EU competition rules on vertical agreements – evaluation

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About this consultation

Feedback period

4 February 2019 - 27 May 2019 (midnight Brussels time)

Topic

Competition

Target audience

The Commission has conducted a mapping exercise relying on the Commission's experience with enforcing Article 101 of the Treaty, the information gathered through the E-commerce Sector Enquiry and the feedback received on the Roadmap for the Evaluation of the Vertical Block Exemption Regulation. The outcome of the mapping exercise points to several stakeholder groups similarly interested in (and also similarly affected by) the evaluation of the Vertical Block Exemption Regulation. These groups are expected to be: (i) companies with business operations in the EU, including but not limited to suppliers of goods and services, distributors/retailers of goods and services and platforms/intermediaries active in e-commerce, together with (ii) law firms advising them on related competition issues, (iii) industry associations, (iv) consumer organizations and (v) academics with a focus on EU competition law and notably on vertical restraints. All these groups are expected to have similar level of interest on this procedure.

Why we are consulting

Article 101(1) of the Treaty on the functioning of the European Union ("the Treaty") prohibits agreements between undertakings that restrict

competition unless they contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, in accordance with Article 101(3) of the Treaty. The prohibition of Article 101(1) of the Treaty covers amongst others agreements entered into between two or more undertakings operating at different levels of the production or distribution chain and relating to the conditions under which the parties may purchase, sell or resell certain goods or services (so-called “vertical agreements”).
The purpose of Commission Regulation (EU) No 330/2010 (Vertical Block Exemption Regulation, VBER) is to exempt from the prohibition contained in Article 101(1) of the Treaty those vertical agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty. The Commission also adopted a Commission Notice providing guidance on the interpretation of the VBER and Article 101 of the Treaty (VGL).
The evaluation of the VBER was launched in October 2018 to gather evidence on the functioning of the VBER, together with the VGL, that will allow the Commission to determine whether it should let the VBER lapse, prolong its duration or revise it, together with the VGL.
This public consultation, which is part of the evaluation of the VBER, aims, as such, to collect evidence and views from stakeholders.
Please note that the application of the VBER to the motor vehicle sector is excluded from the scope of this evaluation and will be dealt with in the context of the upcoming evaluation of the Motor Vehicle Block Exemption Regulation.

Public questionnaire for the 2018 Evaluation of the Vertical Block Exemption Regulation

Fields marked with * are mandatory.

Introduction

Background and aim of the public questionnaire

Article 101(1) of the Treaty on the Functioning of the European Union (“the Treaty”) prohibits agreements between undertakings that restrict competition unless, in accordance with Article 101(3) of the Treaty, they contribute to improving the production or distribution of goods or services, or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, and unless they are indispensable for the attainment of these objectives and do not eliminate competition in respect of a substantial part of the product in question (i.e. they “generate efficiencies in line with Article 101(3) of the Treaty”).

The prohibition contained in Article 101(1) of the Treaty covers, amongst others, agreements entered into between two or more undertakings operating at different levels of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services (so-called "vertical agreements").

Commission Regulation (EU) No 330/2010 (Vertical Block Exemption Regulation, "VBER") exempts from the prohibition contained in Article 101(1) of the Treaty those vertical agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty. The Commission Guidelines on Vertical Restraints ("VGL") provide binding guidance on the Commission for the interpretation of the VBER and for the application of Article 101 of the Treaty to vertical agreements. The VBER will expire on 31 May 2022.

This public questionnaire represents one of the methods of information gathering in the evaluation of the VBER, together with the VGL, which was launched on 3 October 2018. The purpose of this questionnaire is to collect views and evidence from the public and stakeholders. The evaluation of the VBER, together with the VGL, is based on the following criteria:

- Effectiveness (Have the objectives been met?),
- Efficiency (Were the costs involved proportionate to the benefits?),
- Relevance (Is EU action still necessary?),
- Coherence (Does the policy complement other actions or are there contradictions?) and
- EU added value (Did EU action provide clear added value?).

The collected information will provide part of the evidence base for determining whether the Commission should let the VBER lapse, prolong its duration or revise it, together with the accompanying VGL.

If the VBER is not prolonged or revised, vertical agreements currently covered by the VBER, will no longer be block exempted and companies will have to assess whether the vertical agreements they enter into are compliant with Article 101 of the Treaty based on the remaining legal framework (e.g. the Article 101(3) Guidelines and the enforcement practice of the Commission and national competition authorities, as well as relevant case-law at EU and national level).

The responses to this public consultation will be analysed and the summary of the main points and conclusions will be made public on the Commission's central public consultations page.

Nothing in this questionnaire may be interpreted as stating an official position of the European Commission.

Submission of your contribution

You are invited to reply to this public consultation by answering the questionnaire online. To facilitate the analysis of your replies, we would kindly ask you to keep your answers concise and to the point. You may include documents and URLs for relevant online content in your replies.

For your information, you have the option of saving your questionnaire as a "draft" and finalising your response later. In order to do this you have to click on "Save as Draft" and save the new link that you will receive from the EUSurvey tool on your computer. Please note that without this new link you will not be able to access the draft again and continue replying to your questionnaire.

In case of questions, you can contact us via the following functional mailbox: COMP-VBER-REVIEW@ec.europa.eu.
In case of technical problem, please contact the Commission's CENTRAL HELPDESK.

Duration of the consultation

The consultation on this questionnaire will be open for 16 weeks.

About you

*Language of my contribution

English

*First name

Hendrik Jan

*Surname

Van Oostrum

*Email (this won't be published)

*I am giving my contribution as

Company/business organisation

*Country of origin

Please add your country of origin, or that of your organisation.

Netherlands

*Please describe the relevance of the VBER and the VGL for you:

1000 character(s) maximum

*Publication privacy settings

The Commission will publish the responses to this public consultation. You can choose whether you would like your details to be made public or to remain anonymous.

- **Anonymous**
  Only your type, country of origin and contribution will be published. All other personal details (name, organisation name and size, transparency register number) will not be published.
- **Public**
  Your personal details (name, organisation name and size, transparency register number, country of origin) will be published with your contribution.

☑ *I agree with the personal data protection provisions

Effectiveness (Have the objectives been met?)

The **purpose of the EU competition rules** is to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union (see e.g. T-458/09 and T-171/10 *Slovak Telekom v. Commission*, ECLI: EU:T:2012:145, para. 38). In line with this objective, the Commission's policy towards vertical agreements is to ensure undistorted and effective competition in European supply and distribution so that consumers can benefit from the lower prices, increased quality and variety of products and services and the greater incentives to innovate that are delivered by competitive markets (see Impact Assessment for the current VBER, SEC(2010)413), para. 60).

The **purpose of the VBER** is to exempt from the prohibition contained in Article 101(1) of the Treaty those vertical agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty. The VGL provide guidance on the assessment of vertical agreements under both the VBER and Article 101 of the Treaty (see recital 1 of the VGL). Undertakings therefore rely on both the VBER and the VGL in order to assess whether the vertical agreements they enter into are compliant with Article 101 of the Treaty.

*Do you perceive that the VBER and the VGL have contributed to promote good market performance in the EU?

- (•) Yes
- ( ) Yes, but they contributed only to a certain extent or only in certain sectors
- ( ) They were neutral
- ( ) No, they negatively affected market performance
- ( ) Do not know

*Do you consider that the VBER and the related guidance in the VGL provide a sufficient level of legal certainty for the purpose of assessing whether vertical agreements and/or specific clauses are exempted from the application of Article 101 of the Treaty and thus compliant with this provision (i.e. are the rules clear and comprehensible, and do they allow you to understand and predict the legal consequences)?

- ( ) Yes
- ( ) No
- (•) Do not know

Please estimate the level of legal certainty provided by the VBER and the VGL for each of the following areas by providing a qualitative estimate using the following number coding: 1 (very low), 2 (slightly low), 3 (appropriate), or selecting "DN" if you do not know or "NA" if not applicable to your organisation:

Please reply only to rows not numbered. The numbered rows are titles to assist in identifying the relevant areas.
For those rows where only the recitals of the VGL are mentioned, please reply only in the column of the VGL.

	VBER	VGL
Vertical agreements (Article 1(1)(a) VBER and recitals 24-26 VGL)	3	3
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(1) Vertical agreements generally falling outside the scope of Article 101(1) of the Treaty		
Agreements of minor importance (recitals 8-11 VGL)		3
Agency agreements (recitals 12-21 VGL)		3
Subcontracting agreements (recital 22 VGL)		na
(2) Additional conditions for the exemption of specific vertical agreements (Article 2 VBER)	3	
Vertical agreements entered into between an association of undertakings and its members (Article 2(2) and Article 8 VBER, and recitals 29-30 VGL)	3	3
Non-reciprocal vertical agreements between competitors under certain circumstances (Article 2(4) VBER and recitals 27-28 VGL)	na	na
Vertical agreements containing provisions on IPR (Article 2(3) VBER and recitals 31-45 VGL)	na	na
Market share threshold for the supplier (Article 3 and Article 7 VBER, and recitals 86-95 VGL)	3	3
Market share threshold for the buyer (Article 3 and Article 7 VBER, and recitals 86-95 VGL)	3	3
(3) Hardcore restrictions (Article 4 VBER)		

Resale price maintenance (Article 4(a) VBER and recitals 48-49 VGL)	3	3
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)	3	3
Online sales restrictions (recitals 52-54 VGL)		2
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)	2	2
Restrictions of cross supplies (Article 4(d) VBER and recital 58 VGL)	na	na
Agreements preventing or restricting the sourcing of spare-parts (Article 4(e) VBER and recital 59 VGL)	na	na
(4) Excluded restrictions (Article 5 VBER)		
Non-compete obligations with indefinite duration or exceeding 5 years (Article 5(1)(a) VBER and recitals 66-67 VGL)	3	3
Post term non-compete obligations (Article 5(1)(b) VBER and recital 68 VGL)	3	3
Restrictions to sell brands of particular competing suppliers in a selective distribution system (Article 5(1)(c) VBER and recital 69 VGL)	na	na

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)	na	na
Severability (recitals 70-71 VGL)		3
Conditions for the withdrawal and disapplication of the block exemption (Article 6 VBER and recitals 74-85 VGL)	dn	dn
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(5) Enforcement policy in individual cases (Section VI VGL)		
The framework of analysis (recitals 96-127 VGL)		3
Analysis of specific vertical restraints (recitals 128-229 VGL)		3
Single branding (recitals 129-150 VGL)		3
Exclusive distribution (recitals 151-167 VGL)		3
Exclusive customer allocation (recitals 168-173 VGL)		3
Selective distribution (recitals 174-188 VGL)		3

Franchising (recitals 189-191 VGL)		2
Exclusive supply (recitals 192-202 VGL)		3
Upfront access payment (recitals 203-208 VGL)		2
Category management agreements (recitals 209-213 VGL)		3
Tying (recitals 214-222 VGL)		3
Resale price restrictions (recitals 223-229 VGL)		3

If you have rated one or several issues as "very low" or "slightly low", please explain the reasons for your rating. Please also explain whether the lack of legal certainty stems from (i) the definition of the particular area in the VBER or the related description in the VGL, (ii) their application in practice or (iii) the overall structure of the VBER and/or VGL:

2000 character(s) maximum

- online sales restrictions
- act/ pass restrictions selective distri
- franchise
- upfront access payment

*Are there other areas for which you consider that the VBER and/or the VGL provide insufficient legal certainty?

- Yes
- No
- Do not know

The VBER sets out a number of conditions that vertical agreements need to meet in order to benefit from the block exemption. The VGL provide additional guidance on how to interpret these conditions. These conditions have been defined with the purpose of capturing in the exemption only those agreements for which it can be assumed with sufficient certainty that they generate efficiencies in line with Article 101(3) of the Treaty. For example, the definition and level of the market share threshold aims at identifying those vertical agreements that, in the absence of significant market power of the supplier and the buyer are unlikely to have negative effects, or, if they do, where the positive effects are likely to outweigh the negative effects. Similarly, other rules aim at taking account of consumers' interests of benefitting from new online forms of distribution, while also addressing possible concerns of market segmentation or free-riding (see Impact Assessment for the current VBER, (SEC(2010)413), section 3). **The below set of questions are aimed at verifying whether the conditions as currently defined meet the objective of capturing those agreements for which it can be assumed with sufficient certainty that they generate efficiencies in line with Article 101(3) of the Treaty.** In particular, this objective is met if these conditions are not subject to two errors: a false positive error (e.g. exempting an agreement that should not be exempted) and a false negative error (e.g. not exempting an agreement that should be exempted).

*Leaving aside the appropriateness of the scope of the current list of hardcore restrictions (Article 4 VBER) and excluded restrictions (Article 5 VBER) (see the last three questions in this section), do you consider that the additional conditions defined in the VBER (i.e. Article 2 and 3 VBER) lead to the exemption of types of vertical agreements that do not generate efficiencies in line with Article 101(3) of the Treaty?

- Yes
- (•) No
- Do not know

*Are there other types of vertical agreements for which it can be assumed with sufficient certainty that they generate efficiencies in line with Article 101(3) of the Treaty but which are not covered by the current scope of the exemption?

- Yes
- No
- (•) Do not know

*Are there any types of vertical restrictions that the VBER considers as hardcore (Article 4 VBER), but for which it can be assumed with sufficient certainty that they generate efficiencies in line with Article 101(3) of the Treaty?

- Yes
- No

- ○ Do not know

*Does the list of excluded vertical restrictions (Article 5 VBER) exclude types of vertical restrictions for which it can be assumed with sufficient certainty that they generate efficiencies in line with Article 101(3) of the Treaty?

- ○ Yes
- ◉ No
- ○ Do not know

*Are there other types of vertical restrictions for which it cannot be assumed with sufficient certainty that they generate efficiencies in line with Article 101(3) of the Treaty but which are not captured by the current list of hardcore restrictions (Article 4 VBER) or excluded restrictions (Article 5 VBER)?

- ◉ Yes
- ○ No
- ○ Do not know

Efficiency (Were the costs involved proportionate to the benefits?)

*Does the assessment of whether the VBER, together with the VGL, is applicable to certain vertical agreements generate costs for you (or, in the case of a business association, for the members you are representing)?

- ◉ Yes
- ○ No
- ○ Do not know
- ○ Not applicable

*Does the assessment of whether the VBER, together with the VGL, is applicable to certain vertical agreements generate costs proportionate to the benefits they bring for you (or, in the case of a business association, for the members you are representing)?

- ◉ Yes
- ○ No
- ○ Do not know
- ○ Not applicable

*Would the costs of ensuring compliance of your vertical agreements (or, in the case of a business association, the vertical agreements of the members you are representing) with Article 101 of the Treaty increase if the VBER were not prolonged?

- ○ Yes
- ○ No
- ◉ Do not know

Have the costs generated by the application of the VBER and the VGL increased as compared to the previous legislative framework (Reg. 2790/1999 and related Guidelines)?

- ○ Yes
- ○ No
- ◉ Do not know

Relevance (Is EU action still necessary?)

*Would you expect any effect in case the VBER were to be prolonged and the VGL maintained without any change? (multiple answers are allowed)

- [x] Yes, positive for my organisation (in case of business associations, for your members)
- [ ] Yes, negative for my organisation (in case of business associations, for your members)
- [x] Yes, positive for the industry
- [ ] Yes, negative for the industry
- [x] Yes, positive for consumers
- [ ] Yes, negative for consumers
- [ ] No
- [ ] Do not know

*Would you expect any effect in case the VBER were not to be prolonged and the VGL were to be withdrawn? (multiple answers are allowed)

- [ ] Yes, positive for my organisation (in case of business associations, for your members)
- [x] Yes, negative for my organisation (in case of business associations, for your members)
- [ ] Yes, positive for the industry
- [x] Yes, negative for the industry
- [ ] Yes, positive for consumers
- [x] Yes, negative for consumers
- [ ] No
- [ ] Do not know

*Do you see the need for a revision of the VBER in light of major trends and/or changes during the past 5 years (e.g. the increased importance of online sales and the emergence of new market players)?

- ○ Yes
- ◉ No
- ○ Do not know

*Do you see the need for a revision of the VGL (including Section VI) in light of major trends and/or changes during the past 5 years (e.g. the increased importance of online sales and the emergence of new market players)?

- ◉ Yes
- ○ No
- ○ Do not know

Is there any area for which the VBER and/or the VGL currently do not provide any guidance while it would be desirable?

- ◉ Yes
- ○ No
- ○ Do not know

Coherence (Does the policy complement other actions or are there contradictions?)

*Based on your experience, are the VBER and the VGL coherent with other instruments that provide guidance on the interpretation of Article 101 of the Treaty (e.g., other Block Exemption Regulations, the Horizontal Guidelines and the Article 101(3) Guidelines)?

- ◉ Yes

- ○ No
- ○ Do not know

*Based on your experience, do the VBER and the VGL contradict other existing and/or upcoming legislation and/or policies at EU or national level?

- ◉ Yes
- ○ No
- ○ Do not know

EU added value (Did EU action provide clear added value?)

*Do the VBER and the VGL add value in the assessment of the compatibility of vertical agreements with Article 101 of the Treaty compared to, in their absence, a self-assessment by undertakings based on other instruments that provide guidance on the interpretation of Article 101 of the Treaty (e.g., the Article 101 (3) Guidelines, the enforcement practice of the Commission and national competition authorities, as well as relevant case-law at EU and national level)?

- ◉ Yes
- ○ No
- ○ Do not know

Final comments and document upload

Is there anything else you would like to add which may be relevant for the evaluation of the VBER and/or the VGL?

1000 character(s) maximum

please see annex

If you wish to do so, you can attach relevant supporting documents for any of your replies to the questions above, clearly identifying the number of the question to which they refer.

The maximum file size is 1 MB
Only files of the type pdf,txt,doc,docx,odt,rtf are allowed

Select file to upload

End of the questionnaire. Thank you for your contribution.

Annex to consultation on EU competition rules on vertical agreements

Franchise and internet sales (recitals 52 and 189-191 VGL)

With regards to franchise and online we observe the following. Franchisors create web shops to sell and deliver products to end customers. This requires significant investments, which can normally not be undertaken by individual franchisees. However, nowadays also some franchisees wish to offer products from their websites. Although this may be a legitimate desire and we understand that franchisors should not withhold the benefits of the new technologies from franchisees, this can easily create confusion and undermine the reputation of the brand and thus adversely affect the brand value. Obviously, this would harm all members of operating the licensed formula. Therefore, it is necessary to make arrangements on the way in which franchisees can present themselves. In situations where the franchisees play a role in the exploitation of the franchisor's web shop, also some non-compete arrangements seem to be justified. Under the current guidelines it is not clear to which extent this kind of arrangements will be treated as legitimate measures to protect the value of the brand or as prohibited resale restrictions. Some clarification on this would be welcomed.

RPM (4 VBER)

It is our experience that attempts to restrict the buyer (retailer) in setting its own consumer pricing are more subtle than RPM describes. Examples are: suppliers restricting the volume during a promotion by a retailer, suppliers trying to prevent retailers from selling products for the promotion price after the promotion period or refusing the future supply of goods after a deep promotion. It would be welcomed if the VGL could provide more clarity on the matter, by providing examples of behavior which would be treated as RPM and thus as having an anticompetitive object. Also, in our experience, suppliers try to indirectly limit parallel trade of their products, e.g. by limiting promotional discounts to products which are resold in a certain area. For instance, a national sales subsidiary of a manufacturer may not provide certain discounts on goods which are sold outside its country. Some manufacturers present these invoice discounts as compensation for (marketing) services to be rendered by the retailer and restrict the area in which such marketing services can be rewarded. In practice, this means that these discounts are not available for sales outside the relevant area. We believe that these are resale restrictions, which have the objective to restrict parallel trade. It would be welcome if the guidelines explicitly state this.

CÍRCULO FORTUNY
COMMENTS TO THE EC CONSULTATION ON VERTICAL RESTRAINTS

1. Círculo Fortuny

Círculo Fortuny is a non-profit organization, which brings together the Spanish luxury sector. First actions of Círculo Fortuny took place in 2009, with the aim of defending the joint position of the prestigious Spanish cultural and creative brands in the context of the review of the EU legal framework for vertical restraints and distribution agreements. Currently, 61 brands and institutions are members of Círculo Fortuny. Círculo Fortuny represents the following sectors: Design & Furniture, Fashion, Gastronomy, Health & Wellness, Hotels & Resorts, Jewels & Watches, Leather Goods, Perfumes & Cosmetics and Wines & Spirits.

2. Summary on selective distribution

- Selective distribution is **essential** for the luxury sector and its consumers. This applies equally online and offline.

- Selective distribution aims to achieve **consumers' welfare:**

(i) Consumers' protection: consumers need to be ensured that the products acquired as luxury products do meet the excellence, special and extra value offered by the brands. Consumers also need guidance regarding the type of product they are purchasing, its adequacy for the purpose sought, maintenance, etc. This also relates to consumers security in terms of packaging, datamatrix, counterfeiting etc.

(ii) Consumers' extended choice: thanks to the investments in *inter alia* innovation and creativity of luxury brands, other products and services at other market levels arise by following the trends of luxury brands (e.g. private label products and mid-low cost products) and have great success with customers. This allows consumers to benefit from a larger choice of products of different quality levels and prices.

(iii) Consumers' expectations: the purchase of luxury products and services is fuelled by the desire to enjoy something exclusive. It is not only the ownership of the product which will help to meet customers' expectations, but the entire purchasing experience. Such experience requires stores to properly reflect the excellence and value of the brand, including the decoration/look and feel, the attention and guidance provided by sellers, the sale and after-sales services, etc.

- Selective distribution needs to take into account the **shift in market power** between products' manufacturers and distributors. Nowadays, large distributors (both brick-and-mortar retailers and on-line platforms) hold significant market and bargaining power. This entails that the negotiation of the criteria that such distributors need to meet to sell luxury brands has become more difficult. Luxury brands' manufacturers need more protection nowadays than years ago in order to ensure a larger choice of luxury brands and consumers' welfare (i.e. luxury manufacturers need to be able to control the whole distribution chain of their products with the aim to guarantee that they are sold to consumers with all the required guarantees).

- Luxury brands engage in substantial continuous **investments** in innovation and creativity.

  (i) This contributes to the unique position and prestige of the cultural and creative sector and has beneficial spill over effects for the economy such as the appearance of other brands inspired by the image and quality of luxury products while being more affordable for consumers.
  (ii) Moreover, luxury brands also invest in sustainable products and cultural sponsorship by means of ad hoc foundations and other initiatives for the benefit of society.
  (iii) And, indeed, brands invest to ensure distributors respect the aura, quality criteria and sales-related services that correspond to consumers' expectations.

- Regarding on-line distribution, luxury brands also contribute to an enhanced **digital environment** either by means of their own sales' channels or by means of those of selected distributors. This entails increased on-line sales, presence of Spanish brands as ambassadors of excellence values in the digital environment and innovation and creativity in such ecosystem. This also needs protection by means of selective distribution rules.

- In general, Círculo Fortuny believes that the **current EU legal framework** for selective distribution (i.e., the VBER and VGL) is adequate. However, if this regime were to be revisited, the reviewed instruments should be clear with regard to on-line distribution. This type of distribution has become increasingly important for the luxury sector and, paradoxically, it is not fully adequately addressed in the VBER.

- Luxury brands **need to be able to monitor** their selective networks to meet consumers' high standards and preserve the quality of their products (which includes the quality of the sales process). In case those monitoring measures were to be considered as restrictions of competition (quod non), new rules should establish the principle that, if intended to protect the quality and image of the product and its distribution process,

such restrictions should be exempted. In this sense, reflecting for example the criteria arising from *Coty*[1]case in the reviewed version of the VBER is core.

Relevant questions

About you

1. *Are the companies/business organisations that are members of your association suppliers or buyers of products and/or services, or both?*

- *Supplier* **X**
- *Buyer*
- *Both*
- *Do not know*
- *Not applicable*

2. *Please describe the relevance of the VBER and the VGL for you:*

Círculo Fortuny: The VBER and VGL are relevant for the members of our association, as these instruments provide a harmonised competition framework across the EU for competition-related issues in commercial distribution schemes, and more particularly in selective distribution, which is essential for the luxury sector and its consumers.

Selective distribution, and the possibility for manufacturers to control their distribution networks, are the means to meet consumers' expectations with regard to luxury products (i.e., quality, exclusivity and added value). Without the possibility to protect the aura and image of luxury products and the quality in terms of service and client care that needs to be ensured when selling them, the very essence of the luxury industry would be harmed, manufacturers would have little incentive to invest in innovation and high quality. This would be detrimental to the industry as a whole and to consumers.

A uniform framework is crucial for the members of our association as most of them they are active in several (if not all) Member States through selective distribution networks. Having this framework in place helps saving costs and increases legal certainty as it renders unnecessary to check 28 (or 27) different legal orders to ensure compliance with competition rules.

[1] Judgment of the Court of Justice of the EU in Case C-230/16, *Coty Germany GmbH v Parfümerie Akzente GmbH*.

Effectiveness (Have the objectives been met?)

The purpose of the VBER is to exempt from the prohibition contained in Article 101(1) of the Treaty those vertical agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty. The VGL provide guidance on the assessment of vertical agreements under both the VBER and Article 101 of the Treaty (see recital 1 of the VGL). Undertakings therefore rely on both the VBER and the VGL in order to assess whether the vertical agreements they enter into are compliant with Article 101 of the Treaty.

3. *Do you perceive that the VBER and the VGL have contributed to promote good market performance in the EU?*

- *Yes*
- *Yes, but they contributed only to a certain extent or only in certain sectors* ***X***
- *They were neutral*
- *No, they negatively affected market performance*
- *Do not know*

Please explain your reply, distinguishing between sectors where relevant:

Círculo Fortuny: In our view, the VBER and VGL have generally contributed to good market performance. However, some areas of uncertainty remain, in particular due to e-commerce growth. This may jeopardise the consolidation of an efficient online market for luxury products. Further clarity could help to increase market performance.

4. *Do you consider that the VBER and the related guidance in the VGL provide a sufficient level of legal certainty for the purpose of assessing whether vertical agreements and/or specific clauses are exempted from the application of Article 101 of the Treaty and thus compliant with this provision (i.e. are the rules clear and comprehensible, and do they allow you to understand and predict the legal consequences)?*

- *Yes*
- *No* ***X***
- *Do not know*

Please explain your reply:

Círculo Fortuny: In general terms, the VBER and VGL provide a good level of legal certainty.

However, with regard to e-commerce growth, these instruments still fall short.

For instance, there is not a single mention to the internet in the VBER. The words “online”, “e-commerce” or “Internet” do not even appear in the VBER. Online sales are by default assimilated to passive sales in the VGL (para. 52). This responds to an outdated conception of e-commerce that should be trespassed now. We understand that the VBER should be a self-explanatory document, which is not the case so far.

The core in this regard is that the VBER shall continue to enable luxury brands to proper monitor the distribution of their products, both off-line and on-line. This is the only way to meet consumers’ expectations (i.e., quality, exclusivity, added value) and to protect them (e.g. by ensuring they receive the necessary information on the product when they buy it or that there is a consumer phone line for queries).

In addition, there should be a clear distinction between rules on what could be considered as being an infringement of article 101 TFEU (on the one side) and guidance on how the Commission reads the VBER (on the other). The VGL should not be used to extend de scope of the provisions of the VBER. Such a distinction would improve legal certainty.

5. *Please estimate the level of legal certainty provided by the VBER and the VGL for each of the following areas by providing a qualitative estimate using the following number coding: 1 (very low), 2 (slightly low), 3 (appropriate), or selecting "DN" if you do not know or "NA" if not applicable to your organisation:*

(2) Additional conditions for the exemption of specific vertical agreements (Article 2 VBER)

- *Vertical agreements containing provisions on IPR (Article 2(3) VBER and recitals 31-45 VGL)* **3**

(3) Hardcore restrictions (Article 4 VBER)

- *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)* **2**
- *Online sales restrictions (recitals 52-54 VGL)* **2**
- *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)* **3**

(4) Excluded restrictions (Article 5 VBER)

- *Restrictions to sell brands of particular competing suppliers in a selective distribution system (Article 5(1)(c) VBER and recital 69 VGL)* **3**

(5) Enforcement policy in individual cases (Section VI VGL)

- *Selective distribution (recitals 174-188 VGL)* **2**

If you have rated one or several issues as "very low" or "slightly low", please explain the reasons for your rating. Please also explain whether the lack of legal certainty stems from (i) the definition of the particular area in the VBER or the related description in the VGL, (ii) their application in practice or (iii) the overall structure of the VBER and/or VGL:

Círculo Fortuny: As for the enforcement policy in selective distribution schemes, although the text of the instruments that are currently in force seem to provide an adequate level of certainty, Círculo Fortny considers that there could be room for improvement.

New provisions to be adopted by the European Commission could, in this sense, more clearly reflect that, for luxury brands, vertical restraints are necessary to encourage relationship-specific investments (for example in brand-image), to ensure retailers have optimal incentives to invest in services that are necessary to launch a new product or to signal the quality of a product without risk of other retailers free-riding on their efforts.

In some cases, consumers continue to rely on retail services, for example in the case of luxury products, complex products or experience goods. In such cases the risk of free riding can be exacerbated by e-commerce, this risk should be mitigated in order to protect consumers and the investments made by manufacturers and their authorized resellers (see answer to question 9). Concerning online sales, please see answers to questions 4 and 9.

6. *Are there any types of vertical restrictions that the VBER considers as hardcore (Article 4 VBER), but for which it can be assumed with sufficient certainty that they generate efficiencies in line with Article 101(3) of the Treaty?*

- *Yes* **X**
- *No*
- *Do not know*

Please select these types of vertical restrictions by ticking "Yes". Otherwise, please tick "No":

- *Online sales restrictions (recitals 52-54 VGL)* **Yes (in case of selective distribution)**
- *Restrictions of active or passive sales by members of a selective distribution system (Article 4(c) VBER and recitals 56-57 VGL)* **Yes**

Please explain your selection by providing examples and explain how prevalent these restrictions are in your industry:

Círculo Fortuny: The *Coty* case is an example of this. See answer to question 9 below.

