

Comments
by the Federal Ministry for Economic Affairs and Energy
and the Bundeskartellamt
assessing Commission Regulation (EU) No 330/2010
on the application of Article 101(3) TFEU to categories of
vertical agreements and concerted practices
(Vertical Block Exemption Regulation, VBER) and Guidelines on Vertical Re-
straints

The Federal Ministry for Economic Affairs and Energy and the Bundeskartellamt (German competition authority) welcome the review of the Vertical Block Exemption Regulation and the Guidelines and the related wide consultation by the European Commission and gladly take this opportunity to comment on certain key aspects.

1. General aspects

The review of the Commission's system of block exemption regulations relating to Article 101 TFEU is the first opportunity in ten years to discuss in detail the need for change in the assessment of vertical restraints and to implement corresponding changes in response to the challenges of the fast-growing internet economy.

In the shared view of the Economic Affairs Ministry and the Bundeskartellamt, the instruments of the VBER and the accompanying Guidelines have in general worked well in practice. They have helped to increase legal certainty and to reduce transaction costs for businesses across the EU.

However, we see a need for changes particularly with a view to the growing importance of e-commerce. New sales channels have formed in this area which result in better product and price transparency and make it possible also for smaller retailers to enter new markets. In many cases, manufacturers and retailers respond to the increased competitive pressure by adopting measures to restrict competition. Also, online platforms have emerged which broker between end-users and manufacturers, dealers and other providers. Due to network effects, some of these platforms have obtained strong negotiating positions, and use these to influence the sale of goods or services on their platform to their own benefit.

Against the backdrop of these developments, it is right and necessary to subject the VBER and the Guidelines to an in-depth evaluation and to update them with regard to e-commerce. The interpretation of the hardcore restrictions of the VBER is of special importance in this respect, and so are questions relating to the area of selective distribution. The review should include possibilities to withdraw or revoke the benefits of the exemption.

The Guidelines should continue to contain highly relevant explanations of these provisions in response to current developments so the VBER and Guidelines continue to deliver greater legal certainty with regard to the EU's ban on cartels.

2. Online platforms

There is likely to be a consensus that the VBER and the Guidelines should be clearer when it comes to the categorization of online platforms under competition law. The Economic Affairs Ministry and the Bundeskartellamt also suggest a discussion as to whether it might be more useful in the medium to long term to adopt specific rules for online platforms as they act as brokers on various sides of the market, which does not fully allow their classification according to the traditional model of a vertical distribution chain.

In the shared view of the Economic Affairs Ministry and the Bundeskartellamt, the Guidelines should clearly explain whether and under what conditions platforms can be qualified as a provider of a brokering service towards their various user groups or whether they are also a purchaser of the good. For example, in addition to the platforms which merely provide the infrastructure for transactions, there are also platforms which participate actively in individual transactions and can thus be considered the purchaser of the good from the manufacturer and the seller of the good to the end-user. In such cases, it would make sense to distinguish platforms according to the extent of their involvement in the transaction they mediate.

It should also be made clearer whether online platforms can be “genuine” agents within the meaning of the Guidelines. In the shared view of the Economic Affairs Ministry and the Bundeskartellamt, it cannot generally be assumed that the distribution of risks which is typical of the agency business exists in the relationship between platforms and their users. However, the existing criteria in the Guidelines are only of limited use when it comes to answering this question, and should be adapted accordingly.

Various difficulties arise with regard to the VBER's market share threshold, especially when it comes to online platforms. For example, the definition of the relevant product market can entail particular problems in the case of multisided services. It is also necessary to bear in mind that the market power of many online platforms is determined by their access to data and by network effects rather than by their turnover. It should therefore be considered to include guidance for defining the market and possibly also other benchmarks for assessing market power, e.g. the number of the mediated transactions or user numbers.

Also, the VBER or the Guidelines should make it clear that agreements between hybrid platform operators and retailers are in principle not forms of dual distribution and therefore do not benefit from the block exemption. This is because, unlike in the case of dual distribution by manufacturers, there is no direct relationship between the provision of the platform services and the activity as retailers which would justify privileged treatment under the VBER.

The Bundeskartellamt's case practice so far has shown that price parity clauses which online platforms impose on the companies which use them to offer their goods and services have competition-restricting effects. Certainly, the use of broad price parity clauses restricts price competition, both in terms of the commission paid to competing platforms and in terms of prices for end-users. In addition, price parity clauses can make it more difficult for new providers to enter the market, which ultimately results in higher prices for the consumers. It should therefore be considered whether at least broad price parity clauses should be exempt from the privileges of the VBER.

