EuroCommerce for retail & wholesale

Position
27 May 2019

Contribution to the Commission assessment of the Vertical Block Exemption Regulation

Key messages

1. **VBER has worked well over the last nine years and provided a relatively balanced framework for the relationship between businesses in a vertical relationship in the supply chain**. The Commission's current evaluation is an opportunity to create an updated regulatory framework which provides legal certainty in the supply chain, and supports a competitive retail and wholesale sector in the next decade.

2. **Adapt the current framework to new market developments and circumstances, in particular digital**. Digital has brought about huge transformational changes in supply chains, increasing transparency and competitive pressure. On-line sales are growing fast and influence store-based sales. As a result, retailers increasingly offer a combination of both on-line and off-line services. Digitalisation has also had a huge impact on interactions with manufacturers, who are increasingly becoming direct competitors, addressing consumers direct on-line. Organised distribution channels, such as selective distribution channels, remain vital in certain sectors. Selective distribution systems can make a significant contribution to efficiency if they are based on objective criteria and justifiable in respect of the specificities of the product in question.

3. **Seek to address through the regulation and its guidelines the following issues**:
   - **adapt definitions of geographical and product markets**: retail markets should be considered at least as national, not local and take into account the diversity of distribution channels when assessing the relevant market;
   - **maintain the strict principle of prohibiting resale price maintenance**: the freedom to negotiate and set prices is fundamental for retailers and wholesalers;
   - **review provisions on selective distribution** to reflect market developments and recent case law; provide clear definitions on products ("luxury", "high technology" products); ensure that criteria for selective distribution are objectively justified by the nature and characteristics of the product, non-discriminatory, proportionate and necessary; strengthen transparency requirements;
   - **prohibit absolute marketplace bans**: restrictions of (re)selling on a marketplace should only be allowed if they do not generally prohibit sales on marketplaces and are justified on the basis of objective criteria;
   - **clarify the definitions of active and passive sales** to reflect the impact of on-line sales, and adapt requirements to the geo-blocking regulation; ensure that restrictions on passive sales remain strictly limited;
   - **clarify provisions addressing territorial supply restrictions** and strongly enforce these;
   - **consider new practices such as channelling** and their effect on prices and the market.

4. **Step up and ensure consistent enforcement:** the principle of self-assessment is widely accepted and should remain in place; however, we are concerned at frequent cases of weak enforcement and risk of divergent interpretation by national competition authorities; consider a guide for SME entrepreneurs in plain language as a complement to detailed provisions in the guidelines.

General comments

1. **VBER has worked well over the last nine years and provided a relatively balanced framework for the relationship between businesses in a vertical relationship in the supply chain.** The Commission's current evaluation is an opportunity to create an updated regulatory framework which provides legal certainty in the supply chain, and supports a competitive retail and wholesale sector in the next decade.

2. **Since the last revision in 2010, the market has changed dramatically, in particular with the development of on-line and digital technology, which have increased price transparency and lowered entry barriers**. This has made it easier for manufacturers to sell direct to consumers and compete directly with their distribution networks (dual role of the manufacturer). Lines between retail and wholesale are increasingly blurred. Digital is also influencing and reacting to changing consumer behaviour on-line and off-line. The Commission e-commerce enquiry in 2016/7 shed light on developments arising from on-line developments, affecting competition conditions in the supply chain, including greater use of restrictive practices by manufacturers. This led to enforcement action by the Commission.

3. **Territorial supply constraints are another issue that would merit further attention in the context of changing market conditions**, and their impact in hampering the development of the single market and its potential benefit to consumers. In practice, retailers and wholesalers are unable to benefit from the single market for certain products, especially "must-have" – i.e. products they must stock, or risk losing customers to competitors - because suppliers make it impossible for them to source products cross-border (no parallel import) or freely move products within their own network of stores/operations (quantity forcing). We ask the Commission to consider this as a priority in the current evaluation.

4. **The current assessment is also an opportunity for reflection upon enforcement practice**. The DG COMP e-commerce enquiry of 2017 shed light on a range of restrictive practices and the need for stronger enforcement. We note that certain provisions have never been applied –e.g. article 6/VBER on the disapplication of a block exemption – and seen competition authorities interpreting the rules differently across Europe. VBER relies on self-assessment by companies, which, in principle, has proven efficient. It is therefore critical to ensure that the rules remain relevant to the current business environment and changing competitive landscape, in particular arising from digital. Finally, given the inherent complexity of the guidelines, we would suggest the Commission to develop a **separate guide in plain language designed for use by SME entrepreneurs in applying these, while pointing to the more precise wording necessary in the Guidelines**.

Scope of application

Commercial agents (VGL 12-21)

5. **The current exemption for commercial agents and the definition and conditions for application are seen to be working well and providing the necessary legal certainty for operators to self-assess, perform and compete on the market.**

6. A commercial agent is a legal or physical person authorised to negotiate and/or conclude contracts on behalf of another person (the principal). Commercial Agency agreements are excluded from the scope of Article 101 (1) of the Treaty on the Functioning of the European Union (TFEU). The exemption is justified by the fact that commercial agents are usually bound by the principal's instructions in terms of prices and conditions for the transactions concluded by the agent, whereas the principal bears all significant risks associated with the distribution to end customers. Provided that these conditions are fulfilled, commercial agents have an auxiliary function, forming an economic entity with the principal. Genuine agency agreements are thus not agreements between independent entities according to competition law. An exception to this principle is made where the agent assumes financial or commercial risks in relation to the initiation, conclusion and execution of the respective transaction (Para 13 et seq. of the Guidelines).

7. **Genuine agency agreements should continue to fall outside of the scope of Article 101(1) TFEU**. If the agent does not bear any, or only insignificant, risks in relation to the contracts concluded and/or negotiated on behalf of the principal, in relation to market-specific investments for that field of activity, and in relation to other activities required by the principal to be undertaken in the same product market, the agent does not act as an independent undertaking.