Relevance (Is EU action still necessary?)

7. *Would you expect any effect in case the VBER were to be prolonged and the VGL maintained without any change? (multiple answers are allowed)*

- *Yes, positive for my organisation (in case of business associations, for your members)* **X**
- *Yes, negative for my organisation (in case of business associations, for your*
- *members)*
- *Yes, positive for the industry*
- *Yes, negative for the industry*
- *Yes, positive for consumers* **X**
- *Yes, negative for consumers*
- *No*
- *Do not know*

Please explain your reply and illustrate with concrete examples:

Círculo Fortuny: In general terms, we believe that the current EU legal framework for selective distribution (i.e., the VBER and VGL) is adequate. However, if it were to be amended, the reviewed instruments should be clearer particularly with regard to on-line distribution and should continue to allow manufacturers of luxury products to ensure proper monitoring of their distribution networks both off-line and on-line. See replies to questions 3 and 4 above, and to question 9 below.

8. *Would you expect any effect in case the VBER were not to be prolonged and the VGL were to be withdrawn? (multiple answers are allowed)*

- *Yes, positive for my organisation (in case of business associations, for your*
- *members)*
- *Yes, negative for my organisation (in case of business associations, for your*
- *members)* **X**
- *Yes, positive for the industry*
- *Yes, negative for the industry*
- *Yes, positive for consumers*
- *Yes, negative for consumers* **X**
- *No*
- *Do not know*

Please explain your reply and illustrate with concrete examples:

Círculo Fortuny: Ensuring a clear legal framework for selective distribution networks (in the sense of the VBER and the VGL) is necessary for our industry. In addition, clarifying the content of these instruments is important to ensure legal certainty across Member States and avoid divergent national rules in the EU. See reply to question 2 above.

9. *Do you see the need for a revision of the VBER in light of major trends and/or changes during the past 5 years (e.g. the increased importance of online sales and the emergence of new market players)?*

- *Yes* **X**
- *No*
- *Do not know*

Please explain your reply:

Círculo Fortuny: The current rules included in the VBER and the VGL with regard to on-line sales seem to a certain extent insufficiently adapted to the current state of e-commerce and possible new trends (see reply to question 4 above).

New rules should take into account the importance for the European economy of luxury brands, which rely on the distribution of their goods through physical outlets that are consistent with so-called selective distribution criteria.

However, experience shows that current rules do not sufficiently clarify the limits and/or conditions that manufacturers can impose on on-line sales by selective distributors to preserve the image of their goods.

In 2017, this issue was tackled in the *Coty* case with regard to restrictions of on-line sales by authorised distributors via third-party platforms.

The CJEU stated that Article 101 of the Treaty does not preclude a contractual clause prohibiting authorised selective distributors of luxury goods designed, mainly, to preserve the luxury image of those goods to use, in a discernible manner, third-party platforms for internet sales, provided that:

- the clause is aimed at preserving the luxury image of the goods concerned;
- it is laid down uniformly and not applied in a discriminatory way; and
- it is proportionate in the light of the objective pursued.

Principles underlying this case law should be reflected in the reviewed version of the VBER and VGL.

In addition, in view of the recent fine imposed on *Guess*[2] for, among others, restricting the use of the Guess brand and trademarks for online search advertising, it would be advisable to bring more clarity with regard to this type of restrictions. It appears that under certain circumstances, this type of restriction could be acceptable to protect the image of a brand in a selective distribution network.

Finally, Círculo Fortuny's members consider that the VBER should not be made more onerous to their contractual freedom. Otherwise, innovation and creativity could be harmed.

10. *Do you see the need for a revision of the VGL (including Section VI) in light of major trends and/or changes during the past 5 years (e.g. the increased importance of online sales and the emergence of new market players)?*

- *Yes* **X**
- *No*
- *Do not know*

Please explain your reply:

Círculo Fortuny: See reply to question 9 above.

[2] Case AT.40428.

POSITION OF RAKUTEN FRANCE ON THE EUROPEAN COMMISSION ROADMAP FOR REFORM OF THE VERTICAL RESTRAINTS REGULATION

RAKUTEN FRANCE (formerly known as PRICEMINISTER), is an historical actor within the marketplace business in France. It acts as a *pure player* in operating the intermediation platform https://fr.shopping.rakuten.com/. In 2010, it integrated the Japanese group RAKUTEN INC as one of its French subsidiaries in the marketplace business.

The public consultation opened by the Commission in anticipation of the expiration of the Vertical Block Exemption Regulation 330/2010 (VBER) is an approach to salute, and that we will grasp to make known our position towards the regulation's effectiveness, efficiency, relevance and coherence.

Stakeholders sometimes omit that following 101(1) TFEU, "*all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market*" are by principle prohibited. The burden of assessing and establishing the compliance of such an agreement lies on its authors and designers.

From this objective assessment ensued the subjectively appreciated exception of Article 101(3) TFEU, under which Article 101(1) may be declared inapplicable in cases where the concerned undertakings manage to exempt their agreement by demonstrating a real contribution to "*improving the production or distribution of goods*", or to "*promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit*".

VBER represents the choice to grant specific types of agreements the benefit of avoiding the application of Article 101(1) provided that the market share of each of the implicated undertakings remains under a specific percentage. Enabling such a block exemption may constitute a surprise knowing that VBER aims to adapt the application of Article 101(3) of the TFEU, whose scope is fundamentally subjective and based on case-to-case assessments.

We intend to emphasize that VBER's approach and achievement must be preserved for at least two reasons. First, because of its work to define several forms of key distribution networks and introduce guidelines in their approach. Defining those systems was not self-evident within a sector where agreements are by nature innominate, flexible and evolutive. The resultant framework shall be safeguarded. Secondly, because the indiscriminate block exemption granted by VBER is offset by the hardcore and excluded restrictions listed in its Articles 4 and 5 and detailed in the Guidelines on Vertical Restraints. Specifically, the confirmed presence of hardcore restrictions between two undertakings will have the effect not only to withdraw the benefit of VBER, but to logically complicate the awarding of an individual exemption. VBER has the merit to list and particularize several restrictions which are the reflection of Article 101(1) of TFEU but cannot be detailed within this latter provision in order to preserve its flexibility.

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Nevertheless, VBER should be improved at least on selective distribution and marketplace matters following the recent decisions issued by the Court of Justice of the European Union (CJEU) and national competition authorities. The incoming expiry of VBER in 2022 is a chance for the institutions to adjust the legal framework according to the evolution this sector is experiencing.

Three hardcore restrictions (Article 4, b), iii); c) and d) and a section of the Guideline on Vertical Restraints are dedicated to this form of network. CJEU has had the opportunity to set out and reaffirm the conditions under which the recourse to selective distribution may be deemed authorized since 1977 with "*Metro SB-Großmärkte GmbH & Co. KG v Commission*" case (No 26-76).

These conditions were reaffirmed in recent "*Coty Germany GmbH v Parfümerie Akzente GmbH*" case on December 6th, 2017 (No C-230/16), where CJEU stated that selective distribution is lawful 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*".

It may be on the ground of the necessity for the concerned products to be protected by selective distribution regarding their characteristics and nature that the review of VEBER shall play a decisive role.

According to our view, it would not amount to exaggeration to consider that beyond being one of the conditions for the lawfulness of a selective distribution system, the nature and characteristics of the product are the cornerstone on which the said lawfulness appreciation is grounded.

On December 2017, CJEU considered that Article 101(1) TFEU does not preclude a contractual prohibition to authorised distributors from "*using, in a discernible manner, third-party platforms for the internet sale of the contract goods*" for "***luxury goods***" which, in this case, were renowned perfumes.

Yet, it is unquestionable that the scope of *Coty* case is not limited to luxury products.

Recent "*Sithl*" decision (No 18-D-23, October 24th, 2018) issued by French Competition Authority, where the contributions ensuing *Coty* case have been directly applied to motorized cultivation equipment, is one of the examples.

In this decision, if French Competition Authority considered the prohibition set out by the supplier for the distributors to sell specific Stihl products online without a systematic in-store pick-up of the said products to be a hardcore restriction (Article 4, c), the interdiction made by Stihl to its distributors from selling through marketplaces was considered lawful.

Globally speaking, the *Coty* case was a logical application of selective distribution conditions to the specific case of the marketplace channel, where the CJEU was particularly awaited (Final Report on the E-commerce inquiry from the Commission, pt. 38).

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Nevertheless, this decision may have cleared the way for the implementation and claim of selective distribution systems aiming to protect the selling of products whose nature and characteristics do not absolutely require such a strict network.

It may seem unfortunate that CJEU chose to preserve a case-to-case approach on this matter and limited its appreciation to consider that Coty's products were indeed luxurious (pt. 8) and to remind that "*the quality of such goods is not just the result of their material characteristics, but also of the allure and prestigious image which bestow on them an aura of luxury, that that aura is essential in that it enables consumers to distinguish them from similar goods*[1]" (pt. 25).

From our perspective, the review of VBER and its Guidelines should be the occasion to fix criteria for the appreciation of the luxurious, dangerous and/or technical nature and characteristics of the product for which a selective distribution system protection needs to be implemented, in order to restrain the extension of *Coty* solution to products whose nature does not require such a system.

This advance would permit to distinguish situations where the peculiar nature and characteristics of the products require *per se* the enforcement of a selective distribution system and, on the contrary, situations where the recourse to selective distribution specifically aims to confer a luxurious or prestigious image to the concerned products, and stakeholders need this distinction.

In our opinion, VBER shall also be the occasion to introduce the marketplaces as a true stakeholder within the distribution chain. *Coty* decision, once again, considered that prohibition to distributors from using in a discernible manner third-party platforms was not precluded by Article 101(1) notably "*given the absence of any contractual relationship between the supplier and the third-party platforms enabling that supplier to require those platforms to comply with the quality criteria which it has imposed on its authorised distributors*".

Whereas recent CJEU decision and the Commission's Final Report on the E-commerce inquiry tended to represent marketplace as potential outsiders to the classical supplier-distributor relationship, VBER Guidelines evoked early the possibility for a third-party platform to enter the supply chain in a legitimate way[2]. This eventuality has notably been considered by the French Competition Authority[3].

From our understanding, VBER reviewed version should be the reflect of the growing importance of marketplaces for both retailers and suppliers[4] and their technical capacity to enforce the qualitative criteria implemented by the head of the distribution network.

[1] Judgment of 23 April 2009, Copad, C-59/08, EU:C:2009:260, paragraphs 24 to 26.
[2] VBER Guidelines, pt. 55.
[3] Decision No 14-D-07, 23 July 2014.
[4] Illustrated by the incoming Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services.

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<u>Gemeinsame</u> Rückmeldung im Rahmen der öffentlichen Konsultation

der nachfolgenden Verbände und Organisationen

zur Bewertung der EU-Wettbewerbsregeln für vertikale Vereinbarungen

- **VKE – Verband der Vertriebsfirmen Kosmetischer Erzeugnisse e.V.**,
  Unter den Linden 42, 10117 Berlin
- **VCP – Verband Cosmetic Professional e.V.**,
  Bäumbachring 22, D-76571 Gaggenau
- **VDM – Verband der Deutschen Möbelindustrie e.V.**,
  Flutgraben 2, D-53604 Bad Honnef
- **VdDW – Verband der Deutschen Wohnmöbelindustrie e.V.**
  Goebenstrasse 4-10, D-32052 Herford
- **VdDP – Verband der Deutschen Polstermöbelindustrie e.V.**,
  Goebenstrasse 4-10, D-32052 Herford
- **VdDK – Verband der Deutschen Küchenmöbelindustrie e.V.**,
  Goebenstrasse 4-10, D-32052 Herford
- **VDS - Vereinigung Deutsche Sanitärwirtschaft e.V.**,
  Rheinweg 24, D-53113 Bonn
- **ZVSHK - Zentralverband Sanitär Heizung Klima**,
  Rathausalle 6, D-53757 Sankt Augustin
- **businessler WirtschaftsForum**,
  Fabrikstrasse 1-1, D-73728 Esslingen

Namens der vorgenannten Verbände und Organisationen, nehmen wir zur 'Evaluierung der Gruppenfreistellungsverordnung für vertikale Wettbewerbsbeschränkungen' gerne Stellung.
Die produzierenden Mitglieder der vorgenannten Verbände vermarkten ihre Markenprodukte in vielen Märkten der Europäischen Union durch eigenständige Absatzmittler. Dabei werden häufig auch selektive Vertriebssysteme eingesetzt.

Wichtig ist, dass die Vertikal-GVO erhalten bleibt und zum Wohle des qualitäts- und serviceorientierten Leistungswettbewerbs konkretisiert wird. Gerade kleinere und mittlere Markenhersteller benötigen einheitlich international wirkende und praxisgerecht ausgestaltete kartellrechtliche Regelungen, um mit vertretbarem Aufwand EU-weit vertikale Vereinbarungen umzusetzen.

Innovation in neue Zukunftsfelder, die Bezahlung fairer Löhne sowie die Einhaltung von nachhaltigen Produktions-, Arbeitsschutz- und Umweltstandards für nachhaltig arbeitende Hersteller und Händler bleiben in der Europäischen Union (EU) nur dann finanzierbar und erhalten, wenn die EU-Unternehmenspolitik ein level playing field schafft, dass auch qualitäts- und serviceorientiertem Leistungswettbewerb faire Gewinnchancen ermöglicht. Die zentrale Rolle dabei spielt die Fortschreibung der EU-Wettbewerbsregeln für vertikale Vereinbarungen.

Aus Sicht der vorgenannten Verbände war die Stellungnahme im Format des vorgeschlagenen Fragebogens nicht zielführend möglich, da im Zuge der Fortschreibung der Vertikal-GVO 2010 grundsätzliche wechselwirkende Regelungsmechanismen auf den Prüfstand gestellt und im Interesse eines fairen Leistungswettbewerbs fortentwickelt werden sollten. Dies der Kommission zu erläutern war nur im systematischen Zusammenhang sinnvoll möglich.

1. Zusammenfassung der Stellungnahme:

Die Kommission wird gebeten die folgenden Punkte zu berücksichtigen:

Das europäische Wettbewerbsrecht darf nicht den Verbraucherschutz gegen die berechtigten Interessen insbesondere von kleinen und mittleren Unternehmen konterkarieren. Die Wettbewerbsbehörden haben bisher eher Verbraucherinteressen in den Vordergrund gestellt und dabei die berechtigten Interessen von Herstellern und Handel mehr oder weniger gänzlich außen vor gelassen (**siehe Ziffer 2.**).

Wettbewerb ist nicht alles. Daher ist die justiziable Abgrenzung zwischen erwünschtem Preiswettbewerb und unerwünschtem Preisverfall zwingend nötig. Die EU-Unternehmenspolitik muss ein level playing field schaffen, dass kleinen und mittleren Unternehmen sowohl in einzelnen Landesmärkten, als auch EU-weit faire Chancen für qualitätsorientierten Leistungswettbewerb eröffnet (**siehe Ziffer 3.**).

Dazu zählt auch, dass in einer zunehmenden Plattformökonomie kleine und mittlere Unternehmen faire Wettbewerbschancen gegen international agierende Plattformen erhalten. Weil Herstellerunternehmen als eigenständige Unternehmen arbeiten und nicht zentral verwaltet werden ist es Hersteller-Kooperationen bislang kaum möglich, auf die rasanten strukturellen Veränderungen der Plattformökonomie konzertiert zu reagieren (**siehe Ziffer 4.**).

Der Markeninhaber trägt das Produktrisiko, daher muss er im Inter- und Intrabrand-Wettbewerb über die Positionierung im (Preis-) Wettbewerb entscheiden können. In der EU hat es nie 'per-se-Verbote' für Preisbindung gegeben. Das hat der Europäische Gerichtshof bereits im Jahr 1966 in der Sache Société Technique Mineière gegen Maschinenbau Ulm GmbH (EuGH, C-56/65,) entschieden (**siehe Ziffer 5.**).

Die in der heutigen Vertikal-GVO 2010 etablierte Effizienzeinrede hat sich als nicht praxistauglich erwiesen. Freistellungen aus Effizienzgründen haben keine große praktische Bedeutung erlangt, weil die damit verbundenen Nachweispflichten für die Marktteilnehmer mit großem wirtschaftlichen Aufwand bei zu großen wirtschaftlichen und für die handelnden Personen persönlichen (Haftungs-) Restrisiken verbunden sind (**siehe Ziffer 6.**).

Für hochprofessionell, international agierende (Online-) Handelsformate müssen abweichende und strengere Wettbewerbsregeln möglich sein, als für kleine und mittlere (Hersteller-) Unternehmen. Es ist zu verhindern, dass Oligopole - gleich auf welcher Wirtschaftsstufe – insbesondere durch Informationsaustausch zu Einkaufskonditionen und anderen Einkaufs-Parametern (Mengen, Zeiträume etc.) auch innerhalb von Einkaufsgenossenschaften und sonstigen Einkaufsgemeinschaften noch marktmächtiger werden und dadurch eine bedenkliche Nachfragemacht zulasten kleinerer Marktteilnehmer entsteht (**siehe Ziffer 7.**).

In einem sich digitalisierenden und mithin internationalisierenden Vermarktungsumfeld muss der Markeninhaber entscheiden können, wie und wo seine Markenprodukte präsentiert und verkauft werden. Wenn man die zu Online-Marktplätzen getroffenen Feststellungen des 'Final Reports on the E-commerce Sector Inquiry 2017' nun für Drittplattformen im allgemeinen und Preissuchmaschinen im besonderen zugrunde und diese im Sinne der Coty-Entscheidung des EuGH (EuGH, 06.12.2017, C-230/16, Coty Germany vs. Parfümerie Akzente) auslegt, sind qualitative Kriterien zulässig, selbst wenn diese zu einem de facto-Verbot von entsprechenden Online-Formaten von Drittplattformen führen (**siehe Ziffer 8.**).

Sogenannte Hybridhändler – also stationäre Händler, die gleichzeitig einen Online-Handel betreiben – müssen wie reine Online-Händler behandelt werden dürfen, wenn ihr überwiegender Umsatz online generiert wird. Nach den aktuellen Leitlinien für vertikale Beschränkungen (Kommission, Leitlinien für vertikale Beschränkungen, ABl. 2010 C 130/1, Rn. 225f) stellt der Betrieb einer Website grundsätzlich eine Form des passiven Verkaufs dar. In diesem Bereich sieht die Kommission derzeit jede Verpflichtung als Kernbeschränkung an, durch die Vertragshändler von der Benutzung des Internets abgehalten werden. Zukünftig muss es einem Markeninhaber möglich sein den Hybridhändler mit überwiegendem Onlineumsatz anders vertraglich zu verpflichten, als solche Händler, die überwiegend stationär vermarkten (**siehe Ziffer 9.**).

Fazit: Die Europäische Union braucht insbesondere mittelständische Unternehmen als Rückgrat der europäischen Wirtschaft. Mittelständische Unternehmen haben das Potential zur Schaffung von Arbeitsplätzen und Wirtschaftswachstum. Die Kommission muss dafür sorgen, dass mittelständische Unternehmen in einem fairen Leistungswettbewerb die Chance auf faire Gewinne haben. Es darf nicht sein, dass europäische Unternehmen einerseits immer höhere Standards zu erfüllen haben und andererseits durch überzogenen Wettbewerbsdruck deren finanzielle Spielräume eingeschränkt werden. Ansonsten bleiben Innovation, Nachhaltigkeit und gerechte Löhne zum Wohle der Menschen in Europa nicht finanzierbar.

2. Das europäische Wettbewerbsrecht darf nicht den Verbraucherschutz gegen die berechtigten Interessen von Unternehmen konterkarieren:

Die Wettbewerbsbehörden haben bisher eher Verbraucherinteressen in den Vordergrund gestellt und dabei die berechtigten Interessen von Herstellern und Handel mehr oder weniger gänzlich außen vor gelassen.

Funktionierender Verbraucherschutz ist wichtig. In Zukunft muss jedoch verstärkt eine ausgewogene Balance zwischen den Interessen der Verbraucher und der Unternehmer tatsächlich sichergestellt werden. Dies gilt insbesondere für den grenzüberschreitenden Online-Handel.

Der mündige Bürger im Sinne eines normal informierten, vernünftig aufmerksamen und kritischen Verbrauchers gemäß der Rechtsprechung von BGH und EuGH muss das Leitbild für die Ausgestaltung der Vertikal-GVO und der dazugehörigen Leitlinien für vertikale Beschränkungen sein.

In diesem Zusammenhang wird auch auf den Grundsatz der Subsidiarität und den Grundsatz des judicial self-restraint hingewiesen. Nach dem Subsidiaritätsprinzip wird die EU in den Bereichen, die nicht in ihre ausschließliche Zuständigkeit fallen nur tätig, sofern und soweit die Ziele der in Betracht gezogenen Maßnahmen weder auf zentraler noch auf regionaler oder lokaler Ebene ausreichend verwirklicht werden können, sondern vielmehr wegen ihres Umfangs oder ihrer Wirkungen auf Unionsebene besser zu verwirklichen sind. Der Grundsatz des judicial self-restraint bedeutet nicht eine Verkürzung oder Abschwächung der Kompetenzen der EU, sondern den Verzicht Politik zu treiben in Bereichen, die auf Basis bestehender Vertrags- oder Rechtslagen anderen Organen zu deren freier politischer Gestaltung Raum garantieren.

Es gilt daher die unterschiedlichen Vermarktungsvoraussetzungen (wie unterschiedliche Strukturen im Handel) und auch die wirtschaftlichen Möglichkeiten (wie Kaufkraft der Endkunden oder Verbraucherpreisindices) in den einzelnen EU-Mitgliedstaaten mehr zu berücksichtigen.

3. Wettbewerb ist nicht alles. Daher ist insbesondere die justiziable Abgrenzung zwischen erwünschtem Preiswettbewerb und unerwünschtem Preisverfall zwingend nötig:

Am 19. Februar 2019 präsentierten der französische Wirtschafts- und Finanzminister Bruno Le Maire und der deutsche Wirtschaftsminiser Peter Altmaier ein deutsch-französisches Manifest für eine europäische Industriepolitik im 21. Jahrhundert.

Die wesentliche Kernbotschaft dieses Manifests ist, dass sich die Rahmenbedingungen im globalen Wettbewerb grundsätzlich und dynamisch verändern. Im gleichen Maße müssten innerhalb der EU die erfolgskritischen Faktoren insbesondere auch bei den wettbewerbsrechtlichen Rahmenbedingungen so angepasst werden, dass Europäische Unternehmen im globalen Maßstab wettbewerbsfähig seien. Kurz gesagt hieße das, dass der seither vor allem von der EU-Kommission favorisierte Fokus auf den (Preis-) Wettbewerb 'nicht alles' sei.

Diese neue Gewichtung und mithin Justierung der politischen Ziele trifft auch auf die Vermarktung von Konsumgütern zu und muss in den fortzuschreibenden europäischen Wettbewerbsrichtlinien zwingend umgesetzt werden.

In der Wirkweise vergleichbar wie in der globalen Industriepolitik haben sich auch die Rahmenbedingungen für die Herstellung und Vermarktung von Konsumgütern verändert. Die nationalen und europäischen Wettbewerbsregeln sind insbesondere nicht auf einen neuartigen Wettbewerb zwischen stationären Fachhändlern und neuartigen Online-Handelsformaten eingestellt, bei denen beispielsweise risikokapital-finanzierte Online-Spieler den Verkauf von Handelswaren nur zum Anlass für die Gewinnung von Daten nehmen, auf deren Vermarktung sie eigentlich abzielen. Das heißt, die etablierten Teilnehmer des Wettbewerbs werden mit fundamental veränderten und meist auch disruptiv wirkenden Herausforderungen durch neue Spieler konfrontiert.

Hinzu kommt, dass stationärer Handel auf tradierten Mechanismen wie persönlicher Kundenkontakt, sinnliche Wahrnehmung und Nahversorgung aufbaut, wohingegen Onlinehandel im wesentlichen auf auf Algorithmen und Preisdruck aufbauen. Daraus folgt, dass selbst wenn 90% des Warenabsatzes stationär abgewickelt werden, doch 100% des Marktes unter online-getriebenen Wettbewerbsdruck stehen. Damit können marktmächtige Onlineformate EU-weit die Wahrnehmung von Marken, Produkten, Preisstellungen und Anbietern durch gezielte Einflussnahme (beispielsweise über Such- oder Bewertungsfunktionalitäten) kuratieren und manipulieren.

Die EU-Unternehmenspolitik muss daher ein level playing field schaffen, dass kleinen und mittleren Unternehmen sowohl in einzelnen Landesmärkten, als auch EU-weit faire Chancen für qualitätsorientierten Leistungswettbewerb eröffnet. Hier sei beispielsweise der Aufbau und Betrieb eines selektiven Vertriebssystems genannt. Der derzeit viel zu große operative und administrative Aufwand macht gerade kleinen und mittleren Unternehmen eine nationale oder gar EU-weit wirksame Vertriebssteuerung und Markenführung nahezu unmöglich.

Es geht also nicht um Sonderrechte für einzelne Gruppen. Vielmehr geht es um den Ausgleich durch EU-Wettbewerbsrecht geschaffener massiver Nachteile und um faire Chancen für qualitätsorientierten Leistungswettbewerb.

Wird die Kommission hier nicht unverzüglich tätig, werden insbesondere kleine und mittlere Hersteller vom Markt gehen müssen und die Verbraucher unter einem schlechteren Zugang, einer verminderten Auswahl sowie schlechteren Qualität von Waren und Dienstteistung leiden.

4. In einer zunehmenden Plattformökonomie müssen faire Chancen von kleinen und mittleren Unternehmen gegen international agierende Plattformen geschaffen werden:

Hersteller-Kooperationen agieren im Wettbewerb mit Filialsystemen, Online-Plattformen, Einkaufskooperationen oder sonstigen Großbetriebsformen. Sie werden jedoch im Rahmen der EU-Wettbewerbspolitik unterschiedlich behandelt, weil Herstellerunternehmen als eigenständige Unternehmen arbeiten und nicht zentral verwaltet werden.

Aus diesem Grund ist es Hersteller-Kooperationen bislang kaum möglich, auf die rasanten strukturellen Veränderungen konzertiert zu reagieren. In dem neuen Marktumfeld bedrohen die aufgezeigten wettbewerbspolitischen Beschränkungen die Fähigkeit und Flexibilität der Hersteller-Kooperationen, die Vermarktung ihrer Produkte auf ein effektives und vollständig koordiniertes Omnichannelsystem auszuweiten.

Die für die meisten Unternehmen beste Chance, im Wettbewerb zu bestehen, ist die überbetriebliche Zusammenarbeit in gewerblichen Genossenschaften und anderen förderwirtschaftlichen Verbundgruppen. Dabei müssen Kooperationen auf gleicher und unterschiedlicher Wirtschaftsstufen möglich sein. Im Vergleich zu Filialsystemen und Internetanbietern sind Hersteller-Kooperationen Stand heute insbesondere dadurch im Wettbewerb benachteiligt, dass sie die datengestützten Möglichkeiten der Digitalisierung nicht bzw. nur in sehr begrenztem Umfang nutzen dürfen. Dies betrifft allen voran gemeinsame Marketingstrategien, bei denen Hersteller-Kooperationen nicht mit verbindlichen, einheitlichen Preisen am Markt auftreten können. Gleiches gilt auch für die Nutzung von Big Data in Kooperationen. In der Folge verlieren mittelstän-

dische Herstellerunternehmen quasi „systembedingt“ mit fortschreitender Digitalisierung erhebliche Marktanteile und die Kontrolle sowie ihre Vertriebssteuerung und Markenführung. Dies gefährdet bereits gegenwärtig und auch auf mittlere Sicht in weiten Bereichen die Existenz- und Wettbewerbsfähigkeit lokaler Geschäftsinhaber.

Infolgedessen hinken Hersteller-Kooperationen insbesondere den international operierenden Online-Plattformen, Online-Handelsformaten, marktmächtigen Einkaufskooperationen oder den großen Filialsystemen bei diesem technologischen Wettlauf chancenlos hinterher.

Durch einen einseitigen Protektionismus der Kartellbehörden zugunsten von zumindest zentralisierten, wenn nicht sogar monopolisierten Strukturen wird auf Dauer die Angebotsvielfalt zu Lasten des Verbrauchers reduziert. Es ist daher dringend notwendig, dass das Kartellrecht die Schlüsselrolle für Hersteller-Kooperationen insbesondere für mittelständische Unternehmen deutlich stärker berücksichtigt. Hersteller-Kooperationen müssen den mittelständischen Unternehmen einen Nachteilsausgleich verschaffen, durch den sie im Wettbewerb erfolgreich bestehen können. Sie stärken die wirtschaftliche Vielfalt und ermöglichen dadurch nicht weniger, sondern gerade mehr Wettbewerb - zum Nutzen der Verbraucher. Dazu wird ein verlässlicher und transparenter europäischer Wettbewerbsrahmen gebraucht.

Dieser Rahmen braucht mindestens vergleichbare Freiräume für Hersteller-Kooperationen wie sie für Filialbetriebe und Internetplattformen bereits gelten, damit diese auf neue wirtschaftliche und technische Herausforderungen, insbesondere die der Digitalisierung, adäquat reagieren können.

5. Der Markeninhaber trägt das Produktrisiko, daher muss er im Inter- und Intrabrand-Wettbewerb über die Positionierung seiner Markenprodukte im (Preis-) Wettbewerb entscheiden können:

Das europäische Kartellrecht wird seit jeher von der Binnenmarktperspektive geprägt. Auch deshalb werden Beschränkungen des Wettbewerbs stets auf die daraus folgenden Effizienzgewinne oder Nachteile für den Verbraucher hin untersucht. Dabei werden mit einem ökonomisch, wirkungsbasiertem Prüfungsansatz die wettbewerbsfördernden Effekte den wettbewerbsfeindlichen gegenübergestellt und mit Blick auf die Verbraucherwohlfahrt abgewogen.

