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EVALUATION

of the

Vertical Block Exemption Regulation

{SWD(2020) 173 final}

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Glossary

<i>Term or acronym</i>	<i>Meaning or definition</i>
Commission	European Commission
DG Competition	Directorate-General for Competition of the European Commission
CJEU	European Court of Justice
EEA Agreement	Agreement on the European Economic Area
EFTA	European Free Trade Association
EU	European Union
EUR	Euro
HGL	Horizontal Guidelines
IA	Impact assessment
IPR	Intellectual property rights
ISSG	Inter-service steering group
MVBER	Motor vehicle block exemption regulation
MFNs	Most Favoured Nation clauses
NCA	National competition authorities
OEMs	Original equipment manufacturers
OTAs	Online travel agencies
RPM	Resale price maintenance
SMEs	Small and medium-sized enterprises
TSCs	Territorial supply constraints
TTBER	Block exemption regulation on technology transfer agreements
VBER	Vertical block exemption regulation
VGL	Guidelines on Vertical Restraints / Vertical Guidelines
RSB	Regulatory Scrutiny Board

1. INTRODUCTION

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.

Agreements which are entered into by two or more undertakings, each operating, for the purposes of the agreement, at a different level of the production or distribution chain, and which relate to the conditions under which the parties may purchase, sell or resell certain goods or services ("vertical agreements") are, among others, susceptible to fall within the scope of the prohibition of Article 101(1) of the Treaty. Vertical agreements are ubiquitous across the EU economy.

Under Regulation 19/65/EEC¹ ("Empowerment Regulation of 1965"), the Commission is empowered by the Council to adopt block exemption regulations, which define certain categories of agreements that generally fulfil the conditions of exemption under Article 101(3) of the Treaty. On this basis, the Commission has adopted several block exemptions, some of which concern vertical agreements.

As is the case for other block exemption regulations in the antitrust area, the purpose of Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty to categories of vertical agreements and concerted practices ("Vertical Block Exemption Regulation" or "VBER")² is to define those categories of agreements for which it can be assumed with sufficient certainty that they fulfil the conditions of Article 101(3) of the Treaty and exempt them from the prohibition contained in Article 101(1) of the Treaty. The VBER entered into force on 1 June 2010 and will expire on 31 May 2022.

The Guidelines on Vertical Restraints ("Vertical Guidelines")³ provide guidance on the assessment of vertical agreements not only under the VBER but also under Article 101(1) and Article 101(3) of the Treaty. Vertical agreements which do not qualify for an exemption under the VBER may nonetheless satisfy the conditions of the exemption provided by Article 101(3) of the Treaty. The Vertical Guidelines are without prejudice

¹ Regulation No 19/65/EEC of 2 March of the Council on application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices, OJ 36, 6.3.1965, p. 35, as amended by Council Regulation (EC) No 1215/1999 of 10 June 1999, OJ L 148, 15.6.1999, p. 1.

² Commission Regulation (EU) No 330/2010 of 20 April 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, OJ L 102, 23.4.2010, p. 1.

³ Guidelines on Vertical Restraints, OJ C 130, 19.5.2010, p. 1.

to the case law of the Union courts concerning the application of Article 101 of the Treaty to vertical agreements.⁴

This Staff Working Document reflects the findings and views of the Commission's staff and does not reproduce the formal position of the Commission itself. It does not prejudge the final nature or content of any act that may be prepared by the Commission as a follow-up to this evaluation.

The following sections set out the purpose of the VBER evaluation (see section 1.1 below), as well as the substantive and geographic scope of the VBER evaluation (see section 1.2 below).

1.1. Purpose of the VBER evaluation

The purpose of the evaluation is to gather evidence on the functioning of the VBER, together with the Vertical Guidelines, which will serve as a basis for the Commission to decide whether it should let the VBER lapse, renew or revise it.

As required by the Commission's Better Regulation Guidelines,⁵ the evaluation examines whether the objectives of the VBER were met during the period of its application (effectiveness) and continue to be appropriate (relevance) and whether the VBER, taking account of the costs and benefits associated with applying it, was efficient in achieving its objectives (efficiency). It also considers whether the VBER, as legislation at EU level, provided added value (EU added value) and is consistent with other Commission documents providing guidance on the application of Article 101 of the Treaty and related legislation with relevance for vertical agreements (coherence).

The impact of the COVID-19 outbreak is not dealt with in this Staff Working Document, given that these developments are very recent and the evidence gathered in the evaluation could not take them into account. Moreover, the duration and impact of the COVID-19 crisis cannot be predicted or accurately quantified at the current stage, and it is therefore not possible to evaluate the effects of the COVID-19 crisis on the rules subject to the evaluation. Nevertheless, the Commission is conscious that there has been a significant increase in e-commerce in the wake of the confinement measures.

1.2. Scope of the VBER evaluation

The substantive scope of the evaluation includes the VBER, together with the Vertical Guidelines, in their entirety. Insofar as the Vertical Guidelines refer to the provisions of the VBER and inform their application and interpretation, the assessment of the VBER would not be complete if it did not include them. As explained in more detail in section 2.2 below, the VBER and the Vertical Guidelines adopted in 2010 are to a large extent a continuation of the approach taken in the previous versions of these two documents from

⁴ Vertical Guidelines, paragraph 4.

⁵ Commission staff working document, Better Regulation Guidelines, Brussels, 7 July 2017, SWD (2017) 350.

1999, with limited adaptations to address specific issues identified during the last review process.

Since the adoption of the current VBER and Vertical Guidelines, there have been a number of market developments, notably the growth of online sales and of new market players such as online platforms.⁶ As these developments may affect parts of the VBER and Vertical Guidelines that go beyond the specific provisions changed in 2010, it is appropriate to evaluate the VBER, together with the Vertical Guidelines, in their entirety, rather than focusing on the main changes that were made as a result of the last review.

The Motor Vehicle Block Exemption Regulation ("MVBER") was adopted in 2010.⁷ It contains a transition clause,⁸ which prolonged the application of the previous block exemption regulation for the motor vehicles sector⁹ to the purchase, sale or resale of new motor vehicles until 1 June 2013. Since then, the distribution of new motor vehicles has been benefitting from the exemption provided by the VBER, when the conditions set out therein are fulfilled. As regards aftermarkets, the MVBER has been dealing with the conditions for the purchase, sale or resale of spare parts and the provision of repair and maintenance services for motor vehicles since its adoption in 2010.¹⁰ The MVBER is subject to a separate review launched in 2018. The outcome of the evaluation of the MVBER will be taken into account in the context of the impact assessment of the VBER.

The geographic scope of the evaluation extends to all EU Member States.¹¹ Article 101(1) of the Treaty has direct applicability in all EU Member States by virtue of the case law of the Union courts.

Council Regulation 1/2003¹² created a system of parallel competences also for Article 101(3) of the Treaty, by introducing a directly applicable exemption system in which the competition authorities and the courts of the Member States have the power to apply not only Article 101(1) of the Treaty, but also Article 101(3) of the Treaty.¹³ When assessing

⁶ The notion of online platforms is used in this document in a non-technical sense, in line with the way stakeholders used it in their contributions. It therefore refers more broadly to businesses active in the e-commerce sector including marketplaces, online retailers and price comparators. The use of this notion is without prejudice to the definition of online platforms used in existing regulation.

⁷ Commission Regulation (EU) No 461/2010 of 27 May 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 in the motor vehicle sector, OJ L 129, 28.5.2010, p. 52.

⁸ MVBER, Article 2.

⁹ Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, OJ L 203, 1.8.2002, p. 30.

¹⁰ MVBER, Article 4.

¹¹ Since the VBER has been fully applicable in the United Kingdom during the period under review, the evaluation includes evidence gathered from stakeholders in the UK, in particular from the UK's Competition and Markets Authority.

¹² Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ("Council Regulation 1/2003"), OJ L 1, 4.1.2003, p. 1.

¹³ Council Regulation 1/2003, recital 4.

the compatibility of vertical agreements that may affect trade between Member States in the meaning of Article 101 of the Treaty, national competition authorities ("NCAs") and national courts are bound by the directly applicable provisions of the VBER. The Vertical Guidelines, which are binding on the Commission,¹⁴ do not bind NCAs or national courts, but they are typically taken into account when assessing the compatibility of vertical agreements with Article 101 of the Treaty.

Against this background, the evaluation of the VBER does not only include the decisional practice of the Commission but also that of the NCAs, as well as the relevant jurisprudence of national courts.

The three EFTA States (Iceland, Liechtenstein and Norway) are not part of the evaluation since the VBER is not directly applicable in these countries. Secondary EU law (such as Commission regulations) first has to be included in the Agreement on the European Economic Area ("EEA Agreement")¹⁵ on the basis of Article 60 of the EEA Agreement and must then be incorporated into the national legal orders of the EFTA States to become applicable. Subject to this process, the VBER is applicable in the EFTA States. In view of the Commission's obligation to informally seek advice from experts of the EFTA States for the elaboration of new legislative proposals,¹⁶ the Commission has informed the EFTA States of the evaluation of the VBER in order to provide them with an early opportunity to share their experience in this regard.

2. BACKGROUND TO THE INTERVENTION

The following sections provide an overview of the EU competition policy framework for vertical agreements (see section 2.1 below), a description of the 2010 VBER and the Vertical Guidelines, which constitute the intervention subject to this evaluation (see section 2.2 below), a presentation of the intervention logic (see section 2.3 below) and a presentation of the evaluation baseline for the 2010 VBER and the Vertical Guidelines (see section 2.4 below).

2.1. Overview of the competition policy framework

The purpose of the EU competition rules enshrined in the Treaty (notably Article 101 and 102 of the Treaty) and related secondary EU law (such as Commission regulations) and soft law (such as Commission notices and guidelines, which are binding on the Commission but not on NCAs or national courts) is to prevent competition from being distorted to the detriment, directly or indirectly, of consumers, thereby contributing to

¹⁴ See e.g. judgment of 28 June 2005 in Case C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, ECLI:EU:C:2005:408, *Dansk Rørindustri A/S*, paragraph 211; judgment of 13 December 2012 in Case C-226/11, ECLI:EU:C:2012:795, *Expedia Inc. v Autorité de la concurrence and Others*, paragraph 28.

¹⁵ Agreement on the European Economic Area, OJ L 1, 3.1.1994, p. 1, Annex XIV, section B.

¹⁶ Article 99(1) EEA Agreement.

achieving an integrated internal market.¹⁷ More specifically regarding vertical supply and distribution agreements, the Commission's policy aims to ensure undistorted and effective competition in the European supply and distribution chain so that consumers can benefit from lower prices, increased quality and variety of products and services, as well as the results of increased incentives to innovate as delivered by competitive markets.

Article 101(1) of the Treaty prohibits agreements (including vertical 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.¹⁸

As an exception to this rule, Article 101(3) of the Treaty sets out that the prohibition contained in Article 101(1) of the Treaty may be declared inapplicable to agreements that are on balance efficiency-enhancing, provided that such agreements fulfil four cumulative conditions. They have to (i) contribute to improving the production or distribution of goods or to promoting technical or economic progress, (ii) while allowing consumers a fair share of the resulting benefits. Moreover, they (iii) should not impose restrictions that are not indispensable to the attainment of the aforementioned objectives, and (iv) should not afford the undertakings the possibility of eliminating competition in respect of a substantial part of the products concerned.¹⁹

In light of the above, the assessment of agreements under Article 101 of the Treaty consists of two parts. The first step is to assess (in the context of Article 101(1) of the Treaty) whether an agreement between undertakings, which is capable of affecting trade between Member States, restricts competition. This is the case if it reveals a sufficient degree of harm to competition so that there is no need to examine its actual or potential effects ("restriction by object")²⁰ or if it results in actual or potential anti-competitive effects ("restriction by effect"). The second step, which only becomes relevant when an agreement is found to restrict competition pursuant to Article 101(1) of the Treaty, is to determine (in the context of Article 101(3) of the Treaty) the pro-competitive benefits produced by the agreement and to assess whether these pro-competitive effects outweigh the anti-competitive effects resulting from the agreement.²¹

¹⁷ See e.g. judgment of 18 April 1975 in Case 6/72, ECLI:EU:C:1973:22, *Europemballage Corporation and Continental Can Company v Commission*, paragraphs 25-26; judgment of 17 February 2011 in Case C-52/09, ECLI:EU:C:2011:83, *TeliaSonera Sverige*, paragraph 22; judgment of 27 March 2012 in Case C-209/10, ECLI:EU:C:2012:172, *Post Danmark A/S v Konkurrenserådet*, paragraphs 20-24 and judgment of 6 September 2017 in Case C-413/14 P, ECLI:EU:C:2017:632, *Intel Corp. Inc. v Commission*, paragraph 133.

¹⁸ Communication from the Commission, Notice - Guidelines on the application of Article 81(3) of the Treaty ("Article 81(3) Guidelines"), OJ C 101, 27.4.2004, p. 97, paragraph 8.

¹⁹ Article 81(3) Guidelines, paragraph 9.

²⁰ See e.g. Commission guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice ("Guidance on by object restrictions"), SWD(2014) 198 final, page 3.

²¹ Article 81(3) Guidelines, paragraph 11.

In view of the initially large number of notifications in relation to vertical agreements submitted by businesses under the first regulation implementing the EU competition rules, the Council adopted the Empowerment Regulation of 1965 to facilitate the enforcement work of the Commission by empowering it to declare by way of regulation that Article 101(1) of the Treaty does not apply to certain categories of vertical agreements and practices.²² This meant that the Commission no longer had to carry out an individual assessment of compliance with Article 101 of the Treaty for vertical agreements covered by a block exemption regulation adopted on the basis of the Empowerment Regulation of 1965, as agreements that fall within the scope of such a block exemption regulation benefit from a presumption of legality (so-called "safe harbour").²³ However, businesses still had to self-assess whether their agreements fell within the scope of the block exemption regulation.

The Commission has made repeated use of this empowerment by adopting various block exemption regulations for vertical agreements. More specifically, in line with the Empowerment Regulation of 1965, these block exemption regulations defined categories of vertical agreements that the Commission regarded at the time of adoption as normally satisfying the conditions laid down in Article 101(3) of the Treaty and that therefore did not require an individual assessment by the Commission under Article 101(3) of the Treaty.²⁴ The scope of the different block exemption regulations was determined on the basis of the Commission's enforcement experience and, where applicable, the overall experience with the application of previous block exemption regulations.²⁵

One of the elements determining the scope of the VBER are market shares thresholds. They limit the applicability of the safe harbour to vertical agreements between businesses holding a share in the relevant market(s) that does not exceed the thresholds set out in the VBER. The definition of the relevant market to be carried out for that purpose is not specific to the VBER, but follows the principles established in the case law of the Union courts and reflected in the Commission's Market Definition Notice.²⁶

The following sections briefly summarise the main features of the 1999 block exemption regulations (see section 2.1.1 below) as well as of the review of the 1999 VBER (see section 2.1.2 below).

²² Empowerment Regulation of 1965, recital 7.

²³ Vertical Guidelines, paragraph 23.

²⁴ See e.g. VBER, recitals 2 and 5.

²⁵ Empowerment Regulation of 1965, recital 8 and e.g. VBER, recital 2.

²⁶ Commission notice on the definition of the relevant market for the purposes of Community competition law ("Market Definition Notice"), OJ C 372, 9.12.1997, p. 5. The Market Definition Notice is currently subject to a separate review launched in April 2020.

2.1.1. The 1999 block exemption regulations

In the 1980s, the Commission adopted block exemption regulations in the field of distribution, relating to exclusive distribution,²⁷ exclusive purchasing²⁸ and franchising.²⁹

Against the background of a growing feeling of unease in the mid-1990s relating to the effectiveness of the Commission's policy towards vertical agreements and notably the approach of the block exemption regulations, the Commission thoroughly reviewed its policy in this field on the basis of a Green Paper issued in 1997.³⁰ The stakeholder feedback received during the consultation process revealed that the block exemption regulations adopted in the 1980s were perceived as too formalistic and as creating an unnecessary compliance burden, especially for businesses without significant market power such as small and medium-sized enterprises ("SMEs"). It also became clear that stakeholders expected any new policy to follow a more economic approach, which meant analysing vertical agreements in their market context and making the assessment dependent upon their effects on the market.³¹ As a follow-up to the Green Paper, the Commission outlined a new policy approach towards vertical agreements.³²

In 1999, the Commission adopted a new block exemption regulation³³ ("the 1999 VBER") and, in 2000, accompanying Guidelines on vertical restraints ("the 2000 Vertical Guidelines").³⁴ Unlike the previous block exemption regulations, the 1999 VBER applied to all types of vertical agreements entered into by two parties or more, except for those falling within the scope of any other block exemption regulation, and covered almost all sectors of the economy.³⁵

The 1999 VBER and the 2000 Vertical Guidelines formed the first package of a new generation of block exemption regulations and guidelines inspired by a more economic and effects-based approach. In fact, they were based on the principle that for a proper

²⁷ Commission Regulation (EEC) No 1983/83 on exclusive distribution agreements, OJ L 173, 30.6.1983, p. 1.

²⁸ Commission Regulation (EEC) No 1984/83 on exclusive purchasing agreements, OJ L 173, 30.6.1983, p. 5.

²⁹ Commission Regulation (EEC) No 4087/88 on franchising agreements, OJ L 359, 28.12.1988, p. 46.

³⁰ Green paper on vertical restraints in EC competition policy, COM (96) 721 final.

³¹ See e.g. Commission staff working document, impact assessment, accompanying document to the draft Commission 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 and the draft Commission notice - Guidelines on Vertical Restraints ("2010 IA"), C(2010) 2365 fin, SEC(2010) 413, Annex 1, paragraph 7.

³² Communication from the Commission on the application of the Community competition rules to vertical restraints, COM (98) 544 final.

³³ Commission regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ L 336, 29.12.1999, p. 21.

³⁴ Commission Notice, Guidelines on Vertical Restraints, OJ C 291, 13.1.2000, p. 1.

³⁵ For example, the 1999 VBER did not apply to supply and distribution agreements in the motor vehicle sector covered by the MVBER. See 1999 VBER, Article 2(5), and 2000 Vertical Guidelines, paragraph 45.

assessment of the likely effects of a vertical agreement, both negative and positive, the conditions on the relevant market have to be taken into account.³⁶

The main elements of the effects-based approach underlying the 1999 VBER can be summarised as follows:

First, the likelihood that efficiency-enhancing effects of vertical agreements will outweigh any anti-competitive effects resulting from restrictions contained therein depends on the degree of market power of the undertakings concerned and, therefore, on the extent to which those undertakings face competition from other suppliers of interchangeable goods or services (so-called inter-brand competition).³⁷ Where the share of the relevant market accounted for by the supplier does not exceed 30%, it can be presumed that vertical agreements that do not contain certain types of severely anti-competitive restrictions generally lead to an improvement in production or distribution and allow consumers a fair share of the resulting benefits.³⁸ Above the market share threshold of 30%, there can be no presumption that vertical agreements falling within the scope of Article 101(1) of the Treaty will usually give rise to objective advantages of such a character and size as to compensate for the disadvantages which they may create for competition.³⁹

Second, vertical agreements containing restrictions which do not create objective economic benefits or do not benefit consumers⁴⁰ or which are not indispensable to the attainment of any efficiency-enhancing effects cannot be exempted from the application of Article 101(1) of the Treaty. This concerns in particular certain types of severely anti-competitive restrictions such as minimum and fixed resale prices, as well as certain types of territorial protection (so-called "hardcore restrictions").⁴¹ If an agreement contains one or more hardcore restrictions, the agreement falls outside the safe harbour created by the vertical block exemption regulation (irrespective of the market share of the undertakings concerned) and its compatibility with Article 101 of the Treaty has to be assessed on an individual basis.

Third, the market share cap and the non-exemption of hardcore restrictions normally ensure that the vertical agreements to which the block exemption applies do not enable the participating undertakings to eliminate competition in respect of a substantial part of the products or services in question.⁴² If an agreement benefitting from the block exemption nevertheless has effects incompatible with Article 101(3) of the Treaty, the Commission can withdraw the benefit of the vertical block exemption, notably (i) where

³⁶ See 2010 IA, paragraph 10 of the historic description provided in Annex 1.

³⁷ 1999 VBER, recital 7.

³⁸ 1999 VBER, recital 8.

³⁹ 1999 VBER, recital 9.

⁴⁰ Communication from the Commission, Notice Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.04.2004, p. 97, paragraph 46.

⁴¹ 1999 VBER, recital 10.

⁴² 1999 VBER, recital 12.

the buyer has significant market power in the relevant market in which it resells the goods or provides the services, or (ii) where parallel networks of vertical agreements have similar effects which significantly restrict access to a relevant market or competition therein (so-called "cumulative effects").⁴³ The Commission did not use this possibility to withdraw the benefit of the 1999 VBER.⁴⁴

Moreover, to strengthen the supervision of parallel networks of vertical agreements which have similar restrictive effects and which cover more than 50% of a given market, the Commission can declare the block exemption inapplicable to vertical agreements containing specific restrictions relating to the market concerned, thereby restoring the full application of Article 101 of the Treaty to such agreements.⁴⁵ So far, the Commission has not used this possibility.

The 2000 Vertical Guidelines, which accompanied the 1999 VBER, set out principles for assessing vertical agreements under the 1999 VBER and a framework for assessing vertical agreements not benefitting from the safe harbour created by the 1999 VBER under Article 101 of the Treaty.

2.1.2. The review of the 1999 VBER

In view of the expiry of the 1999 VBER in May 2010, the Commission launched a review process in 2008. All fact-gathering initiatives carried out during the 2008 review indicated that the new architecture of the "first block exemption with guidelines package" had led to a flexible and comprehensive enforcement policy regarding vertical restrictions. The review also revealed that by providing a clear analytical framework to both businesses and NCAs, the first block exemption with guidelines package had enhanced legal certainty, which was considered increasingly important in the context of the new decentralised system based on self-assessment introduced by Council Regulation 1/2003.⁴⁶ Against this backdrop, the review concluded that there was no need for major structural changes of the package and that the review should focus on certain specific aspects of the assessment of vertical restrictions.

Among the issues raised during the review process, two were particularly debated. First, it was considered that there is a need to take into account not only the possible market power of the supplier, but also that of the buyer, since both are relevant for assessing the risk that vertical restrictions may lead to consumer harm. Second, in the context of the growth in online sales, there was a demand for more guidance on the circumstances in which restrictions on the use of the internet by distributors should be considered a

⁴³ 1999 VBER, recital 13.

⁴⁴ The Commission did however withdraw the benefit of the block exemption under the previous rules in two cases (Commission decision of 25 March 1992 relating to a proceeding under Article 85 of the EEC Treaty in Case IV/34.072 - *Mars/Langnese and Schöller* and Commission decision of 4 December 1991 relating to a proceeding under Article 85 of the EEC Treaty in Case IV/33.157 - *Eco System/Peugeot*).

⁴⁵ 1999 VBER, recital 15.

⁴⁶ 2010 IA, pages 7-8.

hardcore restriction.⁴⁷ Section 2.2 below explains how these two issues were addressed in the review process.

As a result of the 2008 review, the Commission adopted a revised block exemption regulation, together with revised Vertical Guidelines, which are the subject of the current evaluation.

2.2. Description of the intervention

The 2010 VBER and Vertical Guidelines are to a large extent a continuation of previous rules in both their structure and substance. They were, however, updated and adapted in order to address the issues identified during the 2008 review process.

The two main changes made as a result of the 2008 review process concerned the market share threshold and the treatment of online sales restrictions.

First, to take into account potential anti-competitive effects stemming from market power on the buyer side, it was decided that the block exemption should only apply when both the market share of the supplier and also that of the buyer do not exceed the threshold of 30% (Article 3 of the VBER).⁴⁸ This double threshold brought the vertical regime in line with the approach taken in other block exemption regulations adopted after 2000⁴⁹ and in the Commission's *De Minimis* Notice of 2001,⁵⁰ which are all based on a market share threshold for both the supplier and the buyer of the respective agreement.

Second, the 2008 review revealed that the development of the internet as a distribution channel had considerably affected the functioning of exclusive and selective distribution, which were the two main distribution models at the time.⁵¹ To provide stakeholders with sufficient legal certainty, it was therefore necessary to clarify under which circumstances restrictions imposed by suppliers on the use of the internet by distributors should be considered as hardcore restrictions under the VBER, notably in the context of these two distribution models.

Exclusive distribution enables the supplier to reserve for himself or to designate only one distributor in a particular territory and to protect that distributor against other (exclusive) distributors actively approaching customers in the exclusively allocated territory (protection against so-called active sales). This protection provides the exclusive distributor with more incentives to invest in distributing the supplier's products or

⁴⁷ 2010 IA, page 8.

⁴⁸ 2010 IA, pages 12-16.

⁴⁹ See e.g. Article 3 of Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements ("TTBER"), OJ L 123, 27.4.2004, p. 11. A new version of the TTBER entered into force in 2014, OJ L 93, 28.03.2014, p. 17.

⁵⁰ See paragraph 7(b) of the Communication from the Commission - Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union ("De Minimis Notice"), OJ C 368 22.12.2001, p. 13. A new version of the notice entered into force in 2014, OJ C 291 30.8.2014, p. 1.

⁵¹ 2010 IA, page 17.

services in that territory, as the exclusive distributor will be protected to a certain extent against possible free-riding by other distributors on its investments. However, this protection does not allow the supplier to prohibit other distributors from responding to unsolicited requests from individual customers (so-called passive sales). It is considered that a restriction of passive sales would go beyond what is necessary to protect the investments made by the exclusive distributor. The possibility to make passive sales into exclusive territories was also seen as a safety valve for protecting the internal market, which allows consumers, businesses and their agents to purchase products wherever they want within the EU. Restrictions of passive sales therefore qualify as hardcore restrictions under the VBER.

The 2008 review revealed that the use of the internet made both active and passive selling to customers located in an area that had been exclusively allocated to another distributor easier and more efficient, thus reducing the protection of the exclusive distributor's investments. Due to the increase in online sales recorded in the context of the 2008 review, a clearer delineation between active and passive sales had to be found in order to strike the right balance between allowing consumers to take advantage of the internet to overcome geographic barriers and allowing suppliers and distributors to prevent free-riding on their investments. To tackle this issue, it was decided to further refine the distinction between passive and active sales in the context of the internet by adding in the Vertical Guidelines examples of practices amounting to active and passive sales restrictions respectively.⁵²

In a selective distribution system, the supplier can choose its distributors on the basis of qualitative and/or quantitative criteria and prohibit authorised distributors at wholesale and retail level from selling to unauthorised resellers. However, to benefit from the safe harbour created by the VBER, the supplier cannot restrict authorised distributors from making active or passive sales to end users and from making cross-supplies to other authorised distributors at the wholesale or the retail level. Such restrictions are considered hardcore restrictions under the VBER.

The 2008 review revealed that the use of the internet could result in free-riding concerns when consumers use the pre-sales services (e.g. showroom services and customer advice) offered in brick-and-mortar shops to inform their purchase decision, but then buy the product for a lower price on the internet from distributors who have not invested in such pre-sales services. It was considered that free-riding could lead to a sub-optimal provision of pre-sales services and a reduction in the performance of selective distribution systems. To address this issue, it was decided to clarify in the Vertical Guidelines that under the VBER, a supplier can require its distributors to have one or more brick-and-mortar shops in order to allow consumers to touch and feel and/or experience the product, thereby excluding internet-only distributors from its distribution network.⁵³

⁵² 2010 IA, pages 44-45.

⁵³ 2010 IA, pages 44-45.

2.3. Intervention logic

As explained in section 1.2 above, this evaluation looks at the functioning of the VBER, together with the Vertical Guidelines, as a whole. Therefore, the intervention logic (summarised in Figure 1 below) refers to the 2010 VBER in its entirety, together with the Vertical Guidelines (i.e. the **intervention**), and not only to the specific provisions that were changed in 2010.

The VBER exempts specific types of vertical agreements from the prohibition of Article 101(1) of the Treaty and the Vertical Guidelines provide guidance on the application of the VBER and Article 101 of the Treaty to vertical agreements. The **general objective of the intervention** is twofold. First, it aims **to facilitate the enforcement work of the Commission and, in view of the decentralised enforcement system, also the work of the national competition authorities and national courts**, which no longer have to carry out an individual assessment under Article 101 of the Treaty for vertical agreements covered by the block exemption.⁵⁴ Second, it aims **to help businesses conduct the self-assessment of their vertical agreements**,⁵⁵ thereby reducing costs.

Exempting certain vertical agreements from the prohibition of Article 101(1) of the Treaty also contributes in the long-term to the promotion of effective competition and economic efficiency. As recognised in the VBER itself *"certain types of vertical agreements can improve economic efficiency within a chain of production or distribution by facilitating better coordination between the participating undertakings. In particular, they can lead to a reduction in the transaction and distribution costs of the parties and to an optimisation of their sales and investment levels"*.⁵⁶ This needs to be seen in light of the objective of Article 101 of the Treaty,⁵⁷ which, according to the Vertical Guidelines is *"to ensure that undertakings do not use agreements – in this context, vertical agreements – to restrict competition on the market to the detriment of consumers. Assessing vertical restraints is also important in the context of the wider objective of achieving an integrated internal market. Market integration enhances competition in the European Union."*⁵⁸

⁵⁴ Empowerment Regulation of 1965, recital 3.

⁵⁵ Vertical Guidelines, paragraph 3.

⁵⁶ VBER, recital 6.

⁵⁷ See e.g. judgment of 18 April 1975 in Case 6/72, ECLI:EU:C:1973:22, *Europemballage Corporation and Continental Can Company v Commission*, paragraphs 25-26; judgment of 17 February 2011 in Case C-52/09, ECLI:EU:C:2011:83, *TeliaSonera Sverige*, paragraph 22; judgment of 27 March 2012 in Case C-209/10, ECLI:EU:C:2012:172, *Post Danmark A/S v Konkurrenserådet*, paragraphs 20-24 and judgment of 6 September 2017 in Case C-413/14 P, ECLI:EU:C:2017:632, *Intel Corp. Inc. v Commission*, paragraph 133. See also judgment of 6 October 2009 in cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, ECLI:EU:C:2009:610, *GlaxoSmithKline Services Unlimited v Commission*, paragraph 63, according to which Article 101 of the Treaty *"aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such"*.

⁵⁸ Vertical Guidelines, paragraph 7.

The specific objectives of the VBER, together with the Vertical Guidelines, are better understood in the context of the wider legal framework for applying Article 101 of the Treaty that was in place in 2010 (and remains in place today), as further explained below.

First, Council Regulation 1/2003 abolished the pre-notification of agreements to the Commission as established by the previous Council Regulation 17/62.⁵⁹ Businesses therefore can no longer notify their agreements to the Commission in order to benefit from immunity from fines. They have to self-assess the compliance of their agreements with Article 101 of the Treaty. In order to do this, businesses can rely on the existing case law of the Union courts, as well as on the enforcement practice of the Commission and the NCAs. However, the assessments in such judgments and decisions are case-specific and cannot always be directly applied to other markets and different practices. Consequently, irrespective of their precedent value, they provide a limited degree of legal certainty to businesses. In the absence of broader guidance drafted in more general terms, self-assessing agreements can create a significant burden, especially for SMEs, which may lack the necessary resources and/or legal expertise. There was therefore a need to provide greater legal certainty and more guidance for businesses that enter into vertical agreements to assist them with their self-assessment. This was also in line with Article 103(2)(b) of the Treaty, which provides that the Council, in laying down rules for the application of Article 101(3) of the Treaty, should aim to simplify administration to the greatest possible extent.

Second, the Commission is empowered to adopt block exemptions, especially as regards vertical agreements, by the Empowerment Regulation of 1965. This empowerment, however, is necessarily limited to those agreements falling within Article 101(1) of the Treaty for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty.⁶⁰ In providing additional legal certainty and guidance through a block exemption, the Commission therefore has to take a cautious approach when setting out the conditions which must be met for an agreement to be exempted or not, especially in order to avoid exempting agreements for which it cannot be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty. The latter would constitute a "false positive", which would not be in line with the Treaty and the requirements of the Empowerment Regulation of 1965. In particular, the Commission takes account of the market power of the parties to the agreement, since the likelihood that *"efficiency-enhancing effects will outweigh any anti-competitive effects due to restrictions contained in vertical agreements depends on the degree of market power of the parties to the agreement"*.⁶¹ The Commission also defines certain types of severe restrictions of competition (hardcore restrictions), which, if present in an agreement, remove the benefit of the exemption for the entire agreement, since in these cases there cannot be sufficient certainty that the agreement satisfies the conditions of

⁵⁹ Council Regulation (EEC) No 17, First Regulation implementing Articles 85 and 86 of the Treaty, OJ 13, 21.2.1962, p. 204.

⁶⁰ Empowerment Regulation of 1965, recital 12 and VBER, recital 5.

⁶¹ VBER, recital 7.

Article 101(3) of the Treaty.⁶² In line with that provision, the conditions set by the VBER should normally ensure that the agreements to which it applies "*do not enable the participating undertakings to eliminate competition in respect of a substantial part of the products in question*".⁶³ At the same time, the Commission also strives to avoid not exempting an agreement for which it can be assumed with sufficient certainty that it satisfies the conditions of Article 101(3) of the Treaty ("false negatives"), as such a situation would increase the burden for businesses when self-assessing the compliance of their agreements with Article 101(3) of the Treaty.

Third, Council Regulation 1/2003 also decentralised the application of Article 101(3) of the Treaty by empowering national competition authorities and national courts to apply both Article 101(1) and Article 101(3) of the Treaty, which in the past was a prerogative of the Commission only. This decentralised enforcement system created a need to provide a common framework of assessment for the national competition authorities and national courts, in order to ensure that businesses operating across the EU could benefit from a level playing field.⁶⁴

It follows from the foregoing that the VBER, together with the Vertical Guidelines, has the following three specific objectives:

- (1) The VBER, together with the Vertical Guidelines, aims to **provide legal certainty** to stakeholders as to which vertical agreements can be considered compliant with Article 101 of the Treaty on the basis of a simpler set of rules and which agreements require an extended individual assessment, thereby making it easier for stakeholders to perform the self-assessment required by the wider legal framework.
- (2) In line with the Empowerment Regulation of 1965, the VBER aims to identify the conditions that vertical agreements need to meet in order to benefit from the block exemption (such as market share thresholds or the absence of hardcore restrictions) in a way that **reduces the risk of "false positives"** (i.e. exempting an agreement for which it cannot be assumed with sufficient certainty that it satisfies the conditions of Article 101(3) of the Treaty). At the same time, in view of the general objective of the intervention, which is to facilitate the enforcement work of the relevant authorities and to help businesses conduct the self-assessment of their vertical agreements, the VBER also aims to **reduce the risk of "false negatives"** (i.e. not exempting an agreement for which it can be assumed with sufficient certainty that it satisfies the conditions of Article 101(3) of the Treaty). The latter is however of lesser importance than the avoidance of "false positives", since "false negatives" do not result in a

⁶² Empowerment Regulation of 1965, recital 9. See also paragraph 46 of the Article 81(3) Guidelines, which explains that severe restrictions of competition are unlikely to fulfil the conditions of Article 101(3) of the Treaty. Agreements of this nature generally fail (at least) the two first conditions of Article 101(3) of the Treaty. Moreover, these types of agreements generally also fail the indispensability test under the third condition.

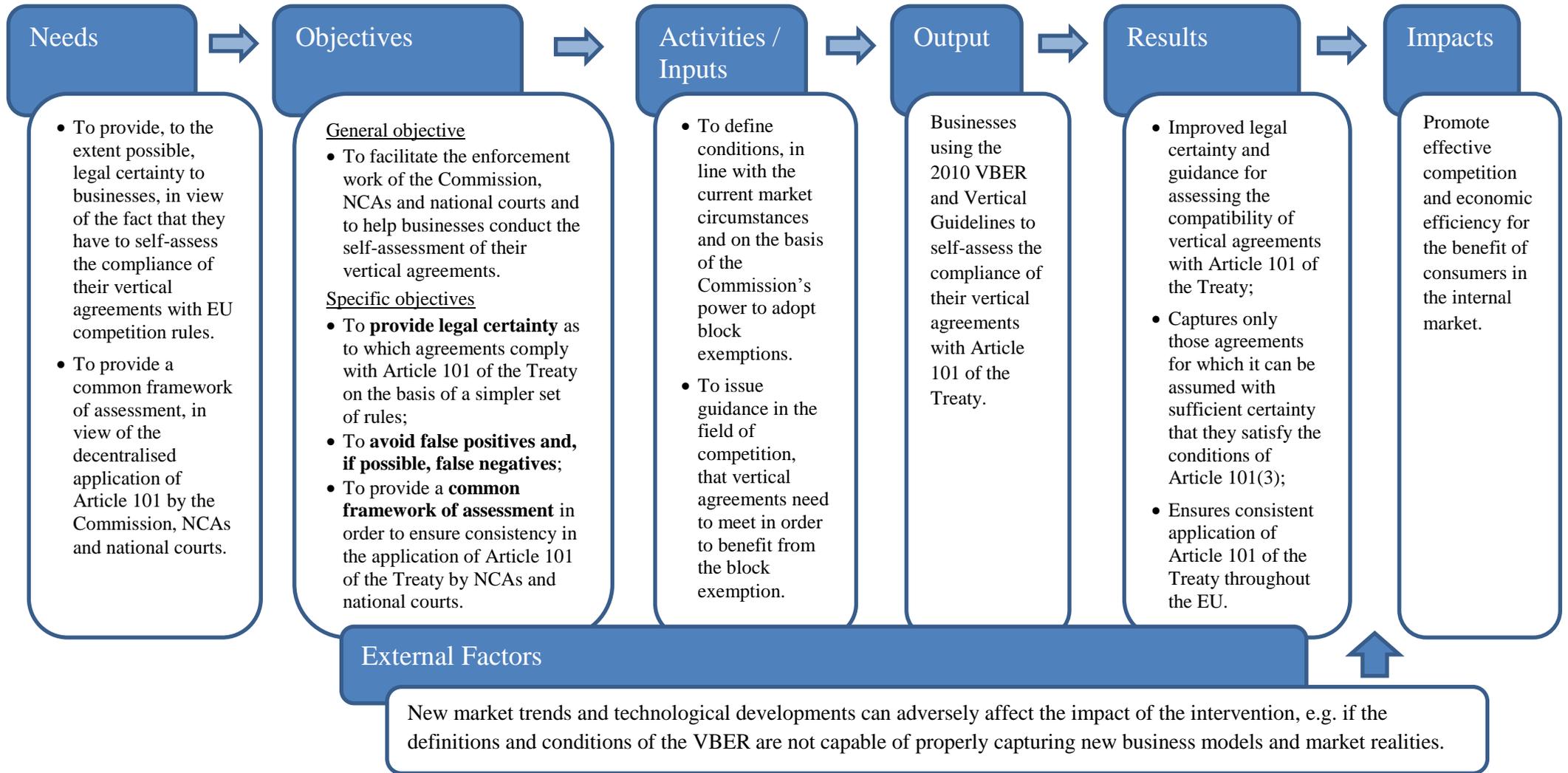
⁶³ VBER, recital 12.

⁶⁴ The Empowerment Regulation of 1965, recital 8, also recalls that the Commission shall exercise its powers "*in close and constant liaison with the competent authorities of the Member States*".

situation that would be in breach of the Treaty and the Empowerment Regulation of 1965.

- (3) The VBER, together with the Vertical Guidelines, also aims to provide **a common framework of assessment for national competition authorities and national courts, in order to ensure consistency in the application of Article 101 of the Treaty**. NCAs and national courts are bound by the directly applicable provisions of the VBER. The Vertical Guidelines do not bind the NCAs or national courts, but they are – as emerged from the public consultation for the purposes of this evaluation – typically taken into account when assessing the compatibility of vertical agreements with Article 101 of the Treaty.

FIGURE 1 : INTERVENTION LOGIC FOR THE VBER, TOGETHER WITH THE VERTICAL GUIDELINES



2.4. Evaluation baseline

The main point of comparison for the evaluation is the hypothetical situation of not having a VBER and Vertical Guidelines in place.⁶⁵ The evaluation therefore looks at the functioning of the VBER, together with the Vertical Guidelines, as compared to a situation in which the assessment of whether vertical agreements comply with Article 101 of the Treaty would have to be done only in light of other Commission guidance, relevant case law at EU and national level, as well as the enforcement practice of the Commission and the national competition authorities.

The baseline for comparison, however, depends on the evaluation criteria and related evaluation questions to be assessed.

The effectiveness analysis looks at whether the objectives of the VBER, together with the Vertical Guidelines, have been met, and hence looks at what has been the impact of the initiative compared to a situation without it. At the same time, the analysis looks at whether there is still room for improvement in meeting the objectives.

The efficiency analysis compares the actual situation with the hypothetical situation of not having a VBER and Vertical Guidelines in place, in order to determine what are the costs it entails, whether these are proportionate to the benefits it brings and whether the costs of ensuring compliance of vertical agreements with Article 101 of the Treaty would increase in the absence of the VBER and the Vertical Guidelines. However, the efficiency analysis also compares the current situation with the situation before the intervention (i.e. when the 1999 VBER and the 2000 Vertical Guidelines were in place), in order to determine whether the current rules have increased costs for stakeholders.

3. EVALUATION QUESTIONS

This evaluation assesses the VBER and the Vertical Guidelines against the five Better Regulation criteria, namely effectiveness (see section 3.1 below), efficiency (see section 3.2 below), relevance (see section 3.3 below), coherence (see section 3.4 below) and EU added value (see section 3.5 below), using the specific evaluation questions for each of them.

3.1. Effectiveness

1. What is the level of legal certainty that the VBER, together with the Vertical Guidelines, provides for assessing whether vertical agreements and/or specific clauses/restrictions are exempted from the application of Article 101 of the Treaty and thus compliant with this provision?

⁶⁵ This point of comparison is hypothetical as prior to the adoption of the 2010 VBER and Vertical Guidelines, the 1999 VBER and the 2000 Vertical Guidelines were in place.

2. To what extent do the conditions currently defined in the VBER, as interpreted in the Vertical Guidelines, meet the objective of exempting 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?
3. To what extent does the VBER, together with the Vertical Guidelines, provide a common framework for the assessment of the compliance of vertical agreements with Article 101 of the Treaty in order to ensure a consistent application of Article 101 of the Treaty by national competition authorities and national courts to vertical agreements?

3.2. Efficiency

4. Are the costs for assessing whether the VBER, together with the Vertical Guidelines, is applicable to certain vertical agreements proportionate to the benefits that the VBER, together with the Vertical Guidelines, brings for stakeholders?
5. Is there scope for further simplification and cost reduction?
6. Would the costs of ensuring compliance of vertical agreements with Article 101 of the Treaty increase if the VBER were not renewed?
7. Have the costs generated by the application of the VBER, together with the Vertical Guidelines, increased as compared to the 1999 VBER and the 2000 Vertical Guidelines?

3.3. Relevance

8. How well do the objectives of the VBER, together with the Vertical Guidelines (i.e. to provide legal certainty for assessing whether vertical agreements comply with Article 101 of the Treaty, to properly capture under the block exemption those vertical agreements that can be considered with sufficient certainty as efficiency-enhancing and to provide a common framework to ensure a consistent application by national competition authorities and national courts of the vertical rules across the EU) still correspond to the needs?

3.4. Coherence

9. Is the VBER, together with the Vertical Guidelines, coherent with other Commission instruments that provide guidance on the interpretation of Article 101 of the Treaty and with other EU legislation with relevance for vertical supply and distribution agreements?

3.5. EU added value

10. Does the VBER, together with the Vertical Guidelines, as an intervention at EU level, add value in the assessment of the compatibility of vertical agreements with Article 101 of the Treaty?

4. METHODOLOGY

The evaluation assessed the functioning of the VBER, together with the Vertical Guidelines, both from a general perspective taking into account the intervention as a whole and more specifically with regard to the conditions set out in the VBER, together with the guidance provided thereon in the Vertical Guidelines.

This section is structured as follows: Section 4.1 identifies the sources used for evaluating the functioning of the VBER, together with the Vertical Guidelines. Section 4.2 describes how the evidence gathered from various sources was processed. Section 4.3 explains the limitations of the analysis carried out on this basis and the extent to which they could be addressed in the evaluation.

4.1. Description and use of the sources

During the evaluation phase, the Commission gathered evidence on the functioning of the VBER, together with the Vertical Guidelines, from various sources. These included a public consultation (see section 4.1.1. below), a targeted NCA consultation (see section 4.1.2 below), a stakeholder workshop (see section 4.1.3 below), an evaluation support study (see section 4.1.4 below), spontaneous stakeholder submissions (see section 4.1.5 below) and evidence gathered through other Commission initiatives (see section 4.1.6 below).

4.1.1. Public consultation

Between 4 February 2019 and 27 May 2019, the Commission carried out a public consultation to gather stakeholder views on the functioning of the VBER, together with the Vertical Guidelines. The public consultation aimed to gather qualitative and quantitative evidence on all five evaluation criteria (i.e. effectiveness, efficiency, relevance, coherence and EU added value).

The public consultation generated 164 contributions submitted through the online questionnaire and 13 position papers submitted outside the online tool. The contributions came from a variety of stakeholders, in particular business associations and companies/business organisations with international or national reach from several EU Member States, representing different levels of the supply chain (e.g. manufacturers, online distributors and retailers). The summary report of the contributions to the public consultation was published on the Better Regulation Portal⁶⁶ and the dedicated VBER review webpage on DG Competition's website⁶⁷ on 30 July 2019. The summary report is also part of the synopsis report provided in Annex 2 to the Staff Working Document.

⁶⁶ See <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1936-Evaluation-of-the-Vertical-Block-Exemption-Regulation/public-consultation>.

⁶⁷ See section 1 titled "*Results of the public consultation*" at https://ec.europa.eu/competition/consultations/2018_vber/index_en.html.

4.1.2. Targeted consultation of national competition authorities

During the evaluation phase, the Commission conducted a targeted consultation of NCAs, which was based on the same questionnaire as the one used in the public consultation. The Commission received 20 contributions, including one coming from one of the EFTA States. The information provided by NCAs contributed to the assessment of all five evaluation criteria. A summary report of the targeted NCA consultation was published on the dedicated VBER review webpage on DG Competition's website⁶⁸ on 13 December 2019. It is also part of the synopsis report provided in Annex 2 to the Staff Working Document.

4.1.3. Stakeholder workshop

On 14 November 2019 (afternoon) and 15 November 2019 (full day), the Commission carried out a stakeholder workshop to gather additional evidence about the functioning of the VBER, together with the Vertical Guidelines. Building on the outcome of the public consultation, the objective of the workshop was to deepen the discussion on the issues that stakeholders considered not to be functioning well in the current framework and that, in their view, would deserve re-thinking to ensure that the rules remain relevant for the coming years. Considering that the enforcement of EU competition law is driven by the consumer welfare objective, defined as including all relevant parameters of competition (e.g. price, output, quality, choice and innovation), the workshop was intended to focus on how consumers are impacted by the identified shortcomings.

Participation in the workshop was limited to stakeholders who had contributed to the public consultation and consumer associations. Approximately 150 participants from companies and business associations representing a variety of sectors attended the workshop. The information resulting from these discussions contributed to the assessment of the evaluation criteria of effectiveness and relevance. A summary report of the stakeholder workshop was published on the dedicated VBER review webpage on DG Competition's website⁶⁹ on 5 February 2020. It is also part of the synopsis report provided in Annex 2 to the Staff Working Document.

4.1.4. External evaluation support study

The Commission commissioned an external evaluation support study ("evaluation study") in order to carry out an independent evaluation of the functioning of the VBER, together with the Vertical Guidelines, with a particular focus on the evaluation criteria of effectiveness, efficiency and relevance.

The purpose of the evaluation study was to gather qualitative and quantitative information on the basis of nine tasks. These included (i) four stakeholder surveys aimed

⁶⁸ See section 3 titled "*Contributions of the NCAs to the evaluation of the VBER and the VGL*" at https://ec.europa.eu/competition/consultations/2018_vber/index_en.html.

⁶⁹ See section 4 titled "*Stakeholder workshop*" at https://ec.europa.eu/competition/consultations/2018_vber/index_en.html.

to collect evidence on specific restrictions in Germany, France, Italy, Sweden, Poland and Hungary mainly from stakeholders that had not participated in the public consultation and (ii) a consumer survey aimed to collect evidence on the purchasing behaviour of European consumers, notably with regard to the interaction between online and offline channels. The consumer survey was based on the same set of Member States used for the stakeholder surveys and covered 2.500 consumers per Member State, thus resulting in a total of 15.000 consumer interviews.

The final study report was submitted to the Commission on 3 April 2020 and published on the dedicated VBER review webpage on DG Competition's website⁷⁰ on 25 May 2020. The final consumer survey report was submitted to the Commission on 27 April 2020 and published, together with the final study report, on the dedicated VBER review webpage on DG Competition's website⁷¹ on 25 May 2020.

4.1.5. Spontaneous stakeholder submissions

In the course of the evaluation, the Commission received several spontaneous submissions from stakeholders who had either not participated in the public consultation or wanted to supplement their contribution to the public consultation with additional evidence. These included studies carried out by stakeholders to provide the Commission with additional evidence. All such submissions were published on the dedicated VBER review webpage on DG Competition's website,⁷² except for a few for which stakeholders had asked the Commission not to publish for confidentiality reasons. The Commission used the latter to enhance its understanding of a particular stakeholder position but did not rely on the information contained therein for any of the conclusions in the Staff Working Document.

4.1.6. Evidence gathered through other Commission initiatives

On 6 May 2015, the Commission launched a sector inquiry into the electronic commerce of consumer goods and digital content in the EU ("e-commerce sector inquiry"). The e-commerce sector inquiry allowed the Commission to obtain an overview of the prevailing market trends and gather evidence on barriers to competition in e-commerce. It also allowed the Commission to understand the prevalence of certain business practices and their underlying rationale. The results of the e-commerce sector inquiry were published in the form of a final report and an accompanying Staff Working Document on the website of DG Competition⁷³ on 10 May 2017.

⁷⁰ See section 5 titled "*Evaluation support study*" at https://ec.europa.eu/competition/consultations/2018_vber/index_en.html.

⁷¹ See section 5 titled "*Evaluation support study*" at https://ec.europa.eu/competition/consultations/2018_vber/index_en.html.

⁷² See section 2 titled "*Contributions outside the public consultation*" at https://ec.europa.eu/competition/consultations/2018_vber/index_en.html.

⁷³ See https://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html.

Despite the scope of the VBER being broader than the scope of the e-commerce sector inquiry, the evidence gathered in the context of the latter is relevant for this evaluation and notably for the assessment of the evaluation criteria of effectiveness and relevance.

Moreover, in recent years, the Commission has enforced the EU competition rules in relation to vertical restrictions in a number of cases. The Commission's enforcement practice with regard to vertical restrictions is relevant for the assessment of the evaluation criteria of effectiveness, relevance and coherence and is described in more detail in section 5.1.3 below.

In addition, in April 2018, following the judgment of the European Court of Justice ("CJEU") in the *Coty* case,⁷⁴ a Competition policy brief on the application of the EU competition rules to marketplace bans ("policy brief") was issued.⁷⁵ The case concerned a contractual restriction included in a selective distribution agreement between Coty Germany GmbH ("Coty"), which is one of Germany's leading suppliers of luxury cosmetics, and one of its distributors, Parfümerie Akzente GmbH ("Parfümerie Akzente"). The marketplace ban introduced by Coty aimed to prohibit Parfümerie Akzente from distributing its products on "Amazon.de" through Amazon's marketplace, which enables third-party sellers such as Parfümerie Akzente to sell products alongside Amazon's offerings.

Against this background, the policy brief provides a common point of reference to stakeholders in the Member States on how to apply Article 101 of the Treaty to a prohibition by a supplier on the use of third-party marketplaces by its distributors.

4.2. Processing and triangulating of the evidence collected

For the purposes of the evaluation of the VBER, together with the Vertical Guidelines, evidence from the various sources had to be analysed and triangulated.

The main sources of the evidence used to inform the assessment of each evaluation criterion are listed in the table below. A further breakdown of this table, which includes the evaluation questions for each criterion and a more detailed reference to the sources used, is provided in the evaluation matrix contained in Annex 3 to the Staff Working Document.

⁷⁴ Judgment of 6 December 2017 in Case C-230/16, EU:C:2017:941, *Coty Germany GmbH v Parfümerie Akzente GmbH*.

⁷⁵ See <https://ec.europa.eu/competition/publications/cpb/2018/kdak18001enn.pdf>.

Sources	Public consultation (including spontaneous submissions)	Targeted NCA consultation	Stakeholder workshop	Study	Other Commission initiatives
Criteria					
Effectiveness	✓	✓	✓	✓	✓
Efficiency	✓	✓		✓	
Relevance	✓	✓	✓	✓	✓
Coherence	✓	✓			✓
EU added value	✓	✓			

In line with the general objective of the VBER, the evidence-gathering carried out by the Commission focused primarily on the views of other agencies enforcing EU competition law (i.e. NCAs) and businesses having to self-assess the compliance of their vertical agreements with Article 101 of the Treaty. Through the targeted consultation and some of the tasks of the evaluation study, the Commission collected the views of NCAs, which were complemented with the Commission’s own experience in this area and additional research performed by the contractor. Through the public consultation, the stakeholder workshop and some of the tasks of the evaluation study, the Commission collected mainly the views of businesses, business associations and law firms advising businesses in this area of law. In this context, the evaluation took due account of the fact that the views of businesses operating at different levels of the supply chain (i.e. supply, wholesale or retail level) and distributors relying on different channels of distribution (i.e. brick-and-mortar or online) may differ with regard to a number of aspects of the rules.

For the assessment of each evaluation criterion, the Commission proceeded as follows:

The assessment started with the results of the **public consultation**. An in-depth analysis of the feedback resulted in a preliminary but comprehensive understanding of the main issues faced by stakeholders as regards the functioning of the current rules. It allowed the Commission to establish the issues on which stakeholders held common positions, as well as the issues on which their positions diverged. The assessment of the specific issues raised was done based on (i) the examples and the level of detail provided by stakeholders to support their concerns with concrete evidence, (ii) the variety of different positions and (iii) the extent to which different types or groups of stakeholders shared the same view.