8. The provisions of the VGL further provide valuable and practical guidance where commercial agents may operate different roles and functions. There may be merit in the Commission looking at the guidelines in the light of national and EU level case law covering commercial agency agreements, and market developments.

9. **Not prolonging the exemption would deprive commercial agents of the legal certainty that the current VGL provide in combination with the directive on commercial agency**[1]. This would put at risk a sector that supports about 600,000 SMEs, generates a turnover of €290bn, provides employment to about 1 million people and supports market integration in the EU by facilitating access to third country markets[2].

Subcontracting agreements (VGL 22)

10. **The exclusion from the provisions of article 101(1) TFEU for subcontracting agreements is relevant and provides legal certainty. It thus needs to be maintained. Experience with the Subcontracting Notice of 1978[3] has shown that it is still relevant.**

11. Some clarification could be considered to extend provisions of VGL (22) to 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.

12. Retailer brands are **products manufactured for a distributor and sold under the distributors' name and responsibility**. The exclusion is justified on the ground that retailers provide know-how (e.g. market research on consumer preferences and market trends) and invest in the marketing of the products. Manufacturers benefit from such an agreement, as they do not need to invest in marketing or branding and it supports an efficient use of their production capacities.

Retailer brands are an important part of a retailers' assortment; they support competition, innovation and consumer welfare

Retailer brands support competition, innovation and consumer welfare. They are an important tool for retailers to meet fast-changing consumer preferences:

- they increase consumer choice, ensure an efficient use of shelf-space, give smaller suppliers access to retailers' shelves without the need to invest in the development of a brand; they make it possible for manufacturers to optimise the efficient use of their production capacities;
- they intensify inter-brand competition and play an important role in allowing retailers to differentiate, in complementing brands' assortments and meeting consumer demand for specific products. If retailers' assortments were only made up of branded goods, retailers would only compete on the basis of price, and consumer choice severely curtailed;
- much innovation has been introduced through retailer brands by combining suppliers' product expertise with retailers' knowledge of consumer trends;
- retailers usually provide know-how (e.g. market research on consumer preferences and market trends) and invest in the marketing of the product.

[1] Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents

[2] According to Eurostat, in 2017, commercial agents in the EU28 accounted 588,080 businesses (vs. 587,817 in 2011), reporting a turnover of 289 billion EUR, that is 3.4% of total commerce turnover and providing employment to 998,000 people.

[3] Commission notice of 18 December 1978 concerning its assessment of certain subcontracting agreements in relation to Article 85 (1) of the EEC Treaty

Associations of retailers (VBER 2.2; VGL 29-30)

13. **VBER and VGL set out clear provisions for the relations between joint purchasing groups and their networks of independent SME retailers. The current evaluation process is an opportunity to spell out more clearly the pro-competitive effects of associations of independent retailers and to adapt criteria to the latest market developments.**

14. **The conditions for benefiting from the safe harbour for associations of retailers (VGL 29) are very strict and need to be reviewed to reflect current market developments, high turnover arising from a trading activity and the on-going review of the SME definition**. In retail, even relatively small retailers easily achieve a turnover of EUR 50 million. In practice, such a threshold excludes a significant number of associations of retailers from the safe harbour even if they individually and collectively represent a negligible share of the market. Against this background, the turnover threshold should be significantly increased. Furthermore, the 15% market share threshold should refer to the market share of an individual company instead share represented by the combined turnover of the members of the association. This would increase legal certainty.

15. **The pro-competitive role of joint purchasing agreements through associations of retailers should be further spelt out**. Joint purchasing groups enable individual retailers to negotiate on better terms with often very much larger suppliers, by generating economies of scale (through bundling volumes) and offering common services. Consumers directly benefit from better conditions: the fact that consumer loyalty is never guaranteed is the best incentive for retailers to pass on the outcome of their negotiations with suppliers. Clarification could be achieved through amendment of para 30 of the VGL or in a new paragraph which would spell out that joint purchasing agreements between independent retailers, where one corporate entity purchases from suppliers at wholesale level, is generally considered as pro-competitive under the conditions laid down in the Horizontal Guidelines. Such joint purchasing cooperation usually allows independent retailers to achieve better purchase prices and other purchasing conditions from suppliers.

16. VBER and VGL provide guidance on the tests to be applied for associations of retailers to benefit from the safe harbour, and are conducted **in combination with an assessment of the horizontal impact**. The vertical aspects being less sensitive from a competition point of view, the assessment of the vertical relationship should only be required in very narrow circumstances (i.e. if there are indications that the result of the horizontal assessment needs to be revised in the individual case).

Non-reciprocal agreements – vertical agreements between competitors (VGL 27-28)

Dual role of the manufacturer and increased direct-to-consumer sales (VGL 28)

17. Direct manufacturer sales to consumers (M2C) are a growing phenomenon. The current evaluation is an opportunity to reflect on the impact of such sales, and adapt the guidelines to market developments. We would suggest clarifying the relationship with horizontal guidelines to ensure that only vertical rules apply to non-reciprocal agreements. The VGL could clarify inter alia that information exchange that typically takes place in the distribution of a product / service (e.g. communication of Recommended Retail Prices (RRP), joint campaign planning, etc.) benefits from the safe harbour. For instance, campaign planning is hardly possible for a reseller without disclosing to the distributor certain information about the campaign, e.g. (additional) quantities required, timing, etc. As a general principle, the exemption granted under art. 2 of the VBER should also apply to aspects covered by the horizontal guidelines such as disclosure of sensitive information, as long as they are necessary to the distribution relationship.