Klar ist, dass es in der EU nie 'per-se-Verbote' für Preisbindung gegeben hat. Das hat der Europäische Gerichtshof bereits im Jahr 1966 in der Sache Société Technique Mineière gegen Maschinenbau Ulm GmbH (EuGH, C-56/65,) entschieden. Mit Urteil 'Bionon gegen Agence et Messageries de la Presse' (EuGH, C-243/83) stellte der EuGH klar, dass jede Beschränkung, auch eine Kernbeschränkung, nach Art. 101 Abs. 3 AEUV freigestellt sein kann, auch und explizit eine Preisbindung.

Selbst bei Preis-, Mengen- und Gebietskartellen wird von der EU-Komission immer geprüft, ob Artikel 103 Abs. 3 AEUV zur Anwendung kommen könnte. Und tatsächlich hat die EU-Kommission zweimal ein Krisenkartell zum Abbau von Produktionskapazitäten genehmigt (Sache IV/34.456 – Stichting Baksteen, Kommissionsentscheidung vom 29.04.1994, ABl Nr. L 131 vom 26.05.1994, S.15-22; sowie Sache IV/30.810 – Kunstfasern, Kommissionsentscheidung vom 04.07.1984, ABl. Nr. L 207 vom 02.08.1984, S. 17-25).

In der derzeit gültigen Vertikal GVO 330/2010 ist die Preisbindung noch eine Kernbeschränkung gemäß Art. 101 Abs. 1 AEUV, welcher diese auch in lit. a) als Regelbeispiel *„die unmittelbare oder mittelbare Festsetzung der An- und Verkaufspreise oder sonstiger Geschäftsbedingungen“* nennt. Vertikale Preisbindung ist auch eine sog. Kernbeschränkung gemäß Art. 4 (a) der Vertikal-GVO, die nicht nur von der Kommission, sondern gemäß Art. 3 Abs. 2 VO 1/2003 (bzw. bei fehlender zwischenstaatlicher Auswirkung gemäß § 2 Abs. 2 GWB) auch vom Bundeskartellamt (BKartA) angewendet wird.

Auch bei sehr niedrigen Marktanteilen bleibt das Kartellverbot (zumindest das deutsche) auf vertikale Preisbindung anwendbar. Da die vertikale Preisbindung als bezweckte Wettbewerbs-

beschränkung gemäß Art. 101 Abs. 1 AEUV angesehen wird, ist auf sie die sog. De-Minimis-Bekanntmachung von vorneherein nicht anwendbar. Zwar ist die Spürbarkeit der Beeinträchtigung des zwischenstaatlichen Handels gemäß Art. 101 Abs. 1 AEUV dann zu verneinen, wenn der gemeinsame Marktanteil der Parteien auf keinem relevanten Markt über 5% liegt und zudem der gesamte von der Vereinbarung erfasste Umsatz zwischen den Vertragsparteien maximal 40 Mio. Euro beträgt. Eine entsprechende Spürbarkeitsschwelle gibt es aber im deutschen Recht nicht, so dass selbst bei Unterschreitung dieser niedrigen Schwellen § 1 GWB weiterhin anwendbar ist.

Die EU-Kommission diskutiert in den aktuell noch gültigen Leitlinien für vertikale Beschränkungen so ausführlich wie nie zuvor die positiven und negativen Wirkungen einer Preisbindung und widmet den Beschränkungen für den Wiederverkaufspreis ein substantiell erweitertes Kapitel.

Zu den positiven Auswirkungen von vertikaler Preisbindung gehören demnach vor allem die Lösung des sogenannten 'Trittbrettfahrer-Problems' und die Erschließung neuer Märkte. Eine Preisbindung kann eventuell auch notwendig sein, um die Auslistung eines Produkts, das ein Händler als Lockvogel einsetzt, durch einen anderen Händler zu vermeiden. Das ist in Zeiten, in denen das stationäre Marktpreisniveau durch marktmächtige Online-Spieler international manipuliert werden kann, von großer Bedeutung und muss angemessen ergänzt beziehungsweise erweitert werden.

Bisher hat insbesondere die rechtswissenschaftliche Lehre argumentiert, dass der Preiswettbewerb der einzig wirksame Wettbewerb sei, weil Qualitäts- und Servicewettbewerb einerseits nicht wirklich messbar wäre und andererseits auch Endkunden den vermeintlichen Mehrpreis für ein Produkt würden bezahlen müssen, die diese (zusätzlichen) Serviceleistungen gar nicht in Anspruch nehmen wollten. Diese sogenannten infra-marginalen Kunden würden bei jedweden Preisbindungen daher schlechter gestellt.

Ein Beispiel für diese Argumentation ist die aktuelle Haltung der deutschen Monopolkommission zur Buchpreisbindung. Die Monopolkommission führt dort aus, dass es durch die Ausschaltung des Preiswettbewerbs nicht zwangsläufig bei allen Buchhändlern zu einer Ausweitung des Serviceangebotes kommen müsse. Händler, die etwa aufgrund ihrer geografischen Lage oder eines speziellen Sortiments nur bedingt in Konkurrenz zu anderen stünden, dürften weniger starke Anreize haben, zusätzlichen Service zu bieten als Händler in einem hart umkämpften Markt. Auch sei generell davon auszugehen, dass der Servicegrad einer Buchhandlung vom Kunden schwer abzuschätzen sei und Serviceunterschiede weniger direkt spürbar seien als Preisdifferenzen. Daher sei zu erwarten, dass der Servicewettbewerb keinen gleichwertigen Wettbewerbsdruck wie der Preiswettbewerb entfalte (Sondergutachten Nr. 80 der Monopolkommission zur Buchpreisbindung vom 29.05.2018, Rz. 175).

Diese nach diesseitiger Meinung praxisferne Einschätzung der Monopolkommission ist nicht akzeptabel. Sie geht an der vertrieblichen Lebenswirklichkeit von Markenherstellern der Konsumgüterindustrie vorbei. Dies gilt grade für Neuprodukte beispielsweise von Start-ups oder von kleinen und mittleren Herstellern mit neuen und/oder weniger bekannten Marken. Nur wenn diese Marken dem Endkunden besondere Leistungsmerkmale oder Services bieten, können diese erfolgreich in den Markt eingeführt werden oder sich dort behaupten. Absatzmittler interessieren sich nämlich nur dann für solche Produkte, wenn sie damit auch Geld verdienen können.

Das heißt, dass unkontrollierbarer Preisdruck dazu führt, dass neue und/oder weniger bekanntere Produkte, Marken oder Innovationen faktisch deutlich schlechter gestellt werden, als marktmächtige und dem Endkunden bereits bekannte Produkte, Marken oder Spieler.

6. Die in der heutigen Vertikal-GVO 2010 etablierte Effizienzeinrede hat sich als nicht praxistauglich erwiesen:

Nach diesseitiger Einschätzung ist die sogenannte Effizienzeinrede insbesondere für kleine und mittlere Unternehmen kein praxistaugliches und wirtschaftlich tragbares Mittel gegen die kartellrechtliche (Über-) Regulierung der Konsumgüterdistribution. Aus Gründen der Subsidiarität und Deregulierung sollte daher zumindest die Preisbindung der zweiten Hand aus dem Kanon der Kernbeschränkungen (Art. 4 GVO 2010 sowie Rz. 47 ff der Leitlinien für vertikale Beschränkungen zur Vertikal-GVO) herausgelöst werden.

Eine Kernbeschränkung kann – ebenso wie andere Wettbewerbsbeschränkungen gemäß Art. 101 Abs. 1 AEUV – gemäß Art. 101 Abs. 3 AEUV vom Kartellverbot (einzel-) freigestellt sein, wenn sie zur Verbesserung der Warenerzeugung oder Warenverteilung oder zur Förderung des technischen oder wirtschaftlichen Fortschritts beiträgt, die Verbraucher eine angemessene Beteiligung an dem entstehenden Effizienzgewinn erhalten, die Beschränkung für die Verwirklichung dieser Ziele unerlässlich ist und die Vereinbarung den Parteien nicht die Möglichkeit eröffnet, für einen wesentlichen Teil der betreffenden Waren den Wettbewerb auszuschalten.

Die Kommission hat in den Leitlinien für vertikale Beschränkungen für drei Konstellationen die Bedingungen konkretisiert, unter denen eine vertikale Preisbindung als einzeln freigestellt angesehen werden kann, nämlich (a) Sonderangebotskampagnen von 2-6 Wochen Dauer in Franchise- oder ähnlichen Vertriebssystemen, (b) Einführung eines neuen Produktes oder eines bekannten Produktes auf einem neuen geographischen Markt und (c) bei Erfahrungsgütern oder komplizierten Produkten, für die nachweislich ein Trittbrettfahrerproblem besteht.

Diese drei von der Kommission konkretisierten Konstellationen sind jedoch sehr beschränkt, und insbesondere für die Konstellationen (b) und (c) sind die von der Kommission aufgestellten Voraussetzungen sehr weitreichend. Zudem sind außerhalb dieser drei Konstellationen die Anforderungen an den Nachweis der Freistellungsvoraussetzungen bei vertikaler Preisbindung sehr hoch. Darüber hinaus besteht – wie stets bei Kernbeschränkungen – für den Fall, dass den Unternehmen der ihnen obliegende Beweis der Einzelfreistellung gemäß Art. 101 Abs. 3 AEUV nicht gelingt, ein erhöhtes Bußgeldrisiko.

In der Vertikal-GVO 2010 hat die Kommission zwar im Anschluss an das Leegin-Urteil des US Supreme Court im Grundsatz eine Wende hin zu Preisbindungen konsequenter Weise vollzogen. Erwartungsgemäß haben Freistellungen aus Effizienzgründen aber keine große praktische Bedeutung erlangt, weil die damit verbundenen Nachweispflichten für die Marktteilnehmer mit großem wirtschaftlichen Aufwand bei zu großen wirtschaftlichen und für die handelnden Personen persönlichen (Haftungs-) Restrisiken verbunden sind.

Damit besteht in der EU nur theoretisch ein Rule of Reason Standard in § 2 Abs. 1 GWB beziehungsweise in Art. 101 Abs. 3 AEUV. Faktisch kann nicht wirklich von einem Rule of Reason-Standard gesprochen werden. Vielmehr herrscht in der EU nach wie vor ein per se-Verbot der Preisbindung. Daher besteht nach diesseitiger Einschätzung ein dringender Deregulierungsbedarf sowohl in der zu aktualisierenden Vertikal-GVO als auch klarstellend in den entsprechenden Leitlinien für vertikale Beschränkungen.

Nach dem in der EU theoretisch bestehenden Rule of Reason-Standard aus der in § 2 Abs. 1 GWB beziehungsweise in Art. 101 Abs. 3 AEUV angelegten Einzelfreistellung ist vorgesehen, dass die Wettbewerbsbehörden und Gerichte in einem Verfahren gegen Unternehmen und Unternehmensgruppen einen überzeugend begründeten Effizienzeinwand nachträglich als Rechtfertigung zulassen und daraufhin von einer weiteren Verfolgung des inkriminierten Verhaltens ablassen 'können'.

Diese Effizienzeinrede ist aus betriebswirtschaftlicher Sicht aber eine Fehlkonstruktion. Damit

werden insbesondere kleine und mittlere Unternehmen massiv diskriminiert, weil diese weder die Finanzkraft, noch die Personalausstattung haben, um solche Nachweise führen und gerichtlich durchfechten zu können. Und zwar aus folgenden Gründen:

- Der Unternehmer muss gemäß § 2 Abs. 1 GWB beziehungsweise Art. 101 Abs. 3 AEUV beweisen, dass der beanstandeten Verhaltensweise ein zusätzlicher Gewinn eindeutig zugerechnet werden kann und der Verbraucher daran angemessen beteiligt wurde.
- Oder der Unternehmer muss beweisen, dass die beanstandete Verhaltensweise zur Verbesserung der Warenerzeugung oder -verteilung oder zur Förderung des technischen oder wirtschaftlichen Fortschritts beiträgt und dass den beteiligten Unternehmen keine Beschränkungen auferlegt werden, die für die Verwirklichung dieser Ziele nicht unerlässlich sind.
- Und der Unternehmer muss jedenfalls beweisen, dass durch die beanstandete Vorgehensweise der Wettbewerb der betreffenden Waren nicht ausgeschaltet werden kann.

Alle vorgenannten Punkte sind für einen (mittelständischen) Unternehmer nicht mit vertretbarem kaufmännischen Aufwand zu realisieren. Hinzu kommt, dass die mit diesem Verfahren einhergehende Unsicherheit und das Risiko einer eventuell notwendigen jahrelangen und teuren gerichtlichen Auseinandersetzung viele Entscheider in Unternehmen davon abhalten, es überhaupt auf die Geltendmachung des Effizienzeinwands ankommen zu lassen.

Es ist zu unterstellen, dass sich auch die Kommission dieser für Anbieter sehr nachteiligen Planungs- und Rechtsunsicherheiten bewusst ist.

7. Für hochprofessionell, international agierende (Online-) Handelsformate müssen abweichende und strengere Wettbewerbsregeln möglich sein, als für kleine und mittlere (Hersteller-) Unternehmen:

Es ist eine unbestrittene Tatsache, dass Qualität, nachhaltige Produktionsstandards und Innovation – sowohl für Hersteller als auch für Handelsunternehmen – mit erheblichen Kosten verbunden sind. Es ist auch eine unbestrittene Tatsache, dass sowohl Hersteller als auch Handelsunternehmen aus den erzielten Deckungsbeiträgen aus dem Verkauf der von ihnen hergestellten oder gehandelten Produkte und Services ihre Innovationskraft und die Qualität ihrer Produkte und Leistungen finanzieren (müssen).

Das ist ein wesentlicher Unterschied beispielsweise zu den zwischenzeitlich marktmächtigen Online-Spielern, die den Verkauf von Waren oder die Erbringung von Diensten mutmaßlich nur zum Anlass nehmen, um Daten über Endkunden(kauf)verhalten zu gewinnen und diese Daten sowie andere Leistungen tatsächlich vermarkten. Oder auch zu Private Equity- oder Venture Capital-finanzierten (Online-) Spielern, die mit maximaler Preisaggressivität versuchen, Marktanteile zu gewinnen, ohne im Ergebnisse die kalkulatorischen Grundsätze eines ordentlichen Kaufmanns berücksichtigen zu müssen. Oder schließlich auch marktmächtige Kooperationen oder Handelsunternehmen, die ihre Nachfragemacht zum Nachteil insbesondere von kleinen und mittleren Herstellern ausnutzen.

Dass maximaler Konditionendruck auf die Herstellerseite nicht zwingend positive Effekte hat, wurde vom Bundeskartellamt bereits festgestellt. So wird der Präsident des Bundeskartellamts Andreas Mundt in einer Pressemitteilung aus dem Oktober 2018 am Beispiel des Möbelhandels wie folgt zitiert: (…) „Die meisten Möbelhändler in Deutschland haben sich Einkaufskooperationen angeschlossen. Das Kartellrecht steht derartigen Kooperationen grundsätzlich nicht im Wege. Sie können vor allem kleineren Möbelhändlern helfen, bessere Einkaufskonditionen zu erreichen und so gegenüber Ketten und den „Großen“ im Markt mithalten zu können. Wir müssen jedoch darauf achten, dass dadurch keine bedenkliche Nachfragemacht zulasten der überwiegend mittelständisch geprägten Herstellerlandschaft entsteht. Natürlich können die Verbraucher zunächst von den günstigeren Konditionen der Händler profitieren, wenn diese an die Kunden weitergegeben werden. Wenn am Ende aber Hersteller aufgrund des Konditionendrucks durch die Handelsseite langfristig nicht mehr mithalten können und aus dem Markt ausschei-

den, leidet die Vielfalt, können die Preise steigen, und die Verbraucher haben das Nachsehen“ (…) (PM des BKartA vom 24.10.2018, Bundeskartellamt untersucht Lieferstrukturen im Möbelhandel).

Es ist also zu vermeiden, dass faktische Monopole oder Oligopole - gleich auf welcher Wirtschaftsstufe – insbesondere durch Informationskonzentration, Informationsaustausch zu Einkaufskonditionen und anderen Einkaufs-Parametern (Mengen, Zeiträume etc.) noch marktmächtiger werden und Druck auf kleinere Marktteilnehmer ausüben können.

Dies gilt übrigens nicht nur für den Informationsaustausch auf horizontaler Ebene innerhalb einer Verbundgruppe, z.B. in Einkaufsausschüssen oder ähnlichen Gremien, wo sich die Anschlusshäuser der Verbundgruppe beraten. Dies gilt auch für den Fall, dass ein Anschlusshaus der Verbundgruppe im Namen der Verbundgruppe die Verhandlungen mit Lieferanten führt. Der Grund ist, dass die dadurch entstehende Nachfragemacht gerade kleine und mittlere Anbieter so unter Druck setzt, dass diese dem Konditionendruck nicht mehr Stand halten können und vom Markt gehen müssen.

8. In einem sich digitalisierenden und mithin internationalisierenden Vermarktungsumfeld muss der Markeninhaber entscheiden können, wie und wo seine Markenprodukte präsentiert und verkauft werden:

Online-Marktplätze, Online-Auktionsplattformen und Online-Preissuchmaschinen sind Drittplattformen im Sinne der Vertikal-GVO 2010 beziehungsweise der Leitlinien für vertikale Beschränkungen zur Vertikal-GVO.

Gemäß Rz. 54 letzter Satz LL-Vertikal-GVO 2010 kann der Anbieter verlangen, dass 'Kunden die Website des Händlers nicht über eine Website aufrufen, die den Namen oder das Logo dieser Plattform trägt'. Damit ist es gleichgültig, ob das über die Drittplattform erreichte Online-Verkaufsangebot den definierten qualitativen Kriterien entspricht oder nicht. Wenn der Hersteller schon das 'Aufrufen einer Website über eine Drittplattform' untersagen kann, kommt es nur auf den Startpunkt und nicht auf das Ziel der Suche an. Auch der EuGH hat in der Coty-Entscheidung klargestellt, dass der Hersteller verlangen kann, dass seine Waren im Internet in einer Umgebung verkauft werden, die den mit seinen autorisierten Händlern vereinbarten Qualitätsanforderungen entspricht (Rz 47, Coty-Entscheidung). Da zwischen dem Hersteller und den Drittplattformen keine Vertragsbeziehung besteht, kann der Hersteller von diesen nicht auf einer solchen Grundlage die Einhaltung der Qualitätsanforderung verlangen, die er seinen autorisierten Händlern auferlegt hat (Rz 48, Coty-Entscheidung).

Weil der Hersteller keine vertragliche Vereinbarung mit Drittplattformen geschlossen hat, kann er die Einhaltung der mit seinen autorisierten Absatzmittlern vereinbarten Qualitätsanforderungen gegenüber diesen Drittplattformen nicht durchsetzen. Dadurch werden die mit einem (selektiven) Vertriebssystem verfolgten Ziele konterkariert. Mithin darf ein Hersteller die Nutzung von Online-Drittplattformen (wie Online-Marktplätze, Online-Auktionsplattformen und Online-Preissuchmaschinen) nach der EuGH-Rechtsprechung per se untersagen.

Nun meinen gerade deutsche Vertreter der rechtswissenschaftlichen Lehre, sowie von Kartellbehörden und Gerichten (noch), dass per se-Verbote insbesondere hinsichtlich Preissuchmaschinen unzulässig seien. Juristisch lässt sich diese wohl eher (verbraucher-) politisch motivierte Einschätzung nach diesseitiger Meinung nicht rechtfertigen.

Klar ist aber jedenfalls, dass qualitative Kriterien, die den Anforderungen der EuGH-Rechtsprechung entsprechen (also nicht über das hinausgehen, was zur Wahrung der Qualität und zur Gewährleistung des richtigen Gebrauchs der betreffenden Produkte erforderlich ist) jedenfalls zur Reglementierung von Drittplattformen (Online-Marktplätze, Online-Auktionsplattformen und Online-Preissuchmaschinen) zulässig sind (Rz. 175 LL-Vertikal-GVO). Dies wurde in der aktuellen Coty-Entscheidung des EuGH auch ausdrücklich untermauert (Rz 58, Coty-Entscheidung).

Hinzu kommt, dass die (deutsche) Rechtsprechung bestimmte qualitative Kriterien gebilligt hat. Zu denken ist an das OLG Karlsruhe, wonach ein Hersteller bei der Online-Warenpräsentation keine "praktisch unterschiedslose, listenmäßige Darstellung gleichartiger Angebote, die den Schnäppchenjäger adressiert", hinnehmen müsse (Rz 77, Scout-Entscheidung, OLG-Karlsruhe, 2009).

Bisher wurde teilweise behauptet, dass ein vertragliches oder sogenanntes 'de facto-Verbot' von Drittplattformen (bzw. insbesondere Preissuchmaschinen) einem Totalverbot des Internets gleichkäme und mithin unzulässig sei. Dabei wurde mit der (insoweit missverständlichen) Pierre Fabre-Entscheidung des EuGH aus dem Jahr 2011 argumentiert, wonach angeblich jede Einschränkung des Internet-Vertriebs durch einen Hersteller unzulässig sein solle.

Dieses Missverständnis wurde nun vom EuGH ausdrücklich dahingehend aufgeklärt, dass zwischen einem pauschalen Verbot der Internetnutzung insgesamt (Rz. 32, Coty-Entscheidung) und der Vorgabe von einzuhaltenden Qualitätsanforderungen (Rz 35, Coty-Entscheidung) zu unterscheiden ist.

Nach den Erkenntnissen des 'Final Reports on the E-commerce Sector Inquiry 2017' sind Verbote von Drittplattformen im übrigen nicht als Verbot der Nutzung des Internets insgesamt anzusehen, weil für die überwiegende Mehrzahl der Online-Händler der eigene Online-Shop die größte Bedeutung hat. Beschränkungen von Drittplattformen sollten nach den Ergebnissen des vorgenannten Final Reports daher nicht gleichsam eines per se-Verbots bewertet werden (Rz. 502 ff 'Final Reports on the E-commerce Sector Inquiry 2017'). Zudem wird in diesem Final Report festgestellt, dass Beschränkungen hinsichtlich der Nutzung von Preissuchmaschinen, die auf qualitativen Kriterien beruhen, von der Vertikal-GVO gedeckt seien. Demnach seien Hersteller, die ein selektives Vertriebssystem betreiben prinzipiell berechtigt, bestimmte Standards hinsichtlich der Werbung im Internet zu ihren Produkten einzufordern (Rz. 553 ff 'Final Reports on the E-commerce Sector Inquiry 2017').

Wenn man die zu Online-Marktplätzen getroffenen Feststellungen des 'Final Reports on the E-commerce Sector Inquiry 2017' nun für Drittplattformen im allgemeinen und Preissuchmaschinen im besonderen zugrunde und diese im Sinne der Coty-Entscheidung des EuGH auslegt, sind qualitative Kriterien zulässig, selbst wenn diese zu einem de facto-Verbot von entsprechenden Online-Formaten von Drittplattformen führen.

Das sollte so eindeutig auch in der neuen Vertikal-GVO und den dazugehörigen Leitlinien klargestellt und umgesetzt werden.

9. Sogenannte Hybridhändler – also stationäre Händler, die gleichzeitig einen Online-Handel betreiben – müssen wie reine Online-Händler behandelt werden dürfen, wenn ihr überwiegender Umsatz online generiert wird:

Die aktuelle Vertikal-GVO sieht vor, dass ein stationär autorisierter Absatzmittler gleichzeitig berechtigt ist, einen eigenen Online-Handel zu betreiben. Nun gibt es viele Online-Händler, die vordergründig ein stationäres Ladenlokal betreiben, um die Voraussetzungen der Autorisierung durch einen Markenhersteller zu erfüllen.

Tatsächlich wird der weit überwiegende Teil der Umsätze jedoch mit überregionalen oder sogar internationalen Onlineverkäufen getätigt. Damit wirken diese hybriden Absatzmittler im Markt faktisch wie reine Online-Händler. Zudem sind auch diese Hybridhändler aufgrund der unmittelbaren Endkundenbeziehung mit meist millionenfachen Endkundenkontakten pro Monat in der Lage, die Wahrnehmung von Produkten und Marken sowie das Marktpreisniveau national und international zu manipulieren.

Im Interesse einer wirksamen Markenführung müssen über ein selektives Vertriebssystem vertreibende Lieferanten daher bestimmte Produkte ihres Sortiments nur für den stationären Vertrieb bestimmen dürfen. In diesem Fall wäre dem Online-Händler nur die Werbung auf Onlineformate nur unter Verwendung der unverbindlichen Preisempfehlung des Herstellers, sowie die Produktdarstellung und Produktinformation beziehungsweise die Nutzung von Drittplattformen jeweils gemäß den mit dem Hersteller vereinbarten Qualitätskriterien gestattet.

Nach den aktuellen Leitlinien für vertikale Beschränkungen stellt der Betrieb einer Website grundsätzlich eine Form des passiven Verkaufs dar. In diesem Bereich sieht die Kommission derzeit jede Verpflichtung als Kernbeschränkung an, durch die Vertragshändler von der Benutzung des Internets abgehalten werden.

Zukünftig muss es einem selektiv vertreibenden Markenhersteller legal möglich sein

- den Händler zu verpflichten technisch zu verhindern, dass Kunden aus anderen EU-Staaten oder Drittstaaten Angebote zu selektiv vertriebenen Produkten auf seiner Website einsehen können;
- den aktiven nationalen und internationalen Verkauf von selektiv vertriebenen Produkten über das Internet ganz oder teilweise zu untersagen und/oder
- Mindestpreise für die Online-Bewerbung von selektiv vertriebenen Produkten vorzugeben, von denen bei der stationären Vermarktung nach der eigenverantwortlichen Kalkulation des Händlers jedoch abgewichen werden kann.

Esslingen, den 24.05.2019

gez. RA Markus Nessler MBA

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Berlin, 27. Juni 2019

Aktualisierte Stellungnahme der deutschen Brauer zur Evaluierung der Vertikal-Gruppenfreistellungsverordnung Nr. (EU) 330/2010 (Vertikal-GVO)

Sehr geehrte Damen und Herren,

die deutschen Brauer vertreiben ihre Produkte fast ausschließlich über Dritte, entweder über den Groß-und Einzelhandel oder die Gastronomie. Kartellrechtliche Regelungen, die sich auf vertikale Vereinbarungen beziehen, sind somit auch von hoher Bedeutung für unsere Mitglieder.

Besonders im Bereich des Bierlieferungsrechts nutzen Brauereien die Möglichkeit, Alleinbezugsvereinbarungen mit Abnehmern aus der Gastronomie zu vereinbaren. Dies ist auch grundsätzlich interessengerecht, da Brauereien regelmäßig Brauereidarlehen gewähren, Inventar zur Verfügung stellen oder finanzieren oder aber Räumlichkeiten an die Gastronomie verpachten und Abnehmern dadurch einen erheblichen Vorteil verschaffen.

Die deutschen Brauer halten eine Flexibilisierung der Vertikal-GVO im Hinblick auf die Laufzeit von Alleinbezugsbindungen für wünschenswert. Die derzeit geltenden Regelungen der Vertikal-GVO werden den tatsächlichen Marktgegebenheiten sowie den Interessen seiner Mitglieder nur unzureichend gerecht.

Hierzu im Einzelnen:

I. Derzeitiger Status-Quo bei Bierlieferungsverträgen mit Alleinbezugsbindungen

Der Europäische Gerichtshof (EuGH) hat sich bereits im Jahre 1991 zu Bierlieferungsverträgen mit Alleinbezugsbindungen geäußert. Die aufgestellten Grundsätze gelten nach wie vor.

In seiner Entscheidung DELEMITIS ./. HENNINGER BRÄU (Az. C-234/89) hat der EuGH festgestellt, dass die Beurteilung, ob eine entsprechende vertikale Vereinbarung unter das Verbot des Art. 85 Abs. 1 EWGV (101 AEUV) fällt, wesentlich von der Marktstruktur und den jeweiligen Wettbewerbsbedingungen abhängt.

Im Besonderen stellt der EuGH bei Alleinbezugsbindungen auf die sog. Bündeltheorie ab, wonach ein Bündel gleichartiger Verträge zu einem Abschottungseffekt auf dem relevanten Markt führen kann. Genannt werden insoweit namentlich 12 Kriterien, u.a. die Zahl der gebundenen Gaststätten im Verhältnis zu nicht gebundenen Gaststätten sowie die Dauer der eingegangenen Verpflichtungen und die von den Verträgen erfassten Biermengen. Darüber hinaus ist konkret der Beitrag der bindenden Brauerei zur eventuellen kumulativen Wirkung des Vertragsnetzes zu prüfen.

Die Prüfung dieser Kriterien erfordert freilich eine intensive Analyse der Gegebenheiten auf dem relevanten Markt. Erst bei Vorliegen der vom EuGH aufgestellten Kriterien kann überhaupt somit von einem Verstoß gegen Art. 101 Abs. 1 AEUV ausgegangen werden, sodass der Anwendungsbereich der Vertikal-GVO eröffnet wird.

Die Vertikal-GVO kann daher für die Brauwirtschaft unter bestimmten Voraussetzungen von Relevanz sein. Sie könnte die Funktion eines Auffangtatbestandes für Bierlieferungsverträge erfüllen, sollte eine Marktanalyse einschließlich des nennenswerten Beitrages der betreffenden bindenden Brauerei dazu führen, dass ein Abschottungseffekt vorliegt.

II. Für Bierlieferungsverträge relevante Regelungen der Vertikal-GVO bei Annahme einer wettbewerbsbeschränkenden Wirkung eines einzelnen Bierlieferungsvertrages

Bierlieferungsklauseln mit Alleinbezugsbindung, die für über fünf Jahre abgeschlossen werden, würden wegen Art. 5 Abs. 1 lit. a Vertikal-GVO grundsätzlich nicht in den Anwendungsbereich der Vertikal-GVO fallen. Eine Ausnahme würde lediglich für Konstellationen gelten, in denen Art. 5 Abs. 2 Vertikal-GVO greift.

