Public questionnaire for the valuation of the Vertical Block Exemption Regulation

Answers prepared for the European Commission

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1 Level of legal certainty provided by the VBER and the VGL

1A Agency agreements

1.1 It would be useful if the VGL could provide more guidance on how to assess whether an agreement is an agency agreement, and greater clarity on the conditions under which such agreements would fall under the exemption.

1.2 This is particularly important because of the development of intermediary platforms, such as comparison websites and meta-sites, which primarily aim to increase transparency for consumers and decrease search costs; and not necessarily engage in the re-selling of the product/service. While they do invest in their brand and potentially ancillary services, the role in distribution and the level and/or type of risk borne by these online platforms may be very different from those of traditional/bricks and mortar 'agents'.

1.3 In a number of enforcement actions, national competition authorities (NCAs), such as the Bundeskartellamt (in case B9 - 66/10), have not explicitly taken into account the special character of the online platforms when considering provisions 12-21 of the VGL. It would therefore be useful to update the guidelines to clarify the conditions under which a company, especially an online platform, can benefit from those provisions.

1.4 This is also important as manufacturers are changing their distribution strategy in light of growth of online sales and platforms. For example, as found in the

European Commission's e-commerce sector inquiry, manufacturers have been moving to more direct distribution to consumers in order have more control over their sales.[1] This is supported by the Oxera 2016 survey[2] for the CMA, which highlighted the scrutiny into selective distribution and other vertical agreements as one reason for such a move.

1.5 However, from an economic perspective, a widespread move to such a model may not be the most efficient in all sectors. Platforms that benefit from agency agreements can increase inter-brand competition and allow manufacturers to reach more consumers; hence the need for more guidance on this issue.

1B Resale price restrictions/resale price maintenance

1.6 The current VGL and VBER provide guidance on RPM and discuss when an RPM, despite presumed to be a hardcore infringement, might be exempted due to efficiency benefits under Article 101(3).

1.7 As is well-established in the literature, from an economic perspective, RPM can be beneficial to efficiency and market functioning (for example, assisting in preventing free riding and provision of services by retailers, or signalling the quality of a good), particularly if there is sufficient inter-brand competition. Similar benefits can arise from recommended retail prices (RRP), as acknowledged in the VGL and RRPs therefore benefit from the VBER (see the CMA study[3] on business rationale for vertical agreements).

1.8 An economic approach would therefore be to assess RPM and RRP cases on the effects; both in terms of the degree of negative impact on competition and the potential positive effects on efficiency and consumers.

1.9 Yet, for policy reasons, RPM has often been considered as an infringement by object. This enhances legal certainty, and enables competition authorities to bring infringement cases without having to consider effects. Indeed, due to the difference in treatment of RPM and RRP under the VBER, competition authorities have at times alleged RPM even when the case involved RRPs and

[1] http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf, para 15(i)
[2] Available here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/511332/Final_report_on_vertical_restraints_240316.pdf
[3] Ibid.

retailers have freedom to discount off the RRP (for example, the UK sports bras case (OFT CE/9610-12)[4].

1.10 It is important to consider the guidance on RPM and RRP in the VGL to reduce the risk of over-intervention in cases where these practices have limited negative effects and/or are beneficial to consumers. For example, the guidance could include examples or case studies to illustrate the conditions under which RRP and RPM would not be infringements due to the benefits that they can generate. The existing guidance on RRP (noting the potential harm through focal points) could also be reconsidered, for example in the context of high transparency of online prices of both manufacturers and retailers irrespective of recommendations from suppliers.

1C Online sales restrictions and selective distribution

1.11 The guidance on online sales restrictions in the current VBER and VGL is largely driven by the view on the importance of the Internet as a sales channel and on potential effect on consumers of a restriction of passive sales.