M2C is becoming an important competing distribution channel

Manufacturers have recognised the positive opportunities to engage directly with their consumers through on-line and are increasingly selling direct to consumers (M2C) as part of wider distribution strategies. While retail remains a significant distribution channel, direct to consumer sales are growing fast. Research group NPD, estimated that, in 2017, M2C sales increased by 34% and represented 13% of all e-commerce sales in the US (in absolute terms, 60 bn EUR). Research conducted by Bringg[4] reports that 87% of big manufacturers rate M2C channels as highly relevant to both products and consumers. Almost half of manufacturers (48%) are turning to M2C channels to help increase revenue share. According to new research from Diffusion's "2018 Direct-to-Consumer Purchase Intent Index", one in three U.S. consumers plan to do at least 40% of their shopping from M2C companies in the next five years. A company like Nike is reported to foresee M2C sales to reach $16 billion (EUR 14 billion) by 2020; a massive increase from the $6.6 billion this channel generated in 2015.

In 2017, it was reported that Unilever and Mars signed up to a new digital shopping service to sell their brands direct to consumers: "*the new digital grocery service, which is designed by tech firm INS, claims it could cut grocery bills by 30 per cent as it allows wholesalers to sell directly to consumers, without having to deal with grocery retailers as the "middleman"*".[5]

18. **Given this rapid development of M2C, it is all the more important the provision on own brands is fundamental and the exemption should be maintained**. Retailers are not active in the role of manufacturer. The supply of own brands is a subcontracting relationship[6] and retailers do not compete with the manufacturers of such own brand products for their client base, as generally own brands are only sold through their own network.

19. **Agreements with IPR provisions (art. 2 (3) VBER and 31 – 45 VGL):** potential issues could arise with regard to statutory obligations of retailers vis-à-vis end consumers. For example, it should be considered illegal for a supplier to refuse to provide updates on a product, where this is needed to maintain the service to customers after the sale of the product.

Market definition

20. Market definition and the market share calculation method are key to allowing businesses to self-assess whether they can benefit from the safe harbour.

21. EuroCommerce members consider that the **market share calculation method** is still appropriate in ensuring that the market power of an undertaking is adequately assessed and can be easily compared with other players.

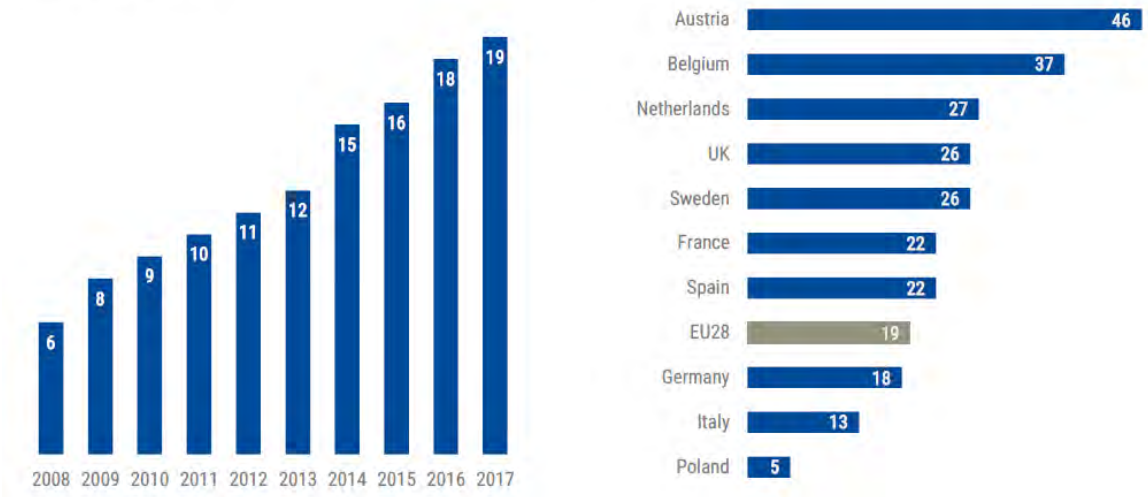
22. Assessment of the **geographic market,** on the other hand, needs to take into account new market circumstances, including on-line. The **relevant market for retail should generally be at least national, not regional or local.** Retailers' procurement policies are primarily defined on a national basis. On-line tools including price comparison tools and delivery models (drive, click & collect, home delivery) have expanded the geographical market. Furthermore, in a number of countries, a significant share of on-line purchases are made on a foreign-based web site.

[4] See article here.

[5] https://www.retailgazette.co.uk/blog/2017/11/unilver-mars-reckitt-benckiser-move-direct-consumer/

[6] "a distributor that provides specifications to a manufacturer to produce particular goods under the distributor's brand name is not to be considered a manufacturer of such own-brand goods." (VGL 27)

Percentage of shoppers who purchased from EU-based foreign websites, in the EU28 (left) and from individual countries in 2017 (right)



Source: Eurostat

Belgian households are buying more and more cross-border:

Total e-commerce sales, Belgium (billion EUR)

Source: Comeos

Belgian shoppers are buying more and more often online. The fastest growing categories in 2016 were those Belgians are already accustomed to buying online, such as apparels and footwear, media products, and homewares and home furnishings.
The most important factors influencing online shopping decisions are previous experience with the brand, with the retailer and available information. As consumers grow more confident and knowledgeable, they are becoming more demanding too. Delivery methods have thus become one of the key issues for on-line retailing.

23. As concerns the **product market**, we would ask that the **diversity of distribution channels, including on-line sales and direct sales to consumers, are taken into account when assessing the market**. In many trading relationships, retailers and wholesalers are dependent on suppliers of "must-have" products. Provisions on substitutability - "*any goods or services which are regarded by the buyers as interchangeable, by reason of their characteristics, prices and intended use*" (VGL 88) - are important for assessing the market and need to be maintained. The guidance could be expanded to provide clarification of how the Commission will identify and take into account that "*a distributor, as reseller, cannot ignore the preferences of final consumers when it purchases final goods*" (VGL 89).