Hiernach gilt die gesetzliche Begrenzung auf fünf Jahre (Art. 5 Abs. 1 lit. a Vertikal-GVO) nicht, wenn Vertragspartner von Brauereien Brauereiprodukte in Räumlichkeiten und auf Grundstücken verkaufen, die entweder im Eigentum der Brauereien stehen oder von diesen gepachtet oder gemietet sind. Dann darf das Wettbewerbsverbot (ausschließliche Bezugsbindung) nach der Vertikal-GVO auch über einen längeren Zeitraum als fünf Jahre gelten, jedoch nicht über den Zeitraum hinausreichen, in dem Vertragspartner diese Räumlichkeiten und Grundstücke nutzen.

Art. 5 Abs. 2 Vertikal-GVO erfüllt somit für diese Art von Verträgen die wertvolle Funktion eines Auffangtatbestandes für den Fall, dass eine spürbare wettbewerbsbeschränkende Wirkung von Alleinbezugsbindungen nach der sog. Bündeltheorie in Deutschland festgestellt wird. Denn dann ist ein Rückgriff auf Art. 5 Abs. 2 Vertikal-GVO, wonach Alleinbezugsbindungen auch über fünf Jahre hinaus zulässig sind, erlaubt und würde somit die berechtigten Interessen zahlreicher Brauereien wahren.

Vor diesem Hintergrund sprechen sich die deutschen Brauer für den Erhalt des Art. 5 Abs. 2 Vertikal -GVO aus.

III. Anpassungsbedarf im Hinblick auf eine Vertikal-GVO 2022

Die Konstellation einer über fünf Jahre dauernden Vertragsbeziehung, die auf einer langfristigen Verpachtung und einer Bezugsbindung beruht, ist in Deutschland nach wie vor üblich, wenngleich andere Vertragsarten im Verhältnis Brauwirtschaft zu Gastronomie zunehmen.

Die deutschen Brauer halten eine längere Laufzeit von Alleinbezugsbindungen (zehn Jahre) auch dann für interessengerecht, wenn anderweitige synallagmatische Gegenleistungen durch den Anbieter gegenüber Abnehmern erbracht werden.

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Die Wertung des Gesetzgebers aus Art. 5 Abs. 2 Vertikal-GVO, dass dem Abnehmer durch die Zurverfügungstellung von Räumlichkeiten des Anbieters ein Vorteil erwächst, etwa die Schaffung einer geschäftlichen Existenzgrundlage, sodass eine Bezugsbindung über mehr als fünf Jahre gerechtfertigt ist, lässt sich ebenso auf die Fälle übertragen, in denen die Geschäftsgrundlage von Gastronomen mit Hilfe von Brauereidarlehen erst geschaffen wird und/oder zur Existenzgründung Inventar zur Verfügung gestellt wird.

Nach wie vor sind es hauptsächlich Brauereien, die die Gastronomie mit hohem Risiko finanzieren. Oftmals werden Existenzgründern Brauerei-Darlehen in nicht unerheblichem Umfang gewährt, sodass die Brauereien nahezu das volle Insolvenzrisiko ihrer Geschäftspartner in der Gastronomie tragen. Die Kreditinstitute haben sich dagegen weit überwiegend von der Kreditvergabe an einzelne Gastronomen zurückgezogen.

Um die Geschäftspartner nicht zu überfordern, sind Darlehensverträge zwingend erforderlich, die die Leistungsfähigkeit der Gastronomen angemessen abbilden, was sich besonders in einer längeren Vertragslaufzeit niederschlägt.

Die mit der Laufzeit der Darlehensverträge korrespondierenden Vereinbarungen von Bezugsbindungen, die über 5 Jahre hinausgehen (i.d.R. 10 Jahre), sind bei hohen Leistungen erforderlich, da beispielsweise interne Abschreibungen des Darlehens anhand des Getränkeabsatzes erfolgen. Geringere Laufzeiten bei Bezugsbindungen würden somit notwendigerweise zu geringeren Leistungen führen, was wiederum zur Folge hätte, dass Brauereien Existenzen für die Gastronomie nicht im bisherigen Umfang mitbegründen könnten.

Die Praxis von Brauereien in Bezug auf die Dauer von Alleinbezugsvereinbarungen ist jedoch unterschiedlich und hängt maßgeblich vom Umfang des Darlehens ab. Deshalb prüfen Brauereien stets, ob eine fünfjährige Alleinbezugsbindung den Gastronomen einseitig besser stellt und eine Vereinbarung aus Sicht der Brauerei somit noch interessengerecht ist.

Aus Sicht der deutschen Brauer könnte eine Regelung nach dem Beispiel des Artikels 5 Abs. 2 Vertikal-GVO vor allem dann zu mehr Rechtssicherheit führen, wenn eine Regelung eine über fünf Jahre hinausgehende Alleinbezugsverpflichtung (i. d. R. zehn Jahre) durch höhere Finanzierungsleistungen begründet werden kann (z. Bsp. ab einer Darlehenssumme von 25.000 EUR), und das nicht nur für Darlehen, sondern auch für vertragsspezifische Zuschüsse.

Da Brauereien ihr Produktportfolio stetig diversifizieren, wäre es darüber hinaus im Sinne der Rechtssicherheit wichtig, eine Ausschließlichkeit möglichst auf das gesamte Produktsegment vereinbaren zu können.

IV. Drohende Rechtsfolgen nach derzeitiger Rechtslage, falls ein Bierlieferungsvertrag eine Wettbewerbsbeschränkung darstellt

Die Kommission führt in Rn. 133 ihrer Leitlinien zur Vertikal-GVO (Vertikal-LL) zu Einzelfreistellungen speziell bei Ausschließlichkeitsvereinbarungen aus:

> *„Beträgt die Dauer mehr als fünf Jahre, ist davon auszugehen, dass die Verbote bei den meisten Investitionsarten nicht als für die Erzielung der behaupteten Effizienzgewinne erforderlich betrachtet werden bzw. dass diese Gewinne nicht ausreichen, um die Abschottungswirkung zu kompensieren."*

Eine Einzelfreistellung nach 101 Abs. 3 AEUV kann allerdings dann in Betracht kommen, wenn sehr umfangreiche vertragsspezifische Investitionen getätigt wurden, z.B. der Erwerb einer Anlage durch den Anbieter eigens für den Vertrag mit dem konkreten Abnehmer, die er nach Ablauf des Vertrages nicht weiter für andere Abnehmer nutzen und nur mit hohem Verlust verkaufen kann. Allgemeine oder marktspezifische Investitionen sind normalerweise jedoch nicht vertragsspezifisch.

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In Rn. 147 Vertikal-LL führt die Kommission zudem aus, dass es in der Regel nicht genügt, wenn der Anbieter dem Abnehmer ein Darlehen gewährt oder Ausrüstung überlässt. Allein diese für einen Bierliefervertrag typischen Leistungen genügen damit in der Regel noch nicht für eine Einzelfreistellung; gewährt der Anbieter jedoch umfangreichere Leistungen, kann eine Einzelfreistellung in Betracht kommen.

Eine geltungserhaltende Reduktion auf die zulässige Dauer ist in solchen Konstellationen nach deutschem Recht wohl nicht anzunehmen, da damit die zwingende Rechtsfolge des Art. 5 Vertikal-GVO umgangen würde.

Gem. § 139 BGB greift im deutschen Recht die Rechtsfolge der Nichtigkeit in der Regel nur für die relevante Klausel, nicht jedoch für den gesamten Vertrag, der nach wie vor für eine Freistellung in Betracht kommen kann. Voraussetzung hierfür ist die Existenz einer salvatorischer Klausel im Vertrag. Insofern unterscheidet sich Art. 5 Vertikal-GVO („Nicht freigestellte Beschränkungen") von den in Art. 4 Vertikal-GVO geregelten Kernbeschränkungen, denn nur eine Kernbeschränkung nach Art. 4 Vertikal-GVO führt zum Ausfall der Gruppenfreistellung für den gesamten Vertrag.

In der Konsequenz würde dies jedoch für den deutschen Markt bedeuten, dass bei einer Vielzahl von Verträgen nur ein „Rumpfgerüst" übrigbleibt, das Brauereien einseitig zur Gewährung von Leistungen gegenüber seinen Vertragspartnern verpflichten würde. Für eine etwaige Rückabwicklung würden zudem die Regeln des Bereicherungsrechts gelten. Gemäß § 81 Abs. 4 GWB könnten Bundeskartellamt sowie die Kommission gem. Art. 23 VO (EU) Nr. 1/2003 letztlich bei vorsätzlichen oder fahrlässigen Verstößen gegen § 1 GWB bzw. Art. 101 AEUV Geldbußen gegen Brauereien festsetzen.

Hier wäre eine differenziertere Betrachtung wünschenswert, die die Interessenlagen der jeweiligen Vertragspartner angemessen berücksichtigt, zumal Brauereien, wie bereits geschildert, in Vorleistung treten und das Insolvenzrisiko ihrer Geschäftspartner, insb. bei Existenzgründungen, tragen.

Wir bitten Sie, unsere Anliegen vor dem Hintergrund unserer Ausführungen zu prüfen, und in die laufende Diskussion einzubeziehen.

Bei Rückfragen stehen wir Ihnen jederzeit gerne zur Verfügung und verbleiben

mit freundlichen Grüßen
Deutscher Brauer-Bund e.V.

Holger Eichele
Hauptgeschäftsführer

Matthias Nadolski
Syndikusrechtsanwalt

Bundesministerium
Digitalisierung und
Wirtschaftsstandort

Bewertung der Vertikal-GVO und der Leitlinien der Europäischen Kommission für vertikale Beschränkungen

Short Abstract

The Austrian Federal Ministry for Digital and Economic Affairs was carrying out a national consultation process and is submitting following comments to the consultation process concerning Regulation (EU) No 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices as well as the related EC Guidelines on Vertical Restraints.

The Regulation and the Guidelines are important, especially in light of the recent discussion on industrial policy. Therefore, in our view, the Regulation as well as the Guidelines should be extended and revised in the light of structural changes in the value chain in the global competition.

The following points should be taken into consideration:

- In the light of current discussion on an EU Industrial Policy Strategy, competition law enforcement and industrial policy need to be linked better. It is necessary to concentrate also on aspects like **quality and innovation in competition law enforcement** to strengthen welfare in Europe.
- The **degree of market power** of the parties to the agreement as well as interdependence **(relative market power)** should be taken more into account in competition law enforcement.
- **Evaluation of effects on a case-by-case assessment** instead of by object, especially in case of **SME .**
- The increasing share of retailer's **private labels** should be taken into account - the buyer could also be a manufacturer and a distributor of goods and is a competitor of the supplier.
- **Resale price maintenance (RPM)** should not always be determined as hardcore restriction. In exceptional cases, such vertical agreements could be important for SME to remain in the market. A broader approach regarding RPMs would be desirable.
- Measures to support the **brick and mortar shops** (offline sales) should be developed - the prohibition of "dual pricing" (Guidelines 52 point d) should be revised.

Konsultationsbeitrag

des Bundesministeriums für Digitalisierung und Wirtschaftsstandort

Das in Österreich für Wettbewerbspolitik und -recht zuständige Bundesministerium für Digitalisierung und Wirtschaftsstandort (im Folgenden „BMDW“) hat einen nationalen Konsultationsprozess durchgeführt und übermittelt folgenden Konsultationsbeitrag zur öffentlichen Konsultation betreffend die Bewertung der VO (EU) Nr. 330/2010 der Kommission über die Anwendung von Artikel 101 Absatz 3 Vertrag über die Arbeitsweise der Europäischen Union auf Gruppen von vertikalen Vereinbarungen und abgestimmten Verhaltensweisen (im Folgenden „Vertikal-GVO“) sowie die Bewertung der Leitlinien der EK für vertikale Beschränkungen.

Die Vertikal-GVO sowie die dazugehörigen Leitlinien der EK haben eine große Bedeutung, insbesondere auch im Zusammenhang mit den aktuellen industriepolitischen Diskussionen. Eine Verlängerung bzw. Überarbeitung unter Bedachtnahme auf strukturelle Änderungen in der Wertschöpfungskette im globalen Wettbewerb ist zu begrüßen.

Wirksamer Wettbewerbsvollzug muss über Preiseffekte hinausgehen

- Nach Ansicht des österreichischen BMDW, unter Berücksichtigung der Ergebnisse des Konsultationsprozesses, darf **wirksame Wettbewerbsrechtsvollziehung nicht als Selbstzweck angesehen** werden. Vielmehr ist sie Bedingung für die Verwirklichung eines freien und dynamischen Binnenmarktes und dient als eines von mehreren Instrumenten zur Förderung des allgemeinen wirtschaftlichen Wohlstands. Ziel und Zweck der Wettbewerbsregeln ist, den Wettbewerb vor Verfälschungen zu schützen. Größere Produktauswahl, bessere Qualität, niedrigere Preise sowie mehr Innovationen sollen durch die Einhaltung der Wettbewerbsregeln sichergestellt werden. Diese Ziele sind grundsätzlich als gleichrangig zu betrachten. In letzter Zeit standen jedoch bei der Vollziehung der Wettbewerbsregeln nur die kurzfristigen Effekte wie niedrigere Preise für Konsumenten im Fokus. Niedrigere Preise für Konsumenten sind jedoch nur ein Teil der Zielsetzungen des Wettbewerbsrechts und für sich allein zu kurzsichtig. Auch der EuGH hat bereits darauf hingewiesen, dass Artikel 101 AEUV, wie auch die übrigen Wettbewerbsregeln des Vertrags, nicht nur dazu bestimmt sind, die unmittelbaren Interessen einzelnen Wettbewerber oder Verbraucher zu schützen, sondern die Struktur des Marktes und damit den Wettbewerb als solchen (EuGH 04.06.2009 T-Mobile, C-8/08 Rz. 38).

- Die geltende Vollzugspraxis geht oft zulasten von Herstellern und hier vor allem auch von KMU, die in der Lieferkette besonders verwundbar sind. Die Konzentration auf den niedrigsten Preis für den Endkonsumenten führt mittel- bis langfristig dazu, dass die

erste Stufe der Lieferkette, nämlich die Hersteller, besonders unter Druck gesetzt wird und letztlich aus dem Markt ausscheidet. Dies erhöht die Marktkonzentration automatisch, und bewirkt das Gegenteil der Zielsetzung des Wettbewerbsrechts.

- Europa steht im globalen Wettbewerb mit anderen Kontinenten und hier kann es nicht um den Wettbewerb der niedrigsten Preise gehen, sondern um den **Wettbewerb von Qualität und Innovation**, um damit den Wohlstand in Europa im globalen Wettbewerb sicherzustellen. Es wäre daher wichtig, bei der Wettbewerbsrechtsvollziehung wieder mehr auf langfristige Auswirkungen, wie insbesondere bessere Qualität sowie mehr Innovation abzustellen, um den Wohlstand in Europa zu erhalten. Ein Konsument ohne Arbeitsplatz kann am Wohlstand nicht teilhaben. Wettbewerbsrechtsvollziehung darf daher nicht zum Bumerang für Arbeitsplätze werden. Durch einen vermehrten Fokus auf Qualität und Innovationen würden auch die Anliegen betreffend den europäischen Standort und somit Arbeitsplätze indirekt besser abgebildet und dadurch auch eine bessere Verbindung zu den aktuellen Diskussionen über eine europäische Industriestrategie hergestellt werden. Der Konsultationsprozess zur Vertikal-GVO gibt daher die Gelegenheit, den wettbewerbsrechtlichen Rahmen gesamthaft zu sehen und den Gestaltungs- und Auslegungsspielraum des Primärrechts zu nutzen.

<u>Aspekte der relativen Marktmacht stärker einbeziehen</u>

- Der Schaden horizontaler Kartelle ist unbestritten. Hinsichtlich **vertikaler Vereinbarungen** sind die **Auswirkungen auf den Wettbewerb** jedoch **ökonomisch differenzierter** und vor allem **komplexer**. Auch in den Leitlinien der EK für vertikale Beschränkungen wird festgehalten, dass solche Beschränkungen in der Regel mit weniger Nachteilen verbunden sind als horizontale Beschränkungen und zudem erhebliche Effizienzgewinne ermöglichen können (z.B. Rz. 6, 98, 99). Bei der Beurteilung solcher vertikaler Vereinbarungen sind, insbesondere aus KMU-politischer Sicht, auch **Aspekte der Abhängigkeiten und der Marktmacht zueinander (relative Marktmacht) bzw. einer marktbeherrschenden Stellung einzubeziehen**. Die Relevanz der Marktmacht der an der Vereinbarung beteiligten Unternehmen wird auch in EG 7 der Vertikal-GVO anerkannt. Den Leitlinien der EK für vertikale Beschränkungen ist diesbezüglich zu entnehmen, dass die meisten vertikalen Beschränkungen nur dann wettbewerbsrechtlich bedenklich sind, wenn auf mindestens einer Handelsstufe kein ausreichender Wettbewerb besteht, d.h. wenn Anbieter oder Abnehmer oder beide über eine gewisse Marktmacht verfügen (z.B. Rz. 6, 23). Eine Beschränkung des Wettbewerbs wird daher tendenziell nicht vorliegen, wenn auf keiner Seite des vertikalen Verhältnisses eine besondere Marktmacht besteht bzw. ähnliche Beschränkungen nicht in weiten Teilen eines Markts angewendet werden. Ungleiche Machtverhältnisse können im vertikalen Verhältnis jedoch ausschlaggebend für die

Akzeptanz von Vertragsklauseln durch einen Vertragspartner sein. Der Missbrauch einer marktbeherrschenden Stellung zu Lasten eines schwächeren Vertragspartners (solche Situationen sind nach Branche oft unterschiedlich - entweder auf der Anbieterseite der auf der Abnehmer- bzw. Händlerseite) könnte möglich sein. Dies sollte beim Vollzug stärker berücksichtigt werden. Relative Marktmacht, d.h. Abhängigkeitsverhältnisse auch ohne das Erreichen der absoluten Marktmacht, sollten bei einer Einzelfallprüfung vermehrt Beachtung finden und sich im neuen Text der GVO bzw. der Leitlinien widerfinden.

Rechtssicherheit - weniger Verbote für KMU

- Für die Beurteilung vertikaler Vereinbarungen sind Artikel 101 ff AEUV sehr zeitlos formuliert. **Gerade für KMU braucht es klare Bestimmungen und transparente Auslegungsleitlinien.** Daher sind Klarstellungen in Form einer Vertikal-GVO sowie dazugehörigen Leitlinien der EK zu begrüßen. In Hinblick auf eine Verlängerung bzw. Überarbeitung sind jedoch vor allem **neue Marktentwicklungen** einzubeziehen. Die grundsätzlich geeigneten Bestimmungen der Vertikal-GVO sollten überprüft und gegebenenfalls an neue Entwicklungen angepasst werden, insbesondere auch um die aktuellen Diskussionen über die industriepolitischen Zielsetzungen und Herausforderungen im globalen Wettbewerb widerzuspiegeln. Beispielsweise sollte bei der Überarbeitung auch die mittlerweile **große Bedeutung des Internethandels** berücksichtigt werden, welcher unter anderem zu veränderten Vertriebsstrategien der Unternehmer führt. In diesem Lichte gewinnen auch selektive Vertriebssysteme immer mehr an Bedeutung. Dies hat die EK bereits in ihrer 2015/2016 durchgeführten Sektoruntersuchung zum elektronischen Handel festgestellt (siehe Abschlussbericht über die Sektoruntersuchung zum elektronischen Handel vom 10.05.2017). Solche selektiven Vertriebssysteme sind jedoch nicht nur negativ zu betrachten, vielmehr können sie dazu beitragen, das Markenimage eines Produktes zu stärken und so die Attraktivität dieses Produktes für Verbraucher zu erhöhen. Der EuGH hat in seiner Coty-Entscheidung (EuGH 06.12.17 Coty, C-230/16) festgehalten, dass sich aus der bisherigen Rechtsprechung ergebe, dass für Luxuswaren in Anbetracht ihrer Eigenschaften und ihres Wesens die Einrichtung eines selektiven Vertriebssystems erforderlich sein könne, um ihre Qualität zu wahren und ihren richtigen Gebrauch zu gewährleisten (Rz. 28). Der EuGH hat entschieden, dass zur Sicherung des Luxusimages von Waren, ein selektives Vertriebssystem sowie darin enthaltene Klauseln mit Artikel 101 Absatz 1 AEUV vereinbar sind, sofern die festgelegten Kriterien für alle Wiederverkäufer einheitlich und ohne Diskriminierung angewendet werden, in angemessenem Verhältnis zum angestrebten Ziel stehen und über das erforderliche Maß nicht hinausgehen. Darüber hinaus ist es generell und insbesondere für KMU wichtig, mehr Gestaltungsspielraum, z.B. für Kapazitätsplanungen zu haben. Der

Vertrieb etwa über Drittplattformen kann bei KMU zu Problemen bei der Produktionsplanung führen, da die Flexibilität hinsichtlich Aufstockung oder auch Reduktion nicht so groß ist. Auch kann ein selektiver Vertrieb die Steigerung der Verkaufsanstrengungen des Einzelhändlers fördern. Im Abschlussbericht der Sektoruntersuchung zum elektronischen Handel vom 10.05.2017 wird festgehalten, dass (absolute) Marktplatzverbote nicht als Kernbeschränkungen im Sinne von Artikel 4 Buchstabe b und Artikel 4 Buchstabe c der Gruppenfreistellungsverordnung für Vertikalvereinbarungen angesehen werden sollten (Rz. 42). Dem kann vor dem Hintergrund des zuvor gesagten nur beigepflichtet werden.

Es wäre wünschenswert, dass diese Rechtsprechung des EuGH in die Überarbeitung einfließt und auch für ein breiteres Spektrum, nicht nur für Luxusgüter, angewendet wird, um vor allem KMU den nötigen Gestaltungsspielraum hinsichtlich ihrer Vertriebswege einzuräumen.

Eigenmarken der Händler im Wettbewerb zu Produkten der Lieferanten

- Eine Entwicklung, welche bei einer Verlängerung bzw. Überarbeitung der Vertikal-GVO insbesondere mitbedacht werden sollte, ist der **steigende Anteil von Eigenmarken der Händler**. Eigenmarken stehen in einem horizontalen Wettbewerb zu Herstellermarken, wodurch Händler zu direkten Wettbewerbern der Hersteller werden. Langfristig bewirkt dieser horizontale Wettbewerb zu Herstellermarken ein strategisches Problem. Wenn die Austauschbarkeit zu Markenartikeln gegeben ist, dann wird die Verhandlungsmacht des Händlers gestärkt. Mögliche Produktinnovationen durch die Hersteller werden unter Umständen reduziert, weil Innovationen für Eigenmarken möglicherweise kopiert werden können und Innovationen der Hersteller somit keinen Gewinn liefern würden. Durch die Konfrontation von vor allem KMU mit einem stärkeren Geschäftspartner könnte das Risiko bestehen, dass einzelne Produkte oder Produktgruppen der Hersteller aus dem Sortiment genommen werden. Dies könnte zum Ausscheiden von KMU aus dem Markt führen und eine höhere Konzentration am Markt bewirken, was langfristig für den Wettbewerb schädlich wäre und negative Arbeitsmarkteffekte bewirken würde.

  Die Vertikal-GVO adressiert in der derzeitigen Fassung nur jene Fälle, in denen der Anbieter zugleich Hersteller und Händler von Waren, also sowohl Lieferant als auch Wettbewerber des Abnehmers ist, der Abnehmer dagegen nur als Händler fungiert. Der umgekehrte Fall, indem der Anbieter nur Hersteller und der Abnehmer sowohl Händler als auch Hersteller ist, findet sich derzeit nicht in der GVO. Im Lichte des Anstiegs der Eigenmarken und der daraus resultierenden gestärkten Verhandlungsmacht sowie Wett-

bewerbsposition der Händler sollte auch jener Fall, in dem der Händler eine Doppelfunktion innehat, in der Vertikal-GVO geklärt werden. Dies könnte beispielsweise in Artikel 2 Absatz 4 Vertikal-GVO erfolgen. Auch wären die Leitlinien der EK für vertikale Beschränkungen entsprechend anzupassen (Rz. 28).

Vertikale Preisbindungen

- Die strenge Handhabung hinsichtlich **vertikaler Preisbindungen (Nennung als Kernbeschränkung in Artikel 4 lit a Vertikal-GVO** und damit einhergehende Klassifizierung als bezweckte Wettbewerbsbeschränkung) sollte **im Zusammenhang mit den erzielten Effekten hinterfragt werden**, insbesondere dahingehend, ob in Ausnahmefällen solche Preisbindungen nicht doch gerechtfertigt sein können. Laut EuGH (z.B. C-226/11 Expedia, C-32/11 Allianz, C-67/13 P Cartes Bancaires) liegt der Unterschied zwischen „bezweckten Verstößen" und „bewirkten Verstößen" darin, dass bestimmte Formen der Kollusion zwischen Unternehmen schon ihrer Natur nach als schädlich für das gute Funktionieren des normalen Wettbewerbs angesehen werden. Die tatsächlichen Auswirkungen einer Vereinbarung müssen nicht geprüft werden, wenn sich ergibt, dass diese eine Verhinderung, Einschränkung oder Verfälschung des Wettbewerbs bezweckt. Bei der Prüfung, ob eine bezweckte Wettbewerbsbeschränkung vorliegt, ist auf deren Inhalt und die mit ihr verfolgten Ziele sowie auf den wirtschaftlichen und rechtlichen Zusammenhang abzustellen. Auch sind die Natur der betroffenen Waren und Dienstleistungen, die auf dem betreffenden Markt/Märkten bestehenden tatsächlichen Bedingungen und die Struktur des Marktes/der Märkte zu berücksichtigen.

  In seiner Allianz-Entscheidung hat der EuGH außerdem festgehalten, dass es den Wettbewerbsbehörden und den Gerichten der Mitgliedstaaten und der Union nicht verwehrt ist, die Absicht der Beteiligten zu berücksichtigen, auch wenn sie kein notwendiges Element ist, um den wettbewerbsbeschränkenden Charakter einer Vereinbarung festzustellen (EuGH 14.03.13 Allianz, C-32/11, Rz. 37, ebenso EuGH 11.09.2014 Cartes bancaires, C-67/13 P, Rz. 54). Zweifellos schaden vertikale Preisbindungen dem Wettbewerb, wenn sie horizontale Effekte haben, z.B. eine koordinierte Ausübung von Marktmacht zwischen Hersteller- oder Händlerebene ermöglichen. Freilich bieten Verbote das höchste Maß an Rechtssicherheit. Eine Marktwirtschaft kann allerdings nicht auf Verboten aufbauen. Für Klein. bzw. Jungunternehmer können derartige Verbote eine maßgebliche Marktzugangsschranke sein und würden damit gerade eine wettbewerbshinderliche Auslegung des Rechts darstellen. Für Kleinunternehmer mit einer bestimmten Umsatzgrenze soll daher eine Ausnahme vom absoluten Verbot in Frage kommen, damit sie sich nicht automatisch in einer grundsätzlich verbotenen Situation befinden und damit abhängig von einer wohlwollenden Beurteilung einer Wettbewerbsbehörde

sind, die aufgrund mangelnder Spürbarkeit den Fall nicht aufgreift. Bei der Einstufung als Wettbewerbsbeschränkung „by effect“ kann die Behörde allenfalls Maßnahmen setzen, wenn der Wettbewerb tatsächlich verfälscht wird. Durch Festlegung als Kernbeschränkung sind auch die De-minimis-Bekanntmachung der EK und die dort vorgesehenen Schwellenwerte und die daraus resultierenden Vorteile für KMU nicht anwendbar (Bekanntmachung über Vereinbarungen von geringer Bedeutung, die im Sinne des Artikels 101 Absatz 1 des Vertrags über die Arbeitsweise der Europäischen Union den Wettbewerb nicht spürbar beschränken (De-minimis-Bekanntmachung), Rz. 13). Solche Praktiken, insbesondere die Festlegung von Mindestverkaufspreisen, können jedoch in Ausnahmefällen aus Sicht der KMU auch gerechtfertigt sein. Zu bedenken ist, dass vertikale Vereinbarungen positive Effekte, wie die Förderung des Wettbewerbs zwischen Marken oder die Erhöhung der Nachfrage durch die Erhöhung des Status und der Exklusivität eines Produktes durch einen höheren Preis, haben können. Insbesondere für KMU ist Flexibilität hinsichtlich der Produktionsplanung ausschlaggebend, um auf Schwankungen reagieren und Stabilität garantieren zu können. KMU brauchen daher mehr Freiheit, auch um auf dem europäischen Markt weiterhin bestehen zu können. Dies würde auch die Sicherstellung der Produktvielfalt gewährleisten. Denn gesunde KMU sind ausschlaggebend für die Sicherstellung des Produktions-und Industriestandortes Europa - die EU muss ein attraktiver Produktionsstandort bleiben.

Daher wäre ein breiterer Ansatz hinsichtlich vertikaler Preisbindungen wünschenswert. Eine Abwägung zwischen der Freiheit des Händlers und der Entscheidung des Herstellers über einen effizienten Vertrieb sollte jedenfalls vorgenommen werden. Ein genaues Augenmerk ist darauf zu legen, wie und in welchem Maße die Vereinbarung den Wettbewerb im Markt tatsächlich oder wahrscheinlich beeinträchtigt, deren Inhalt und die mit ihr verfolgten Ziele sollten genau geprüft werden. Auch sollten die vom EuGH festgelegten Kriterien (EuGH 14.03.13 Allianz, C-32/11, Rz. 48), wie die Struktur des relevanten Marktes, die Existenz alternativer Vertriebswege und deren jeweilige Bedeutung sowie die wechselseitige Marktmacht beim Vollzug mehr Beachtung finden. Dem herrschenden Vollzugstrend, vieles als bezweckte Wettbewerbsbeschränkung anzusehen, sollte entgegengewirkt werden. Europa steht im Wettbewerb mit anderen Kontinenten und daher muss auch eine Diskussion über eine differenziertere Betrachtung von vertikalen Verhältnissen in anderen Kontinenten (z.B. rule of reason in den USA) zugelassen werden.

