

PINSENT MASONS' RESPONSE TO EC CONSULTATION QUESTIONNAIRE

EVALUATION OF THE VERTICAL BLOCK EXEMPTION REGULATION

24 MAY 2019

Introduction

This response is made on behalf of the Competition, EU & Trade Group of Pinsent Masons LLP. The comments made in this paper are those of Pinsent Masons LLP and do not necessarily represent the views of any of our individual clients or of individual partners of Pinsent Masons LLP. We are content for this response to be published on the European Commission website. This response does not contain any confidential information.

Explanation of those areas in the VBER and VGL which Pinsent Masons LLP considers as lacking clarity:

1. **Vertical agreements (Article 1(1)(a) VBER and recitals 24-26 VGL)**
 - 1.1 Online marketplaces and price comparison tools are blurring the lines as to what constitutes a vertical arrangement and the traditional approach to market share may not reflect the importance of such marketplaces to the overall online retail sector or the balance of power between the parties. Further guidance on those issues would be welcomed as well as on how restrictions/obligations on the use and control of data fit into the VBER regime.
2. **Territorial/customer restrictions (Article 4(b) VBER and recital 50 VGL) and exceptions to these restrictions (Article 4(b) (i)-(iv) VBER and recitals 51,55 VGL) AND Exclusive customer allocation (recitals 168-173 VGL)**
 - 2.1 Before an active sales restriction can be imposed, certain conditions must be met (i.e. exclusive territories/customers must be reserved for the seller or allocated to a single distributor, and the restriction is imposed in parallel on all other distributors). This does not reflect the piecemeal way in which many distribution networks are established. In addition, it is not necessarily only sole exclusive distributors that need to make the investments that would justify protection from active sales from other distributors. There is no guidance or limitation with regard the size or scope of the exclusive territory or customer group.
 - 2.2 There is also some inconsistency (which causes confusion) between paragraph 50 VGL which extends all of Article 4(b) to 'the buyer to the agreement or its customers'; whereas such wording only appears in the VBER in Article 4(b)(i). The concept of 'customer of the buyer' is also very broad; it is not clear whether this is intended to include all forms of sub-dealer, or just independent retailers. This is a common concern for manufacturers/brands owners and greater clarity is required; for example whether it is permissible to prevent dealers from intentionally targeting/using third parties to undermine the active selling restrictions or selling to customers where it is obvious that the customer intends to only/predominantly sell into other territories.
 - 2.3 In relation to Article 4(b)(iv) (restrictions on sale of components supplied for incorporation), it states that distributors can only be prevented from selling components to competitors of the supplier. There can be circumstances where this causes issues, such as where a manufacturer has a category of products which it produces solely for the purpose of incorporation (e.g. large containers of alcohol for incorporation into food), where it would find it difficult to prevent the food producer from re-selling products which the manufacturer would not otherwise put on the market.

- 2.4 There is also relatively little discussion of how a variety of sales restrictions (either active or passive) which may prevent sales into or from non-EU countries may infringe EU competition law. We anticipate that these issues will be commonplace post-Brexit, in particular as trade between the UK and EU is far higher than most other non-EU countries.

3. **Online sales restrictions (recitals 52-54 VGL)**

- 3.1 There is substantial uncertainty as to the legal position regarding a number of online practices, with varying approaches being taken by NCAs. These include: online marketplace restrictions (which para 54 of the VGL suggests are permissible), price comparison restrictions, the use of most-favoured nation clauses, restrictions on the use of, and participation in auctions for, Adwords/other online search terms and the use of data. A considerable amount of discussion has focused on how such restrictions may be applied in the context of selective distribution (albeit the position is still unclear); however there is even less clarity as to how such restrictions apply in the context of non-selective distribution.

4. **Hardcore restrictions falling outside the scope of Article 101(1) of the Treaty or likely to fulfil the conditions of Article 101(3) of the Treaty (recitals 60-64 VGL)**

- 4.1 We are aware of comments by certain parties (e.g. the Dutch Authority for Consumers and Markets) in relation to dual pricing and whether it should remain a hard-core restriction in relation to online versus offline sales (i.e. that manufacturers should be able to discriminate in favour of offline sales in order to ensure that physical stores remain competitive). We have not experienced significant difficulties with the current application of the rules in this regard, but consider that further consideration and explanation should be given to the circumstances where such arrangements are likely to fulfil the conditions of Article 101(3).

5. **Restrictions of active or passive sales to end users by members of a selective distribution system (Article 4(c) VBER and recitals 56-57 VGL) AND Analysis of specific vertical restraints (recitals 128-229 VGL): Selective distribution (recitals 174-188 VGL)**

- 5.1 There are a number of issues when analysing the practice of mixing selective distribution and other distribution networks (e.g. exclusive distribution). For example, there is some inconsistency between Article 4(c) of the VBER which prevents restrictions on sales to end users in a selective distribution network and paragraph 56 of VGL which notes that it is acceptable to do so where exclusive distribution is used elsewhere. Other practical issues remain such as how to prevent an exclusive distributor in one territory from actively selling to unauthorised distributors in a territory which has a selective distribution network (as this territory is not itself exclusively appointed, active sales into it cannot be prevented).

- 5.2 There is a lack of clarity as to when restrictions such as bricks and mortar requirements, quantitative sales restrictions etc would not be available in selective or non-selective distribution networks either where the type of product would or would not otherwise qualify for selective distribution. Paragraph 176 VGL suggests such restrictions are not allowed where they are not justified by the nature of the product and where an anti-competitive effect occurs, but it is not immediately clear when this would apply if the parties otherwise have less than 30% market share (is it the case that such an arrangement would have the VBER individually withdrawn – if so why has this never occurred as such arrangements are widespread?).

6. **Analysis of specific vertical restraints (recitals 128-229 VGL) AND Resale price restrictions (recitals 223-229 VGL)**

- 6.1 While we consider, for the sake of legal certainty, it arguably makes sense for RPM to remain as a hard-core restriction, there are numerous occasions where companies

with very small [e.g. less than 1%] market shares struggle to develop their business in part due to a lack of control of the supply chain as a result of the prohibition. The VGL provide some instances where RPM may be justified (para 223 onwards), but further consideration should be given to additional examples, and greater clarity of for example what constitutes a 'new product' or 'introductory period'. Further consideration is also required as to the use of pricing algorithms to monitor and enforce RRP's and RPM.

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