The **stakeholder workshop** provided additional input, which helped, first, to deepen the understanding of the issues raised in response to the public consultation and, second, to preliminarily evaluate not only their impact on stakeholders but also on consumers. During the workshop, stakeholders were able to decide freely on the topics for discussion. In particular, stakeholders were therefore able to elaborate on the views already expressed in the public consultation by, for instance, providing examples of specific issues and explaining how those issues impacted stakeholders and consumers. Despite having the possibility to propose new topics, stakeholders did not raise any new issues.

The combined results of the public consultation and the stakeholder workshop provided the stakeholders' perspective on the effectiveness, efficiency, relevance, coherence and EU added value of the VBER, together with the Vertical Guidelines.

The **targeted consultation of the national competition authorities** aimed to gather their perspective on the five evaluation criteria. It provided a significant amount of evidence on the challenges faced by NCAs in applying the VBER and considering the Vertical Guidelines, as well as their views on a number of specific issues with the current rules.

The evidence of the public consultation and the stakeholder workshop were compared to and contrasted with the evidence resulting from the targeted consultation of the NCAs. The combination of these sources resulted in a more complete and balanced understanding of the areas where the VBER, together with the Vertical Guidelines, has not been functioning well, or not functioning as well as it could.

On this basis, the **evaluation study** was designed to (i) enrich the list of issues raised by expanding the number of stakeholders interviewed, (ii) further deepen and/or add a different perspective on issues that were already identified (with the aim of correcting for potential biases that might have been present in the evidence collected previously), as well as (iii) expand and complement the results of the e-commerce sector inquiry on the main market trends since the adoption of the VBER in 2010.

4.3. Limitations of the analysis

The analysis of the different evaluation criteria, including the methodology applied and the evidence sources used for that purpose, is subject to the following limitations: the difficulty of gathering evidence on VBER related costs and benefits (see section 4.3.1 below), a certain lack of representativeness of stakeholder feedback (see section 4.3.2 below) and a lack of information about consumer views (see section 4.3.3 below). Each of the sections describes the nature of the limitation and the extent to which it was possible to address it in the evaluation.

4.3.1. Evidence on VBER related costs and benefits

As regards the evaluation criterion of efficiency, it proved difficult to collect quantitative evidence on the costs of applying the VBER, together with the Vertical Guidelines. This is mainly due to the fact that businesses appear to assess the costs they incur to ensure

compliance of their business operations with EU competition law at a general level. Businesses therefore do not appear to distinguish between the type of agreement concerned or the instrument relied on for the purposes of their self-assessment (e.g. VBER or the Vertical Guidelines).

The difficulty of gathering cost related evidence is reflected in the low response rate of stakeholders to the public consultation with regard to the questions aimed at gathering best efforts estimates of VBER related compliance costs. Only two companies out of the total of 164 respondents provided an estimate of their compliance costs, with the two estimates however differing to a significant extent. Nor were the NCAs able to quantify the costs that the application of the VBER, together with the Vertical Guidelines, created for them.

In the same way, it proved difficult to obtain quantitative evidence on the balance between the benefits and the costs of applying the VBER, together with the Vertical Guidelines. Businesses only provided qualitative evidence in reply to the question in the public consultation relating to this issue, which reflects the difficulty for businesses to properly estimate this parameter. The same applies to the NCAs.

To overcome this limitation, the study aimed to gather additional evidence about VBER related costs and benefits on the basis of ten case studies in the form of interviews conducted by phone, e-mail or in person. The interviewed respondents were law firms advising clients on vertical restrictions, industry associations, a manufacturer of construction equipment who operates globally, and a professor of competition law. As reported in the study, none of the respondents could provide any specific figures concerning the costs in question but all of them provided a qualitative assessment.

The lack of quantitative data in relation to both these issues made it difficult to provide a robust quantitative assessment of the efficiency of the VBER, together with the Vertical Guidelines. The conclusions drawn in section 5.2.2 below therefore essentially rely on the qualitative evidence provided by stakeholders in response to the public consultation and in the context of the evaluation study.

4.3.2. Representativeness of stakeholder feedback

Evaluation activities subject to voluntary participation, by definition, do not necessarily lead to representative results. In this evaluation, this applies to the public consultation and the stakeholder workshop, which was conceived as a follow-up to the public consultation and therefore mirrored participation in the public consultation. While the Commission received contributions from a large variety of stakeholder groups, some of them accounted for a higher share of responses than others. However, this did not have any meaningful impact on the results of the evaluation since the areas identified by stakeholders as either functioning well or not functioning well did not differ to an appreciable extent within a particular stakeholder group. This means that a more limited participation of some stakeholder groups did not result in a less complete overview of the views of those stakeholder groups on the functioning of the VBER, together with the Vertical Guidelines.

Moreover, the study aimed at reducing any potential bias within each stakeholder group to the detriment of micro and small stakeholders who may not have had the resources to participate in the public consultation or the stakeholder workshop. Corrective measures included increasing the sample size, simplifying the questionnaires for the consumer surveys and reaching out specifically to micro and small stakeholders.

In the assessment set out in section 5.2 below, reference is made to specific stakeholder groups whenever the views reported were shared primarily by one or more different stakeholder groups. While indicative of a trend, the fact that a view was broadly shared by all or only some of the stakeholder groups, does not however mean that the evaluation disregards diverging views, both within the same or across different stakeholder groups/sectors. This is also reflected in Annex 4 to this Staff Working Document, which presents the different views and issues raised by stakeholders per area of the rules, regardless of whether they were supported by a large or small number of stakeholders. These views will be taken into account in any next steps following the evaluation.

4.3.3. Limited evidence about consumer views

Consumers and consumer associations only made a limited contribution to this evaluation, most likely for the following reasons.

First, the VBER, together with the Vertical Guidelines, is a technical piece of legislation, which is primarily aimed at providing guidance to businesses self-assessing compliance of their vertical agreements with EU competition law. Consumers and consumer associations may therefore be neither aware of its existence, nor familiar with its functioning.

Second, despite having an impact on the prices at which consumers buy products and services and the choice of products and services available to them, consumers are neither a party to the vertical agreements entered into between businesses active in the supply chain of goods and services, nor privy to the conditions stipulated in such agreements. They are therefore not able to link the purchase conditions they are exposed to in retail markets to a particular malfunctioning of the vertical supply chain or even less to the safe harbour created by the VBER.

The aforementioned reasons explain the limited participation of consumers and consumer associations, despite the Commission having actively reached out to many of them to solicit their participation notably in the workshop, and why it did not have any meaningful impact on the results of the evaluation.

5. ANALYSIS AND ANSWERS TO THE EVALUATION QUESTIONS

This section presents the assessment of the VBER, together with the Vertical Guidelines, based on the five evaluation criteria (effectiveness, efficiency, relevance, coherence and EU added value).

This section is structured as follows: Section 5.1 describes the main market developments that occurred during the period under evaluation. Section 5.2 answers the evaluation questions set out in section 3 above for the VBER, together with the Vertical

Guidelines, as a whole. Section 5.3 sets out the areas for which the evaluation has shown that the VBER, together with the Vertical Guidelines, is not functioning well or not functioning as well as it could, including the underlying reasons.

5.1. Market developments since the adoption of the VBER

Since the adoption of the VBER, together with the Vertical Guidelines, in 2010, there have been a number of market developments affecting the supply and distribution of goods and services, which are in particular linked to the increasing digitalisation of the economy.

The Digital Single Market strategy adopted in 2015 recognised that the global economy was rapidly becoming more digitalised and outlined several key actions under three pillars, by means of which the Commission envisaged to create a Digital Single Market.⁷⁶ One of these pillars related to ensuring better access for consumers and businesses to goods and services via e-commerce across the EU. In addition to a number of legislative initiatives under this pillar, the Commission decided to launch a sector inquiry in May 2015 into e-commerce in consumer goods and digital content in the EU. The e-commerce sector inquiry allowed the Commission to obtain an overview of market trends and gather evidence on barriers to competition in e-commerce. It also allowed the Commission to understand the prevalence of certain business practices and their rationale, and ultimately to identify priorities for enforcing the EU competition rules. The results of the e-commerce sector inquiry, which cover the period from 2005 to 2015, are summarised in section 5.1.1 below.

As part of the evaluation of the VBER, together with the Vertical Guidelines, the Commission commissioned an evaluation study in order to, among other things, understand how markets have evolved since the e-commerce sector inquiry, as well as to cover other sectors and offline trade, thus complementing the findings of the e-commerce sector inquiry. The relevant results of the evaluation study are summarised in section 5.1.2 below.

In addition, and in part as a follow-up to the e-commerce sector inquiry, the Commission took enforcement action against a number of anti-competitive vertical agreements, with a particular focus on business practices that have evolved or become widespread as a result of increased e-commerce during the last decade. An overview of relevant cases is provided in section 5.1.3 below.

Enforcement action against vertical restrictions was also taken at national level. Between 1 June 2010 and 1 January 2020, NCAs reported 391 cases concerning vertical agreements. Moreover, six NCAs also issued guidance related to vertical restrictions. An overview of national cases and policy initiatives is provided in section 5.1.4 below.

⁷⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "A Digital Single Market Strategy for Europe", COM(2015) 192 final.

It should also be noted that during the last years there have been increasing discussions about the compatibility of sustainability agreements with Article 101 of the Treaty. Given that no specific issue in relation to sustainability agreements in the vertical supply chain was identified during the evaluation, this development is not reflected in the Staff Working Document. However, in line with the objectives of the European Green Deal,⁷⁷ which is one of the priorities for this Commission mandate and which aims to make the EU's economy sustainable by turning climate and environmental challenges into opportunities across all policy areas, any related issues may be taken into account when considering next steps.

5.1.1. The main findings of the e-commerce sector inquiry

The final report of the e-commerce sector inquiry was published in May 2017.⁷⁸ The results of the sector inquiry, which cover the period from 2005 to 2015, confirmed that the growth of e-commerce over the preceding decade and in particular the increase in price transparency and thus price competition with regard to **consumer goods sold in an online environment** had a significant impact on businesses' distribution strategies and consumer behaviour.

First, price transparency increased with online trade, since consumers are able to instantaneously obtain and compare product and price information online and to switch swiftly from one channel to another (i.e. from online to offline and vice versa). While this allows consumers to find the best deal, it may also result in free-riding behaviour, since consumers can use pre-sale services provided by brick-and-mortar shops before purchasing the product online (i.e. free-riding on offline services that are not provided online) or search for and compare products online before purchasing in brick-and-mortar shops (i.e. free-riding on online services that are not provided offline).

Second, the ability to compare the prices of goods and services across online retailers leads to increased price competition affecting both online and offline sales. While such increased price competition has beneficial effects for consumers, it may affect competition on parameters other than price, such as quality, brand and innovation.

Third, increased price transparency allows businesses to monitor more easily the prices at which their goods or services are distributed and the prices of competitors. Due to the increasing availability of automated pricing software, detecting low-price offers takes a matter of seconds and manufacturers are increasingly able to monitor and influence

⁷⁷ See https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en. The "Farm to Fork Strategy" is one of the actions launched by the Commission in order to achieve the objectives of the European Green Deal in the agriculture sector. For further information, see: https://ec.europa.eu/food/farm2fork_en#:~:text=The%20Farm%20to%20Fork%20Strategy%20is%20at%20the%20heart%20of,%2C%20healthy%20and%20environmentally%2Dfriendly.&text=The%20Farm%20to%20Fork%20Strategy%20aims%20to%20accelerate%20our%20transition,neutral%20or%20positive%20environmental%20impact.

⁷⁸ For further background, see section 4.1.6 above.

retailers' price setting. The availability of real-time pricing information may also lead to automated price coordination.

Fourth, alternative online distribution models such as online marketplaces have made it easier for retailers to access customers. By using these third-party platforms, small retailers may, with limited investments and effort, become visible to potential customers and sell products to a large customer base and in multiple Member States. This may however clash with the distribution and brand strategies of manufacturers, in particular where they perceive sales through online marketplaces as potentially harmful for their business (e.g. because they consider that the image of their brand is not protected or the level of service is not sufficient).

These market developments have significantly affected the distribution and pricing strategies of both manufacturers and retailers. As a reaction to notably the increased price transparency and price competition, manufacturers have sought greater control over their distribution networks, with a view to better controlling price and quality. To that end, manufacturers have started implementing in particular the following strategies:

- A large proportion of manufacturers have started to sell their products directly to consumers through their own online retail shops, thereby competing increasingly with their distributors.
- Manufacturers have made increasing use of selective distribution systems, under which products and services can only be sold by pre-selected and explicitly authorised resellers, thus allowing manufacturers to better control their distribution networks, in particular in terms of the quality of distribution but also price.
- Manufacturers have made increasing use of contractual restrictions to better control the distribution of goods. Depending on the manufacturer's business model and strategy, such restrictions may take various forms such as pricing restrictions, marketplace (platform) bans, restrictions on the use of price comparison tools and the exclusion of pure online players from distribution networks.

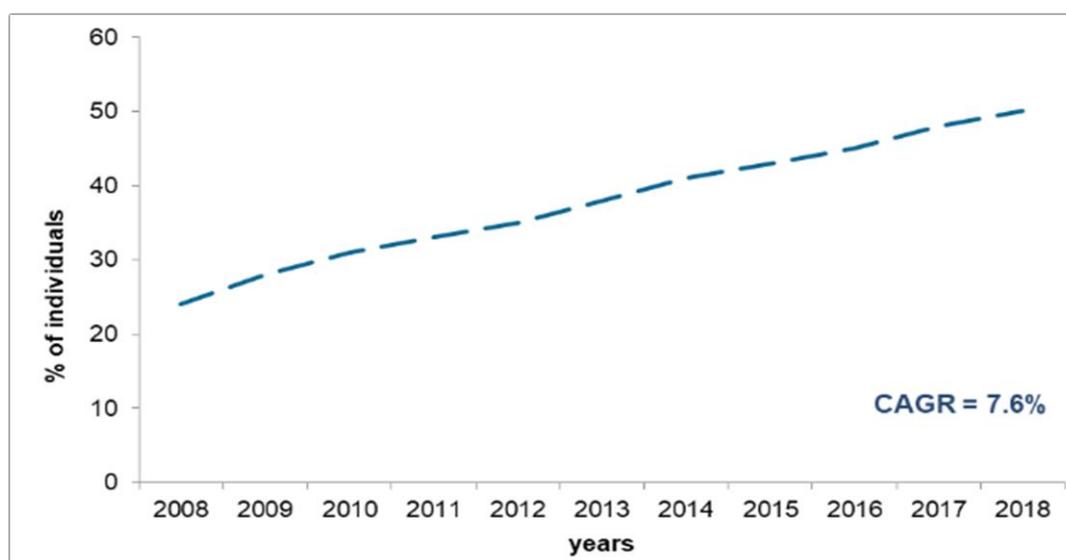
As regards **digital content**, the results of the e-commerce sector inquiry indicated that online transmission (i.e. the possibility for consumers to access digital content online) has changed the way in which digital content is accessed and consumed. The results also confirmed that the availability of licences from content copyright holders is essential for digital content providers and a key factor determining the level of competition in the market. The results also pointed to certain licensing practices that may make it more difficult for new online business models and services to emerge. One of the key findings of the e-commerce sector inquiry in this regard was that almost 60% of digital content providers who participated in the inquiry contractually agreed with right holders to geo-block access to their content, thus preventing consumers from accessing digital content available online in other EU Member States.

5.1.2. The main findings of the evaluation study

The evaluation study aimed, among other things, to complement the findings of the e-commerce sector inquiry and gather relevant information for other sectors, given that the VBER, together with the Vertical Guidelines, applies not only to online sales of consumer goods and digital content, but also to supply and distribution agreements in other areas of the economy, both online and offline. For that purpose, the evaluation study included a survey on the evolution of distribution models for various goods and services over the last ten years, complemented by three case studies about business models of online platforms. In addition, it included a survey of the purchasing behaviour of European consumers to gather information about consumer behaviour across the different stages of the consumer purchasing journey and notably how consumers interact with different sales channels, as well as the relative importance of these sales channels and possible free-riding issues between offline and online channels, different offline channels or different online channels.

First, the findings of the evaluation study show that, since the adoption of the VBER and the Vertical Guidelines, the development with the biggest impact on distribution models was the **growth of online sales and online marketplaces**. In fact, online purchasing is increasingly popular among consumers for a wide range of products. Overall, as depicted in Figure 2, the share of individuals purchasing online has increased by 100% since 2008.⁷⁹

FIGURE 2 : SHARE OF INDIVIDUALS PURCHASING ONLINE IN THE LAST 3 MONTHS – EU 28.



SOURCE : EVALUATION STUDY ANNEX IX

In most of the sectors under analysis, consumers can now purchase the desired products and services through a variety of different channels such as offline and online shops, marketplaces and other online platforms. As reported in the evaluation study, for the four

⁷⁹ See section 4.3.1 of the evaluation study.

categories of products selected for the survey of consumer purchasing behaviour, search engines, online marketplaces, and price comparison tools are particularly important for consumers who purchase online. At least one of these three channels was used by 35% of all consumers and 59% of the consumers who purchased online for cosmetics and hair care, by 39% of all consumers and 53% of the consumers who purchased online for clothing and shoes, by 60% of all consumers and 84% of the consumers who purchased online for house and garden equipment and by 68% of all consumers and 80% of the consumers who purchased online for consumer electronics and large electrical appliances.

FIGURE 3 : USE OF SEARCH ENGINES, ONLINE MARKETPLACES, AND PRICE COMPARISON TOOLS THROUGHOUT THE CUSTOMER JOURNEY – COSMETICS AND HAIR CARE

	Share of consumers using ... in at least one of the three phases of the customer journey (inspiration, information & evaluation, purchase)			
	Search engine	Price comparison tools	Online marketplaces	At least one of those channels (search engine, price comparison tool, online marketplace)
All consumers (online and offline purchases) (N=7959)	16%	8%	23%	35%
Consumers who purchased online (N=3971)	23%	13%	43%	59%

SOURCE: EVALUATION STUDY, TABLE 3-37

FIGURE 4 : USE OF SEARCH ENGINES, ONLINE MARKETPLACES, AND PRICE COMPARISON TOOLS THROUGHOUT THE CUSTOMER JOURNEY – CLOTHING AND SHOES

	Share of consumers using ... in at least one of the three phases of the customer journey (inspiration, information & evaluation, purchase)			
	Search engine	Price comparison tools	Online marketplaces	At least one of those channels (search engine, price comparison tool, online marketplace)
All consumers (online and offline purchases) (N=8136)	14%	8%	28%	39%
Consumers who purchased online (N=5370)	18%	10%	40%	53%

SOURCE: EVALUATION STUDY, TABLE 3-38

FIGURE 5 : USE OF SEARCH ENGINES, ONLINE MARKETPLACES, AND PRICE COMPARISON TOOLS THROUGHOUT THE CUSTOMER JOURNEY – HOUSE AND GARDEN EQUIPMENT

	Share of consumers using ... in at least one of the three phases of the customer journey (inspiration, information & evaluation, purchase)			
	Search engine	Price comparison tools	Online marketplaces	At least one of those channels (search engine, price comparison tool, online marketplace)
All consumers (online and offline purchases) (N=6497)	24%	16%	47%	60%
Consumers who purchased online (N=3786)	31%	21%	71%	84%

SOURCE: EVALUATION STUDY, TABLE 3-39

FIGURE 6 : USE OF SEARCH ENGINES, ONLINE MARKETPLACES, AND PRICE COMPARISON TOOLS THROUGHOUT THE CUSTOMER JOURNEY – CONSUMER ELECTRONICS AND LARGE ELECTRICAL APPLIANCES

	Share of consumers using ... in at least one of the three phases of the customer journey (inspiration, information & evaluation, purchase)			
	Search engine	Price comparison tools	Online marketplaces	At least one of those channels (search engine, price comparison tool, online marketplace)
All consumers (online and offline purchases) (N=6733)	28%	21%	50%	68%
Consumers who purchased online (N=4866)	31%	25%	63%	80%

SOURCE: EVALUATION STUDY, TABLE 3-40

The more complex the purchase, the greater appears to be the importance of these online channels. For purchases of cosmetics and hair care products or clothing items and shoes, the percentage of those who use the services offered by search engines, online marketplaces, and price comparison tools, including to obtain information on the best price, is lower than for purchases of house and garden equipment or consumer electronics and large electrical appliances.⁸⁰ The survey also found that while the price still has a

⁸⁰ See section 3.3.7 of the study on consumer purchasing behaviour in Europe. Consumers who purchased cosmetics and hair care products and checked for the best price most notably tended to use search engines (26%), online marketplaces (18%), or price comparison apps or websites (18%). Also, online and offline stores of retailers selling multiple brands are used by at least 15% and 14% of the consumers, respectively. Consumers who purchased clothing items and shoes and checked for the best price most notably tended to use search engines (25%) or online marketplaces (22%). Physical (brick-and-mortar) stores of retailers selling multiple brands were less widely mentioned by consumers as a channel used to check for the best prices, compared to consumers who bought cosmetics and hair care products. Consumers who purchased house and garden equipment and checked for the best price most notably tended to use search engines (34%), online marketplaces (25%), or price comparison apps or websites

strong impact on consumer decisions regardless of the product purchased, consumers also gather other types of information that are incorporated into the decision-making process (e.g. product information, brand and retailer information).⁸¹

The evaluation study also found that **today's consumer journey is a fluid omni-channel process** whereby consumers change easily (i) within the online channel (i.e. between online retailers and online platforms), (ii) between online and brick-and-mortar distributors, (iii) within the brick-and-mortar channel (i.e. between offline retailers) and (iv) between mono-brand and multi-brand retailers. Within such a context, consumers expect to have a continuous omni-channel experience. In response to this changing consumer behaviour and in order to meet consumer expectations, businesses seek to create a seamless omni-channel environment for consumers.⁸²

As regards online marketplaces, the findings of the evaluation study show that platform business models appear to be evolving over time. Overall, businesses pursue different diversification strategies, with the aim of redistributing risks and achieving positive economies of scale and synergies. Today, many platforms take on a dual role, acting as both an intermediary service provider and a retailer. For instance, Amazon and Zalando do not only grant third-party sellers access to their platforms by offering intermediary services in exchange for a commission, but also act as retailers selling products they source from suppliers, manufacturers or brands at wholesale level on the same platform in competition with the third-party sellers that use their platform. The selection of third-party sellers that will be permitted access can vary greatly depending on the way the platform is organised. For instance, in some marketplaces sellers (even those selling competing products) are admitted as long as they satisfy certain general conditions. In other marketplaces, it is more likely that platforms will select sellers whose products complement the existing basket of products available on the platform. Also platforms that only provide services follow the trend of diversifying their business model. For example, Uber is expanding its business model from offering rides for individuals and companies to also offering services such as food delivery or the rental of new means of mobility (such as eBikes). All these business models involve an increase in the number of contractual relationships, including an increased use of vertical agreements.

Second, the evaluation study also confirmed the **increased use of selective distribution systems** during the last ten years, which is in line with the results of the e-commerce sector inquiry. Selective distribution agreements are among the most common vertical agreements that can be found in the Member States analysed in the evaluation study. According to the interviewed manufacturers and retailers, this type of distribution model

(29%). Review pages also seem to play a role for this product category. Consumers who purchased consumer electronics and large electrical appliances and checked for the best price most notably tended to use search engines (36%), online marketplaces (30%), or price comparison apps or websites (29%). Review pages also seem to play a role for this product category.

⁸¹ See section 3.3.9 of the study on consumer purchasing behaviour in Europe.

⁸² See section 4.3.1 of the study on consumer purchasing behaviour in Europe.

is quite common in all countries and across a wide range of sectors, but it is most prevalent in the clothing, sporting goods, luxury goods, household appliances and cosmetics industries.

The economic literature identifies a number of possible pro-competitive effects of selective distribution systems. In particular, such systems may help addressing possible free-rider problems by encouraging retailers to provide valued sales services, incentivising them to maintain and support the brand image, supporting the launch of new products and protecting them in making relationship-specific investments. However, they may also lead to anti-competitive effects such as facilitating collusion at supplier level and preventing specific retailers from offering certain products (i.e. foreclosure at retailer level). The actual effects of selective distribution systems on consumer welfare depend on the specific market circumstances. According to the companies interviewed in the context of the evaluation study, the most common motivations behind the implementation of selective distribution networks are to protect the brand image and to offer a better customer experience.

The features of selective distribution systems (i.e. the selection criteria and requirements imposed on authorised distributors), however, do not seem to have changed much over the last ten years. The only notable change concerns the increasing use of criteria regarding online sales, which are seen by stakeholders as nothing more than the adaptation of the existing brick-and-mortar criteria to an e-commerce context. This is due to the growth of e-commerce in the sectors where selective distribution is more prevalent, which confirms the findings of the e-commerce sector inquiry.

According to the companies interviewed in the context of the evaluation study, selective distribution is most often based on qualitative criteria. That said, quantitative criteria, used in combination with qualitative criteria, are also quite prevalent. Among the criteria reported, manufacturers most often require pre-sale and post-sales advice to the customer, product-specific training and the obligation for the retailer to buy a minimum number of units of the contract product(s). The requirement to have at least one brick-and-mortar store is also commonly found, as well as the need to comply with quality requirements for online sales. In contrast, retailers reported that the requirement to have at least one brick-and-mortar store is the most common obligation, followed by the requirement to offer pre-sale and post-sales advice to the customer and the obligation for the retailer to buy a minimum number of units of the contract product(s).

As regards the objectivity and transparency of the criteria for joining a selective distribution network, the evaluation study shows that these seem to vary according to the strategy of the individual supplier. The selection criteria can be either displayed on the supplier's website or shared upon request, or they may not be shared at all. Retailers across industries often have imperfect knowledge of the criteria on the basis of which they are selected or rejected as an authorised distributor.

As regards the use of specific vertical restrictions relating to online sales in selective distribution systems, the evaluation study shows that, due to the expectation of consumers to have a seamless omni-channel experience, suppliers usually set criteria that must be used in all (online and offline) distribution channels. Manufacturers often require

that all marketing materials used by their retailers have to be either provided or pre-approved by them. Often, qualitative requirements for advertising pursue the same objectives as other requirements relating to the sale of branded products. This includes, according to stakeholders, the need to maintain for instance the luxury and/or quality image of the advertised products and requirements on the environment in which those products are advertised. Nevertheless, the evaluation study found that in the majority of cases, retailers and wholesalers were not subject to any online sales restrictions (such as restrictions on sales through marketplaces or restrictions on the use of price comparison websites). The evaluation study however also found that the VBER, together with the Vertical Guidelines, does not provide sufficient clarity on the assessment of these types of restrictions, which have become more prevalent over time.

Third, the findings of the evaluation study show that the **e-commerce growth also had an impact on exclusive distribution networks**. Whereas previously territorial exclusivity was fairly straightforward in its application, nowadays e-commerce makes it easier for buyers to reach sellers outside their territory (and vice-versa). This development has increased the relevance of the distinction between active and passive sales, with only restrictions on the latter being prohibited in the context of exclusive distribution under the current rules. This is because the competitive pressure resulting from passive sales by distributors and retailers located in other territories increases the need perceived by suppliers to be able to restrict such passive sales, in addition to the currently (and only partially) allowed restriction of active sales. The evaluation study therefore indicated that distribution models which rely on territorial sales restrictions are becoming less viable. As a result, suppliers seem to be moving away from exclusive distribution models, at least at retail level, and shifting towards other distribution models such as selective distribution. Nevertheless, exclusive distribution models remain relevant in certain sectors (like specialised electronics (e.g. medical lab equipment), industrial machinery, or frozen products) and at wholesale level.

Fourth, the evaluation study also analysed retail parity clauses. Although the study did not target a specific sector, its findings focus on the hotel industry, as this was the main sector that participated in the relevant interviews. The findings of the evaluation study show that distribution models in the hotel industry have changed radically since 2009, when online travel agencies (“OTAs”) started to play a major role in the market. Stakeholders thus reported that it has become a necessary condition for all hotels to be visible on these OTAs. The findings of the evaluation study also show that **retail parity clauses are common in the agreements between OTAs and hotels**. Evidence gathered from the stakeholder interviews suggests that these clauses are more frequently applied in the hospitality sector and in mass markets (i.e. goods produced in large quantities that do not have the features of luxury products).

According to the evidence gathered in the evaluation study, retail price parity clauses may be requested by retailers to avoid continuous price negotiations with manufacturers and maintain a competitive price for the products concerned. This seems to be the case in the mass market segment. Retail price parity clauses may also be imposed by the platform itself, as is the case in the hotel industry. In this context, the study pointed out that platforms such as OTAs aggregate a large amount of data and provide customers

with information, which would be otherwise difficult for these customers to obtain when making purchasing decisions. At the same time, the market power of sellers in such a context is strongly reduced.

Fifth, the evaluation study also included a **study of the consumer purchasing behaviour in Europe**. The study traced customer journeys for four product categories, namely (i) consumer electronics and large electrical appliances, (ii) house and garden equipment, (iii) clothing and shoes, as well as (iv) cosmetics and hair care, in an online survey covering six EU Member States (i.e. France, Germany, Hungary, Italy, Poland, and Sweden). To complement the survey, the study included a literature review, an analysis of Google Trends data for each product category and an analysis of GlobalWebIndex data providing time-series insights into consumer purchasing behaviour.

The study confirmed that over the last years, the number of different distribution or sales channels used by suppliers to promote their products to a wide range of consumers has increased, leading to a more prevalent multi-channel sales approach. According to the literature, this multi-channel sales approach has a positive effect since it satisfies consumers' shopping needs better, as they can choose the channels that are most convenient for them and best fit their needs. Also retailers and manufacturers can benefit from the fragmentation of sales channels. By using several sales channels, retailers can distribute their costs more effectively than by focussing on just one sales channel and at the same time increase sales. Despite the positive effects of such a multi-channel environment, there is however much discussion about free-riding in this context, which can be a negative consequence of today's multi-channel sales environment.

Nowadays, consumers tend to make complementary use of several online as well as offline sales and information channels during the entire purchasing process, which can be divided into three main stages: inspiration, information and evaluation, and purchase. In the first and second phase, the consumer will recognise a need, get inspired and eventually narrow down the choice of purchase by searching for information about price, physical attributes and availability. In the purchase phase, the consumer ultimately selects the preferred brand and retailer, and finalises the buying process. How exactly consumers behave in the purchasing process can depend on a variety of factors. These include (but are not limited to) the following factors: product characteristics, frequency of purchase, consumer involvement, order value (price), type of consumer (consumer of brand or retail primacy kind), socio-demographic characteristics, or personal preferences.

The findings of the survey did not only show that consumers who bought different types of products behaved differently, but also that the behaviour of individual groups of consumers who bought the same product varied considerably. For instance, the survey found that consumers tended to spend more effort and were more highly involved in the product and purchasing process when they were about to spend more money. The same applies to less frequent purchases. For consumers who bought consumer electronics and large electrical appliances, this included considering a wider range of information in the decision-making process and consulting a greater number of different types of channels to obtain the relevant information. Consumers who bought a clothing item, shoes,

cosmetics or hair care products spent less on their products, were particularly less involved, and indicated a lower number of channels used to find information. Even among consumers who bought the same type of product, the study repeatedly found that those consumers who paid the least for their product, or who have been less involved, were more likely to invest less effort in the buying process.

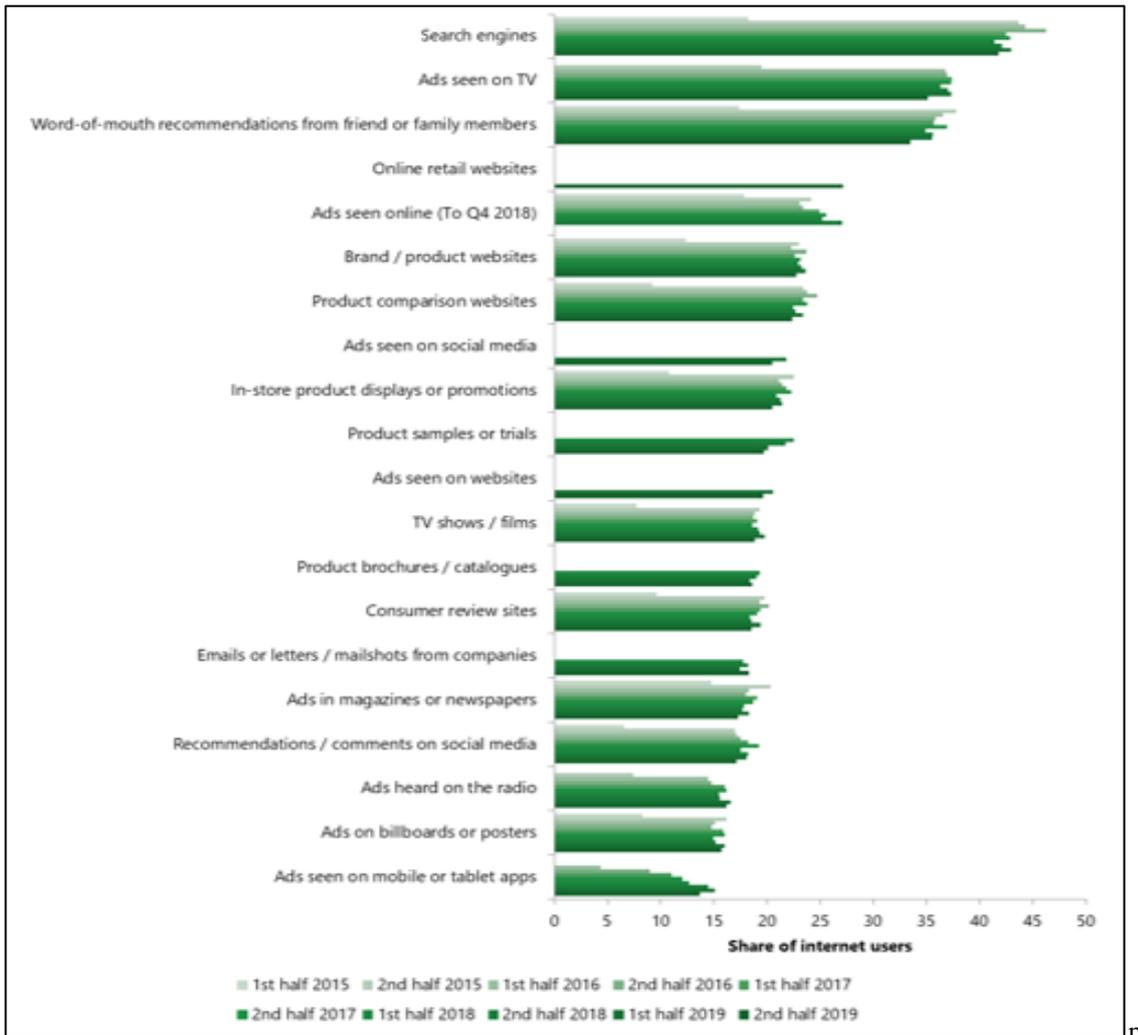
Regardless of the type of product purchased, the survey found that most consumers gathered price or product information. A slightly smaller percentage of consumers gathered information about retail outlet services or the brand. The differences in shares of consumers gathering price information, product information, brand information, or information about retail outlet services were only minor, which leads to the assumption that all these types of information were decisive in the purchasing process. This assumption is confirmed by other studies analysed in the literature review. For example, recent studies found that although price has a significant influence on the purchase channel ultimately used, product quality, delivery times, information and support are just as important in the decision-making process. Nevertheless, the results of the survey also show that checking for the best price was particularly common for very expensive products like those purchased from the categories house and garden equipment as well as consumer electronics and large electrical appliances. The survey also analysed the reasons for which consumers chose a specific retail outlet or brand. The brand was chosen mainly for the quality of its products or for the combination of price and quality. In general, a majority of consumers in the individual product groups tended to cite price as the reason for their choice of retailer. However, at the same time, 70-77% of the consumers who bought products in the respective product groups did not consider price to be a decisive criterion for selecting the retail outlet, or at least not the only criterion.

The survey found that online channels play a major role in the information and evaluation phase, regardless of the product category. Internet websites and applications were among the most widely used. The usage pattern of specific internet websites and applications varied depending on the products that consumers purchased. The results of the secondary data showed that consumers integrate online marketplaces, price comparison tools and search engines strongly into the purchasing process. The share of individuals using these services has increased steadily over the years. Furthermore, social media, messaging services and voice assistants gradually start to play a role in consumer purchasing journeys as well. Also mobile devices play an important role in the purchasing process nowadays. In recent years, the proportion of consumers making purchases via their mobile devices has increased, while the share of consumers making purchases via personal computers and laptops has decreased.

According to data provided by GlobalWebIndex,⁸³ the most used channel for today's brands and product discovery (see Figure 7) and for gathering information on brands, products and services (see Figure 8) are search engines, as shown below.

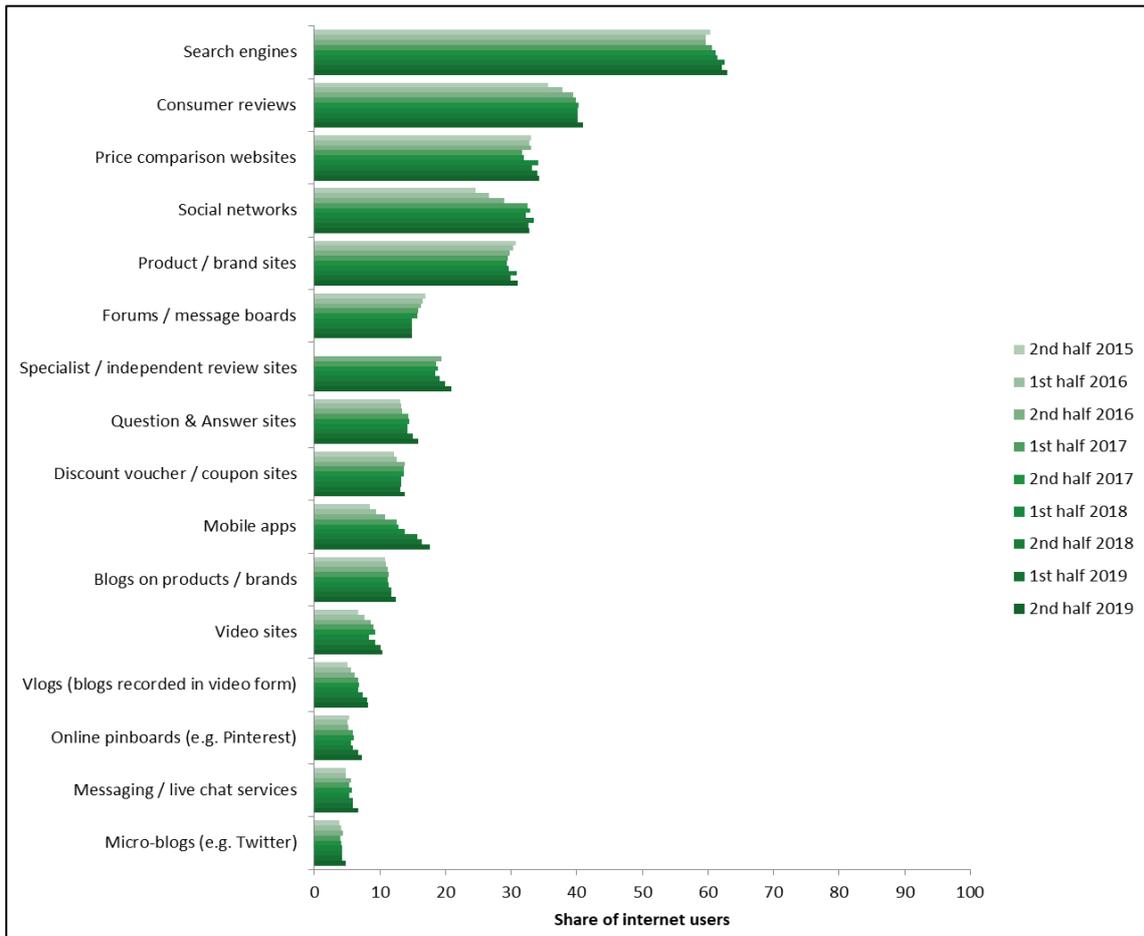
⁸³ For more details on this data, see section 3.7 of the study on consumer purchasing behaviour in Europe.

FIGURE 7 : SOURCES OF BRAND AND PRODUCT DISCOVERY – EU MEMBER STATES AND UNITED KINGDOM (IN %)



SOURCE: EVALUATION STUDY, FIGURE 3-147

FIGURE 8 : SOURCES USED TO ACTIVELY LOOK FOR INFORMATION ON BRANDS, PRODUCTS, AND SERVICES – EU 27 AND UNITED KINGDOM (IN %)



SOURCE: EVALUATION STUDY, FIGURE 3-148

The keywords used when searching with search engines also give an indication of which information is important to consumers. According to the study results, consumers predominantly used keywords containing product names, brand names or product-specific keywords. The analysis of Google Trend data yielded similar results. For several years now, consumers have been using more product-specific search queries compared to brand or retail related searches for almost all types of products considered.

As regards possible free-riding concerns, the survey results show that a large proportion of consumers use online and offline channels in combination, constantly changing between both types of channels. Furthermore, the study shows that there is a high share of consumers who use the same type of channel (online or offline) for completing the transaction which they used in the pre-purchase phase.

The use of different channels across the customer journey could give rise to free-riding behaviour. The study finds in this regard that among all purchases and product categories under consideration, free-riding between online and offline channels is only relevant for about 2-15% of all consumers/purchases, depending on the product. Free-riding between different types of online channels is relevant to an even lesser extent, with 1-9% of all purchases affected, depending on the product. In contrast, there is a slightly higher

potential for free-riding within the same type of online channel, with 3-25% of all purchases affected, again depending on the product. These figures suggest that the level of free-riding is modest between online and offline channels, while being slightly more important across and within online channels.

It should be noted that these figures are approximations based on the percentage of consumers or purchases that could be affected by free-riding activities of distributors. For this purpose, the consumer survey identified specific behaviour that is consistent with free-riding by calculating the share of purchases for which consumers gathered information via one channel but purchased from a completely different channel, primarily because of the lower price. The consumer survey was, however, not able to determine whether consumers acted in this way intentionally or whether it was a natural result of the purchasing process, and whether the specific services chosen by consumers actually provided different levels of information or service. Finally, it should be highlighted that a consumer survey cannot offer insights about the actual impact of free-riding behaviour on suppliers and the incentives to invest of affected distributors.⁸⁴

5.1.3. The Commission's enforcement action regarding vertical restrictions

In part as a follow-up to the e-commerce sector inquiry, the Commission took enforcement action against a number of anti-competitive vertical agreements, with a particular focus on business practices that have evolved or become widespread as a result of increasing e-commerce during the last decade.

The relevant prohibition decisions, which are briefly summarised below, provide examples of vertical restrictions imposed by suppliers with a view to reducing the competitive pressure from online sales (e.g. consumer electronics cases and *Guess*) and artificially segmenting markets to the detriment of consumers (e.g. *Pioneer*, *Guess*, licensed merchandise cases and *Meliá*). Moreover, the *Guess* case is illustrative of the increasing trend towards vertical integration on the supply side, which already figured among the findings of the Commission's e-commerce sector inquiry. The resulting direct competition with their distributors provides suppliers with incentives to limit competition at retail level, notably in the context of a selective distribution, e.g. by restricting authorised distributors from advertising and selling the contract products online in order to provide their own direct online sales channel with a distribution advantage. In addition, the consumer electronics cases show how the growing e-commerce environment allows manufacturers to easily monitor prices and to swiftly intervene to dampen price pressure. They also illustrate how a targeted intervention by the supplier against a few (low-price) benchmark retailers can be sufficient to achieve a re-alignment of the overall online prices for the respective products across the market due to the online retailers' use of pricing software (based on algorithms). It is also worth noting that the use of resale price maintenance by the manufacturers in these cases did not seem to be driven by concerns about a suboptimal level of service provision, but rather by the desire

⁸⁴ See section 4 of the study on consumer purchasing behaviour in Europe, p. 264.

to correct the price level for the products concerned without any service enhancing considerations.

On 24 July 2018, the **Commission fined consumer electronics manufacturers Pioneer, Denon & Marantz, Philips and Asus for imposing fixed or minimum resale prices on online retailers for widely used consumer electronics products** such as kitchen appliances, notebooks and hi-fi products.⁸⁵ The four manufacturers intervened particularly against online retailers who offered their products at low prices. When those retailers did not follow the prices requested by manufacturers, they faced threats or sanctions such as the blocking of supplies. The investigations showed a wide use by retailers of pricing algorithms that automatically adapt their retail prices to those of competitors, due to which the pricing restrictions imposed on low-pricing online retailers typically had a broader impact on overall online prices for the respective consumer electronics products. Moreover, the investigations showed that the use of sophisticated monitoring tools allowed the manufacturers to effectively track the setting of resale prices in their distribution network and to intervene swiftly in case of price decreases. The price interventions limited effective price competition between retailers and led to higher prices with an immediate effect on consumers.

On 17 December 2018, the **Commission fined the clothing company Guess for restricting retailers in its selective distribution system from certain online selling and advertising activities and from selling cross-border to consumers in other Member States (so-called geo-blocking)**.⁸⁶ The investigation showed the use by Guess of a number of restrictions that were directly related to the growth of e-commerce. More specifically, Guess restricted its authorised retailers chosen on the basis of quality criteria from (i) using the Guess brand names and trademarks for the purposes of online search advertising, (ii) selling online without a prior specific authorisation by Guess, for which the company had full discretion and which was not based on any specified quality criteria, (iii) selling to consumers located outside the authorised retailers' allocated territories, (iv) cross-selling among authorised wholesalers and retailers and (v) determining their resale prices independently. These practices allowed Guess to partition European markets and maintain artificially high retail prices, in particular in Central and Eastern European countries, to the detriment of European consumers.

In 2019 and 2020, the **Commission fined Nike,⁸⁷ Sanrio⁸⁸ and NBC Universal⁸⁹ for restricting sales of licensed merchandising products** featuring respectively some of

⁸⁵ See Commission press release of 24 July 2018, IP 18/4601, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4601. A non-confidential version of the prohibition decisions is available on DG Competition's website.

⁸⁶ See Commission press release of 17 December 2018, IP 18/6844, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_18_6844. A non-confidential version of the prohibition decision is available on DG Competition's website.

⁸⁷ See Commission press release of 25 March 2019, IP 19/1828, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1828. A non-confidential version of the prohibition decision is available on DG Competition's website.

Europe's best-known football clubs and federations for which Nike held a licence, Hello Kitty or other characters owned by Sanrio and the Minions, Jurassic World and other images and characters from NBC Universal's films. The restrictions used by the three companies consisted in particular of (i) direct measures restricting out-of-territory sales by licensees (e.g. clauses explicitly prohibiting these sales and obligations to notify out-of-territory sales to the licensor), (ii) direct measures restricting online sales and, (iii) indirect measures to implement or encourage compliance with the sales restrictions (e.g. threatening licensees with ending their contract if they sold out-of-territory and carrying out audits). Nike and NBC Universal also used other restrictions such as (iv) an obligation on licensees to pass on the out-of-territory sales restrictions to their customers (both Nike and NBC Universal) and (v) direct measures restricting sales beyond allocated customers or customer groups (NBC Universal). These practices partitioned the Single Market and prevented licensees in Europe from selling products cross-border and across customer groups, to the ultimate detriment of European consumers.

On 21 February 2020, the **Commission fined hotel group Meliá for discriminating between customers based on their place of residence in its hotel accommodation agreements with tour operators.**⁹⁰ Meliá's standard terms and conditions contained a clause which provided that the contracts were only valid for reservations by consumers who were residents in specified countries. These agreements restricted the tour operators' ability to sell hotel accommodation freely in all EEA countries and to respond to direct requests from consumers who were residents outside the defined countries (i.e. active and passive sales restrictions). As a result, consumers were not able to see the full hotel availability or book hotel rooms at the best prices with tour operators in other Member States, thus depriving them of the possibility to shop around for more choice and lower prices, one of the core benefits of the Single Market.

In two other cases, the Commission accepted commitments offered by companies to address the preliminary competition concerns raised by the Commission with regard to certain distribution practices. The Commission decisions adopted in these two cases rendered the commitments offered by the parties legally binding, but did not conclude on whether the practices concerned amounted to an infringement of the EU competition rules. These cases dealt with respectively under Article 102 and 101 of the Treaty concerned the following vertical restrictions:

⁸⁸ See Commission press release of 9 July 2019, IP 19/3950, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_19_3950. A non-confidential version of the prohibition decision is available on DG Competition's website.

⁸⁹ See Commission press release of 30 January 2020, IP 20/157, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_157. A non-confidential version of the prohibition decision is available on DG Competition's website.

⁹⁰ See Commission press release of 21 February 2020, IP 20/302, available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/40528/40528_410_6.pdf. A non-confidential version of the prohibition decision is available on DG Competition's website.

The commitment decision adopted on 4 May 2017 against Amazon related to **most favoured nation ("MFN") clauses in Amazon's distribution agreements with e-book publishers in Europe**.⁹¹ These clauses required publishers to offer Amazon terms and conditions which were similar to or better than those offered to Amazon's competitors and to inform Amazon about more favourable or alternative terms granted to Amazon's competitors. The clauses covered not only price, but also other parameters that a competitor might use to differentiate itself from Amazon such as alternative business (distribution) models, innovative e-books or promotions. The Commission considered that such clauses could make it more difficult for other e-book platforms to compete with Amazon by reducing the ability and incentives of publishers and competing platforms to develop new and innovative e-books and alternative distribution models. The commitments address these concerns by binding Amazon to no longer enforce or introduce these clauses in agreements with e-book publishers.

The commitment decisions adopted on 26 July 2016 against the film studio Paramount⁹² and on 7 March 2019 against the broadcaster Sky UK and four other film studios (Disney, NBC Universal, Sony and Warner Bros)⁹³ related to **certain contractual clauses in their film licensing agreements for the provision of pay-TV services in Europe**. These clauses, which also interact with IPR, prevented Sky UK from allowing consumers outside the territory covered by its licence to access films via satellite or online. They also required the film studios to ensure that other broadcasters were prevented from making their pay-TV services available to consumers in the territory covered by Sky UK's licence. The Commission considered that such clauses could restrict the ability of broadcasters to accept unsolicited requests (i.e. passive sales) for their pay-TV services from consumers located outside their licensed territory, thus eliminating cross-border competition between pay-TV broadcasters and partitioning the Single Market along national borders. The commitments made binding on Sky UK and the film studios to address these concerns foresee that they will neither act upon nor enforce these clauses in existing film licensing agreements for pay-TV services and refrain from (re)introducing such clauses in film licensing agreements for pay-TV with any broadcaster in the EEA.

The commitments decision against Paramount was appealed by Canal+, a French pay-TV broadcaster, at the beginning of 2017. In its judgment of 12 December 2018, the General Court dismissed the appeal in its entirety, confirming that the contractual clauses at stake constituted passive sales restrictions amounting to a restriction of competition by

⁹¹ See Commission press release of 4 May 2017, IP 17/1223, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1223. A non-confidential version of the prohibition decision is available on DG Competition's website.

⁹² See Commission press release of 26 July 2016, IP 16/2645, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2645. A non-confidential version of the commitments decision is available on DG Competition's website.

⁹³ See Commission press release of 7 March 2019, IP 19/1590, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1590. A non-confidential version of the commitments decision is available on DG Competition's website.

object.⁹⁴ Canal+ appealed the judgment to the Court of Justice where the case is currently pending.⁹⁵

5.1.4. NCA enforcement and policy actions regarding vertical restrictions

Between 1 June 2010 and 1 January 2020, NCAs were very active enforcers in the area of vertical agreements, with a **total of reported 391 cases**. Out of these 391 cases, 257 led to a finding by the responsible NCA or the competent national court. The reported reasons for not pursuing the remaining cases were mainly insufficient evidence or the removal of the vertical restrictions by the parties to the agreement before any final decision by the NCA. Figure 9 provides a breakdown of these cases by NCA.

FIGURE 9 : BREAKDOWN OF CASES IN THE AREA OF VERTICAL RESTRICTIONS BY NCA

Member State	NCA/court(s)	Number of cases (of which they led to a decision)
AT	Federal Competition Authority	52 (52)
BE	Belgian Competition Authority	4 (3)
BG	Bulgarian Commission on Protection of Competition	24 (16)
CY	Cyprus Commission for the Protection of Competition	3 (3)
CZ	The Office for the Protection of Competition	7 (6)
DE	Bundeskartellamt	31 (19)
DK	Danish Competition and Consumer Authority (DCCA)/ State Prosecutor for Serious Economic and International Crime (SPSEI)/ City Courts and High Court	21 (20)
EE	Estonian Competition Authority	6 (3)
EL	Hellenic Competition Commission	9 (9)
ES	Spanish National Authority for Markets and Competition	18 (6)
FI	Finnish Consumer and Competition Authority	3 (0)
FR	Autorité de la concurrence	32 (14)
HR	Croatian Competition Agency	15 (5)
HU	Hungarian Competition Authority (GVH)	9 (8)
IE	Competition and Consumer Protection Commission	2 (2)
IT	Italian Competition Authority	7 (7)
LT	Lithuanian Competition Council	9 (7)
LU	Conseil de la concurrence	3 (0)
LV	Latvia Competition Council	6 (1)
MT	Malta Competition and Consumer Affairs Authority	3 (3)
NL	Authority for Consumers and Markets	1 (0)
PL	Polish Competition Authority (UOKiK)	10 (10)
PT	Portuguese Competition Authority	14 (9)
RO	Romanian Competition Council	17 (17)
SE	Swedish Competition Authority	10 (3)
SI	Slovenian Competition Protection Agency	5 (4)
SK	Antimonopoly Office of the Slovak Republic	41 (10)
UK	Competition and Markets Authority (CMA)/ Competition Appeal Tribunal (CAT) and High Court	30 (20)
Total		392 (257)

SOURCE: EVALUATION STUDY, TABLE 2, P. 39.

