GSMA Vertical Block Exemption Regulation consultation response accompanying paper

The GSMA welcomes the European Commission DG Competition's initiative to evaluate the need and effectiveness of the Commission Regulation 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union ('TFEU') to categories of vertical agreements and concerted practices (hereinafter 'VBER'). In addition to responding to the Commission's questionnaire, the GSMA has prepared this accompanying paper putting forward recommendations to amend or clarify the provisions in the VBER and the Commission Guidelines on Vertical Restraints (hereinafter 'VGL').

In general terms, the GSMA believes that both the VBER and VGL provide an appropriate legal framework for companies operating in the digital economy to ensure that vertical agreements do not constitute an infringement of Article 101(1) TFEU. Moreover, both instruments provide sufficient legal certainty for agreements meeting the conditions of Article 101(3) TFEU.

However, the GSMA would like to put forward the following suggestions in order to improve the interpretation and application of these legal instruments, which would help increase legal certainty for companies by ensuring that vertical agreements are in full compliance of competition rules. Moreover, the GSMA highlights the need to adapt both instruments and address the new challenges that have arisen with the digital economy.

Recommendations:

- **The Commission should incorporate the recent European Court of Justice case-law[1] in both VBER and VGL to increase legal certainty.**

- **The VBER and the VGL should acknowledge that market definitions used in merger control decisions might not always be adequate to define markets when analysing vertical relationships**.

- **Better definition of 'competitor' and differentiation from 'distributor'.** Following a strict interpretation of VBER, companies could risk being seen as competitors of their distributors. Companies do not normally set up an exclusive distribution system and do not reserve customers for themselves.

- **Include a clear definition of 'manufacturer' in Article 2 (4.a) VBER.**

- **Extend the 30% market share benchmark in Article 3 VBER and paragraph 23 VGL**. The 30% threshold is not always adequate to address vertical relations and anticompetitive effects in certain markets. In particular, the benchmark rarely applies in oligopolistic markets with economies of scale, high investments and only a few competing players. In that regard, companies with a higher market reference share are subject to less legal certainty when concluding vertical

[1] E.g.: ECJ Judgement on case C-230/16 - Coty Germany

agreements with third parties down-stream, even when such agreements comply fully with Article 101(3) TFEU (i.e., they improve the production or distribution of goods, promote technical or economic progress or consumers are the final beneficiaries of the agreement).

- **Clarify the maximum sale price (Article 4 (a) VBER).** There is a need to include the criteria to define and set up a maximum sale price.

- **Define 'customer group' (Article 4 (b.i) VBER).** There is a need for a clear definition and guidance on the elements that define said customer group.

- **Introduce an exemption in Article 5.1 (a) VBER with regards to renewable agreements.** There is legal uncertainty surrounding vertical agreements that are renewed by express agreement of the parties involved. The non-compete obligation set out by Article 5.1 (a) VBER does not foresee the possibility to extend the period, even when the parties want to continue the commercial relationship. Also, it should be kept in mind that renewable agreements have pro-competitive effects (price decrease). **For this reason, the introduction of a new exemption covering renewable vertical agreements that are renegotiated every 3 years is appropriate.**

- **The self-provision share of a supplier should be considered in the application of the market share threshold under Article 7 VBER.** In order to apply the market share thresholds provided for in Article 3 VBER, the market share of the supplier should also be calculated, including the self-provision share of the supplier that provides goods or services to buyers. Self-provision means that in a wholesale market where a supplier provides goods or services, the supplier also uses such goods or services for its self-provision to its customers. Thus, in a wholesale market, the relevant market shares should include those covering that provision to third parties but also the self-provision made by the supplier for its own customers[2].

- **Introduce for further guidance on what is considered a vertical agreement in paragraph 25 VGL.** In particular, there is a need for clarification in relation to agreements or concerted practices under vertical agreements exempted by paragraph 25(d) VGL.

- **Revise the definition of active and passive sales in the online distribution.** There is a need for a new definition of active and passive sales in the digital world. The current presumption set out by paragraph 52 VGL that transactions made over the Internet are passive sales, does not reflect the reality in the digital economy.

[2] This has already been addresses by the Spanish Competition Authority (CNMC) in two merger control reviews when it calculates the parties' market shares and the turnover thresholds: Case C/0527/13 ABERTIS/ACTIVOS TELEFÓNICA/ACTIVOS YOIGO and Case C/0604/104 ABERTIS/TELEFONICA ACTIVOS.

- **Passive sales of audio-visual content should comply with the Geo-blocking Regulation**[3]**.** We find it essential to include in the VGL Section III.4 (Individual cases of hardcore sales restrictions that may fall outside Article 101(1) TFEU or may fulfil the conditions of article 101(3) TFEU) that the prohibition of passive sales of audiovisual content shall not be considered as a hardcore restriction. This request complies with the Geo-blocking Regulation that expressly foresees that audio-visual content may be subject to geographical restrictions with the aim to guarantee the distributors' investments to acquire the exclusivity of a content in a specific territory.

- **Introduce clarity on geographical market definition in section V.2 VGL**. In telecommunications markets, it is difficult to define the relevant area in which the companies concerned are supplying products or services and in which the conditions of competition are sufficiently homogeneous. For instance, a network provider that only provides services in a specific region of a country: which geographical relevant market should be considered, the regional or the national market?

- **Introduce more guidance/criteria on agency and distribution agreements.** This would enable a better understanding of their differences and a better harmonisation of case law and guidelines.

- **Introduce further guidelines on what should be considered as online system distribution**. The GSMA would welcome the inclusion of guidelines in the VGL to set out provisions, which guarantee fair online vertical distribution in compliance with competition rules.

- **Guidelines on Most Favourite Nation clauses (MFN) would be welcome.** The GSMA supports the EC's approach to this issue in the recent Report on "*Competition Policy for the digital era*"[4]. In this report, the appointed experts consider that MFN clauses interposed by digital platforms may have both pro- and anti-competitive consequences. Indeed, their effects depend on the particular characteristics of the market and therefore a case-by-case analysis is necessary. However, the experts consider that due to very strong network externalities (especially in multi-sided platforms), incumbency advantage is important and strict scrutiny is appropriate. They believe that any practice aimed at protecting the investment of a dominant platform should be minimal and well targeted. For this reason, they propose two scenarios: "*If competition between platforms is sufficiently vigorous, it could be sufficient to forbid clauses that prevent sellers on a platform from price differentiating between platforms (i.e. a ban of "wide" MFNs), while still allowing clauses preventing the seller from offering lower prices on its own websites ("narrow MFNs). If competition between platforms is weak, then pressure on the dominant platforms can only come from*

[3] Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC.

[4] "Competition Policy for the digital era". A Report by Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, requested by the DG Competition. http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf

other sale channels (e.g. on the case of hotel booking platforms, direct sales by hotels on their own websites) and it would be appropriate to also prevent "narrow" MFNs." We consider that this revision would be an opportunity to include the EC experts' approach on this issue.

About the GSMA

The GSMA represents the interests of mobile operators worldwide, uniting more than 750 operators with over 350 companies in the broader mobile ecosystem, including handset and device makers, software companies, equipment providers and internet companies, as well as organisations in adjacent industry sectors. The GSMA also produces the industry-leading MWC events held annually in Barcelona, Los Angeles and Shanghai, as well as the Mobile 360 Series of regional conferences.

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