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Warsaw, 24 May 2019

EFFECTIVENESS – RESPONSE TO QUESTION 4
THE PUBLIC QUESTIONNAIRE FOR THE 2018 EVALUATION
OF THE VERTICAL BLOCK EXEMPTION REGULATION

We have identified the following areas where the level of legal certainty provided by the VBER and/or the VGL could be improved:

1. Section II VGL – Agency agreements;
2. Article 3 VBER – Market share threshold;
3. Article 4 VBER – RPM;
4. Article 4 VBER – Territorial/customer restrictions and exceptions to these restrictions;
5. Section III VGL - Online sales restrictions;
6. Article 5 VBER – Non-compete obligations with indefinite duration or exceeding 5 years;
7. Article 5 VBER – Post term non-compete obligations;
8. Section VI VGL – Single branding;
9. Section VI VGL – Franchising;
10. Section VI VGL – RPM.

1. Vertical agreements generally falling outside the scope of Article 101(1) of the Treaty - Agency agreements (recitals 12-21 VGL)

1.1 In terms of the guidelines regarding the assessment of the agency agreements (recitals 12-21 VGL) the level of certainty of the VGL is defined as slightly low, because we believe the following issues need clarification.

1.2 First of all, according to the VGL, three (3) types of financial or commercial risk are material for the definition of an agency agreement (recital 14). The VGL define the categories of such risks and clearly state that if the agent bears even one of them, the agreement cannot be classified as agency (recital 21). At the same time however, the issue of intensity of those risks remains unclear. Recital 14 explains that "(…) the agreement cannot be classified as agency if the agent does not bear any, or bears only insignificant, risks (…)". Thus, it should be clarified how to interpret "insignificant" in this context. In other words, it should be clarified when the risk borne by the agent is sufficiently material

to be taken into account, and when it can be disregarded for the purposes of the analysis in question. Secondly, in terms of the third category or risk i.e. “risks related to other activities undertaken on the same product market", it remains an ambiguous concept, and it would be helpful if further clarification, perhaps through examples, was given here. Finally, despite the broad description of the three categories of risks in recitals 14 to 17, recital 17 clearly states that the list provided therein is not exhaustive. This gives the Commission a high level of discretion and results in the deterioration of the level of legal certainty.

2. Additional conditions for the exemption of specific vertical agreements (Article 3 VBER) – market share threshold

2.1 We would like to draw the Commission's attention to the fact that a double market share threshold as the condition to benefit from the block exemption (Article 3 VBER) exposes the parties to unnecessary costs and uncertainty as to the applicability of the safe harbour.

2.2 An obligation to consider the other party’s market share entails significant practical issues for the companies willing to benefit from the safe harbour. In practice, they need to either rely on market share data provided by the other party or conduct their own market analysis in this respect. The first solution may involve uncertainty whether the market share has been calculated properly (e.g. with the use of adequate data and correct methodology), whereas the other one involves significant costs and practical difficulties in obtaining credible market data. What is important, in many cases, the costs of such analysis may not proportionate to the benefits of the applicability of the block exemption itself.

2.3 As we understand it, introducing in 2010 the buyer’s market share threshold as a general condition for block exemption was aimed to take into account the increased market power of some buyers. While we appreciate that in certain sectors the buying power of distributors has grown considerably over the last years, in our view it is not adequate to apply a double market share threshold for each type of restrictive arrangement. In our view, it would be more adequate that VBER recognises that the supplier's and buyer’s market share thresholds are alternative rather than cumulative, i.e. in case of certain restrictions it should be enough to take into account only the market shares of the buyer while in case of other restrictions – only the market shares of the supplier. The proposed approach takes into account the nature of the restrictive clause and the fact which party enjoys the main benefit of such restriction.

2.4 For example, in case of exclusive supply agreements, in our view it would be sufficient that the market share threshold applies only to the buyer’s market share. In such a case, a negative effect on the market may occur if the buyer’s market share is significant – if such entity uses its power to conclude exclusive supply agreements with several suppliers, it may lead to the foreclosure of rival buyers.

2.5 On the contrary, in case of exclusive distribution, in our view only the market share of the supplier would be relevant. In such a case, as long as the distributors have other sources of supply (which will be the case if the supplier's market share does not exceed 30%) the fact of exclusive distribution of one brand should not have a negative impact on the market, even if the buyer’s market share exceeds 30%.

2.6 In view of the above, we would welcome it if the Commission reconsidered introducing its approach applied in the previous legal regime where it stated:

"*The simplified approach of the Block Exemption Regulation, which only takes into account the market share of the supplier or the buyer (as the case may be) on the market between these two parties, is justified by the fact that below the threshold of 30 % the effects on downstream markets will in general be limited. In addition, only having to consider the market between supplier and buyer makes the application of the Block Exemption Regulation easier and enhances the level of legal certainty, while the instrument of withdrawal (see paragraphs 71 to 87) remains available to remedy possible problems on other related markets*." (paragraph 22, Guidelines on Vertical Restraints 2000).