Hardcore practices

Resale price maintenance (recitals 48-49; 223 – 229)

24. **The freedom to negotiate and set prices is essential for retail and wholesale entrepreneurs. Thus the principle of prohibiting Resale Price Maintenance should be strictly maintained.**

25. The DG COMP e-commerce enquiry revealed 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[7].

26. We are concerned that some national authorities may not be applying the hardcore RPM restriction in a consistent manner, and **would request the Commission to seek greater and consistent enforcement of this provision**. The Commission could for instance draw on guidance from the German competition authority[8], which inter alia, considers that vertical price fixing can be justified on the basis of a case by case analysis (i.e.: market launch of a new products or a short-term promotion campaign reflecting the EU VGL) but also stresses that similar or greater efficiencies can be achieved via far less competition-restrictive measures. The Commission should take into account statements and decisions of national competition authorities in order to ensure a consistent approach throughout the EU with regard to the scope of RPM.

27. **A degree of flexibility should be introduced on existing provisions allowing independent entrepreneurs who are part of a franchise network or group of entrepreneurs, but should be limited to short term (on-line) marketing campaigns for new products or advertising** (VGL 225). Under paragraph 225 VGL, fixed resale prices may be admissible in a distribution system with uniform format (e.g. franchise network or group of independent retailers) for coordination of short-term price campaigns. Clarification in that paragraph should be considered for groups of SME independent retailers and franchisees to carry out such campaigns. In particular associations of independent retailers and franchisors should under specific conditions, be able to communicate fixed sales prices to their members/franchisees in order for the latter to be able to effectively sell and jointly market products online, even if they are not interconnected under company law, are not subject to shared control and/or do not constitute a combined market presence.

28. Furthermore, the VGL foresee the possibility for suppliers to resort to RPM, e.g. in the case of a new product introduction. **We would ask that this possibility is limited in time** –e.g. with a maximum of 6 weeks, so as to prevent application of RPM for unnecessarily long periods.

Territorial and customer restrictions

29. **We ask the Commission to review the guidelines with respect to selective distribution and on-line sales restrictions in order to reflect recent court cases and market developments**.

On-line market developments

The recent adoption of the geo-blocking regulation requiring retailers to sell across borders, and increased retail diversity and the continued development of on-line retail are making traditional territorial and customer restrictions harder to justify. The line between digital and brick and mortar sales is increasingly blurred: even if transactions continue to mostly take place in physical shops (over 80%), a large number of sales are initiated or influenced by digital (over 50%). Marketplaces can offer a high quality and convenient sales environment that may be indistinguishable from a retail website. They have become an important route to customers for many retailers, and for many SMEs, provide them with the only economically viable option for on-line visibility, services and regulatory compliance (e.g. GDPR compliance, etc.). Following the adoption of the Coty case, many retailers, including many SMEs, have been facing restrictions on their ability to sell through marketplaces, which limits their competitiveness in a digital environment (c.f. parag. 36 ff below).

[7] 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

[8] Bundeskartellamt guidance note on the prohibition of vertical price fixing in the brick-and-mortar food retail sector, 25 January 2017

30. Selective distribution systems are important for many SMEs, specialist retailers and wholesalers. These can make a significant contribution to efficiency (benefits to consumers and guarantee a high level of quality advice), if they are based on objective criteria and are justifiable in respect of the nature of the product in question, are transparent, non-discriminatory and benefit consumers. The DG COMP e-commerce enquiry has shed light on manufacturers resorting increasingly to selective distribution systems to limit competition, 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.

Criteria for selective distribution must be objective and justified by the specificities of the product.

31. **Selective distribution must be restricted to "luxury" and "high technological" products on the basis of objective criteria, not a mere self-assessment of the supplier**. Extending the possibilities for resort to selective distribution to maintain "brand image" or prestige" alone is not justified and is likely to aid manufacturers in maintaining prices at artificially high levels by reducing competition in the market. **Brand image and prestige are not part of the characteristics of a product and thus cannot justify a selective distribution system.** Deciding otherwise would leave it entirely to the manufacturer to define whether a selective distribution system is legitimate and with that the restrictions of certain customer groups.

32. Following the Coty case and subsequent court cases, we ask the Commission to clarify the applicable guidelines with respect to selective distribution. In particular, we would ask that **selective distribution systems should only be protected by the VBER safe harbour on grounds of specific product characteristics, such as "luxury" or "high-technology" justifying the use of selective distribution and provided that the Metro conditions are strictly fulfilled** – i.e. "*provided that resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion, that the characteristics of the product in question necessitate such a network in order to preserve its quality and ensure its proper use and, finally that the criteria laid down do not go beyond what is necessary*"[9].

33. **Clear criteria helping to better define "luxury" and "high-technology" products should be introduced.** Such criteria could refer to the know-how, scarcity, the use of "noble" materials justifying different pricing. Similarly, "high technological" products usually require support in the form of service or advice from qualified staff for the purchase, installation or use of the good.

34. In line with the Pierre Fabre judgment[10], **maintaining brand image in itself, should not be understood as a justification for imposing selective distribution restrictions**. This is critical, in particular in the case of branded goods which are not easily substitutable and where brands hold significant bargaining power.

35. **Greater levels of transparency would be instrumental to achieve proper control over the application of the Metro criteria**. This could be achieved through the obligation for manufacturers / suppliers to list all products subject to a selective distribution agreements, and all authorised distributors. We would further ask that **criteria for selective distribution to be systematically communicated and easily made available to all distributors interested in becoming an authorised distributor** (VGL 175). Without a comprehensive view on all products subject to selective distribution, together with an obligation to communicate conditions for joining a selective distribution network, it is merely impossible to control that uniformity, objectivity and proportionality criteria are met. Greater transparency could also help identify operators that are part of a selective distribution network and thus increase legal certainty for buyers, giving them a greater guarantees of the integrity of the selective distribution network. It would also give consumers a guarantee that their product is authentic.

