



# SPK

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## **RELEVANCE – RESPONSE TO QUESTION 5 THE PUBLIC QUESTIONNAIRE FOR THE 2018 EVALUATION OF THE VERTICAL BLOCK EXEMPTION REGULATION**

We have identified the following areas of the VBER and VGL that require a revision in light of recent market trends and developments.

- 1. Addressing free-riding and showrooming regarding goods that require pre-sales/post-sales services**
  - 1.1 Recent market developments demonstrate the need for relaxing the restriction related to resale price maintenance (RPM; Art. 4(a) VBER). This is caused in particular by the phenomena of free-riding and showrooming which significantly increased over the last 10 years due to the dynamic growth of e-commerce across the EU. In the long-term perspective, these phenomena could possibly lead to the disappearance of a significant number of brick-and-mortar stores which would eventually be to the consumers' detriment, because consumers would no longer be able to benefit from the (offline) pre- and post-sale services these stores currently offer.
  - 1.2 Therefore, the VBER and VGL should be amended to limit the free-riding and showrooming effects in a way which would be proportionate and not negatively affect the consumer benefits in the areas in which the free-riding and showrooming effects are not present (in the event of the goods sold through both online and offline sales channels for example in relation to products which consumers research online but purchase offline).
  - 1.3 A reasonable proposal to address free-riding and showrooming in respect of goods sold in online stores and in brick-and-mortar stores would be to expressly allow (i.e. cover by the VBER exemption) RPM based upon dual pricing (or another form of RPM) for goods sold in both online and offline channels which require pre-sales/post-sales services.
  - 1.4 Moreover, fixed fees currently envisaged in recital 52 VGL do not seem to be suitable and there should be a possibility to apply a fee of a different nature (e.g. as a % of sales). The fact is that brick-and-mortar stores are run in fact in the interest of consumers. Fixed fees do not seem to make much sense from the commercial point of view: (i) they are unlikely to be efficient (it means that for every single brick-and-mortar store the supplier would need to calculate the cost of running a brick-and-mortar store and take into account vis-à-

vis the cost and sales of an online store – such burden does not seem to be justified/proportionate); and (ii) they make it difficult to manage return on investment (distribution costs may vary – they usually depend on the volumes sold; fixed fee does not address variable costs – to simplify: “the more goods are sold, to more employees retailers need”). Allowing other forms of fees than fixed fees to support offline sales efforts, would be in principle equivalent to allowing dual pricing as proposed above.

- 1.5 However, as the free-riding and showrooming phenomena are not only present in relation to the goods sold through both online and offline channels, but may as well occur in one channel (for example in a situation in which one retailer invests in a well set-up professional brick-and-mortar store and employs competent staff which provides advice to customers and demonstrates how to use complex products that require pre- or post-sales services, whereas another one sells the same goods from a “garage” at a lower price without offering any pre- or post-sale services). Given this, we would also encourage the Commission to address this kind of situations, for example by expressly allowing RPM in such event. as, according to recital (225) VGL, “the extra margin provided by RPM may allow retailers to provide (additional) presales services, in particular in case of experience or complex products”.
- 1.6 To enable undertakings to self-assess whether their products do require pre-sales/post-sales services and ensure a sufficient degree of legal certainty, it would be helpful if the Commission listed: (i) objective criteria on how to identify goods that require pre-sales/post-sales services and (ii) the tools and instruments which undertakings could use to justify the qualification of their goods under point (i) and which would be convincing and acceptable to the Commission in the event of a dispute.
- 1.7 It could be assumed with sufficient certainty that such dual pricing / RPM would satisfy the conditions of Article 101(3) of the Treaty as consumer benefits would most likely outweigh any potential disadvantages and therefore we propose covering that practice by the VBER exemption. Although currently recital 225 VGL states that RPM may be helpful in preventing free-riding at the distribution level, it does not provide sufficient or clear guidance on how the undertakings could apply it to ensure that they fall within the application of the VBER and VGL.

## **2. RPM in franchise agreements**

- 2.1 Another area in which, in our view, Article 4(a) VBER should be amended is RPM in franchise agreements.
- 2.2 Treating fixed resale prices in franchise agreements as a hardcore restriction does not seem justified. First, franchising agreements are usually present in very competitive markets (e.g. in Poland, these are in principle the retail sector, gastronomy and jewellery). Second, consumers shopping in franchise retail stores expect that the prices in all stores will be the same, regardless of the location of the store and very often this is the very reason why they choose to shop in these stores (they know exactly what products they can buy there and their price level). Third, in many markets franchisees do not compete with each other as they often act in local markets and therefore, they compete with other third party undertakings offering similar goods and services. Therefore, covering fixed resale prices in franchise agreements by the VBER exemption would not restrict intra-brand price competition. Fourth, as franchisees in principle do not distribute other products than those

covered by the franchise agreements, setting fixed prices for products sold in franchise agreements would not result in softening competition between different suppliers using the same distributors.

