NCA's argued that the impact assessment should be fully reflective of these developments.

III. **Additional points and views submitted by NCA's during the consultation period**

a. Treatment of platforms under the VBER

NCA's shared the view that platforms play an increasingly important role for the distribution of goods and services and that some of the ways of doing business enabled by platforms are not easy to categorise under the concepts traditionally associated with vertical relationships between manufacturers and distributors in the brick-and-mortar environment. Against this backdrop, it was suggested to consider excluding platforms from the VBER altogether, as the VBER may not present an appropriate framework to address platforms. However, the majority of the NCA's indicated that they would rather welcome clarifications in the VBER and the Vertical Guidelines on the application of the VBER to platforms to increase legal certainty.

b. Approach to online restrictions more generally

NCA's agreed that the VBER and the Vertical Guidelines will need to be updated in light of online restrictions that have emerged or have become more prevalent over the last decade. The updated rules will need to clarify how the VBER applies to these types of restrictions, notably under which conditions such restrictions would amount to a hardcore restriction and in which cases they may benefit from the block exemption. In this context, it was argued that under the revised VBER and Vertical Guidelines, restrictions should be qualified as hardcore if they severely restrict online sales. Such an approach would be stricter than finding a hardcore restriction if the restriction amounts to a (de facto) ban on online sales.