[9] Competition policy brief, 2018-01, April 2018, European Commission, DG COMP

[10] Paragraph 46 Pierre Fabre judgment: "*The aim of maintaining a prestigious image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU*."

Examples

It is reported that the same suppliers may be applying different criteria in different countries within their selective distribution network – e.g. imposing different criteria for store location and design (with multiple criteria being imposed when assessing stores), adjacency criteria (suppliers may apply different criteria to similar products, defining products differently from country to country (e.g. applying the concept of luxury product to one country but not for another), different criteria for a "representative assortment" (minimum percentage of their overall assortment provided to one supplier). Such practices obviously thwart the argument that the criteria and restrictions imposed would be justified on the basis of the nature and characteristics of the product.

E-commerce enquiry and findings on selective distribution

- (225), p. 71: "(…) 19 % of manufacturers report having introduced a selective distribution system where they did not apply selective distribution beforehand, while 2 % extended their existing selective distribution systems to other types of products. 67 % of manufacturers that use selective distribution report having introduced new criteria in their distribution agreements.
- (258), p. 85: "**24 % of the manufacturers report that they do not communicate their selective distribution criteria to retailers wishing to be part of the selective distribution network**. Out of the **76 % that communicate their selection criteria to retailers, some however specify that they would not necessarily do so when, based on information available to them regarding the retailer** (such as for instance the lack of a brick and mortar shop), it is clear that the retailer would anyway not fulfil their set of selection criteria."

Marketplace bans

36. "*Online platforms are key enablers of digital trade. At present, more than a million EU enterprises trade through online platforms in order to reach their customers, and it is estimated that around 60% of private consumption and 30% of public consumption of goods and services related to the total digital economy are transacted via on-line intermediaries*"[11]. The sector enquiry identified that marketplace bans were most prevalent in member states where marketplaces were more important as a sales channel and in product segments where sellers sold more on marketplaces. The message for the future was clear, in absence of a hard-core restrictions, brands will continue to extend marketplace bans as that channel grows.

37. Market places offer many companies in the digital world, especially SMEs, who may not have the financial and/or technical means to set up their own on-line channel, an efficient and cost-effective way to reach customers. Consumers need access to products and the market is today no longer just the physical local market but a combination of various opportunities. **A general "*per se*" marketplace ban, outside a selective distribution network and without any regard to objective criteria, should be considered a hard-core restriction (under art. 4b or 4c)**. Since it is legally necessary to take into account the economic context of a restriction when assessing whether it amounts to an infringement "by object", we would recommend clarification by the Commission that blanket marketplace bans already amount to such an infringement[12]. Specific requirements imposed for distribution on marketplaces should only be allowed as long as they do not generally prohibit sales on marketplaces and are justified on the basis of objective criteria.

38. Following the Coty case and subsequent interpretation from the Commission, we suggest that **market place bans should only be allowed under strict conditions and be justified, using the Metro criteria for selective distribution as a basis, so that the Coty case is not understood as allowing suppliers to impose a per se prohibition without clear criteria**. Such a clarification could be introduced through a hard-core ban under art. 4b or 4c which are currently limited to bans

[11] Proposal for a regulation of the EP and the Council on promoting fairness and transparency for business users of on-line intermediation services, COM(2018) 238 final

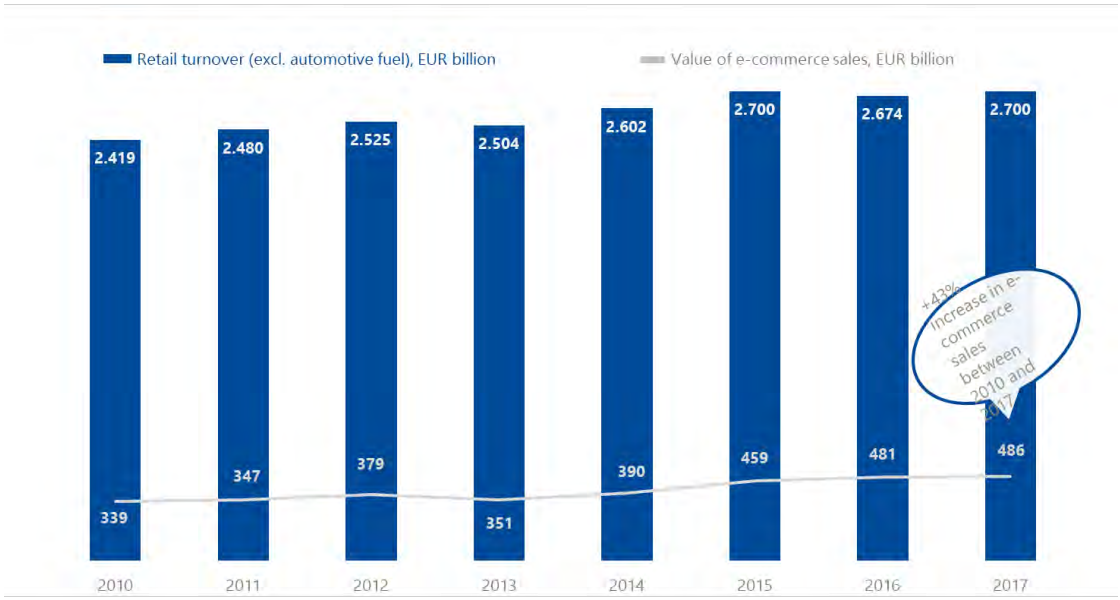
[12] See *SIA Maxima Latvija* C-345/14, paragraphs 16-24; *Allianz Hungária Biztosító and Others*, C-32/11, paragraph 34; *CB v Commission*, C-67/13, paragraph 52, and *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13, paragraph 116

without a justification. Furthermore, reflecting the e-commerce enquiry and the Coty case, the Commission could also specify clearly, in line with the Coty judgment, that **a supplier selling through the same marketplace should not be allowed to prevent their distribution networks from selling on it or on marketplaces of equivalent quality**. Furthermore, a market place ban that is imposed on brand protection grounds or a lack of pre- or post-sales service cannot be justified where the manufacturer has itself accepted a marketplace operator as an authorised seller, or where the operator's retail site offers a similar sales environment.