Entsprechend dieser Ausführungen wären die Vertikal-GVO sowie die dazugehörigen Leitlinien der EK für vertikale Beschränkungen anzupassen. Das BMDW stellt in weiterer Folge gerne einen Textvorschlag für Art. 4 Absatz 2 und für Rz 223 der Leitlinien zur Verfügung.

Internethandel

- Der Handel ist zweifellos durch die Digitalisierung im Umbruch. Dies hat auch die bereits 2015/2016 durchgeführte Sektoruntersuchung der EK zum elektronischen Handel ergeben (siehe Abschlussbericht über die Sektoruntersuchung zum elektronischen Handel vom 10.05.2017). Es ist daher **erforderlich, Maßnahmen zu überlegen, welche unfairen Wettbewerb zwischen Online- und Offlinehandel (stationärem Handel) verhindern.** Aus der Praxis sind Fälle bekannt, in denen Hersteller zur Förderung des stationären Handels, welcher für die Konsumenten auch wesentliche Beratungsleistungen erbringen, beitragen wollen, dies jedoch nicht möglich ist, da gemäß Rz. 52 Buchstabe d der Leitlinien der EK für vertikale Beschränkungen eine Kernbeschränkung des passiven Verkaufs vorliegt, wenn vereinbart wird, dass der Händler für Produkte, die er online weiterverkaufen will, einen höheren Preis zahlt als für Produkte, die offline verkauft werden sollen (Doppelpreissystem). Zwar sieht Rz. 64 der Leitlinien vor, dass unter bestimmten Umständen die Voraussetzungen des Artikel 101 Absatz 3 erfüllt sein können, jedoch sind diese Umstände sehr eingeschränkt. Wie im Falle vertikaler Preisbindungen sollte auch hier nicht per se von einer Kernbeschränkung ausgegangen werden. Die zuvor genannte Sektoruntersuchung hat ergeben, dass Doppelpreissysteme von den Betroffenen häufig als ein potenziell effizientes Instrument gegen das Trittbrettfahren angesehen werden. In den Stellungnahmen zu Doppelpreissystemen wurde daher auf die Notwendigkeit eines flexibleren Ansatzes in Bezug auf leistungsabhängige Preisfestsetzung hingewiesen. Dadurch wäre eine Differenzierung zwischen den Verkaufskanälen je nach den tatsächlichen Verkaufsbemühungen möglich und Hybridhändler würden dazu ermutigt, Investitionen in kostspieligere Kundendienstleistungen (typischerweise offline) zu tätigen, die einen Mehrwert bieten (Abschlussbericht über die Sektoruntersuchung zum elektronischen Handel vom 10.05.2017, Rz. 35). Daher werden Änderungen in Rz. 52 und 64 der Leitlinien erforderlich sein. Auch hier wird das BMDW gerne einen Textvorschlag zur Verfügung stellen.

Definition des relevanten Marktes

- Ein weiterer Punkt, der zwar nicht direkt die Überarbeitung der Vertikal-GVO und der dazugehörigen Leitlinien betrifft, ist, im Lichte der steigenden Bedeutung des Internethandels und des Zeitalters der Digitalwirtschaft, die Frage, ob die aus dem Jahr 1997 stammende **Bekanntmachung der EK über die Definition des relevanten Marktes** im Sinne des Wettbewerbsrechts der Gemeinschaft noch zeitgemäß ist oder ebenfalls überarbeitet werden könnte.

Zusammenfassung

Zusammenfassend ist festzuhalten, dass aus Sicht des österreichischen BMDW, nach Durchführung eines Konsultationsprozesses, die Vertikal-GVO sowie die dazugehörigen Leitlinien der EK weiterhin von Bedeutung sind und daher eine Verlängerung und Überarbeitung unter Bedachtnahme auf strukturellen Änderungen in der Wertschöpfungskette und den Herausforderungen im globalen Wettbewerb sinnvoll wäre. Gerade für KMU braucht es klare Bestimmungen und transparente Auslegungsleitlinien und gleichzeitig mehr Rücksicht auf die relative Marktmacht. In einigen Bereichen ist auch die Vollzugspraxis an die aktuellen Herausforderungen des globalen Wettbewerbs sowie die aktuelle Rechtsprechung des EuGH (z.B. Coty) anzupassen. Es sollte vermehrt auf einzelfallbasierte Beurteilungen („by effect“) statt auf per se Verbote in Form von Kernbeschränkungen abgestellt werden. Wir ersuchen daher die aufgezeigten Änderungsvorschläge zu berücksichtigen und freuen uns, bei den weiteren Diskussionen eingebunden zu bleiben.

European Commission Consultation on EU competition rules on vertical agreements

ETNO contribution

ETNO would like to take the opportunity of the EC consultation on the evaluation of EU competition rules on vertical agreements to highlight some major points which ETNO Members deem important to guarantee that the Vertical Block Exemption Regulation ("VEBR") and the Vertical Guidelines ("VGL") fulfil their goals.
As a general remark, ETNO believes that the VBER and VGL have overall contributed to promote good market performance, supporting the companies in the self-assessment of the agreements, especially in sectors where the chain of distribution is particularly complex and crucial for the business.

However, the indications provided for in the VBER and, above all, in the VGL are not always easy to apply to the concrete cases, therefore not ensuring the legal certainty that companies need in order to develop their initiatives of cooperation. Also, market and legislative changes have occurred during the past 5 years which make necessary an update of the provisions.

Following are the major issues that ETNO believes should be taken into account in the revision:

- **Calculation of market share**: as the starting point for the application of the VBER the calculation of market share should be streamlined allowing the participants to assess the market position with a sufficient legal certainty. In particular, for a producer it is very difficult to consider the market share of the distributors (and viceversa) and the risk of mistakes might jeopardize the application of the exemption.

- **Application to the "new" digital market**: the instruments were initially thought to be applied to traditional markets. The VGL makes reference to the Commission Notice on definition of the relevant market of 1997, as a starting point when considering market definition issues. It is clear that digital markets have dramatically changed since 1997 and the VGL should provide additional guidance to define markets where traditional market share (based on price and volume) are not relevant.

- **Further guidance on what is considered vertical agreement is needed in paragraph 25 of VGL:** we see a particular concern in this issue, mainly when the VGL sets out in paragraph 25 (d) what are considered agreements or concerted practices under vertical agreements exempted by VBER. In particular, sales to final business customers should be considered normal business transactions and not vertical agreements.

- **Definition of active and passive sales in the online distribution:** the presumption enshrined in the VGL that transactions made over the Internet are passive sales does not capture the business model of the digital players which don't need to promote themselves through a direct campaign. The definition should then be revised.

- **Passive sales of audiovisual content should comply with Geo-blocking Regulation**[1]**:** we find it essential to include in the VGL, Section 4 (Individual cases of hardcore sales restrictions that

[1] 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

may fall outside Article 101(1) or may fulfil the conditions of article 101(3)), that the prohibition of passive sales of audiovisual content shall not be considered as a hardcore restriction. This request complies with Geo-blocking Regulation that expressly provides that audiovisual content may be subject to geographical restrictions with the aim of guaranteeing investments made by the distributors which pay rightsholders to acquire the exclusivity of a content in a specific territory. Therefore, under Geo-blocking Regulation, the passive sale of audiovisual content is not foreseen due to geographical restrictions.

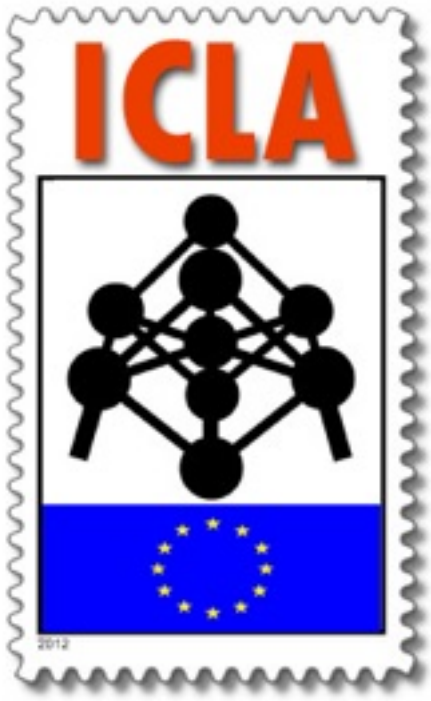
- **Extend the benchmark of 30% in Article 3 of VBER and paragraph 23 VGL in certain market conditions**: the 30% threshold does not always make sense for the economical relationships and the anticompetitive effects. Indeed, it is hard not to overcome the benchmark established by the VBER in markets where there are only a few players competing due to the economies of scale and the high investments needed. In that sense, ETNO believes that companies that have higher market reference share are deprived to enjoy legal certainty in vertical agreements reached with third parties down-stream even when such agreements comply with Article 101 (3) conditions, i.e. they improve the production or distribution of goods or promote technical or economic progress, being consumers the final beneficiaries.

- **Clarify the definition of geographical market**: in some markets such as telecommunications markets, it is difficult to define the relevant area in which the companies concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogeneous. For instance, in the case of 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?

- **Need to make an exemption in Article 5 (a) of VBER with regard to renewable agreements:** there is legal uncertainty in vertical agreements that are renewed when the parties agree expressly to continue the relationship. Renewable agreements may have pro-competitive effects (price decrease) and the non-compete obligation set out by Article 5 (a) does not provide the possibility to extend the period, even though the parties want to continue the commercial relationship. For this reason, we propose a new exemption covering renewable vertical agreements, being renegotiated every 3 years.

- **Maximize legal certainty**: the aim of the entire revision should be to help companies in their self-assessment and to allow them to timely and easily evaluate the agreements. In this sense, even in cases where the agreements cannot benefit from the block exemption, ETNO believes that the Commission should provide companies with a mechanism to allow the necessary legal certainty. For example, there might be the possibility to voluntarily submit the agreements in order to obtain confirmation of a self-assessment.

or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC.



REVIEW OF THE VERTICAL BLOCK EXEMPTION REGULATION

COMMENTS OF THE IN-HOUSE COMPETITION LAWYERS' ASSOCIATION ('ICLA')

Introduction

1. The In-House Competition Lawyers' Association ("ICLA") (www.competitionlawyer.co.uk) is an informal association of in-house competition lawyers across Europe and in South East Asia. The Association meets quarterly to discuss matters of common interest to its members, as well as to share competition law knowledge. There are currently almost 350 members in 23 countries. The Association does not represent companies but is made up of individuals as experts in this area of the law. The paper represents the view of the members of the working group that was created to respond to the consultation.

2. Because of their role, in-house competition lawyers have a clear interest in a simple and straightforward competition law regime that prioritises certainty, minimises costs, and does not represent a disproportionate demand on businesses' time and resources.

3. The Commission Regulation (EU) No. 330/2010 of April 2010 on the application of the Treaty on the functioning of the European Union to categories of vertical agreements and concerted practices ('VBER') is due to expire on 31 May 2022. The European Commission is consulting on the Regulation and considering whether it should let it lapse, prolong its duration or revise it on the basis of the evidence gathered. We welcome the opportunity to provide comments to the Commission to assist it in its review.

4. We do not seek to respond to every question posed in the questionnaire; rather, we focus on a small number of points on which ICLA members' views and experience can assist the Commission the most.

Vertical Agreements in general

5. It is widely accepted that vertical agreements create fewer competition concerns than horizontal agreements. They are also a common and efficient way for companies to distribute their goods. Vertical agreements sometimes do contain some restrictions on the freedom of one or both of the parties, but these agreements could lead to efficiencies such as reducing transaction costs, promoting investments into research and development, helping solve economic problems such as double marginalisation, free-riding and inefficient pre-sale services.

6. The VBER, along with the Guidelines on Vertical Restraints ('Vertical Guidelines'), is a very valuable instrument for companies and its advisors. It should therefore be maintained. In general it has worked well. Although not perfect, the legal certainty it provides is crucial for companies and has provided some baseline comfort on the application of competition rules to vertical agreements. Clarity and certainty are of great benefit to business.

7. In our view, there are however some aspects of the VBER which would benefit from some flexibility or where some clarifications to reflect economic and market reality would be welcomed. We highlight those in this paper. But before we do so, we would like to make two general comments, one relating to the need to ensure consistency between National Competition Authorities ('NCAs') and the Commission and a second one on the impact the VBER might have outside the EU.

    a. <u>Consistency</u>

    Since Council Regulation No. 1/2003 was implemented, NCAs have been playing an increasing role in the application of EU competition law, including its application to vertical agreements. Many have observed that, since its entry into force, the majority of cases dealing with vertical agreements, especially in the online world, have been handled by NCAs rather than the Commission. While this development

is nothing more than what was possibly envisaged in Regulation 1/2003, we have concerns about some aspects of the investigations handled by NCAs.
We have noticed that many NCAs have taken a liberal approach in interpreting the VBER, or sometimes arguably even diverging from it. The same is true for the Vertical Guidelines. (although we acknowledge the difference in legal status between the VBER and the Vertical Guidelines). For businesses which have set up an EU wide distribution policy, different application of the rules by the Commission or NCAs can have quite a negative impact while also increasing costs and requiring large (and sometimes burdensome) investments in ensuring compliance with different and sometime diverging rules. In particular, in the online world, if there is divergence in how rules are applied across the EU, companies have no choice but to create different distribution systems to comply with those rules or, most likely, adopt the strictest standard to the whole of the EU. Neither of the two is desirable, as it would go against the spirit of the single market and prevent consumers to reap the benefits of a more efficient distribution system.

We would like the Commission to consider how consistency across the EU could be best realised as this will greatly help in achieving the single market quicker and better. In our view, there are three possible complementary options.

i. The first option is to strengthen the coordination at the ECN level.

ii. The second option is based on the concepts of coordination between Member States and the Commission within the framework of the Merger Regulation. If a company operates a distribution system in more than x number of Member States, and an NCA is conducting an investigation into the legality of some of its elements, there should be a role for the Commission and / or the other Member States in which that model operates to advise on the distribution issues that are subject of the investigation. A more radical option would be for the Commission to be exclusively competent. The purposes of such exercise would be to avoid a repetition of the very disjointed investigations of hotel platforms with different outcomes in different Members States, and to avoid a situation like the one in the recent Stihl case of the French Autorité de la Concurrence. As it is well known, Stihl had actively sought guidance from the German Federal Cartel Office and had also received positive feedback from the Swedish

and Swiss NCAs for its clause requiring hand-delivery of tools such as chainsaws but was fined €7 millions for the same clause in France. Stihl now seemingly faces the question of how to proceed: a difference in its distribution policy between France and other Member States in itself is not a positive outcome. A lack of legal certainty in an area of law which carries heavy fines and serious reputational damage is not desirable.

iii. The Commission might also want to consider moving into the VBER itself some of the guidance currently in the Vertical Guidelines.

b. Impact of VBER outside the EU.

In the last few years, the number of competition authorities across the world has increased. The International Competition Network (ICN) currently has more than 130 members. Online vertical restrictions have been a topic for the ICN for some time. A very comprehensive document is the 'Online Vertical Restraints special project report', prepared and presented by the Australian Competition and Consumer Commission ('ACCC') at the ICN Annual conference in Sydney in 2015. Currently vertical restrictions in the online world are being discussed as part of the ICN Unilateral Conduct Working Group. These discussions show a large amount of convergence between competition authorities when assessing vertical restraints and the Commission has had and has a key role in educating younger competition authorities in the proper assessment of vertical restraints.

While some restrictions are generally recognized as harmful to competition, some of the rules in the VBER are specific to the EU and the objective to achieve a single market. One can only think of the issue of geo-blocking or active and passive sales which are not a competition issue in other jurisdictions. Some clarifications by the Commission in relation to the rationale for these rules in the VBER would be welcome to ensure these are not incorrectly "exported" to countries where there the creation of a single market is not an issue.

Resale Price Maintenance ('RPM')

8. RPM is treated differently in various jurisdictions across the world. While the EU considers RPM as a hardcore restriction, in the USA RPM restrictions are largely assessed on a rule

of reason basis. Economic literature has several examples of where RPM would lead to efficiencies. The Commission at the moment views RPM as a hardcore restriction of competition, with no realistic option for individual exemption. The 2014 Notice on agreements of minor importance[1] excludes its application to agreement containing an RPM clause as the Commission generally considers any restriction on a buyer's ability to determine its minimum sale price as restriction by object, even in cases where the companies involved have no market power whatsoever.

9. In our view, the Commission should consider relaxing the rules on RPM, recognizing more prominently that RPM may, under certain circumstances, bring pro-competitive efficiencies, some of which are mentioned below. This could be achieved by introducing clear de-minimis thresholds for cases where RPM is already exempted within the scope of the VBER (e.g., RPM during a strictly limited time immediately following the introduction into the market of a genuine innovation[2]), or by making RPM subject to a rule of reason analysis where the pro-competitive and anti-competitive effects of the practice are balanced in order to carry out the assessment. In theory one could exempt RPM under Art. 101(3) but this is very unlikely. A more flexible application in practice of this article might overcome some of the issues we mentioned above.

10. When reviewing potential RPM conduct, one should assess the effects on the market by weighing the possibly restrictive effects against the efficiencies RPM may bring. In addition to the advantages mentioned in the Vertical Guidelines, the following should be taken into account when performing such assessment:

    a. <u>Quality and Brand Recognition</u>

       Manufacturers that are concerned with maintaining a strong brand name and a reputation for quality or durability with end customers, might want to use minimum resale price contracts so that its products are not offered at a discount. When prices are discounted by wholesalers and retailers, the end customer may ultimately purchase the product at a price point that undermines the brand image perception that the manufacturer wants to project. This can ultimately create repercussions as consumers might associate lower prices with lesser quality.

[1] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2014.291.01.0001.01.ENG
[2] Paragraph 225 of the VBER

As an example, for certain (luxury or exclusive) products high prices are an essential element of the brand image. The target group for luxury or exclusive products consists precisely of customers who actually appreciate the high price and therefore the image that they portray.

In addition, the supplier may wish to protect the reputation or image of the product and prevent it from being used by retailers as a loss leader to attract customers.

Finally, suppliers may want to ensure that the distribution channel maintains a certain level of investment into the creation of a qualitative and specialized sales environment in order to bring certain products to the market. Distributors that are faced with low-price competition see their margins come under pressure, and might lead them to reduce investments, ultimately to the detriment of the customers who are no longer able to benefit from the professional sales and support environment that some products may require.

As it is well accepted, absent market power, if a company puts its prices up, it will hurt itself with lower sales.

b. Prevention of free riding

RPM may also be used to prevent free riding by retailers on the efforts of other competing retailers which spend time, money and efforts promoting and explaining the technical complexities or attributes of the product to create a sales environment to attract new customers, or to convey the image of the brand to consumers. For example, a retailer may choose to price its products at a higher price, but in return invest in a highly trained and skilled sales personnel that can properly explain and demonstrate to customers the use of a complex product such as computers or other high-tech equipment. The customer may after acquiring this information choose to buy the computer from a retailer that sells it at a lower price and does not explain or demonstrate its uses. This will cause the initial retailer to rethink its business strategy, ultimately lowering its prices and reducing the skill-level of its trained sales force – to the detriment of the customer. Similarly, one retailer may invest heavily into creating experiences for its consumers rather than purely focusing on sales. With the world at a consumer's finger tips on their smart phones, such retailers deserve protection against free riding.

11. One should not forget that manufacturers which would like to have more control about their final price could choose not to distribute products through independent distributors but rather to organize the distribution themselves, which ultimately means that no intra-brand competition whatsoever remains. One may argue that this outcome would be less beneficial to consumers than a rule of reason approach to RPM.

12. One of the members suggested that some clarification on maximum prices might be helpful in situations they encounter such in the so called 'fulfillment model'[3]:

    a. A manufacturer negotiates the conditions of a business transaction directly with an end-customer. In many cases the negotiation is initiated by the end-customer by way of a formalized private tender procedure or a request for quotation to several manufacturers;

    b. Due to objective economic reasons, an independent third party (distributor) becomes involved;

    c. The distributor buys the products from the manufacturer as an independent contractor and resells them to the end-customer in its own name and for its own account and therefore takes the full financial and commercial risk on the transaction. From a competition perspective, the distributor is an independent third party.

13. Currently these business transactions are arranged using maximum price agreements, that is the manufacturer agrees on a certain price for a product in direct negotiations with the end-customer. Afterwards the manufacturer enters into a maximum price agreement with a distributor containing an individual maximum price that the distributor may charge from the specific end-customer.

14. It would be helpful to clarify in the Vertical Guidelines that in such situations, the use of a maximum price agreement will not infringe competition law. The mere fact that a maximum price is set low (as it was negotiated in a tender scenario) and that the distributor will be

[3] This model describes the distribution of goods from a manufacturer to an end-0customer via an independent third party, a distributor.

unlikely to undercut it, should not lead to the result that it is not a valid maximum price agreement.

Hardcore restrictions

15. In our view, the list of hardcore restriction should not be expanded although, to the extent that the notion of blacklisted and hardcore restrictions has become confused, there is an opportunity to improve clarity in the distinction.

Online sale restrictions

16. In today's world, more and more consumers are shopping online. Online sales are also a perfect way for consumer to have access and buy products in other Member States.

17. While online sales arguably have a special role to play in the context of the European single market, and European competition law may be used as a tool to promote the single market, there are instances in which the current rules go beyond what is necessary.

18. If inter-brand competition is strong, any restriction of intra-brand competition is unlikely to harm competition and other suppliers are able to fill the "gap" that the supplier who chooses not to sell online leaves. This applies to restrictions of online sales even more than to resale price restrictions. Even against the background of the need to protect cross-border trade and promote the European single market, there should be no need for every product to be available online and able to be found on price comparison websites.

19. Para. 52 of the Vertical Guidelines ("*in principle, every distributor must be allowed to use the internet to sell products*") has been misinterpreted as a general rule that any restriction of online sales is prohibited. It is important to remember the context of para. 52: It provides additional guidance on Art. 4 b) (i), i.e., on cases where the supplier has allocated exclusive territories or customers to buyers and wants to protect these buyers from active sales into their allocated territory or to their allocated customer groups.

20. The restrictions which are imposed on European players and which are not imposed on players operating in other countries are having a negative impact on European businesses. It is not a coincidence that most of the online players in the world are not European but have been successful and expanded first in other jurisdictions. Given that

any violations are likely to result in considerable fines, compliance with the detailed EU rules on online sales restrictions is paramount for suppliers active in the EU. Substantial effort and resources are required to achieve a reasonable degree of legal certainty.

21. For example, the quality requirements for online sales on the retailer's own website, on platforms and perhaps also for promotions via price comparison websites in the context of selective distribution agreements must be closely scrutinized by companies and regularly updated to ensure compliance. When certain conditions (such as performance related bonuses or other incentives) are imposed to brick-and-mortar, hybrid and online retailers, expert legal advice must be obtained in order to avoid falling into "dual pricing" scenario. For example, what if a manufacturer wants to reward retailers for services that can by nature only be provided in a meaningful way in the brick-and-mortar shop and where no reasonably "equivalent" online service exists? This assessment has to be done for several EU countries because of divergent enforcement practices. Business people find it difficult sometime to understand the reason for these rules as well as the different application by NCAs. For example, one of our members mentioned the difficulties he encountered in explaining to his business colleagues why it usually is possible to refuse selling a particular product to a pure online player, but not allowed to prohibit a hybrid player from selling the same product online.

22. We welcome the statements by the Commission that platform bans are not a hardcore restriction and need to be assessed on a case-by-case basis. In our view, it would be important for the Commission to update the VBER to bring it in line with most recent case law in this regard.

Dual distribution systems

23. Nowadays suppliers increasingly sell directly to consumers either online or in brick and mortar shops and thus at retail level compete with their distributors. Being considered competitors has an impact on what suppliers can do or share with their distributors and on the application of the VBER. The VBER should continue to exempt dual distribution and the Vertical Guidelines should clarify that dual distribution is purely a vertical relationship and that collection of information that is relevant in the vertical relationship (e.g. retail sales data for better planning and logistics that ensures better availability of products to meet consumer demand and limits over production) should not give rise to horizontal concerns between the supplier and its distributors at retail level. It should be recognized that

competition between a supplier and a distributor is by definition of a different nature than competition between independent distributors as the suppliers owns the brand, designs the products and drives the brand image. This is possibly an area where further thoughts should be given to avoid creating unnecessary obstacles and compliance costs.

Selective distribution

24. The general principle is that each seller should be free to set up its distribution system in the way that suits it, as long as there are no harmful restrictions. Selective distribution is a perfectly legitimate way to distribute goods. The way rules on selective distribution have been applied in Europe, especially online, have been inconsistent and hampering legitimate business activities.

25. One of our members, an in-house competition lawyer at a supplier of consumer goods, notes that his company has a selective distribution network across the EU, based on largely identical agreements. When, in 2014 Adidas was investigated by the German Federal Cartel Office and agreed to remove the "platform ban" from its selective distribution agreements, that company decided that they should do the same – at least in Germany. Hundreds of agreements had to be changed. Since a uniform selective distribution system across different countries is highly desirable to create a level playing field for all partner retailers, the company then had to "export" these adaptations to other countries. Hundreds of agreements were subsequently adapted in countries other than Germany (even if it was not legally required), and external legal advice had to be sought to assess the risk if individual countries wanted to keep the "platform ban".

26. Today, our members take comfort in the Coty case and we believe that the "Coty" arguments apply to high-quality branded goods as well, and not only to luxury goods. As AG Wahl wrote in his opinion[4]: "*Selective distribution systems are, especially for goods with distinctive qualities, a vector for market penetration. Brands, and in particular luxury brands, derive their added value from a stable consumer perception of their high quality and their exclusivity in their presentation and their marketing. However, that stability cannot be guaranteed when it is not the same undertaking that distributes the goods.*" It would be helpful if the Commission can confirm this point in the revised VBER.

[4] Para 43: http://curia.europa.eu/juris/document/document.jsf?text=&docid=193231&doclang=EN

How a seller can reserve a customer group and benefit from VBER

27. Each seller should be free to set up its distribution system in the way that suits it – provided there are no harmful restrictions. Furthermore, any restriction on intra brand competition cannot be harmful to competition on the market if inter-brand competition is strong.

28. Under the current VBER, the exemption for the restriction of active sales only applies in very limited circumstances. The current VBER lets a manufacturer appoint an exclusive distributor, only by restricting the active supply to a territory that the manufacturer has reserved to itself or has exclusively granted to another distributor. Especially with the rising importance of online sales and thus the difficulty of distinguishing sometimes between active and passive sales, this does not allow a manufacturer to actively appoint only one distributor to sell in a particular territory.

29. In certain circumstances it may make sense for a manufacturer to decide per territory / customer group on the best strategy to distribute a product. In some areas, it may make sense to distribute the product via an exclusive distributor, e.g. in an area which has not yet been well developed and where a distributor would invest a significant amount of money in setting up a distribution network. In this case, it could make sense to reserve a territory or a customer group solely to this distributor (excluding passive sales by others, in order to incentivize the distributor to invest in that field, to provide a compensation for its efforts and to limit the risk of free-riding. However, in other areas / for other customer groups, this may not make sense and the producer would like to appoint more than just one distributor to serve exclusively a territory with a limited number of others.

30. A supplier and a distributor should be free to define a reserved customer group. The parties should have freedom to decide which customers are covered by the reservation (from a very generic “all current and future customers of the manufacturer” to a more granular “all customers above a certain threshold/ all customers in a specific distribution channel”, etc.), when such reservation is made (at the start of the agreement or at a later stage) and how (explicitly in the agreement or orally) as long as both parties understand who targets which customer.

Commercial agency

31. For an agent to be considered a genuine agent, it must not undertake other activities within the same product market required by the principal unless these activities are fully reimbursed by the principal.

32. The relevant section of the Vertical Guidelines, para. 16 point g), is often interpreted as precluding such a "dual role" of trade partner, that is the distributor selling other products of the same manufacturer cannot be an agent for other brands of the manufacturer at the same time.

33. One of our members, an in-house lawyer advising a company that manufactures and sells products under different brands based on a traditional two-tier distribution model and that wishes to position these brands along the spectrum of "basic", "added value", to "luxury", highlighted that they would like to use commercial agency for their luxury brand. However, they think the risk is too high if they use as commercial agents their existing partners , who sell and would continue selling that company's basic brands as distributors. Commercial agency would allow companies to ensure the appropriate positioning of their brand and their products in a way that selective distribution cannot, and companies want to work with partners that are already active in the relevant market because only they have the necessary skills. Commercial agency as such is a perfectly legitimate alternative to other distribution models. We would therefore welcome a clarification in the Vertical Guidelines (or deletion of para. 16 point g) that such a dual role does not prevent an undertaking from acting as a genuine agent.

Market share thresholds

34. Vertical restrictions are mainly intra-brand restrictions which are not likely to harm competition if there is sufficient inter-brand competition. The Commission should either at least maintain the 30% and consider introducing a buffer between 30% and 40% or more to a 40% threshold, considering the difficulties in defining market shares precisely.

35. If the market share of a supplier does not exceed 40% there is still at least 60% inter-brand competition which is sufficient, especially because hardcore-restrictions are not exempted in any case.

36. Separately we would welcome if the Commission were to consider whether the market shares to take into account need to be in all instances, the market shares of the buyer and the seller. In our view, the market share test should relate to the party (whether seller or buyer) which is imposing the restrictions.

Non-compete obligation – 5 years

37. The VBER states in Art 5(1)a that any non-compete obligation, "*which is indefinite or exceeds five years*" does not fall within the block exemption. It then states that any such obligation which "*is tacitly renewable beyond a period of five years shall be deemed to have been concluded for an indefinite duration*."

38. Para 66 of the Vertical Guidelines states that "*non-compete obligations are exempted… where their duration is limited to five years or less and no obstacles exist that hinder the buyer from effectively terminating the non-compete obligation at the end of the five year period*."