2.7 In our view, the current restrictive double market share approach is too burdensome for the parties and at the same time excludes agreements that are pro-competitive from VBER coverage. The previous approach, which took into account either the market share of the supplier or the buyer (depending on the restriction involved) is in our view more appropriate as it correctly identifies restraints that may have anticompetitive effects and at the same time does not impose excessive burden on parties in cases where there is no risk of such effects.

3. Hardcore restrictions (Article 4 VBER) – RPM

3.1 The level of certainty of the VGL is defined as slightly low because from recital 48 VGL it is not entirely clear where the borderline is between a permitted maximum/recommended resale price and a hardcore fixed/minimum resale price. In particular, printing a recommended price on a product or monitoring of prices should not in itself be regarded as a practice sufficiently incentivising retailers not to deviate from that price (and therefore, should not be treated as imposing a fixed resale price).

3.2 We would encourage the Commission to clarify in the VGL that in the absence of incentives to follow the maximum/recommended prices or a limited number of those incentives, if most or all retailers follow the recommended/maximum prices (because the recommended/maximum price falls short of the competitive market price), such practice should not be treated as anticompetitive price fixing. We note that the enforcement across EU member states is inconsistent in this respect (e.g. France) and for the sake of proper functioning of the internal market these inconsistencies should be eliminated.

4. Hardcore restrictions (Article 4 VBER) – Territorial/customer restrictions and exceptions to these restrictions

4.1 The level of certainty of the VBER and VGL is defined as slightly low because it is not entirely clear whether the exception provided in Article 4(b)(ii) VBER allows the restriction of the activity of the wholesaler at the retail level as a whole, including the restriction of online sales – both active and passive.

4.2 Therefore, we would encourage the Commission to expressly provide in the VGL that the exception in Art. 4(b)(ii) VBER allows the supplier to restrict distributor's sales to end customers as a whole (including the online channel) if that distributor acts not only as a wholesaler, but also as a retailer in both brick and mortar stores and online.

4.3 In more general terms, we would encourage the Commission to confirm that the exceptions provided in art. 4(b)(i)-(iv) may be applied jointly, i.e. the agreements covering more than one of these restrictions would still be considered as covered by the VBER exemption.

4.4 It would also be helpful if the Commission expressly confirmed that, due to the absence of any criteria as to how an exclusive territory or customer group must be defined, it is left to the discretion of the parties.

5. Application of the block exemption regulation (Section III VGL) – Online sales restrictions

5.1 We would like to draw the Commission's attention to the following issues that require modification and precision:

5.1.1 The current vision of competition in omnichannels must be specified. Although, the current VGL favour the online channel, the situation since the introduction of the VGL has changed. Protection of the online channel should be reduced. The network organizers should have more freedom as to how they wish to distribute their products and what kind of requirements they impose in the same way as in the case of offline. In effect, the assessment of practices should cover following aspects:

(a) competition takes place more and more between various omnichannels (i.e. networks of suppliers and sellers) rather than between the offline and online channels and should be therefore considered as the benchmark for assessment;

(b) as prices become more transparent on the Internet, the role of qualitative competition (pre- and after-sales services) is becoming more important;

(c) free rider effect is two-sided.

5.1.2 What should be the benchmark of the relevant market that allows the assessment of practice in the omnichannel?

5.1.3 The demarcation of passive and active sales in the network. The notion of passive sales (recital 51 VGL) needs to be adapted to online marketing practice by indicating clearly situations constituting passive sales.

5.1.4 Importance of consumer protection and personal data protection in competition enforcement should be elaborated.

5.1.5 The uniform application by national authorities (NCAs) of rules related to distribution should be introduced in order to avoid differentiated enforcement (e.g. *Booking case*).

6. Excluded restrictions (Article 5 VBER) – Non-compete obligations with indefinite duration or exceeding 5 years

6.1 According to recital 66 of the VGL, non-compete obligations are exempted under the VBER where their duration is limited to five years or less and no obstacles exist that hinder the buyer from effectively terminating the non-compete obligation at the end of the five-year period.

6.2 In our opinion, no such obstacle exists also where, under agreements concluded for an indefinite time with five years non-compete obligations, the supplier has a right to terminate the agreement if a distributor does not agree to the renewal of a non-compete obligation. However, VGL does not provide for sufficient clarity in this respect. Thus, in our view, it would be helpful to explicitly confirm the above in the VGL.

7. Excluded restrictions (Article 5 VBER) – Post term non-compete obligations

7.1 According to Article 5(3)(c) VBER it is allowed, as an exception, to enter into a post-term non-compete obligation, if inter alia the obligation is indispensable to protect the know-how transferred by the supplier to the buyer. Under Article 1(1)(g) VBER, the know-how must be 'substantial', which means that the know-how is significant and useful to the buyer for the use, sale or resale of the contract goods or services.