Brick and mortar requirements and fixed fees

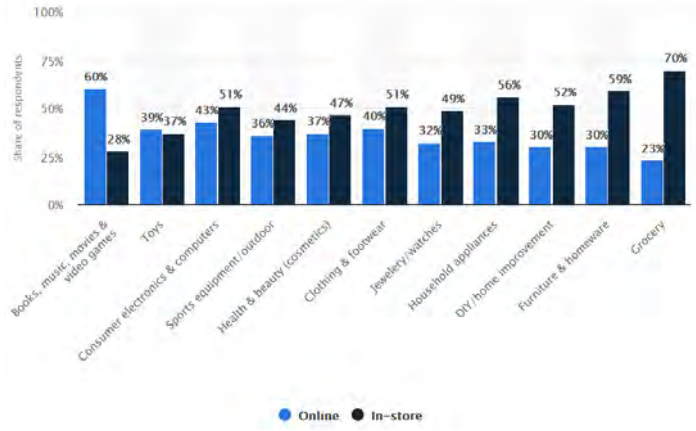
39. **Suppliers should be able to continue to support their networks of distributors who sell through brick and mortar stores. Positive feedback from customers shows how much they value the expertise of trained staff in stores, but also the ability to test products and benefit from advice at the sales point, where this is relevant. However, rules on brick and mortar and on-line requirements and other fees should be adapted to market circumstances. On-line and off-line do not need be treated the same way, provided that the criteria applied by manufacturers are objective, proportionate, transparent, non-discriminatory and necessary to the specific circumstances.**

On-line sales are a growing share of total retail sales; physical stores continue to play a key role



Data are for the EU28, Source: Eurostat

Customer preferences on-line and off-line show that both physical and online play a key role in different product categories



Source: statista

40. **Allowing a fixed fee (VGL 52d) to support a retailers' off-line or on-line sales efforts has been shown not to work effectively**. At the same time, introducing a variable reference to turnover would appear to be prohibited. Companies operate with a different cost base, depending on where their stores are located and whether they are operating on-line or off-line. As a result, a given fee could represent a small amount for a sales office in a big city centre, but be significant for a sales office in a rural area. At the same time, manufacturers will in most cases only provide sales support for return on investment. In line with relevant case law, it should therefore be clarified that variable fees or discounts are also allowed to support brick and mortar retail trade insofar as congruent or equivalent sales efforts in online and off-line trade are taken into consideration. This should also not lead to one distribution channel being advantaged over the other without any objective justification. At the same time, manufacturers should also be allowed to honour sales efforts for which there is no de facto equivalent in individual sales channels (e.g. the "look-and-feel" experience in brick and mortar stores) without this automatically being regarded as an inadmissible dual pricing system.

41. **Brick and mortar requirements**: Manufacturers should be able to continue to apply equivalent criteria for on-line and brick and mortar, provided that they can justify their requirements by reference to the specific characteristics of the product, in a transparent and non-discriminatory manner[13]. The VBER should thus explicitly clarify that **attempts by manufacturers to *per se* prevent (re)sales via certain sales channels/retail concepts** (online, specialised shops, discounters, department stores, etc.) **should be considered as hard-core restrictions outside a legitimate qualitative selective distribution system** (i.e. which meets the Metro criteria).

42. Under VBER, charging different prices (**dual pricing**) depending on whether a product is to be sold via an on-line or an off-line sales channel **is generally considered a hardcore restriction**. We ask the Commission to maintain the current provisions; there may be other less restrictive means to achieve the same objective.

Findings from the e-commerce enquiry

- (254) "*However, in some cases brick and mortar shop requirements essentially aim at shielding products from price competition by pure online players, **without enhancing competition on other parameters than price***"
- (255) "*certain requirements to operate brick and mortar shops that are not linked to justified brand image or distribution quality concerns **may need further scrutiny in individual cases***"
- (597) "***Charging different (wholesale) prices to different retailers is generally considered a normal part of the competitive process. Dual pricing for one and the same (hybrid) retailer is generally considered as a hardcore restriction under the VBER***."
- (595) "*Setting different wholesale prices depending on the channel in which the products are to be sold is, however, **rarely considered as a viable option by manufacturers***."
- (994) "*While manufacturers often voice their intention to create a level-playing field between online and offline sales channels, taking into consideration potential differences in cost levels, **dual pricing** (setting different wholesale prices depending on the sales channel) **is rarely considered as a viable option due to the risk that a dual pricing strategy could be in breach of Article 101(1) TFEU***."

Territorial restrictions: the case of territorial supply constraints (TSCs)

43. **We ask the Commission to take this opportunity to introduce clarifications to address territorial supply constraints.** TSCs are illegitimate restrictions, which are imposed by suppliers to restrict the retailers' ability to source centrally or in the country of their choice or negotiate better conditions. They are not justified by EU or national rules and standards, consumer preferences or need to adapt to national circumstances such as climate differences and work to the detriment of consumers by restricting choice and maintaining artificially high prices. As a result, retailers cannot:
    - choose the countries where to source from, parallel import or purchase centrally;

[13] Case C-439/09 Pierre Fabre. Judgment of 13.10.2011, para. 41

- move products to another EU country;
- offer products available in other countries, while customers are able to purchase them online or by shopping abroad;
- access the full range of products of their choice, while consumers have access to these products – e.g. when buying (online) across the border - and increasingly manufacturers are selling their whole range to consumers directly online.

44. TSCs take diverse forms. An internal survey among EuroCommerce members shows that main practices include refusal to supply, limiting the quantities and threats to stop supplying; differentiating product ranges between EU member states; tariff differences between EU member states; and limiting language options.