⁹⁴ Judgment of 12 December 2018 in Case T-873/16, ECLI:EU:T:2018:904, *Groupe Canal+ v Commission*.

⁹⁵ Case C-132/19 P, *Groupe Canal+ v Commission*.

The reported cases span across 21 sectors.⁹⁶ Out of the 391 reported cases, 210 cases concerned resale price maintenance, which was thus the most investigated restriction during the period in question. Figure 10 provides a breakdown of NCA cases by the type of vertical restriction investigated.

FIGURE 10 : BREAKDOWN BY TYPE OF VERTICAL RESTRICTION INVESTIGATED

Type of restraint	Number of cases
Price restrictions	222
Resale price maintenance	210
Maximum resale price	4
Recommended resale price	11
Selective distribution	64
Selective Distribution Network based on qualitative criteria	29
Selective Distribution Network based on quantitative criteria	13
Combination of both qualitative and quantitative criteria	9
Channelling or product mapping	3
Exclusive distribution	37
Most-favoured nation (MFN) or parity clauses	20
Wholesale MFN	1
Wide retail MFN	12
Narrow retail MFN	10
Price MFN	15
Non-price MFN	6
Other restraints covered by the Vertical Guidelines	102
Single branding	30
Franchising	14
Exclusive supply	19
Quantity forcing	4
Upfront access payments	2
Category management	1
Tying	1
Other restraints not specifically addressed by the Vertical Guidelines	29⁶
Total number of cases	392

SOURCE: EVALUATION STUDY TABLE 3, P. 40

In addition, **several NCAs issued policy documents with regard to vertical restrictions** during the period concerned. In the context of the evaluation study, six NCAs (i.e. AT, DE, SE, SK, NL and IE) reported that they had issued guidance in this area.

In 2010, the Irish NCA issued a "*Declaration dealing with Vertical Agreements and Concerted Practices*" in order to provide guidance to interested parties on how to assess their vertical agreements so as to ensure that they can avail themselves of the exemption provided for by the Declaration.⁹⁷

⁹⁶ See evaluation study, Figures 3, 4, 5, 6 and 7 in Annex IV, p. 204-208.

⁹⁷ See <https://www.ccpc.ie/business/enforcement/civil-competition-enforcement/declarations/vertical-agreements-concerted-practices/>.

In July 2014, the Austrian NCA published guidance in order to provide information and foster the prevention of resale price restrictions, as well as to facilitate compliance with competition law, especially for SMEs.⁹⁸ The guidance deals notably with resale price maintenance and contains a code of conduct for suppliers and dealers as well as an orientation guide for SMEs with an illustrative list of behaviours that the Austrian NCA would generally consider as raising competition concerns from an antitrust perspective.

In 2015, the Slovak NCA issued guidance on vertical agreements in order to increase legal certainty and the general knowledge of the rules among SMEs. The guidance follows the approach of the Commission's Vertical Guidelines.⁹⁹

In 2016, the Swedish NCA issued an interactive guide in order to help companies self-assess their vertical agreements, in line with the approach of the Commission's Vertical Guidelines.¹⁰⁰

In 2017, the German NCA issued guidance with the aim of explaining to businesses, also with the help of practical examples, the background, purpose and scope of the prohibition of vertical price fixing in the brick-and-mortar food retail sector.¹⁰¹

In 2019, the Dutch NCA issued Vertical Guidelines in order to explain how it assesses a number of common arrangements between suppliers and buyers.¹⁰² The guidelines primarily target businesses, trade organisations and their advisors with a view to facilitating the self-assessment of their vertical agreements with competition law, in line with the approach of the Commission's Vertical Guidelines. The guidelines also contain an example of an online advertising restriction, by which a supplier restricts its distributors in their ability to advertise on online search engines.¹⁰³

5.2. Answers to the evaluation questions regarding the VBER, together with the Vertical Guidelines, as a whole

This section answers the evaluation questions regarding the VBER, together with the Vertical Guidelines, as a whole in relation to the evaluation criteria of effectiveness (see

⁹⁸ See https://www.bwb.gv.at/fileadmin/user_upload/PDFs/PDFs3/BWB_Standpoint_on_Resale_Price_Maintenance_english.pdf.

⁹⁹ See https://www.antimon.gov.sk/data/files/422_cielove-vertikalne-dohody-pohlad-pmu-sr.pdf.

¹⁰⁰ See <http://www.konkurrensverket.se/en/Competition/Aboutthecompetitionrules/Prohibitionagainstanti-competitivecooperation/vertical-agreements/guidance-regarding-distribution-agreements/> and more specifically, <http://www.konkurrensverket.se/upload/Distribution-agreements/index.html>.

¹⁰¹ See https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/Guidance_note_prohibition_vertical_price_fixing_LEH.pdf?blob=publicationFile&v=2.

¹⁰² See <https://www.acm.nl/sites/default/files/documents/2019-07/guidelines-regarding-arrangements-between-suppliers-and-buyers.pdf>.

¹⁰³ See as a background, the working paper published in 2019 "*Price effects of non-brand bidding agreements in the Dutch hotel sector*", <https://www.acm.nl/sites/default/files/documents/2019-06/working-paper-acm-price-effects-of-search-advertisement-restrictions.pdf>.

section 5.2.1 below), efficiency (see section 5.2.2 below), relevance (see section 5.2.3 below), coherence (see section 5.2.4 below) and EU added value (see section 5.2.5 below).

5.2.1. Effectiveness

Evaluation Question 1 – What is the level of legal certainty that the VBER, together with the Vertical Guidelines, provides for assessing whether vertical agreements and/or specific clauses/restrictions are exempted from the application of Article 101 of the Treaty and thus compliant with this provision?

What is the issue?

As explained in more detail in sections 1 and 2.3 above, one of the objectives of the VBER, as an instrument that provides a safe harbour for certain categories of vertical agreements, is to **give legal certainty to stakeholders**, making it easier for them to perform the self-assessment required by the wider legal framework. The Vertical Guidelines, insofar as they provide additional guidance on how to interpret the VBER and how to apply Article 101 of the Treaty to vertical agreements, also aim to give legal certainty to stakeholders in their assessment of vertical agreements.

The assessment of this objective seeks to determine whether the rules provide increased legal certainty, as compared to a situation without them, but also whether there is room for improvement in achieving the objective. In this context, it should be taken into account that the VBER and the Vertical Guidelines cannot provide an absolute level of legal certainty. In order to provide legal certainty, the conditions for the exemption must be set out in a clear and comprehensible manner, which allows stakeholders to understand those conditions and how they apply to their agreements, and therefore to predict whether their agreements are covered by the exemption. At the same time, the VBER covers a broad variety of sectors, business models, agreements and restrictions, which change over time. When setting the conditions for the exemption, it is therefore impossible to predict how markets will evolve and the type of restrictions that might appear. Therefore, to ensure that the exemption remains future-proof, it necessarily has to rely on conditions that require some interpretation in their application to specific cases. Moreover, even though the Vertical Guidelines provide additional guidance on how to apply the VBER and Article 101 of the Treaty, they cannot for the same reasons be exhaustive in covering every possible type of agreement or restriction or in anticipating future market evolutions.

In addition, it should be kept in mind when assessing this objective that the assessment by stakeholders of the level of legal certainty provided by the rules may also depend on the difficulties they encounter when applying the rules to their particular field of activity. Therefore, the assessment of this objective relies not only on the stakeholders' overall perception of the level of legal certainty achieved by the rules as a whole, which reflects their views on the usefulness of the exemption, but also pays particular attention to the

specific areas of the rules for which stakeholders (even if only a few) consider that there is uncertainty.¹⁰⁴

Even though the exemption relies on conditions that require some interpretation, notably to allow its application to new types of vertical agreements or restrictions that might appear after the adoption of the VBER, it cannot be excluded that subsequent market developments may nevertheless lead to gaps in the exemption or a lack of clarity as to how the exemption applies to new types of vertical agreements or restrictions. Therefore, such market developments may affect the ability of the VBER, together with the Vertical Guidelines, to increase legal certainty. Understanding how the market has developed since the adoption of the intervention (see section 5.1 above) is therefore also important for the assessment of effectiveness. In other words, the ability of the VBER, together with the Vertical Guidelines, to meet its objectives is also dependent on how well it is adapted to the evolution of the market since the adoption of the intervention.

What are the findings?

The evidence gathered in the evaluation suggests that the VBER, together with the Vertical Guidelines, is overall a useful instrument that increases legal certainty as compared to a situation without the VBER and the Vertical Guidelines. Nevertheless, the evaluation identified certain provisions that, according to stakeholders, lack clarity, are difficult to apply or no longer adapted to recent market developments, in particular as regards the online environment. The evaluation also identified gaps in the rules and areas of the rules that do not refer to case law issued since the adoption of the rules (e.g. the CJEU's Coty judgment). The evidence gathered in the evaluation suggests that these issues affect the level of legal certainty provided by the VBER and the Vertical Guidelines. Therefore, the objective of facilitating the enforcement work of the relevant authorities and the stakeholders' self-assessment of their vertical agreements by providing them with legal certainty has not been fully met.

A majority of respondents to the **public consultation**,¹⁰⁵ across all stakeholder groups,¹⁰⁶ indicated that the VBER and the Vertical Guidelines overall (i.e. seen in their entirety) provide a sufficient level of legal certainty. Most of the respondents, including those who

¹⁰⁴ These specific areas are analysed in more detail in section 5.3 below and in Annex 4.

¹⁰⁵ Throughout section 5, references to the views of the respondents to the public consultation should be understood as including only those respondents who expressed a view on the issue at hand, thus excluding those who did not reply or indicated that the issue was not applicable to them.

¹⁰⁶ Throughout section 5, where no qualification is made regarding the views of the respondents to the public consultation, this should be understood as meaning that the reported view is broadly shared by all stakeholder groups that participated in the public consultation across the different sectors. Where a particular view was shared primarily by one or more different stakeholder groups among those that participated in the public consultation (e.g. distributors, suppliers and stakeholders belonging to a particular sector) this is reported. While indicative of a trend, the fact that a view was broadly shared by all or only some of the stakeholder groups does not however mean that the Commission disregards diverging views, both within the same or across different stakeholder groups/sectors. Annex 4 reports in more detail the stakeholder views per area, regardless of whether these views were shared by a majority or minority of stakeholders.

pointed to an overall insufficient level of legal certainty, explained that the VBER and the Vertical Guidelines provide useful guidance for businesses to conduct a self-assessment of their vertical agreements. However, they also pointed to areas of the rules which they perceive as not functioning sufficiently well. Respondents argue that a clarification and revision of certain aspects would therefore increase legal certainty.

Respondents to the public consultation were also asked to estimate the level of legal certainty provided by the VBER and the Vertical Guidelines for specific areas of the rules. For the majority of the areas of the rules, respondents (across all stakeholder groups) generally considered that there is an appropriate level of legal certainty. This is in line with the finding that the overall framework provides a sufficient level of legal certainty. Nevertheless, also for these areas of the rules a few respondents raised some issues, which are analysed in more detail per area in Annex 4.

There were, however, a number of areas of the rules for which the majority of respondents, across all stakeholder groups, considered that there is a slightly low or very low level of legal certainty (e.g. the hardcore restriction regarding resale price maintenance), or where the number of replies indicating a slightly low or very low level of legal certainty was comparable to the number of replies indicating an appropriate level of legal certainty (e.g. the guidance on agency agreements). This suggests that these areas, which are assessed in more detail in Annex 4, should be taken into account in any next steps following the evaluation.¹⁰⁷

The reasons why certain areas of the rules are considered to provide a lower level of legal certainty vary between the areas identified. Respondents mentioned primarily the lack of clarity of certain legal concepts and principles (e.g. the criteria defining a commercial agent), the complexity of the structure of the rules, difficulties in applying certain areas of the rules in practice (e.g. applying the market share threshold to online platforms), a lack of sufficiently detailed examples for certain areas, and the fact that, for some areas, the rules and guidance are no longer adapted to recent market developments¹⁰⁸ (e.g. the growth of online sales) or do not refer to case law issued since the adoption of the VBER (e.g. the CJEU's *Coty* judgment). The level of legal certainty for these areas, including the underlying reasons, are analysed per area in more detail in section 5.3 below and in Annex 4.

Participants in the **stakeholder workshop** expressed similar views. They identified a number of areas of the current rules which, according to them, are not functioning well and explained the underlying reasons. They also drew attention to a lack of clarity in respect of certain provisions and to areas where the rules are not well adapted to recent market developments and for which therefore the level of legal certainty is not as high as it could be. The views of the workshop participants are also discussed per area in more detail in section 5.3 below and in Annex 4.

¹⁰⁷ For more details, see Annex 2, section 2.2.

¹⁰⁸ For more details, see section 5.1 above.

The **National Competition Authorities** also confirmed that the VBER, together with the Vertical Guidelines, have provided helpful guidance to NCAs and legal certainty to stakeholders for the assessment of vertical agreements and restrictions under Article 101 of the Treaty. However, in their view, the effectiveness of the VBER and the Vertical Guidelines is not as high as it could be due to a lack of clarity and insufficient guidance in certain areas. Moreover, the NCAs indicated that the VBER and the Vertical Guidelines are not up to date as regards market developments, in particular the rise of new business models and new technologies. The NCAs also suggested integrating recent case law of the Union courts on vertical restrictions in order to improve legal certainty. The NCAs' views on the specific areas of the rules for which they consider that legal certainty is not as high as it could be are explained per area in more detail in section 5.3 below and in Annex 4.

The **evaluation study** also looked at the level of legal certainty provided by the VBER, together with the Vertical Guidelines, with a focus on the specific areas it covered, namely price restrictions, selective distribution, exclusive distribution and retail parity clauses. Overall, the evaluation study found that certain legal definitions used in the VBER are not sufficiently clear and that there is a lack of guidance in a number of areas, such as the assessment of the market shares of the parties to a vertical agreement for the purposes of determining whether the VBER is applicable to them. In addition, the evaluation study indicated that the VBER, together with the Vertical Guidelines, does not provide sufficient legal certainty for assessing vertical agreements in an online environment, as it does not sufficiently reflect market developments, especially the increased importance of online sales. The findings of the evaluation study as regards specific areas of the rules are explained per area in more detail in section 5.3 below and in Annex 4.

Evaluation Question 2 – To what extent do the conditions currently defined in the VBER, as interpreted in the Vertical Guidelines, meet the objective of exempting 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?

What is the issue?

As explained in sections 1 and 2.3 above, the safe harbour provided by the VBER is limited by the Empowerment Regulation of 1965, which only authorises the Commission to block exempt those agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty. In other words, the Commission must be cautious when drawing the line between agreements and restrictions that can and cannot be block exempted and thus when defining the scope of the block exemption. In this regard, the Commission must pay particular attention to avoiding false positives (i.e. exempting agreements for which it cannot be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty) to ensure that the VBER is in line with the Treaty and the requirements of the Empowerment Regulation of 1965.

At the same time, the Commission also seeks to avoid false negatives, which result in a situation where the respective vertical agreement or practice is not block exempted

despite fulfilling the conditions of Article 101(3) of the Treaty. A false negative therefore increases the burden for businesses when self-assessing the compliance of their agreements with Article 101 of the Treaty, as they have to perform an extended individual assessment, instead of being able to rely on a simpler set of rules (i.e. the VBER and Vertical Guidelines). Reducing the risk of false negatives therefore contributes to fulfilling the general objective of the VBER, which is to facilitate the enforcement work of the Commission and, in view of the decentralised enforcement system, also the work of national competition authorities and national courts, as well as to help businesses conduct the self-assessment of their vertical agreements. Avoiding false negatives is however of lesser importance as they do not result in a situation that would be in breach of the Treaty and the Empowerment Regulation of 1965.

In view of the above, one of the objectives of the VBER is to correctly draw the line when setting out the conditions that vertical agreements need to meet in order to benefit from the block exemption with a view to avoiding both false positives and false negatives, with the former being of greater importance.¹⁰⁹

The conditions to take into account when assessing this objective are those set out in Articles 2 to 5 of the VBER. These include the conditions to be met, first, by all agreements, namely the market share threshold below which the exemption is granted (Article 3), the hardcore restrictions that remove the benefit of the block exemption for the whole agreement (Article 4), the excluded restrictions to which the block exemption does not apply, while the remainder of the agreement may still be exempted (Article 5), and, second, the additional conditions under which the block exemption applies to specific types of vertical agreements (Article 2). The Vertical Guidelines are also relevant for this assessment insofar as they provide additional guidance on the interpretation of the respective provisions of the VBER.

Similarly to what was explained as regards legal certainty in relation to Evaluation Question 1 above, once the conditions that vertical agreements need to meet in order to benefit from the block exemption are set, subsequent market developments may lead to gaps or a lack of clarity as to how the exemption applies to new types of vertical agreements or restrictions. Therefore, such market developments (see section 5.1 above) may also affect how well the VBER, together with the Vertical Guidelines, achieved its objective of avoiding false positives and false negatives.

What are the findings?

All the sources of evidence used in the evaluation suggest that the VBER, together with the Vertical Guidelines, generally meets the objective of avoiding false positives. This means that it generally does not exempt agreements for which it cannot be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty. Nevertheless, some stakeholders argued that the application of the market share threshold to online intermediaries may lead to false positives and that retail parity

¹⁰⁹ For more details, see section 2.3 above.

clauses, online platform bans and some restrictions on online advertising should be qualified as hardcore restrictions. Other stakeholders, however, did not share these views. The evaluation also found that there are practices and restrictions that have become more prevalent in the last years, such as online platform bans and restrictions on the use of price comparison websites, for which additional guidance is lacking to determine whether they fall under the current list of hardcore restrictions.

The evidence gathered in the evaluation also suggests that the VBER, together with the Vertical Guidelines, generally meets the objective of avoiding false negatives, i.e. it does not fail to exempt agreements that could be exempted. However, some stakeholders argued that the market share threshold is too low. Some stakeholders also indicated that non-compete obligations exceeding 5 years should not be an excluded restriction. In addition, as regards in particular the list of hardcore restrictions, the view that the rules avoid false negatives is not shared by all stakeholder groups. Whereas NCAs and a number of respondents to the public consultation (including a majority of distributors) find this list appropriate, many respondents to the public consultation and participants in the stakeholder workshop found the list to lead to false negatives. On the other hand, the enforcement practice of the Commission and the NCAs since the adoption of the VBER generally confirms the treatment of certain hardcore restrictions under the current rules. Overall, while the evidence therefore suggests that the lists of hardcore restrictions and excluded restrictions are generally appropriate, there may still be scope in some areas of the rules to further reduce the risk of false negatives.

False Positives

Respondents to the **public consultation** expressed their views on the scope of the exemption separately as regards the risk of false positives and false negatives, as well as separately for the conditions set out in Articles 2 to 5 of the VBER.

As regards Articles 2 and 3 of the VBER, a large majority of the respondents indicated that the VBER does not exempt agreements that should not be exempted. In particular, only one respondent pointed to the risk of a false positive as regards Article 2(2) of the VBER¹¹⁰ and very few respondents¹¹¹ pointed to the risk of a false positive as regards Article 2(4) of the VBER, whereas no respondents mentioned such a risk as regards Article 2(3) of the VBER. As regards Article 3 of the VBER, some respondents¹¹² pointed to the risk of a false positive especially as regards the application of the market share threshold to online intermediaries.

A majority of the respondents also indicated that there are no types of vertical restrictions beyond those included in Articles 4 and 5 of the VBER for which it cannot be assumed with sufficient certainty that they generate efficiencies in line with Article 101(3) of the

¹¹⁰ This issue was raised by a legal professional in relation to the retail market for food (e.g. supermarket alliances).

¹¹¹ Most of the respondents who indicated this are active on the distribution side of the supply chain, with the majority representing the motor vehicle sector.

¹¹² Mainly suppliers and associations of lawyers.

Treaty. This means that they did not believe that there are any vertical restrictions that currently benefit from the exemption despite being severe restrictions of competition (hardcore restrictions) or restrictions that can only be block exempted subject to certain conditions (excluded restrictions), which should therefore be added to these Articles. Nevertheless, some respondents argued that certain retail parity clauses, online platform bans and some restrictions on online advertising should be qualified as hardcore restrictions. Very few respondents also argued that the withdrawal procedure in the context of cumulative effects could lead to a false positive.

For each of the aforementioned conditions, respondents to the public consultation indicated in more detail the underlying reasons for the risk of a false positive.¹¹³ Given that the reasons are specific to each condition and cannot always be easily distinguished from the reasons for which stakeholders see a lack of legal certainty, these are addressed per area in more detail in section 5.3 below and in Annex 4.

The views of the participants in the **stakeholder workshop** were in general aligned with the views of the respondents to the public consultation. For most of the conditions, the workshop participants indicated that a lack of clarity in respect of certain provisions and the existence of areas where the rules are not well adapted to the market reduce their effectiveness. However, very few areas were mentioned as leading to false positives. These views are also addressed per area in more detail in section 5.3 below and in Annex 4.

National Competition Authorities were of the view that the VBER, together with the Vertical Guidelines, overall does not lead to false positives. In particular, NCAs indicated that, based on their experience, the market share threshold of 30% is generally appropriate. However, they raised the question whether the market share threshold may be too high or whether it is an appropriate indicator of market power for vertical agreements involving online platforms. At the same time, some NCAs pointed out that reducing the market share threshold for platforms would put significant weight on the definition of what can be considered a platform for that purpose and raise questions as to the appropriate level. NCAs also raised the question of whether the market share threshold functions properly in oligopolistic markets. As regards the list of hardcore restrictions in Article 4 of the VBER, NCAs pointed to a number of practices and restrictions that have become more prevalent in the last years, such as online platform bans and restrictions on the use of price comparison websites, for which additional guidance is lacking to determine whether they fall under the current list of hardcore restrictions. In particular, some NCAs expressed the view that online platform bans and absolute restrictions on the use of price comparison websites should be considered a hardcore restriction under the VBER. NCAs generally did not express concerns regarding the list of excluded restrictions in Article 5 of the VBER. The views of the NCAs regarding the specific conditions are addressed per area in more detail in section 5.3 below and in Annex 4.

¹¹³ For more details, see Annex 2, section 2.2.

The **evaluation study** also investigated whether, for the specific areas it covered (i.e. price restrictions, selective distribution, exclusive distribution and retail parity clauses), the exempted restrictions satisfy the conditions of Article 101(3) of the Treaty and whether the non-exempted restrictions do not satisfy those conditions. In particular, the evaluation study found that the exemption of selective distribution is adequate, as it leads to a number of benefits in the distribution of goods. The findings on particular restrictions commonly found in selective distribution agreements were however more nuanced. Similarly, the evaluation study found that the rules on exclusive distribution are appropriate, although there are some areas in which there is a lack of clarity. In contrast, as regards retail parity clauses, the evaluation study found mixed evidence as to the effects of those clauses.¹¹⁴ Also as regards resale price maintenance, the evaluation study resulted in mixed evidence.¹¹⁵ These findings are addressed per area in more detail in section 5.3 below and in Annex 4.

False Negatives

As regards Articles 2 and 3 of the VBER, a majority of the respondents to the **public consultation** indicated that there are no other types of vertical agreements beyond those covered by the current scope of the exemption for which it can be assumed with sufficient certainty that they generate efficiencies in line with Article 101(3) of the Treaty. Nevertheless, some stakeholders mainly indicated that the exemption of dual distribution is too narrow, that the market share threshold is too low and that there is a lack of clarity as to the exact scope of these Articles.

As regards the list of hardcore restrictions in Article 4 of the VBER, an important part of the respondents to the public consultation, especially legal professionals, indicated that it leads to false negatives because it contains one or more types of vertical restrictions for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty, and which should therefore be exempted. A significant number of respondents (including a majority of distributors), however, argued the opposite. Respondents mentioned, inter alia, resale price maintenance,¹¹⁶ at least in certain specific situations, and certain online restrictions as being potential false negatives.

A majority of the respondents to the public consultation indicated that the list of excluded vertical restrictions in Article 5 of the VBER also does not exclude types of restrictions for which it can be assumed with sufficient certainty that they generate efficiencies in line with Article 101(3) of the Treaty. Nevertheless, there was still a significant number of respondents who indicated that there are false negatives (e.g. some respondents indicated that non-compete obligations exceeding 5 years should not be an excluded restriction).

¹¹⁴ See section 3.4 of the evaluation study.

¹¹⁵ See section 3.3 of the evaluation study.

¹¹⁶ As regards resale price maintenance, this view was shared primarily by suppliers, whereas distributors and retailers generally agreed with the classification of RPM as a hardcore restriction under the VBER.

For each of the aforementioned conditions, respondents to the public consultation indicated in more detail which specific provisions of the rules lead, according to them, to false negatives and the underlying reasons.¹¹⁷ Given that the reasons are specific to each condition and cannot always be easily distinguished from the reasons for which stakeholders see a lack of legal certainty, these are addressed per area in more detail in section 5.3 below and in Annex 4.

The participants in the **stakeholder workshop** had largely similar views, with some areas mentioned as leading to false negatives. In particular, some participants argued that the current approach to dual pricing is too rigid. Some participants also argued that the market share threshold could be higher, as agreements between parties with higher market shares can also be efficiency-enhancing. Participants in the stakeholder workshop mostly expressed concern as regards the list of hardcore restrictions in Article 4 of the VBER. Other participants argued that non-compete obligations exceeding five years could also be efficiency-enhancing. These views are also addressed per area in more detail in section 5.3 below and in Annex 4.

National Competition Authorities were of the view that the VBER, together with the Vertical Guidelines, overall does not lead to false negatives. As regards the list of hardcore restrictions in Article 4 of the VBER, NCAs generally recognise the importance of this list and find it adequate, although some notions referred to in Article 4 are considered not to be sufficiently clear. The views of the NCAs regarding the specific conditions are addressed per area in more detail in section 5.3 below and in Annex 4

The **evaluation study** also investigated whether, for the specific areas it covered (i.e. price restrictions, selective distribution, exclusive distribution and retail parity clauses), the non-exempted restrictions do not satisfy the conditions of Article 101(3) of the Treaty. In particular, the evaluation study found mixed evidence as to the effects of retail parity clauses. The results pointed to both pro-competitive and anti-competitive effects of such clauses, depending on the nature of the clause in question and the market circumstances.¹¹⁸ Also as regards resale price maintenance, the evaluation study resulted in mixed evidence.¹¹⁹ While the results suggest that there can be efficiencies associated with RPM agreements, the study focused on the book sector, which has some unique features. Therefore, the results for this sector have to be interpreted with caution and cannot be easily transposed to other sectors. The results for both types of restrictions are presented in more detail in Annex 4.

Finally, also the **enforcement practice of the Commission and the NCAs**, set out in sections 5.1.3 and 5.1.4 above, is useful in assessing the risk of false negatives. This enforcement practice generally confirms the treatment of certain hardcore restrictions under the current rules, which suggests a low risk of false negatives as regards these restrictions. It should be noted that the hardcore restrictions under the current rules

¹¹⁷ For more details, see Annex 2, section 2.2.

¹¹⁸ See section 3.4 of the evaluation study.

¹¹⁹ See section 3.3 of the evaluation study.

include practices that have consistently been found to amount to a severe restriction of competition in enforcement actions taken by the Commission and NCAs since the adoption of the VBER. In particular resale price maintenance, which is the hardcore restriction that was more controversially discussed during the evaluation, corresponds to the highest number of decisions by NCAs and was also pursued by the Commission in several recent cases.

Evaluation Question 3 – To what extent does the VBER, together with the Vertical Guidelines, provide a common framework for the assessment of the compliance of vertical agreements with Article 101 of the Treaty in order to ensure a consistent application of Article 101 of the Treaty by national competition authorities and national courts to vertical agreements?

What is the issue?

As explained in more detail in sections 1 and 2.3 above, in view of the decentralised system introduced by Council Regulation 1/2003, NCAs and national courts have the power to apply not only Article 101(1) of the Treaty, but also Article 101(3) of the Treaty. One of the objectives of the VBER, together with the Vertical Guidelines, is therefore to provide a common framework of assessment for the Commission, NCAs and national courts to apply Article 101(3) of the Treaty to vertical agreements. Harmonised rules contribute to ensuring that businesses operating across the EU benefit from a level playing field, which in turn can contribute to the proper functioning of and to enhancing the European Single Market.

When assessing this objective, it is relevant to recall that NCAs and national courts are bound by the VBER, which is directly applicable in all Member States. The Vertical Guidelines, however, do not bind NCAs or national courts, but are typically taken into account when assessing the compatibility of vertical agreements with Article 101 of the Treaty. Moreover, as explained as regards legal certainty in relation to Evaluation Question 1 above, the VBER covers a broad variety of sectors, business models, agreements and restrictions, which evolve over time. As it is impossible to predict how markets will evolve and what type of restrictions might appear, the VBER and Vertical Guidelines necessarily require some interpretation in their application to specific cases. When new types of restrictions appear, different NCAs or national courts may thus have diverging views regarding the assessment under the VBER and the Vertical Guidelines. The resulting divergences in the application of the current rules may persist despite the existence of mechanisms to overcome such divergences, such as the possibility for national courts to ask the Commission for an opinion pursuant to Article 15(1) of Council Regulation 1/2003 or to refer questions¹²⁰ to the CJEU for a preliminary ruling, as well as the possibility for NCAs to consult the Commission under Article 11 of Council Regulation 1/2003 or to discuss issues of interest among themselves in the context of the European Competition Network. Divergences are also likely to take some time to be

¹²⁰ A preliminary ruling is not only binding on the national court that made the reference for a preliminary ruling, but also on the national courts of all other Member States.

resolved, for example, because of the time required for a question to reach the CJEU and for the CJEU to take a position on it, or because additional experience is needed on the effects of a particular new restriction on the market, before NCAs can agree on a coherent approach.

Given that diverging views may notably exist when new types of restrictions appear, it necessarily follows that market developments subsequent to the adoption of the intervention, as those identified in section 5.1 above, may also affect how well the VBER, together with the Vertical Guidelines, has met its objective of providing a common framework of assessment.

What are the findings?

The evidence gathered in the evaluation suggests that while the VBER, together with the Vertical Guidelines, is overall taken into account by national competition authorities and national courts in their assessment of vertical agreements, there remains significant scope for diverging interpretations. The evaluation has identified a perceived lack of clarity in respect of certain provisions, as well as gaps in the current rules (i.e. new types of restrictions that are not addressed in the rules, such as retail price parity clauses), which have led to diverging interpretations. Such diverging interpretations lead to a decreased level of legal certainty of the VBER, together with the Vertical Guidelines, and also affect the efficiency and coherence of the intervention, as explained in sections 5.2.2 and 5.2.4 below. Therefore, the objective of providing a common framework of assessment to ensure consistency in the application of Article 101 of the Treaty to vertical agreements by national competition authorities and national courts has not been fully met.

A significant number of respondents to the **public consultation**, across all stakeholder groups and sectors, indicated that there are diverging interpretations by NCAs and national courts when applying the VBER and the Vertical Guidelines. These diverging interpretations stem, on the one hand, from the fact that the Vertical Guidelines do not bind NCAs or national courts. On the other hand, respondents also indicated that the VBER and the Vertical Guidelines do not offer sufficient clarity in a number of areas, which in turn provides scope for diverging interpretations. Respondents pointed, for example, to the rules on resale price maintenance being interpreted in an inconsistent manner at national level and suggested that those inconsistencies may be due to a lack of clarity on the correct approach in this area (in particular regarding whether the use of recommended prices accompanied by monitoring policies can qualify as resale price maintenance). Other respondents pointed to diverging interpretations of existing case law, such as the CJEU's *Coty* judgment, and similarly argued that such divergences could be due to a lack of clarity in the VBER or the Vertical Guidelines on the interpretation to be given to such case law. Respondents also indicated that NCAs and national courts have adopted diverging approaches to new types of restrictions that are not addressed in the VBER and the Vertical Guidelines and that have become more prevalent in recent years (e.g. retail price parity clauses). The lack of consistency in the treatment of these restrictions has led, according to the respondents, to significant costs for businesses, as businesses have had to adapt their contracts for each Member State in which they

operate, and to a possible chilling effect on pro-competitive conduct. The particular areas of the rules for which respondents pointed to diverging interpretations, as well as the underlying reasons, are addressed per area in more detail in section 5.3 below and in Annex 4.

Overall, respondents to the public consultation argue that the diverging interpretations by NCAs and national courts lead to a decreased level of legal certainty of the VBER, together with the Vertical Guidelines. According to the respondents, this decrease in legal certainty forces suppliers and distributors to assess compliance risks for each Member State in which they operate and adjust their business practices according to the approach taken by the respective NCA and national courts. It may also lead to suppliers and distributors adopting the approach of the NCA or national court which has the strictest interpretation. According to the respondents to the public consultation, such diverging interpretations by NCAs and national courts also have an effect on the coherence and efficiency of the VBER, together with the Vertical Guidelines. With regard to the latter, respondents indicated that businesses often incur additional costs in order to ensure that their vertical agreements comply with the diverging interpretations of NCAs and national courts, which therefore reduces the efficiency of the rules. This is especially burdensome for SMEs, which may be deterred from entering into vertical agreements due to the high costs involved.

Participants in the **stakeholder workshop** also pointed to a number of areas of the VBER and the Vertical Guidelines that have been subject to diverging interpretations by NCAs and national courts, such as the market definition in vertical relationships and the treatment of certain online sales restrictions. Some participants suggested that the Vertical Guidelines should be binding on NCAs and national courts, whereas others limited themselves to highlighting that the lack of a uniform interpretation and application of the VBER and the Vertical Guidelines reduces legal certainty. The views of the participants are addressed per area in more detail in section 5.3 below and in Annex 4.

The **National Competition Authorities** also acknowledged the existence of areas in which they have diverging views, e.g. regarding the question whether online platforms can qualify as genuine agents, the treatment of online platform bans and dual pricing. NCAs further acknowledged that the limited guidance provided in the VBER and the Vertical Guidelines regarding the legal qualification and assessment of price parity clauses might result in divergences in the treatment of such clauses, which reduces legal certainty for stakeholders. In view of this, the NCAs would welcome additional guidance on these issues. The views of the NCAs are addressed per area in more detail in section 5.3 below and in Annex 4.

The **evaluation study** analysed the enforcement activities of the NCAs as regards vertical restrictions over the last ten years and confirmed the existence of divergent interpretations among NCAs when applying the VBER and the Vertical Guidelines, although only in some areas of the rules.

Cases involving price restrictions represented slightly more than half of the total number of reported cases, with resale price maintenance accounting for the vast majority thereof.

Based on the reported cases, it appears that NCAs did not face major difficulties regarding the legal assessment of resale price maintenance as the criteria for assessment are relatively straightforward. However, NCAs seem to have somewhat divergent approaches in assessing some particular types of price restrictions (e.g. novel implementations of RPM, for which the current rules do not contain any guidance).

Cases involving selective distribution were the second largest category among the reported cases and included several different restrictions, such as internet sales bans, bans on sales through online marketplaces, bans on the use of price comparison tools, restrictions on keyword bidding for the purposes of online advertising, dual pricing, cross-selling restrictions and the exclusion of online retailers. Based on the reported cases, the evaluation study identified divergent approaches between NCAs and national courts as regards in particular the treatment of bans on sales through online marketplaces.

In contrast, cases involving exclusive distribution were not very numerous during the analysed time period and the evaluation study did not find any significant divergences in the approach taken by NCAs.

As regards retail parity clauses, the evaluation study indicated that the NCAs followed a similar approach in applying the rules to wide parity clauses. However, narrow parity clauses (primarily in the hospitality sector), were not treated in the same way by all NCAs. The findings of the study in this regard are addressed in more detail in section 5.3 below and in Annex 4.

5.2.2. Efficiency

Evaluation Questions

4 – Are the costs for assessing whether the VBER, together with the Vertical Guidelines, is applicable to certain vertical agreements proportionate to the benefits that the VBER, together with the Vertical Guidelines, brings for stakeholders?

5 – Is there scope for further simplification and cost reduction?

6 – Would the costs of ensuring compliance of vertical agreements with Article 101 of the Treaty increase if the VBER were not renewed?

7 – Have the costs generated by the application of the VBER, together with the Vertical Guidelines, increased as compared to the 1999 VBER and the 2000 Vertical Guidelines?

What is the issue?

The criterion of efficiency looks at whether the VBER, together with the Vertical Guidelines, was efficient in achieving its objectives, taking into account the costs and benefits associated with applying it. In accordance with the current framework for applying Article 101 of the Treaty, businesses have to self-assess their vertical agreements to ensure compliance with Article 101 of the Treaty. This self-assessment necessarily entails costs for businesses. The VBER, together with the Vertical

Guidelines, aims to facilitate this self-assessment by creating a safe harbour for vertical agreements that can be considered with sufficient certainty as efficiency-enhancing, providing guidance for the application of the VBER and Article 101 of the Treaty, as well as creating a common framework for the assessment of vertical agreements under the VBER and Article 101 of the Treaty across the EU. In this context, it is important to note that the VBER, together with the Vertical Guidelines, does not impose any additional compliance obligations on businesses beyond those reflected in Article 101 of the Treaty. Nevertheless, in order to verify whether their agreements can benefit from the safe harbour provided by the VBER, businesses need to check them against the conditions set out in the VBER, which may entail costs.

In assessing whether the VBER, together with the Vertical Guidelines, has been efficient in achieving its objectives, the Commission focused on four elements. First, the Commission weighed whether the costs of assessing whether the VBER, together with the Vertical Guidelines, applies to a particular vertical agreement are proportionate to the benefits it brings, namely the facilitation of the businesses' self-assessment, when compared to the hypothetical baseline scenario of not having a VBER and Vertical Guidelines in place. Second, the Commission assessed the potential for simplification of the current rules and for a further reduction of the associated costs. Third, the Commission assessed whether the costs of ensuring compliance of vertical agreements with Article 101 of the Treaty would increase if the VBER were to lapse (i.e. comparing the actual situation to a hypothetical baseline scenario of not having a VBER and Vertical Guidelines in place). Fourth, the Commission assessed whether the costs incurred by businesses under the VBER and the Vertical Guidelines have increased as compared to the costs incurred before the intervention, i.e. under a baseline scenario of having the 1999 VBER and the 2000 Vertical Guidelines in place.

What are the findings?

Although the evidence gathered was not sufficient to allow the Commission to conclude on the costs that stakeholders incur for assessing the application of the VBER, together with the Vertical Guidelines, to their vertical agreements, all sources of evidence relied on in the evaluation suggest that those costs are proportionate to the benefits brought by the rules, notably the safe harbour and the resulting increase in legal certainty. Moreover, the evidence gathered in the evaluation also suggests that those costs would increase in the absence of the VBER and Vertical Guidelines, especially for SMEs. At the same time, the evidence suggests that there is significant room for simplification and further cost reduction, notably by reducing the complexity of the wording and structure of the rules and by updating the rules in order to bring them in line with the current needs. The fact that the rules are not sufficiently well adapted to recent market developments also seems to have impacted the evolution of compliance costs since the 1999 and 2010 amendments. In this regard, the evidence gathered during the evaluation does not allow to conclude clearly on whether the compliance costs have decreased.

Are the costs proportionate to the benefits?

A majority of the respondents to the **public consultation**, across all sectors, confirmed that the assessment of the application of the VBER, together with the Vertical Guidelines, to their vertical agreements generates costs. These respondents were primarily businesses, as a large number of business associations reported that they do not have information on the costs incurred by their members. A number of respondents provided a qualitative estimate of the costs linked to the assessment of the applicability of the rules by describing the nature of the costs they incur. Most replies refer to the fees for external consultants (lawyers and economists), as well as to the cost of internal legal advice and the time spent by commercial teams to negotiate and review contractual documents. As regards quantitative estimates, however, a majority of the respondents indicated that they are not able to provide any such cost estimate. This is either because it is not possible for them to identify the relevant costs among the total compliance and legal costs they incur or, in the case of business associations, because they do not have an insight into the costs incurred by their members. A few respondents did provide cost estimates, which however did not allow the Commission to draw any general conclusions, notably due to the significant divergence in the figures provided.

Despite recognising that the application of the VBER, together with the Vertical Guidelines, generates costs, a majority of the respondents to the public consultation indicated that these costs are proportionate to the benefits it brings. Respondents mention, for example, that the legal certainty resulting from the application of the VBER, together with the Vertical Guidelines, can lead to less legal disputes between the parties to an agreement, which generate additional costs for stakeholders. Respondents highlighted that these benefits are particularly important for SMEs, whose market shares are generally low and therefore do not exceed the market share thresholds of the VBER, enabling them to benefit more often than other businesses from the block exemption.

National Competition Authorities generally pointed out that, in their view, it appears to be difficult for businesses, especially SMEs, to self-assess whether a vertical agreement complies with the VBER, together with the Vertical Guidelines, without consulting a lawyer specialised in competition law, which entails certain costs for them. Nevertheless, NCAs indicated that the VBER, together with the Vertical Guidelines, contributes to reducing the costs borne by stakeholders, even though this reduction is difficult to measure.

The **evaluation study** confirmed these findings. On the basis of ten case studies in the form of interviews of law firms advising clients on vertical restrictions, industry associations, a company operating globally and a professor of competition law, the evaluation study found that the costs generated by the VBER, together with the Vertical Guidelines, are proportionate to the benefits of the rules.

Is there scope for further simplification and cost reduction?

Respondents to the **public consultation** indicated that there is scope for further cost reduction. In particular, respondents mentioned that the lack of clarity of certain provisions, as well as the fact that the rules are not fully adapted to market developments

detract from the legal certainty of the rules. Therefore, applying the rules requires an increased need for legal advice, which increases costs and reduces the efficiency of the rules. Respondents also indicated that the diverging interpretation of some provisions of the VBER and the Vertical Guidelines by NCAs and national courts generates additional costs, as it requires businesses to seek specific legal advice for each Member State in which they operate. The lack of a harmonised interpretation therefore also detracts from the efficiency of the rules. Clarifying the rules, adapting them to the market developments and reducing the scope for diverging interpretations should therefore lead to a cost reduction.

The evidence also suggests that a further cost reduction could be achieved through a simplification of the current rules. Some respondents mentioned in this regard that the rules are not straightforward to understand and apply, due to unclear wording or structure (e.g. exceptions to exceptions in Article 4 of the VBER), as well as a lack of clear definitions and guidance, which is not presented in a consistent manner for some areas concerned. Businesses therefore often need to have recourse to external legal advice in order to apply the rules properly.

NCAs also indicated that due to the complexity of the rules, many businesses need to seek an opinion from a law firm specialised in competition law in order to apply the VBER. Simplifying the rules would therefore reduce costs for stakeholders.

Would the costs increase if the VBER were not renewed?

In any event, almost all of the respondents to the **public consultation** indicated that the costs linked to ensuring compliance of vertical agreements with Article 101 of the Treaty would increase if the VBER were not renewed since legal certainty for their self-assessment would decrease or even disappear. In particular, respondents explained that businesses from all sectors would have to spend more time and resources (notably fees for lawyers and economists) on assessing the compliance of their vertical agreements with Article 101 of the Treaty since an assessment of whether an agreement is block-exempted usually entails less work and requires less facts to be investigated compared to an extended individual assessment under Article 101 of the Treaty. Moreover, litigation-related costs would also increase, as the lack of legal certainty would likely lead to more disputes about the legality of certain vertical restrictions. Some law firms stated that not renewing the VBER would increase the time required to assess vertical restrictions and that the cost of legal advice would increase accordingly. Respondents, however, were not able to provide a quantitative estimate for this increase in costs. Several respondents also stressed that SMEs would be especially affected by any such cost increase, since they do not have the human and financial resources needed to perform what is, from their perspective, a complex self-assessment under Article 101 of the Treaty. Some respondents also indicated that not renewing the VBER could have a chilling effect, as businesses could be deterred from offering innovative business solutions or developing new business models whose compatibility with Article 101 of the Treaty would have to be assessed in each individual case (instead of being block-exempted). Finally, respondents also indicated that the divergences in approach between NCAs and national courts when applying Article 101 of the Treaty to vertical agreements are likely to

increase in the absence of the VBER. The above also suggests that the costs of using the VBER, together with the Vertical Guidelines, are lower compared to a situation where stakeholders must self-assess without the VBER and the Vertical Guidelines.

NCAs also considered that the costs they incur when assessing the compliance of vertical agreements with Article 101 of the Treaty would increase in the absence of the VBER. **NCA**s reached the same conclusion in respect of the absence of the Vertical Guidelines.

The **evaluation study** also found that in the absence of the VBER, the legal costs for businesses would be much higher than is currently the case and there would be less legal certainty for stakeholders regarding the compliance of their vertical agreements with Article 101 of the Treaty. The same would happen in the absence of the Vertical Guidelines. Nevertheless, the case studies did not produce any specific figures that would help estimate the costs in question.

Have the costs increased as compared to the 1999 VBER and the 2000 Vertical Guidelines?

As regards how the costs generated by the application of the VBER, together with the Vertical Guidelines, compare to the costs incurred under the 1999 VBER and the 2000 Vertical Guidelines, a majority of the respondents to the **public consultation** indicated that the costs have decreased, in particular because the VBER and the Vertical Guidelines are clearer than the previous rules. In contrast, some respondents indicated that the costs have increased because of (i) market developments such as growing online sales, which have rendered the assessment more complex and to which the rules are not sufficiently well adapted, and (ii) diverging interpretations of the current rules by **NCA**s and national courts. However, none of the respondents provided a quantitative estimate of the perceived change in costs.

Similarly, the evidence gathered in the **evaluation study** suggests that it is not clear whether the costs have increased or decreased. Some case studies indicated that costs are lower, since the two regimes are similar and businesses have gained experience in using the conditions of the block exemption to assess their agreements. Other case studies, however, indicated that the costs are higher, since the current regime extended the market share threshold also to the buyer's market share, which requires stakeholders to incur, among others, the cost of collecting additional information. Moreover, due to rapid changes in market conditions, in particular the growth of online sales and of new market players such as marketplaces, the costs of applying the rules are constantly increasing, as businesses need more legal advice.

The evidence from the evaluation study as well as from the public consultation therefore suggests that the evolution of costs since 1999 has not necessarily been linear. At the time of the 2010 amendment, costs were likely reduced as the VBER and Vertical Guidelines addressed issues for which there had previously not been sufficient guidance. However, as the market continued to evolve after 2010, costs appear to have increased, as the rules progressively became less adapted to those market developments. The increase in new types of agreements and new vertical restrictions, which are by their very nature not explicitly covered by the rules and for which there is limited or no guidance, is likely

to lead to increased costs for stakeholders, as they entail an increased need for legal advice.

5.2.3. Relevance

Evaluation Question 8 – How well do the objectives of the VBER, together with the Vertical Guidelines (i.e. to provide legal certainty for assessing whether vertical agreements comply with Article 101 of the Treaty, to properly capture under the block exemption those vertical agreements that can be considered with sufficient certainty as efficiency-enhancing and to provide a common framework to ensure a consistent application by national competition authorities and national courts of the vertical rules across the EU) still correspond to the needs?

What is the issue?

The assessment of the relevance of the VBER, together with the Vertical Guidelines, focuses on whether its objectives have proven to be appropriate and whether they still correspond to the current needs, taking into account the market developments that have taken place since its adoption. The VBER, together with the Vertical Guidelines, aims at addressing the need for legal certainty of businesses entering into vertical agreements (in view of the fact that they have to self-assess the compliance of their agreements with Article 101 of the Treaty) and the need for a common framework of assessment for the NCAs and national courts (in view of the decentralised application of Article 101 of the Treaty). In addition, it is important to recall that by exempting certain vertical agreements from the application of Article 101 of the Treaty and providing guidance on both the application of the VBER and Article 101(1) of the Treaty to vertical agreements, the VBER, together with the Vertical Guidelines also contributes in the long-term to the promotion of effective competition and economic efficiency in the European Single Market for the benefit of consumers. When assessing the relevance of the VBER, together with the Vertical Guidelines, it must also be taken into account that its ability to promote effective competition and economic efficiency for the benefit of consumers is linked to how well the VBER, together with the Vertical Guidelines, is adapted to the current market environment, which has evolved significantly since its adoption.

In assessing whether the VBER, together with the Vertical Guidelines, is still relevant, the Commission focused on two main aspects.

First, the Commission assessed how the evolution of distribution models over recent years might have impacted the needs and objectives of the intervention. Understanding this evolution is necessary to assess whether the needs are still the same since significant changes to distribution models (e.g. a pronounced shift to vertical integration and away from more traditional distribution systems) could have an impact on whether there is still a need to provide legal certainty and a common framework of assessment for these distribution models. At the same time, the assessment of the evolution of distribution models over recent years is also important for the assessment of effectiveness, since the ability of the VBER, together with the Vertical Guidelines, to meet its objectives is dependent on how well adapted it is to the evolution of the market since the adoption of the intervention. This is reflected in section 5.2.1 above, as the evaluation shows that the

market developments that are explained in more detail in section 5.1 above have had an impact on the effectiveness of the intervention.

Second, the Commission assessed whether, in view of new market developments, stakeholders still see a need for maintaining the VBER, together with the Vertical Guidelines, and whether they see a need for a revision of the rules.

What are the findings?

The evidence gathered during the evaluation suggests that the VBER and the Vertical Guidelines are not sufficiently well adapted to the current market environment, as they do not entirely take into account the market developments that have taken place since their adoption. In particular, the evaluation has shown that since the adoption of the intervention, the growth of online sales and online platforms has had a significant impact on distribution models. In this context, the evolving nature of platform business models has led to an increase in the number of contractual relationships and the increased use of vertical agreements over time. At the same time, today's consumers expect to have a continuous omni-channel experience across a variety of different channels such as offline and online shops, marketplaces and other online platforms. This has led suppliers to increase the number of different distribution and sales channels used to promote their products and services. These developments have led to changes as to the distribution models used. For example, the use of selective distribution systems has increased, whereas exclusive distribution is used less frequently today. Similarly, new types of vertical restrictions, such as restrictions regarding sales through online marketplaces, restrictions on online advertising or retail parity clauses have become more prevalent due to the growth of e-commerce. In addition, some issues that were already analysed at the time of the last revision have become more prominent over time, such as stakeholder concerns with regard to possible free-riding between the different sales channels and the appropriate delineation between active and passive sales.

These market developments support the finding that the VBER, together with the Vertical Guidelines, remains relevant, as there is a need to address the changes in the use of different distribution models and sales channels, as well as the increase of vertical agreements and new vertical restrictions. In particular with regard to the latter, there is a need to provide legal certainty for their assessment, to determine whether they satisfy the conditions of Article 101(3) of the Treaty and to provide a common framework of assessment.

In addition to the assessment of the evolution of distribution models over recent years set out in section 5.1 above, the Commission also assessed whether stakeholders still see a need for maintaining the VBER, together with the Vertical Guidelines, and whether they see a need for a revision of the rules.

A large majority of the respondents to the **public consultation** indicated that not renewing the VBER and withdrawing the Vertical Guidelines would have negative effects for them, leading in particular to a severe loss of legal certainty in the assessment of vertical agreements. Respondents mentioned that the absence of the VBER and the Vertical Guidelines would result in uncertainty, which could discourage them from

entering into certain supply and distribution agreements and reduce their incentives to invest, thus slowing down innovation to the detriment of consumers. In addition, this would lead to higher compliance and legal costs, as well as a likely decrease in harmonisation among Member States, as there could be an increase in differing interpretations of Article 101 of the Treaty by NCAs and national courts. A number of respondents also highlighted that the VBER and the Vertical Guidelines are closely linked, so that withdrawing the Vertical Guidelines while maintaining the VBER would undermine its effectiveness.

A majority of the respondents to the public consultation also indicated that renewing the VBER and maintaining the Vertical Guidelines without any change would have effects for them, either negative or positive. Among these respondents, many indicated that the renewal of the current rules without any change would be preferable to letting the VBER lapse and withdrawing the Vertical Guidelines, as this would have the positive effect of ensuring at least a minimum level of legal certainty. A significant number of respondents, however, also indicated that the renewal of the current rules without change would have negative effects, since the current rules are not adapted to the market developments that have occurred since the adoption of the VBER and the Vertical Guidelines in 2010.

In light of the above, from the perspective of the respondents to the public consultation, there is a continued need for legal certainty and for a common framework for NCAs and national courts. However, the respondents consider that the VBER, together with the Vertical Guidelines, may no longer be able to meet these needs unless it is revised to take account of the market developments that occurred since its adoption in 2010.

The need for a revision of the VBER to reflect major supply and distribution trends, as well as changes to supply and distribution practices during recent years was highlighted by a large majority of the respondents, whereas an even higher number of respondents indicated that the Vertical Guidelines also need to be revised in light of major trends and changes in recent years. Respondents pointed to a number of areas that need revision, as well as the major trends and changes motivating the need for such a revision. Different stakeholder groups among the respondents mentioned different areas with varying degrees of importance and not all stakeholder groups have the same view as to what they believe the revision should look like in practice to meet their needs. These views are addressed per area in more detail in section 5.3 below and in Annex 4.

Despite the divergence of views, a high number of respondents pointed to a perceived need for a revision of the guidance concerning online sales and online advertising restrictions, due to the increasing importance of online sales, including sales through online platforms (including marketplaces) and the increasing importance of online advertising. A high number of respondents also pointed to a perceived need for a revised approach to hardcore restrictions in the context of selective distribution and to the guidance provided in the Vertical Guidelines on this topic, due to the increasing prevalence of selective distribution in the EU across a variety of sectors. Another area that many respondents perceived as needing revision relates to resale price maintenance (which is considered a hardcore restriction under the VBER) and the related guidance in the Vertical Guidelines. This is due to several reasons, such as the increasing use of price

monitoring software and pricing algorithms by market players, free-riding concerns, as well as potential efficiencies stemming from resale price maintenance and the current economic thinking on this topic. Respondents also mentioned other areas where they perceive a need for a revision.¹²¹

Finally, a large majority of the respondents to the public consultation also indicated that there are areas for which the VBER, together with the Vertical Guidelines, does not provide any guidance and that this would be desirable to ensure that the rules remain relevant and able to meet their objectives. In particular, they mentioned retail parity clauses, restrictions on the use of online search advertising and price comparison websites, vertical exchanges of information between competitors (e.g. in the context of dual distribution), territorial supply constraints and the practice of retail channelling.¹²² The views of the respondents in this regard, as well as the underlying reasons mentioned, are addressed per area in more detail in section 5.3 below and in Annex 4.