1.12 This perhaps reflected an important policy concern a decade ago. The enormous growth of online sales and online platforms in the last ten years now raises a potential concern about the detrimental impact on bricks and mortar stores and on consumers. Various reports highlight the potential value of preserving bricks and mortar stores, and hence the potential justifications of online sales restrictions (such as ensuring quality of service, safety of consumers, preventing free riding, managing stock and ensuring access).[5]

1.13 The Court of Justice of the European Union (CJEU) has also endorsed this justification in the *Coty* case (ECJ case C-230/16) where a ban on an authorised retailer of selling through an online marketplace was considered justifiable. While *Coty* provides some guidance, it is for a specific market, and in other cases such as *Ping* (CMA case 50230), the restriction on online sales was not considered justifiable.

1.14 More guidance and additional relevant examples on this issue would be useful to include in the VGL. In this respect, more guidance through examples on the

[4] https://www.oxera.com/agenda/from-sports-bras-to-cigarettes-economic-analysis-of-anticompetitive-agreements/

[5] See section 5 of the 2016 CMA study available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/511332/Final_report_on_vertical_restraints_240316.pdf and the Commission's e-commerce inquiry report, as referred above

nature of the qualitative criteria in a selective distribution system would also be helpful (e.g. is the qualitative criteria of having one bricks and mortar store always justifiable, and under what conditions is it not justified?).

1D Overall comments

1.15 Overall, there have been an increasing number of cases involving vertical agreements such as selective distribution, restriction of online sales, RPM and RRP. There are significant competitive developments and dynamics at play in many online markets, and business models and strategies continually change. Competition policy and enforcement must be careful not to distort the competitive dynamics and bargaining between manufacturers/suppliers on one hand and retailers/platforms on the other, by favouring one side. The revision of the VGL and VBER should take this general principle into account.

1.16 Lastly, it would be important to provide more clarity about the balance of weights attached to the short-term effects (in particular price) of vertical agreements and the long-term effects (e.g. innovation or new business models). This is critical for ensuring that both price and non-price aspects of consumer welfare are taken into account (for example, lower prices online, and services offered by bricks and mortar stores). It is also important for maintaining the balance between the bargaining power of the manufacturer and the retailer/platform, as excessive constraints on the manufacturer's strategies and strong bargaining power of platforms (or vice versa) could in the longer run distort inter-brand competition.[6]

2 Areas for which the VBER and/or the VGL currently do not provide any guidance

2A Most Favoured Nation (MFN) clauses

2.1 A number of NCAs across Europe have looked in recent years at most-favoured nation clauses in different sectors (e.g. the hotel booking sector in Germany and the insurance sector in the UK). The approach and decisions of the different NCAs have differed, sometimes significantly so, which illustrates why consistent guidance would be useful on this issue.

2.2 In addition, certain NCAs and policy-makers have expressed a view that certain MFN clauses, for example, those that apply to a number of different

[6] See for example section 5.1.2 of the CMA survey: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/511332/Final_report_on_vertical_restraints_240316.pdf

channels (wide MFNs), should be considered by-object restrictions. This would not be the right approach from an economic perspective.

2.3 As the economic literature and evidence show, MFN clauses can bring a number of benefits to the market in question, and benefit consumers (e.g. by increasing investment through the reduction of free riding or providing incentives to customers to switch provider). In addition, there is little evidence to date that any anti-competitive effects are substantial and are not outweighed by benefits brought by the increase in inter-brand competition. For example, an ex-post assessment carried out by the European Commission and a number of NCAs revealed little evidence that commission rates actually changed after the removal of the wide-MFN clauses across Europe.[7]

2B Non-brand keyword bidding and interaction with trademarks

2.4 The VGL currently does not provide guidance on agreements related to keyword bidding. With the growth of online search, these agreements are now more prevalent (as seen in some of the recent cases including Guess – EC case AT.40428).

2.5 In this regard, one key aspect is the interaction with trademark law and guidance on whether and when a branded manufacturer can legitimately prevent the use of its brand name by competitors (other brands or own retailers) due to its intellectual property right.

2.6 This is a new area of vertical arrangements, the effects of which have not yet been properly analysed or understood. It may be too soon to give any detailed guidance, but it may be useful at least to flag the main questions arising from these practices.

[7] See 'Report on the monitoring exercise carried out in the online hotel booking sector by EU competition authorities in 2016' available here: http://ec.europa.eu/competition/ecn/hotel_monitoring_report_en.pdf