- 2.3 Applying fixed (not minimum) prices in franchise agreements should be without prejudice to the franchisors' possibility of setting different fixed price levels for shops located in different areas, depending on the local market conditions (such as the cost of rent or labour), if the relevant retail franchisees' markets are defined as local (narrower than national) markets.
- 2.4 Covering fixed resale prices in franchise agreements by the VBER exemption would also be justified in light of the goal to ensure a uniform image of franchise networks which is explained in more detail in points 7.2-7.3 below.

### **3. Territorial/customer restrictions**

*Introducing an exemption allowing the restriction of the activity of the retailer at the wholesale level*

- 3.1 Article 4(b)(ii) VBER expressly allows the restriction of the activity of the wholesaler at the retail level. Given this, it does not seem justified not to exempt a mirroring practice, i.e. the restriction of the activity of the retailer at the wholesale level.
- 3.2 Therefore, we would encourage the Commission to introduce such additional exemption in the VBER and VGL.

### **4. Non-compete obligations (Art. 5(1)(a) VBER and recitals 66-67 VGL)**

*Coverage of non-compete obligations with indefinite duration or exceeding 5 years by the block exemption during the whole duration of the agreement*

- 4.1 The non-compete obligations should be covered by the block exemption during the whole duration of the agreement if the agreement satisfies the general conditions of the VBER concerning market shares (it should apply not only in cases where the non-compete is limited to five years but also for non-compete obligations exceeding 5 years or indefinite).
- 4.2 The reason for the exclusion of certain non-competes from the block exemption is their potential foreclosure effect on the market – this effect is only likely if the market shares of the parties to the agreement are high.
- 4.3 In case of agreements between suppliers and distributors, where market shares are under 30%, any potential foreclosure effect is unlikely. In very exceptional situations, where the foreclosure effect would occur regardless of the low market shares (e.g. cumulative effects), there are other instruments that the EC may use to address individual problems (e.g. withdrawal procedure).
- 4.4 Under current rules, it is already allowed to renew the non-compete for consecutive five-year periods if no obstacles exist that hinder the buyer from effectively terminating the non-compete obligation at the end of the five-year period. We are not aware of any negative market consequences of non-compete obligations in case of such renewal. If the five-year limit is entirely removed, the potential market effects of such non-compete clauses without time limitation will be comparable to the current situation, which is not problematic (as renewal of non-competes for consecutive periods is already allowed).

*Different treatment of non-compete clauses in comparable situations*

- 4.5 Under the current rules, the non-compete obligations that are indefinite or exceeding five years are not covered by the block exemption even for the initial five-year period, while non-compete obligations which are limited to five years are covered.
- 4.6 There is no good justification for treating differently (i) the initial five-year period of a non-compete that is indefinite or exceeds five years and (ii) a non-compete which is limited to five years.
- 4.7 The risk of negative market effects of non-compete (i.e. foreclosure) is the same in both situations. If the agreement satisfies the general conditions of the VBER concerning market shares, any potential foreclosure effect in the initial five-year period is unlikely in both situations.

**5. Non-compete obligations (Art. 5(1)(c) VBER and recital 69 VGL)**

- 5.1 According to recital 69 of the VGL, the objective of Article 5(1)(c) of the VBER is to avoid a situation whereby a number of suppliers using the same selective distribution outlets prevent one specific competitor or certain specific competitors from using these outlets to distribute their products (foreclosure of a competing supplier which would be a form of collective boycott).
- 5.2 If a number of suppliers prevent specific competitor(s) from using specific outlets to distribute their products because of collusion between suppliers, it is a horizontal boycott, which is an anticompetitive practice that may infringe Article 101 of the TFUE regardless of the VBER exclusion. Thus, there is no need for Article 5(1)(c) VBER.
- 5.3 Moreover, there is no good reason not to cover by the VBER a situation where a supplier takes an independent decision to prevent one specific competitor or certain specific competitors from using certain outlets to distribute their products. Under current rules, it is allowed to prevent all competitors (not only selected ones) from using certain outlets, which has definitely more potential to foreclose the market than the prevention of one specific competitor or certain specific competitors.
- 5.4 Thus, Article 5(1)(c) VBER excludes from the block exemption cases that should be covered, i.e. where the supplier took its own decision to prevent certain competitors from using its distributors' outlets.
- 5.5 Thus, if the agreement satisfies the general conditions of the VBER concerning market shares, all non-competes should be covered by the block exemption during at least the initial five-year period, regardless of the total duration of the non-compete obligation.