45. We ask the Commission to ensure proper enforcement of VGL (50), which addresses territorial supply restrictions and reads as follows: *"(…) That may be the result of direct obligations, such as the obligation not to sell to certain customers or to customers in certain territories* ***or the obligation to refer orders from these customers to other distributors****. It may also result from indirect measures aimed at* ***inducing the distributor not to sell to such customers, such as refusal or reduction of bonuses or discounts, termination of supply, reduction of supplied volumes or limitation of supplied volumes to the demand within the allocated territory or customer group, threat of contract termination, requiring a higher price for products to be exported, limiting the proportion of sales that can be exported*** *or profit pass-over obligations (…)".*

46. We welcome the Commission's infringement decision in the ABInBev case and ask 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.

Definitions of active and passive sales

47. **Rules need to be much more specific, in order to reflect the impact of on-line sales and adapt to requirements under the Geoblocking Regulation**, which considers any agreement that imposes territorial restrictions, which would contradict the geo-blocking regulation, on a seller on passive sales as void.

48. Under current practice, where a distributor uses a website to sell products and if a customer visits the web site of a distributor and contacts the distributor and this leads to a sale, this is considered as passive sales (VGL 52). The current understanding that "*every distributor must be allowed to use the internet to sell products*" should be maintained and strengthened as the digital environment grows further (see section on marketplaces). Offering different language options on a web site or even the use of a national domain name does not itself change the passive character of such selling and we are concerned by Commission comments to the contrary[14]. A narrowing of passive sales in this way, combined with outdated case law such as Novalliance/Systemform (OJ 1997 L47/11) could be taken as indicating that *any* sale by a member of a single corporate group of products sourced by another group member in a specific EU Member State could amount to an active sale when made to a customer located in a different member state. It should be made clear that such an interpretation of passive/active sales would not be justified.

49. A related area of confusion which could be exploited to block passive sales by interpreting them as active sales arises in respect of jurisprudence on consumer rights under the Rome I Regulation. This has had the effect of, for example, suggesting that a web page accessible by customers located in another country or offering different language options can be seen as targeting those customers actively.

50. It is important therefore that **the Commission maintains relevant provisions in VGL 52 unchanged, and makes it clear that interpretation of passive and active sales under Rome I governing consumer rights is separate and not relevant to B2B relations**. It should point out that attempts to further restrict passive sales are not legitimate under VBER. This is particularly

[14] See e-commerce enquiry parag 421 of the Staff Working Document (SWD(2017) 154 final): "*launching a website which is targeting a specific Member State by using the country-specific top-level domain (e.g. ".it" for Italy) can be considered as actively selling into that territory.*"

important in an environment that is increasingly digital, in which allowing manufacturers/suppliers to impose more restrictions on passive sales will harm consumers, restrict competition from independent on-line sellers and favour manufacturer to consumer sales (M2C) channels.

Excluded restrictions (art 5; VGL 66-71)

51. **Time limitation on non-compete obligations** (art 5.2; 67 VGL): the scope of the VGL should be extended to comparable situations. In particular, the time limitation should not apply where the buyer has received a (significant) loan from the supplier.

52. We further note **unnecessary administrative burdens and a risk that the buyer circumvents the 5 year non-compete obligation**. Contracts which are open-ended and can be terminated with a period of e.g. 1 year are deemed to be agreed upon for more than 5 years. This could be clarified in the Vertical Guidelines. Example: a business appoints an exclusive distributor in an area with a requirement to source 100% of the products he sells from the manufacturer. The contract ends after 5 years, unless extended in writing. If a buyer can terminate at any time with e.g. a 1-year termination period, he can escape the exclusivity provisions of the contract. If he does not want to terminate, he will also not reject a proposal to extend the expiring contract by another five years – otherwise the contract simply lapses. Deeming open-ended contracts to be concluded for more than 5 years could therefore be cancelled.

53. **Post-term non-compete obligations** (art. 5.3; VGL 68): these should be justifiable only in exceptional circumstances, by reference to the specific characteristics of the products, proportionate, transparent, non-discriminatory and necessary.

Severability (recitals 70-71)

54. **The distinction between hard-core and restricted practices in this area is important and we see no reason to review this**.

Conditions for withdrawal and disapplication of the block exemption (art. 6; 74-85 VGL)

55. To our knowledge, there have been no cases to date where DG COMP has revoked the block exemption, even though the guidelines cover cases where the benefit of the block exemption may need to be withdrawn (e.g. VGL 188 example of selective distribution with cumulative effects).

56. Parag. 71 of the VGL also foresees the possibility for national competition authorities (NCA) to withdraw the benefit of the block exemption in their territories. NCAs should be encouraged to actively make use of this possibility. The need for additional procedural steps before a specific agreement can be removed from the safe harbour increases costs for competition authorities, which may be acting as a deterrent to effective enforcement. Furthermore, in order to maintain legal certainty, it should be clarified that even if the exemption was withdrawn for a specific agreement, there would be no additional sanctions imposed against the parties to the agreement.

57. Relying on private enforcement is not a viable alternative to public enforcement in this area. A private claimant is unable to challenge an agreement that is protected by the VBER safe harbour, even if he can bring convincing evidence before the Court of an anticompetitive outcome of a particular agreement. This reduces the efficiency of the regime, and shield practices from scrutiny which in reality should be questioned more closely.

Enforcement policy in individual cases (section VI VGL)

Framework of analysis (96-127 VGL)

58. **Enforcement remains a key concern**. Whilst the principle of self-assessment is well-accepted and should not put into question, we are concerned at frequent cases of weak enforcement and the risk of divergent interpretation by national competition authorities.

59. The e-commerce enquiry has revealed cases of anticompetitive behaviour and led to enforcement action from the Commission[15]. **We would suggest that VBER & VGL should be reviewed more frequently or on an ongoing basis rather than waiting for a fully-fledged review**. Technological developments and market circumstances are changing rapidly. Greater account also needs to be taken of the potential for abuse of selective distribution within the protective scope of the block exemption.