7.2 The level of certainty of the VBER and the VGL is defined as slightly low because in practice, it may be very difficult to distinguish what know-how is substantial, and the definition provided in Article 1(1)(g) of VBER is often not sufficient to address the practical problems in identifying it. This problem is particularly visible in franchise systems that concern the distribution of simple products or services. In such a case, one may argue that the know-how provided by a franchisor is not significant, as the franchisee would still be able to distribute such products or services without the know-how provided by the franchisor. In such situations, it is difficult to decide if the transferred know how is substantial, as the definition does not provide guidance on how to understand the very general premise of "significance". Thus, in our view, in addition to the definition itself, the VGL should provide more guidance here (e.g. to elaborate on the applicable criteria, possibly illustrating them with examples).

8. Enforcement policy in individual cases (Section VI VGL) – Single branding

8.1 With respect to single branding, the "slightly low" legal certainty stems in our view from descriptions provided in recitals 107(e) and 148 of the VGL, which note that the transfer of "substantial" know-how justifies a non-compete obligation for the whole duration of the supply agreement. The quantification of know-how in this example as "substantial" is confusing in the sense that the definition of know-how included in Art. 1(g) of the VBER already refers to practical information, which is substantial, i.e. significant for and useful to the buyer. We therefore suggest deleting this reference from recitalts 107(e) and 148 of the VGL to allow for the admissibility of non-compete provided for the entire duration of a vertical agreement in any case where know-how is transferred to the buyer.

9. Enforcement policy in individual cases (Section VI VGL) – Franchising

9.1 The level of certainty of the VGL is defined as slightly low because from the VGL it is not entirely clear whether and under what criteria the VGL exempts non-compete clauses exceeding 5 years in franchising agreements from the application of Article 101(1) of the Treaty. The VGL (and VBER) contain three different provisions that may exempt or justify non-compete clauses exceeding 5 years: (1) recital 190(b) VGL, (2) Article 5(2) VBER together with recital 67 VGL and (3) recital 148 VGL.

9.2 Under recital (148) VGL, the transfer of substantial know-how usually justifies a non-compete obligation for the whole duration of the supply agreement, as for example in the

context of franchising. Recital (190)(b) VGL, in turn, provides that a non-compete obligation on the goods or services purchased by the franchisee falls outside the scope of Article 101(1) where the obligation is necessary to maintain the common identity and reputation of the franchised network. According to Article 5(2) VBER together with recital 67 VGL, the time limitation of five years for non-compete obligations shall not apply where the contract goods or services are sold by the buyer from the premises and land owned by the supplier or leased by the supplier from third parties, provided that the duration of the non-compete obligation does not exceed the period of occupancy of the premises and land by the buyer.

9.3 As the key feature of franchise networks is the provision of a complete and uniform business method by the franchisor to its franchisees and the transfer of know-how (which, according to its definition in Article 1(1)(g) VBER is always substantial), we would encourage the Commission to expressly state that in franchise agreements falling within the meaning of franchise agreements in recital (189) VGL, non-compete obligation is justified for the whole duration of the agreement, regardless of whether franchisees carry out their businesses under franchise agreements in premises owned or leased by the franchisor from third parties, and therefore falls outside the scope of Article 101(1).

9.4 If the Commission is of the view that there could be any situations in which such non-compete clause would not be justified in franchise agreements, for the sake of legal certainty it would be helpful if the Commission provided examples of such situations.

10. Enforcement policy in individual cases (Section VI VGL) – RPM

10.1 The level of certainty of the VGL is defined as slightly low because it is not clear what distribution systems are considered similar to franchise systems (recital 225 VGL) and thus, in which distribution systems applying RPM in short-term low price campaigns may be considered as leading to efficiencies. We consider that applying RPM in short-term low price campaigns in principle leads to efficiencies in all distribution systems, not only "in a franchise system or similar distribution system". Eventually, consumers benefit from those campaigns, regardless of the distribution system. Therefore, we would encourage the Commission to broaden the description of RPM leading to efficiencies in short-term low price campaigns to all distribution systems.

10.2 Moreover, it would be prudent for the Commission to provide more guidance on the borderline between a permitted maximum/recommended resale price and a hardcore fixed/minimum resale price, especially in light of the current wording of recital 227 VGL. The setting of maximum resale prices that most or all resellers are likely to follow (because they fall short of the competitive market price), in the absence of incentives to follow the maximum/recommended prices or a limited number of those incentives, should not be treated as setting "a focal point" price. To increase the level of legal certainty, the VGL should reflect this. Such change would also contribute to a more uniform application of the VBER/VGL and their national equivalents across the EU.