39. Art 5(1)a should be more flexible, e.g. by including a provision that also a longer duration of a non-compete obligation/exclusivity falls under the VBER, if a five year duration does not make sense considering the market situation / product in question. This is in particular the case where the product has long service intervals, extending beyond the five years where customers look to total life cycle cost.

40. In addition, one of our members requests clarity on whether contracts agreed for a term of five years or less, in which the buyer can terminate at any time after the term has elapsed, require an explicit "active renewal" clause, whereby the contract stipulates that the buyer should actively renew its commitment to the contract after the initial term has elapsed.

41. The member notes that para 58 of 2000 Verticals Guideline contained the following additional wording (which was removed from the 2010 Guideline: "*non-compete obligations are covered [by the VBER] when their duration is limited to five years or less, or when renewal beyond five years requires explicit consent of both parties and no obstacles exist that hinder the buyer from effectively terminating the non-compete obligation at the end of the five year period.*"

42. It seems that that the removal of the underlined wording indicates that active renewal is no longer required in order for agreements with terms of less than five years to benefit from the VBER. However, there is some confusion among commentators over whether this is the case [5].

43. In any event, the current position that any non-compete containing an "evergreen clause" is deemed to be of an unlimited duration appears to be overly restrictive. In practice, a non-compete for two years with an evergreen clause which can be terminated by either party or at least the purchaser at certain (typically yearly) intervals thereafter without cause is much less restrictive than a non-compete with a fixed duration of five years.

Geo-blocking

44. The relationship between the VBER and the geo-blocking regulation should be clarified. For example, the prohibition of passive sales of audiovisual content should not be considered a hardcore restriction where the Geo-blocking Regulation expressly provides that it may be subject to geographical restrictions.

Conclusion

45. We appreciate the opportunity to provide these comments and we would be happy to develop them further, if helpful.

[5] Vertical Agreements in EU Competition Law **by** Filip Tuytschaever **and** Frank Wijckmans (2nd edition)

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ÖFFENTLICHE KONSULTATION
EU-Wettbewerbsregeln für vertikale Vereinbarungen – Bewertung

Sehr geehrte Damen und Herren,

mit dem folgenden Beitrag möchten wir uns an der öffentlichen Konsultation zur Verlängerung der Verordnung (EU) Nr. 330/2010 der Kommission (Gruppenfreistellungsverordnung für vertikale Vereinbarungen) beteiligen.

Der Bundesverband Parfümerien e.V.

Der Bundesverband Parfümerien e.V. ist der branchen- und wirtschaftspolitische Spitzenverband des deutschen Parfümerie- und Kosmetikeinzelhandels.

Mitglieder sind Unternehmen des Parfümerieeinzelhandels, Fachparfümerien einschließlich Ketten sowie die Fachabteilungen der Warenhäuser. Zusammen repräsentieren sie im relevanten Sortiment einen Marktanteil von rund 80%. Die Mitgliedschaft ist freiwillig.

In seiner Funktion als Fachverband des Einzelhandels mit Parfums, Kosmetik sowie Körperpflege- und Waschmitteln im Handelsverband Deutschland (HDE), Berlin betreut der Bundesverband Parfümerien e.V. darüber hinaus die entsprechenden Sortimentsbereiche innerhalb der Einzelhandelsorganisation.

Insgesamt steht der Verband damit derzeit für ein Umsatzvolumen von rund 18.6 Mrd.* Euro im deutschen Einzelhandel. Davon entfallen rund 4,8 Mrd.* auf den Bereich der Wasch- und Reinigungsmittel. Das größte Volumen nimmt jedoch mit 13,8 Mrd.* der Bereich Parfum, Kosmetik und Körperpflege ein (*IKW, 2018). Ein Anteil von rund 3 Mrd. entfällt dabei auf den Bereich des Parfümerie-Einzelhandels.

Der Bundesverband Parfümerien ist Mitglied des europäischen Parfümerie-Dachverbandes FEPD.

Ausgangslage

Mit der Verordnung (EU) Nr. 330/2010 der Kommission (Gruppenfreistellungsverordnung für vertikale Vereinbarungen, im Folgenden „Vertikal-GVO") wurde für gewisse Gruppen von vertikalen Vereinbarungen und entsprechenden aufeinander abgestimmten Verhaltensweisen eine Freistellung gemäß Art 101 Abs 3 des Vertrags über die Arbeitsweise der Europäischen Union (AEUV) von der Anwendung des Artikel 101 Absatz 1 AEUV vorgenommen.

Grundlage für das selektive Vertriebssystem im Parfümerie-Einzelhandel

Diese Verordnung ist die Grundlage für das selektive Vertriebssystem („Depotverträge“ im Parfümerieeinzelhandel). Der deutsche Parfümerieeinzelhandel ist als stark mittelständisch strukturierter, spezialisierter Fachhandelsbereich mit selektivem Vertriebssystem, besonders von den Auswirkungen der entsprechenden Regelungen betroffen.

Verbesserungen für Markt und Verbraucher

Im Bereich der Prestigekosmetik- und Parfümerieprodukte kommt das System des selektiven Vertriebs auf allen Ebenen zur Anwendung. Die Einführung der Gruppenfreistellungs-VO hat dort zu einer spürbaren Verbesserung der Wettbewerbssituation geführt.

Es sind vor allem die qualitativen Selektionskriterien, die die Basis für Leistungen und Werte wie Auswahl, Qualität, Service, Beratung und ein luxuriöses Verkaufsumfeld legen, die von den europäischen Verbrauchern als Mehrwert gefordert werden. Für die Lieferanten bietet das Vertriebssystem die Möglichkeit, die Produkte mit einem hohen Image- und Servicewert zu verbinden.

Eine weitere Verlängerung der Vertikal-GVO wird daher befürwortet.

Erforderlichkeit und Verhältnismäßigkeit

Wichtig ist jedoch, dass die Gebote der tatsächlichen Erforderlichkeit und Verhältnismäßigkeit der Wettbewerbsbeschränkungen berücksichtigt werden müssen. Transparente, nachvollziehbare und nichtdiskriminierende Qualitätskriterien die unterschiedslos angewendet werden und nachvollziehbare und adäquate Gegenleistungen der anderen Wirtschaftsstufe sind dafür Voraussetzung. Das gilt auch für die Sortimente.

Probleme durch quantitative Kriterien

Während der Nutzen qualitativer Kriterien für den Vertrieb von Luxusprodukten außer Frage steht, haben quantitative Kriterien in den letzten Jahren immer wieder negative Auswirkungen auf den Handel gezeigt. Sie werden durch die Lieferanten häufig weder diskriminierungsfrei, noch transparent gehandhabt und führen zu einem Ungleichgewicht der beiden Wirtschaftsstufen.

Hier sind insbesondere nicht unterschiedslos angewendete, intransparente und einseitig festgelegte Mindestumsatzforderungen der Lieferanten sowie nicht marktgerechte Sortimentsauflagen zu nennen. Diese führen zu einer starken Belastung bis hin zur Diskriminierung einzelner Handelsbetriebe. Darüber hinaus unterbinden sie faktisch Querlieferungen innerhalb des Vertriebssystems und verhindern so den Erwerb von Produkten von anderen Systempartnern im eigenen, oder in einem anderen EU-Mitgliedstaat. Hinzukommt, dass Umsätze mit Vertriebsgesellschaften in anderen EU-Mitgliedstaaten oder anderen Mitgliedern des Vertriebssystems, dem Gedanken des Binnenmarktes widersprechend, in der Praxis oft nicht auf die Mindestumsatzforderungen im eigenen Land angerechnet werden.

Diese Kritikpunkte müssen unseres Erachtens bei der Ausgestaltung des Depotvertrages bzw. in der Gruppenfreistellungs-VO selbst, berücksichtigt werden.

eCommerce

Die Bindung des elektronischen Vertriebs an eine stationäre Verkaufsstelle hat sich in unseren Augen bewährt und sollte weitergeführt werden. Nur so kann für alle Gebiete ein einheitlicher Service am Kunden garantiert werden. Dabei muss jedoch sichergestellt werden, dass die Kriterien des jeweiligen Vertriebssystems diskriminierungsfrei und unterschiedslos angewendet werden.

Das gilt auch für die Ecommerce-Aktivitäten der Hersteller. Um Wettbewerbsverzerrungen zu vermeiden, sollten die Hersteller mit Ihren ECommerce-Aktivitäten dieselben Auflagen erfüllen müssen, die von anderen Partnern innerhalb des selektiven Vertriebssystems eingefordert werden.

Bei europaweit tätigen Unternehmen muss zusätzlich sichergestellt werden, dass in jedem relevanten regionalen bzw. nationalen Markt eine stationäre Verkaufsstelle zur Beratung der Kunden in Landessprache zur Verfügung stehen sollte.

In diesem Zusammenhang ist grundsätzlich festzuhalten, dass alle unterschiedlichen Vertriebsformen den gleichen Anforderungen entsprechen müssen, um Wettbewerbsverzerrungen zwischen den einzelnen Vertriebsformen (Parfümeriefachhandel, Counter der Hersteller, Direktvertrieb, eCommerce, Webshop der Hersteller, etc.) zu vermeiden.

Vertrieb über Marktplätze

Bei Produkten, die über ein selektives Vertriebssystems vertrieben werden, erscheint ganz im Sinne der Coty-Entscheidung, ein Verbot des Vertriebs über Marktplätze als nachvollziehbar und sinnvoll.

Da selektive Vertriebsverträge aus gutem Grund den Vertrieb über Dritte untersagen, sollte dieses Verbot auch für Marktplätze gelten. Sie treten dem Verbraucher gegenüber faktisch als Anbieter auf.

Im Sinne der Nichtdiskriminierung sollte, nach unserer Auffassung, der Vertrieb über Plattformen die selbst und deren Teilnehmer Bestandteil des selektiven Vertriebssystems sind (z.B. Internetangebote der Kooperationen) davon unberührt bleiben.

Vermeidung einer missbräuchlichen Nutzung der Rechtsvorteile einer Freistellung

Darüber hinaus halten wir neben den Guidelines die Einrichtung einer Schieds- oder Beschwerdestelle zur Klärung strittiger Fragen in der Handhabung eines selektiven Vertriebssystems für wünschenswert.

Diese sollte, bei missbräuchlicher Nutzung, im Einzelfall die Rechtsvorteile der Gruppenfreistellung entziehen und von allen Vertragsparteien angerufen werden können.

Die Verlängerung der Gruppenfreistellungs-VO vertikaler Vertrieb wird daher vom deutschen Parfümerieeinzelhandel ausdrücklich befürwortet. Nur so kann sichergestellt werden, dass der hohe Standard des selektiven Vertriebs, und Auswahl und Beratung über den Parfümeriefachhandel zum Nutzen des Verbrauchers weiterhin beibehalten werden können.

Online-Fragebogen

In Bezug auf die Beantwortung des „Fragebogen für die Öffentlichkeit zur Bewertung der Gruppenfreistellungsverordnung für vertikale Vereinbarungen im Jahr 2018“ schließen wir uns der gemeinsamen Bewertung durch den Europäischen Parfümerieverband FEPD (Fédération Européenne des Parfumeurs Détaillants) an.

Für Rückfragen stehen wir Ihnen jederzeit gerne zur Verfügung.

Mit freundlichen Grüßen aus Düsseldorf für den Bundesverband Parfümerien e.V.

Barbara Summerer
Präsidentin

Elmar Keldenich
Geschäftsführer

“About You” (eBay)

Please describe the main activities of your organisation
eBay Inc. is a global commerce leader, which includes our Marketplace, StubHub and Classifieds platforms. Collectively, we connect millions of buyers and sellers around the world, empowering people and creating opportunity for all. Our technologies and services are designed to give buyers choice and a breadth of relevant inventory and to enable sellers worldwide to organize and offer their inventory for sale, virtually anytime and anywhere. Our Marketplace platforms include our online marketplace located at www.ebay.com, its localized counterparts and the eBay suite of mobile apps. We believe that these are among the world’s largest and most vibrant marketplaces for discovering great value and unique selection. Our StubHub platforms include our online ticket platform located at www.stubhub.com, its localized counterparts and the StubHub mobile apps. These platforms connect fans with their favorite sporting events, shows and artists and enable them to buy and sell millions of tickets annually, whenever and wherever they want. Our Classifieds platforms include a collection of brands such as mobile.de, Kijiji, Gumtree, Marktplaats, eBay Kleinanzeigen and others. Offering online classifieds around the world, these platforms help people find what they are looking for in their local communities.

Please describe the relevance of the VBER and the VGL for you
As a global leader in online commerce, eBay welcomes the EU Commission’s review of the VBER and VGL, which seeks to remove anticompetitive contractual barriers to the EU Digital Single Market. The global reach of our Marketplaces platforms in combination with their enabling features allow even the smallest economic operators to engage in commerce over large distances. Indeed, 96% of Micro, Small, and Medium-Sized Enterprises (MSMEs) using the eBay marketplace in the EU, export – in contrast to an average of 26% of traditional firms, most of which are large or medium-sized. These technology-enabled exporters reach on average 22 different countries annually, a geographical reach that is unparalleled in traditional retail.
However, anticompetitive practices in the market can have a devastating effect on MSMEs seeking to use online marketplaces as this springboard to more and different customers. Indeed, a growing number of suppliers of consumer goods prevent their authorized distributors from offering their goods for sale on open online marketplaces and also enforce these prohibitions aggressively.

I. Effectiveness (Have the objectives been met?)

Do you perceive that the VBER and the VGL have contributed to promote good market performance in the EU?

*Yes, <u>but</u> they contributed only to a certain extent or only in certain sectors

Overall, the VBER and the VGL are important tools to promote good market performance in the EU. That is because their primary aim is to create some legal certainty for all actors in the distribution chain. However, it seems that, as the debate has become increasingly advanced as well as polarised, it has lost sight of the fact that any block exemption is a great concession to those who benefit from it. The starting point remains that an agreement which infringes Article 101(1) is presumed to be unlawful, unenforceable and potentially exposed to fines, unless the party seeking to rely on it can prove that it meets the exemption criteria of Article 101(3). While the burden of proving an infringement of Article 101(1) is on the enforcer, the burden of proving exemption is on the company.

Do you consider that the VBER and the related guidance in the VGL provide a sufficient level of legal certainty for the purpose of assessing whether vertical agreements and/or

specific clauses are exempted from the application of Article 101 of the Treaty and thus compliant with this provision (i.e. are the rules clear and comprehensible, and do they allow you to understand and predict the legal consequences)?

*No

The VBER and the VGL are a comprehensive and fairly complex set of rules which, in general, increase legal certainty. That, however, is not true for all restrictions. Blanket online marketplace bans (OMB) are a restriction to competition that can by no means be described as 'minor' because of its widespread nature. The same is true for arbitrary bricks and mortar store requirements. A blanket OMB excludes a priori (i.e. without a case by case assessment) a new – and, admittedly for some, disruptive – form of distribution capable of satisfying qualitative trading criteria. Despite the considerable impact of OMBs on EU commerce and competition, their legal qualification remains unclear. The Coty Germany case (Case C-230/16) provided clarity to only a very limited extent as the case concerned 'luxury goods' and focused on the legality of an OMB for the purpose of preserving a luxurious or prestigious image. However, OMBs continue to predominantly and extensively affect non-luxurious, everyday products.

The legal disagreement about blanket OMBs is surprising to say the least in view of how case law has made clear that a generalized appraisal of how a certain distribution method complies with the criteria of a selective distribution system is not acceptable: “a manufacturer who has introduced a selective distribution system cannot therefore absolve himself, on the basis of an a priori evaluation of the characteristics of the various forms of distribution, from the duty of checking in each case whether a candidate for admission satisfies the specialist trade conditions” and, moreover, one cannot simply presuppose “that the new forms of distribution are not, by their very nature and type of organization, capable of satisfying the specialist trade conditions” (paras 75, 74 of Case 107/82 AEG v European Commission).

The court has further emphasized how it is inconsistent with Article 101(1) to exclude certain forms of trading): “*A selective distribution system which resulted in the exclusion of certain forms of marketing capable of being used to sell products in enhancing conditions, for example in a space or area adapted for that purpose, would simply protect existing forms of trading from competition from new operators and would therefore be inconsistent with Article [101(1)]) of the Treaty”* (Case T 19/92 Groupement d’achat Edouard Leclerc).

If you have rated one or several issues as "very low" or "slightly low", please explain the reasons for your rating. Please also explain whether the lack of legal certainty stems from (i) the definition of the particular area in the VBER or the related description in the VGL, (ii) their application in practice or (iii) the overall structure of the VBER and/or VGL:

Online marketplace bans (OMB) continue to be a source of legal debate. The legal qualification of blanket OMBs, i.e. those that are imposed with respect to all online marketplaces, remains unclear. The Coty Germany judgment (Case C-230/16) increased legal clarity to only a very limited extent as the case concerned 'luxury goods' and focused on the legality of an OMB for the purpose of preserving a luxurious or prestigious image. OMBs, however, continue to affect non-luxurious, everyday products. And blanket OMBs cut across different online marketplaces and different retailers without consideration, resulting in the general exclusion of a new form of distribution.

A source of legal disagreement remains the last sentence of Recital 54 VGL, also referred to as the 'logo clause'. This sentence has often been interpreted to mean that blanket online marketplace bans are law-compliant. We consider this interpretation to be contrary to the overall approach of the VBER and the VGL which view undue discrimination against online

retail as a hardcore restriction of competition. In our experience, some manufacturers excessively rely on the 'logo clause' to justify the imposition of blanket OMBs on authorised sellers covering any online marketplace to reach customers, irrespective of the substance of their criteria for online sales or the quality of the sales experience provided. The anti-competitive intent becomes most clearly visible when OMBs are maintained where a marketplace offers a high quality retail environment that has been approved for sales of the same product on a linked retail site that shares its essential characteristics. The 'logo clause' should not justify per se OMBs affecting all online marketplaces. It should rather be understood to apply to specific marketplaces that have a demonstrable detrimental effect on brands.

Finally, it should certainly remain open to a national competition authority to withdraw the benefit of the exemption in circumstances where an agreement produces particular anti-competitive effects within its territory, as is currently recognised in recital 14 to VBER. Such an approach has to be consistent with a system of enforcement that at its heart is effects-based and focused more on substance than on legal form. Moreover, those who argue that allowing such withdrawal would risk fragmenting the market are entirely missing the point. Market conditions vary as recognised by the Commission in its e-commerce sector inquiry report of May 2017. A restrictive agreement that in one territory might be benign or have little impact, could clearly pose a threat to competition in another territory where the market structure is different or where certain practices or distribution channels are more prevalent. To argue otherwise would amount to saying that the convenience to a company of having an EU wide restrictive agreement trumps the interests of other market participants and consumers. Once again, if a company is confident that its agreement meets the exemption criteria and delivers sufficient benefits to consumers, it will have an opportunity to argue this before withdrawal is triggered and will presumably have a reasonable period of notice in which to adjust.

Are there other areas for which you consider that the VBER and/or the VGL provide insufficient legal certainty?

*Do not know

Leaving aside the appropriateness of the scope of the current list of hardcore restrictions (Article 4 VBER) and excluded restrictions (Article 5 VBER) (see the last three questions in this section), do you consider that the additional conditions defined in the VBER (i.e. Article 2 and 3 VBER) lead to the exemption of types of vertical agreements that do not generate efficiencies in line with Article 101(3) of the Treaty?

*Do not know

This question may be the appropriate place to remind about the limits of VBER. VBER may only provide a safe harbor for "categories of agreements and concerted practices in respect of which the conditions of [Article 101(3)] may be considered as being fulfilled". This follows from Regulation 19/65 and was further qualified by Recital 5 to Regulation 330/2010 in how VBER "should be limited to vertical agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3)". Indeed, Recital 10 to Regulation 330/2010 stresses that "this Regulation should not exempt vertical agreements containing restrictions which are likely to restrict competition and harm consumers or which are not indispensable to the attainment of the efficiency-enhancing effects". Its predecessor Regulation 2790/99 had referred only to the indispensability element. The intention of Regulation 330/2010 was to tighten up the test so as to make sure to exclude agreements from which consumers would not obviously benefit. The lack of enforcement by the European Commission against blanket online marketplaces bans (OBM) effectively means that a category of restrictions for which consumer benefits cannot be assumed are nevertheless

provided a safe harbor. A blanket OBM excludes a priori and in its entirety a new form of distribution that brings benefits to both MSME sellers and consumers.

Are there other types of vertical agreements for which it can be assumed with sufficient certainty that they generate efficiencies in line with Article 101(3) of the Treaty but which are not covered by the current scope of the exemption?

*Do not know

Are there any types of vertical restrictions that the VBER considers as hardcore (Article 4 VBER), but for which it can be assumed with sufficient certainty that they generate efficiencies in line with Article 101(3) of the Treaty?

*Do not know

It is essential that the new Regulation continues to include "blacklist" provisions which take out of scope those restrictions which on their face are most likely to diminish competition and for which procompetitive justifications cannot be assumed with confidence on a general basis. It is also essential to dissipate the confusion which has arisen between "blacklist" provisions and clauses that constitute "hard-core" infringements. That confusion is in part exacerbated by the heading to Article 4 of the VBER. However, the fact that a given type of clause is identified in a blacklist ought to mean only that an agreement containing it cannot automatically benefit from the block exemption. That ought not in any sense pre-judge the issue of whether that provision might constitute a hard-core infringement or whether in a particular case it might merit exemption. To the extent that these two notions have become confused, this review presents a good opportunity to clarify the distinction.

In other words, it is perfectly consistent to have a precise block exemption with a suitably long list of blacklist provisions to avoid the exemption having unintended consequences. In brief, the block exemption creates a "safe harbour" within which companies have the luxury of not having to consider the impact of their agreements. If they wish to stray outside that safe harbour, they need to reflect whether their provisions are indispensable and pro-competitive.

Does the list of excluded vertical restrictions (Article 5 VBER) exclude types of vertical restrictions for which it can be assumed with sufficient certainty that they generate efficiencies in line with Article 101(3) of the Treaty?

*Do not know

Are there other types of vertical restrictions for which it cannot be assumed with sufficient certainty that they generate efficiencies in line with Article 101(3) of the Treaty but which are not captured by the current list of hardcore restrictions (Article 4 VBER) or excluded restrictions (Article 5 VBER)?

*Yes

Blanket online marketplace bans (OMB) are a restriction for which it cannot be assumed with sufficient certainty that they generate sufficient efficiencies to offset their anti-competitive effect. The general prohibition on involving visible third-party platforms catches in particular online marketplaces with a wide consumer reach. Such a prohibition constitutes a significant restriction of resellers in their opportunities to reach a greater number and variety of customers. The VGL make clear that the use of the Internet, going beyond a mere right to set up an independent website, is a powerful tool to create these opportunities. Equally, resellers'

opportunities to passively sell to end users who are looking for products on online marketplaces on their own initiative are severely restricted. Therefore, there are good reasons to classify blanket OMBs as 'hardcore' under the VBER.

Recital 10 of the VBER stresses that “this Regulation should not exempt vertical agreements containing restrictions which are likely to restrict competition and harm consumers or which are not indispensable to the attainment of the efficiency-enhancing effects”, whereas its predecessor (Regulation 2790/99) in the corresponding recital had referred only the indispensability element. This strongly indicates that the intention in the current VBER was to tighten up the test, so as to make sure to exclude agreements from which consumers would not obviously benefit. We do not see that intention reflected in enforcement practice. To the contrary, the lack of enforcement by the European Commission means in practice that a category of restrictions – blanket OMBs – benefit from the safe harbor even though consumer benefits cannot be assumed with sufficient degree of certainty.

We should remind ourselves that the (cumulative) conditions for exemption in Article 101(3) include that the restrictions are indispensable to the attainment of objective efficiencies and that consumers should receive a fair share of those benefits. It follows that any block exemption should be drafted carefully so as to ensure that it does not accidentally grant an exemption to agreements or categories of agreements that do not deserve it. This is important not only because of the need to preserve free and fair competition, but because to exempt non-compliant agreements would be ultra vires the Commission.

That might indeed mean that a block exemption could appear quite prescriptive. However, those who claim that a narrow block exemption would impose a “straitjacket” on companies are missing the point. A company has a free choice whether to draft its agreements to comply with a block exemption or not. Where it chooses not to do so, it still has the ability to engage in self-assessment and satisfy itself that its agreement meets the criteria for exemption under Article 101(3). It is therefore in no greater jeopardy than if the block exemption did not exist. In addition, many of the companies who rely on block exemptions are very well resourced and indeed far better resourced than those who are the “victims” of their restrictive agreements. It is entirely fair and proportionate that the burden of compliance should remain on those companies.

II. Efficiency (Were the costs involved proportionate to the benefits?)

Does the assessment of whether the VBER, together with the VGL, is applicable to certain vertical agreements generate costs for you (or, in the case of a business association, for the members you are representing)?

*Not applicable

Does the assessment of whether the VBER, together with the VGL, is applicable to certain vertical agreements generate costs proportionate to the benefits they bring for you (or, in the case of a business association, for the members you are representing)?

*Not applicable

Would the costs of ensuring compliance of your vertical agreements (or, in the case of a business association, the vertical agreements of the members you are representing) with Article 101 of the Treaty increase if the VBER were not prolonged?

*Do not know

Have the costs generated by the application of the VBER and the VGL increased as compared to the previous legislative framework (Reg. 2790/1999 and related Guidelines)?

*Do not know

III. Relevance (Is EU action still necessary?)

Would you expect any effect in case the VBER were to be prolonged and the VGL maintained without any change? (multiple answers are allowed)

*Yes, negative for my organisation
*Yes, negative for the industry
*Yes, negative for consumers

As explained above, the key issue that requires a policy change is the legal qualification of blanket online marketplace bans (OMB). E-commerce has been growing over the last years and will continue to grow. For many MSME sellers, online marketplaces are the most effective online sales channel, particularly for those who trade cross-border in the EU. It remains incomprehensible that the existing framework is currently interpreted in a way that supposedly allows suppliers to cut off such an important online sales channel independently of whether or not legitimate distribution criteria can be fulfilled by sellers on online marketplaces. Ultimately, it's a matter of proportionality: are there means less restrictive than blanket marketplace bans to ensure the legitimate aims of suppliers? There can only be one answer: yes, there are as there are marketplaces that give sellers all the necessary tools to comply with legitimate distribution requirements.

Would you expect any effect in case the VBER were not to be prolonged and the VGL were to be withdrawn? (multiple answers are allowed)

*Do not know

Do you see the need for a revision of the VBER in light of major trends and/or changes during the past 5 years (e.g. the increased importance of online sales and the emergence of new market players)?

*Do not know

Do you see the need for a revision of the VGL (including Section VI) in light of major trends and/or changes during the past 5 years (e.g. the increased importance of online sales and the emergence of new market players)?

*Yes

A considerable source of legal disagreement remains the last sentence of Recital 54 VGL, also referred to as the 'logo clause'. This sentence has often been interpreted to mean that blanket online marketplace bans are law-compliant. We consider this interpretation to be contrary to the overall approach of the VBER and the VGL which view undue discrimination against online retail as a hardcore restriction of competition. In our experience, manufacturers excessively, broadly and consistently rely on the ‘logo clause’ to justify the imposition of blanket OMBs on authorised sellers covering any online marketplace to reach customers, irrespective of the substance of their criteria for online sales or the quality of the sales

experience provided. Such blanket bans – an approach already found inconsistent with Article 101(1) - could furthermore not meet the equivalence principle in Recital 56 VGL.

Please (i) list the paragraphs of the VBER and/or the VGL that would require a revision, (ii) identify the major trends and/or changes motivating the need for such revision and (iii) provide a short explanation with concrete examples:

Articles of the VBER and/or recitals of the VGL:
Recital 54 VGL

Major trends/changes:
Online and mobile commerce continue to grow. Online marketplaces are particularly important for MSME online sellers trying to increase cross-border sales. EU countries are maturing as e-commerce economies at different pace and that is reflected in the relative importance of online marketplaces for their MSME population.

Short explanation/concrete examples:
Today's text leaves too much ambiguity resulting in the VBER exempting agreements from which consumers are not benefitting. It should be revised to make clear that blanket online marketplace bans, widely applied to everyday products and all marketplaces, are not block exempted.

Is there any area for which the VBER and/or the VGL currently do not provide any guidance while it would be desirable?

*Do not know

IV. Coherence (Does the policy complement other actions or are there contradictions?)

Based on your experience, are the VBER and the VGL coherent with other instruments that provide guidance on the interpretation of Article 101 of the Treaty (e.g., other Block Exemption Regulations, the Horizontal Guidelines and the Article 101(3) Guidelines)?

*Do not know

Based on your experience, do the VBER and the VGL contradict other existing and/or upcoming legislation and/or policies at EU or national level?

*Yes

There is an inherent tension between the current framework's inability to address blanket online marketplace bans (OMB) and the EU's longstanding policy goal to support a thriving MSME landscape and to make sure small businesses have easy access to retail markets abroad, both within and outside of the EU. Online marketplaces can play an important role in making Europe’s (digital) single market a reality. In fact, online marketplaces guarantee access to consumers far beyond the EU’s borders. Online marketplace bans impede these policy goals and hinder greater price competition to the detriment of consumers. Platform bans also stand in the way of the development of home-grown marketplace businesses. It is somewhat paradoxical how the recently adopted EU Regulation on Promoting Fairness and Transparency for Business Users of Online Intermediation Services recognizes the importance of online marketplaces for business sellers to the degree that regulation is deemed

necessary to ensure a fair relationship; while at the same time, EU competition law fails to safeguard the very same business sellers' right to use these online marketplaces.

V. EU added value (Did EU action provide clear added value?)

Do the VBER and the VGL add value in the assessment of the compatibility of vertical agreements with Article 101 of the Treaty compared to, in their absence, a self-assessment by undertakings based on other instruments that provide guidance on the interpretation of Article 101 of the Treaty (e.g., the Article 101 (3) Guidelines, the enforcement practice of the Commission and national competition authorities, as well as relevant case-law at EU and national level)?

*Yes

The answer is a general "yes". However, with respect to two restrictions in particular, blanket online marketplace bans and the brick and mortar shop requirement, a clear policy direction must be taken as to the incompatibility of these restrictions with EU competition rules and the overall economic policy goals of the EU (for further details see preceding responses).