3. (Online) trade restrictions

As a consequence of the competitive pressures and the pressure on prices resulting from e-commerce, some manufacturers and traders have imposed restrictions on e-commerce which, in the shared view of the Economic Affairs Ministry and the Bundeskartellamt, should not be exempted by the VBER.

The general ban on resale price maintenance should remain unchanged. This does not mean that there may not be legitimate interests justifying a restriction on price competition in favour of other factors of competition. Resale price maintenance cuts out any price competition at the retail stage. It is usually doubtful whether in return it results in efficiencies, e.g. better service from the retailer and greater inter-brand competition. In most cases handled by the Bundeskartellamt so far, efficiencies have not been cited as

a reason, nor have they been otherwise apparent. In any case, there are normally less restrictive ways to give retailers incentives to behave in the desired way. In order to improve legal certainty, the Guidelines should be supplemented with regard to admissible behaviour relating to price-setting, such as non-binding recommended retail prices.

General bans on e-commerce which are not based on qualitative criteria should not be protected by the VBER. Manufacturers of high-quality branded products should, however, still have the possibility to impose qualitative requirements on the online distribution of their products, especially when it comes to distribution via (third-party) platforms or price-comparison websites. In these cases, it should not be possible to generally rule out such distribution, but it should be possible to make such distribution subject to compliance with quality requirements.

The Guidelines should remain critical of dual pricing as its practical effect can be equivalent to general bans on e-commerce.

In order to prevent foreclosure and to permit full use to be made of the potential of e-commerce throughout the internal market, online sales should continue to be treated in principle as passive sales.

4. Selective distribution systems

In view of the increased competitive pressure due to e-commerce, manufacturers have been making more use of selective distribution systems. There is still a lack of legal certainty in this field, even following the ECJ's Coty judgment (Case C-230/16). The Economic Affairs Ministry and the Bundeskartellamt would therefore appreciate it if the Guidelines clarified the conditions under which a selective distribution system does not violate Article 101(1) TFEU. In this respect, the Economic Affairs Ministry and the Bundeskartellamt support a strict assessment of whether the nature of the product in question calls for a selective distribution system and/or the restraints remain within the scope of what is necessary. Against this background, the Guidelines should state whether the findings of the ECJ in the Coty judgment apply solely to luxury goods or also to other high-quality branded products.

Based on the Bundeskartellamt's experience, the anti-competitive effects of selective distribution systems can outweigh their positive effects. The discussion should thus also focus on whether a general exemption for selective distribution systems under the

VBER remains justified, or how effective instruments can be designed to remove the advantage (cf. section 6 below).

5. Including the vehicle sector in the VBER

In principle, the inclusion of the distribution of new vehicles in the scope of the VBER can be deemed a success. The application of the VBER with the supplementary Guidelines has become well established and has proved its worth in the area of vehicle trade. Despite this, legal uncertainty remains, e.g. in the case of envisaged direct distribution by the vehicle manufacturers coupled with demands for investment by the dealers. There is also a lack of legal certainty regarding the handling of personal data and data generated by the vehicles. Corresponding guidance should be included in the Guidelines. In revising VBER and the Guidelines, both the relationship to Regulation (EU) No 461/2010 for the vehicle sector including the supplementary guidelines and any necessary changes to them should thus be included in the considerations.

6. Withdrawal of the exemption

The cases handled by the national competition authorities show that especially on oligopolistic markets on which the oligopolists apply comparable restraints, the 30% market share threshold can result in outcomes that are not objectively justified: Whether the market shares of the respective companies are above or below this threshold may be a matter of chance, despite the high level of concentration on the market. It should be discussed whether in these cases a lower market share should be applied, or whether it should be made easier for the competition authorities to withdraw the block exemption.

Due to e-commerce, the competition landscape in online business and thus also the vertical relationships are becoming increasingly complex and require a more rapid and individualized assessment. In order to enable the competition authorities to carry out such an assessment, it is necessary to examine how to make the existing toolbox for the withdrawal of the block exemption more manageable in practice, e.g. via better guidance in the Guidelines. Also, the discussion should focus on how to improve the preconditions for national competition authorities to withdraw the VBER privilege.