Participants in the **stakeholder workshop** confirmed that the VBER, together with the Vertical Guidelines, remain relevant tools for self-assessing the compliance of vertical agreements with Article 101 of the Treaty. They also discussed a number of areas for which, in their view, the rules are currently not functioning well and would therefore warrant a revision to ensure that they remain relevant for the future. Participants discussed in particular agency agreements, dual distribution, the market share thresholds, price-related restrictions, issues related to online distribution, selective and exclusive distribution, franchising, non-compete obligations and access to data.¹²³ The views expressed by participants in the stakeholder workshop are addressed per area in more detail in section 5.3 below and in Annex 4.

National Competition Authorities also generally confirmed that the VBER, together with the Vertical Guidelines, remains useful in view of the current needs (i.e. the need for legal certainty and for a common framework of assessment for NCAs and national courts) and should therefore be maintained. In addition, the high level of enforcement by NCAs in this area, as set out in section 5.1.4 above, suggests that the objective of providing a common framework for the assessment of the compliance of vertical agreements with Article 101 of the Treaty was (and remains) relevant.

While the objectives of the rules remain relevant, NCAs also pointed to a number of market developments that are currently not reflected in the VBER or the Vertical Guidelines. In particular, new forms of distribution have emerged, due to the increased importance of online sales and new players (e.g. online platforms) that are now active on many markets. These market developments have influenced and changed the behaviour of market participants and consumers. They therefore justify a revision of the VBER, together with the Vertical Guidelines, in particular to give guidance on the assessment of

¹²¹ For more details, see Annex 2, section 2.2.

¹²² Retail channelling is a practice by which suppliers grant access to "top tier" products only to certain distributors, especially in the context of a selective distribution network.

¹²³ For more details, see Annex 2, section 2.4.

new vertical practices, so that these rules continue to meet their objectives. The views of the NCAs are addressed per area in more detail in section 5.3 below and in Annex 4.

5.2.4. Coherence

Evaluation Question 9 – Is the VBER, together with the Vertical Guidelines, coherent with other Commission instruments that provide guidance on the interpretation of Article 101 of the Treaty and with other EU legislation with relevance for vertical supply and distribution agreements?

What is the issue?

When assessing the coherence of the VBER, together with the Vertical Guidelines, both other Commission rules and guidance on the application of Article 101 of the Treaty and other EU legislation with relevance for vertical supply and distribution agreements have to be taken into account.

As regards other Commission rules and guidance on the application of Article 101 of the Treaty, there are a number of guidelines, notices and other block exemptions, many of which touch upon concepts and issues also dealt with in the VBER and the Vertical Guidelines. For example, the Article 81(3) Guidelines provide additional guidance on the application of the four conditions of Article 101(3) of the Treaty and therefore also apply for the purposes of carrying out individual assessments of vertical agreements covered by the Vertical Guidelines.¹²⁴ The MVBER is also closely related to the VBER, as the exemption it grants is conditional upon agreements fulfilling the requirements for an exemption under the VBER, in addition to further sector-specific conditions.¹²⁵ Similarly, the Horizontal Guidelines¹²⁶ and the Guidelines on Technology Transfer Agreements,¹²⁷ together with the respective block exemption regulations, contain references to both the VBER and the Vertical Guidelines, even though they apply to different types of agreements.

In addition, it is necessary to assess whether other EU legislation with relevance for vertical supply and distribution agreements is coherent with the VBER, together with the Vertical Guidelines. In this regard, there are in particular two regulations to be considered, to the extent that they interact with the VBER.

First, the Geo-blocking Regulation, which addresses unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of

¹²⁴ Communication from the Commission, Notice - Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97-118.

¹²⁵ For further details on the MVBER, see section 1.2 above.

¹²⁶ Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements ("Horizontal Guidelines"), OJ C 11, 14.1.2011, p. 1-72

¹²⁷ Communication from the Commission, Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements ("Guidelines on Technology Transfer Agreements"), OJ C 89, 28.3.2014, p. 3.

establishment.¹²⁸ This Regulation complements EU competition law by also catching (unilateral) geo-blocking measures that are not covered by Article 101 of the Treaty. The general non-discrimination provision of the Regulation does not apply to certain non-audiovisual electronically supplied services that offer copyright-protected content (see Article 4(1) of the Geo-blocking Regulation), while audiovisual services are fully excluded from its scope. The Geo-blocking Regulation contains a specific reference to the VBER, with regard to the possible relationship of the prohibitions of the Regulation applicable to traders and possible vertical agreements with their suppliers.¹²⁹ In particular, the impact of the Geo-blocking Regulation on vertical agreements between suppliers and traders is limited to passive sales restrictions as defined in the VBER, together with the Vertical Guidelines (hence excluding active sales restrictions; see Article 6(1) of the Geo-blocking Regulation). Moreover, in order to prevent any possible circumvention of the new rules, Article 6(2) of the Geo-blocking Regulation clarifies that passive sales restrictions (within the meaning of the VBER) imposing contractual obligations in contrast with the specific prohibitions of the Geo-blocking Regulation are automatically void. This means that there is no longer a possibility to invoke efficiencies with regard to such practices (in contrast to what was so far allowed in the context of an individual assessment under Article 101(3) of the Treaty for a very limited group of passive sales restrictions).¹³⁰

Second, the Platform-to-Business Regulation regulates certain aspects of the (vertical) relationship between online platforms and their business users, as well as between online search engines and corporate website users, in particular unfair practices, transparency and redress possibilities.¹³¹

What are the findings?

The evidence gathered in the evaluation shows that the VBER, together with the Vertical Guidelines, is overall coherent both with other Commission rules and guidance on the application of Article 101 of the Treaty, as well as with other EU legislation with relevance for vertical supply and distribution agreements. Nevertheless, stakeholders pointed to a few areas in which coherence is not as high as it could be due to a lack of clarity or perceived inconsistencies between certain rules. In particular, the perceived lack of coherence of the VBER, together with the Vertical Guidelines, with the Geo-

¹²⁸ 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 or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC ("Geo-blocking Regulation"), OJ L 60I, 2.3.2018, p. 1.

¹²⁹ For further details, see Q&A documents prepared by the Commission services, in particular section 2.5., available at <https://ec.europa.eu/digital-single-market/en/news/geo-blocking-regulation-questions-and-answers>.

¹³⁰ See Article 6(2) and recital 34 of the Geo-blocking Regulation.

¹³¹ Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services ("Platform-to-Business Regulation"), OJ L 186, 11.7.2019, p. 57.

blocking Regulation comes from the fact that the latter prohibits certain practices, which is a legislative choice, which could be further clarified when considering any next steps that may follow the evaluation.

A large majority of the respondents to the **public consultation** indicated that the VBER, together with the Vertical Guidelines, is coherent with other Commission rules and guidance on the interpretation of Article 101 of the Treaty. The few respondents who considered that there is a lack of coherence pointed, for example, to the assessment of information exchanges in the context of dual distribution under the Vertical Guidelines and the Horizontal Guidelines, perceived inconsistencies between the various block exemptions as regards the definition of potential competitors, and difficulties with identifying the dividing line between the different block exemptions. The few issues raised by those respondents are addressed per area in more detail in section 5.3 below and in Annex 4. Respondents also expressed concerns regarding diverging interpretations of the VBER and the Vertical Guidelines by NCAs and national courts. This issue is assessed in more detail under the criterion of effectiveness in section 5.2.1 above.

The respondents to the public consultation had more nuanced views as regards coherence with other existing and/or upcoming EU legislation, with the number of positive and negative replies being essentially the same. A few respondents (mainly legal professionals and business associations) expressed concerns regarding possible inconsistencies with the Geo-blocking Regulation, such as the perception that some restrictions of passive sales are allowed under the VBER but not under the Geo-blocking Regulation. Respondents indicated that guidance on the interaction between the two pieces of legislation is currently insufficient. A few respondents also mentioned perceived inconsistencies with the Platform-to-Business Regulation, in particular as regards the treatment of parity clauses. Furthermore, the franchise sector pointed to perceived inconsistencies with the Directive on the protection of trade secrets.¹³² Respondents also indicated that there are perceived inconsistencies between the VBER, together with the Vertical Guidelines, and some national legislation, such as the French Commercial Code or national laws relating to franchising. A few respondents mentioned as well perceived inconsistencies with the *De Minimis* Notice, e.g. as regards the exceptions to the rules on resale price maintenance set out in the Vertical Guidelines but not in the *De Minimis* Notice. Finally, a few respondents mentioned that the VBER, together with the Vertical Guidelines, has an effect on the fundamental rights to property and freedom of profession. These issues are addressed per area in more detail in section 5.3 below and in Annex 4.

National Competition Authorities also generally consider that the VBER, together with the Vertical Guidelines, is coherent with other Commission rules and guidance on the application of Article 101 of the Treaty. NCAs however mentioned that the VBER, together with the Vertical Guidelines, may be affected by the Platform-to-Business

¹³² Directive (EU) 2016/943 of the European Parliament and the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure ("Directive on the protection of trade secrets"), OJ L 157, 15.6.2016, p. 1.

Regulation. Consequently, any revision of the rules should take into account the Platform-to-Business Regulation, to ensure that both pieces of legislation complement and do not contradict each other.

5.2.5. EU added value

Evaluation Question 10 – Does the VBER, together with the Vertical Guidelines, as an intervention at EU level, add value in the assessment of the compatibility of vertical agreements with Article 101 of the Treaty?

What is the issue?

When assessing whether the VBER, together with the Vertical Guidelines, as an intervention at EU level, provides added value, it has to be taken into account that competition law is an area where the EU has exclusive competence. This means that the EU alone is allowed to legislate and adopt binding acts in this area, whereas the Member States are only allowed to legislate if empowered by the EU to implement these acts. Moreover, the Empowerment Regulation of 1965 grants only the Commission, and not the Member States, the power to adopt block exemption regulations for certain categories of vertical agreements.

Therefore, in the absence of the VBER and the Vertical Guidelines, which is the relevant point of comparison for the assessment, stakeholders would be deprived of the safe harbour that only an EU intervention can provide. They would therefore have to rely on other instruments for the purpose of self-assessing the compliance of their vertical agreements with Article 101 of the Treaty, instead of being able to rely on a simpler set of rules.

What are the findings?

The evidence gathered in the evaluation suggests that the VBER, together with the Vertical Guidelines, provides EU added value. Since it provides a safe harbour from EU competition law, which can only be granted at EU level, the VBER offers increased legal certainty and guidance as compared to existing, more general and nationally fragmented guidance on the application of Article 101 of the Treaty.

A very large majority of the respondents to the **public consultation** indicated that the VBER, together with the Vertical Guidelines, provides clear added value. This is in particular because the VBER, together with the Vertical Guidelines, provides a harmonised approach for the assessment of vertical agreements throughout the EU, which contributes to increased legal certainty. Respondents also explained that self-assessing compliance with Article 101 of the Treaty in the absence of the VBER, together with the Vertical Guidelines, would be more costly and administratively burdensome. Especially for businesses doing business across the EU, having a harmonised approach can significantly reduce compliance costs and contribute to avoiding market fragmentation, which would impede cross-border trade in the European Single Market.

Respondents to the public consultation nevertheless indicated that the value provided by the VBER and the Vertical Guidelines would be increased if the rules were updated and revised, in particular to reflect recent market developments.

National Competition Authorities also generally consider that the VBER, together with the Vertical Guidelines, provides clear added value for the assessment of the compliance of vertical agreements with Article 101 of the Treaty. Therefore, allowing the VBER, together with the Vertical Guidelines, to lapse would seriously undermine the level of harmonisation achieved in the enforcement of Article 101 of the Treaty across the EU.

5.3. Overview of the areas in which the VBER, together with the Vertical Guidelines, is perceived as not functioning well or not functioning as well as it could

This section sets out the areas for which the evaluation has shown that the VBER, together with the Vertical Guidelines, is not functioning well or not functioning as well as it could, including the underlying reasons. A clarification or a revision of the approach in those areas could, according to the stakeholders who contributed to the evaluation, help increase the effectiveness and relevance of the VBER, together with the Vertical Guidelines, as well as its efficiency and coherence in certain of those areas.¹³³ A detailed analysis per area can be found in Annex 4 to the Staff Working Document.

The table below lists the issues identified by the evaluation as regards vertical agreements generally falling outside the scope of Article 101(1) of the Treaty (see section 4.1 in Annex 4).

	Vertical agreements generally falling outside the scope of Article 101(1) of the Treaty	Effectiveness	Efficiency	Relevance	Coherence
	<i>Agreements of minor importance and agreements between small and medium-sized enterprises</i>				
1	Paragraphs 8-11 VGL provide an appropriate level of legal certainty	✓			
2	Issues of consistency with the <i>De Minimis</i> Notice adopted in 2014, the Effect on Trade Guidelines and relevant case law (notably the CJEU's <i>Expedia</i> judgment)	✓	✓		✓

¹³³ In the below tables, effectiveness is marked for all issues that pertain to how the intervention met its objectives. Efficiency is marked for all issues that, by reducing the level of effectiveness of the intervention, therefore also reduce its efficiency. Relevance is marked for all issues that support the finding that the objectives of the intervention are still relevant, notably those related to recent market developments. Coherence is marked for all issues that affect the level of coherence of the intervention.

		Effectiveness	Efficiency	Relevance	Coherence
	Vertical agreements generally falling outside the scope of Article 101(1) of the Treaty				
	<i>Subcontracting agreements</i>				
3	Paragraph 22 VGL provides an appropriate level of legal certainty	✓			
4	Lack of clarity regarding the interplay of the VGL with the Subcontracting Notice	✓	✓		✓
	<i>Agency agreements</i>				
5	Stakeholders generally agree with the fact that all obligations imposed on the agent in relation to the contracts concluded and/or negotiated on behalf of the principal fall outside Article 101(1) of the Treaty	✓			
6	Lack of clarity concerning the level and type of risks that are relevant to determine whether a vertical agreement can be considered a genuine agency agreement	✓	✓		
7	Issues regarding the application of the agency exception to online platforms	✓	✓	✓	
8	Issues related to the possibility of applying the agency exception to tripartite relationships between suppliers, intermediaries and final customers	✓	✓	✓	
9	Issues as regards the relationship between the principal and the agent, in particular the duration of non-compete clauses that may benefit from the VBER and the possibility to impose requirements other than those listed in paragraph 18 VGL	✓	✓		

The table below lists the issues identified by the evaluation as regards the scope of the exemption set out in Articles 1 and 2 of the VBER (see section 4.2 in Annex 4).

		Effectiveness	Efficiency	Relevance	Coherence
	Scope of the exemption				
	<i>Definition of vertical agreements</i>				
1	The definition of vertical agreements in Article 1(1)(a) VBER, as further specified in the VGL, has worked well	✓			

	Scope of the exemption	Effectiveness	Efficiency	Relevance	Coherence
2	However, lack of clarity of some aspects of the definition	✓	✓		
3	Other aspects of the definition are not well suited to capture the relationship between new online intermediaries and their users	✓	✓	✓	
	<i>Agreements between associations and their members</i>				
4	Article 2(2) VBER and the corresponding paragraphs of the VGL provide an appropriate level of legal certainty	✓			
5	Stakeholders questioned the appropriateness of the thresholds set out in Article 2(2) VBER and paragraph 29 VGL	✓	✓		
6	Lack of clarity on whether joint purchasing agreements between independent retailers are generally considered as pro-competitive	✓	✓		
7	Issues with the limitation of the exemption to associations of retailers distributing goods	✓	✓		
8	Insufficient guidance on the fact that the exemption for these agreements only applies if also the criteria of Articles 3 to 5 VBER are met and if there are no horizontal concerns	✓	✓		
	<i>Agreements containing provisions on IPRs</i>				
9	Article 2(3) VBER and the corresponding paragraphs of the VGL provide an appropriate level of legal certainty	✓			
10	Lack of guidance on various types of IPR agreements that are not covered by the VBER, nor any other block exemption	✓	✓		
11	Lack of guidance on field-of-use restrictions in vertical distribution agreements	✓	✓		
	<i>Dual distribution</i>				
12	The qualification of dual distribution as a vertical relationship and its exemption from the prohibition of Article 101(1) of the Treaty is adequate and should remain part of the VBER	✓			
13	However, Article 2(4) VBER and the corresponding paragraphs of the VGL provide either a slightly low or a very low level of legal certainty	✓	✓		
14	Insufficient clarity as to whether information exchanges in dual distribution scenarios are to be treated as vertical	✓	✓		

	Scope of the exemption	Effectiveness	Efficiency	Relevance	Coherence
	restrictions and can thus be considered as covered by the VBER, and as regards the extent and under which conditions information exchanges in dual distribution scenarios are admissible/problematic				
15	Issues with the fact that Article 2(4)(a) VBER limits the exemption for dual distribution to manufacturers distributing goods downstream, thus excluding wholesalers or independent importers who are also active in the downstream market from the benefit of the VBER	✓	✓		
16	Issues as regards the interplay with the Horizontal Guidelines	✓	✓		✓
17	Lack of clarity as to whether agreements between a manufacturer and a retailer that sells private label goods produced by third parties are covered by the VBER	✓	✓		
18	Issues with the fact that the increase of direct sales by manufacturers has an impact on the viability of the investments distributors are required to make	✓	✓	✓	
19	Issues as regards the definition of the concept of potential competitor set out in paragraph 27 VGL	✓	✓		✓
20	Issues with regard to the relationship between hybrid online platforms and the sellers present on such platforms, and whether they should be covered by Article 2(4) VBER	✓	✓	✓	
21	Insufficient clarity as regards the conditions under which the exemption for dual distribution applies to service providers	✓	✓		

The table below lists the issues identified by the evaluation as regards the market share thresholds (see section 4.3 in Annex 4).

	Market share thresholds for the supplier and the buyer	Effectiveness	Efficiency	Relevance	Coherence
1	The market share thresholds set out in Article 3 VBER, as further specified in the corresponding paragraphs of the VGL, provide an appropriate level of legal certainty and should therefore continue to apply	✓			

		Effectiveness	Efficiency	Relevance	Coherence
	Market share thresholds for the supplier and the buyer				
	<i>Application of the market share thresholds</i>				
2	Lack of clarity and consistency with regard to the definition of the relevant market as businesses and NCAs cannot rely on a uniform set of rules and precedents	✓	✓		
3	Issues regarding the suitability of the current rules to determine relevant markets in emerging online markets or when online intermediaries are involved	✓	✓	✓	
4	Difficulties to assess the market shares of the supplier and the buyer, especially for online platforms	✓	✓	✓	
	<i>Substantive issues in relation to the market share thresholds</i>				
5	Issues regarding the assessment of the market share threshold for both the supplier and the buyer, which can be challenging and costly or not well adapted to capture vertical relations in oligopolistic markets	✓	✓		
6	Market share thresholds can lead to false positives (e.g. too high when applied to online intermediaries or not an accurate indicator of market power in digital technology sectors)	✓	✓		
7	Market share thresholds can lead to false negatives (e.g. too low as they exclude efficiency-enhancing agreements between non-dominant companies from the benefit of the VBER)	✓	✓		

The table below lists the issues identified by the evaluation as regards the concept of hardcore restrictions and excluded restrictions (see sections 4.4 and 4.5 in Annex 4).

		Effectiveness	Efficiency	Relevance	Coherence
	The concept of hardcore and excluded restrictions				
	<i>The concept of hardcore restriction</i>				
1	Issues with regard to the clarity of the concept of hardcore restriction	✓	✓		
2	Lack of guidance on the specific legal and economic circumstances under which hardcore restrictions could be considered as satisfying the conditions of Article 101(3) of the	✓	✓		

		Effectiveness	Efficiency	Relevance	Coherence
	The concept of hardcore and excluded restrictions				
	Treaty				
3	Mixed evidence as regards the scope of the list of hardcore restrictions set out in Article 4 VBER (i.e. false positives and false negatives)	✓	✓		
	<i>The concept of excluded restriction</i>				
4	The concept of excluded restriction is sufficiently clear	✓			
5	Lack of clarity regarding the framework of assessment for excluded restrictions (restrictions by object or by effect)	✓	✓		

The table below lists the issues identified by the evaluation as regards Resale Price Maintenance (see section 4.6.1 in Annex 4).

		Effectiveness	Efficiency	Relevance	Coherence
	Resale Price Maintenance (RPM)				
1	Article 4(a) VBER and the corresponding paragraphs of the VGL generally provide an appropriate level of legal certainty	✓			
2	Limited guidance on the circumstances under which recommended or maximum resale prices could amount to RPM, which results in a lack of legal certainty	✓	✓		
3	Lack of clarity as regards the conditions under which RPM can benefit from the exemption of Article 101(3) of the Treaty	✓	✓		
4	Lack of coherence in the treatment of RPM across the EU given that NCAs partly pursue divergent approaches to novel implementations of RPM	✓	✓		
5	Mixed evidence regarding the classification of RPM as a hardcore restriction according to the VBER	✓	✓		

The table below lists the issues identified by the evaluation as regards territorial and customer restrictions (see section 4.6.2 in Annex 4).

		Effectiveness	Efficiency	Relevance	Coherence
	Territorial and customer restrictions				
1	Stakeholders consider that Article 4(b) VBER and the corresponding paragraphs of the VGL provide an appropriate level of legal certainty	✓			
2	Lack of clarity of the structure and the wording of Article 4(b) VBER as well as the corresponding paragraphs of the VGL	✓	✓		
	<i>Specific findings relating to customer restrictions</i>				
3	Lack of consistency between the different language versions of the VBER	✓	✓		
4	Lack of definition of the concept of customers and its scope	✓	✓		
5	Lack of basis in the case law for subjecting customer restrictions to the same strict test as territorial restrictions	✓	✓		
	<i>Specific findings relating to territorial restrictions</i>				
6	Lack of clarity of the rules on territorial restrictions	✓	✓		
7	Need to enforce the prohibition on territorial restrictions more vigorously	✓	✓		
8	Lack of consistency between the VBER and the Geo-blocking Regulation	✓	✓		✓

The table below lists the issues identified by the evaluation as regards parity clauses (see section 4.6.3 in Annex 4).

		Effectiveness	Efficiency	Relevance	Coherence
	Parity clauses				
1	Increased use of retail parity clauses over the last ten years	✓		✓	
2	VBER and VGL do not provide sufficient guidance on how to assess the compatibility of retail parity clauses with Article 101 of the Treaty	✓	✓		

		Effectiveness	Efficiency	Relevance	Coherence
	Parity clauses				
3	Divergent treatment of retail parity clauses by NCAs	✓	✓		
4	Perceived lack of coherence with the P2B Regulation	✓			✓

The table below lists the issues identified by the evaluation as regards non-compete obligations (see section 4.6.4 in Annex 4).

		Effectiveness	Efficiency	Relevance	Coherence
	Non-compete obligations (Article 5 of the VBER)				
1	Article 5 VBER provides an appropriate level of legal certainty	✓			
2	Issues with Article 5(1)(b) VBER excluding non-compete clauses exceeding five years from the benefit of the VBER, which seems too broad and results in an unjustified burden for businesses	✓	✓		
3	Issues with Article 5(1)(b) VBER excluding post-term non-compete from the benefit of the VBER, which seems too broad	✓	✓		
4	Issues with the cumulative conditions for the derogation regarding post-term non-compete clauses, which appear outdated and too narrowly defined	✓	✓		
5	Issues with Article 5(1)(c) VBER excluding non-compete obligation imposed on members of selective distribution system from the benefit of the VBER, which appears unjustified	✓	✓		

The table below lists the issues identified by the evaluation as regards exclusive distribution (see section 4.6.5 in Annex 4).

		Effectiveness	Efficiency	Relevance	Coherence
	Exclusive distribution				
1	Paragraphs 151-167 VGL provide an appropriate level of legal certainty	✓			
2	The rules are not sufficiently flexible as regards the exception set out in Article 4(b)(i) VBER	✓	✓		
3	Lack of guidance or limitation with regard to the size or scope of the exclusive territory or customer group	✓	✓		
4	Issues with the fact that the rules allow the restriction of active sales by a buyer, but only where such a restriction does not limit sales by the customers of the buyer	✓	✓		
5	Lack of clarity regarding the possibility to combine selective and exclusive distribution in the same territory at different levels of the supply chain or in different territories	✓	✓		

The table below lists the issues identified by the evaluation as regards selective distribution (see section 4.6.6 in Annex 4).

		Effectiveness	Efficiency	Relevance	Coherence
	Selective distribution				
1	Unanimous confirmation of the significant increase in the use of selective distribution at different levels of the vertical supply and distribution chain			✓	
2	Level of legal certainty provided by the VBER and the VGL is overall acceptable, although clarifications are needed for some areas	✓	✓		
3	Stakeholders have very diverse opinions about the effects of selective distribution systems on competition	✓	✓		
4	Stakeholders questioned the appropriateness of the level of the market share thresholds in the context of selective distribution systems	✓	✓		
5	Issue regarding the functioning of the market share threshold and the willingness of businesses to set up pan-European	✓	✓		

		Effectiveness	Efficiency	Relevance	Coherence
	Selective distribution				
	selective distribution systems				
6	Article 4(b)(iii) VBER does not provide sufficient legal certainty	✓	✓		
7	Paragraph 63 VGL, which allows restrictions on active sales within a selective distribution system under certain conditions, does not provide sufficient legal certainty	✓	✓		
8	The case law and enforcement practice with regard to selective distribution has developed significantly	✓	✓		
9	NCA's have not always assessed the compatibility of selective distribution systems with Article 101 of the Treaty in a consistent manner	✓	✓		
10	VBER and VGL lack guidance on the resale of spare parts	✓	✓		
	<i>Specific findings related to online sales</i>				
11	Low level of legal certainty concerning paragraphs 52-54 VGL	✓	✓	✓	
12	Variety of views among stakeholders on the effects of the brick-and-mortar requirement	✓	✓		
13	Paragraph 54 VGL is not sufficiently clear as to whether quality standards for the use of the internet may also be imposed in distribution systems other than selective distribution	✓	✓		
14	Concerns as regards the functioning of the equivalence principle enshrined in paragraph 56 VGL	✓	✓	✓	
15	Lack of legal certainty in relation to the possibility to withdraw the benefit of the VBER in certain cases (paragraph 176 VGL)	✓	✓		
16	Lack of effectiveness of the withdrawal procedure in the context of cumulative effects resulting from parallel selective distribution networks (paragraph 179 VGL)	✓	✓		
17	Lack of guidance on the assessment of restrictions on sales through third-party online marketplaces and the need to update the rules in light of recent case law	✓	✓	✓	
18	Divergences in the assessment by NCA's of restrictions on the	✓	✓	✓	

		Effectiveness	Efficiency	Relevance	Coherence
	Selective distribution				
	use of online marketplaces				
19	Lack of guidance on the assessment of restrictions on the use of price comparison websites and the need to update the rules in light of recent case law	✓	✓	✓	

The table below lists the issues identified by the evaluation in the context of other online sales restrictions (see section 4.6.7 in Annex 4).

		Effectiveness	Efficiency	Relevance	Coherence
	Other online sales restrictions				
1	Slightly low or low legal certainty of the VBER as regards online sales restrictions and need to update the rules in light of market developments	✓	✓	✓	
	General comments				
2	No dedicated VBER section dealing with online sales restrictions, which reduces legal certainty	✓	✓	✓	
3	Lack of precision on internet related issues of the VGL, which causes legal uncertainty	✓	✓	✓	
	Dual pricing				
4	Lack of clarity of the definition of dual pricing referred to in the Vertical Guidelines	✓	✓		
5	Need for clarification of the rules on dual pricing to avoid an inconsistent application throughout the EU	✓	✓		
6	Lack of suitability of specific aspects of the approach to dual pricing with regard to the current market environment due to new market developments	✓	✓	✓	
7	Issues with the fixed fee that a supplier can offer to support the (offline or online) sales efforts of a distributor, which appears not workable in practice	✓	✓		
8	Need for guidance in the VGL on the criteria that could be used to perform an individual assessment	✓	✓		

		Effectiveness	Efficiency	Relevance	Coherence
	Other online sales restrictions				
	<i>Definition of active and passive sales regarding online sales</i>				
9	Lack of clarity of the current distinction between active and passive sales regarding online sales	✓	✓		
10	Issues with the distinction between active and passive sales, which appears not to work well and not up to date with regard to the development of e-commerce	✓	✓	✓	
11	Issues with the prohibition of passive sales restrictions, which appears too strict and can lead to false negatives by excluding efficiency-enhancing practices from the benefit of the VBER	✓	✓		
12	Need to preserve coherence between the EU rules regarding passive sales (notably VBER and Geo-blocking Regulation)	✓	✓		✓
	<i>Online restriction on the use of trademarks and brand names</i>				
13	Need for more guidance as regard online advertising	✓	✓	✓	
14	Need for guidance on the restriction to use trademarks and brands names in the context of online advertising	✓	✓	✓	
15	Need for more guidance on the ability of retailers to bid on the trademarks of certain manufacturers to achieve better listings on search engines (brand-bidding restrictions)	✓	✓	✓	

The table below lists the issues identified by the evaluation in the context of franchising (see section 4.6.8 in Annex 4).

		Effectiveness	Efficiency	Relevance	Coherence
	Franchising				
1	Paragraphs 189-191 VGL provide an appropriate level of legal certainty	✓			
2	Issue related to the lack of a definition of franchising in the VBER	✓	✓		
3	Issues related to the definition of know-how	✓	✓		✓

4	Lack of clarity as regards specific restrictions and their application to franchising	✓	✓	✓	
5	Issues as regards the application of non-compete obligations in the context of franchising	✓	✓		
6	Issues with regard to the market share threshold in the context of franchising	✓	✓		
7	Lack of clarity as regards the treatment of joint purchasing through the franchisor and the treatment of (vertical) information exchange in franchise systems	✓	✓		
8	Insufficient legal certainty with regard to the combination of franchising with exclusive distribution	✓	✓		

The table below lists other issues identified by the evaluation (see section 4.6.9 in Annex 4).

		Effectiveness	Efficiency	Relevance	Coherence
	Other issues				
	<i>Data sharing</i>				
1	Need to clarify the rules on data collection as well as information exchange in supply and distribution agreements	✓	✓	✓	✓
	<i>Aftermarkets</i>				
2	For a large majority of stakeholders Article 4(e) VBER is working well	✓			
3	Lack of clarity with regard to certain elements of the provision and some difficulties linked to its application	✓	✓		
	<i>Withdrawal and disapplication procedure</i>				
4	Most stakeholders consider that the related provisions provide an appropriate level of legal certainty	✓			
5	Lack of clarity, complexity and limited effect of the current rules, which explain the lack of application of these procedures	✓	✓		

6. CONCLUSIONS

Based on the assessment developed in the previous sections, this section presents the conclusions on the evaluation of the VBER, together with the Vertical Guidelines.

The substantive scope of the evaluation is the VBER, together with the Vertical Guidelines, in their entirety. As the Vertical Guidelines are inherently linked to the VBER, insofar as they refer to its provisions and inform their application and interpretation, the assessment of the VBER must also include the Vertical Guidelines. Besides, even though the VBER and the Vertical Guidelines adopted in 2010 are to a large extent a continuation of the approach taken in 1999, the new market developments that have taken place since their adoption affect parts of the VBER and Vertical Guidelines that go beyond the specific provisions changed in 2010. Therefore, the evaluation does not focus on the changes made in 2010, but covers the entirety of the VBER, together with the Vertical Guidelines.

The geographic scope of the evaluation extends to all EU Member States. NCAs and national courts are bound by the directly applicable provisions of the VBER. The Vertical Guidelines do not bind NCAs or national courts, but they are typically taken into account when assessing the compatibility of vertical agreements with Article 101 of the Treaty. Against this background, the evaluation of the VBER includes not only the decisional practice of the Commission, but also that of the NCAs and the relevant jurisprudence of national courts.

The evaluation is based on evidence gathered from various sources. These include a public consultation, a targeted consultation of NCAs, a stakeholder workshop and an external evaluation support study, as well as evidence gathered in the context of other Commission initiatives (i.e. its e-commerce sector inquiry, its enforcement experience as well as that of the NCAs, and informal guidance provided through policy documents). In line with the general objective of the VBER, the evidence-gathering focused primarily on the views of other agencies enforcing EU competition law (i.e. NCAs) and businesses having to self-assess the compliance of their vertical agreements with Article 101 of the Treaty.

The evidence-gathering during the evaluation was subject to certain limitations, which did not, however, have any meaningful impact on the results of the evaluation.

First, it was not possible to gather reliable quantitative evidence on VBER related costs and benefits. Despite the attempt to overcome this limitation through the evaluation study, the assessment of the efficiency of the VBER, together with the Vertical Guidelines, essentially relies on qualitative evidence provided by stakeholders in response to the public consultation and in the context of the evaluation study.

Second, there was a certain lack of representativeness of stakeholder feedback due to the voluntary nature of participation in the public consultation and the stakeholder workshop. As a result, some stakeholder groups accounted for a higher share of responses than others. This did not, however, have any meaningful impact on the results of the evaluation since the areas identified by stakeholders as either functioning well or not

functioning well did not differ to an appreciable extent within a particular stakeholder group. Moreover, the evaluation study aimed at reducing any potential bias within each stakeholder group that could have affected small and medium enterprises. In any event, while indicative of a trend, the fact that a view was broadly shared by all or only some of the stakeholder groups does not mean that the evaluation disregards diverging views. This is also reflected in Annex 4 to the Staff Working Document, which presents the different views and issues raised by stakeholders, regardless of whether they were supported by a large or small number of stakeholders.

Third, there was a lack of information about consumer views, likely due to the fact that the VBER is a technical piece of legislation and that consumers are neither a party to vertical agreements between actors in the supply and distribution chain, nor privy to the conditions that they contain. For the same reasons, the limited participation of consumers and consumer associations did not have any meaningful impact on the evaluation.

Overall, the evidence gathered in the evaluation suggests that the VBER, together with the Vertical Guidelines, is useful and remains relevant for stakeholders. Nonetheless, the evaluation has identified a number of issues, in particular as regards the clarity of the rules and their ability to address new market developments, which limit the effectiveness, efficiency and coherence of the intervention.

Effectiveness: The evidence gathered in the evaluation suggests that the VBER, together with the Vertical Guidelines, is overall a useful instrument that increases legal certainty. Nevertheless, the evaluation identified certain provisions that, according to stakeholders, lack clarity, are difficult to apply or no longer adapted to the market developments that occurred since the adoption of the VBER and the Vertical Guidelines in 2010, in particular as regards the online environment. The evaluation also identified gaps in the rules and areas of the rules that do not refer to case law issued since the adoption of the rules (e.g. the CJEU's *Coty* judgment). Therefore, the evidence suggests that the objective of facilitating the enforcement work of the relevant authorities and the stakeholders' self-assessment of their vertical agreements by providing them with legal certainty has not been fully met.

All the sources of evidence used in the evaluation suggest that the VBER, together with the Vertical Guidelines, generally meets the objective of avoiding false positives. This means that it generally does not exempt agreements for which it cannot be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty. Nevertheless, some stakeholders argued that the application of the market share threshold to online intermediaries may lead to false positives and that retail parity clauses, online platform bans and some restrictions on online advertising should be qualified as hardcore restrictions. Other stakeholders, however, did not share these views. The evaluation also found that there are vertical restrictions that have become more prevalent over time, for which additional guidance is lacking to determine whether they fall under the current list of hardcore restrictions.

The evidence gathered in the evaluation also suggests that the VBER, together with the Vertical Guidelines, generally meets the objective of avoiding false negatives. This means that it generally does not fail to exempt agreements that satisfy the conditions of

Article 101(3) of the Treaty. However, some stakeholders argued that the market share threshold is too low. Some stakeholders also indicated that non-compete obligations exceeding 5 years should not be an excluded restriction. In addition, as regards in particular the list of hardcore restrictions, the view that the rules avoid false negatives is not shared by all stakeholder groups. Whereas NCAs and a number of respondents to the public consultation (including a majority of distributors) find this list appropriate, many respondents to the public consultation, especially legal professionals, and participants in the stakeholder workshop found the list to lead to false negatives. On the other hand, the enforcement practice of the Commission and the NCAs since the adoption of the VBER generally confirms the treatment of certain vertical restrictions as hardcore restrictions under the current rules. Overall, while the evidence therefore suggests that the lists of hardcore restrictions and excluded restrictions are generally appropriate, there may still be scope in some areas of the rules to further reduce the risk of false negatives.

The evidence gathered in the evaluation suggests that the VBER, together with the Vertical Guidelines, is overall taken into account by NCAs and national courts as a common framework of assessment for vertical agreements. However, there remains significant scope for diverging interpretations. The evaluation has identified a perceived lack of clarity in respect of certain provisions, as well as gaps in the current rules (i.e. new types of restrictions not addressed by the VBER or the Vertical Guidelines) that have resulted in diverging interpretations during the last ten years. Such diverging interpretations have led to a decreased level of legal certainty provided by the VBER, together with the Vertical Guidelines, and have also affected the efficiency and coherence of the rules.

Efficiency: The evidence gathered during the evaluation was not sufficient to allow the Commission to conclude on the costs that stakeholders incur for assessing the application of the VBER, together with the Vertical Guidelines, to their vertical agreements. However, all sources of evidence relied on in the evaluation suggest that those costs are proportionate to the benefits brought by the rules, notably the safe harbour from Article 101 of the Treaty provided by the VBER and the resulting increase in legal certainty. Moreover, the evidence gathered in the evaluation also suggests that those costs would increase in the absence of the VBER and Vertical Guidelines, especially for SMEs. At the same time, the evidence suggests that there is significant room for simplification and further cost reduction, notably by reducing the complexity of the wording and structure of the rules and by updating the rules in order to bring them in line with the current needs. The fact that the rules are not sufficiently well adapted to recent market developments also seems to have impacted the evolution of compliance costs since the 1999 and 2010 amendments. In this regard, the evidence gathered during the evaluation does not allow to conclude clearly on whether the compliance costs have decreased.

Relevance: The evidence gathered during the evaluation suggests that the VBER and the Vertical Guidelines are not sufficiently well adapted to the current market environment, as they do not take into account the market developments that have taken place since their adoption. In particular, the evaluation has shown that since the adoption of the VBER, together with the Vertical Guidelines, the growth of online sales and online platforms, including online marketplaces, has had a significant impact on distribution

models. In this context, the evolving nature of platform business models has led to an increase in the number of contractual relationships and the increased use of vertical agreements over time. At the same time, consumers nowadays expect to have a continuous omni-channel experience across a variety of different channels such as offline and online shops, marketplaces and other online platforms. This has led suppliers to increase the number of different distribution or sales channels used to promote their products and services. These developments have led to changes as to the distribution models used. For example, the use of selective distribution systems, has increased, whereas exclusive distribution is used less frequently today. Similarly, new types of restrictions, such as restrictions regarding sales through online marketplaces, restriction on online advertising or retail parity clauses have become more prevalent due to the growth of e-commerce. In addition, some issues that were already analysed at the time of the last revision have become more prominent over time, such as stakeholder concerns with regard to possible free-riding between the different sales channels and the appropriate delineation between active and passive sales. These market developments support the finding that the VBER, together with the Vertical Guidelines, remains relevant, as there is a need to address the changes in the use of different distribution models and sales channels, as well as the resulting increase of vertical agreements and new vertical restrictions. In particular with regard to the latter, there is a need to provide legal certainty for their assessment, to determine whether they satisfy the conditions of Article 101(3) of the Treaty and to provide a common framework of assessment.

Coherence: The evidence gathered in the evaluation shows that the VBER, together with the Vertical Guidelines, is overall coherent both with other Commission rules and guidance on the application of Article 101 of the Treaty, as well as with other EU legislation with relevance for vertical supply and distribution agreements. Nevertheless, stakeholders pointed to a few areas in which coherence is not as high as it could be due to a lack of clarity or perceived inconsistencies between certain rules. In particular, the perceived lack of coherence of the VBER, together with the Vertical Guidelines, with the Geo-blocking Regulation comes from the fact that the latter prohibits certain practices, which is a legislative choice, which could be further clarified when considering any next steps that may follow the evaluation.

EU added value: The evidence gathered in the evaluation suggests that the VBER, together with the Vertical Guidelines, provides EU added value. Since it provides a safe harbour from Article 101 of the Treaty, which can only be granted at EU level, the VBER offers increased legal certainty and guidance as compared to existing, more general and nationally fragmented guidance on the application of Article 101 of the Treaty.

It follows from the above that there is a continued need for a vertical block exemption and guidance on how to apply Article 101 of the Treaty to vertical agreements. Stakeholders unanimously confirmed that the VBER and the Vertical Guidelines are useful tools that greatly facilitate the self-assessment of vertical agreements required by the wider legal framework. Notably in view of the market developments that occurred since the adoption of the rules, there is a clear need for rules that provide legal certainty for the assessment of new vertical restrictions, that determine whether they satisfy the

conditions of Article 101(3) of the Treaty and that provide a common framework of assessment for NCAs and national courts.

The evaluation has also shown that the VBER, together with the Vertical Guidelines, has overall achieved its general objective of facilitating the enforcement work of the Commission, NCAs and national courts, as well as helping businesses conduct the self-assessment of their vertical agreements, and that its specific objectives are still relevant.

Nonetheless, the evaluation has also shown that the specific objectives of providing legal certainty to stakeholders and providing a common framework of assessment for NCAs and national courts have not been fully met. There is scope for improving the level of legal certainty provided by the rules, and consequently for reducing the cost of applying the VBER, together with the Vertical Guidelines, for all stakeholders. Addressing the areas of the rules where the evaluation has identified a lack of clarity or gaps, and the areas where the rules are no longer adapted to market developments that occurred since their adoption in 2010 would also improve the ability of the rules to provide a common framework of assessment for national competition authorities and national courts. Moreover, while the evidence suggests that the lists of hardcore restrictions and excluded restrictions are generally appropriate, there may still be scope in some areas of the rules to further reduce the risk of false negatives.

The evaluation has identified a number of areas of the rules which are not functioning well, or as well as they could, for various reasons. While some issues were reported only by a small number of stakeholders, others were more widely discussed, also by different stakeholder groups. The main concern that arises from the evaluation is the fact that the VBER and the Vertical Guidelines are **not well adapted to the market developments that took place since the adoption of the rules, notably the growth of online sales and of new market players such as online platforms**. Both developments raise issues for the functioning of the VBER, together with the Vertical Guidelines, in a number of areas of the rules. These include the assessment of online sales and advertising restrictions and dual pricing, as well as the distinction between active and passive sales, which is relevant to determine the boundaries of some of the hardcore restrictions set out in the VBER. Many issues were also raised in relation to the impact of these market developments on the assessment of selective distribution agreements. The assessment of the principle of equivalence, as well as of restrictions on the use of online marketplaces and price comparison websites were other areas mentioned in this context as not functioning well. The same also applies to areas such as the assessment of agency agreements and retail parity clauses, as well as the rules on dual distribution. These issues, which are explained in more detail in Annex 4 to the Staff Working Document, should be taken into account in any next steps following the evaluation.

A number of other areas of the rules were mentioned by many stakeholders as **not functioning well for reasons not necessarily linked to market developments**. These include issues regarding some of the hardcore restrictions (e.g. RPM) and excluded restrictions (e.g. non-compete clauses), as well as certain distribution models (e.g. franchising) or the combination of different distribution models (e.g. the use of exclusive and selective distribution by the same supplier). The reasons why these areas are not

functioning well are varied, but include a lack of clarity, the complexity of the rules, difficulties with applying certain areas of the rules in practice, a lack of sufficiently detailed examples for certain areas and the fact that, for some areas, the rules and guidance do not refer to case law issued since the adoption of the VBER (e.g. the CJEU's *Coty* judgment). Stakeholder comments also touched upon the application of the withdrawal procedure and the disapplication procedure, as well as the appreciation of cumulative effects of restrictions in the vertical agreements of several suppliers in the same market. It is expected that these issues will not resolve over time and may instead become more prominent if they are not addressed. Any next steps following this evaluation should therefore pay attention to these issues, which are explained in more detail in Annex 4 to the Staff Working Document.

Finally, the **evaluation has also pointed to some more general issues** as regards the VBER, together with the Vertical Guidelines, which need to be taken into account when considering any next steps following the evaluation.

First, the evaluation has shown that market developments that take place after the adoption of the rules can have an impact not just on the relevance but also on the effectiveness and efficiency of the rules. Future market developments are of course hard to predict and it is therefore challenging to design a set of rules that allows such developments to be taken into account. Nevertheless, this suggests that there is a need for rules which are, to the extent possible, future-proof. This means that they should not only address known issues but also contain bright-line principles that can cater for possible new types of vertical agreements and restrictions.

Second, the evaluation has shown that the complexity of the rules is one important factor affecting their effectiveness and efficiency. Stakeholders pointed among other things to unclear wording or structure (e.g. exceptions to exceptions in Article 4 of the VBER), as well as a lack of clear definitions and guidance, which is not presented in a consistent manner for some areas concerned. All of these issues lead to a certain complexity of the rules, which reduces legal certainty and makes the rules challenging to use, especially for SMEs which may lack the necessary resources and expertise. Given that the VBER necessarily has to rely on conditions that require some interpretation in their application to specific cases in order to remain future-proof, it may not be possible to fully solve this issue, but it should nevertheless be taken into consideration in any next steps that may follow the evaluation.

Third, the evaluation has shown that the benefit of providing a common framework of assessment has been impacted by the fact that NCAs and national courts have taken divergent approaches in some areas. While there are already mechanisms that aim to overcome these divergences, it may be necessary to consider further options to limit the impact of this issue on the effectiveness of the VBER, together with the Vertical Guidelines.

Annex 1: Procedural information

1.1. LEAD DG, D_eCIDE PLANNING/CWP REFERENCES

The Directorate-General for Competition of the European Commission ("DG Competition") is the lead DG for the review of Commission Regulation (EU) No 330/2010 of 20 April 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 practice ("VBER"), together with the Guidelines on Vertical Restraints ("Vertical Guidelines").

The review was registered in the Decide Planning with the reference "PLAN/2018/4003".¹³⁴

1.2. ORGANISATION AND TIMING

The evaluation of the VBER, together with the Vertical Guidelines, was launched on 3 October 2018 in order to ensure sufficient time for carrying out the procedural steps required by the Commission's Better Regulation Guidelines.¹³⁵ The **evaluation roadmap**, which set out the background of the evaluation as well as its purpose and scope, was published on 8 November 2018. The evaluation roadmap also presented the consultation activities that would be conducted by the Commission during the evaluation (notably a public consultation, an external evaluation support study, a dedicated stakeholder workshop and a consultation of the NCAs) and explained the data collection methodology that would be followed to gather relevant information for the purpose of the evaluation.

The evaluation of the VBER, together with the Vertical Guidelines, was carried out in close cooperation with other interested Commission services. The **inter-service steering group** ("ISSG") set up for that purpose comprises representatives of the Directorates-General CNECT, CLIMA, ECFIN, GROW, AGRI, ENV, MOVE and FISMA, as well as the Secretariat-General and the Legal Service, which are associated by default to any such initiative. The ISSG was consulted on the evaluation roadmap, the consultation strategy and the online evaluation questionnaire aimed at collecting the views of the stakeholders in the context of the public consultation. The ISSG also reviewed the summary of the results of the public consultation and the stakeholder workshop. The ISSG was likewise consulted on the tender specifications and the milestones for the evaluation study and the survey on consumer purchasing behaviour.

¹³⁴ See Better Regulation Portal at <https://infragate.ec.europa.eu/decide/sep/entrance?view-dossier-details-id=DORSALE-DOSSIER-2018-24941>.

¹³⁵ Commission staff working document, Better Regulation Guidelines, Brussels, 7 July 2017, SWD (2017) 350.

The evaluation of the VBER, together with the Vertical Guidelines, was carried out in close cooperation with the NCAs, which were consulted on the milestones for the evaluation study and the study on consumer purchasing behaviour.

The different **milestones of the evaluation phase** are reflected in the table below:

Timing	Step
3 October 2018	Launch of the evaluation in the Commission's Decide Planning
26 October 2018	<u>1st ISSG Meeting with the following agenda items:</u> <ul style="list-style-type: none"> - presentation of the tentative planning of the initiative, - consultation on the draft evaluation roadmap, and - consultation on the draft consultation strategy
8 November 2018	Publication of the evaluation roadmap (4-weeks comments period)
9 January 2019	<u>2nd ISSG Meeting with the following agenda items:</u> <ul style="list-style-type: none"> - presentation of the comments on the evaluation roadmap, and - consultation on the draft online evaluation questionnaire
4 February 2019	Publication of the online evaluation questionnaire (16-weeks consultation period)
16 July 2019	<u>3rd ISSG Meeting with the following agenda items:</u> <ul style="list-style-type: none"> - presentation of the results of the public consultation (the draft summary report was consulted on in writing as a follow-up), - update on the evaluation study, and - update on the organisation of the stakeholder workshop
16 July 2019	Upstream RSB meeting
30 July 2019	Publication of the summary report of the public consultation
8 August 2019	Signature of the contract for the evaluation study
14-15 November 2019	Stakeholder workshop
13 December 2019	Publication of the summary report of the NCA contributions
18 December 2019	Signature of the contract for the consumer purchasing study
8 January 2020	<u>4th ISSG Meeting with the following agenda items:</u> <ul style="list-style-type: none"> - presentation of the summary of the NCA consultation, and - consultation on the draft summary report of the stakeholder workshop
5 February 2020	Publication of the summary report of the stakeholder workshop
3 April 2020	Submission of the final report of the evaluation study
27 April 2020	Submission of the final report of the consumer purchasing study
25 May 2020	Publication of the evaluation study and the consumer purchasing study
18 May 2020	<u>5th ISSG Meeting (video-conference) with the following agenda item:</u> <ul style="list-style-type: none"> - consultation on the draft Staff Working Document
24 June 2020	Consultation of the Regulatory Scrutiny Board

1.3. EXTERNAL EVALUATION SUPPORT STUDY

As explained in section 4.1.4 above, the evaluation was supported by an external evaluation study. The purpose of the study was to gather qualitative and quantitative information about market trends with regard to distribution models and strategies, as well as the use of certain vertical restrictions and their effects. The study also included an analysis of the enforcement action of the NCAs with regard to vertical restrictions, as well as case studies on the costs and benefits of applying the VBER, together with the Vertical Guidelines. The evaluation study was complemented by a consumer purchasing study, which aimed to collect information on the purchasing behaviour of European consumers, notably with regard to the interaction between online and offline channels.

The evaluation study was tendered on the basis of DG Competition's framework contract for evaluations and impact assessments in the field of antitrust. The framework contract is based on the cascade procedure, according to which a request for an offer for a specific contract is made to the first placed tenderer, who can then decide to submit an offer or to reject the request. In the latter case, the request is passed on to the second placed tenderer.

The framework contract was signed at the end of June 2019 with two of the three tenderers who had participated in the tender procedure. The first placed tenderer is a consortium led by VVA Brussels (an Italian-based business consultancy), which includes Grimaldi Studio Legale, LE Europe, Österreichisches Institut für Wirtschaftsforschung and WIK-Consult. The second placed tenderer is a consortium led by BKP Economic Advisors, which includes Analysys Mason, Deutsches Institut für Wirtschaftsforschung and Learlab.

The first placed tenderer was invited to submit an offer for the evaluation study at the beginning of July 2019. On the basis of this offer, the Commission signed the contract for the evaluation study with the consortium led by VVA on 8 August 2019 for a period of 34 weeks. Due to special circumstances, the contractor was granted an extension of two working days to deliver the final report of the study in March 2020. The contractor submitted the interim report of the evaluation study to the Commission on 18 December 2019, the draft final report on 4 March 2020 and the final report on 3 April 2020. The ISSG was consulted on all interim documents related to the evaluation study.

The first placed tenderer was invited to submit an offer for the consumer purchasing study at the beginning of November 2019. On the basis of this offer, the Commission signed the contract for the consumer purchasing study with the consortium led by VVA on 18 December 2019 for a period of 15 weeks. Due to special circumstances, the contractor was granted an extension of 17 working days. The contractor submitted the interim report of the consumer purchasing study on 11 February 2020, the draft final report on 16 April 2020 and the final report on 23 April 2020. The ISSG was consulted on all interim documents related to the consumer purchasing study.