Final Comments

The Commission should revise the current legal framework to address blanket online marketplace bans (OMB) which have multiple detrimental effects:
1. MSME sellers suffer the most - for some OMBs amount to a general online sales ban. This is particularly true for sellers from remote areas who cannot offset their online income loss with sales from their physical establishment.
2. Cross-border trade is strongly impeded - online marketplaces make the Digital Single Market a reality today: they drive cross-border trade.
3. Price competition is harmed - OMBs reduce price transparency which reduces price competition.
4. European sellers cannot access the 'mobile consumer' - it is difficult for MSME sellers to reach the 'mobile customer' other than through online marketplaces that run successful and trusted apps.
5. Cumulative effects magnify the negative impact - the effect of OMBs is often intensified by the simultaneous imposition of such practices by several producers in a respective market.

From:	Frank van der Giessen
To:	COMP VBER REVIEW
Cc:	Frank van der Giessen
Subject:	Answer BOVAG to the public consultation VBER/VGL
Date:	lundi 27 mai 2019 22:52:52
Attachments:	image001.png CECRA"s answer to the VBER questionnaire 24 05 2019.pdf

Dear Sir / Madam,

The European Commission is consulting the EU competition rules on vertical agreements. We had some difficulties using the online questionnaire, therefore we would like to inform you about our contribution in this e-mail.

BOVAG (Transparency Register number 420196831589-20) is a Dutch association representing the interests of approximately 9.000 businesses. Our members are conducting business in the mobility sector, including, but not limited to (both authorized and independent) dealers and repairers of cars, but also of commercial vehicles, trucks, bicycles, motorbicycles, etc.

As a member of CECRA, we would like to refer to CECRA's answer to the public consultation. In addition to CECRA's answer, we would like to add the following:

1) From our perspective and experience, the issues mentioned and the answers given by CECRA are also applicable to (for example) the distribution of trucks, bicyles, motorbicycles, etc.

2) We would like to suggest that, regarding the future VBER/VGL and their application (especially regarding the definition of marketshares), a more precise explanation is needed in so called "tying" situations.

3) Generally, we expect that a certain level of protection of investments for distributors is necessary (and should be part of the future VBER/VGL) to enable the independence of distributors and (in consequence) intrabrand competition.

4) The purpose of the EU competition rules is - briefly - to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers. We would like to ask your attention *also* for the position of individual undertakings.

Because of two important developments during the last years (1: concentration of manufacturers has strongly increased, 2: direct contacts / relations between manufacturers / importers and consumers have also strongly increased) the future regulation should integrate again clauses which enable the independence of distributors and (in consequence) intrabrand competition.

We hope to have you informed sufficiently about our contribution to the evaluation of the VBER/VGL. Please find attached CECRA's answer to the VBER questionnaire.

If you have any further questions, please do not hesitate to contact us.

Kind regards,

mr. F.W.P. (Frank) van der Giessen
juridisch medewerker

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[redacted]

REVISION OF THE VBER & VGL

Executive Summary

The VBER and VGL are necessary in terms of legal certainty but they should shift their focus from the supplier-led restraints to the retailer/platform-led ones in order to keep in line with the new economy where operators with a market share well below the current safety threshold (30%) act as gatekeepers to consumers and can dictate their terms to suppliers and compete with them.
Upward vertically integrated retailers/platforms must be considered competitors (affiliated/own brands) of their suppliers (unaffiliated brands). Their category management practices and demands for service-related payments can foreclose unaffiliated brands and restrict competition in the market, most notably in terms of innovation, as evidenced by the progressive negative correlation between growth of private label and overall innovation found in the "The economic impact of choice and innovation in the EU food sector" study conducted for the Commission. Likewise, their pricing control of the unaffiliated brands questions the current de facto prohibition of retail price maintenance.

Relevance of the VBER&VGL

The VBER and the VGL are critical for the suppliers of fast moving consumer goods (FMCG), most notably food products, because they are heavily reliant on independent distributors to reach final consumers.

Effectiveness (Have the objectives been met?)

The VBER and the VGL have not contributed to promote good market performance in the FMCG supply chain. Specifically, they have failed to provide a sufficient level of legal certainty for the purpose of assessing buyer power and buyer-led restrictive practices that may undermine competition in the market. This failure is particularly serious because buyer power was one of the two market developments that the current VBER and VGL were supposed to address[1]. Indeed, ever since the adoption of the current VBER and VGL, the mounting evidence of unfair trading practices (UTPs) in the FMCG supply chain have led a vast majority of Member States to adopt specific regulatory measures and, ultimately, to the adoption of the Directive on UTPs in the food supply chain. Today, buyer-power and buyer-led restrictions of competition are a pressing market trend that needs to be addressed again in the revision of the VBER and VGL.
Admittedly, the issue of buyer power raises substantial conceptual and practical challenges in the field of competition policy. The experience gained so far should help the Commission to revise the VBER and VGL in order to tackle effectively the buyer-led restrictive practices that undermine competition in the market. The revision of the VBER and VGL offer a unique opportunity to fill the numerous gaps identified in this field:

[1] European Commission press release IP/09/1197, "Antitrust: Commission launches public consultation on review of competition rules for distribution sector", 28.07.2009: "*The main suggestions for amendments intend to take account of recent market developments, in particular the increased buyer power of big retailers and the evolution of on-line sales on the Internet…Competition Commissioner N. Kroes stated: "Competitive and efficient distribution are essential for consumer welfare and for our economy. The review launched today aims to ensure that the assessment of supply and distribution agreements under the competition rules takes account of recent market developments, namely further increased market power at the level of buyers and new forms of distribution including the opportunities brought by the Internet*"."

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- The framework of analysis (recitals 96-127 VGL): the basic goal of competition policy is to protect competition in the market and consumer welfare. Competition policy reckons that consumer welfare not only relates to lower prices but to more innovation, quality and variety[2]. Very often these parameters of competition run against each other and undue preference to intra-brand (price) competition does not serve the best interests of competition in the market and consumer welfare. For example, if a supplier of a given brand faces intense competition from other brands, the adoption of a resale price maintenance strategy should never be presumed to be a hard-core restriction of competition in the market. Certainly, it may reduce price competition among its distributors but may also signal an optimal price/quality point to the consumer based on the suppliers' expertise and business model that increases the supplier's innovation, quality and variety in the market from both a static and, certainly, a dynamic perspective.
The revision of the VBER and VGL comes at the perfect time to refocus competition policy to the new economic paradigm represented by the emergence of powerful retailers/platforms. The traditional duality between inter-brand competition (i.e. competition between suppliers of competing brands) and intra-brand competition (i.e. competition between distributors of the same brand) coexists with a new reality: inter-retailer/platform and intra-retailer/platform competition. Indeed, the traditional distinction between the merchant and the intermediary/market business model has disappeared in the FMCG sector. Retailers offer a myriad of remunerated services to their suppliers (i.e., the buyers/consumers of these services from a competition law standpoint) and transfer retailing risks to them (e.g., return of unsold items, supplier sponsored price-promotions and guaranteed margins).

-Vertical agreements (Article 1(1)(a) VBER and recitals 24-26 VGL):
The VBER and VGL imply the existence of an agreement and, thereby, do not apply to unilateral conduct. In the absence of an explicit agreement, it suffices that the unilateral policy of one party receives the explicit or tacit acquiescence of the other party[3]. In particular, "*tacit acquiescence may be deduced from the level of coercion exerted by a party to impose its unilateral policy on the other party or parties to the agreement in combination with the number of distributors that are actually implementing in practice the unilateral policy of the supplier. For instance, a system of monitoring and penalties, set up by a supplier to penalise those distributors that do not comply with its unilateral policy, points to tacit acquiescence with the supplier's unilateral policy if this system allows the supplier to implement in practice its policy*"[4].
However, the VGL are silent on the coercion exerted by retailers/competitors on suppliers to impose seemingly unilateral policies. For example, no FMCG retailer/competitor has agreed to sign a confidentiality agreement preventing the undue use of a suppliers' sensitive commercial information for the benefit of the retailers' own brand. The implicit coercion is that if a supplier dares to request contractual protection against such misuse or even initiate *ex post* legal action, it will be delisted altogether. As a consequence, FMCG retailers/competitors are free to use all the sensitive commercial information provided by their suppliers for the benefit of their own competing brands with the tacit acquiescence of the latter.

- Market share threshold for the buyer (Article 3 and Article 7 VBER, and recitals 86-95 VGL): the buyer power of large retailers led to the introduction in the VBER of a buyer market-share threshold (30%), alongside the original seller market share threshold (30%). Originally, the Commission proposed that the

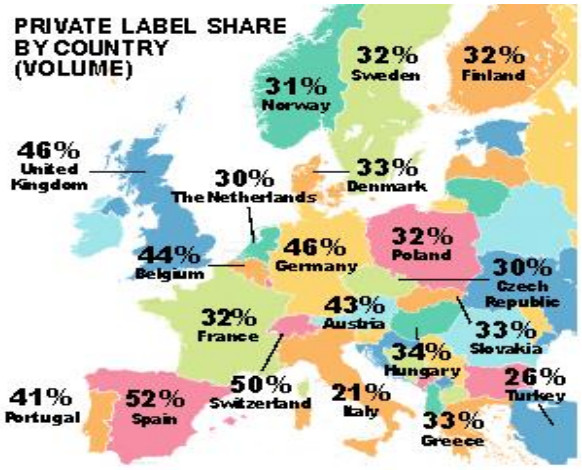
[2] See par. 96 of the VGL: "*(…). For vertical agreements to be restrictive of competition by effect they must affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation, or the variety or quality of goods and services can be expected with a reasonable degree of probability. (…). Market power is the ability to maintain prices above competitive levels or to maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a not insignificant period of time.*"
[3] Par. 25 of the VGL.
[4] Id.

buyer threshold should cover any downstream market where the buyer resold the product[5]. However, following a public consultation where retailers strongly opposed the Commission's proposal, the latter finally confined the buyer market-share threshold to the procurement market. Therefore, the vast majority of European retail chains currently benefit from the buyer market share threshold (30%), which contrasts with the lower bargaining power threat thresholds identified by the Commission in the Rewe/Meinl and Carrefour/Promodès Decisions (i.e., 5-10% and 20%). Indeed, the observation of the market reality and the gatekeeper role played over their suppliers by retailers/platforms with market shares well below the 30% threshold calls for the revision of the buyer threshold to take into account their gatekeeper role.

- Non-reciprocal vertical agreements between competitors under certain circumstances (Article 2(4) VBER and recitals 27-28 VGL): Dual role of buyers/competitors

In the FMCG sector, buyer/retailers' brands compete with third-party brands (unaffiliated with the retailers). According to Article 2(4) of the VBER, the supply agreements of unaffiliated brands to the retailers would have to be assessed first under the EU Horizontal Guidelines. However, par. 27 of the VGL considers that the buyers who subcontract the manufacturing of their own brands are not to be considered manufacturers, ergo competitors of suppliers of unaffiliated brands. This reasoning overlooks the fact that mere manufacturing is not relevant from a competition law perspective. Indeed, many independent companies manufacture for both independent grocery brands and supermarkets and competition policy has special rules for sub-contracting agreements. The relevant competition in the market takes place between FMCG brands and those who exercise business control over them, regardless of who manufactures them.

The revised VBER and VGL should make it crystal clear that retailers' own brands compete with those of the suppliers' and, therefore, retailers' dual role (buyers/retailers and competitors) deserves a special consideration from a competition standpoint. Indeed, in the FMCG sector, retailers' brands are collectively the largest competitor and they lead vast number of categories:



Source: PMLA, https://www.plmainternational.com/industry-news/private-label-today

[5] See Draft Commission Notice - Guidelines on Vertical Restraints, SEC(2009) 946/3, par. 23: "*The Block Exemption Regulation creates a presumption of legality for vertical agreements depending on the market share of the supplier and the buyer. Pursuant to Article 3 of the Block Exemption Regulation, it is the supplier's market share on the market where it sells the contract goods or services and the buyer's market share on the market(s) where it resells the contract goods or services or where it sells its product produced with the help of the contract goods or services which determine the applicability of the block exemption. The supplier's as well as the buyer's market share may not exceed the threshold of 30 % in order for the block exemption to apply*."

Hardcore restrictions (Article 4 VBER): Resale price maintenance (Article 4(a) VBER and recitals 48-49 VGL)

EU competition policy has considered resale price maintenance a cardinal sin for decades and, accordingly, the VBER considers it a hard-core restriction of competition[6]. In the US, however, the Supreme Court's "Leegin Judgment" has considered that resale price maintenance is not per se illegal and should be assessed under the rule of reason[7]. The Supreme Court's analysis of resale price maintenance and vertical competition is highly relevant in the FMCG field: First, the pro-competitive justifications of resale price maintenance are similar to those for other vertical restraints: the promotion of inter-brand competition[8]. Second, resale price maintenance can also benefit new product introductions[9]. Third, consumer welfare is not necessarily reflected in lower prices but in a healthy inter-brand rivalry that takes care of quality and innovation[10]. Fourth, in general, the interests of manufacturers and consumers are aligned with respect to retailer profit margins[11].

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[6] See also par. 123 of the VGL: "*As explained in section III.3, resale price maintenance (RPM), that is, agreements or concerted practices having as their direct or indirect object the establishment of a fixed or minimum resale price or a fixed or minimum price level to be observed by the buyer, are treated as a hardcore restriction. Where an agreement includes RPM, that agreement is presumed to restrict competition and thus to fall within Article 101(1). It also gives rise to the presumption that the agreement is unlikely to fulfil the conditions of Article 101(3), for which reason the block exemption does not apply.*"

[7] US Supreme Court, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.,* Op. No. 06–480, Decided June 28, 2007 ("the Leegin Judgment").

[8] The Leeing Judgment, p. 10: "*Minimum resale price maintenance can stimulate interbrand competition—the competition among manufacturers selling different brands of the same type of product—by reducing intrabrand competition—the competition among retailers selling the same brand. See id., at 51–52. The promotion of interbrand competition is important because "the primary purpose of the antitrust laws is to protect [this type of] competition*."

[9] *Id.*, pp. 11-12: "*Resale price maintenance, in addition, can increase interbrand competition by facilitating market entry for new firms and brands. "[N]ew manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer."…New products and new brands are essential to a dynamic economy, and if markets can be penetrated by using resale price maintenance there is a procompetitive effect*."

[10] *Id.*, pp. 15-16: "*Respondent is mistaken in relying on pricing effects absent a further showing of anticompetitive conduct. Cf. id., at 106 (explaining that price surveys "do not necessarily tell us anything conclusive about the welfare effects of [resale price maintenance] because the results are generally consistent with both procompetitive and anticompetitive theories"). For, as has been indicated already, the antitrust laws are designed primarily to protect interbrand competition, from which lower prices can later result. See Khan, 522 U. S., at 15. The Court, moreover, has evaluated other vertical restraints under the rule of reason even though prices can be increased in the course of promoting procompetitive effects. See, e.g., Business Electronics, 485 U. S., at 728. And resale price maintenance may reduce prices if manufacturers have resorted to* costlier *alternatives of controlling resale prices that are not per se unlawful. See infra, at 22–25; see also Marvel 371*."; and p. 17: "*Many decisions a manufacturer makes and carries out through concerted action can lead to higher prices. A manufacturer might, for example, contract with different suppliers to obtain better inputs that improve product quality. Or it might hire an advertising agency to promote awareness of its goods. Yet no one would think these actions violate the Sherman Act because they lead to higher prices. The antitrust laws do not require manufacturers to produce generic goods that consumers do not know about or want. The manufacturer strives to improve its product quality or to promote its brand because it believes this conduct will lead to increased demand despite higher prices. The same can hold true for resale price maintenance*." *[emphasis added]*

[11] *Id.*, pp. 16-17: "*Respondent's argument, furthermore, overlooks that, in general, the interests of manufacturers and consumers are aligned with respect to retailer profit margins. The difference between the price a manufacturer charges retailers and the price retailers charge consumers represents part of the manufacturer's cost of distribution, which, like any other cost, the manufacturer usually desires to minimize. See GTE Sylvania, 433 U. S., at*

All in all, the Leegin Judgment displayed a modern economic thinking at odds with the conventional competition analysis that mixes static prices with consumer welfare and identifies retailers' welfare with that of consumers. The new market trend represented by modern retailers/competitors in the FMCG sector poses a new challenge to competition authorities: can it be deemed more beneficial for dynamic and even static competition that a vertically integrated retailer/competitor fixes the retail price of an unaffiliated brand instead of the supplier himself? The answer, in line with the economic reasoning of the Leegin Judgment, appears to be negative.

First, bearing in mind that "*antitrust laws are designed primarily to protect interbrand competition*"[12], suppliers of unaffiliated brands should be allowed to control their retail prices in order to prevent supermarkets from employing pricing practices that distort competition between their own brands and unaffiliated brands without being noticed by consumers[13]. Second, innovation is the lifeblood of the FMCG sector and supermarkets offer a narrow window of time to recoup the investment. The retail marketing and pricing of these new products may be critical in order to attract consumer demand. Therefore, control of retail prices may allow the supplier of an unaffiliated brand to introduce new products successfully. Third, prices alone do not tell anything about consumer welfare. As the US Supreme Court held, "*the antitrust laws do not require manufacturers to produce generic goods that consumers do not know about or want*". Innovation and quality improvement is the source of competitive rivalry and economic growth and "*the manufacturer strives to improve its product quality or to promote its brand because it believes this conduct*

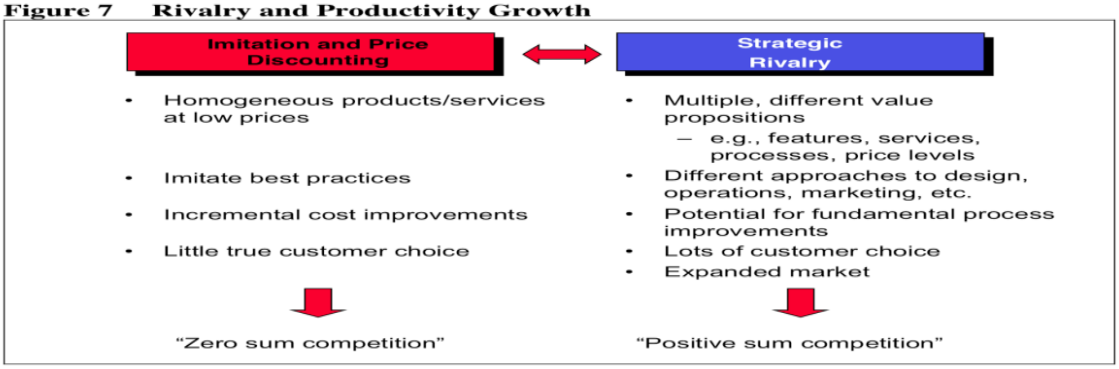
56, n. 24; see also id., at 56 ("Economists . . . have argued that manufacturers have an economic interest in maintaining as much intrabrand competition as is consistent with the efficient distribution of their products"). A manufacturer has no incentive to overcompensate retailers with unjustified margins. The retailers, not the manufacturer, gain from higher retail prices. The manufacturer often loses; interbrand competition reduces its competitiveness and market share because consumers will "substitute a different brand of the same product." Id., at 52, n. 19; see Business Electronics, supra, at 725. As a general matter, therefore, a single manufacturer will desire to set minimum resale prices only if the "increase in demand resulting from enhanced service . . . will more than offset a negative impact on demand of a higher retail price." [emphasis added]

[12] See, the Leegin Judgment and par. 98 of the VGL: "*Vertical restraints are generally less harmful than horizontal restraints. The main reason for the greater focus on horizontal restraints is that such restraints may concern an agreement between competitors producing identical or substitutable goods or services. In such horizontal relationships, the exercise of market power by one company (higher price of its product) may benefit its competitors. This may provide an incentive to competitors to induce each other to behave anti-competitively. In vertical relationships, the product of the one is the input for the other-, in other words, the activities of the parties to the agreement are complementary to each other. The exercise of market power by either the upstream or downstream company would therefore normally hurt the demand for the product of the other. The companies involved in the agreement therefore usually have an incentive to prevent the exercise of market power by the other*."

[13] Berasategi, "Supermarket Power: serving Consumers or Harming Competition", February 26, 2014, https://ssrn.com/abstract=2401723 describes the following pricing strategies that may foreclose unaffiliated brands without being noticed by consumers: (1) an artificial price gap with the leading independent grocery brand; (2) price-dumping of the independent brand in order to destroy its brand value; (3) pocketing of promotional wholesale prices; and (4) prohibition of on-packaging promotions. See also Olbrich and Buhr, "The impact of private labels on welfare and competition - how retailers take advantage of the prohibition of retail price maintenance in European competition law", Department of Business Administration and Economics, FernUniversität Hagen, Research Paper 1, 2004. and Klein, "Competitive resale maintenance in the absence of free-riding", FTC Hearings on Resale Price Maintenance, 17.02.2009. Klein rightly points out that a manufacturer has to prevent retailer price discounting in order to assure that other retailers continue to distribute and adequately promote its products. Indeed, it is critical for independent grocery brands to achieve a high level of weighted distribution. However, the concern identified by Klein is aggravated by a new concern: competition from supermarket brands, which are in a position to dictate the retail prices of independent grocery brands.

will lead to increased demand despite higher prices"[14]. In the FMCG sector, as in all other sectors of the economy, the Strategic Rivalry model associated with competition between unaffiliated brands brings more economic and consumer welfare than the Imitation and Price Discounting model associated with vertically integrated FMCG retailers and online marketplaces[15]:

Figure 7 Rivalry and Productivity Growth



Source: Porter, "Competition and Antitrust: A Productivity-Based Approach"

Fourth, the interests of unaffiliated brands and shoppers are regularly aligned. FMCG brands are mostly interested in minimising their cost of distribution (i.e., retailers' margins). A supplier's goal is to set the retail price at the point where the value proposition of the brand is highest for consumers. A higher price will be more than offset by a reduction in demand and a lower price may undermine the value perception of the product. However, retailers have a different agenda. On the one hand, they may fix higher prices than the manufacturer would like in order to subsidise their retail activities or promote their own competing brands. On the other hand, they may dump the price of a product in order to attract consumers to the store and recoup the losses on that product with the margins made on others, at the expense of the value perception of the dumped product. This mismatch between the economic interests of the retailer and those of individual unaffiliated brands and their consumers leads to substantial inefficiencies and non-optimum prices as far as the unaffiliated brands are concerned. Conversely, resale price fixing by FMCG brands may even lead to lower overall prices. For example, as the Leegin Judgment recognised, resale price maintenance could reduce prices if manufacturers had previously resorted to costlier alternatives of controlling resale prices that are not *per se* unlawful. In the FMCG sector, it has been widely documented that retailers demand *ex ante* guaranteed margins from unaffiliated brands or unilaterally impose *ex post*

[14] See Orbach, "Antitrust vertical myopia: the allure of high prices", Arizona Law Review 50, 2008, p. 277: "*The underlying premise of antitrust laws is that, for any given product, consumer welfare is inverse to the product's cost to the consumer, which includes its nominal price, search costs, and other costs. This assumption is also one of the most fundamental working tools of standard economic analyses…While the premise that "paying less is better" seems rather straightforward, contradicting market phenomena are widespread and their causes are equally straightforward: many people are willing to pay a premium for a brand, irrespective of quality and other tangible benefits*"; p. 278: "*Prices sometimes even influence perceptions of quality: scientific evidence shows that increases in wine prices tend to affect positively the perceived flavor pleasantness of wines. These findings are consistent with other studies that show that information about beer brands affects the pleasure of drinking beer. Some studies indicate that, in certain circumstances, consumers who pay discounted prices may derive less actual benefit from consuming the product than consumers who purchase the same product for a full price*"; and p. 279: "*The resentment for loss-leader pricing among many manufacturers of branded goods is yet another reflection of manufacturers' preferences for high prices. They believe that, although in the short term low prices may boost sales and revenues, in the long term low prices would damage their product image and result in decline in demand*."

[15] Porter, "Competition and Antitrust: A Productivity-Based Approach", essay, revised 30.05.2002.

charges to meet their margin requirements, thereby adopting the role of service providers (or even agents). However, they do not want to relinquish their power to set retail prices of unaffiliated brands. In short, if retail prices fall below their expectations, the suppliers of the unaffiliated brands have to shoulder the financial burden. If retail prices exceed their expectations, retailers pocket the financial gain. And in any case, they are able to use in-store prices to promote their own brands at the expense of unaffiliated brands.
For all the above considerations, it is argued that resale price maintenance in the FMCG sector can generate efficiencies in line with Article 101(3) of the Treaty and should not be treated as a hard-core restriction of competition.

Enforcement policy in individual cases (Section VI VGL): Upfront access payment (recitals 203-208 VGL) and Category management agreements (recitals 209-213 VGL)
The VGL specifically address two buyer-driven practices (i.e., category management and upfront access fees), but their core assumption is that these practices are led by leading independent brands in order to exclude smaller independent brands. The dual role of retailers/competitors is only mentioned somewhat incidentally in the section devoted to category management practices. The VGL admit that vertically integrated retailers may foreclose unaffiliated brands but then reference is made to the single branding section in order to assess this foreclosure:
"*While in most cases the distributor may not have an interest in limiting its choice of products, when the distributor also sells competing products under its own brand (private labels), the distributor may also have incentives to exclude certain suppliers, in particular intermediate range products. The assessment of such upstream foreclosure effect is made by analogy to the assessment of single branding obligations (in particular paragraphs (132) to (141)) by addressing issues like the market coverage of these agreements, the market position of competing suppliers and the possible cumulative use of such agreements.*"

However, no indication is given as to how the required agreement will arise and, most notably, the available remedies (i.e., termination of the exclusivities or the category management agreements) seem to be suited only for supplier-to-supplier foreclosure practices. In sum, the VGL do address specific buyer-led practices but they focus on supplier-to-supplier foreclosure. They ignore the fact that FMCG retailers/competitors enjoy substantial bargaining power vis-à-vis the suppliers of unaffiliated brands and they can rely on all sorts of access/service fees in order to raise rivals' costs and a differentiated category management in order to foreclose them without consumers even noticing it. Understandably, Commissioner Vestager has alerted against the distortion of competition that online platforms' dual role may engender:

"That's why, in April, the Commission proposed new laws to make platforms deal openly and fairly with their business customers. And I hope the European Parliament and the Council will very soon make those proposals into law. One important part of those proposals is to make sure that platforms are open about whether they're treating their own services more favourably than their customers'. Because businesses that rely on platforms sometimes find themselves competing with a part of the very company that runs that vital platform. Like a comparison shopping provider that has to compete with a service offered by the search engine that it relies on to bring in customers. Or a seller on an online marketplace that finds that the owner of that marketplace is competing with it to sell, say, TVs or computer games. That's an uncomfortable place to be – and not surprisingly. Because there's a serious risk here of a conflict of interests, when the same company is both the platform, and on the platform, at the same time – when it acts as both player and referee. (…). But one of the main concerns was how platform businesses that are also users of their own platform could deny rival users a chance to compete. It's not hard to see the temptation, in a situation like that, for a powerful platform business to undermine competition; for it to manipulate the way the platform works, to give its own services a head start, and make it hard for others to compete.

And if that's happening, then there's reason to be worried. Because competition is a vital guarantee of a fair deal for consumers. (…) We've also started to look at Amazon's position, as both player and referee, and its possible impact. Amazon's Marketplace is a platform that links sellers and buyers. But Amazon also sells products directly – often in competition with the very same sellers. That raises the question of how Amazon uses the data it collects about other sellers through the platform, and whether that use leads to unfair competition against them. This is still at a very early stage. We certainly can't say today that Amazon has done anything wrong. But one thing is clear – we need to keep a close eye on whether platform businesses are using the power of their platforms to undermine competition in other markets. (…).
In this modern world, we depend on those platforms, almost as much as we depend on the electricity or the water that run into our homes. And we need to discuss what that dependence means for us. We need to think about the rules that we want to put in place –besides the competition rules – to make sure platforms behave in a way that's good for society."[16]

The Commission's concern about online platforms' dual role should extend to that of FMCG retailers', as they are the gatekeepers of the food supply chain. E-commerce marketplaces show a concentrated market structure which is also present in the national FMCG retail markets. Furthermore, e-commerce consumers often enjoy the choice between general marketplaces and sector specific marketplaces/retailers, let alone the e-commerce offering of many brands.

It is difficult to find evidence of the negative effects of platforms' practices on innovation and choice. Indeed, it is difficult, if not impossible, to measure he opportunity cost of the absent innovation. However, the evidence found in the FMG sector is compelling and signals the likely scenario in the platform environment. The "The economic impact of choice and innovation in the EU food sector" study conducted for the Commission found a statistically and economically significant progressive correlation between private label growth and decline in innovation. The existence of a risk threshold or tipping point above which private label market shares in a product category will restrict innovation has been confirmed by research relative to Spain done by Kantar World Panel ("Innovating in the post-crisis era", November 2014). The benchmark analysis of 104 categories in the period 2011-2013 led Kantar to conclude that a private label market share above 35% leads to less innovation and growth in the market.

Conversely, in the FMCG sector, the recurrent low-value shopping of multiple items (one-stop shopping) naturally locks in consumers into their preferred FMCG retailer(s). The end conclusion is that FMCG retailers exercise a more powerful gatekeeper function than general online marketplaces.

Other types of retailer/competitor-led vertical restrictions for which it cannot be assumed with sufficient certainty that they generate efficiencies in line with Article 101(3) of the Treaty but which are not captured by the current list of hardcore restrictions (Article 4 VBER) or excluded restrictions (Article 5 VBER)

There are some buyer-led practices made possible with the forced acquiescence of the suppliers that do not generate efficiencies and yet benefit from the VBER safe harbour.