**6. Enforcement policy in individual cases (Section VI VGL) – selective distribution**

*A definition of a luxury product*

- 6.1 We suggest introducing a definition of a luxury product into the VGL, including criteria for assessment whether a product is luxury.
- 6.2 According to the case law of the EC, the CJEU and the NCA's admissibility of certain restrictions and prohibitions in selective e-commerce distribution depends on the nature of the product, which is distributed. More restrictions/prohibitions are admissible in the distribution of luxury products. Thus, we believe that it would be very helpful to lay down

in the VGL clear criteria for qualifying products as luxury and distinguishing them from branded product that are not luxury.

*A catalogue of admissible restrictions and prohibitions on selective e-commerce distribution*

6.3 We suggest introducing a catalogue of admissible restrictions and prohibitions in selective e-commerce distribution, including practical guides on which combinations of restrictions limit passive sales.

6.4 Case law of the EC, CJEU and NCA's concerns in particular:

6.4.1 restriction/prohibition from selling on a third-party online platform;

6.4.2 restriction/prohibition from advertising on search engines and market places;

6.4.3 restriction/prohibition of using price comparison engines;

6.4.4 restriction/prohibition of using the brand or logo (trade marks) of the producer (supplier) within search engines.

6.5 We believe that it would be very helpful to provide guidelines in the VGL that would clarify which of the above restrictions and prohibitions and under what conditions (e.g. failure to meet certain quality requirements by the platform or comparison engine) are admissible in the distribution of luxury products.

*Admissibility of a combination of selective and exclusive distribution in different territories in terms of the prohibition of active sales*

6.6 The VGL should confirm the admissibility of a combination of selective and exclusive distribution in different territories in terms of the prohibition of active sales.

6.7 Under point 176 of the VGL, if selective and exclusive distribution are used in different territories, it is admissible to prohibit selective distributors from active sales in the territories covered by the exclusive distribution. Accordingly, the VGL allows for joint selective and exclusive distribution, if they cover different territories, e.g. selective distribution in Poland and exclusive distribution in Germany. However, the admissibility of a combination of selective and exclusive distribution in different territories in terms of the prohibition of active sale seems to be incompatible with the wording of art. 4 c of the VBER. Thus, it is justified to unequivocally confirm the admissibility in the VBER by introducing such exception into art. 4 c of the VBER.

**7. Enforcement policy in individual cases (Section VI VGL) - franchising**

*Non-compete obligation in franchise agreements exempt from the application of Article 101(1) of the Treaty*

7.1 As already provided in the section concerning "Legal certainty", there is no justification for the potentially different treatment of non-compete obligations in franchise agreements which fall within the meaning of recital (189) VGL. Given the nature of franchise agreements, the franchisor should be entitled to decide on the assortment of products sold/services rendered by the franchisees and thus, to include non-compete obligations in agreements with franchisees. This is justified by the necessity to ensure a common, uniform identity and reputation of the network, effective quality control (which may be particularly important for foodstuffs where non-compete obligations enable centralized

deliveries and thus, the quick central withdrawal of faulty lots of products), and the availability of the same products at different franchisees at the same time.

*RPM in franchise agreements*

- 7.2 The arguments in this respect were partly provided in section 2 above. In addition to those arguments, covering fixed resale prices in franchise agreements by the VBER exemption would also be justified in light of the goal to maintain a common identity and reputation of franchise networks and the fact that under franchise agreements the franchisor shares with its franchisees a complete business concept. Price, next to the assortment of products/services that customers can purchase from franchisees and the quality of the products/services, is one of the key elements by which customers identify franchise networks and distinguish them from brands of other entities. Therefore, covering fixed resale prices in franchise agreements by the VBER exemption is, in our view, justified.
- 7.3 Applying fixed (not minimum) prices in franchise agreements should be without prejudice to the franchisors' possibility of setting different fixed price levels for franchisee shops located in different areas, depending on the local market conditions (such as the cost of rent or labour), if the relevant retail franchisees' markets are defined as local (narrower than national) markets