1.4. CONSULTATION OF THE RSB

The meeting of the Regulatory Scrutiny Board (RSB) took place on 24 June 2020. The outcome was a positive opinion, issued on 26 June 2020. The following table provides information on how the comments made by the RSB were addressed in this Staff Working Document:

<i>RSB comments</i>	<i>Action taken</i>
<p>(1) The report should analyse more how market developments have affected the need for the measures contained in the VBER. It should look into the issues that led to the adoption of the VBER, the amendments in 2010, and how these have evolved in the meantime. The analysis should explore how the development of online sales affects the relevance of the various measures and whether they serve consumer interests (e.g. check if free-riding is still an issue that the VBER needs to address; look into the impact of VBER on consumer prices). To this end, the main text could integrate certain elements of identified issues in annex 4 that support such analysis.</p>	<p>A new section 5.1 was added to the Staff Working Document (SWD) before the answers to the different evaluation questions, which draws on information previously presented in other sections of the SWD and notably in the section on relevance. More specifically, this new section describes and analyses in more detail the main market developments since the adoption of the VBER. It also includes the results of the consumer purchasing study concerning the potential magnitude of free-riding between and within different distribution channels for the different product categories analysed in the context of the study. The new section also gives an overview of the enforcement practice with regard to vertical restrictions both at EU and national level since the adoption of the VBER. More information and graphs from the evaluation study have been added to this new section in order to provide a more comprehensive overview of the market developments since the adoption of the VBER, as well as to illustrate the impact of these developments on supply and distribution agreements and consumer behaviour.</p> <p>The changes made in the 2010 VBER are described in detail in the introduction of the SWD and analysed in the context of the specific area concerned in Annex 4.</p>
<p>(2) The report should look into room for simplification in the current Regulation and its implementation.</p>	<p>A new evaluation question has been added under the efficiency criterion, which assesses the scope for simplification and cost reductions based on the evidence gathered in the evaluation.</p>
<p>(3) The report should analyse the regulation's risk of "false positives" and</p>	<p>The assessment of evaluation question 2 was split to present the evidence gathered</p>

<p>"false negatives" separately, both in the analysis and in the conclusions. It should clarify that they correspond to different objectives with different levels of priority: the avoidance of "false positives" is necessary to respect Treaty provisions while the avoidance of "false negatives" pursues an objective of consumer benefits through transaction cost reductions. If case studies suggest the existence of "false positives", this should be flagged for further investigation.</p>	<p>in the evaluation separately as regards false positives and false negatives. The introduction to this section also clarifies that, while being part of the same objective of creating a safe harbour with an appropriate scope, false positives and false negatives deserve a different level of priority in the evaluation of the functioning of the rules. Moreover, more information was added on the areas of the rules for which stakeholders pointed to a risk of false positives or false negatives in order to better reflect the detailed assessment presented in Annex 4.</p>
<p>(4) The conclusions should be more nuanced. They should better consider the uncertainties surrounding the analysis that is predominantly based on incomplete stakeholder views and less on quantitative data. The report should better take into account the weak representation of consumer interests in the consultation and reflect this in the conclusions. Moreover, the conclusions should fully correspond to what the evidence suggests and avoid general unsubstantiated statements that VBER "functioned well" or is "appropriate". The report should include more details on lessons learnt, drawing on the issues identified in annex 4, and develop more operational conclusions that are useful for future action.</p>	<p>The general conclusions on the overall functioning of the VBER, together with the Vertical Guidelines, were adapted to better reflect the detailed assessment presented in Annex 4. Moreover, the methodology section was updated to clarify why the evidence-gathering in the evaluation mainly focused on the views of agencies enforcing the VBER and businesses having to self-assess compliance of their vertical agreements with Article 101 of the Treaty, in line with the general objective of the VBER. It was also clarified that the evaluation takes into account all stakeholder views, regardless of whether they are supported by a large or small number of stakeholders. This is also reflected in Annex 4, which presents the different views and issues raised by stakeholders per area of the rules, including diverging views both within the same and across different stakeholder groups/sectors. An effort was also made to refer in more detail throughout the assessment to the main issues raised by stakeholders as set out in Annex 4.</p>

In addition to the comments set out above, the RSB provided some technical comments, which were taken into account when finalising the Staff Working Document.

Annex 2: Stakeholder consultation

This annex presents the results of the consultation activities performed in the context of the evaluation of the VBER, together with the Vertical Guidelines.

As set out in the consultation strategy for the evaluation,¹³⁶ the objective of the consultation process was to collect in-depth and high quality evidence on the key competition issues arising in vertical relationships from the perspective of the businesses, consumers and EU competition law enforcers.

Based on a mapping exercise relying on the Commission's experience of enforcing Article 101 of the Treaty, the information gathered through the Commission's e-commerce sector inquiry and the feedback received on the evaluation roadmap, the Commission identified the following stakeholder groups as being similarly interested in (and also similarly affected by) the evaluation of the VBER, together with the Vertical Guidelines: (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 competition related issues, (iii) industry associations, (iv) consumer organisations and (v) academics with a focus on EU competition law and notably on vertical restrictions. As regards the enforcement perspective, the experience gained by the national competition authorities of the EU Member States in applying the VBER and considering the Vertical Guidelines was considered of particular interest for the evaluation.

The various consultation activities consisted of:

- a consultation on the evaluation roadmap;
- an open public consultation based on an online questionnaire;
- a targeted consultation of national competition authorities;
- a stakeholder workshop.

The different consultation activities mentioned in this annex aimed to gather input from stakeholders on how the VBER, together with the Vertical Guidelines, has functioned since its adoption. To that end, the Commission focused in particular on trying to understand which areas of the rules have not functioned well or have not functioned as well as they could have, and the underlying reasons. Many stakeholders nonetheless provided input on the changes they consider necessary to improve the functioning of the rules and what these changes should look like. Despite being outside the scope of the evaluation, this input has nevertheless been analysed and taken into account to the extent that it provided useful insights into why the rules are considered not to have functioned

¹³⁶ The consultation strategy is available on the dedicated VBER review webpage on DG Competition's website at https://ec.europa.eu/competition/consultations/2018_vber/consultation_strategy.pdf.

as well as they could have. Any reference to such proposed changes by stakeholders in the following summaries of the various consultation activities should therefore be understood in this context.

2.1. CONSULTATION ON THE EVALUATION ROADMAP

2.1.1. Overview of respondents

The Commission received 25 responses as feedback to the evaluation roadmap. The large majority of the entities that provided feedback were business associations, either operating at EU level or with national reach (21 responses out of 25). Feedback was also received from one company, one law firm, one lawyer/consultant and one member of the European Parliament. As to the breakdown by country of origin, 8 respondents were domiciled in Belgium, 5 in Germany, 5 in France, 2 in the Netherlands and 1 each in Italy, Spain, Finland, Denmark and Sweden.

2.1.2. Overview of submissions

The feedback provided showed overall support for the Commission's initiative to perform the evaluation. Stakeholders generally indicated that the VBER is useful and remains necessary. They therefore consider that it should be maintained, but reviewed to address issues that have arisen in its interpretation, as well as new market developments. Stakeholders also expressed an interest that the review includes the Vertical Guidelines, as these have become *de facto* rules over time. A number of stakeholders also raised the issue of the non-uniform application of the rules by NCAs and national courts.

In addition, stakeholders raised a number of issues as regards the functioning of the rules. These include the fact that the rules are not well adapted to the increase in digitalisation, increased direct sales by manufacturers to customers, the emergence of online platforms and the growth of e-commerce. Some stakeholders also raised issues as regards the market share thresholds, the prohibition of resale price maintenance and the application of the rules to agency agreements.

On the consultation process, stakeholders suggested increasing the deadline for responding to the public consultation.¹³⁷ A couple of stakeholders suggested considering additional evaluation criteria. A number of stakeholders expressed an interest in participating in other consultation activities, as well as an interest in having other channels of communication with the Commission (in particular allowing for the transmission of confidential information). Finally, some stakeholders emphasised the need for the evaluation to take account of the views of stakeholders representing various forms of trade to ensure a balanced outcome.

¹³⁷ In view of these comments, the consultation period was extended from 12 to 16 weeks.

2.2. SUMMARY OF THE OPEN PUBLIC CONSULTATION

A summary report of the open public consultation was published in July 2019.¹³⁸

Introduction

The European Commission ("Commission") ran an open public consultation on the evaluation of the Vertical Block Exemption Regulation (EU) No 330/2010 ("VBER") from 4 February to 27 May 2019.

The public consultation targeted both citizens and stakeholders in order to gather views on the functioning of the current VBER and the accompanying Guidelines on Vertical Restraints ("VGL"). The questionnaire was published in English, French and German. Participants could reply in any of the 24 official languages of the EU.

The public consultation was also promoted through Twitter and the DG Competition website.

The Commission received 164 contributions to the public consultation submitted through the online questionnaire. It also received 13 position papers submitted in the context of the public consultation, which largely echoed the issues raised in the contributions to the public consultation.

The statistics computed in this summary are based only on contributions to the public consultation submitted through the online questionnaire. The input has been analysed using a data analysis tool,¹³⁹ complemented by manual analysis.

Upon request of some respondents, the Commission amended their respective contributions according to the instructions received. Due to a technical failure of the uploading option provided in the online questionnaire, the Commission also had to upload manually the attachments that participants had declared to be missing from their reply. This was the main reason for the delay with which the contributions to the public consultation were published on the Better Regulation Portal.

Profile of respondents to the online questionnaire

Among the 164 respondents, there are 93 business associations, 42 companies/business organisations (including 8 companies engaged in legal or accounting activities), 3 non-governmental organisations (including one consumer association), 4 EU citizens, 3 academic and research institutions, 1 trade union and 18 others (more than half of which

¹³⁸ The summary report is available at https://ec.europa.eu/competition/consultations/2018_vber/factual_summary.pdf.

¹³⁹ The tool used is Doris Public Consultation Dashboard, an internal Commission tool for analysing and visualising replies to public consultations. It relies on open-source libraries using machine-learning techniques and allows for the automatic creation of charts for closed questions, the extraction of keywords and named entities from free-text answers as well as the filtering of replies, sentiment analysis and clustering.

are individual lawyers or law firms).¹⁴⁰ The majority of the contributions were submitted in English, German and French.

The majority of the contributions comes from organisations with an international (93) or national scope (59). The distribution of replies across organisation size is relatively homogenous with 55 large (250 or more employees), 40 micro (1 to 9 employees), 38 small (10 to 49 employees) and 27 medium organisations (50 to 249 employees). 4 respondents did not specify their size.

As far as business associations are concerned, 44 out of 93 reported having an international scope. 43 business associations indicated a national scope, 4 a regional scope and 2 a local scope. Table 1 shows the EU countries in which the business associations with national, regional or local scope operate.

Country	Count
Austria	5
Belgium	6
Finland	1
France	10
Germany	10
Italy	5
Netherlands	5
Poland	2
Spain	3
Switzerland	1
United Kingdom	1
Total	49

TABLE 1 - DISTRIBUTION OF NON-INTERNATIONAL BUSINESS ASSOCIATIONS ACROSS EU COUNTRIES

Furthermore, 64 business associations stated that their members are both suppliers and buyers of products and/or services, while 7 business associations have members who are only buyers and another 7 business associations have members who are only suppliers.¹⁴¹

As far as companies/business organisations are concerned, the majority of the respondents are large in size and have an international scope. In fact, out of 42 companies/business organisations, 33 are large (250 or more employees), 6 medium (50 to 249 employees), 2 small (10 to 49 employees) and 1 micro (1 to 9 employees). Moreover, 35 have an international scope and 6 a national scope.

The companies/business organisations who responded to the public consultation cover several sectors of the European economy. Table 2 provides an overview of the

¹⁴⁰ It should be noted that some respondents mistakenly classified themselves incorrectly. The Commission corrected these mistakes for the purposes of this summary and established the statistics on the basis of the corrected dataset.

¹⁴¹ It should be noted that 15 business associations did either not declare anything in reply to this question or responded that the question was not applicable to them.

distribution of the companies/business organisations across the 2-digit NACE Rev.2 code.¹⁴²

	NACE	Count
	10 Manufacture of food products	1
	11 Manufacture of beverages	4
	14 Manufacture of wearing apparel	1
	15 Manufacture of leather and related products	2
	20 Manufacture of chemicals and chemical products	6
	22 Manufacture of rubber and plastic products	1
	26 Manufacture of computer, electronic and optical products	1
	32 Other manufacturing	2
	SubTotal Manufacturers¹⁴³	18
	46 Wholesale trade, except of motor vehicles and motorcycles	3
	47 Retail trade, except of motor vehicles and motorcycles	8
	SubTotal Retailers	11
	51 Air transport	1
	61 Telecommunications	1
	69 Legal and accounting activities	8
	70 Activities of head offices; management consultancy activities	1
	73 Advertising and market research	1
	77 Rental and leasing activities	1
	SubTotal Others	13
	TOTAL	42

TABLE 2 - DISTRIBUTION OF COMPANIES/BUSINESS ORGANISATIONS ACROSS THE 2-DIGIT NACE REV.2 CODE.

Among the companies/business organisations who responded to the public consultation, there are companies with significant direct off-line sales as well as companies with significant direct on-line sales, including some that rely on third-party online marketplaces/platforms.

Contributions to the online questionnaire

The public consultation aimed at collecting views and evidence from the public and stakeholders on the following five evaluation criteria: effectiveness, efficiency, relevance, coherence and EU added value. The below summary of the contributions to the online questionnaire is therefore structured around these five evaluation criteria.

Effectiveness (Have the objectives been met?)

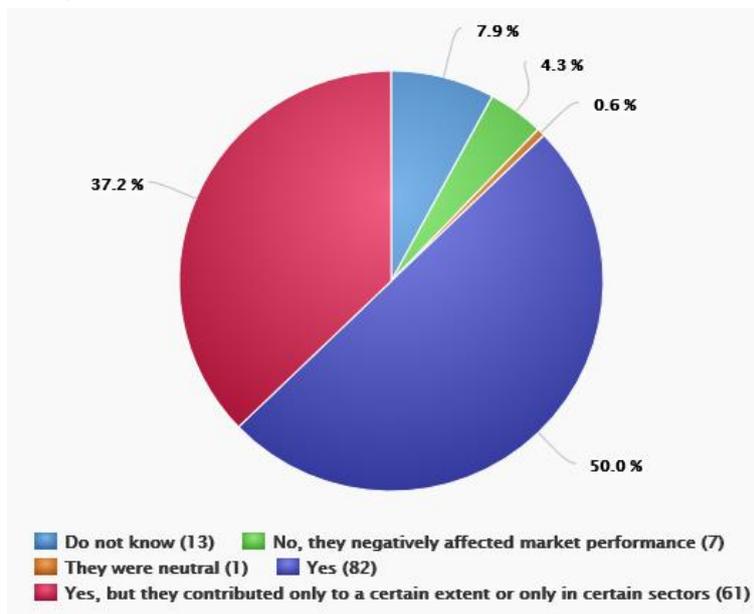
In order to evaluate whether the VBER, together with the VGL, have met their objectives, stakeholders were asked to answer three sets of questions.

¹⁴² See <https://ec.europa.eu/eurostat/documents/3859598/5902521/KS-RA-07-015-EN.PDF/dd5443f5-b886-40e4-920d-9df03590ff91?version=1.0>. For the purposes of this statistical overview, the Commission made some manual adjustments to the NACE code identified by respondents (e.g. in cases where the respondents' business description did not match the NACE code identified in the reply, respondents did not reply or did not reply properly).

¹⁴³ It should be noted that some of the manufacturers included in this figure are also involved in the distribution of their own products.

The first question inquired whether stakeholders perceive the VBER and the VGL to have contributed to the **promotion of good market performance in the EU**.

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

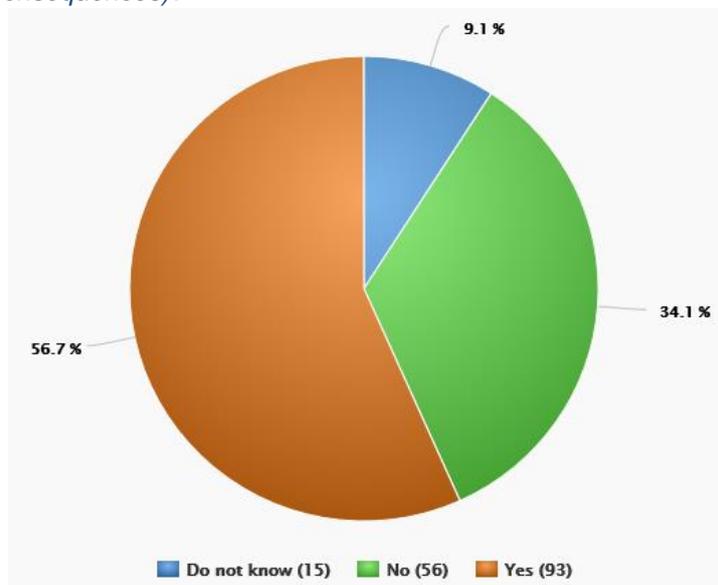


143 respondents (approximately 87%, with no major difference between stakeholder groups) respond positively, even if some of them perceive the contribution to be only partial. Many of these respondents reasoned their view by pointing out that the VBER and VGL contributed to an increased level of legal certainty. The respondents that consider the positive effect to be limited mention as reasons for this, for example, the complexity of the rules and the difficulty for SMEs to apply the rules. As regards particular sectors in which the effects were perceived to be less positive, stakeholders mentioned, for example, the e-commerce sector, travel agencies, franchising and the motor vehicle sector. This was due to the increased importance of online sales and online intermediaries, sector specificities and, as regards the motor vehicle sector, the fact that the VBER has only applied to the sector since 2013.

Out of the 21 respondents (approximately 13%) that do not reply positively, 7 (primarily business associations) state that the VBER and the VGL negatively affected market performance, whereas 13 respondents (across different stakeholder groups) do not know and 1 (a law firm) considers the effect of the VBER and the VGL to be neutral. Some of these respondents mention that certain elements of the existing rules are too restrictive, thus preventing businesses from optimising their distribution policies, or that the rules have had an adverse effect on the development of online markets in Europe.

The second set of questions aimed at assessing the level of legal certainty provided by the current legal framework.

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)?



To the question whether stakeholders consider that the VBER and the VGL provide a **sufficient level of legal certainty**, most of the respondents (both replying positively and negatively) explain that the VBER and the VGL are useful as guidance, but need to be revised and/or clarified in relation to certain aspects in order to increase legal certainty, in particular in view of new market developments¹⁴⁴ during the last years. Some respondents (primarily companies and business associations representing the supply side of the vertical chain, but also some legal experts) also mention that the non-binding nature of the VGL has resulted in an inconsistent application of the rules by national competition authorities and national courts, which has overall reduced the level of legal certainty provided by the VBER. Respondents mention, as concrete examples, an inconsistent application of the rules regarding restrictions on online selling (e.g. the use of online platforms) as well as of the rules regarding resale price maintenance.

Stakeholders were also asked to estimate the **level of legal certainty provided by the VBER and the VGL for specific areas of the rules by providing a qualitative estimate for each area**, ranging between 1 and 3 (where 1 corresponded to a very low, 2 to a slightly low and 3 to an appropriate level of legal certainty). The number of responses for each specific area varied considerably.

A large number of respondents do not reply or state that the question is not applicable to them or that they do not know. Considering only the replies providing a figure between 1 and 3, there is also a significant variation between the replies for each area of the VBER and/or the VGL. However, for almost all areas tested, only a minority of respondents

¹⁴⁴ The respondents provided more detailed information about these market developments in reply to the question asking them to list candidate areas for a possible revision, together with the major trends motivating the need for such a revision (see below).

indicate a very low level of legal certainty (marked 1), with less than 20 respondents per area choosing this option. Moreover, there were no areas for which this was the most chosen option.

For the majority of the areas tested, the number of respondents (across all stakeholder groups) that consider that there is an appropriate level of legal certainty (marked 3) is considerably higher than the number of respondents that estimate a slightly or very low level of legal certainty (marked 1 or 2). This includes areas such as the definition of vertical agreements, agreements of minor importance or subcontracting agreements; the market share threshold for both supplier and buyer; the hardcore restrictions regarding cross-supplies and the sourcing of spare parts; most of the excluded restrictions; as well as the guidance in the VGL regarding exclusive distribution, exclusive customer allocation, exclusive supply, upfront access payments, category management agreements and tying.

For other areas, a majority of respondents (across all stakeholder groups) consider that there is a slightly low or very low level of legal certainty (marked 1 or 2). These areas include the conditions for non-reciprocal vertical agreements between competitors to benefit from the VBER; the hardcore restrictions regarding resale price maintenance, territorial/customer restrictions, online sales restrictions and restrictions of active/passive sales in selective distribution; as well as the guidance in the VGL regarding selective distribution and resale price restrictions.

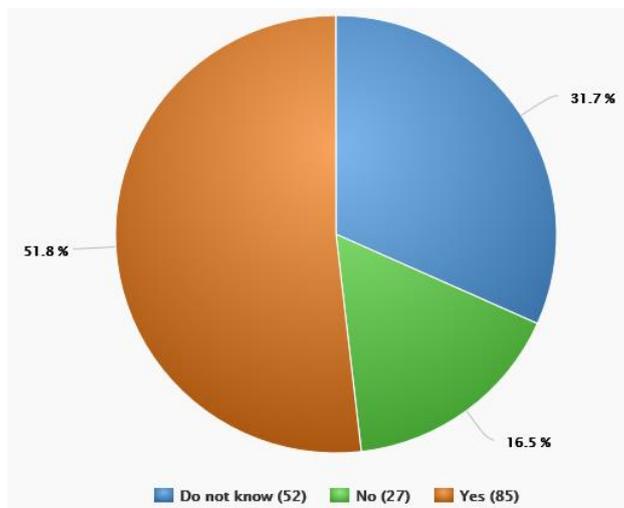
Finally, for a small number of areas, the replies indicating a slightly low or very low level of legal certainty (marked 1 or 2) are comparable in terms of number to the replies indicating an appropriate level of legal certainty (marked 3). These areas include the conditions for the withdrawal of the VBER, as well as the guidance in the VGL on agency agreements, individual cases of hardcore restrictions falling outside the scope of Article 101(1) of the Treaty or fulfilling the conditions of Article 101(3) of the Treaty, single branding and franchising.

Stakeholders were also asked to explain the reasons for low ratings and in particular to specify 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 the VGL. Respondents mainly explain in more detail which provisions in particular they consider unclear or in need of revision. In addition, respondents point to several instances of unclear wording and the complexity of parts of the VBER and the VGL. Some respondents also argue for the clarification of certain legal concepts and principles, as well as for more detailed examples and clearer, updated guidance, notably to reflect new market developments and relevant case law of the last years. Some respondents also point to the difficulty in applying the rules in practice, notably the market share thresholds.

Regarding the question whether stakeholders consider that there are **other areas for which the VBER and/or the VGL provide insufficient legal certainty**, particular areas specified by respondents (other than those already mentioned) include new ways of distribution over the internet, the treatment of "most favoured nation" or "price parity"

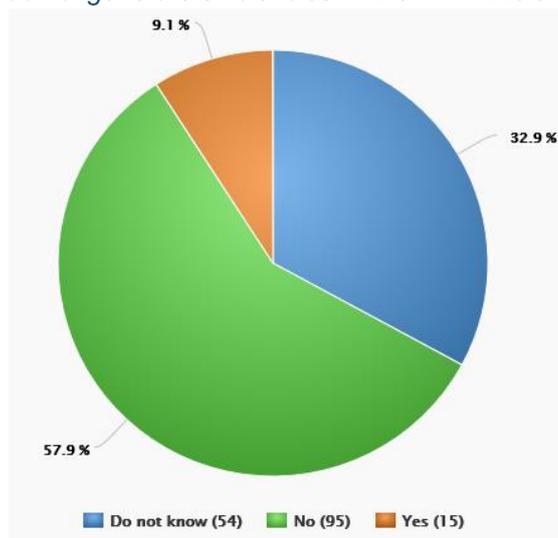
clauses, restrictions on the purchasing of keywords for the purposes of online advertising and vertical restrictions imposed by intermediaries.

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



The second set of questions aimed at verifying whether the conditions currently defined in the VBER and the VGL (e.g. market share thresholds, hardcore restrictions and excluded restrictions) meet the objective of capturing the agreements for which it can be assumed with sufficient certainty that they generate efficiencies in line with Article 101(3) of the Treaty, or whether these conditions lead to false positives (e.g. exempting an agreement that should not be exempted) and false negatives (e.g. not exempting an agreement that should be exempted).

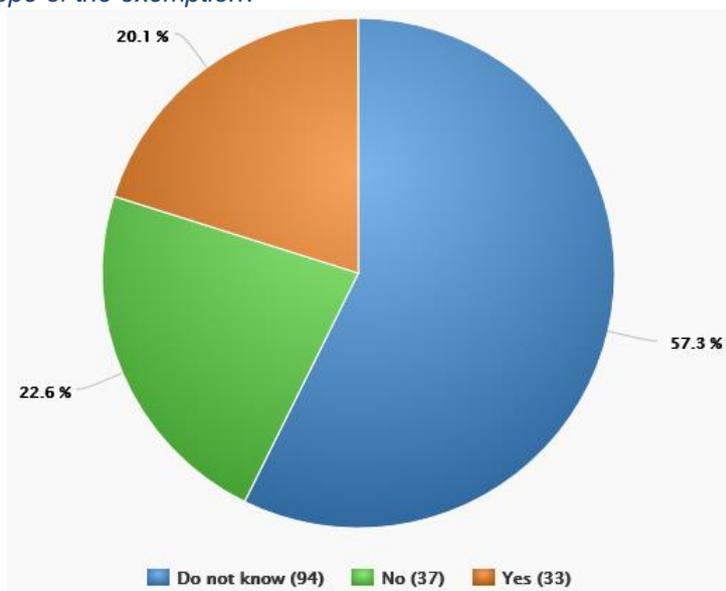
Leaving aside the appropriateness of the scope of the current list of hardcore restrictions (Article 4 VBER) and excluded restrictions (Article 5 VBER), do you consider that the additional conditions defined in the VBER (i.e. Article 2 and 3 VBER) lead to the exemption of types of vertical agreements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



Regarding the **conditions set out in Articles 2 and 3 of the VBER**, which vertical agreements have to meet to benefit from the block exemption, among the 15 respondents (primarily business associations and legal experts) that consider these conditions to lead

to the exemption of agreements that should not benefit from the block exemption, 10 respondents link the false positives to the market share threshold of the supplier and 5 to the market share threshold of the buyer. For 7 out of these 15 respondents, also the condition regarding non-reciprocal vertical agreements between competitors leads to undue exemptions. 1 respondent also links false positives to the condition regarding vertical agreements entered into between an association of undertakings and its members.

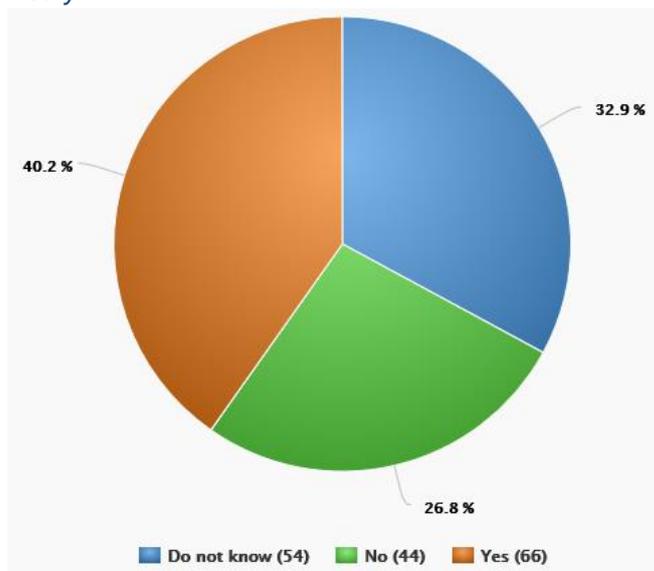
Are there other types of vertical agreements for which it can be assumed with sufficient certainty that they generate efficiencies in line with Article 101(3) of the Treaty but which are not covered by the current scope of the exemption?



Concerning the **current scope of the exemption**, the 33 respondents¹⁴⁵ that indicate that some agreements that are currently not covered by the exemption should benefit from it, mention, for example, agreements entered into by companies with a market share between 30% and 40% and agreements containing clauses imposing resale price maintenance due to the efficiencies they can generate according to some stakeholders.

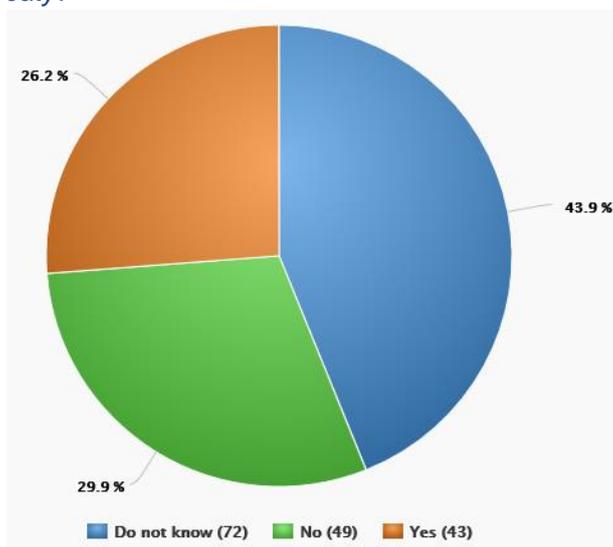
¹⁴⁵ Primarily business associations and legal experts, but also some companies and other types of stakeholders.

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?



As regards the **list of hardcore restrictions in Article 4 of the VBER**, out of the 66 respondents¹⁴⁶ that consider that it leads to false negatives because it contains one or more type(s) of vertical restrictions for which it can be assumed with sufficient certainty that they generate efficiencies, 43 refer to online sales restrictions, 41 to resale price maintenance, 36 to territorial or customer restrictions, 31 to restrictions of active or passive sales, 20 to restrictions of cross-supplies and 10 to agreements preventing or restricting the sourcing of spare parts.

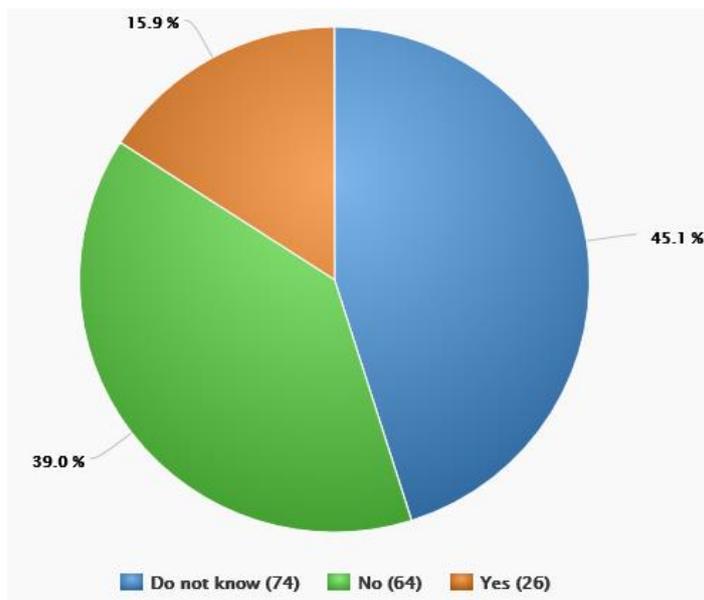
Does the list of excluded vertical restrictions (Article 5 VBER) exclude types of vertical restrictions for which it can be assumed with sufficient certainty that they generate efficiencies in line with Article 101(3) of the Treaty?



¹⁴⁶ Legal experts replied mostly positively to this question, whereas there was no discernible trend in the responses of other stakeholder groups.

As regards the **list of excluded vertical restrictions in Article 5 of the VBER**, 43 respondents (with no major difference between stakeholder groups) consider that the current list can lead to false negatives because it excludes certain types of restrictions that can generate efficiencies such as non-compete obligations with indefinite duration or exceeding 5 years (for 36 of the 43 respondents), post term non-compete obligations (for 25 of the 43 respondents) and restrictions to sell brands of particular competing suppliers in a selective distribution system (for 13 of the 43 respondents).

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)?



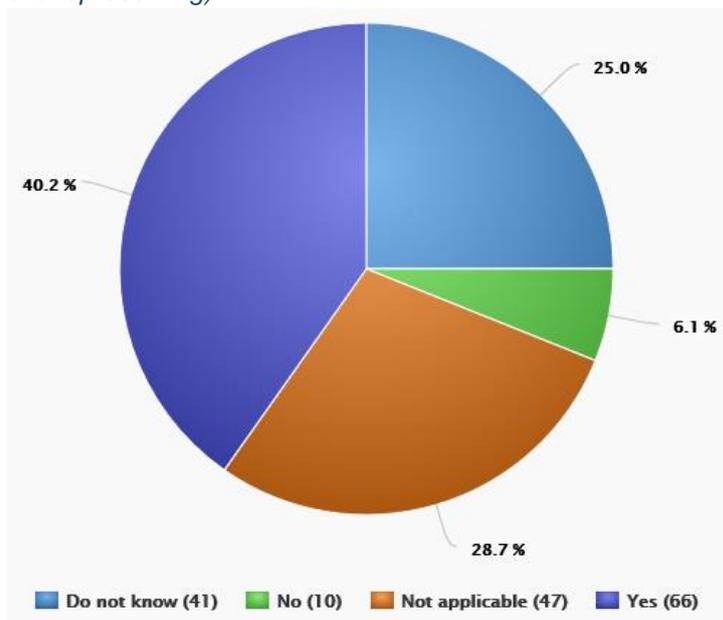
According to some of the 26 respondents (primarily business associations) that consider that there are **other types of vertical restrictions** for which it cannot be assumed with sufficient certainty that they generate efficiencies in line with Article 101(3) of the Treaty, online market place bans, "most favoured nation" clauses and retail channelling (as an indirect form of resale price maintenance) should, for example, be considered as hardcore restrictions.

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

In order to evaluate whether the VBER and the VGL have generated costs proportionate to the benefits they bring, stakeholders were asked a number of questions.

As regards **the costs generated by the assessment of the applicability of the VBER and the VGL to vertical agreements**, 66 respondents (primarily companies and some business associations) indicate that the assessment of the application of the VBER and VGL generates costs.

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)?



Some of the 41 respondents (35 being business associations) that do not know if the assessment of the application of the VBER and VGL generates costs indicate that they do not have information on the costs incurred by their members.

Stakeholders were also asked to provide the Commission with a **qualitative and a quantitative estimate of the costs linked to the assessment of the applicability of the VBER and the VGL**. Concerning the qualitative estimate, some respondents describe the nature of the costs they incur. Most replies refer to the fees for external consultants (lawyers and economists), as well as to costs for internal legal advice and the time spent by their commercial teams to negotiate and review contractual documents.

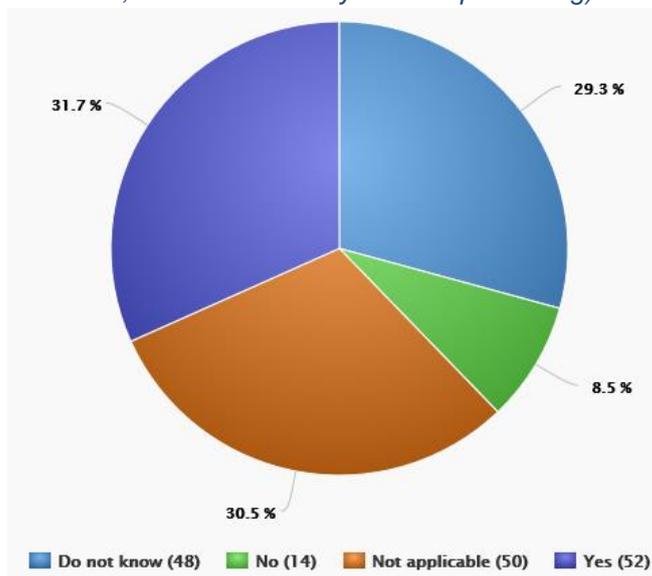
The majority of respondents indicate that they are not able to provide a quantitative estimate of the costs. In this respect, some companies explain that it is not possible for them to identify these costs among all the compliance and legal costs they incur. Some business associations indicate that they do not have an insight into the costs incurred by their members in this respect. However, a few respondents provide quantitative cost estimates. Two large companies indicate that the assessment costs can amount to respectively 0,5% and 20% of their turnover. In terms of value, one small company states that the assessment costs range between 50 and 100 euros per company per year, while one large company replies that the costs amount to several thousand euros.

To the question dealing with the **proportionality of the costs and benefits generated by the VBER and the VGL**, 52 respondents¹⁴⁷ indicate that the costs generated by the assessment of the applicability of the VBER are proportionate to the benefits it brings.

¹⁴⁷ Primarily business associations and companies, since legal experts and other stakeholders mostly indicated that they did not know or that the question was not applicable to them.

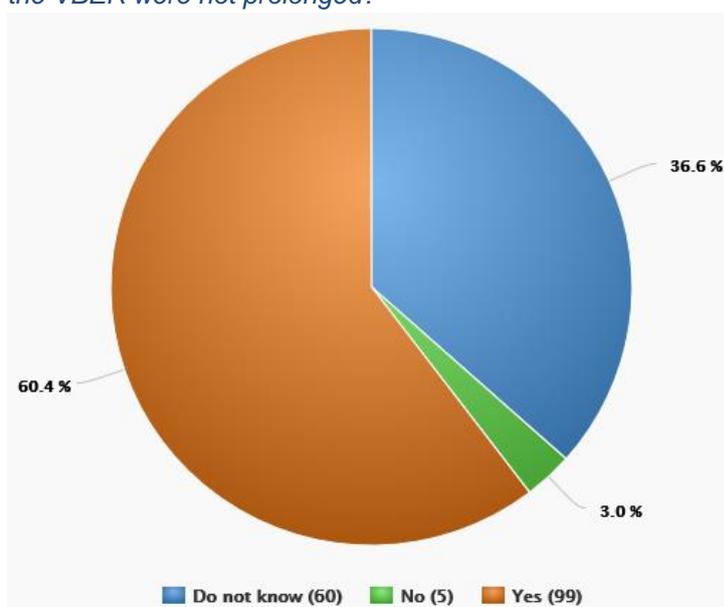
They consider that the benefits of the safe harbour resulting from the application of the VBER outweigh the costs incurred due to the assessment it requires. However, they all acknowledge that it is not possible to give a quantitative estimate of the related costs.

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)?



Some of the 14 respondents (with no major difference between stakeholder groups) who indicate that the costs incurred are not outweighed by the benefits consider that the costs to obtain advice on the applicability of the VBER (mainly legal fees) are high and that they are not always compensated in terms of legal certainty.

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?



If the VBER were not prolonged, 99 respondents (with no major difference between stakeholder groups) consider that the costs linked to ensuring compliance of vertical

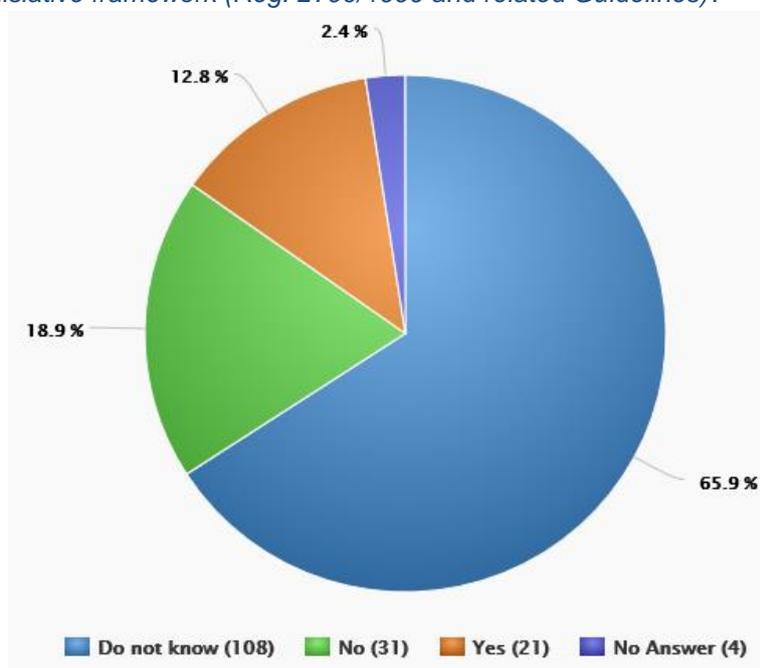
agreements with Article 101 of the Treaty would increase and that the legal certainty provided by the VBER would decrease or even disappear. Some respondents also indicate that the divergences between national authorities and courts when applying Article 101 of the Treaty to vertical agreements are likely to increase. They also note that litigation related costs would increase.

Besides, respondents mention that business organisations in all sectors would have to spend more time and resources (notably fees for lawyers and economists) to systematically self-assess the compliance of their vertical agreements with Article 101 of the Treaty. In this regard, some law firms state that a withdrawal of the VBER would increase the time spent to assess vertical restrictions and that legal fees would raise accordingly. Several respondents also stress that SMEs would be especially affected by any such cost increase since they do not have the human and financial resources needed to perform such a complex self-assessment.

Some respondents (with no major difference between stakeholder groups) also point out that the withdrawal of the VBER could have a "chilling effect", as companies could be deterred from applying innovative solutions or develop new business models whose compatibility with Article 101 of the Treaty would have to be fully assessed in each individual case (instead of being block exempted).

One respondent estimates that the increase in costs due to the non-prolongation of the VBER would at least amount to a factor of 10.

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)?



Regarding the **costs generated by the application of the VBER and the VGL compared to those incurred under Regulation 2790/1999 and the related guidelines**, some respondents indicate that the costs have decreased because the VBER and the VGL are clearer than the previous Regulation. In contrast, 21 respondents (primarily companies and business associations representing the supply side of the vertical chain,

but also some legal experts) indicate that the costs have increased compared to those incurred under the previous Regulation. According to them, the increase would result from market developments such as growing e-commerce and online sales, and the diverging interpretation of the current rules by national authorities and courts. None of the respondents provides a quantitative estimate of the increase or decrease of the costs generated by the application of the VBER and the VGL as compared to the previous Regulation.

Relevance (Is EU action still necessary?)

In order to evaluate whether the VBER and the VGL are still up to date in light of new market developments or other changes, stakeholders were asked several questions.

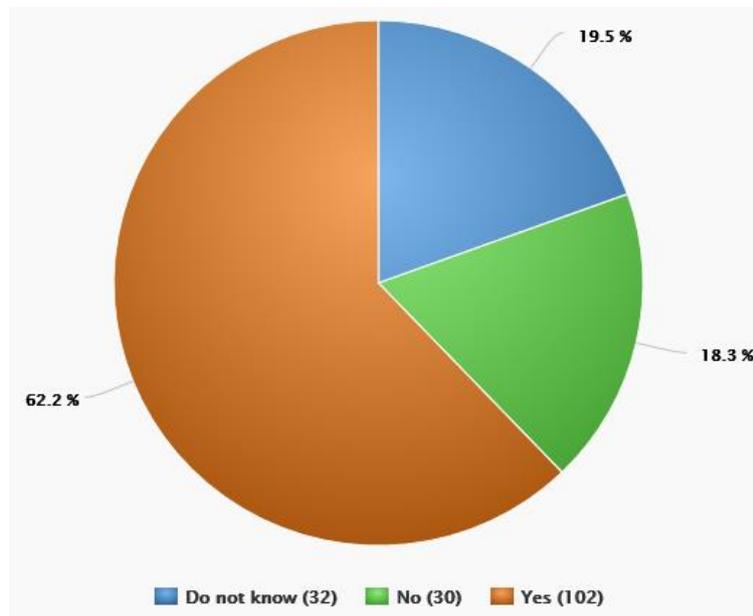
142 out of 164 respondents (approximately 87%) expect effects of some type **in case the VBER were to be prolonged and the VGL maintained without any change**. 6 respondents (approximately 4%) do not expect any effects, arguing that both the current level of legal certainty as well as the current uncertainties would remain unchanged in such a scenario. 16 respondents (approximately 10%) do not know. There is no major difference between stakeholder groups in these replies.

Out of the 142 respondents that expect some effects, 80 (approximately 49%) expect only positive effects, 62 respondents (approximately 38%) expect only negative effects and 8 respondents (approximately 5%) expect positive as well as negative effects. 29 of the respondents who believe that they would experience negative effects if the VBER were to be prolonged and the VGL maintained without any changes point out that the current framework is not fit for new developments and that clarifications and adaption of the rules are vital in face of the increasing digitisation of the economy, in particular regarding online platforms and online sales. The respondents that expect positive effects mainly explain that the prolongation of the legal framework would be positive, in that this option is preferable to no prolongation at all (i.e. a scenario in which the VBER would expire and the VGL would be withdrawn). 40 of them consider the prolonging of the VBER necessary to provide legal certainty. In this regard, 15 respondents are concerned about losing the benefit of commercial agency agreements being expressly excluded from Article 101(1) of the Treaty. 41 respondents also advise to update the VBER by taking into account recent market developments.

To the question regarding possible effects **in case the VBER were not to be prolonged and the VGL were to be withdrawn**, out of 164 respondents, 135 (approximately 82%) expect only negative effects, 5 respondents (approximately 3%) expect only positive effects, 1 respondent (approximately 1%) expects positive and negative effects, 1 respondent (approximately 1%) expects no effect and 22 (approximately 13%) do not know. 86 respondents argue that not prolonging the VBER and withdrawing the VGL would lead to a severe loss of legal certainty in the assessment of vertical agreements. 35 respondents also point out that this would lead to higher compliance costs and legal fees, with 21 seeing SMEs being particularly put at a disadvantage, as they do not have the financial resources to obtain extensive economic and legal advice. 12 respondents also mention concerns regarding a possible decrease in harmonisation among Member States,

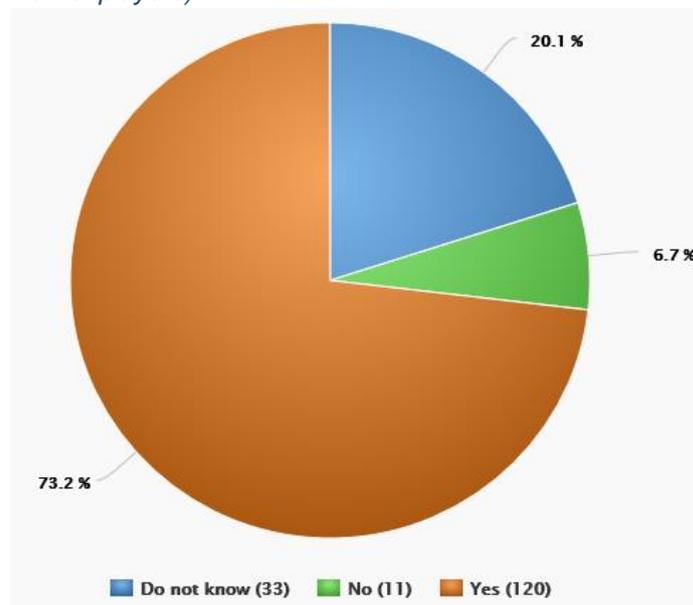
as there could be an increase in differing interpretations by the national competition authorities and national courts. Finally, 16 see the risk that not prolonging the current framework would discourage them from entering into distribution agreements and reduce the incentives for businesses to invest, thus slowing down innovation.

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)?



To the question whether there is a **need for a revision of the VBER in light of major market trends and/or changes**, among the 30 respondents (including business associations, companies and legal experts) who answer negatively, 18 consider that the VBER is sufficient and flexible enough, but see the need to update the VGL. On the other hand, 10 of the respondents who answer negatively see also no reason to update the VGL and consider the current legal framework to be sufficient.

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)?



As to the **need for a revision of the VGL in light of major market trends and/or changes**, only 11 respondents (primarily business associations) answer negatively, stating that the current rules are sufficient. Among the respondents who answer positively, the underlying reasons provided (also as regards the VBER) are overall consistent with what they answered to the following question, which asked them to list candidate areas for a possible revision, together with the major trends motivating the need for such a revision.

93 out of 164 respondents (approximately 57%) replied to the question asking them to **list candidate areas for a possible revision, together with the major trends motivating the need for such a revision**. The respondents (across all stakeholder groups) identify a large variety of areas of both the VBER and the VGL as requiring a revision. Different stakeholder groups mention different areas with varying degrees of importance and not all stakeholder groups have the same view as to what the revision should look like in practice.

Many respondents point to the need for a revision of the guidance concerning online sales restrictions (especially in the context of the distinction between passive and active sales). The major trends/changes motivating the need for a revision in this regard are the increasing importance of online sales, including sales through online marketplaces and online platforms, as well as the increasing importance of online advertising.

Many respondents also mention the hardcore restrictions relating to selective distribution as well as the guidance of the VGL on this topic as areas that need to be revised. The major trends/changes motivating the need for a revision in this regard are the increasing prevalence of selective distribution in the EU across a variety of sectors.

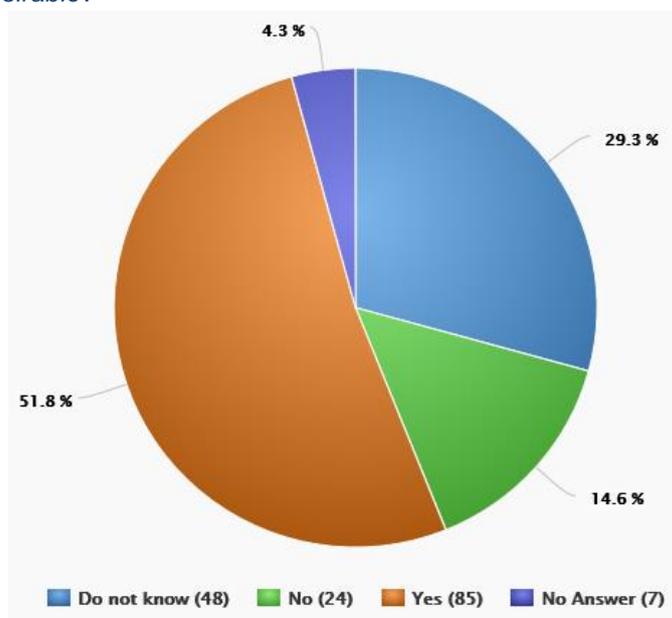
Another area identified by the respondents is resale price maintenance, which is considered a hardcore restriction under the current rules, and the related guidance in the

VGL. In this regard, respondents referred to the increasing use of price monitoring software and price algorithms, free-riding issues, as well as potential efficiencies stemming from resale price maintenance and the latest economic theories on this topic.

Other areas in need of a revision mentioned by respondents include the list of hardcore restrictions, the excluded restrictions (especially as regards non-compete obligations), the guidance related to agency agreements, the rules applying to vertical agreements entered into between competing undertakings, the market share thresholds (in particular their application to the relevant markets) and the guidance on franchising (notably as regards the transfer of know-how). The major trends/changes motivating the need for a revision in this regard are the increased market concentration, the dual role of manufacturers as distributor and competing seller, the increased vertical integration of suppliers and the incoherent application of the current rules across Member States (e.g. regarding "most favoured nation" or "price parity" clauses).

Many respondents also referred to the need to reflect the recent case law (e.g. the judgment of the Court of Justice in *Coty*) as well as the conclusions of the Commission's e-commerce sector inquiry.

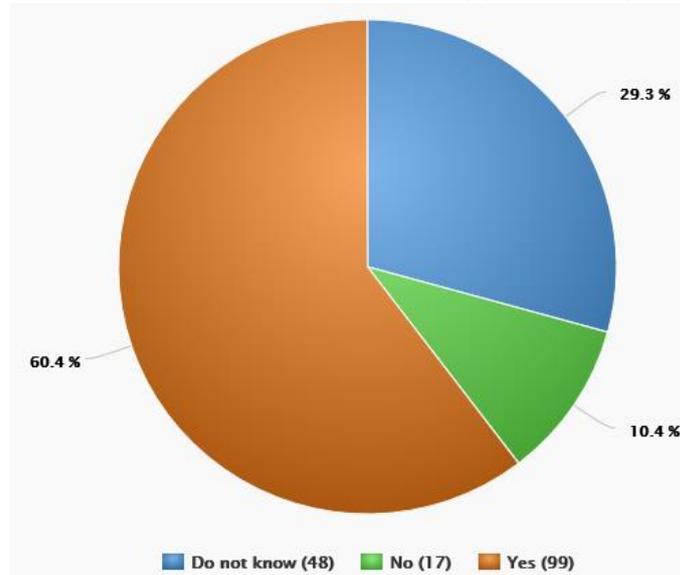
Is there any area for which the VBER and/or the VGL currently do not provide any guidance while it would be desirable?



To the question whether there are **areas for which the VBER and/or the VGL currently do not provide any guidance while this would be desirable**, of the 85 respondents (primarily legal experts and companies) who reply affirmatively, some indicate that it would be desirable for the VBER and/or the VGL to provide more guidance on several aspects related to online sales. Additional areas mentioned include p clauses, online search advertising restrictions, the use of price comparison websites, vertical exchanges of information between competitors, territorial supply constraints and the practice of retail channelling.

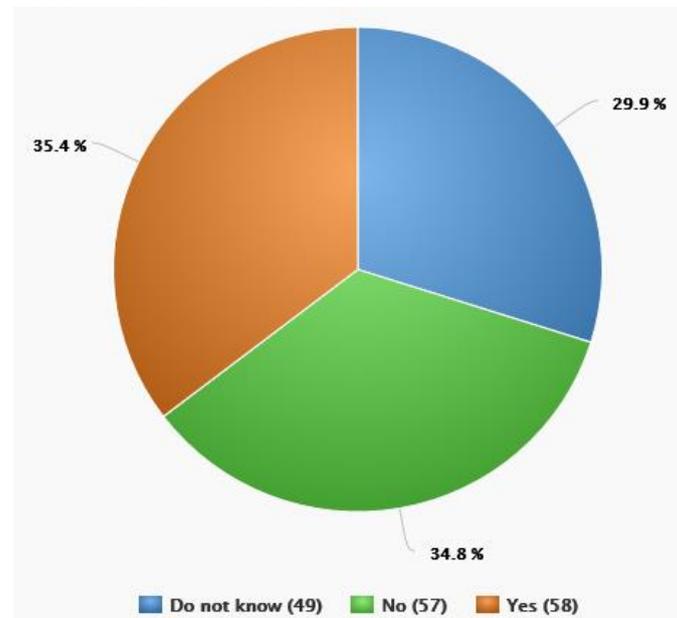
Coherence (Does the policy complement other actions or are there contradictions?)

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)?



To the question whether the **VBER and the VGL are coherent with other instruments that provide guidance on the interpretation of Article 101 of the Treaty**, the respondents that answer negatively mainly point to inconsistencies with the Technology Transfer Block Exemption Regulation, the Horizontal Guidelines and the Motor Vehicle Block Exemption Regulation.

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?