[16] Commissioner Vestager, "New technology as a disruptive global force", Youth and Leaders Summit, Paris, 21 January 2019. https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/new-technology-disruptive-global-force_en

Use of a suppliers' sensitive commercial information for the benefit of a retailers' competing brand

The FMCG supply chain exhibits a unique market failure: some competitors (retailers) have access to the commercially sensitive information of other competitors (unaffiliated brands) and can misuse it for their own benefit without fear of being exposed to commercial retaliation or legal actions.

Guaranteed margins

The bargaining power of FMCG retailers over their suppliers enables them to demand guaranteed margins or to impose ex post payments that fulfil the same goal. This practice is antithetical to a retailer function because it inefficiently transfers the commercial risk to the supplier without any associated benefit and raises a rival's costs. It would make sense if suppliers were allowed to fix the resale prices of their products but not under the current regime.

Tie-in of purchase of goods to payments for unwanted services

FMCG retailers/competitors have increasingly tied the purchase of goods from suppliers to demands for payments linked to services that form part of the retailing function, are not demanded by the suppliers and are priced without consideration for the cost incurred. Again, this amounts to an inefficient risk transfer and raises rivals' costs and the Commission should assess whether they are acceptable. For the avoidance of doubt, the prohibition of these practices would not undermine the bargaining power of retailers over their suppliers. They would be free to bargain on prices and secure the lowest possible ones.

Differentiated treatment of platforms'/retailers' own brand

The issue of differentiated treatment has been lightly addressed in the proposal for a Regulation on promoting fairness and transparency for business users of online intermediation and was not even raised in the proposal for a Directive on unfair trading practices in business-to-business relationships in the food supply chain (even though the Parliament introduced an amendment along the lines of article 5 of the Regulation that was not finally adopted). Par. 209 *in fine* of the VGL deals with it but even if the evaluation framework (single branding) offered may be helpful, the envisaged remedies are not suited for this purpose. Therefore, the Commission should consider whether upward integrated retailers with a relevant market share (well below the current 30% threshold and not only in the national procurement market, but in specific retail markets) should be authorised to engage in a differentiated treatment, particularly taking into account that this practice is generalised and the cumulative effects of this practice may reach 100% of each retail market. Finally, it should assess how the expansive interpretation of the concept of agreement used in order to address supplier-led practices can accommodate this retailer-led practice that all suppliers must accept in order to deal with their retailers.

Efficiency (Were the costs involved proportionate to the benefits?)

Yes. Basic concepts of competition policy such as "restriction of competition" or "consumer welfare" may be interpreted in different and often diverging ways. Therefore, the cost of complying with the VBER and the VGL is far less burdensome than the risks of being exposed to investigations, penalties and damage claims. This is especially true as this paper advocates a fundamental shift of competition policy from the current supplier-centric focus to a more balanced one or even to a retailer/platform-centric focus in several sectors such as the FMCG. This fundamental shift should be reflected in a revised VBER and VGL in order to offer legal certainty to businesses.

Relevance (Is EU action still necessary?)

Yes because buyer power, upward vertical integration of retailers/marketplaces and retailer-led restrictions of competition is a new economic shift that challenges the conventional competition law understanding of

seller power and consumer welfare linked to lower prices. Certainly, this commentary advocates for a deep revision/modernization of the policy on vertical restraints that focuses less on the restrictions imposed by the suppliers and more on the restrictions imposed by the retailers/competitors. The European Commission is the best placed to undertake this modernization and crystallise it in a new VBER and VGL adapted to the new economic paradigm.

Coherence (Does the policy complement other actions or are there contradictions?)
The current VBER and VGL have tried but failed to address platform/retailer power in important sectors from an economic and social standpoint, such as FMCG. It does not take into account the bargaining power of leading FMCG retailers and online marketplaces. The new VBER and VGL should take stock of the regulatory remedies adopted to tackle unfair trading practices (UTPs) in the food/grocery supply chain and in the field of the online intermediation. The VBER and VGL focus on supplier-led practices (thereby undermining their business model and increasing retailers' and online platforms' bargaining power) is not coherent with the regulatory intervention in some sectors, which shows that it is the suppliers that deserve protection against several retailer/platform-led practices that are not only unfair but anticompetitive as well (i.e., generalised and aimed at competitors).

EU added value (Did EU action provide clear added value?)
EU action is efficient and relevant because there is a need for a fundamental but harmonised shift in EU competition policy from a supplier focus to a retailer/platform focus at least in some important economic sectors. The Commission should lead this shift.

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COMMENTS OF THE AMERICAN BAR ASSOCIATION'S ANTITRUST LAW SECTION AND INTERNATIONAL LAW SECTIONS REGARDING THE EUROPEAN COMMISSION'S CONSULTATION ON THE CURRENT REGIME FOR THE ASSESSMENT OF VERTICAL AGREEMENTS

These Comments are presented on behalf of the American Bar Association's Antitrust Law Section and International Law Section. They have not been approved by the House of Delegates or the Board of the Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association as a whole.

May 27, 2019

I. Introduction

The American Bar Association's Antitrust Law Section and International Law Section (the Sections) are pleased to offer some comments to the European Commission in response to its consultation on Commission Regulation (EU) No 330/2010 (the Vertical Block Exemption Regulation, or **VBER**). The Sections also offer comments on the related Guidelines on Vertical Restraints.[1]

All firms rely on other firms for at least certain input or distribution requirements. Indeed, in a modern, open market economy, it is difficult to envisage that any product could be supplied by a single vertically integrated undertaking – one that handles all activities from supply of raw materials through every stage of production, distribution, retailing, *etc*. on its own. Therefore, vertical agreements are an essential and ubiquitous feature of a well-functioning and competitive market.

Vertical agreements play an especially important role for firms that aspire to sell their products in a new geographic market. Despite the new opportunities created by e-commerce, partnering with a local distributor is still the most common method for targeting new markets. Many such agreements will contain certain vertical restraints; the Union courts have always accepted that vertical restraints may confer economic efficiencies and be necessary to set up a rational distribution system.[2]

However, self-assessing the legality of particular vertical restrictions with certainty can be difficult, at least in the absence of clear enforcement standards and appropriate "safe harbors". The theories of harm that may lead to a finding of anticompetitive "effects" (see paragraphs 100-105 of the Vertical Guidelines) are often complex to apply in practice, e.g. since the outcome depends on multiple factors other than the terms of the agreement (paragraph 111). It can be equally challenging to determine whether a type of vertical restraint that is normally deemed to amount to a restriction "by object", is nevertheless justified in a particular context.[3] Such

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1 *See* EC, Commission Notice: Guidelines on Vertical Restraints, SEC(2010) 411, http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf [hereinafter Vertical Guidelines].

2 *See Société Technique Minière v. Commission*, 56/65, EU:C:1966:38; *Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Schillgallis*, 161/84, EU:C:1986:41; *Groupement d'achat Édouard Leclerc v. Commission of the European Communities*, T-88/92, EU:T:1996:192.

3 *See Groupement des cartes bancaires (CB) v. European Commission*, C-67/13, EU:C:2014:2204.

difficulties increase firms' compliance costs as well as the risk of divergent application of Article 101 TFEU by Member State courts and competition authorities.[4]

The immense practical importance[5] of the VBER must be understood against this background. The VBER provides legal certainty and consistency and reduces transaction costs. The Vertical Guidelines also operate as a valuable guide to interpreting the VBER and to explaining the framework of analysis applicable to vertical agreements that are not covered by the VBER. As such, the VBER and the Vertical Guidelines make it easier for firms to target new markets across the EU using efficient distribution systems and to contribute to the goal of a competitive internal market.

The Sections therefore consider that the VBER, as well as the Vertical Guidelines, should be renewed upon the expiry of the VBER. The renewal is also an opportunity to introduce changes to the Vertical Guidelines to take into account developments since 2010 and to improve the clarity of certain provisions.

The relevance of the VBER is illustrated by the interest attracted by the 2009 review: 164 respondents participated in the consultation on the draft VBER and Vertical Guidelines.[6] The current consultation will likely attract at least as much interest from a variety of stakeholders, including businesses, trade associations, legal practitioners and economists, and other public authorities. Such a large number of contributions from a diverse set of respondents is very positive. However, it is possible that some commentators will urge the Commission to try to address issues that the Sections submit should not be addressed through those by the VBER and Vertical Guidelines, but would be better addressed by unfair trading laws or sector-specific regulation (for example, through the directive on unfair trading practices in the food supply chain[7] or the regulation on promoting fairness and transparency for business users of online intermediation services[8]). Attempting to address such issues through the VBER and Vertical Guidelines could conflict with the goals of the competition laws and diminish the usefulness of the VBER and Vertical Guidelines.

The generally applicable nature of the VBER is one of its major strengths. It would be helpful, however, for the Vertical Guidelines to address a number of areas where it is difficult to apply the current VBER and Vertical Guidelines in a digital context, since they were drafted ten years ago mainly with offline distribution in mind.[9]

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4 The contradictory outcomes of the national investigations into online booking platforms and their use of price parity (MFN) clauses is a well-known example. There is disagreement both as to whether such clauses are covered by the VBER, and as to the compatibility of so-called "narrow" price parity clauses with Article 101 TFEU outside the scope of the VBER.

5 STEPHEN WEATHERILL, CASES AND MATERIALS ON EU LAW 467 (11th ed. 2014).

6 *See* EC, Public Consultations, http://ec.europa.eu/competition/consultations/2009_vertical_agreements/index.html.

7 *See* DIRECTIVE (EU) 2019/633 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 17 APRIL 2019 ON UNFAIR TRADING PRACTICES IN BUSINESS-TO-BUSINESS RELATIONSHIPS IN THE AGRICULTURAL AND FOOD SUPPLY CHAIN, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0633&from=EN.

8 *See* EC, PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON PROMOTING FAIRNESS AND TRANSPARENCY FOR BUSINESS USERS OF ONLINE INTERMEDIATION SERVICES, 26.4.2018 COM(2018) 238 final, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018PC0238&from=EN.

9 For example, it would be helpful to clarify, following the CJEU's Coty ruling, that a ban on the use of online marketplaces is not a hardcore restriction (see Section V(a) of this document). As already mentioned, the application of the VBER and Article 101 TFEU to MFN clauses is another issue that has caused divergent interpretations in different Member States. We note that the Commission's sector inquiry into e-commerce discusses the applicability of the VBER to certain practices that are common in digital markets; this work should prove useful for the update of the VBER and the Vertical Guidelines.

As regards the role played by online platforms, it is also important to note that the on-going discussion among scholars, authorities and practitioners mainly concerns firms that hold dominant positions. If a platform is dominant, the vertical agreements it enters into will fall within the scope of Article 102 TFEU. The VBER and the Vertical Guidelines apply without prejudice to Article 102 (see §1 of the Vertical Guidelines) and it is important to distinguish the "special responsibility" of dominant firms from the framework of analysis applicable to non-dominant firms under Article 101.

The Sections appreciate the opportunity to respond to the European Commission's consultation, and would be pleased to respond to any questions the Commission may have.

II. The VBER

a. Market Share Thresholds

The Sections do not offer a view as to whether the use of market share thresholds is appropriate for purposes of defining a safe harbor for vertical agreements or as to whether the current thresholds are too low. The Sections note the long-established use of such thresholds and the difficulty of developing alternatives suitable for the purposes of the VBER. The Sections also note that there are likely to be divergent views as to whether the current thresholds are too high or too low, and these views may differ depending on the type of restraint in question.

The Sections note, however, that the definition of antitrust markets is particularly difficult in many online contexts, in particular where distribution of goods or services takes place entirely or partly through online platforms. In these contexts, the Sections recommend that the Vertical Guidelines clarify how the market share thresholds should be applied in the context of online and dual distribution structures. (See further below.)

b. Dual Distribution (Article 2(4) VBER) and Information Exchange

While Article 2(4) VBER excludes vertical agreements between parties to competing undertakings from VBER's coverage, it creates an exception for certain non-reciprocal agreements (commonly referred to as dual distribution). A non-reciprocal dual distribution arrangement is present (1) when the supplier is both the manufacturer and the distributor of the goods, while the buyer is only a distributor and not also attempting to compete at the manufacturing level; or (2) when the supplier is a provider of services operating at several levels of trade, while the buyer operates only at the retail level and is not also attempting to compete at the level where it purchases the supplier's contract services. The approach outlined in Article 2(4) represents the mainstream approach taken by competition authorities, as it does not presume horizontal competitive concerns are raised merely from the fact that a manufacturer engages in dual distribution. As a result, non-reciprocal arrangements should continue to be treated as an exception from VBER's exclusion of competing undertaking as outlined in Article 2(4) and should not be analyzed under the more onerous standards that apply to agreements between competitors. One of the questions that the Commission could clarify, however, is the treatment of information exchanges in the context of dual distribution systems, i.e. in circumstances where the supplier is, at least in part, competing with its own distributors, but where it is nonetheless not unusual for the supplier to require its distributors to report certain information regarding their sales to final customers.

In 2017, the Commission expressed concerns in Section 3.1.3 of its E-Commerce Sector Inquiry Report[10] ("E-Commerce Report") that "the exchange of competitively sensitive data, such as on prices and sold quantities, between [online] marketplaces and third party sellers or manufacturers with own shops and retailers may lead to competition concerns where the same players are in direct competition for the sale of certain products or services."[11] These agreements do not seem to be excluded from the scope of Regulation 330/2010, Article 2(4),[12] implying that information exchange agreements between distributors and suppliers can be exempted, even in the case of a dual distribution system (and the competitive relationship between supplier and distributors downstream. However, the position is not clear cut. For example, a footnote to paragraph 212 of the Vertical Guidelines, in relation to category management agreements, emphasizes that *"Direct information exchange between competitors is not covered by the Block Exemption Regulation, see Article 2(4) of that Regulation and paragraphs 27-28 of these Guidelines."* Further, it is not clear whether the exchange of information can be considered an agreement *"relating to the conditions under which the parties may purchase, sell or resell certain goods or services"* in the sense of Article 1(1)(a) of the Regulation, and therefore whether it forms part of a "vertical agreement" subject to exemption.

The statement in the E-Commerce Report creates uncertainties. Given the vertical nature of information sharing in a dual distribution context, however, competitive harm should not be presumed where the existence of a hardcore agreement may not be plausibly inferred, especially where manufacturers and online marketplaces often institute firewalls or place limit other limits on data access with respect to competing retailers and given that (according to the E-Commerce Report), downstream sellers often continue to compete on other platforms on a non-exclusive basis or choose to make platform specific investments voluntarily. The Commission should therefore (i) clarify that information exchanges in the context of a dual distribution agreement are covered by the VBER, in the same manner as pure vertical information exchanges, and (ii) consider incorporating into the Vertical Guidelines guidance as to which kinds of information exchanges are likely to be problematic and how to address the competition concerns alluded to in the e-commerce sector inquiry. Additionally, the Commission should consider providing a potential safe harbor to the data collection practices of manufacturers and online marketplaces that represent less than a 30% share of a relevant market, particularly to the extent such parties are already in compliance with the Commission's other data protection measures.

More recently, the special advisors' "Competition Policy for the Digital Era" report to the Commission[13] raised concerns that an e-commerce platform's access to third party data and its ability to set terms of use could enable the platform to "self-preference" its own products or services. Nonetheless, particularly where sellers have voluntarily chosen to use the platform or are able to access other reasonably competitive alternate distribution channels (both on-line and offline) on a non-exclusive basis, a platform should have the discretion to set the terms of use in order protect its own investment incentives, preserve opportunities for cross- platform competition and encourage the further development of e-commerce alternatives to brick-and-mortar retailing (which still

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10 EC, REPORT FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT: FINAL REPORT ON THE E-COMMERCE SECTOR INQUIRY, 10.5.2017 COM (2017) 229 final, http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf [hereinafter E-COMMERCE REPORT].

11 *Id.* at 14, para 56.

12 *See* VERTICAL: GUIDELINES, para 28.

13 Jacques Crémer Yves-Alexandre de Montjoye & Heike Schweitzer, *Competition Policy for the Digital Era* (2019), at 7, http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

represents the vast majority of retail sales for many products). To this end, caution should be taken in defining a 'market' for these purposes based on the channel of distribution rather than by the relevant set of products and services being sold—particularly in cases where third-party sellers have other viable on-line and off-line outlets or the ability to make their own platform-specific investments. In addition, the Commission should adopt an approach that is "channel neutral", especially where brick-and-mortar outlets can give preferential treatment to their private brands and leverage valuable customer information collected at the point of sale. In any event, in the absence of an inferred or express hardcore agreement, the Commission should have to demonstrate anticompetitive effects of information sharing between a supplier that is a dual distributor and third party distributors before harm is presumed.

c. Hardcore Restraints –RPM and Territorial/Customer Restraints

Resale Price Maintenance (RPM): Under Article 4(a) VBER, a vertical agreement containing a limitation on a reseller's/distributor's ability to determine the minimum selling price for goods is a hardcore restriction and thus not subject to the protections of the VBER. The Vertical Guidelines acknowledge nonetheless that supplier-mandated minimum resale prices can be procompetitive in some circumstances. In recognition of these procompetitive benefits, the Sections recommend that Commission reaffirm that it is only the case that RPM will not be presumed legal (and do not benefit from the VBER's safe harbor); hardcore characterization does not necessarily mean that RPM restricts competition or does not satisfy the conditions of Article 101(3). The Sections thus believe that it is important that the Vertical Guidelines continue to recognize the potential for procompetitive benefits and to provide further guidance on how those benefits are to be reflected and given real and sufficient weight within the Article 101 framework. In particular, we recommend that the Guidelines reflect greater flexibility in their description of the circumstances in which RPM may be defensible in connection with the introduction of a "new" product. As European competition authorities have so far failed to recognize exceptional cases in which the benefits of RPM outweigh any concerns, better guidance is needed to encourage investment. Without this, and especially in the light of the Commission's recent enforcement actions concerning RPM, there is the potential for a chilling effect of this potentially procompetitive behavior. The continued recognition of the procompetitive benefits of RPM in the Vertical Guidelines would help counteract this effect.

The Commission should also consider modifying the language defining the restriction to clarify what constitutes hardcore behavior. The VBER permits suppliers to use maximum resale prices and recommend resale prices to the extent this behavior does not "amount to . . . minimum resale price[s] as a result of *pressure from, or incentives offered by*, any of the parties."[14] In its E-Commerce Report, however, the Commission suggests that the mere monitoring of online retail prices alone—without additional evidence of actual compulsion or agreement—could "*limit the incentives* for retailers to deviate from [] pricing recommendations."[15] The Sections believe this statement could significantly chill the legitimate use of recommended or maximum RPM and recommend clarifying that Article 4(a)—in so far as it relates to maximum and recommended resale prices effectively becoming RPM—refers only to an agreement or concerted practice to fix resale prices and not unilateral acts that may simply *encourage* adherence to recommended prices.

14 Article 4(a) VBER.

15 E-COMMERCE REPORT at para. 33.

Dual pricing for products intended to be resold online or offline: The Sections respectfully submit that the Vertical Guidelines' approach to dual pricing is not workable in the current context and should be updated to reflect the economic and commercial reality.

According to paragraph 52(d) of the Vertical Guidelines, the following is an example of a hardcore restriction of passive selling: *"an agreement that the distributor shall pay a higher price for products intended to be resold by the distributor online than for products intended to be resold offline. This does not exclude the supplier agreeing with the buyer a fixed fee (that is, not a variable fee where the sum increases with the realised offline turnover as this would amount indirectly to dual pricing) to support the latter's offline or online sales efforts"*. A supplier might choose to charge a distributor a lesser price for products or services sold offline than online in order to compensate the distributor for increased costs it bears related to the sale of the product offline and protect it from free riding by distributors distributing online or because the supplier's costs of sales is higher for online distributor sales. The possibility to offer a "fixed fee" has been often criticized: it would imply the need for the supplier to assess, on a case-by-case basis, the value of the sales efforts of each distributor, a process which would be long, costly and of uncertain results.

The Commission shows some flexibility in this respect in paragraph 64 of the Vertical Guidelines, when dealing with dual pricing to address higher costs to the manufacturer: *"However, in some specific circumstances, such an agreement may fulfil the conditions of Article 101(3). Such circumstances may be present where a manufacturer agrees such dual pricing with its distributors, because selling online leads to substantially higher costs for the manufacturer than offline sales. For example, where offline sales include home installation by the distributor but online sales do not, the latter may lead to more customer complaints and warranty claims for the manufacturer. In that context, the Commission will also consider to what extent the restriction is likely to limit internet sales and hinder the distributor to reach more and different customers."* While this statement makes sense, it does not address the main issue behind dual pricing systems, which is free riding.

The E-Commerce Report, in contrast, shows a more open approach, recognising that a dual pricing arrangement may be indispensable to address free-riding (see paragraph 37). Commissioner Vestager expressed the issue in the following terms (that are clearly applicable to dual pricing): *"Pricing restrictions can help to stop physical shops from disappearing. Without them, people might go to a brick-and-mortar shop only to get a feel for a product, but then buy it more cheaply online.*[16]*"*

Nonetheless, some national authorities, and in particular the Bundeskartellamt ("BKA"), have taken a very restrictive approach vis-a-vis price discrimination between on-line and off-line resellers. In the *LEGO* case, the BKA held that the inclusion of additional criteria for rebates that were specific to offline resellers (such as numbers of meters of available shelf space) meant greater discounts for off-line resellers.[17] This approach may allow free-riding by pure on-line resellers who do not incur the same costs, and could ultimately lead to marginalization or even the exit of brick-and-mortar retailers, particularly the smaller ones. The Sections

[16] Margrethe Vestager, Competition and the Digital Single Market, Remarks before the Forum for EU-US Legal-Economic Affairs (Sept. 15, 2016), *available at* https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-digital-single-market_enn.

[17] *See* BKA press release of 18 July2016, *available at* https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/18_07_2016_Lego.html.

therefore recommend that the Commission clarify that dual pricing systems are, as a matter of principle, generally acceptable, particularly in the context of selective distribution systems where brick-and-mortar dealers are requested to make substantial investments in the look and feel of the shop and on the "shopping experience". Also, the Commission should provide guidance detailing the specific circumstances where dual pricing may be problematic.

d. Non-Exempt Restraints and Non-Compete Obligations

Article 5 of the VBER provides that non-compete obligations are not exempted, except under specific circumstances.

The Sections disagree with the position that all non-compete clauses are fundamentally anticompetitive and accordingly should never be exempted under the VBER.[18] The Sections believe that the VBER should maintain the exemption of non-compete obligations under certain circumstances.

The Sections suggest that the Commission consider expanding the definition of non-compete obligations in Article 1(1)(d) VBER to include obligations imposed on a seller. Currently, only restrictions prohibiting a reseller/distributor from manufacturing, purchasing, selling or reselling goods or services which compete with the contract goods or services are considered to be non-compete obligations.

The Sections further recommend that the Commission should clarify and expand on its discussion of the circumstances under which non-compete obligations following the termination of a vertical agreement ("post-term obligation") may be exempted. Under Article 5(3) VBER, post-term non-compete obligations are only exempted if (i) they relate to goods or services which compete with the contract goods or services, (ii) the obligation is limited to the premises and land from which the buyer has operated during the contract period, (iii) the obligation is indispensable to protect know-how transferred by the supplier to the buyer, and (iv) the duration of the obligation is limited to a period of one year after the termination of the agreement.

The Sections note that although it is not clear from the VBER whether these conditions are cumulative, the Vertical Guidelines seem to imply that they are (see para. 68). We think that this should be noted expressly in the Vertical Guidelines.

The Sections also observe that condition in Article 5(3)(b), *i.e.*, the fact that post-term non-compete obligations should be limited to "the premises and land from which the buyer has operated during the contract period" seems too narrow.[19] The Sections believe that the geographic scope of post-term non-competes should be expanded to at least the vicinity of the premises from which the buyer operated. It would otherwise be too easy for buyers to circumvent a legitimate non-compete obligation. Without changing the VBER, the Commission could specify in the Vertical Guidelines that "premises and land" should be interpreted as a reasonable geographic area in the vicinity of the premises in which the buyer operated during the agreement.

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[18] *See, e.g.*, SMEunite, *Evaluation of the Motor Vehicle Block Exemption Regulation - Roadmap Feedback by SMEunite* (March 19, 2019), https://smeunited.eu/admin/storage/smeunited/190319-smeunited-comments-on-motor-vehicles-roadmap.pdf.

[19] In C-117/12, *La Retoucherie de Manuela v. La Retoucherie de Burgos*, the ECJ considered the literal meaning of the words "premises and land" and concluded that this should be interpreted strictly.

The Commission should also consider whether it would make sense to allow sellers to impose on buyers post-term non-compete clauses applicable to the entire territory that was assigned to them under the agreement. This could for example make sense in the context of franchise agreements.

In addition, the Sections believe that there is no need to generally consider contracts with automatically renewable terms to exceed the five-year limit on non-compete obligations. It should suffice to have the opportunity to terminate the agreement to prevent its extension beyond a five year term as this gives competitors a sufficient opportunity for market entry.

V. The Vertical Guidelines

a. Selective Distribution

As recognised in the E-Commerce Report, the significant growth of e-commerce over the past ten years has prompted manufacturers to rely increasingly on selective distribution. The Report also concludes that the general approach of the VBER vis-a-vis selective distribution does not need to be changed, although selective distribution may facilitate the implementation of certain vertical restraints that may raise competition concerns in individual cases.[20] We generally agree with this approach, but would recommend that the new Guidelines should be amended to provide additional clarity in the following key areas.

Online marketplace bans and similar bans (price comparison websites, auctions). It would be helpful for the guidelines to codify the *Coty* judgment[21] and make clear that online marketplace bans imposed in the context of selective distribution system are not a hardcore restriction within the meaning of the VBER and that this finding applies to all products, and not just to luxury goods.[22] Indeed, online marketplace bans are clearly distinguishable from absolute bans to sell online, given that (i) their scope is much narrower, and (ii) the manufacturers may have legitimate concerns about the impact of online marketplace sales on the brand value of their products (including concerns linked to free-riding and brand positioning, as manufacturers have no control over the way in which the products are sold in the marketplace). For the same reason, the Commission should clarify that this approach applies to similar prohibitions (such as bans on the use of price comparison websites or other auction-type sites or marketplaces) that could also negatively affect the brand value of the products in question.

Brick-and-mortar requirement. The E-Commerce Report concludes that the brick-and-mortar distribution requirement, which excludes pure "online" resellers, may not be justified in all cases, and may require further scrutiny in individual cases.[23] However, requiring manufacturers to include pure online players in their selective distribution systems might have adverse effects on off-line resellers, who are called to make significant investments for the promotion of the products in question. Therefore, to preserve the incentives of off-line resellers to continue to invest in the branding and marketing of these products, the Sections urge the Commission

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20 *See* E-COMMERCE REPORT at para 251.

21 *Coty Germany GmbH v Parfümerie Akzente GmbH*, C-230/16, EU:C:2017:941.

22 *See, e.g.*, ASICS case in Germany 12 December 2017 (Case KVZ 41/17) where the Federal Court upheld the BKA Asics decision of 2015, which found that ASICS' ban on the use of price comparison sites and certain other platforms was a hardcore restriction. The Court held that the Coty precedent was not applicable because ASICS was not a luxury brand.

23 *See* E-COMMERCE REPORT at paras. 26-27.

to preserve the current framework, which allows for the imposition of the brick-and-mortar requirement.[24] In addition, the Guidelines already allow the Commission to take action in individual cases where the brick-and-mortar shop does not bring sufficient efficiencies to counterbalance the exclusion of pure online resellers.[25]

b. Exclusive and Selective Distribution

The Sections have some concerns regarding the description of how exclusive and selective distribution can be combined in the Vertical Guidelines, and, in particular, whether the restriction of active sales into other territories or customer groups (which is permitted in an exclusive distribution system) would also be valid in this context. More precisely, the Sections recommend clarifying the relationship between paragraphs 56 and 152 of the Vertical Guidelines. Paragraph 56 seems to allow the restriction of active sales in a selective distribution system when this is done in order to protect an exclusive distribution system that operates in another territory: "*Accordingly, dealers in a selective distribution system, as defined in Article 1(1)(e) of the Block Exemption Regulation, cannot be restricted in the choice of users to whom they may sell, or purchasing agents acting on behalf of those users except to protect an exclusive distribution system operated elsewhere (see paragraph (51))"* However, paragraph 152 seems to point in the opposite direction, noting that the combination of exclusive and selective distribution is only covered by the exemption when active sales into other territories are not restricted: *"A combination of exclusive distribution and selective distribution is only exempted by the Block Exemption Regulation if active selling in other territories is not restricted"*.

The Sections suggest that active sales restrictions be considered to be valid in the framework of a system combining exclusive and selective distribution. The reasons for allowing active sales restrictions in exclusive distribution are arguably equally applicable in the case of selective distribution systems. In that regard, the Sections note that paragraph 63 of the Vertical Guidelines suggests that an individual exemption under Article 101(3) TFUE could be available in the following situation, concerning wholesalers: *"In the case of a selective distribution system, cross supplies between appointed distributors must normally remain free (see paragraph (58)). However, if appointed wholesalers located in different territories are obliged to invest in promotional activities in 'their' territories to support the sales by appointed retailers and it is not practical to specify in a contract the required promotional activities, restrictions on active sales by the wholesalers to appointed retailers in other wholesalers' territories to overcome possible free riding may, in an individual case, fulfil the conditions of Article 101(3)."* This assessment may apply more generally to free riding in selective distribution systems, so that active sales restrictions become more widely acceptable in the combination of exclusive and selective distribution models. The problem goes beyond the strict active sales restrictions: for instance, the setting out of sales geographic targets in the geographic area entrusted to selective distributors (which should be acceptable) may also run counter to paragraph 56 of the Vertical Guidelines.

In sum, the Sections respectfully submit that the rules should be clarified to allow active sales restrictions in these situations, under the conditions laid down for exclusive distribution agreements;

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24 *See* VERTICAL GUIDELINES, para. 54.

25 *See* VERTICAL GUIDELINES, para. 176.

alternatively, there should be a clarification in any case about what the rules are, overcoming the contradiction between paragraphs 56 and 152 of the Vertical Guidelines, for the sake of legal certainty.