60. We received only a few comments concerning the framework for assessing the positive effects of vertical restraints as follows:

- **avoiding free riding** by a distributor on the promotional efforts of another distributor: current provisions may need to be adapted to current market circumstances; in practice the risk of free riding works in both directions as on-line sellers benefit from promotional efforts of brick and mortar retail but also offline retailers benefit from investment by online retailers providing the means for consumers to research prices and product characteristics before making a final offline transaction;
- **opening up new markets** (first time investment): this argument is often used by brand manufacturers to justify price discrimination and market segmentation. Brand manufacturers are usually already active in most European markets, and there are very few cases where they are in reality entering a new market for the first time. Guidance from the German cartel office[16] shows that there are other means that are less competition-restrictive of achieving the same outcome, such as use of promotions to support the launch of a brand or a product in a market where it was hitherto not present;
- **certification free-rider issues**: limiting sales to "premium" stores should not be allowed outside a legitimate selective distribution system, and where such differential treatment is objectively justifiable by reference to the product concerned and its requirements for a specific sales environment. We further note a major discrepancy between the French (*risque de dévalorisation* – ie. the product at risk of losing value) and English versions of this provision (risk of being delisted). The French version would be more appropriate.

Upfront access payments (recitals 203 – 208)

61. **Upfront access payments** are essential for many retailers. Their purpose is to compensate for the risk, pre-emption of shelf-space, logistics costs and administration linked to the introduction of a new product. The vertical guidelines recognise the legitimate use of such fees to reduce the asymmetry of information between retailers and suppliers, who know better the potential for success of new products to be put on the market. They point out that "upfront access payments" encourage suppliers to compete for access to shelf space and share the risk of product failure while contributing to optimal product introduction. **Such provisions need to be maintained and enforced**.

62. VGL 206 provides a skewed perception in this context of the functioning of retail markets and should be amended[17]. **The risk of market foreclosure or collusion among distributors arising from upfront access payment remains theoretical**. Retail markets remain highly competitive, as

[15] See Commission subsequent investigations to the ecommerce enquiry: Guess: AT. 40428; ASUS: AT. 40465; Denon & Marantz: AT. 40469; Philips: AT. 40181; Pioneer: AT. 404182

[16] Bundeskartellamt guidance note on the prohibition of vertical price fixing in the brick-and-mortar food retail sector, 25 January 2017

[17] "*In addition to possible foreclosure effects, upfront access payments may soften competition and facilitate collusion between distributors. Upfront access payments are likely to increase the price charged by the supplier for the contract products since the supplier must cover the expense of those payments. Higher supply prices may reduce the incentive of the retailers to compete on price on the downstream market, while the profits of distributors are increased as a result of the access payments*."

consumer loyalty is never guaranteed (consumers visit on average 3 to 4 supermarkets for their grocery shopping over any monthly period) and as price remains a key determinant for consumer purchases. Retailers have to compete for every customer, and thus the likelihood of market foreclosure via upfront access payments remains solely a theoretical construct, rather than a real risk.

63. VGL 207 and 208 provide a fundamental explanation of the rationale behind upfront access payments (efficient allocation of shelf space, incentives to suppliers to support product success). These should remain. It is worth noting that in practice, 75% of new product introductions fail after one year; the reasons for this are usually lack of consumer demand, but can also result from inadequate marketing support by brand manufacturers[18].

Category management agreements (recitals 209 – 2013)

64. **Category management remains an important collaborative practice**, building on the expertise of the supplier in his product category, while leaving the possibility for the retailer to make the final decision. Category management processes implemented in Europe have been discussed, standardised and defined within the ECR (Efficient Consumer Response, a parity-based organisation of retailers and manufacturers in the fast moving consumer goods segment) initiative[19].

65. It is worth noting however, that in practice, only very few manufacturers have the resources and knowledge to be able to offer category management services.

Tying (recitals 214 – 222)

66. **Product tying is in principle sub-optimal to consumer welfare**. Through tying practices, suppliers only allow retailers to buy products which sell better (e.g. "must stock items") if they agree to stock others that are less attractive or have not been properly promoted by the manufacturer. The retailer has to stock products that consumers expect to find in stores (must stock items); consumers who do not find them simply switch to a competing store. Tying thus forces a retailer to purchase goods he would not necessarily want to stock, takes away limited shelf space from products that are more innovative or may sell better, and at the same time pre-empts consumer choice and access to more desirable products.

Channelling: a practice that needs further reflection

67. **"Channelling" refers to the practice by suppliers to limit buyers' possibility to source their (premium) products (e.g. sport shoes with a recommended retail price above a certain level), by assigning a given buyer only a particular assortment**. The impact of this practice is particularly significant when suppliers develop direct-to-consumer sales and compete directly with their distribution networks, offering a full range while restricting buyers' access to the same products.

68. The growth in direct sales to consumers described has meant that channelling has a significantly more damaging impact. We ask the Commission to consider addressing this in revising Articles 4 (as a form of Resale Price Maintenance art. 4a) and in VGL 178 in respect of selective distribution (indirect RPM which is a hard-core restriction falling under Art 4 VBER) and/or VGL 188 (selective distribution with cumulative effects).

69. Channelling is indirectly used to police the resale pricing of retailers and to limit sales of premium products to retailers that show the required degree of "pricing discipline". It is a method of circumventing the strict prohibition of resale price maintenance. It has a chilling effect on price competition at retail level for (premium) brands. Retailers who are able to list the products in question have no incentive to undercut the recommended retail prices (RRP) and are not subject to competition from more price aggressive retailers with no access to the products in question.

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[18] "*of 61,644 new SKUs introduction in western Europe between 2011-2013, only 24% achieved at least 52 weeks of sales*" Nielsen breakthrough innovation report, sept 2014
[19] http://ecr-community.org/