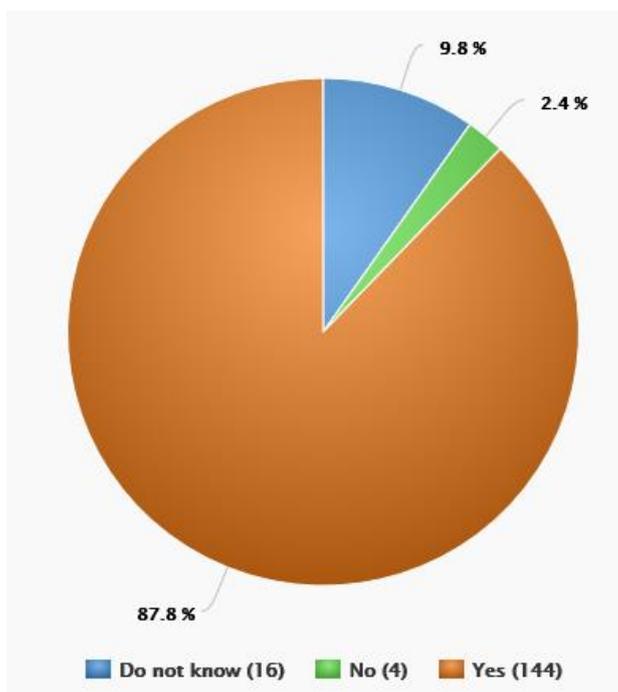


To the question whether the **VBER and the VGL contradict other existing and/or upcoming legislation and/or policies at EU or national level**, the 58 respondents that reply positively express concerns mostly related to divergence in the application of the

EU competition rules by national competition authorities and courts. Respondents are concerned about the different interpretation and standards of enforcement when it comes to parity clauses, dual pricing, resale price maintenance and the criteria to assess the compatibility of online platform bans (as set out in the judgment of the Court of Justice in *Coty*). Nine respondents highlight possible inconsistencies with Regulation (EU) 2018/302 on geo-blocking and seven respondents report contradictions at national level, with six respondents referring to several provisions of the French Commercial Code (e.g. Article L 330-1 *Code de Commerce*, which limits exclusive purchasing agreements to a maximum of 10 years). Three respondents also express the view that the current provisions of the VBER and the VGL would be curtailing their fundamental rights to property and freedom of profession. Furthermore, the franchise sector considers the definition of know-how in Article 1 of the VBER to be inconsistent with the definition of know-how under Directive (EU) 2016/943.

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)?



To the question whether the **VBER and the VGL add value**, among the 144 respondents that reply positively, 79 consider that the VBER and the VGL contribute to legal certainty, in that they provide a harmonised approach to assess vertical agreements throughout the EU. 30 also point out that self-assessing compliance with Article 101 of the Treaty in the absence of the VBER and the VGL would be more costly and administratively burdensome. 20 respondents who consider the VBER and the VGL to be

important tools state that they facilitate the consistent application of Article 101 of the Treaty across Member States.

2.3. SUMMARY OF THE TARGETED CONSULTATION OF NATIONAL COMPETITION AUTHORITIES

*A summary report of the consultation of national competition authorities was published in December 2019.*¹⁴⁸

In the context of the evaluation of the VBER and the related Guidelines on Vertical Restraints ("VGL"), the Commission asked the National Competition Authorities ("NCAs") to share their experience in applying the VBER. NCAs are bound by the VBER when assessing vertical agreements. In contrast, the VGL are non-binding for the NCAs, but nevertheless taken into account by all of them.

The Commission received 20 contributions.¹⁴⁹

Overall, the NCAs consider that the Commission should maintain both instruments, while taking the opportunity of the review to clarify and adjust the current rules, notably in light of market developments over the last decade.

The purpose of this summary is to outline the main points raised by the NCAs without regard to the number of contributions addressing a particular point or whether a particular point of view is shared by all the NCAs. Therefore, in the following, reference is made generically to "NCAs". However, for issues on which NCAs expressed diverging views, both sides of the argument are presented.¹⁵⁰

This summary provides the NCAs' general views on the evaluation of the VBER and the VGL following the five evaluation criteria established by the Better Regulation Requirements,¹⁵¹ i.e. effectiveness, efficiency, relevance, coherence and EU added value (see section I). It also summarizes the comments made by the NCAs as regards the functioning of some specific aspects of the VBER and the VGL (see section II).

I. GENERAL VIEWS OF THE NCAS

Regarding the effectiveness of the VBER and the VGL, NCAs generally share the view that both texts have met their objectives and contributed to promote good market performance in the EU. In particular, they have provided helpful guidance to NCAs and legal certainty to stakeholders for the assessment of vertical agreements and restrictions.

¹⁴⁸ The summary report is available at https://ec.europa.eu/competition/consultations/2018_vber/vber_ncas_summary.pdf.

¹⁴⁹ One contribution was submitted by one of the Contracting Parties to the EEA Agreement.

¹⁵⁰ The contributions received from the NCAs cannot be regarded as the official position of the Commission and its services and thus do not bind the Commission.

¹⁵¹ The better regulation requirements are about designing and evaluating EU policies and laws transparently on the basis of evidence and the views of stakeholders and citizens. They are applicable to all policy areas and aim for targeted and proportionate regulation that does not go further than required to achieve a given objective, while bringing benefits at minimum cost.

However, their effectiveness could be increased by providing clarifications and further guidance on some issues (see section II). Moreover, the VBER and the VGL should be updated to take account of recent market developments, new business models and new technologies. NCAs also suggest integrating the recent case law in relation to vertical restrictions into the VBER and/or in the VGL.

Regarding the efficiency of the VBER and the VGL, NCAs generally consider that the costs incurred by NCAs for the assessment of the compliance of vertical agreements with Article 101 of the Treaty would increase in the absence of the VBER and VGL. NCAs also consider that both instruments contribute to reducing the costs borne by stakeholders of ensuring the compliance of vertical agreements with Article 101 of the Treaty, even though this reduction is difficult to measure. However, as NCAs pointed out, it is difficult for businesses, especially SMEs, to self-assess the lawfulness of a vertical agreement based on the VBER and VGL without seeking an opinion from a law firm specialised in competition law, which entails certain costs.

Regarding the relevance of the VBER and the VGL, NCAs generally consider that both texts are useful and should therefore be maintained. However, NCAs indicate that the VBER and VGL should be revised in order to reflect recent market developments. New forms of distribution have emerged due to the increased importance of online sales and new players are now active on many markets (e.g. online platforms). These market developments have influenced and changed the behaviour of market participants and consumers, thus justifying an update of the VBER and the VGL, as well as the provision of guidance on the assessment of new vertical practices.

NCAs generally consider that the VBER and the VGL are coherent with other instruments that provide guidance on the interpretation of Article 101 of the Treaty. That being said, NCAs note that the VBER and the VGL may be affected by the EU Regulation on promoting fairness and transparency for business users of online intermediation ("Platform-to-Business (P2B) Regulation"), which regulates certain aspects of the relationship between platforms and their business partners. Consequently, this Regulation should be taken into account during the review process to ensure that both instruments complement and do not contradict each other.

NCAs generally consider that the VBER and VGL provide clear added value in the assessment of the compatibility of vertical agreements with Article 101 of the Treaty. Therefore, any lapse of the VBER and the VGL would seriously undermine harmonisation in the enforcement of Article 101 of the Treaty across the EU.

II. SPECIFIC ISSUES RAISED BY NCAs

When evaluating the functioning of the VBER and VGL, NCAs have identified a number of specific issues. In the following, these issues are grouped in six main categories: (i) the scope of application of the VBER, (ii) hardcore restrictions, (iii) vertical issues related to e-commerce, (iv) retail most favourite nation or price parity clauses ("retail MFNs"), (v) frequently used distribution systems, and (vi) withdrawal/disapplication of the VBER.

i. THE SCOPE OF APPLICATION OF THE VBER

1. Regarding the definition of vertical agreements (Article 1(1)(a) of the VBER and paragraphs 24-26 VGL)

NCAs indicate that the current definition of vertical agreements does not take into account the emergence of new market players, notably online platforms and the nature - vertical or horizontal - of their commercial relationship with the businesses that use them to sell their products and services.

2. Regarding vertical agreements that generally fall outside the scope of Article 101(1) of the Treaty ("agency agreements"; paragraphs 12-21 VGL)

NCAs indicate that certain paragraphs of the VGL dealing with the treatment of agency agreements do not capture well the distinction between independent traders and agents acting on behalf of a supplier, especially with regard to the difference in the legal and/or commercial risks incurred.

More specifically with regard to online platforms, there seem to be diverging views among NCAs as to whether they can qualify as genuine agents. Some NCAs consider that certain characteristics of online platforms indicate that they cannot form an integral part of the principal's distribution system and should therefore not be treated as genuine agents (e.g. platforms usually bear the entire risk of investing in their infrastructure, deal with many different - often smaller - principals and can have a strong bargaining position). Other NCAs take the view that, depending on the circumstances, online platforms could qualify as an agent, with the result that Article 101(1) of the Treaty does not apply to intra-brand restrictions agreed between the platform and the principal.

In light of the above, NCAs advocate for more guidance on relevant factors to be taken into account in the assessment whether online platforms can qualify as agents, which should be carried out on a case-by-case basis. Such guidance could take into account the following aspects: (i) in some circumstances online platforms appear to bear more than insignificant risks; (ii) the nature of the relationship between suppliers and online platforms is very different from a traditional agency model where large suppliers act as principals using various smaller (independent) sales agents to sell their goods or services, as the online platform that acts as an agent is often the undertaking with the strongest market position; and (iii) online platforms invest heavily in data-gathering and processing capabilities and keep data of third-party customers exclusively for themselves.

3. Regarding the conditions for the application of the block exemption (Article 2 of the VBER)

Vertical agreements entered into between an association of undertakings and its members (Articles 2(2) and 8 of the VBER and paragraphs 29-30 VGL)

NCAs indicate that the VGL do not provide sufficient guidance on the fact that the restrictions in vertical agreements (e.g. recommended resale prices and maximum resale

prices) between an association and its members or between an association and upstream suppliers, which satisfy Article 2(2) of the VBER, can only benefit from the safe harbour that the VBER provides if the conditions set out in Articles 3 to 5 of the VBER are fulfilled and these agreements are also acceptable under the horizontal rules.

NCA's also point out that more examples should be added in paragraphs 29 and 30 of the VGL to illustrate how to apply Article 2(2) of the VBER in practice. This includes agreements entered into in the context of voluntary chains consisting of a number of independent retailers as opposed to the so-called "capital chains" where all the retailers are owned by one company.

Finally, NCA's indicate that the 50 million euros turnover threshold in Article 2(2) of the VBER could lead to the exemption of agreements that do not generate efficiencies. At the same time, NCA's appear to call into question whether this threshold is relevant at all in the current market conditions.

Non-reciprocal vertical agreements between competitors (Article 2(4) of the VBER and paragraphs 27-28 of the VGL)

NCA's indicate that the wording of Article 2(4) of the VBER does not provide sufficient clarity in relation to several aspects.

First, the meaning of Article 2(4) of the VBER lacks clarity with regard to the relationship between hybrid platforms and retailers. In particular, NCA's consider that it is not clear if hybrid platforms, acting both as suppliers of intermediation services and retailers, should benefit from Article 2(4) of the VBER, since the hybrid model might not correspond to the *ratio legis* of this exception.

Second, Article 2(4) of the VBER arguably lacks clarity on the interplay with the Horizontal Guidelines ("HGL"). For instance, paragraph 27 of the VGL does not clearly stipulate if the horizontal aspects of a mixed horizontal/vertical agreement must always be assessed under the HGL first. NCA's note that it is only if this first assessment leads to the conclusion that the cooperation between competitors would, in principle, be acceptable under the HGL that a second assessment under the VBER should be carried out.

Third, the conditions of application of dual distribution to service providers should be clarified. Notably, the VGL should specify whether, in order to qualify as "a provider of services" for the purpose of Article 2(4)(b), the supplier must himself be at the origin of the service concerned or if the mere reselling of the service supplied by another (upstream) undertaking is sufficient.

4. Regarding the market share threshold (Articles 3 and 7 of the VBER and paragraphs 86-95 VGL)

NCA's indicate that, based on their experience and subject to the points set out below, the 30% market share threshold is generally appropriate.

NCA's point out that it may not be clear as to whether, for the purpose of assessing the market shares of the supplier and the buyer, it is necessary to define one or, conversely, different (separate) geographic markets (i.e. the relevant geographic market on which the supplier sells the contract goods or services and the relevant geographic market on which the buyer purchases the contract goods or services).

NCA's highlight difficulties regarding the application of the market share threshold in relation to online platforms. First, NCA's point to the case of a "distributor platform"¹⁵² where the calculation of the market share could be based on each market on which the platform "purchases" the products sold via the platform. In contrast, when determining the market share of a "supplier platform"¹⁵³ it has to be established whether the relevant market is confined to the supply of platform services or if other suppliers of comparable services (e.g. in the offline world) have to be taken into account, and if so to what extent. Second, NCA's point out that platforms often operate on multi-sided markets. In these cases, it is not clear whether the parties to a vertical agreement have to determine whether the 30% market share threshold is met on each side of the market or whether only one side of the market should be considered.

NCA's also indicate that (the level of) the market share thresholds could be inadequate when it comes to online platforms. First, turnover-based market shares may be less relevant as indicators for market power of platforms than other metrics such as, for example, resources, access to data and network effects. Second, a 30% market share threshold could be too high since platforms may have a certain degree of market power even below this threshold (due to access to data and network effects) and when considering the difficulties with withdrawing the application of the VBER. Third, as the degree of market power of multi-sided platforms might be different depending on the characteristic of the market concerned and relevant consumer behaviour (e.g. multi-homing or single homing), the market share threshold for multi-sided platform may have to be differentiated in order to better reflect different market circumstances.

In addition, NCA's stress that the 30% market share threshold does not seem to function properly when applied to oligopolistic markets. In markets with two to four large players, the individual market shares might fluctuate around 30%, so that even if all members of the oligopoly apply identical practices, some may benefit from the VBER, while others may fall outside its scope. This could create arbitrary results and possible market distortions. This calls for a deeper assessment of cumulative effects of similar vertical restrictions and the possible introduction of an additional oligopoly threshold in combination with a lower market share threshold (e.g. individual market share of at least 15% for each undertaking plus a combined oligopoly market share of 50%).

¹⁵² Distributor platforms can be understood those directly involved in the conclusion of individual transactions *via* the platform and could therefore qualify as a buyer of the product or service *vis-à-vis* the manufacturers and as a supplier *vis-à-vis* end customers.

¹⁵³ Supplier platforms provide only the infrastructure for seller and buyers to interact and conclude a particular transaction.

ii. **HARDCORE RESTRICTIONS**

NCAs generally recognise the importance of the list of hardcore restrictions in Article 4 of the VBER. However, based on their experience with applying the VBER, NCAs point out that some notions referred to in Article 4 are not sufficiently clear.

1. Regarding the concept of hardcore restrictions and restrictions "by object"

NCAs note that the VBER does not establish a clear distinction between hardcore restrictions and restrictions "by object" and that the VGL do not provide more clarity in this regard.

2. Regarding the distinction between active and passive sales

NCAs point out that the VBER does not contain any definition of active sales and passive sales. In fact, Article 4(b)(i) of the VBER only states that active sales restrictions do not qualify as hardcore restrictions in the context of exclusive distribution agreements. The VGL only contain a few paragraphs setting out examples of active and passive sales restrictions, which do arguably not provide sufficient legal certainty in this regard. For example, paragraph 53 of the VGL does not clearly state whether exclusive distribution agreements are the only context in which restrictions of active sales are exempted from the hardcore restriction defined in Article 4(b) of the VBER. In addition, paragraph 56 of the VGL does not specify whether the criterion of overall equivalence²⁷ between the sales restrictions imposed on brick-and-mortar shops and those imposed on internet dealers applies to all types of distribution systems or only to selective distribution.

NCAs also consider that only relying on examples contained in the VGL may not provide sufficient guidance on how to deal with internet sales (as active or passive sales) notably with regard to the increasing ability to target advertisement online.

There is also a need for more guidance regarding sales that take place outside the conventional selling process. Notably, it is not clear if bids submitted in reply to a public call for tender should be considered active or passive sales. This distinction is however important since a qualification as active sales would limit the participation of bidder from outside the territory. Such limitation could lead to market segmentation along national lines, which is contrary to EU procurement rules and the EU's single market objective.

3. Regarding various hardcore restrictions

Resale price maintenance (Article 4(a) of the VBER and paragraphs 48-49 VGL)

NCAs expressed different views regarding the legal treatment of resale price maintenance ("RPM") in the VBER. Some NCAs raise the question whether the presumption of illegality set out in the VBER - albeit rebuttable - is consistent with RPM arguably being on balance welfare enhancing under certain circumstances. Others point to the enforcement practice in recent years, which has shown (i) the widespread use of such restrictions, (ii) their severe effects on competition and the lack of (substantiated)

efficiency claims, as well as (iii) the existence of less restrictive means to achieve the same results (i.e. RPM is not indispensable). They therefore consider that RPM rightfully figures in the list of hardcore restrictions in the VBER.

There is agreement among NCAs that the VBER and the VGL do not provide sufficient legal certainty on "grey areas" of RPM. Notably, more guidance is needed to address the lack of clarity as regards the circumstances in which recommended resale prices amount to RPM. NCAs also point to difficulties with applying the VBER to atypical price restrictions that can constitute RPM. In particular, Article 4(a) of the VBER and paragraph 48 of the VGL do not specify whether certain practices restricting the ability of buyers to determine their selling price should be considered RPM (e.g. practices prohibiting discounts applied by retailers, or practices compelling retailers to apply a price within a specific range defined by the supplier). In addition, the distinction between clear-cut RPM and hub & spoke scenarios is currently not reflected in the VBER and the VGL.

NCAs consider that the increasing price transparency - resulting from boosted e-commerce and online advertising - and the development of advanced price monitoring software may exacerbate the negative effects of RPM strategies. These elements are currently not taken into account in the RPM-related parts of the VGL, notably when it comes to the notion of "supportive" measures to identify price-cutting distributors (see paragraph 48 of the VGL). Similarly, the VGL section on "resale price restrictions" does not provide examples of the types of practices that may amount to a form of pressure or incentive to apply a fixed or a recommended resale price, thus resulting in RPM in the sense of Article 4(a) of the VBER.

NCAs further indicate that the VBER and the VGL arguably do not provide sufficient legal certainty with regard to the assessment of resale price restrictions in the context of selective distribution networks. In this particular context, suppliers may argue that the protection of their brand image or the characteristics of their products or services would justify practices that restrict the ability of buyers to determine the resale price. NCAs would therefore like the VGL to specify whether (and, if so, to what extent) suppliers can indeed use these justifications to interfere in the pricing policy of their retailers.

*Territorial/customer restrictions and exceptions to these restrictions
(Article 4(b) of the VBER and paragraphs 50-55 of the VGL)*

NCAs question the effectiveness of the VBER regarding the prevention of territorial restrictions, which are contrary to the EU's single market objective. In fact, many stakeholders – mostly SMEs – that are facing problems in relation to territorial supply restrictions, applied by their suppliers, may not be able to judge whether these restrictions infringe Article 101 of the Treaty.

NCAs point to difficulties with applying Article 101(3) of the Treaty to territorial restrictions that raise obstacles to market integration but also create efficiencies. It is notably unclear how to balance efficiencies for consumers (e.g. more efficient distribution) against harm to market integration in such situations, given that the two effects are difficult to quantify by the same measure.

NCAAs also note that Article 4(b) of the VBER and paragraph 55 of the VGL are not clear about possible limitations on combining selective and exclusive distribution.

iii. VERTICAL ISSUES RELATED TO E-COMMERCE

1. Regarding online sales restrictions (paragraphs 52-54 of the VGL)

NCAAs indicate that clarifications and adjustments in light of recent market developments and new case law are particularly needed with regard to online sales restrictions. In fact, the massive growth of e-commerce during the last decade has had a profound impact on distribution strategies. As a result, NCAAs have been facing challenges when applying the VBER to new types of vertical restrictions. NCAAs consider that further guidance is needed for the assessment of such restrictions, notably due to their often complex nature. NCAAs highlight that the VBER and the VGL are not up-to-date as regards the type of online restrictions that are allowed in the context of selective distribution, notably in light of recent national and Union case law.

NCAAs also point to the need for more complete, coherent and up-to-date guidance on the assessment of online sales restrictions, especially with regard to restrictions on the use of third-party online platforms and price comparison websites, as well as on brand bidding in online advertising. In particular, NCAAs indicate that it is not clear, if and under which circumstances these restrictions are considered hardcore restrictions and whether there is a difference in approach with regard to restrictions relating to "where" or "to whom" distributors sell a product or service as compared to restrictions relating to "how" distributors sell a product or service. NCAAs note that it is also not clear whether the assessment of online sales restrictions differs depending on the distribution system used (e.g. selective distribution, franchising or exclusive distribution). Further clarity seems to be needed on whether these three types of restrictions are considered restrictions of active or passive sales in the meaning of the VBER and how they should be assessed if the market share thresholds in Article 3 VBER are exceeded and the exemption therefore does not apply.

The NCAAs' views on specific online sales restrictions are explained in more detail below.

Restrictions on the use of third-party online platforms

NCAAs indicate that there is a lack of clarity, both in the VBER and in the VGL, as regards the rules applicable to bans on sales via third-party online platforms ("online platform bans"). NCAAs expressed different views regarding this type of restriction.

Some NCAAs consider that the protection of a supplier's brand image, which is often raised as a justification for platform bans, may actually be used as a pretext to reduce the number of online sellers for a particular product or service and to avoid price transparency and price competition, which can significantly impair the business opportunities of distributors and consumer choice. Therefore, online platform bans should be considered a hardcore restriction. Other NCAAs favour a case-by-case analysis in order to evaluate whether such a restriction could be objectively justified in a particular case. In any event, the NCAAs consider that more guidance is needed on the compatibility of online platform bans with Article 101 of the Treaty.

Some NCAs argue that there is no evidence that marketplaces as such would have an impact on the quality of distribution. Therefore, not quality-based "per se" bans should not benefit from the VBER safe harbour but rather be subject to an individual assessment under Article 101(3) of the Treaty. Moreover, in order to determine whether an online platform ban amounts to a restriction on sales to specific customer groups (i.e. a hardcore restriction) or rather a restriction on the use of one available (online) distribution channel (i.e. not a hardcore restriction), it is not clear whether it is possible to take into account the market structure, since the role of online platforms and other intermediaries may differ between Member States.

With reference to the *Coty* judgment delivered by the CJEU on 6 December 2017, NCAs point out that it is not clear whether the judgement applies only to luxury products or more generally also to other types of products. NCAs also find it unclear whether platform bans applied outside the context of a selective distribution system should be considered as "by object" or "by effect" restriction, or whether this restriction should be considered at all an infringement of Article 101 of the Treaty.

Restrictions on the use of price comparison websites

NCAs would welcome guidance on how to qualify prohibitions on the use of price comparison websites and to what extent the assessment of such provisions should be different from the approach applied to online platform bans. While a restriction on the use of third-party platforms seems to benefit from the safe harbour provided by the VBER, an absolute restriction on the use of price comparison websites that is not linked to quality criteria may constitute a hardcore restriction under Articles 4(b) and 4(c) of the VBER. In fact, price comparison websites normally redirect consumers to the website chosen to complete the transaction. As a result, in the context of a selective distribution system, a restriction of the use of price comparison websites by distributors appears less justified than an online platform ban. This is because final customers carry out the transaction on the website of the authorised distributors, which should, in principle, meet the quality criteria required by suppliers.

Restrictions on online search advertising

NCAs indicate that there is a lack of clarity and guidance as regards online advertising restrictions.

Online advertising restrictions, such as those that limit the use of the manufacturer's brand for advertising purposes ("brand bidding restrictions"), may *de facto* amount to a ban on online sales for smaller distributors with low traffic on their own websites which can only reach online consumers by means of advertisements on search engines or social networks. At the same time, the impact of such brand-bidding restrictions in a vertical relationship may depend on the specific form of these restrictions and on their economic context.

Other requirements with regard to the use of the internet to resell goods

NCA's indicate that paragraph 54 of the VGL is not sufficiently clear as to whether quality standards for the use of the internet may also be imposed in distribution systems other than selective distribution.

NCA's also point out that there is a lack of clarity regarding the limits of the possibility for suppliers to require their distributors to operate a brick-and-mortar shop. This concerns notably the question (i) whether there is any ceiling to be applied on the number of required brick-and-mortar shops (e.g. absolute number per geographic area or relevant market vs. more subjective proportionality requirement), (ii) whether this requirement is only a concern for selective distribution or also for other types of distribution systems, and (iii) whether such a requirement is, in principle, acceptable regardless of the market share of the supplier (i.e. also above 30%).

2. Regarding dual pricing (paragraph 52 of the VGL)

NCA's have diverging views on the effects that the growth of online sales has had on brick-and-mortar stores. On the one hand, NCA's recognise that brick-and-mortar stores have difficulties competing with online stores given the significant investments required for offline sales. Suppliers cannot however compensate hybrid distributors for such investments by applying dual pricing since this constitutes a hardcore restriction. Since allowing suppliers to differentiate net wholesale prices between offline and online sales in such situations could be justified from an economic point of view and correspond to the public interest, dual pricing may have to be dropped from the hardcore list. On the other hand, NCA's indicate that dual pricing may have a similar effect as total online sales bans, since they can incentivise hybrid retailers to reduce their online sales, which would justify maintaining the current approach regarding dual pricing.

NCA's also note that the VGL lacks guidance on the criteria for the individual assessment of dual pricing under Article 101(3) of the Treaty and on possible alternatives for remunerating specific services rendered by physical stores that would not raise competition concerns.

NCA's further indicate that paragraph 52(d) of the VGL may not provide sufficient clarity on whether it only applies to situations where a manufacturer charges the same retailer different prices depending on the sales channels used (i.e. online or offline), or also to situations where a manufacturer applies different prices for offline, hybrid and online retailers. NCA's also consider that there is a lack of guidance regarding the treatment of restrictions having an equivalent effect and the question whether paragraph 52(d) of the VGL applies to all types of distribution systems or only to selective distribution. NCA's highlight that the latter approach would likely create a loophole allowing suppliers to impose more restrictions on their distributors when no selective distribution is in place.

Finally, NCA's point out that the VBER and the VGL do not provide guidance on online price discrimination, suggesting that this may be an area to address for the future.

3. Regarding online platforms

NCA's indicate that the VBER and the VGL do not provide sufficient guidance on how to treat online platforms, which do not fit squarely into the traditional supplier/buyer relationship reflected in the conceptual framework of the VBER. NCA's suggest providing the necessary guidance in the context of a dedicated platform section in the VBER, or at least in the VGL. Any such guidance should address the following aspects:

First, NCA's point out that the definition of a vertical agreement in Article 1(a) of the VBER and paragraph 25 of the VGL does not work well in the online context, since online platforms often do not distribute products in the traditional sense, but operate at a level of trade which is neither purely vertical nor horizontal with respect to suppliers. NCA's therefore indicate that they lack criteria to determine whether agreements between suppliers and online platforms are to be treated as vertical or rather horizontal agreements.

Second, NCA's suggest that restrictions imposed by platforms on sellers are often different in nature from those commonly used in traditional vertical relationships and may not - at least not directly - *"relate to the conditions under which the parties may purchase, sell or resell certain goods or services"*, thus falling outside the definition of vertical agreements in the sense of the VBER.

Third, NCA's observe that vertical restrictions are more likely to be used by downstream platforms, which tend to have significant market power, in order to restrict their own upstream suppliers. This means that the balance of power between suppliers and retailers has shifted in favour of online platforms and that the specificities of online platforms are currently not properly taken into account by the VBER and the VGL.

NCA's also point to uncertainty regarding the treatment of intra-brand restrictions imposed by powerful online platforms, taking into account that (i) network effects often ensure that successful online platforms grow to a significant size and gain bargaining power over their customers, (ii) online platforms are capable of influencing the parameters of the transactions they facilitate for the benefit of their own business interest, and (iii) hybrid platforms function as gatekeepers to certain (online) distribution channels and as retailers competing on the downstream market with the companies using their platform's services.

NCA's highlight that, based on their experience, there is a need to distinguish between "supplier platforms", which provide only the infrastructure for sellers and buyers to interact (see footnote 2 above), and "distributor platforms", which are directly involved in the conclusion of individual transactions via the platform and can therefore qualify as buyers of products vis-à-vis the manufacturers and as suppliers vis-à-vis end customers (see footnote 3 above). The difference between both concepts lies in the degree of participation of the platform in the transaction it facilitates and its responsibility for it. The VBER and the VGL currently do not clarify the consequences of classifying a third-party online platform as either a "supplier platform" or a "distributor platform" with respect to the application of the rules on dual distribution, the hardcore restrictions, excluded restrictions, and the calculation of market shares.

Finally, the experience of NCAs show that online platforms with a degree of market power often require their business partners to supply commercially sensitive and/or valuable data about the transactions concluded on the platform. NCAs flag that unjustified requests for supplier data can have potential anti-competitive effects downstream (as a means for the online platform to strengthen its market position by gathering and using data that allow it to compete more effectively at the downstream level).

iv. RETAIL MOST-FAVoured NATION ("RETAIL MFNS") OR PRICE PARITY CLAUSES

NCAs indicate that the VBER and the VGL do not provide sufficient guidance on the legal qualification and assessment of retail MFNs. This might result in divergence in the treatment of retail MFNs between Member States, thereby limiting legal certainty for stakeholders, notably platforms and their business partners. However, NCAs agree that a distinction should be drawn between wide and narrow retail MFNs.

NCAs specify in this regard that the VBER and the VGL do not capture the fact that wide retail MFN clauses (which require suppliers to offer the platform the same or better prices and conditions as those offered on any other sales channel) are more problematic than narrow retail MFNs (which generally only bind the supplier's direct online channel). They also do not reflect that it is less likely that efficiencies resulting from the use of wide retail MFNs (e.g. avoiding free-riding and recovering investments made by platforms) could outweigh the restrictive effects on competition (e.g. weakening competition between platforms and impeding the entry of platforms willing to charge lower commissions, thus ultimately increasing the price for consumers).

NCAs point out that the VBER and the VGL do not take into account that narrow retail MFNs are generally more likely to be justified than wide retail MFNs. When assessing narrow retail MFNs, particular attention should be paid to the market power of the platforms concerned, and the cumulative effects that may occur if those platforms are used by a large proportion of the suppliers and/or distributors active on the markets concerned. In a recent case, it was considered that a narrow retail MFN clause had similar effect as wide MFNs as the supplier's direct online channel constituted an important distribution channel.

v. FREQUENTLY USED DISTRIBUTION SYSTEMS

1. Selective distribution (paragraphs 174-188 of the VGL)

NCAs point out that over recent years there has been a tendency among manufacturers to apply qualitative selection criteria that are completely unrelated to the actual requirements of the product concerned. In this context, NCAs highlight that selective distribution systems may serve as a means to reduce intra-brand competition and discipline deviant market behaviour. In fact, the ultimate goal of certain selection criteria, in combination with appropriate retaliation mechanisms, seems to be the stabilisation of retail prices.

NCA's indicate that the VBER does not capture the fact that the potential negative effects of selective distribution systems may increasingly outweigh any potential positive effects. In light of this, the unconditional exemption of selective distribution below the market share threshold of 30% may have to be reassessed. This appears all the more justified since the only available instrument to address selective distribution systems benefiting from the VBER while having effects on competition that are incompatible with Article 101(3) of the Treaty is the individual withdrawal of the exemption pursuant to Article 29 of Regulation 1/2003, which has however in practice not proven to be an effective tool.

NCA's also point to a need for more clarification regarding the assessment of vertical restrictions in the framework of selective distribution systems. Notably, the interplay between the Metro criteria and the exemption requirements of the VBER is considered unclear. Account should be taken of the recent jurisprudence in this area and the questions that have remained unsolved after the CJEU's *Coty* judgment should be addressed.

Finally, NCA's indicate that the case law seems to give suppliers with selective distribution systems greater control over the conditions under which their distributors resell their products and services. This may encourage businesses to establish selective distribution systems to impose more restrictions on their distributors than otherwise allowed even though the objective of brand protection may not be justified with regard to the products or services concerned. Guidance is needed to avoid the conflicting application of competition law in different jurisdictions on this matter.

2. Franchising (paragraphs 189-191 of the VGL)

NCA's indicate that the treatment of franchise agreements in the VBER and VGL do not provide sufficient legal certainty with regard to the combination of franchising with exclusive distribution (aimed at providing an exclusive territory to a particular franchisee), which is very common in practice. The VBER does not provide any guidance on the assessment and thus the legality of distribution systems that combine elements of exclusive distribution and franchising. In fact, pursuant to Article 4(b)(i) of the VBER, a restriction of active sales to another buyer's exclusive territory is permitted in the context of an exclusive distribution system, while pursuant to Article 4(c) of the VBER, the restriction of active sales to end users by retailers of a selective distribution system (with franchising being a subcategory of selective distribution) is considered a hardcore restriction. Also paragraphs 56-57, 152, 176 and 185 of the VGL are unclear regarding the circumstances under which selective and exclusive distribution can be combined.

vi. **WITHDRAWAL AND DISAPPLICATION OF THE BLOCK EXEMPTION**

1. Regarding the disapplication and withdrawal of the block exemption (Article 29 of Regulation 1/2003, Article 6 of the VBER and paragraphs 74-85 of the VGL)

NCA's question the effectiveness of the disapplication procedure, since Article 6 of the VBER, which allows the Commission to disapply the VBER in respect of specific restrictions where parallel networks of similar vertical restrictions cover more than 50% of the relevant market, has not been used so far.

NCA's also question the effectiveness of the withdrawal procedure, since Article 29 of Regulation 1/2003, which allows the Commission and the NCA's to withdraw the benefit of the VBER in individual cases, seems difficult to apply in practice. This is notably due to the underlying requirement that the territory of the Member State or a part thereof concerned must constitute a distinct geographic market. NCA's also point out the lack of guidance with regard to the withdrawal procedure, particularly the standard of proof regarding the withdrawal requirements.

2. Regarding the enforcement policy in individual cases (Section VI of the VGL)

NCA's point out that the VGL treat the assessment of individual cases of hardcore restrictions falling outside Article 101(1) of the Treaty and those fulfilling the conditions of Article 101(3) of the Treaty in the same section. New guidance should distinguish between these two scenarios.

2.4. SUMMARY OF THE STAKEHOLDER WORKSHOP

A summary report of the stakeholder workshop was published in February 2020.¹⁵⁴

In the context of the evaluation of the VBER, together with the Vertical Guidelines, the European Commission ("Commission") organised a stakeholder workshop ("workshop") to gather additional information about the functioning of the current rules. The workshop took place on 14 (afternoon) and 15 November (full day) 2019, at Autoworld, Cinquantenaire, in Brussels.

Building on the outcome of the public consultation in which stakeholders had generally reported that the VBER and the Vertical Guidelines were useful and cost-reducing tools

¹⁵⁴ The summary report is available at https://ec.europa.eu/competition/consultations/2018_vber/workshop_summary.pdf. The Commission notes that the published report differs from the summary included in this annex. This is due to the fact that, during the stakeholder workshop, stakeholders expressed views not only the functioning of the rules since their adoption, but also on changes they believe should be made to the rules, to improve their functioning, as well as how such changes would benefit consumers. All these views were included in the published summary, for transparency reasons. However, to the extent that these views focus on possible policy options and their impacts, and are therefore not relevant for the evaluation of the VBER, together with the Vertical Guidelines, they have not been included in this annex.

for self-assessing compliance of vertical agreements with Article 101 of the Treaty, the workshop focused mainly on the evaluation criteria of effectiveness and relevance. The objective of the workshop was therefore to deepen the discussion on the issues that stakeholders consider to be not functioning well in the current framework and that, in their view, would deserve re-thinking to ensure that the rules remain relevant for the coming years. Considering that the enforcement of EU competition law is driven by the consumer welfare objective, which includes all relevant parameters of competition (e.g. price, output, choice and innovation), the workshop was intended to focus on how consumers are impacted by the identified shortcomings.

In view of the aforementioned objective, participation in the workshop was limited to stakeholders who had contributed to the public consultation, as well as consumer associations. Approximately 150 participants from companies and business associations representing a variety of sectors attended the workshop. Among the participants, there was a high number representing the supply side (e.g. brands and manufacturers). There were also several participants representing the distribution side (e.g. retailers) as well as several legal professionals and one consumer organisation.

The discussions among stakeholders took place in small groups of changing composition. The discussion topics were selected by the participants themselves within the boundaries of the workshop objective. The participants were free to choose in which discussions they wanted to take part. The role of the Commission was to facilitate the discussion.

The workshop included two main activities in which participants could discuss and exchange their views. Sections I and II each summarize one activity and its outcome.

I. GENERAL IDEAS FOR POSSIBLE CHANGES

The first activity aimed at gathering general ideas about areas of the VBER and the Vertical Guidelines that are not functioning well, from a consumer welfare perspective.

Stakeholders pointed to 103 perceived shortcomings in the current framework that, in their view, would need re-thinking. Annex II provides the full list of ideas submitted by stakeholders, which can be broadly grouped into the following areas (listed in alphabetical order):

- Agency concept
- Application of the VBER to services
- Dual-distribution and information exchange
- Franchising
- Intellectual Property and the use of territorial restrictions
- Interplay between the VBER and other sector-specific regulations in the area of competition
- Efficiencies and long-run consumer benefit (other than lower prices)
- Most Favoured Nation clauses
- Non-compete clauses
- Online sales restrictions and dual pricing

- Resale Price Maintenance
- Selective distribution (including the treatment of online platform bans)

II. SPECIFIC TOPICS DISCUSSED

The second activity aimed at an in-depth discussion of a number of specific topics selected by participants within the boundaries of the workshop objective.

In total, 25 roundtable discussions took place during two consecutive rounds of discussion, which covered the following main topics¹⁵⁵ (listed, to the extent possible, in accordance with the structure of the VBER):

i. GENERAL APPROACH OF THE VBER AND THE VERTICAL GUIDELINES

One roundtable discussion focused on the issue of whether the current rules strike the right balance between inter-brand and intra-brand competition when assessing the existence of a restriction of competition pursuant to Article 101(1) of the Treaty. The roundtable participants were of the opinion that the Vertical Guidelines do not provide sufficient clarity on this issue. In particular, the roundtable participants explained that inter-brand competition should be the starting point of the analysis under Article 101(1) of the Treaty, in which market shares should only serve as an indication of the intensity of competition. According to them, product and market specificities should be assessed in more detail in cases where restrictions on intra-brand competition are considered to be harmful to consumers. In their view, this approach would benefit consumers, as it would strengthen legal certainty, leading to more efficiency and innovation in the supply chain to the ultimate benefit of consumers.

In another roundtable discussion, the participants argued that the current framework is not business-model neutral because it seems to favour intra-brand competition over inter-brand competition. According to the roundtable participants, the current framework favours platforms and retailers pursuing a high-volume/low-price strategy over other business models that offer innovative, qualitative choices to consumers (i.e. there is currently a stronger focus on price than on other aspects of consumer welfare, such as innovation or quality). The goal should, however, not be to make a particular brand cheaper, but to foster the creation and growth of a variety of brands. The roundtable participants were of the view that facilitating new business models, rewarding innovation and promoting inter-brand competition and business-model neutrality would benefit consumers without having to predetermine winning business models and consumer preferences. It was therefore argued that, unlike what is currently the case, the existence of hardcore restrictions should not prevent vertical agreements from benefiting from the VBER if there is sufficient inter-brand competition.

¹⁵⁵ Several roundtables touched upon more than one of the main topics mentioned in this summary.

ii. AGENCY CONCEPT

Participants in one roundtable discussed the agency concept as set out in the Vertical Guidelines. The roundtable participants indicated that the agency exception is positive and should be kept, but that there is currently a lack of clarity as regards the underlying requirements and their application to fulfilment agents and online platforms. The roundtable participants pointed in particular to a lack of clarity regarding the notion of "*market specific*" investments, the number of principals that an agent can have and the impact of the transfer of the title or possession of the goods concerned from the principal to the agent. They also pointed to a need to address specific situations in the Vertical Guidelines on the basis of worked examples. The roundtable participants argued that the resulting increased clarity and legal certainty would help businesses to provide the most efficient distribution service for consumers.

iii. DUAL DISTRIBUTION

Three roundtable discussions related to dual distribution (i.e. Article 2(4) of the VBER).

The participants in one roundtable argued that the scope of Article 2(4) of the VBER is too narrow, as it does not encompass wholesaler-retailer relationships. They argued as well that there is a lack of clarity in the Vertical Guidelines regarding the extent to which dual distribution is covered by the VBER.

They also called for a more lenient approach to information exchanges in the context of dual distribution as compared to purely horizontal information exchanges. According to the roundtable participants, there is a distinction between three different situations which is not currently captured in the Vertical Guidelines: (i) information exchanges that cannot be considered a restriction of competition pursuant to Article 101(1) of the Treaty (e.g. exchanges of information on past and forecasted volumes of contracted good purchased by the buyer); (ii) information exchanges that should be covered by the VBER (e.g. the exchange of sales information like actual prices and margins, as well as the timing of promotions); and (iii) information exchanges that cannot be exempted and are thus subject to an effects analysis (e.g. information about the buyer's sales of competing products).

The participants in another roundtable argued that the exchange of information in the supply chain should not be considered a vertical restriction and is covered by the VBER in the case of dual distribution. They pointed out that the information exchanged in a vertical scenario allows for the provision of personalised and innovative products and services.

In another roundtable, participants identified as an issue the fact that under the current framework agreements between independent importers and their distributors are not block exempted in the context of dual distribution (in particular as regards the automotive sector). They argued that exempting these agreements would increase legal certainty and thus lead to more investments.

iv. MARKET SHARE THRESHOLD

One roundtable discussion focused on whether the current market share threshold for the application of the VBER is adequate. The roundtable participants perceived the current 30%-threshold as too low. They were of the view that agreements between parties with market shares of 35% or 40% can also be efficiency-enhancing and could therefore be exempted.

The roundtable participants further discussed how making the European rules on market definition binding on NCAs could address the issue of markets being defined too narrowly and of divergent market definitions by different authorities. They also discussed the benefits of including a provision in the Vertical Guidelines stipulating that the threshold can be modified in light of the competitive landscape of the market in question.

v. PRICE RELATED RESTRICTIONS

Six roundtables covered price related restrictions with a particular focus on the treatment of resale price maintenance ("RPM") in the existing legal framework.

In several roundtable discussions, the participants stated that the RPM prohibition is adequate and should be maintained, since it allows effective price competition among retailers who have a better understanding than suppliers of the competitive dynamics and the price levels at retail level. They also pointed out that, in most cases, RPM prevents dealers from sharing efficiencies with consumers and that there are less restrictive alternatives to ensure the provision of specific services by distributors such as targeted financial incentives. At the same time, the roundtable participants acknowledged that RPM can be beneficial for consumers in exceptional cases, e.g. by facilitating the launch of new products or making it easier to agree on promotions. These limited exceptions, which are already reflected in the Vertical Guidelines, were however considered insufficiently clear, which makes them not workable in practice and could lead to potential misuse (e.g. with regard to what can be considered a "new" product). The participants in one roundtable discussion also indicated that there is a perception that authorities are not sufficiently open to discuss such exceptional situations with individual stakeholders and possibly issue guidance letters. The participants in another roundtable further indicated that the current framework does not sufficiently support joint (online) pricing actions by groups of small and medium distributors, which could allow them to compete effectively against big online platforms.

In other roundtable discussions, the participants discussed the perceived rigidity of the current approach to RPM. The participants in one roundtable argued that vertical agreements with RPM clauses entered into by parties with a negligible market share do not have any negative effect on competition and could therefore benefit from a *de minimis* exemption. The participants in another roundtable expressed concerns about aggressive price competition by low-cost online distributors who are perceived as free-riding on the investments made by quality and service-oriented brand manufacturers. The roundtable participants argued that this is leading to a long-term decrease of products and in-store service quality. They therefore saw a need for extending the circumstances under which RPM is permitted (i) to products requiring a high level of investments in services,

quality and safety, and (ii) to markets with strong inter-brand competition. The roundtable participants were of the view that a fixed fee, as foreseen by the current rules, does not allow to take into account the efficiency of each store and is impossible to operate in practice for suppliers relying on a large number of stores for the distribution of their products. They explained that marketing promotions can only target sales of specific products and therefore do not allow addressing long-term fixed investments. They also pointed out that rebates in exchange for investments in good consumer experience do not help to protect against opportunistic price drops caused by free-riders. They further highlighted that the possibility to resort to RPM to support the launch of new products does not allow to address long-term investments and free-riding issues in the long run.

Concerns regarding aggressive price competition were also the subject of discussion in another roundtable in which participants pointed out that low prices do not ensure that consumers receive a fitting product or appropriate service, and that customer care experience, product availability and staff (at fair working conditions) are cost and labour intensive. The roundtable participants argued that the Commission's current approach to vertical agreements does therefore not ensure a sustainable and adaptable supply chain in the long term.

One roundtable discussion focused on the lack of clarity of retail price recommendations. The roundtable participants argued that the VBER and the Vertical Guidelines do not provide sufficient clarity on when such price recommendations can be considered compliant with Article 101 of the Treaty. They pointed in particular to (i) insufficient guidance on when price recommendations amount to unilateral non-binding recommended retail prices, (ii) a lack of clarity on the assessment of the interaction between the supplier and the buyer in this regard (see, e.g. the guidance issued by the German and Austrian competition authorities), and (iii) a lack of focus on the level from which the enforcement of recommended retail prices emanates (e.g. whether it is based on pressure from downstream distributors). The roundtable participants argued that recommended resale prices may result in efficiencies that can be passed on to consumers (e.g. product launches and promotions).

Another roundtable discussion centred around maximum prices. The roundtable participants argued that genuine maximum prices benefit consumers since they reduce the overall price level and allow for lower prices in the distribution chain. They indicated that the current rules lack guidance on (i) circumstances in which maximum prices are considered to constitute fixed prices and (ii) situations in which the distributor merely executes an agreement between the supplier and the customer.

vi. ONLINE RELATED ISSUES

Four roundtable discussions covered different issues in relation to the treatment of online sales in the current rules such as (i) restrictions on the use of third-party online

platforms,¹⁵⁶ price comparison tools and search engines; (ii) dual pricing and (iii) more generally, how to protect investments against free-riding by online distributors.

The participants in two roundtable discussions expressed concerns about the fact that the current rules do not provide sufficient guidance on the assessment of online sales restrictions. The participants of one roundtable indicated that there is a lack of clarity on whether restrictions on the use of search engines and price comparison tools are considered hardcore restrictions pursuant to the VBER and a lack of clear criteria for determining when such restrictions can be justified. The participants in another roundtable argued that the VBER lacks a dedicated chapter on online sales issues, which would have to take into account the present "omni-channel world". The roundtable participants also pointed to the current lack of guidance on the *Coty* ruling, notably with regard to its scope and the product categories covered.

The participants in two roundtables discussed the current approach to dual pricing, arguing that the existing prohibition of dual pricing with regard to hybrid distributors does not reflect current business needs. The participants in one roundtable argued that the current approach in paragraph 52 d) of the Vertical Guidelines does not adequately support value-added services in a fair manner, which reflects investments. In their view, an amendment to this approach is needed to ensure fairness, flexibility and differentiation across all sales channels.

The participants in one roundtable argued that there is currently insufficient clarity about how to protect investments against free-riding by online distributors. They pointed in particular to a lack of clarity with regard to the notion of investments (i.e. long-term investments/sunk investments vs operational costs) and argued that clarifying this concept could help to ensure the protection of non-price competition (e.g. quality, service and innovation), which would benefit consumers by providing them with more choice.

vii. SELECTIVE DISTRIBUTION / EXCLUSIVE DISTRIBUTION

Eight roundtable discussions covered a variety of topics regarding selective and exclusive distribution.

The participants in one roundtable focused on the issue that the current rules do not limit selective distribution to luxury and high-tech products. The roundtable participants discussed (i) the absence of the *Metro* criteria in the VBER, (ii) the lack of access by distributors to qualitative selection criteria and (iii) whether selective distribution should allow for the protection of a supplier's brand image or particular products depending on their nature and characteristics. The roundtable participants noted strong divergence with regard to the appropriate approach to these issues.

The participants in another roundtable discussed whether the current approach to the principle of equivalence within selective distribution systems leads to a level playing field. They expressed the view that qualitative and quantitative selection criteria in the

¹⁵⁶ Third-party platform bans were also discussed in the context of selective distribution (see section VII).

context of selective distribution systems should be applicable to all distribution channels, including marketplaces, in line with the principle of equivalence. General marketplace bans within selective distribution systems would therefore be prohibited.

The participants in a third roundtable discussion argued that there was a lack of clarity about the degree of flexibility within selective distribution systems, in particular as regards the possibility for differentiated partnerships and the exchange of data to provide better services to consumers. The roundtable participants argued that differentiation within selective distribution systems should not be considered as contradicting the non-discrimination principle and that information exchange in scenarios of dual distribution is already covered by the VBER.¹⁵⁷ They explained that this clarification would provide market players with the opportunity to experiment towards a better consumer experience and contribute to product development by allowing for an enhanced customisation of products and services.

Two roundtable discussions focused on the need to ensure the enforceability of selective distribution against sales by unauthorised resellers within the EU. The participants in one roundtable argued that there is a lack of clarity in the Vertical Guidelines on whether free-riding on the efforts and investments of authorised retailers in selective distribution networks constitutes unfair competition. They considered that such a clarification would benefit consumers because, in their view, this would contribute to ensuring product quality and safety, as well as a high level of pre- and aftersales services, and by supporting long-term investments in innovation. They argued that direct action against non-authorised resellers in all EU Member States could equally benefit consumers.

The participants in another roundtable discussion argued that there is a lack of specific tools to enforce selective distribution rules against unauthorised resellers or any other players offering directly or indirectly for sale products that are subject to selective distribution. They argued that creating consistency with the level of protection granted in this regard at national level (e.g. Article 442.2 of the French Commercial Code) would benefit consumers in terms of product safety, integrity, authenticity, liability and aftersales services. They also argued that the resale outside a selective distribution system could be a legitimate reason to consider the absence of exhaustion of intellectual property rights.

Two roundtable discussions covered the interplay between exclusive and selective distribution in the current framework. One roundtable discussion identified as an issue the prohibition of combining exclusive distribution at wholesale level with selective distribution at retail level within the same territory. The roundtable participants argued that allowing this combination would prevent free-riding (as already specified in paragraph 63 of the Vertical Guidelines) and encourage investments resulting in better service quality at retail level. They indicated that there is a need to clarify paragraphs 57 and 63 of the Vertical Guidelines. The participants in another roundtable discussion pointed to the need for a clarification in the Vertical Guidelines with regard to Article

¹⁵⁷ The roundtable participants' arguments with regard to dual distribution are reflected in section III.

4(b)(iii) of the VBER and notably the concept of "territory" to allow big distributors to set up selective distribution systems in some countries, while resorting to exclusive distribution in others, or to allow small distributors to focus on some countries only. They argued that this would allow for the provision of personalised services in accordance with national habits or expectations, ensure quality, safety and innovation, and maintain brand culture, while preventing counterfeiting.

The participants in another roundtable discussion¹⁵⁸ pointed to the current lack of flexibility of the rules that do not allow extending the benefit of the VBER to situations of shared exclusivity with two exclusive distributors. They argued that this would be useful for the agricultural sector (e.g. with regard to agro equipment) and benefit consumers through more investments spurred by increased legal certainty.

viii. FRANCHISING

The participants of one roundtable focused on franchising related issues, including the transfer of know-how. They argued that in view of the absence of a definition of franchising and know-how in the VBER, it is not clear that both concepts are directly associated, with know-how being a crucial characteristic of this distribution model, and that franchising can be confused with other business models. They also called for clearer examples in the Vertical Guidelines of how vertical restrictions may affect both franchisors and franchisees. The roundtable participants argued this would be beneficial for consumers since franchising supports the creation of small and medium enterprises (e.g. by creating value, employment, entrepreneurship and a close seller-consumer relationship) and contributes to town centre dynamics and modernising commerce & services by professionalising the whole commercial chain, including the digital economy without losing the local link with consumers.

ix. NON-COMPETE OBLIGATIONS

The participants of one roundtable discussed why the 5-year limit for non-compete obligations pursuant to Article 5 of the VBER is the "*magic number*". They agreed that the current temporal scope of the safe harbour is working well. However, they considered that paragraph 133 of the Vertical Guidelines lacks clarity as regards the fact that there is no presumption of illegality of non-compete obligations exceeding 5 years and that paragraph 146 of the Vertical Guidelines is too narrow. The roundtable participants nevertheless argued that a 10-year time limit in Article 5 could also be considered efficiency-enhancing. The roundtable participants argued that non-compete obligations with a longer duration would benefit consumers by incentivising long-term investments and allowing for lower sales prices thanks to the ability of suppliers to spread their investments over a longer time period.

¹⁵⁸ The roundtable participants' arguments with regard to dual distribution are reflected in section III.

x. ACCESS TO DATA

The participants of one roundtable discussed whether the current rules enable fair and non-discriminatory third-party access to machine generated/IoT data, which they perceive as necessary to ensure innovative and independent aftermarkets (e.g. repair and maintenance services). The roundtable participants indicated that the current rules lack a generic access provision for such data to enable end-users to maintain their own products or choose their preferred service provider. They argued that this would allow consumers to retain genuine alternative choice (thus preventing lock-in) and control over their data, enhance innovation-based competition (including by small and medium enterprises) and enable market entry. The roundtable participants further discussed possible overlaps with Article 102 of the Treaty, pointing to practical limitations to enforcing the provision effectively under the current legal framework, and possible data access legislation.

2.5. OTHER CONSULTATION ACTIVITIES

In addition to the above-mentioned consultations and the stakeholder workshop, the Commission received a number of spontaneous submissions from stakeholders throughout the evaluation. Some of these contributions were submitted by stakeholders that had participated in the public consultation and were therefore intended to supplement their views with additional evidence. Other submissions were received from EU government bodies and business associations that had not participated in the public consultation. These submissions largely echoed the issues already raised in the different consultation activities. All such submissions were published on the dedicated VBER review webpage on DG Competition's website,¹⁵⁹ except for a few submissions which stakeholders had asked the Commission not to publish for confidentiality reasons. The Commission used the latter to enhance its understanding of a particular stakeholder position but did not rely on the information contained therein for any of the conclusions in the Staff Working Document.

Throughout the evaluation, the Commission also met bilaterally with stakeholders that requested this, primarily in the context of the public consultation. These meetings aimed primarily at discussing the submissions made by stakeholders, either in the context of the public consultation or outside of it, or the process of the evaluation.

¹⁵⁹ See section 2 titled "*Contributions outside the public consultation*" at https://ec.europa.eu/competition/consultations/2018_vber/index_en.html.

Annex 3: Methods and analytical models

Evaluation criteria and questions	Indicator	Sources
Effectiveness		
1. What is the level of legal certainty that the VBER, together with the Vertical Guidelines, provides for assessing whether vertical agreements and/or specific clauses/restrictions are exempted from the application of Article 101 of the Treaty and thus compliant with this provision?	1. Difference in legal assessment of decisions by NCAs and judgments by competent national courts pertaining to the same categories of vertical restraints. 2. Stakeholder responses assessing familiarity and confidence in the application of VBER and Guidelines.	1. Questionnaire, section on effectiveness. 2. Spontaneous stakeholder submissions. 3. Stakeholders' workshop. 4. External study: survey and econometric techniques for Task 1, 2, 3, 4, 5, 6 and 7, and task 8 and consumer survey.
2. To what extent do the conditions currently defined in the VBER, as interpreted in the Vertical Guidelines, meet the objective of exempting 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?	3. Impact on consumer welfare, efficiency gains, impact on intensity of competition. 4. Impact on competition and consumer welfare (estimated using econometric methods and variables for sales price and sales volume).	5. Targeted consultation of NCAs. 6. E-commerce sector inquiry. 7. Enforcement practice of the Commission and NCAs.
3. To what extent does the VBER, together with the Vertical Guidelines, provide a common framework for the assessment of the compliance of vertical agreements with Article 101 of the Treaty in order to ensure a consistent application of Article 101 of the Treaty by national competition authorities and national courts to vertical agreements?	5. Effects of cumulative application of vertical restriction in oligopolistic markets. 6. Potential drawbacks of application of the threshold in oligopolistic markets.	
Efficiency		
4. Are the costs for assessing whether the VBER, together with the Vertical Guidelines, is applicable to certain vertical agreements proportionate to the benefits that the VBER, together with the Vertical Guidelines, brings for stakeholders?	1. Costs of self-assessment of vertical agreement; benefits of the VBER and Vertical Guidelines.	1. Questionnaire, section on efficiency. 2. External study: survey and case studies for Task 2, 3, 4, 5 and 9.
5. Is there scope for further simplification and cost reduction?	2. Difference of costs of compliance under VBER versus projected costs of compliance under Art 101 only.	3. Targeted consultation of NCAs.
6. Would the costs of ensuring compliance of vertical agreements with Article 101 of the Treaty increase if the VBER were not renewed?	3. Difference of costs of compliance under VBER versus costs of compliance under Commission Regulation (EC) No 2790/1999.	
7. Have the costs generated by the application of the VBER, together with the Vertical Guidelines, increased as compared to the 1999 VBER and the 2000 Vertical Guidelines?		
Relevance		
8. How well do the objectives of the VBER, together with the Vertical Guidelines (i.e. to provide legal certainty for assessing whether vertical agreements comply with Article 101 of the Treaty, to properly capture under the block exemption those vertical agreements that can be considered with sufficient certainty as efficiency-enhancing and to provide a common framework to ensure a consistent application by national competition authorities and national courts of the vertical rules across the EU) still correspond to the needs?	1. Indicated changes of distribution models in stakeholder responses. 2. Consumers' omni-channel purchase behaviour. 3. Extent of free-riding between off-line and on-line distribution. 4. Need for off-line distribution.	1. Questionnaire, section on relevance. 2. Stakeholders' workshop. 3. Spontaneous stakeholder submissions. 4. External study: survey and case studies for Task 2, 3, 4, 5 and 9, and task 8 and consumer survey. 5. Targeted consultation of NCAs. 6. E-commerce sector inquiry. 7. Enforcement practice of the Commission and NCAs.
Coherence		
9. Is the VBER, together with the Vertical Guidelines, coherent with other Commission instruments that provide guidance on the interpretation of Article 101 of the Treaty and with other EU legislation with relevance for vertical supply and distribution agreements?	1. Identification of relevant legislation and assessment of level of coherence of VBER and Guidelines with it.	1. Questionnaire, section on coherence. 2. Targeted consultation of NCAs. 3. Spontaneous stakeholder submissions.
EU added value		
10. Does the VBER, together with the Vertical Guidelines, as an intervention at EU level, add value in the assessment of the compatibility of vertical agreements with Article 101 of the Treaty?	1. Benefits for stakeholders of the presence of VBER and Guidelines compared to absence of them.	1. Questionnaire, section on EU added value. 2. Targeted consultation of NCAs. 3. Spontaneous stakeholder submissions.

Annex 4:

Overview of issues identified during the evaluation process

4.1. VERTICAL AGREEMENTS GENERALLY FALLING OUTSIDE THE SCOPE OF ARTICLE 101(1) OF THE TREATY

The exemption of vertical agreements from the prohibition contained in Article 101(1) of the Treaty, as enshrined in the VBER, only applies to vertical agreements that fall within the scope of application of Article 101(1) of the Treaty. Section II of the Vertical Guidelines (paragraphs 8-22) provides further explanations on three categories of agreements that generally fall outside the scope of application of Article 101(1) of the Treaty and to which, therefore, the VBER does not apply. This includes (i) agreements of minor importance and agreements between SMEs (see section 4.1.1 below), (ii) subcontracting agreements (see section 4.1.2 below), and (iii) agency agreements (see section 4.1.3 below).

The evidence gathered during the evaluation indicates that stakeholders consider these provisions to have generally worked well. However, some stakeholders pointed to parts of the Vertical Guidelines that they perceive as not sufficiently clear or not up to date. Some stakeholders also indicated that some provisions, especially those on agency agreements, are not well adapted to the specificities of certain areas or sectors.

4.1.1. Agreements of minor importance and agreements between SMEs

Paragraphs 8-11 of the Vertical Guidelines clarify that Article 101(1) of the Treaty does not cover agreements that are not capable of appreciably restricting competition. This includes vertical agreements that do not contain any hardcore restrictions and meet the conditions of the *De Minimis* Notice (so-called "agreements of minor importance"). Also vertical agreements between small and medium-sized companies as defined in the Annex to Commission Recommendation 2003/361/EC¹⁶⁰ are considered as being rarely capable of appreciably affecting trade between Member States or appreciably restricting competition and therefore generally fall outside the scope of Article 101(1) of the Treaty.

The evidence gathered during the evaluation indicates that stakeholders consider these provisions to have generally worked well. A large majority of the respondents to the

¹⁶⁰ OJ L 124, 20.5.2003, page 36.

public consultation¹⁶¹ (across all sectors and types of stakeholders¹⁶²) indicated that the **relevant paragraphs in the Vertical Guidelines provide an appropriate level of legal certainty**. In addition, very few respondents indicated that these paragraphs would need revision in light of new market developments. Similarly, most NCAs found the current rules to work well and had no specific comments in this regard.

More specifically, respondents to the public consultation, notably from the drinks distribution sector, indicated that the exceptions for agreements of minor importance and agreements between SMEs are useful since they give better protection to small breweries and distributors.

Nevertheless, the evaluation identified the following **main issues with regard to the functioning of the current rules in this area**:

First, some respondents to the public consultation (in particular legal professionals and the franchising sector) indicated that the definitions in the Vertical Guidelines are not aligned with those in the *De Minimis* Notice adopted in 2014. They further indicated that the findings of the Commission Staff Working Document "*Guidance on restrictions of competition 'by object' for the purpose of defining which agreements may benefit from the De Minimis Notice*" should be included in the Vertical Guidelines. The same applies to the "*appreciability exception*" of the Effect on Trade Guidelines¹⁶³ to which a reference should be included in the Vertical Guidelines.¹⁶⁴

¹⁶¹ Throughout this annex, references to the views of the respondents to the public consultation should be understood as including only those respondents who expressed a view on the issue concerned, thus excluding those who did not reply or who indicated that the issue was not applicable to them.

¹⁶² Throughout this annex, where no qualification is made regarding the views of the respondents to the public consultation, this should be understood as meaning that the reported view is broadly shared by all stakeholder groups that participated in the public consultation and generally across all sectors. Where a particular view was shared primarily by one or more different stakeholder groups among those that participated in the public consultation (e.g. distributors, suppliers or stakeholders belonging to a particular sector) this is reported. While indicative of a trend, the fact that a view was broadly shared by all or only some of the stakeholder groups does not however mean that the Commission disregards diverging views, both within the same stakeholder group/sector or across different stakeholder groups/sectors. This annex reports extensively on the main issues raised in the evaluation, regardless of whether these views were shared by a majority or minority of stakeholders.

¹⁶³ Commission Notice - Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ C 101, 27.4.2004, p. 81 ("Effect on Trade Guidelines").

¹⁶⁴ The Effect on Trade Guidelines set out the principles developed by the Union Courts in relation to the interpretation of the effect on trade concept and indicate when agreements are unlikely to be capable of appreciably affecting trade between Member States. Paragraph 50 of the Effect on Trade Guidelines contains a negative rebuttable presumption that applies to all agreements within the meaning of Article 101(1) of the Treaty irrespective of the nature of the restrictions contained in the agreement, thus

Second, respondents to the public consultation indicated that paragraph 10 of the Vertical Guidelines should be updated to reflect the judgment of the CJEU in the *Expedia* case.¹⁶⁵ In this context, respondents noted that it is not clear from the Vertical Guidelines whether all hardcore restrictions have to be considered as restrictions by object and are therefore excluded from the benefit of the *De Minimis* Notice.¹⁶⁶ This issue is developed further in section 4.4 below. Respondents also indicated that it is not clear if the exception for agreements between SMEs covers restrictions by object.

4.1.2. Subcontracting agreements

Paragraph 22 of the Vertical Guidelines explains that subcontracting agreements are agreements whereby a subcontractor undertakes to produce certain products (exclusively) for the contractor based on technology or equipment provided by the contractor. These agreements are covered by the Subcontracting Notice,¹⁶⁷ which sets out that these agreements generally fall outside Article 101(1) of the Treaty if certain conditions are met. Other restrictions imposed on the subcontractor may, however, be caught by Article 101(1) of the Treaty.

The evidence gathered during the evaluation indicates that a large majority of the respondents to the public consultation (across all sectors and types of stakeholders) consider that the **relevant paragraph in the Vertical Guidelines provides an appropriate level of legal certainty**. In addition, very few respondents indicated that this paragraph would need revision in light of new market developments. Similarly, most NCAs found the current rules to work well and had no specific comments in this regard.

More specifically, some stakeholders explicitly stated that the exception from Article 101(1) of the Treaty for subcontracting agreements is relevant and provides legal

including agreements with hardcore restrictions ("appreciably exception"). According to this presumption, as set out in paragraph 52 of the Effect on Trade Guidelines, vertical agreements are in principle not capable of appreciably affecting trade between Member States when (i) the aggregate market share of the parties on any relevant market within the Union affected by the agreement does not exceed 5%, and (ii) the aggregate annual Union turnover of the supplier in the products covered by the agreement does not exceed 40 million euro.

¹⁶⁵ Judgment of 13 December 2012 in Case C-226/11, ECLI:EU:C:2012:795, *Expedia*.

¹⁶⁶ Respondents noted as well that it is not clear from the Vertical Guidelines whether all excluded restrictions should be considered restrictions by effect.

¹⁶⁷ Commission notice of 18 December 1978 concerning its assessment of certain subcontracting agreements in relation to Article 85 (1) of the EEC Treaty ("Subcontracting Notice"), OJ C 1, 3.1.1979, p. 2.

certainty. However, a few stakeholders also indicated that the **relevant paragraph of the Vertical Guidelines and its interplay with the Subcontracting Notice is not sufficiently clear.**

In particular, respondents understand the Vertical Guidelines to define subcontracting agreements more narrowly than the Subcontracting Notice, as the Vertical Guidelines only refer to the contractor providing "*technology or equipment*" to the subcontractor, whereas the Subcontracting Notice also mentions the use of industrial property rights. Some respondents on the distribution side, as well as legal professionals, indicated that paragraph 22 of the Vertical Guidelines could be clarified by including a reference to industrial property rights. This would also make clear that the exception for subcontracting agreements also includes retailer brands or co-branding,¹⁶⁸ even if the retailer does not provide technology or equipment to the manufacturer, but only the necessary know-how or a trademark. Adding trademarks to the definition would arguably imply an extension of the scope of the exception since trademarks (unlike know-how) are currently not mentioned in the Subcontracting Notice.

Moreover, respondents from the banking sector pointed out that the Subcontracting Notice should not be restricted to goods, but also include services. Other respondents noted that the Commission should consider reviewing and incorporating the Subcontracting Notice into the Vertical Guidelines since subcontracting is a vertical relationship.

4.1.3. Agency agreements

Paragraphs 12-21 of the Vertical Guidelines provide guidance on the factors that define agency agreements. They explain that all obligations imposed on the agent in relation to the contracts concluded under an agency agreement fall outside Article 101(1) of the Treaty since the selling or purchasing function of the agent forms part of the principal's activities and the principal bears the commercial and financial risks related to the selling and purchasing of the contract goods or services. Provisions which concern the relationship between the agent and the principal may, however, infringe Article 101(1) of the Treaty.

The evidence gathered during the evaluation indicates that stakeholders generally agree with the fact that all obligations imposed on the agent in relation to the contracts concluded and/or negotiated on behalf of the principal fall outside Article 101(1) of the

¹⁶⁸ Co-branding refers to situations where the manufacturer produces a product according to the specifications of the retailer, which is then sold under the brand of the retailer.

Treaty. Some stakeholders explicitly indicated that this exception is adequate and should remain part of the rules.

The majority of the respondents to the public consultation indicated that the **relevant paragraphs in the Vertical Guidelines provide an appropriate level of legal certainty**. Nevertheless, a significant number of respondents (primarily legal professionals and some business associations representing both suppliers and distributors) considered these paragraphs to **provide a lower level of legal certainty** but only a few respondents stated that **these paragraphs should be revised**, in particular due to the lack of clarity concerning the agent definition and the scope of the exception. These views were supported by NCAs, which indicated that the relevant provisions, while generally adequate, do not capture well the distinction between independent traders and agents acting on behalf of a supplier, in particular as regards online platforms.

The evaluation identified the following **main issues with regard to the functioning of the current rules in this area**:

First, as regards the definition of agent, the evaluation pointed to a lack of clarity concerning the level and type of risks that are relevant to determine whether a vertical agreement can be considered a genuine agency agreement. This concerns in particular how to interpret the notion of "*insignificant risks*" set out in paragraph 15 of the Vertical Guidelines. Respondents to the public consultation also indicated that it is not clear how to assess this in cases where the economic risks to be assumed by the agent are economically transferred back to the principal through a risk coverage payment. They further pointed to a lack of clarity regarding the definition of certain types of risks mentioned in the Vertical Guidelines such as "*investments in sales promotions*". Participants in the stakeholder workshop also mentioned that there is a lack of clarity regarding the notion of market specific investments and the number of principals that an agent can have without losing the benefit of the exception. Stakeholders further indicated that it is unclear whether a genuine agency agreement precludes the agent from acting at the same time as an independent distributor for the same or another supplier in the same product market (so-called "dual role").

Second, the evaluation pointed to issues regarding the application of the agency exception to online platforms. In this regard, respondents to the public consultation indicated that the criteria for defining an agent are difficult to apply to online platforms (e.g. as regards the definition of what would constitute market specific investments) and that this difficulty has resulted in divergent approaches among NCAs and national courts. These views were confirmed by participants in the stakeholder workshop. Respondents argued further that the application of the agency exception is especially unclear for intermediary platforms, such as comparison websites, which primarily aim to increase

transparency and decrease search costs for consumers, but do not necessarily engage in the resale of the product or service concerned, since their role in the distribution chain is different from that of traditional agents.

Also NCAs stressed the need for more guidance on the relevant factors to be taken into account in the assessment of agency agreements. There are, however, diverging views among them as to whether online platforms can qualify as genuine agents. Some NCAs consider that certain characteristics of online platforms indicate that they cannot form an integral part of the principal's distribution system and should therefore not be treated as genuine agents. This is notably because platforms usually bear the entire risk of investing in their infrastructure, deal with many different - often smaller - principals and can have a strong bargaining position. Other NCAs take the view that, depending on the circumstances, online platforms could qualify as an agent. According to these NCAs, the assessment should be carried out on a case-by-case basis, which could take into account the following elements: (i) the risks borne by the online platforms, (ii) the fact that online platforms that act as an agent are often the undertaking with the strongest market position and (iii) whether online platforms invest heavily in data-gathering and processing capabilities and keep data of third-party customers exclusively for themselves.

Third, stakeholders raised questions about the possibility of applying the agency exception to tripartite relationships between suppliers, intermediaries and final customers. Respondents to the public consultation as well as participants in the stakeholder workshop identified a number of situations involving intermediaries who adhere to the commercial conditions agreed beforehand between their supplier and a particular customer and focus solely on executing that agreement, e.g. by taking over logistical functions (so-called "fulfilment contracts"). Given that, in these situations, the intermediary does not have any influence on the commercial conditions of the agreement concerned (notably the price), stakeholders take the view that the intermediary is not acting as an independent distributor. At the same time, the intermediary may not fulfil the requirements of the agency exception either, e.g. because it acquires the ownership of the contract goods intended for resale or it assumes more than insignificant risks in relation to the execution of the agreement. Stakeholders argue that this limitation of the agency definition does not adequately reflect the economic reality of these intermediaries and that the assessment of the economic risk distribution should therefore not be dependent on whether there has been a transitory transfer of ownership to the agent.

In the same vein, stakeholders argue that the execution of the agreement by the intermediary according to the conditions agreed on between the supplier and a particular customer should not be considered a restriction of competition within the meaning of Article 101(1) of the Treaty since these conditions are no longer subject to competition once the agreement has been concluded. In the stakeholders' view, such agreements

should therefore be excluded from the scope of Article 101(1) of the Treaty. This would allow suppliers and their customers to negotiate prices and commercial conditions without risking that this could be considered as resale price maintenance imposed by the supplier on the intermediary. This argument is therefore addressed in more detail in section 4.6.1 below on resale price maintenance.

Fourth, other issues raised by stakeholders include the following:

Paragraphs 18 and 19 of the Vertical Guidelines explain that only the obligations imposed on the agent in relation to the contracts concluded and/or negotiated on behalf of the principal fall outside Article 101(1) of the Treaty, whereas the contractual provisions regarding the relationship between the principal and the agent (which is a separate undertaking from the principal) may infringe Article 101(1) of the Treaty. This includes non-compete clauses, which may benefit from the safe harbour created by the VBER, in particular where the conditions of Article 5 of the VBER are met (e.g. the duration of the non-compete clause does not exceed 5 years). In this regard, some respondents to the public consultation argue that the 5-year limitation for non-compete clauses may not be justified in all cases and should rather reflect the duration of the agency agreement.

Some respondents argued that it should be clarified in the VBER itself, in addition to what is stated in paragraph 18 of the Vertical Guidelines, that the principal can impose on the agent other requirements than those listed in that paragraph (i.e. territorial, customer and price limitations) in the interest of a uniform business strategy (e.g. online sales restrictions).

4.2. SCOPE OF THE EXEMPTION (ARTICLES 1 AND 2 OF THE VBER)

Article 1 of the VBER defines a number of relevant terms used in the VBER (see section 4.2.1 below).

Article 2(1) of the VBER sets out the effects of the exemption. It provides that Article 101(1) of the Treaty shall not apply to vertical agreements falling under the VBER to the extent that they contain vertical restrictions.

The remaining provisions of Article 2 of the VBER determine the scope of the exemption:

According to Article 2(5) of the VBER, the VBER does not apply to vertical agreements the subject matter of which falls within the scope of another block exemption regulation. According to paragraph 46 of the Vertical Guidelines, this refers notably to vertical agreements covered by the block exemption regulation for technology transfer (TTBER) and the block exemption regulation for the motor vehicle sector (MVBBER), as well as

vertical agreements concluded in connection with horizontal agreements falling under one of the two horizontal block exemption regulations (HBERs).

Articles 2(2), 2(3) and 2(4) of the VBER set out under which conditions the exemption applies to specific types of vertical agreements, namely (i) vertical agreements between associations and their members (see section 4.2.2 below), (ii) vertical agreements containing provisions related to intellectual property rights ("IPRs") (see section 4.2.3 below) and (iii) vertical agreements entered into between competing undertakings ("dual distribution") (see section 4.2.4 below). Paragraphs 27-46 of the Vertical Guidelines provide additional guidance on how to interpret Article 2 of the VBER.

The evidence gathered during the evaluation indicates that Article 2 of the VBER and the corresponding paragraphs of the Vertical Guidelines have generally functioned well. However, some stakeholders pointed to provisions that are not sufficiently clear or not up to date. In particular, stakeholders indicated that Article 2(4) of the VBER does not adequately reflect the increasing importance of direct sales by manufacturers (see section 4.2.4 below).

4.2.1. Definition of vertical agreements

The VBER applies to vertical agreements, which Article 1(1)(a) of the VBER defines as *"agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services."*

Paragraphs 25 and 26 of the Vertical Guidelines specify the four main elements enshrined in this definition. First, the VBER applies to agreements and concerted practices, but not to unilateral conduct by undertakings. However, in the absence of an explicit agreement expressing the concurrence of wills between the parties to the agreement, a unilateral policy of one party can constitute a tacit agreement if it receives the (explicit or tacit) acquiescence of the other party. Second, the VBER covers agreements and concerted practices between two or more undertakings, but not with final customers not operating as an undertaking. Third, the undertakings concerned should operate, for the purposes of the agreement, at a different level of the production or distribution chain (e.g. at manufacturer, wholesale or retail level), while not excluding the possibility of being active at more than one level. Fourth, the VBER covers purchase and distribution agreements concerning the conditions for the purchase, sale or resale of the goods or services supplied and/or the conditions for the sale by the buyer of the goods or services that incorporate these goods or services. This means that vertical agreements relating to all final and intermediate goods and services are covered by the VBER.

The evaluation has shown that stakeholders consider **the definition of vertical agreements provided in Article 1(1)(a) of the VBER and further specified in paragraphs 25 and 26 of the Vertical Guidelines to have worked well**. This view is shared by a large majority of respondents to the public consultation and NCAs, which consider that the current definition provides an appropriate level of legal certainty.

Nevertheless, a minority of stakeholders expressed the view that **some aspects of the current definition of vertical agreements are not sufficiently clear, while others are not well suited to capture the relationship between new online intermediaries and their users**. A clarification of the rules with regard to the aspects set out below would, according to those stakeholders, help improving the effectiveness and relevance of the current definition.

Regarding the clarity of the definition, some respondents to the public consultation consider that it should spell out more clearly whether information exchanges between parties to a vertical agreement fall within the meaning of Article 1(1)(a) of the VBER and are therefore block-exempted under the VBER. Moreover, some respondents asked for further guidance to determine whether sales to final business customers are covered by the definition of vertical agreements. Finally, some respondents noted that, while the Vertical Guidelines clearly indicate that coercion exerted on retailers by a supplier to follow its unilateral policy would point to a tacit vertical agreement, the guidance is silent on coercion exerted by retailers on suppliers.

Respondents to the public consultation also call for an adaption of the definition to reflect new market developments. Both respondents to the public consultation and NCAs noted that the emergence of new intermediaries such as online marketplaces and price comparison tools has blurred the lines of what constitutes a vertical agreement. They consider that the Vertical Guidelines do not provide sufficient guidance to determine the (horizontal or vertical) nature of the relationship of these intermediaries with their different user groups. Moreover, some respondents to the public consultation also noted that the current definition enshrined in the VBER only refers to vertical agreements relating to the conditions under which the parties may *"purchase, sell and resell"*. However, agreements concluded with online intermediaries do not always fit into one of these categories. They therefore consider that including a reference to vertical agreements *"making the supplier's products available to third parties"* would improve legal certainty. In the same way, the current reference to the buyer as the company that *"sells goods or services on behalf of another undertaking"* (i.e. the supplier) in Article 1(1)(h) of the VBER could be expanded by adding that the buyer is *"making available to third parties"* the supplier's products.

4.2.2. Agreements between associations and their members

Article 2(2) of the VBER includes in its application vertical agreements entered into between an association of undertakings and its members, or between an association and its suppliers, subject to two conditions. First, all members of the association are retailers of goods (i.e. services are excluded). Second, each individual member of the association has a turnover not exceeding EUR 50 million. Paragraph 29 of the Vertical Guidelines however provides in addition that where these conditions are not met and the vertical agreements are to be assessed individually under Article 101 of the Treaty, they generally do not pose competition problems if only a limited number of the members of the association have a turnover exceeding the EUR 50 million threshold and these members together represent less than 15% of the collective turnover of all the members combined. Article 8 of the VBER explains the rules to be followed for the calculation of the turnover threshold set out in Article 2(2) of the VBER and for the applicability of the exemption in case this turnover threshold would start to be exceeded.

An association of undertakings may involve both horizontal and vertical agreements. Paragraph 30 of the Vertical Guidelines clarifies in this regard that the horizontal agreements underlying the cooperation between the undertakings involved have to be assessed according to the principles set out in the Horizontal Guidelines. Only if the assessment of these horizontal agreements confirms their compatibility with Article 101 of the Treaty, does it become relevant to assess the vertical agreements concluded between the association and its suppliers or individual members under the VBER and the Vertical Guidelines.

The evaluation has shown that stakeholders consider these provisions to have worked well. A majority of the respondents to the public consultation indicated that **Article 2(2) of the VBER and the corresponding paragraphs of the Vertical Guidelines provide an appropriate level of legal certainty**. One respondent indicated that the conditions of Article 2(2) of the VBER would however lead to the exemption of vertical agreements that do not fulfil the conditions of Article 101(3) of the Treaty. In addition, very few respondents indicated that this area would need revision in light of market developments. Most NCAs also found these provisions to have worked well.

Nevertheless, the evaluation pointed to **some issues with regard to the functioning of these provisions**.

First, stakeholders questioned the appropriateness of the thresholds set out in Article 2(2) of the VBER and paragraph 29 of the Vertical Guidelines. Respondents to the public consultation raised the need to adapt these thresholds to reflect the market developments, growth and inflation that took place over the last 10 years. In their view, even relatively small retailers nowadays easily achieve a turnover of EUR 50 million and also retailers

with sales exceeding the turnover threshold need to join associations of retailers to stay competitive and should therefore benefit from the safe harbour of the VBER. As regards the 15% share, respondents argue that it should refer to the share of each individual undertaking rather than the share represented by the combined turnover of the members of the association. Other respondents indicated that the turnover threshold is inadequate and should be replaced by a market share threshold. NCAs also raised the question whether the turnover threshold is still necessary. NCAs further pointed out that more examples in paragraphs 29 and 30 of the Vertical Guidelines would be helpful to illustrate how to apply Article 2(2) of the VBER in practice.

Second, respondents to the public consultation (particularly from the retail sector) pointed to the pro-competitive effects of associations of independent retailers. They therefore argued that the Vertical Guidelines should spell out more clearly that joint purchasing agreements between independent retailers are generally considered pro-competitive under the conditions set out in the Horizontal Guidelines.

Third, as regards the limitation of the exemption to associations of retailers distributing goods, a few respondents argue that there are no reasons to exclude associations of other undertakings (e.g. service providers) from the benefit of the VBER.

Fourth, NCAs indicated that the Vertical Guidelines do not provide sufficient guidance concerning the fact that the exemption for agreements between associations and their members only applies if also the criteria set out in Articles 3 to 5 of the VBER are met and if there are no horizontal concerns.

4.2.3. Agreements containing provisions on IPR

Article 2(3) of the VBER and paragraph 31 of the Vertical Guidelines set out that the exemption applies to vertical agreements containing provisions relating to the assignment to or the use by the buyer of IPR only if the following five conditions are fulfilled. First, the IPR provisions must be part of a vertical agreement as defined in Article 1(1)(a) of the VBER, which contains conditions on the purchase, sale or resale of certain goods or services, thus excluding the assignment or licensing of IPRs for the manufacture of goods or pure licensing agreements. Second, the IPRs must be assigned to or licensed for use by the buyer, thus excluding the provision of IPRs from the buyer to the supplier (e.g. subcontracting involving the transfer of know-how). Third, the IPR provisions must not constitute the primary object of the agreement, i.e. the IPRs assigned to or licensed for use by the buyer must serve the implementation of the vertical agreement. Fourth, the IPR provisions must be directly related to the use, sale or resale of goods or services by the buyer or its customers, thus facilitating the use, sale or resale of the contract goods or services. Fifth, the IPR provisions in relation to the contract goods or services must not

contain restrictions of competition having the same object as vertical restrictions that are not exempted under Articles 4 and 5 of the VBER. Paragraphs 31-45 of the Vertical Guidelines provide further guidance on these conditions as well as the types of IPRs that may be considered to serve the implementation of vertical agreements.

The evaluation has shown that stakeholders consider these provisions to have worked well. A large majority of the respondents to the public consultation indicated that **Article 2(3) of the VBER and the corresponding paragraphs of the Vertical Guidelines provide an appropriate level of legal certainty**. No respondent considered that the conditions of Article 2(3) of the VBER lead to the exemption of vertical agreements that do not fulfil the conditions of Article 101(3) of the Treaty. In addition, very few respondents indicated that this area would need revision in light of market developments. Similarly, NCAs indicated that these provisions have generally functioned well.

The main issue raised by stakeholders with regard to these provisions relates to the definition of know-how in the context of franchising agreements (paragraphs 43-45 of the Vertical Guidelines). This issue is dealt with in more detail in section 4.6.8 below on franchising.

Other issues raised by stakeholders include, first, the lack of guidance on various types of IPR arrangements that are not covered by the VBER, nor by any other block exemption, such as those listed in paragraph 33 of the Vertical Guidelines.¹⁶⁹ Some respondents to the public consultation argue that the VBER should apply to pure brand license agreements. Other respondents mention that the VBER should cover the licensing of copyright for the purposes of reproduction and the licensing of trademarks, as the Guidance on by object restrictions seems to indicate that these are subject to the rules applicable to vertical restrictions.

Second, respondents also pointed to a lack of guidance on field-of-use restrictions in vertical distribution agreements, similar to the guidance provided by the block exemption regulation for technology transfer and the related Commission guidelines. They argue that in particular guidance on how such restrictions can be distinguished from hardcore customer restrictions would be helpful.

¹⁶⁹ Paragraph 33 of the Vertical Guidelines clarifies that the exemption does not apply to agreements concerning the assignment or licensing of IPRs for the manufacture of goods, nor to pure licensing agreements. This is because the first condition of Article 2(3) of the VBER requires the IPR provisions to be part of an agreement with conditions under which the parties may purchase, sell or resell certain goods or services. Paragraph 33 of the Vertical Guidelines lists some examples of agreements that are therefore not covered by the VBER, such as the pure licence of a trademark or sign for the purposes of merchandising.

4.2.4. Dual distribution

Article 2(4) of the VBER sets out the general rule that the VBER does not cover vertical agreements entered into between competitors as defined in Article 1(1)(c) of the VBER. However, it makes certain exceptions to this general rule for non-reciprocal agreements between competitors. These are agreements where the parties act in different economic roles and do not act on the same level of trade (i.e. agreements where only one party distributes for the other). Such non-reciprocal agreements can benefit from the VBER if the supplier is a manufacturer of goods who also acts as a distributor for these goods or a service provider who operates at several levels of trade, whereas the buyer is only a distributor (i.e. it does not compete with the supplier at manufacturing level) or only operates at the retail level (i.e. it does not compete with the supplier at the level of trade at which it purchases the contract services). These situations are typically referred to as dual distribution. At the time of the adoption of the VBER, taking into account that dual distribution was rather limited in scope back then, the potential impact of the competitive relationship between the parties at retail level was considered to be of lesser importance than the potential impact of the vertical agreement on competition in the supply or distribution of the goods or services concerned.¹⁷⁰ Paragraphs 27 and 28 of the Vertical Guidelines provide additional guidance on the application of Article 2(4) of the VBER.

The evidence gathered during the evaluation indicates that stakeholders **perceive the qualification of dual distribution as a vertical relationship and its exemption from the prohibition of Article 101(1) of the Treaty as adequate**. They therefore argue that it should remain part of the VBER. However, they point out that the rules do not adequately reflect a number of issues that have become more prominent with the increased importance of dual distribution over time, particularly as a result of the increasing digitalisation and the growth of online sales.

A majority of the respondents to the public consultation indicated that **Article 2(4) of the VBER and the corresponding paragraphs of the Vertical Guidelines provide either a slightly low or a very low level of legal certainty**. Nevertheless, a significant number of respondents to the public consultation indicated that there is an **appropriate level of legal certainty**. Only very few respondents¹⁷¹ to the public consultation indicated that the conditions of Article 2(4) of the VBER lead to the exemption of vertical agreements that

¹⁷⁰ See examples provided in Brenning-Louko/Gurin/Peepkorn/Viertö, *Vertical Agreements: New Competition Rules for the Next Decade*, Competition Policy International, Number 2 - 2010, p. 14-19 (see section dealing with vertical agreements between competitors).

¹⁷¹ Most of the respondents who indicated this are active on the distribution side of the supply chain, with the majority representing the motor vehicle sector.

do not fulfil the conditions of Article 101(3) of the Treaty. Similarly, only few respondents¹⁷² indicated that this provision would need to be reviewed. NCAs overall also confirmed that the exemption of dual distribution is adequate, but that the current rules are not sufficiently clear on a number of aspects.

Stakeholders raised the following issues regarding dual distribution:

First, stakeholders raised the issue of information exchanges between the supplier and the buyer in dual distribution scenarios. Respondents to the public consultation¹⁷³ indicated that there is insufficient clarity as to whether information exchanges in dual distribution scenarios are to be treated as part of the vertical relationship and can thus be considered as covered by the VBER. There is also a lack of clarity as to what extent or under which conditions information exchanges in dual distribution scenarios are admissible or instead problematic. In this regard, participants in the stakeholder workshop specified further that the current rules do not adequately distinguish between (i) information exchanges that cannot be considered a restriction of competition pursuant to Article 101(1) of the Treaty, (ii) information exchanges covered by the VBER and (iii) information exchanges that cannot be exempted and are thus subject to an effects analysis.

The predominant view among the respondents to the public consultation, which was also expressed by the participants in the stakeholder workshop, is that exchanges of data in the context of dual distribution (including commercially sensitive data) can have pro-competitive effects, provided that the data is not used to restrict the freedom of the distributor in a manner that would be considered a hardcore restriction under the VBER. According to both the respondents to the public consultation and the workshop participants, collecting data such as pricing data or data on consumer profiles from their distributors may allow suppliers to distribute their products more effectively and thus enhance inter-brand competition. Additional guidance would also be needed as to what extent the information collected by suppliers can be passed on within a company.

Other respondents, however, expressed concerns that exempting any type of information exchange in a dual distribution scenario may allow a supplier to require its distributors to pass on customer data that would provide the supplier's downstream retail operations with a strategic advantage and restrict the distributors' ability to compete effectively at retail level.

¹⁷² Primarily legal professionals and distributors from the motor vehicle sector.

¹⁷³ These respondents represented both the supply side and the distribution side of the market, as well as a variety of sectors.

Second, stakeholders also pointed to the fact that Article 2(4)(a) of the VBER limits the exemption for dual distribution to manufacturers distributing goods downstream, thus excluding wholesalers or independent importers who are also active in the downstream market from the benefit of the VBER. Respondents to the public consultation indicated that it is unclear to what extent dual distribution scenarios involving other suppliers would be different from dual distribution by a manufacturer. Therefore, they argued that the exemption should also extend to the wholesale-retail relationship. Participants in the stakeholder workshop expressed the same view.

Third, stakeholders also pointed to issues as regards the interplay with the Horizontal Guidelines. NCAs indicated that there is insufficient clarity on this. For instance, paragraph 27 of the Vertical Guidelines does not clearly stipulate if the horizontal aspects of a mixed horizontal/vertical agreement must always be assessed under the Horizontal Guidelines first. NCAs take the view that it is only if this first assessment leads to the conclusion that the cooperation between competitors would, in principle, be acceptable under the Horizontal Guidelines that a second assessment under the VBER should be carried out. Respondents to the public consultation indicated that it is not clear whether dual distribution scenarios to which the VBER does not apply because the market share threshold is exceeded by one or both parties to the agreement should be assessed under Article 101 of the Treaty as a vertical agreement or as a horizontal agreement.

Fourth, as regards private label/retailer brands, respondents to the public consultation primarily representing the supply side indicated that it is not sufficiently clear whether agreements between a manufacturer and a retailer that sells private label goods produced by third parties are covered by the VBER. Respondents argued this should be the case, as the relevant relationship is predominantly a vertical one. In this context, respondents from the retail side indicated that paragraph 27 of the Vertical Guidelines lacks clarity as to the fact that retailers' private labels compete with manufacturers' brands. This is because the paragraph states that when a retailer provides specifications to a manufacturer to produce particular goods under the retailer's brand name, the retailer is not to be considered a manufacturer of such private label goods.

Fifth, respondents representing in particular the distribution side of the motor vehicle sector argued that the increase of direct sales by manufacturers (and the corresponding decrease of sales by distributors) has an impact on the viability of the investments they are required to make as dealers. In view of this, they argue that direct sales by manufacturers above a certain threshold (e.g. 20%) of the global value of a manufacturer's sales should not be exempted by the VBER and thus be made subject to an individual assessment.

Sixth, some respondents indicated that the definition of potential competitor as set out in paragraph 27 of the Vertical Guidelines is not harmonised with other competition related regulations, in particular as regards the time period for entry in the short term.¹⁷⁴ Respondents further stated that the definition has become blurred with the increase of dual distribution. It would therefore need to be revised or further developed, in particular to better reflect the online environment and its specific characteristics (e.g. by providing examples from the online world as to what situations would be considered as falling within the scope of the definition and what would fall outside).

Seventh, NCAs indicated that there is a lack of clarity with regard to the relationship between hybrid platforms, which act as both suppliers of online platform/intermediation services and retailers, and the sellers present on such platforms. They questioned notably whether such hybrid platforms should be covered by Article 2(4) of the VBER, since their hybrid nature and the fact that they are not the manufacturer of the product or the provider of the service they resell at retail level would be difficult to reconcile with the *ratio legis* of this provision.

Eighth, NCAs also argued that there is insufficient clarity as regards the conditions under which the exemption for dual distribution applies to service providers. Notably, the Vertical Guidelines should specify whether, in order to qualify as a service provider pursuant to Article 2(4)(b) of the VBER, the supplier itself must be at the origin of the service concerned or if the mere reselling of the service supplied by another (upstream) undertaking is sufficient.

4.3. MARKET SHARE THRESHOLDS FOR THE SUPPLIER AND THE BUYER

The likelihood that efficiency-enhancing effects will outweigh any anti-competitive effects resulting from restrictions contained in vertical agreements and that such vertical agreements therefore comply with the conditions of Article 101(3) of the Treaty depends on the degree of market power held by the parties to the agreement. The VBER therefore relies on market share thresholds for both the supplier and the buyer to determine the scope of the block exemption. According to Article 3 of the VBER, the block exemption will only apply if (i) the market share held by the supplier does not exceed 30% on the market on which it sells the contract goods or services and (ii) the market share held by the buyer does not exceed 30% on the market on which it purchases the contract goods or services.

¹⁷⁴ This time period is 1 year in the VBER, 3 years in the Horizontal Guidelines and 1-2 years (or longer) in the Technology Transfer Guidelines.

Article 7(a)-(c) of the VBER sets out the rules for calculating the market share of the supplier and the buyer in order to determine whether the VBER applies to a particular vertical agreement. Article 7(d)-(f) of the VBER sets out the rules for cases where the market shares of the parties to a vertical agreement were initially below the threshold defined in Article 3 of the VBER but subsequently exceed that threshold. In such cases the block exemption continues to apply for a period not exceeding two calendar years in total.

Paragraphs 86-95 of the Vertical Guidelines provide further guidance on the definition of the relevant market and the calculation of the market shares of the parties to a vertical agreement.

The evidence gathered during the evaluation indicates that stakeholders consider the VBER provisions concerning the market share thresholds as generally working well. Most respondents to the public consultation (business associations, companies active on both the supply and the distribution side of the market, as well as legal professionals) expressed the view that **Article 3 of the VBER and the corresponding paragraphs of the Vertical Guidelines provide an appropriate level of legal certainty**. Most NCAs share this view. Some of them expressly mentioned the high level of legal certainty achieved through the market share thresholds set out in the VBER, which should therefore continue to apply.

Nevertheless, stakeholders also **raised some issues regarding the application of the market share thresholds** set out in the VBER:

First, some respondents to the public consultation (mainly law firms and associations of lawyers) pointed to a lack of clarity and consistency with regard to the definition of the relevant market. They indicated that businesses, as well as NCAs, cannot rely on a uniform set of rules and precedents to define the relevant market. The outcome of their assessment may therefore differ depending on the reference material used (e.g. EU regulations and case law as compared to national rules and case practice; antitrust regulations and case law as compared to those for the field of merger control). Given the legal risks associated with defining the relevant market wrongly, businesses therefore tend to adopt a rather conservative approach in their assessment.

In the same vein, law firms that took part in the evaluation study indicated that there is a lack of clarity on relevant definitions and insufficient guidance for the self-assessment of market shares. They argued that this reduces the legal certainty provided by the VBER, together with the Vertical Guidelines, and thus has a negative impact on the further development of their business.

For some respondents, the rules currently used to define the relevant market, which were designed based on more traditional markets, are not well suited to determine relevant product and geographic markets in emerging online markets or when online intermediaries (e.g. platforms) are involved. This view is also shared by some NCAs.

Some respondents to the public consultation also argued that the current rules on the definition of the geographic market do not take into account recent market developments. For other respondents (notably retailers and an association of lawyers), the current rules are not sufficiently clear as to whether a distribution network covering several Member States should be considered as national or European in scope. Some NCAs further indicated that it is not clear whether, for the purposes of assessing the market shares of the supplier and the buyer, it is necessary to define only one or different (separate) geographic markets (i.e. the market on which the supplier sells and the market on which the buyer purchases the contract goods or services).

Second, stakeholders pointed to difficulties in assessing the market shares of the supplier and the buyer. Both respondents to the public consultation and NCAs stressed that the calculation of the market share of online platforms can be particularly difficult. NCAs stated that it is not clear from the current rules whether the market share of a distribution platform should be calculated for each market on which the platform purchases the products or services offered on the platform, or for all the products or services combined.¹⁷⁵ In the same vein, NCAs stated that when determining the market share of a supplier platform, it has to be established whether the relevant market is confined to the supply of platform services or if other suppliers of comparable services (e.g. in the offline world) have to be taken into account and, if so, to what extent.¹⁷⁶ Furthermore, some NCAs pointed to a lack of clarity regarding the treatment of multi-sided platforms, for which it is notably unclear whether the market share threshold has to be met on each side of the market or whether only one side of the market should be considered.

Some law firms interviewed for the evaluation study also stressed the difficulties linked to the definition of the markets concerned and the assessment of the market shares of the parties involved in an agreement, notably those of the buyer. They pointed out that businesses may need external legal assistance to perform such complex analysis.

¹⁷⁵ Distribution platforms are understood by NCAs as being directly involved in the conclusion of individual transactions via the platform, which could therefore qualify as a buyer of the product or service offered by the seller on the platform and as a supplier/reseller of the product or service vis-à-vis end customers.

¹⁷⁶ Supplier platforms are understood by NCAs as providing only the infrastructure for the sellers and buyers on the platform to interact and conclude a particular transaction.

Therefore, complying with the market share thresholds enshrined in the VBER can generate costs for businesses.

In addition, stakeholders that commented on Article 3 of the VBER **raised a number of substantive issues in relation to the market share thresholds:**

First, some respondents to the public consultation and NCAs questioned the **appropriateness of the current market share thresholds in certain situations.**

A few respondents to the public consultation, among which associations of lawyers, called into question the appropriateness of a market share threshold for both the supplier and the buyer side for the following reasons. Firstly, they argued that having to assess the market shares of both parties to the agreement is challenging and costly for businesses since they do not always have (easy) access to relevant data concerning the other party. On this particular point, the evaluation study also reported the view of law firms and a competition law professor, which indicated that the VBER can increase costs for businesses, as it requires them to collect more information than under the 1999 VBER due to the newly introduced market share threshold for the buyer side. Secondly, the respondents pointed out that the cumulative threshold is unnecessary, since it would be sufficient to rely on the market share of the party that is in a position to impose a particular vertical restriction (i.e. typically the supplier). Thirdly, a few respondents argued that focusing on the market share of the buyer on the upstream market (where the buyer purchases the contract goods or services) is not representative of its ability to impose a restriction on the downstream market. Fourthly, some respondents indicated that the buyer's market share should also include online sales of the contract goods or services.

Other respondents to the public consultation considered the 30% threshold as inadequate to properly capture vertical relations in oligopolistic markets characterised by economies of scale, high investments and few competing players. Some NCAs further explained that in markets with two to four large players, the individual market shares might fluctuate around 30%, so that even if all members of the oligopoly apply identical practices, some may benefit from the VBER, while others may fall outside its scope. This would create arbitrary and discriminatory results, as well as possible market distortions. According to these NCAs, in order to avoid such issues, there may be a need for a deeper assessment of the cumulative effects of similar vertical restrictions and the possible introduction of an additional oligopoly threshold in combination with a lower market share threshold for each individual oligopoly member (e.g. an individual market share of at least 15% plus a combined oligopoly market share of 50%).

Second, some stakeholders and NCAs consider that the **market share thresholds lead to false positives**, i.e. they result in the inclusion of vertical agreements that should not benefit from the block exemption, for the following reasons.

For some respondents to the public consultation (mainly suppliers and associations of lawyers) and some NCAs, the 30% market share threshold is too high when applied to online intermediaries. This is because such online intermediaries may have significant market power even below this threshold in view of certain characteristics of the market in which they operate (e.g. network effects and barriers to entry) and certain advantages they may enjoy (e.g. data advantages, financial strength and gatekeeper role). At the same time, some NCAs pointed out that if the market share thresholds of the VBER were to be reduced for platforms, this would, according to their experience, put significant weight on the proper definition of what can be considered a platform for that purpose. Moreover, it would be equally difficult to agree on the level of any such new market share threshold.

In this context, notably suppliers and a few NCAs indicated that market shares are generally not an accurate indicator of market power in digital technology sectors. They argued that alternative criteria such as network effects, cost structures or access to data would be better suited to determine market power in the digital sphere. However, neither these nor other criteria that could be used as alternatives to market shares in zero-price markets (e.g. the number of users or the volume of transactions on a platform) are mentioned in the VBER or the Vertical Guidelines.

A few NCAs also highlighted the fact that the degree of market power of multi-sided platforms may differ depending on the characteristics of the market concerned and consumer behaviour (e.g. multi-homing or single homing). However, under the current rules, the market share thresholds cannot be differentiated with regard to multi-sided platforms in order to better reflect such differences.

Third, some stakeholders and NCAs consider that the **market share thresholds lead to false negatives**, i.e. they result in the exclusion of vertical agreements from the VBER even though they should benefit from the block exemption.

Some respondents to the public consultation (mainly suppliers and lawyers) argued that the 30% market share threshold is too low. In their view, the case law in relation to Article 102 of the Treaty indicates that market power is not expected to arise if a business has a market share below 40%, with vertical agreements between businesses with a market share of 30% to 40% thus being presumptively pro-competitive. They argued that the overly conservative market share thresholds of the VBER therefore wrongly exclude the businesses concerned from the benefit of the block exemption. They also argued that this has a chilling effect on businesses by discouraging them from entering into pro-

competitive vertical agreements in view of the legal risks at stake. Similar views were expressed at the stakeholder workshop where some participants argued that vertical agreements between parties with market shares of 35% or 40% can also be efficiency-enhancing and should therefore be exempted.

Some respondents to the public consultation also considered the 30% market share threshold too low in view of the difficulties that businesses face in calculating their market shares with precision. This would result in the exclusion of pro-competitive vertical agreements from the scope of the VBER where businesses prefer to take a cautious approach in this regard. They also pointed to overly narrow market definitions by some NCAs as having a similar effect. This issue was echoed at the stakeholder workshop where some participants pointed to the fact that the EU rules on market definition are not binding for NCAs. These participants argued that changing this could address the issue of markets being defined too narrowly and of divergent market definitions in cases pursued by different NCAs.

Moreover, some respondents to the public consultation pointed to a lack of coherence between the market share thresholds in the VBER and those applying to selective distribution systems in the motor vehicle sector. They pointed out that for the distribution of new motor vehicles, the Supplementary Commission Guidelines on vertical restrictions in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles acknowledge that quantitative selective distribution will generally satisfy the conditions laid down in Article 101(3) of the Treaty if the parties' market shares do not exceed 40%. They argued that this is also true in other sectors, notably in the cosmetics sector, where the number of brands is higher and the barriers to entry are lower than in the motor vehicle sector. Therefore, the VBER should exempt selective distribution when the market share of the supplier is above 30% but does not exceed 40%.

Finally, other respondents to the public consultation mentioned that under the current rules it is not possible for a supplier with a market share exceeding 30% to benefit from the block exemption for the introduction of a very innovative, novel product or service even though, in the absence of any degree of durable market power, there is no reason to assume that vertical agreements in new markets are generally capable of having anti-competitive effects.

Fourth, respondents to the public consultation pointed to issues in relation to the rules set out in Article 7(d)-(f) of the VBER concerning the **applicability of the block exemption in case the market shares of the parties to a vertical agreement covered by the VBER exceed the thresholds defined in Article 3 of the VBER for a limited period of time**. They considered that these thresholds are too low and unnecessarily

conservative, notably with regard to the introduction of a novel product. At the same time, they pointed out that granting the benefit of the block exemption during a non-transitory period to businesses with significant market power, especially in tipping markets, could undermine the objective of the VBER (i.e. to capture those vertical agreements for which it can be assumed with sufficient certainty that they generate efficiencies in line with Article 101(3) of the Treaty).

4.4. THE CONCEPT OF HARDCORE RESTRICTIONS

Article 4 of the VBER contains a closed list of vertical restrictions which are likely to restrict competition and harm consumers or which are not indispensable to the attainment of efficiency-enhancing effects (so-called hardcore restrictions).¹⁷⁷ Vertical agreements containing such severe restrictions of competition are excluded from the benefit of the block exemption irrespective of the market share of the parties to the agreement.¹⁷⁸

Paragraph 47 of the Vertical Guidelines sets out a double presumption resulting from the inclusion of a hardcore restriction in a vertical agreement, which is relevant for the individual assessment of this agreement under Article 101 of the Treaty. First, there is a positive presumption that the agreement has actual or likely negative effects and therefore falls within Article 101(1) of the Treaty. Second, there is a negative presumption in that the agreement is unlikely to fulfil the conditions of Article 101(3) of the Treaty. The latter is a rebuttable presumption, which means that it is without prejudice to the possibility of the parties to demonstrate pro-competitive effects of a particular hardcore restriction. In addition, paragraphs 48-59 of the Vertical Guidelines provide guidance on the interpretation of the list of hardcore restrictions set out in Article 4 of the VBER.

First, the evaluation **did not identify any issues with regard to the use of the concept of hardcore restrictions** in the context of the VBER and notably the implications of introducing such restrictions in a vertical agreement for the applicability of the VBER.

Respondents to the public consultation argued that the use of the concept of hardcore restrictions has two main positive effects. The concept increases legal certainty because it provides clear guidance to businesses that want to minimise commercial and legal risks concerning the restrictions they should not include in their supply and distribution agreements. It also reduces the need to hire economic or legal experts, or to sustain proceedings before national courts or NCAs, especially for SMEs, thus resulting in a

¹⁷⁷ See VBER, recital 10.

¹⁷⁸ See VBER, recital 10, and Vertical Guidelines, paragraph 47.

reduction of associated costs. Also NCAs confirmed the importance of having a list of hardcore restrictions in the VBER.

Moreover, the respondents to the public consultation indicated that they understood the consequences of including a hardcore restriction in a vertical agreement (i.e. the loss of the benefit of the block exemption for the totality of the agreement).

Second, the evaluation however identified **issues with regard to the clarity of the concept of hardcore restrictions**.

The respondents to the public consultation, the participants in the stakeholder workshop and the evidence collected by the evaluation study pointed to difficulties with identifying the practices covered by this concept, notably since Article 4 of the VBER has been interpreted rather widely by some NCAs. Respondents to the public consultation and NCAs therefore indicated that the relevant case law should be included in the Vertical Guidelines in order to increase legal certainty. A detailed assessment of this issue can be found in the following sections dealing with the different restrictions covered by Article 4 of the VBER.

Stakeholders also pointed to a lack of clarity as regards the distinction and relationship between the concepts of hardcore restriction and by object restriction. Some respondents to the public consultation consider both concepts as interchangeable, whereas others see them as concepts with different meanings. NCAs pointed out that the VBER does not contain a clear distinction between both concepts and that also the Vertical Guidelines do not provide more clarity in this regard.

Third, the evaluation pointed to a **lack of guidance on the specific legal and economic circumstances under which hardcore restrictions could be considered as satisfying the conditions of Article 101(3) of the Treaty**. Respondents to the public consultation argued that businesses have so far never relied on such an efficiency defence since they preferred not to run any legal risk. A detailed assessment of this issue can be found in the following sections dealing with the different restrictions covered by Article 4 of the VBER.

Fourth, the evaluation has resulted in **mixed evidence as regards the scope of the list of hardcore restrictions set out in Article 4 of the VBER and notably the existence of false positives and false negatives**.

As regards possible false positives, the majority of the respondents to the public consultation indicated that the list of hardcore restrictions is not missing any vertical restriction that should be considered as generally harmful since it does not entail any

clear efficiency gains and that should therefore be excluded from the benefit of the block exemption.

However, a significant part of the respondents indicated that there are certain vertical restrictions that can be considered to amount to severe restrictions of competition but are not included in the list of hardcore restrictions in Article 4 of the VBER (e.g. certain price parity clauses). Also NCAs raised the question whether to expand the list of hardcore restrictions to include vertical restrictions that have proven harmful to competition in the context of investigations in several Member States (e.g. certain online sales restrictions and price parity clauses).

As regards possible false negatives, the majority of the respondents to the public consultation indicated that the list of hardcore restrictions contains vertical restrictions that could create efficiencies and that should therefore not be qualified as hardcore restrictions. A significant number of respondents, however, argued the contrary. Both views were reiterated in the context of the stakeholder workshop, especially with regard to specific hardcore restrictions such as resale price maintenance.

NCAs considered that the hardcore list does not capture any vertical restrictions that could create efficiencies that would be sufficiently likely to outweigh the resulting anti-competitive effects.

A detailed assessment of this issue can be found in the following sections dealing with the restrictions for which it was suggested during the evaluation that they should either be excluded from the list of hardcore restrictions or included in addition to the already existing ones.

4.5. THE CONCEPT OF EXCLUDED RESTRICTIONS

Article 5 of the VBER contains a closed list of vertical restrictions that are excluded from the benefit of the block exemption even though the parties to the vertical agreement do not exceed the market share thresholds set out in the VBER.¹⁷⁹ Unlike for Article 4 of the VBER which, as explained in section 4.4 above, excludes the entire agreement containing a hardcore restriction from the benefit of the block exemption, if a vertical agreement contains one of the excluded restrictions listed in Article 5 of the VBER, the remainder of the agreement continues to benefit from the block exemption if it is severable from the excluded restriction.¹⁸⁰ Paragraphs 65-69 of the Vertical Guidelines

¹⁷⁹ See VBER, recital 11, and Vertical Guidelines, paragraph 65.

¹⁸⁰ See Vertical Guidelines, paragraph 65.

provide further guidance on the interpretation of the list of excluded restrictions set out in Article 5 of the VBER.

The evaluation has shown that a large majority of stakeholders and NCAs **consider the concept of excluded restriction to be sufficiently clear.**

However, some respondents to the public consultation and some NCAs pointed out that **the framework to be applied for the analysis of excluded restrictions lacks clarity.** In particular, neither the VBER nor the Vertical Guidelines indicate whether excluded restrictions should always be analysed as restrictions by effect or whether, depending on the circumstances (e.g. the market shares of the parties to the agreement), they can also qualify as restrictions by object.

4.6. SPECIFIC VERTICAL RESTRICTIONS

This section sets out the evidence collected during the evaluation on specific vertical restrictions, namely (i) resale price maintenance (see section 4.6.1 below), (ii) territorial and customer restrictions (see section 4.6.2 below), (iii) most favoured nation or parity clauses (see section 4.6.3 below) and (iv) non-compete obligations (see section 4.6.4 below). It also presents the evidence gathered on restrictions linked to specific distribution systems or channels such as (v) exclusive distribution (see section 4.6.5 below), (vi) selective distribution (see section 4.6.6 below), (vii) online sales (see section 4.6.7 below) and (viii) franchising (see section 4.6.8 below). It also mentions (ix) other issues raised by stakeholders during the evaluation (see section 4.6.9 below).

4.6.1. Resale price maintenance

Minimum and fixed resale prices are considered a severe restriction of competition¹⁸¹ and therefore qualified as hardcore restrictions pursuant to Article 4 of the VBER. More specifically, Article 4(a) of the VBER provides that vertical agreements having as their object the restriction of the buyer's ability to determine its sales price (so-called resale price maintenance or "RPM") are excluded from the benefit of the block exemption irrespective of the market share of the parties to the agreement. Article 4(a) of the VBER clarifies that the supplier is however allowed to impose a maximum or recommended sales price, provided that it does not amount to a fixed or minimum sales price as a result of pressure from or incentives offered by any of the parties to the agreement. Paragraphs 48-49 and 223-229 of the Vertical Guidelines provide further guidance on the application

¹⁸¹ See e.g. VBER, recital 10.

of this provision, including the likely anti-competitive and possible efficiency-enhancing effects of RPM.

The evaluation indicated that the majority of respondents to the public consultation consider that **Article 4(a) of the VBER and the related paragraphs of the Vertical Guidelines generally provide an appropriate level of legal certainty**. However, a significant number of respondents to the public consultation **pointed to a slightly low level of legal certainty**, whereas only a minority considered there to be a low level of legal certainty.

The evaluation identified **the following main issues regarding the application of Article 4(a) of the VBER**:

First, respondents to the public consultation argued that there is limited guidance on the circumstances under which recommended or maximum resale prices could amount to RPM and thus to a hardcore restriction under the VBER, which reduces the level of legal certainty provided by the VBER. By way of example, they pointed to the e-commerce sector inquiry which indicated that the monitoring of retail prices (e.g. with the use of price algorithms) might limit the incentives of distributors to deviate from the recommended prices. Respondents to the public consultation therefore perceived a risk that the Commission and NCAs might conclude that recommended prices accompanied by a monitoring mechanism could amount to RPM in the meaning of Article 4(a) of the VBER. They considered this to be unjustified in view of the fact that the monitoring of retail prices is part of the normal commercial activity of a supplier and should therefore be legal, unless retaliatory measures or threats of such measures are used to achieve compliance with the recommended price level.

Participants in the stakeholder workshop, NCAs and the evidence gathered in the context of the evaluation study also indicated that more guidance is needed to address the lack of clarity as regard the circumstances in which recommended resale prices amount to RPM. Participants in the stakeholder workshop pointed to a similar lack of clarity in relation to maximum resale prices and when those amount to RPM.

NCAs also pointed to difficulties with applying the VBER to atypical price restrictions. In particular, Article 4(a) of the VBER and paragraph 48 of the Vertical Guidelines do not specify whether certain practices that restrict the ability of buyers to determine their resale price should be considered RPM. This includes practices prohibiting discounts applied by retailers, or practices compelling retailers to apply a price within a specific range defined by the supplier. In addition, they argued that the VBER and the Vertical Guidelines do not reflect the distinction between clear-cut RPM and hub-and-spoke scenarios.

Second, the respondents to the public consultation and the participants in the stakeholder workshop argued that there is a lack of clarity as regards the conditions under which RPM can benefit from the exemption of Article 101(3) of the Treaty. They pointed out that as a result, businesses prefer not to run the financial and reputational risk of including hardcore restrictions in their vertical agreements, which makes RPM *de facto* a *per se* infringement of the competition rules.

More specifically, the respondents to the public consultation pointed to a lack of clarity in paragraphs 223-229 of the Vertical Guidelines in relation to the circumstances under which efficiencies resulting from RPM in the context of product launches and short-term price campaigns are accepted. As regards the introduction of a new product, they argued that there is uncertainty about (i) the acceptable duration of the introductory period, (ii) the types of products that can be covered by this exemption (e.g. only entirely new products or also new generations of existing products) and (iii) the supporting evidence that businesses need to provide to prove the resulting efficiencies.¹⁸² As regards short-term low price campaigns, they pointed to uncertainties about (i) the type of distribution systems covered by this exemption (i.e. only franchise systems or also other distribution system) and (ii) the evidence that businesses need to provide to prove the resulting efficiencies.¹⁸³

The respondents to the public consultation also pointed out that there is no guidance on the evidence to be provided by businesses to prove non-price efficiencies resulting from RPM and how these can be weighed against the restrictive effects stemming from RPM.

Third, the respondents to the public consultation argued that there is a lack of coherence in the treatment of RPM across the EU since NCAs seem to pursue divergent approaches in this regard. They pointed out that a possible reason for this could be the lack of guidance on relevant issues in the VBER itself.

The review of the numerous NCA cases regarding RPM in the context of the evaluation study confirmed this perception only partly. In fact, the evaluation study found that NCAs did not face major difficulties in the legal assessment of RPM as the underlying criteria are relatively straightforward. That said, NCAs seemed to have taken somewhat

¹⁸² See paragraph 225 of the Vertical Guidelines: "*RPM may be helpful during the introductory period of expanding demand to induce distributors to better take into account the manufacturer's interest to promote the product.*"

¹⁸³ See paragraph 225 of the Vertical Guidelines: "*Similarly, fixed retail prices, and not just maximum retail prices, may be necessary to organise in a franchise system or similar distribution system applying a uniform distribution format a coordinated short term low price campaign (2 to 6 weeks), which will also benefit the consumers.*"

divergent approaches with regard to novel implementations of RPM, for which the current rules do not contain any guidance.

Fourth, the evaluation resulted in mixed evidence regarding the classification of RPM as a hardcore restriction under the VBER, which is presented separately for each source of evidence (i.e. stakeholder feedback, enforcement practice and evaluation study) in the following.

Stakeholder feedback

The majority of the respondents to the public consultation (mainly distributors and retailers) agreed with the classification of RPM as a hardcore restriction under the VBER, while a significant number of respondents (mainly suppliers) contested this classification. This divergence of views was also reflected among the participants in the stakeholder workshop.

More specifically, retailers argued that RPM only has the effect of increasing prices without generating any non-price benefits for consumers. Furthermore, they argued that RPM tends to limit online sales where the variety of products is larger, with the effect of diminishing the overall availability of products for consumers. Moreover, they pointed out that there are less restrictive means to improve the services offered by distributors and retailers, including special compensation mechanisms for the underlying costs.

In contrast, suppliers argued that RPM could allow distributors to benefit from the suppliers' knowledge about the competitive price level in a particular market, as well as help suppliers counteract the market power of large retailers and online platforms and position new products in existing markets or existing products in new geographical areas. Furthermore, suppliers also argued that RPM is an effective tool to address free-riding concerns because it enables suppliers to support reputable intermediaries against price discounters that free-ride on the investments of other retailers, thus causing a negative impact on the image of the suppliers' brand.

Some respondents to the public consultation also argued that, in the absence of market power, RPM can generate substantial efficiencies, without creating anti-competitive effects.¹⁸⁴ This is because the restriction of intra-brand competition on prices resulting

¹⁸⁴ See e.g. Bishop and Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement*, 2nd edition 2010, pages 202-204; and Goyder, *"Is Nothing Sacred? Resale Price Maintenance and the EU Policy Review on Vertical Restraints"* in: Kronkurrensverket (ed.), *The Pros and Cons of Vertical Restraints*, 2008, pages 167-193.

from the imposition of RPM does not have appreciable anti-competitive effects to the extent that there is sufficient inter-brand competition.

Some respondents to the public consultation further pointed out that other jurisdictions (e.g. Australia and the USA) have taken a more lenient approach to RPM.¹⁸⁵ Moreover, some Member States allowed RPM for certain products like books, magazines and newspapers, with the objective of increasing availability and diversity.

Enforcement practice at national and EU level

The majority of vertical cases pursued at national level since the adoption of the VBER concerned RPM. The highest number of cases was reported by the Austrian NCA, with the underlying legal assessment in all these cases being very similar. In all instances, the Austrian NCA and the Cartel Court concluded that the disputed vertical restrictions constituted a violation of Article 101(1) of the Treaty, which could not be exempted pursuant to Article 101(3) of the Treaty. Similarly, the Cypriot, Czech, Danish, German, Polish and UK NCAs found most of the investigated RPM practices to be prohibited according to Article 101 of the Treaty and the equivalent provisions of national law.

Also the Commission pursued several cases concerning RPM during the last years. In the four prohibition decisions of July 2018, the Commission found that consumer electronics manufacturers Pioneer, Denon & Marantz, Philips and Asus had imposed fixed or minimum resale prices on online retailers for widely used consumer electronics products such as kitchen appliances, notebooks and hi-fi products. The four manufacturers intervened particularly against online retailers offering their products at low prices with threats or sanctions such as the blocking of supplies. The investigations showed that the use of sophisticated monitoring tools allowed the manufacturers to effectively track the setting of resale prices in their distribution network and to intervene swiftly in case of price decreases. The price interventions limited effective price competition between retailers and led to higher prices with an immediate effect on consumers.

The above shows that RPM has consistently been found to amount to a severe restriction of competition in enforcement actions taken by the Commission and NCAs since the adoption of the VBER.

Evaluation study

The evaluation study resulted in mixed evidence with regard to the effects of RPM.

¹⁸⁵ ACCC Determination of 5 December 2014, Tooltechnic Systems (Australia) Pty Ltd, A91433; and Judgment of the Supreme Court of the United States of 28 June 2007, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

The stakeholders interviewed in the context of the evaluation study took the view that the application of RPM cannot produce efficiencies other than during product launches and promotional campaigns.¹⁸⁶ One of the problems manufacturers and most interviewed retailers raised is that consumers learn about a new product in a brick-and-mortar store and later buy it online. According to the interviewees, sometimes the online price significantly decreases (according to some stakeholders by 30%) just a few days after the launch of a new product. Such "*online price dumping*" is a major concern for some of the interviewed stakeholders. This negatively affects brick-and-mortar stores and some retail chains have closed as a result, for example, in the toys industry where specialised shops offer a unique experience for children and their parents and help them familiarise with a manufacturer's brand. Some manufacturers also indicated that they cannot open their own brand shops everywhere and therefore have to rely on brick-and-mortar stores to promote and sell their products.¹⁸⁷ In addition, most of the interviewees considered that RPM could drive up the prices of some products, thus negatively impacting consumers, with the resulting profits not necessarily being invested in product innovation and better customer experience.¹⁸⁸

The economic literature reviewed in the context of the evaluation study points to both pro-competitive and anti-competitive effects of RPM. While the former can be categorised as efficiency gains resulting from the adequate provision of retail services that can affect the demand for the manufacturer's products, the latter concern collusion and rent extraction that RPM may facilitate. Only a relatively thinner strand of the literature looks in addition at the effects of RPM empirically based on NCA interventions or changes in the policy approach, either over time or across regions. Moreover, a large part of these studies is not particularly recent and therefore only of limited value for an assessment of RPM in the current market circumstances.¹⁸⁹

The econometric analysis conducted in the context of the evaluation study focused on the book sector in various Member States where fixed book price rules exist, which allow publishers to require book sellers not to sell books below the price set by the publisher.¹⁹⁰ The results of the econometric study suggest that in the book sector, RPM agreements seem to be associated with higher output and (weakly) lower prices. As a result, consumer welfare would seem to have been higher in the presence of these RPM

¹⁸⁶ See section 4.1.3.4 of the evaluation study.

¹⁸⁷ See section 3.3.1.2 of the evaluation study.

¹⁸⁸ See section 4.1.3.4 of the evaluation study.

¹⁸⁹ See section Annex XII.2.6 of the evaluation study.

¹⁹⁰ See section Annex XI.2 of the evaluation study.

agreements. It should, however, be noted that the book sector has some unique features, such as the cultural importance attached to it, which is the primary reason for the promotion of fixed book price agreements in the Member States concerned. Therefore, the results of the econometric analysis for this sector have to be interpreted with caution and cannot be easily transposed to other sectors. At the same time, these results demonstrate that RPM agreements do have the potential to increase consumer welfare in certain circumstances.

Finally, some respondents to the public consultation pointed to **two specific scenarios that should be differentiated** since they do not constitute typical scenarios of RPM:

As regards franchise systems, some respondents to the public consultation, notably those representing franchisors, argued that fixing retail prices is justified and necessary in order to maintain the common identity and reputation of a particular franchise network and thus meets the conditions of Article 101(3) of the Treaty. In franchise agreements, the franchisor shares with its franchisees a complete business concept, which also implies the need for a clear price positioning of the franchisor's brand and the design of homogenous advertising campaigns in order to avoid consumer deception due to different prices at franchisee level. Moreover, since franchisees normally do not distribute products from competing franchisors, such a restriction would not result in a softening of competition between different suppliers using the same distributors. However, other respondents, notably those representing franchisees, argued that fixing retail prices is not always justified and should only be allowed for short periods and when necessary to effectively sell and market new products.

As regards tripartite relationships where a supplier negotiates prices directly with retailers or final customers and relies on intermediaries to execute the agreement (also called "fulfilment contracts", see section 4.1.3 above), respondents to the public consultation argued that the adherence of the intermediary to the price negotiated between the supplier and the retailer or final customer does not constitute RPM since that price is no longer subject to competition once the agreement has been concluded. Such agreements should therefore be excluded from the scope of Article 101(1) of the Treaty. In the alternative, if such scenarios were to be considered a restriction of competition in the meaning of Article 101(1) of the Treaty, they should be exempted under Article 101(3) of the Treaty. This is because they result in efficiencies in the form of reduced transaction costs, without there being any risk of anti-competitive effects, as the intermediary would not have been able to achieve a better price from the retailer or final customer to whom the product or service is delivered. In fact, the respondents explained that such arrangements are often requested by the retailer or final customer, but could also be in the interest of the supplier. The latter would e.g. be the case where a non-European supplier wishes to negotiate prices directly with final customers, but needs a

local trader in Europe that offers logistics support and other sales assistance, such as support for dealing with customers in their local language and addressing cultural differences.

4.6.2. Territorial and customer restrictions

Certain types of territorial restrictions are considered severe restrictions of competition,¹⁹¹ which are therefore qualified as hardcore restrictions pursuant to Article 4 of the VBER. More specifically, Article 4(b) of the VBER provides that vertical agreements that have as their object the restriction of the territory into which or of the customers to whom the buyer or the buyer's customers may sell the contract goods or services are excluded from the benefit of the block exemption irrespective of the market share of the parties to the agreement. Paragraph 50 of the Vertical Guidelines explains that this provision aims at preventing market partitioning by territory or by customer group. It also provides examples of direct and indirect measures qualifying as territorial or customer restriction pursuant to Article 4(b) of the VBER.

The general rule laid down in Article 4(b) of the VBER contains one exception, which applies irrespective of the type of distribution used. This allows the supplier to restrict the buyer's place of establishment (so-called "location clause"). This means that the benefit of the VBER is not lost if it is agreed that the buyer will restrict its distribution outlet(s) and warehouse(s) to a particular address, place or territory.¹⁹²

The general rule laid down in Article 4(b) of the VBER also includes four specific exceptions. Article 4(b)(i) of the VBER allows the restriction of active sales by a buyer into a territory or to a customer group which the supplier has allocated exclusively to another buyer or has reserved to itself. Active sales means active approaching of customers, as set out in paragraph 51 of the Vertical Guidelines. This protection of exclusively allocated territories or customer groups must, however, permit passive sales, which refers to responding to unsolicited requests from individual customers, as set out in paragraph 51 of the Vertical Guidelines. By contrast, the other three exceptions allow for the restriction of both active and passive sales. Article 4(b)(ii) of the VBER allows a supplier to restrict a wholesaler from selling to end users in order to keep the wholesale and retail levels of trade separate. Article 4(b)(iii) of the VBER allows a supplier to restrict sales by members of its selective distribution system, at any level of trade, to unauthorised distributors located in the territory where the selective distribution system is operated or where the supplier does not yet sell the contract products. Article 4(b)(iv) of

¹⁹¹ VBER, recital 10.

¹⁹² Vertical Guidelines, paragraph 50.

the VBER allows a supplier to restrict a buyer of components or any intermediate goods, to whom those components are supplied for the purpose of incorporation (i.e. for use as an input to produce other goods), from reselling them to competitors of the supplier.

The evidence gathered during the evaluation indicates that a majority of stakeholders consider that **Article 4(b) of the VBER and the related provisions of the Vertical Guidelines provide an appropriate level of legal certainty**. This corresponds notably to the view of the majority of respondents to the public consultation. However, a significant number of stakeholders, including the respondents to the public consultation (across all categories represented) and some NCAs, indicated a **lower level of legal certainty for these rules and raised certain issues** in this regard.

As a general comment, a few respondents to the public consultation pointed to a **lack of clarity of the structure, as well as the wording of Article 4(b) of the VBER and the corresponding paragraphs of the Vertical Guidelines**. According to them, the frequent use of double or triple negations in the exceptions, the conceptual complexity of the restrictions and the complicated description impair the understanding of this provision and lead to diverging interpretations by businesses and NCAs. Moreover, some stakeholders consider that the VBER and the Vertical Guidelines do not provide enough details and examples to determine which restrictions should be considered as hardcore within the meaning of Article 4(b) of the VBER and which restrictions are permitted. In the same vein, respondents expressed a need to better define when a restriction on the place of establishment would be acceptable under this provision.

Stakeholders also made more specific comments on the hardcore restriction (see section 4.6.2.1 below) and the exceptions (see section 4.6.2.2 below) laid down in Article 4(b) of the VBER.

4.6.2.1. Hardcore restriction on the territory into which or the customers to whom a buyer can sell (Article 4(b) of the VBER)

Regarding the **hardcore restriction on the customers to whom a buyer can sell**, stakeholders point to an inconsistency in the different language versions of the VBER, the vagueness of the notion of customer and the lack of case law justifying its qualification as a hardcore restriction.

First, a few respondents to the public consultation (mostly lawyers and business associations) mentioned a lack of consistency between the different language versions of the VBER. Whereas the English version refers alternatively to "customers" or "customer group", other versions (notably the German version) refer to "customer group". They explained that this can lead to different interpretations and generate difficulties with the application of this provision.

Second, a few respondents to the public consultation (business associations, lawyers and companies) expressed concerns about the lack of a proper definition of the concept of customers and its scope in the context of Article 4(b) of the VBER. In particular, some respondents indicated that it is unclear whether customers purchasing on a specific marketplace could be defined as a separate customer group. If this were to be the case, allowing only a single or a limited number of authorised resellers to sell on a particular marketplace for a particular territory (e.g. a Member State) could conceivably be considered as a territorial restriction within the meaning of Article 4(b) of the VBER. This would however lead to unsatisfactory results as it fails to take account of the need for businesses to be able to control the use of this channel to protect their brand image. Other respondents understand that a customer group can be defined based on objective characteristics, but wonder whether it is permitted for a supplier to define the boundaries between certain customer groups or even name customers belonging to a particular customer group. Finally, stakeholders argued that the definition of the notion of customers should take account of the fact that any attempt by manufacturers to prevent sales via certain sales channels is prohibited.

Third, one respondent to the public consultation considered that there is no basis in the case law for subjecting customer restrictions to the same strict test as territorial restrictions, since only the latter relate to the single market objective.

Regarding the **hardcore restriction on the territory into which the buyer can sell**, a few stakeholders stressed the complexity of the rules, the difficulties linked to their enforcement and the risk of inconsistency with the Geo-blocking Regulation.

First, a few respondents to the public consultation (mainly companies and business organisations of retailers) pointed to a lack of clarity of the rules on territorial restrictions. According to them, the current rules do not clearly indicate which territorial restrictions can or cannot be justified under EU and national law. A few NCAs concur with this view, pointing out that many stakeholders and notably SMEs, which are faced with territorial supply restrictions imposed by their suppliers, are not able to judge whether or not these restrictions infringe Article 101 of the Treaty.

Second, a few stakeholders (both respondents to the public consultation and NCAs) consider that the VBER has not been very effective in preventing territorial restrictions, even though they are anti-competitive practices which are inconsistent with the single market objective.

Some respondents mentioned that the prohibition of territorial restrictions set out in the VBER is not vigorously enforced. This view is however in contradiction with several recent Commission decisions concerning territorial and customer restrictions. In *Nike*,¹⁹³ *Sanrio*,¹⁹⁴ and *NBC Universal*,¹⁹⁵ the Commission confirmed that preventing the sale of licensed merchandise products in another Member State or beyond allocated customers or customer groups amounts to a hardcore restriction, which cannot therefore benefit from the block exemption.¹⁹⁶ In *Pioneer*,¹⁹⁷ the Commission confirmed that, in an open distribution system, restricting the territories into which retailers can sell is a restriction of competition by object within the meaning of Article 101(1) of the Treaty.

Other stakeholders (both respondents to the public consultation and NCAs) specifically refer to the need to address territorial supply constraints ("TSCs") in certain sectors such as fast-moving consumer goods. They explain that TSCs are imposed by suppliers to restrict the retailers' ability to source products cross-border, to freely move products within their own distribution network or to offer products to customers that are available in another Member State. Suppliers implement TSCs through different practices such as refusing to supply or threatening to stop supplying a particular distributor, limiting the quantities available for sale, differentiating product ranges and prices between EU Member States and limiting language options for the product packaging. As a result, retailers and wholesalers are unable to benefit from the single market and negotiate better conditions for certain products, especially "must-have" products, in particular in the food and retail sector. Therefore, such TSCs are, in their view, hampering the development of the single market and its potential benefit to consumers, as evidenced by various surveys and studies carried out during recent years.¹⁹⁸ The issue has in particular been touched

¹⁹³ See Commission press release of 25 March 2019, IP 19/1828, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1828. A non-confidential version of the prohibition decision is available on DG Competition's website. See section 5.1.3 above.

¹⁹⁴ See Commission press release of 9 July 2019, IP 19/3950, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_19_3950. A non-confidential version of the prohibition decision is available on DG Competition's website. See section 5.1.3 above.

¹⁹⁵ See Commission press release of 30 January 2020, IP 20/157, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_157. A non-confidential version of the prohibition decision is available on DG Competition's website. See section 5.1.3 above.

¹⁹⁶ Although the VBER was not directly applied in these decisions, as it was not entirely clear whether the agreements would fall in its scope, it has been used as guidance in the assessment of 101(3) of the Treaty.

¹⁹⁷ See Commission press release of 24 July 2018, IP 18/4601, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4601. A non-confidential version of the prohibition decisions is available on DG Competition's website. See section 5.1.3 above.

¹⁹⁸ See notably the publication of the Secretariat General of the Benelux Union of 22 May 2018 on "*Territorial supply constraints in the retail trade in Belgium, the Netherlands and Luxembourg* –

upon in the Communication of the Commission on "*A European retail sector fit for the 21st century*".¹⁹⁹ As a follow-up to this Communication, the Commission launched in 2019 a fact-finding into TSCs in the EU retail sector.

Third, NCAs also pointed to practical difficulties in applying the prohibition in individual cases. Some NCAs indicated that certain territorial restrictions may create efficiencies that - if claimed by the businesses concerned - need to be assessed under Article 101(3) of the Treaty, while at the same time dampening the integration of the single market. This raises the question of how to balance any such efficiencies (e.g. more efficient distribution) against harm to the integration of the single market, given that the two effects are difficult to quantify by the same measure. Moreover, NCAs pointed out that certain effects of territorial restrictions such as price discrimination could be positive for consumers in some EU Member States, while negative in others. In these situations, in their view, the Commission may be better placed to investigate such conduct than the NCAs since it is able to take account of the EU-wide effect of such restrictions.

Fourth, a few respondents to the public consultation (mainly lawyers and business associations) pointed to a lack of consistency with regard to the interplay between the VBER, together with the Vertical Guidelines, and the Geo-blocking Regulation.²⁰⁰ They indicated that, under the Geo-blocking Regulation, restrictions of passive sales on the grounds of nationality, place of residence or place of establishment of the customer are void, without any exception or the possibility of raising efficiency claims, while such restrictions can be exempted under Article 101(3) of the Treaty if they fulfil the underlying conditions, or even fall outside Article 101(1) of the Treaty in the circumstances described in paragraph 61 of the Vertical Guidelines. In their view, it is not clear as to whether this implies that no exemption is possible under Article 101(3) of the Treaty for agreements that fall under both the VBER and the Geo-blocking

Consequences for the Benelux internal market", available at <https://www.benelux.int/files/9215/2696/9988/616-TSC-EN-draft3.pdf>; and the report of the Luxembourgish Competition Council of 18 January 2019 on its retail sector inquiry, available at <https://concurrency.public.lu/fr/avis-enquetes/enquetes/2019/enquete-secteur-grande-distribution.html>.

¹⁹⁹ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "*A European retail sector fit for the 21st century*", COM(2018) 219 final, available at https://eur-lex.europa.eu/resource.html?uri=cellar:93c3b59e-43ad-11e8-a9f4-01aa75ed71a1.0001.02/DOC_1&format=PDF.

²⁰⁰ On the Geo-blocking Regulation, see section 5.2.4 above.

Regulation, whereas an exemption under Article 101(3) of the Treaty is still possible for agreements that do not fall under the Geo-blocking Regulation.

4.6.2.2. Exceptions to the prohibition of territorial and customer restrictions (Article 4(b)(i)-(iv) of the VBER)

As a general remark, stakeholders indicated that neither the VBER nor the Vertical Guidelines specify whether the exceptions in Article 4(b)(i)-(iv) of the VBER may be applied jointly, so that an agreement including several of these restrictions would still be covered by the VBER.

Stakeholders raised a number of issues with regard to the **first and third exception set out in Article 4(b)(i) and 4(b)(iii) of the VBER** concerning restrictions that suppliers operating an exclusive or a selective distribution system can impose on their distributors in order to limit their ability to sell in certain territories or to certain customers. These issues will be dealt with in section 4.6.5 below and section 4.6.6 below covering, respectively, exclusive distribution and selective distribution.

Only a few stakeholders commented on the **second exception laid down in Article 4(b)(ii) of the VBER**. Some stakeholders questioned whether the provision allows restrictions on the wholesaler's activity at retail level, including the restriction of online sales. Other stakeholders expressed a need for clarification as regards the meaning of the expression "certain end users" and "bigger end users" in paragraph 55 of the Vertical Guidelines. Some stakeholders also expressed the view that it is unjustified not to exempt the restriction of the retailer's activity at wholesale level.

Also the **fourth exception contained in Article 4(b)(iv) of the VBER** attracted very few comments. Some respondents to the public consultation raised the question as to why the provisions in relation to spare parts are scattered across the VBER. Others questioned the relevance of preventing the sales of components to the supplier's competitors in certain circumstances and sectors.

4.6.3. Parity clauses

Parity clauses, which are block exempted under the VBER, can be found in different variations. More generally, they can be agreed at wholesale or retail level, they can affect prices but also non-price conditions and they can be wide (i.e. requiring the contract party to offer the same or better prices and conditions as those offered on any other sales channel) or narrow (i.e. imposing restrictions only on the contract party's direct sales channel). Outside the safe harbour created by the VBER, parity clauses may require an

effects analysis in many cases, as shown by the enforcement practice of NCAs.²⁰¹ Neither the VBER nor the Vertical Guidelines explicitly address parity clauses, but they are mentioned in the Vertical Guidelines as a potential means of reducing the buyer's incentive to lower the resale price, which can make RPM more effective.²⁰²

The evaluation has shown that retail parity clauses have become more common over time, and that the VBER and the Vertical Guidelines do not provide sufficient guidance on how to assess their compatibility with Article 101 of the Treaty. It has also shown a divergent treatment of these restrictions by NCAs.

First, the evaluation has shown that the **use of retail parity clauses has increased** over the last ten years.

Some respondents to the public consultation, notably law firms, confirmed this finding, reporting that these types of restrictions have become rather common in an e-commerce environment.

The evaluation study found that retail parity clauses are often applied not only in the hospitality sector, but also for mass market goods which do not have features of luxury products.

In line with a more common use of retail parity clauses, the evaluation study identified several decisions by NCAs involving these clauses, notably in contracts between online travel agencies and hotels. Moreover, several Member States (France, Italy, Austria and Belgium) adopted legislation during the last years which prohibits the use of these clauses by online travel agencies in the hotel sector.

²⁰¹ See for instance, the decisions of the FR, DE, IT and SE NCA in the hotel booking sector (<https://www.autoritedelaconurrence.fr/en/communiqués-de-presse/21-april-2015-online-hotel-booking-sector>, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2016/B9-121-13.pdf?__blob=publicationFile&v=2, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2014/B9-66-10.pdf?__blob=publicationFile&v=3, [https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/660EE2E99780F7B5C1257E350039D1CD/\\$File/p25422.pdf](https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/660EE2E99780F7B5C1257E350039D1CD/$File/p25422.pdf), [https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/4AC063DE04DC3DB1C1257F92003FE656/\\$File/p25940.pdf](https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/4AC063DE04DC3DB1C1257F92003FE656/$File/p25940.pdf), <http://www.konkurrensverket.se/en/news/commitments-given-by-booking-com-benefit-consumers/> and <http://www.konkurrensverket.se/en/news/investigation-of-the-online-travel-agency-expedia-closed/>).

²⁰² Vertical Guidelines, paragraph 48.

Second, the evaluation has shown that the VBER and the Vertical Guidelines **are perceived as not providing sufficient guidance on how to assess the compatibility of retail parity clauses** with Article 101 of the Treaty.

Respondents to the public consultation pointed to a lack of guidance on the assessment of retail parity clauses in both the VBER and the Vertical Guidelines. In this regard, the respondents to the public consultation expressed divergent views on the possible effects of such clauses on competition. Some respondents to the public consultation argued that these restrictions are not likely to create efficiencies and rather have likely anti-competitive effects, as their economic effects are largely identical to those of resale price maintenance, which is considered a hardcore restriction under the VBER. In contrast, other respondents to the public consultation pointed to economic literature and evidence suggesting that retail parity clauses can bring benefits to consumers by increasing investments through the reduction of free-riding and by reducing search and negotiation costs. Some respondents mentioned that retail parity clauses can, however, harm consumer welfare and thus merit a stricter treatment when suppliers have insufficient incentives to offer different conditions to different intermediaries. This is, for example, the case where intermediaries are few and powerful - if not unavoidable - sales channels. They argued that these considerations are properly reflected in the current practice of treating these clauses as restrictions by effect, which require a case-by-case assessment, and that this should be reflected in the Vertical Guidelines to provide a coherent framework of analysis under Article 101 of the Treaty.

NCA's also took the view that there is a lack of guidance on the treatment of retail parity clauses, which may explain the divergent approaches in different Member States. NCA's argued that based on their experience, narrow retail parity clauses are generally more likely to be justified than wide retail parity clauses. However, also for narrow retail parity clauses particular attention should be paid to the market circumstances and notably the market power of the intermediaries (e.g. platforms) involved, as well as to any cumulative effects that may occur if those intermediaries are used by a large share of suppliers and/or distributors. In a recent case, the German NCA considered that in such specific circumstances narrow retail parity clauses could have similar effects to wide retail parity clauses.

The evaluation study confirmed the need for guidance in relation to retail parity clauses. Moreover, the evidence collected by means of two econometric studies, a survey and the review of existing literature pointed to mixed evidence as regards the effects of retail parity clauses, depending on the nature of the clause in question and the market circumstances.

Two separate econometric analyses were developed in the hotel booking sector. One analysis relied on publicly available data at country level, whereas the other analysis drew on a proprietary database of hotel-level price data. Both econometric analyses focused on the switch from a policy context in which narrow parity clauses were allowed to one where no form of parity clauses was allowed. The findings of both econometric analyses suggested that narrow parity clauses limited competition in the hotel booking sector and resulted in higher prices for consumers. Given that no statistically significant effect on the demand was identified, a ban on narrow parity clauses in the observed countries and sector appeared to have increased consumer welfare.²⁰³

The survey collected evidence on the motivation to use parity clauses in mainly two sectors, the mass market sector and the hospitality sector.

In the mass market sector, it emerged that parity clauses are requested by retailers to avoid continuous price negotiations with manufacturers and to maintain a competitive price for the products concerned. According to the experience of a large retailer active in several Member States, parity clauses in this segment tend to cover both price and non-price clauses. Most SMEs (both suppliers and retailers) see parity clauses as a way to reduce frequent negotiations on terms or prices, but also as a means of giving preferential treatment to their business partners and ensure their loyalty. From the perspective of retailers, parity clauses are mainly used to avoid that customers visit their brick-and-mortar stores and then finalise the purchase online.²⁰⁴

In the hospitality sector, the survey captured mainly the point of view of hotels and hotel chains and only to a very limited extent the point of view of booking platforms. It thus offers only a partial view of the use and effects of parity clauses. The major concern reported by hotels is that this sector is characterised by the presence of a few powerful online platforms (OTAs). Many of them also pointed to negative effects of parity clauses, including narrow parity clauses, for consumers.²⁰⁵

The review of the economic literature pointed to both pro-competitive and anti-competitive rationales for the use of parity clauses. Concerning pro-competitive effects, the economic literature shows that parity clauses can be necessary to sustain the business model of platforms and can, as such, increase welfare for consumers to the extent that platforms do, too. The literature thus recognises that in certain circumstances the existence of platforms in the markets can have a positive effect on consumers. They can

²⁰³ See section 3.4.4 of the evaluation study.

²⁰⁴ See section 3.4.2.2.1 of the evaluation study.

²⁰⁵ See section 3.4.2.2.1 of the evaluation study.

improve the flow of information by aggregating the relevant data of suppliers and making such information available to consumers, thereby reducing search costs. They can reduce switching costs by empowering consumers, bring security to online transactions, promote innovation, enable the platforms to protect any investments that they may have made to provide pre-purchase services to consumers such as reviews or advice and, finally, help suppliers to enter or expand in the market by reducing advertising costs. Conversely, regarding anti-competitive effects, the economic literature shows that parity clauses can soften competition between retailers or platforms, impede innovation, entry of new suppliers and expansion of small suppliers and facilitate collusion between retailers or platforms to the detriment of consumers.²⁰⁶

Third, the **evaluation showed a divergent treatment of retail parity clauses by NCAs.**

Respondents to the public consultation expressed the view that NCAs have followed divergent approaches, notably in their cases in the hotel booking sector. This concerns, on the one hand, the German NCA and, on the other hand, the French, Italian and Swedish NCAs.

The evaluation study confirmed the divergent approaches by NCAs in relation to the treatment of narrow parity clauses in the hotel booking sector. The evaluation study pointed out that several NCAs decided not to take action against narrow parity clauses because they considered that they had only a low or no negative impact on competition, as the hotels or restaurants were still able to offer lower prices on other online platforms. However, a different stance was taken by the German NCA in relation to a narrow parity clause in its case against Booking.com.²⁰⁷ It found that hotels would have no incentive to reduce prices on other platforms if they could not offer lower prices on their own (commission-free) sales channels. The German NCA also considered that Booking.com's narrow parity clauses would restrict competition between hotels by limiting their freedom to set prices.

Fourth, very few respondents to the public consultation mentioned a possible **lack of coherence with the P2B Regulation**,²⁰⁸ pointing to Article 10 of the P2B Regulation, which is applicable without prejudice to the application of other Union rules, including

²⁰⁶ See section 3.4.2.3.1 of the evaluation study.

²⁰⁷ German NCA (Bundeskartellamt), Decision B 9 – 121/13 dated 22 December 2015. It should be noted that the Düsseldorf Higher Regional Court (Oberlandesgericht) annulled the prohibition decision on 4 June 2019 (VI-Kart 2/16 (V) – *booking*). The German NCA's appeal against the judgment is currently pending before German Supreme Court (Bundesgerichtshof).

²⁰⁸ Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.

competition law. It was argued that, to allow for a consistent assessment of parity clauses across the EU, the VBER should clarify the circumstances under which those clauses are prohibited.

4.6.4. Non-compete obligations (Article 5 of the VBER)

As explained in section 4.5 above, the VBER excludes three restrictions from the benefit of the block exemption irrespective of the market share of the parties to the agreement concerned, while the benefit of the VBER continues to apply to the remaining part of the vertical agreement if that part is severable from the non-exempted restrictions.

Article 5(1)(a) of the VBER concerns non-compete obligations the duration of which exceeds five years or is indefinite (including non-compete obligations that are tacitly renewable beyond a period of five years), except when they concern contract goods or services being sold by the buyer from premises or land owned by the supplier or leased by the supplier from third parties not connected with the buyer provided that the duration of the non-compete obligation does not exceed the period of occupancy of the premises and land by the buyer.²⁰⁹ Article 5(1)(b) of the VBER covers post-term non-compete obligations on the buyer, unless they are indispensable to protect know-how transferred from the supplier to the buyer, and limited to the point of sale from which the buyer has operated during the contract period and a maximum period of one year after the termination of the agreement, in line with Article 5(3) of the VBER. Article 5(1)(c) of the VBER concerns restrictions on the sale by members of a selective distribution system of products of specific competing suppliers. Paragraphs 65-69 of the Vertical Guidelines provide further guidance on these excluded restrictions.

The evaluation has shown that for a large majority of respondents to the public consultation **Article 5 of the VBER provides an appropriate level of legal certainty.**

However, although the content of this provision is well understood, a significant number of respondents to the public consultation **considered that the provision results in false negatives** by covering non-compete obligations that satisfy the conditions laid down in Article 101(3) of the Treaty and thus wrongly excluding them from the benefit of the VBER.

First, a significant number of respondents to the public consultation raised **issues with regard to the scope of Article 5(1)(a) of the VBER.**

²⁰⁹ See VBER, Article 5(2).

For some respondents to the public consultation, limiting the application of the VBER to non-compete obligations with a maximum duration of five years is not economically justified since businesses often enter into longer commercial relationships, coupled with long-term investments. They also argued that excluding tacitly renewable non-compete obligations from the VBER is legally unjustified to the extent that the buyer can terminate or renegotiate the agreement (including the non-compete obligation) at any time with a reasonable notice period and at reasonable costs.

Some respondents to the public consultation also considered the overly broad scope of the exclusion to result in an unnecessary burden for businesses. Some of the respondents indicated that, in practice, businesses wanting to benefit from the safe harbour of the block exemption limit the duration of their contracts to five years and obviate tacit renewal. In order to continue their contractual relationship beyond five years, they have to either include a renegotiation clause or sign a new contract, which generates an unnecessary administrative burden and additional transaction costs.

Moreover, respondents pointed out that the notion of premises used in Article 5(2) of the VBER is too restrictive and that the derogation should therefore be applicable to all business activities of the buyer.

In addition, some respondents to the public consultation pointed to a lack of guidance on the assessment of non-compete obligations that cannot benefit from the block exemption, but can be considered as nonetheless fulfilling the conditions of Article 101(3) of the Treaty. More specifically, some respondents indicated that it is not clear whether and under which circumstances non-compete obligations exceeding five years in franchising agreements are exempted from the application of Article 101(1) of the Treaty. In particular, respondents pointed out that paragraphs 148 and 190 of the Vertical Guidelines and Article 5(2) of the VBER are not fully consistent and clear as regards the admissibility of non-compete clauses of longer duration. In their view, due to the key features of franchise agreements, non-compete clauses are justified for the whole duration of the agreements, regardless of other conditions being met. The current rules are therefore not sufficiently clear on whether there are situations in which this would not be the case. Respondents also pointed to a lack of clarity as to whether non-compete clauses of longer duration in franchising agreements fulfil the conditions of Article 101(3) of the Treaty or fall outside the scope of Article 101(1) of the Treaty.

Other respondents took issue with the limited examples in paragraphs 146 and 148 of the Vertical Guidelines, which only mention two specific circumstances in which non-compete obligations longer than five years can be justified under Article 101(3) of the Treaty (i.e. high relationship-specific investments or the transfer of substantial know-how). They argued that the Vertical Guidelines do not contain enough examples and

explanations to illustrate how Article 101(3) of the Treaty is applied to non-compete obligations exceeding five years. Some respondents also pointed to the fact that the Vertical Guidelines do not contain a list of objective criteria that businesses could rely on to assess the compatibility of the duration of a particular non-compete obligation with Article 101(3) of the Treaty.

Finally, a few respondents pointed to a contradiction with Article L.330 of the French Commercial Code, which considers that exclusivity clauses up to 10 years are valid.

Second, some respondents to the public consultation considered that **Article 5(1)(b) of the VBER, which excludes post-term non-compete clauses from the benefit of the VBER, is too broad**. Besides, some of them argued that the **cumulative conditions for the derogation set out in Article 5(3) of the VBER are outdated and too narrowly defined**.

Some respondents to the public consultation took the view that limiting the benefit of the VBER to post-term non-compete obligations applying "*to premises and land from which customers have operated during the contract period*" does not correspond to new market developments such as the increasing trend towards online sales. Moreover, the limited territorial scope of this provision hinders the initially envisaged protection of know-how and trade secrets since the customer can resume its competing activity from a location close by.

Moreover, the respondents to the public consultation pointed to the fact that a post-term non-compete obligation can only benefit from the block exemption if it is indispensable to protect the know-how transferred from the supplier to the buyer and provided that this know-how is substantial (see Article 1(1)(g) of the VBER). According to them, the VBER and the Vertical Guidelines do not provide enough guidance to determine in practice if the know-how to be protected is in fact substantial and thus covered by the derogation.

Respondents to the public consultation representing the franchisor side also considered that a post-term non-compete obligation that is limited to one year and does not cover the entire exclusive territory allocated to the franchisee does not provide for sufficient protection of know-how. In contrast, respondents representing the franchisees argued that post-term non-compete clauses are disproportionate, even if limited to one year. They explained that, in practice, such clauses mean that the franchisee is faced, at the end of the contract, with either unconditionally continuing the cooperation with the same franchisor or losing its activity and customers. Such clauses thus place franchisees in a weaker contractual position. In addition, respondents argued that such non-compete clauses also deter new franchisors from entering the market, as existing franchisees will be deterred from changing to another franchise network. As regards the limitation of such

non-compete clauses to situations in which they are indispensable to protect the supplier's know-how, respondents argued that, in practice, it is difficult for franchisees to argue that such a condition is not fulfilled, since the franchisor usually does not specify what know-how is considered relevant and franchisees cannot afford to challenge this in court. They therefore argued that the definition of know-how in the VBER is too broad.

Finally, some respondents pointed to a contradiction with Articles L.341-1 and L.341-2 of the French Commercial Code, which prohibit post contractual non-compete clauses, unless they fulfil certain cumulative criteria, and are therefore stricter than the VBER.

Third, a few respondents to the public consultation took the view that **Article 5(1)(c) of the VBER, which excludes non-compete obligations imposed on members of a selective distribution system from the benefit of the VBER, is unjustified**, considering the efficiencies that can result from restricting the ability of authorised resellers to sell products or brands of particular competing suppliers.

Respondents argued that such restrictions may be justified to avoid free-riding by specific competitors on the investments made by the supplier towards its authorised resellers (e.g. in training and promotional material).

Respondents further argued that also the need to protect sensitive commercial information provided by the supplier can justify limiting the ability of authorised resellers to deal with others suppliers, in particular when the products and services concerned are technically sophisticated and require close interaction between the supplier and its buyers. This close technical cooperation may create the justified concern that the information provided by the supplier to the authorised reseller could be used for the benefit of its competitor(s) and cause the supplier to limit the disclosure of such information to the detriment of the reseller and end customers.

4.6.5. Exclusive distribution

Exclusive distribution refers to a distribution model where the supplier agrees to sell its products only to one distributor for resale in a particular territory and where the exclusive distributor is restricted from actively selling into other territories, which are either reserved for the supplier or allocated to other exclusive distributors.²¹⁰ As explained in section 4.6.2 above, exclusive distribution agreements with these characteristics are block-exempted pursuant to Article 4(b)(i) of the VBER, provided that the parties' market share does not exceed the market share threshold of 30%. Paragraphs 151-167 of the Vertical Guidelines provide guidance on the assessment of exclusive distribution

²¹⁰ See Vertical Guidelines, paragraph 151.

agreements that fall outside the scope of the VBER and are therefore subject to an individual assessment. Paragraph 151 of the Vertical Guidelines explains that the main competition risks stemming from exclusive distribution are reduced intra-brand competition and market partitioning, which may in particular facilitate price discrimination. Moreover, when most or all suppliers in a particular market distribute their products on an exclusive basis, this may soften competition and facilitate collusion at both the suppliers' and the distributors' level. Lastly, exclusive distribution may lead to the foreclosure of other distributors and thus reduced competition at the distribution level.

The evidence gathered during the evaluation indicates that **the rules on exclusive distribution have generally worked well**. A large majority of stakeholders indicated that the treatment of exclusive distribution in the VBER, together with the Vertical Guidelines, is appropriate and does not raise major issues regarding legal certainty. A majority of the respondents to the public consultation also indicated that paragraphs 151-167 of the Vertical Guidelines provide an appropriate level of legal certainty.²¹¹ In addition, very few respondents indicated that the rules on exclusive distribution would need revision in light of new market developments. Similarly, most NCAs found the current rules to work well and had no specific comments on them.

The evaluation study, however, found that exclusive distribution is not a widespread practice, with only a limited number of stakeholders reporting the use of this distribution model. The market investigation performed as part of the evaluation study indicated that selective distribution is generally preferred over exclusive distribution, as it allows to achieve the same benefits while reducing costs and allowing better market coverage. Some stakeholders reported using exclusive distribution for new brands, and subsequently switching to selective or even unrestricted distribution once the brand or product has become well known in the market. As to the sectors covered, the market investigation performed as part of the evaluation study suggests that this distribution model remains more relevant for specific markets, like specialised electronics (e.g. medical lab equipment), industrial machinery, or frozen products. As for NCA cases concerning exclusive distribution during the past ten years, the highest number was

²¹¹ Respondents to the public consultation were asked to comment on the level of legal certainty of Article 4(b) of the VBER and the corresponding paragraphs of the Vertical Guidelines in their entirety, while also having the possibility to explain their views in free text. There is therefore no separate information on how respondents as a whole view the level of legal certainty of the exception set out in Article 4(b)(i) of the VBER. The views of the respondents as a whole regarding Article 4(b) of the VBER are explained in section 4.6.2 above. This section also explains issues raised by individual respondents as regards the level of legal certainty of the exception using free text.

reported in the pharmaceutical industry and the media sector (although a number of other sectors were also concerned, such as telecoms or food and beverages).

Nevertheless, **the evaluation pointed to some issues regarding the current rules.**

First, some respondents to the public consultation, as well as participants in the stakeholder workshop argued that **the rules are not sufficiently flexible as regards the exception set out in Article 4(b)(i) of the VBER**, as they do not allow appointing two or more distributors for a given exclusive territory, but just one per territory. Other respondents to the public consultation considered there to be a lack of flexibility in the requirement that a seller has to reserve all territories or customers either to an exclusive buyer or to itself. The exception therefore does not apply to cases where a seller has appointed one or more exclusive distributors but has failed to reserve all other territories or customers to itself or other buyers. Respondents explained that this provision does not adequately reflect the piecemeal way in which many distribution networks are established. They argued that it is not sufficiently clear whether it is possible for an exclusive distribution agreement to cover only one Member State or a part of a Member State and whether it is necessary to identify in the agreement concluded with non-exclusive distributors all exclusive distributors at European level.

Second, respondents pointed to a **lack of guidance or limitation with regard to the size or scope of the exclusive territory or customer group**. The evaluation study indicated that exclusivity by territory is more prevalent than exclusivity by customer group, although there is also evidence for some overlap between the two. Other respondents mentioned a lack of clarity about whether a supplier can reserve for itself a territory or a customer group where it does not supply that territory or customer group and has no intention to do so in the near future.

Third, as regards the fact that the rules allow the restriction of active sales by a buyer, but only where such a restriction does not limit sales by the customers of the buyer, some respondents argued that **there could be legitimate reasons for suppliers to restrict also sales by the customers of the buyer**, so that this condition could be removed. Other respondents explained in this regard that manufacturers and brand owners are concerned that distributors could intentionally use third parties for the sole purpose of undermining the active selling restrictions and argued that it should be possible to prevent dealers from selling to customers where it is obvious that these customers intend to only or predominantly sell into other exclusive territories. Respondents also mentioned a lack of clarity with regard to the notion of "customers of the buyer", as it is not clear whether it includes all forms of sub-dealers, or just independent retailers.

Fourth, stakeholders mentioned a lack of clarity regarding the **possibility to combine selective and exclusive distribution** (this issue was also raised as regards the rules on selective distribution, see section 4.6.6 below).

Respondents to the public consultation and participants in the stakeholder workshop indicated that there is insufficient guidance on the circumstances in which exclusive and selective distribution may be combined in the same territory, but at different levels of the supply chain without raising concerns under Article 101(1) of the Treaty. Respondents argued that exclusive distribution at the wholesale level and selective distribution at the retail level is commonly used as it reflects the most efficient way of putting certain types of goods on the market. They therefore asked for a clarification that this is indeed possible under the VBER and whether, in such a scenario, the exclusive distributors at wholesale level may be restricted from selling to retailers that are not authorised under the selective distribution network at retail level. The evaluation study confirmed that combining exclusive distribution at the wholesale level and selective distribution at the retail level is a common practice and that there is a lack of clarity in the current rules as to the circumstances under which a combination of selective and exclusive distribution may benefit from the VBER.

Respondents to the public consultation also indicated that there is insufficient clarity as to how exclusive and selective distribution may be combined in different territories. While this appears to be allowed by the current rules, respondents pointed to a lack of clarity as to whether, in case a supplier applies selective distribution in some territories and exclusive distribution in others, exclusive distributors could be prohibited from making sales to unauthorised dealers in the territories where the supplier applies selective distribution.

Respondents also indicated that the relationship between paragraphs 56 and 152 of the Vertical Guidelines is not sufficiently clear. Paragraph 152 of the Vertical Guidelines states that a combination of exclusive distribution and selective distribution is only exempted by the VBER if active selling into other territories is not restricted. Paragraph 56 of the Vertical Guidelines states that dealers in a selective distribution system 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. Respondents to the public consultation indicated that it is not clear, when reading both paragraphs, whether active sales restrictions are allowed in a selective distribution system when this is done in order to protect an exclusive distribution system that operates in another territory. Respondents further argued that a restriction of active sales in such cases could be subject to the same assessment as set out in paragraph 63 of the Vertical Guidelines, which indicates that an individual exemption under Article 101(3) of the Treaty could be available for restrictions on active sales by appointed

wholesalers to appointed retailers operating in the territory of other appointed wholesalers to overcome possible free-riding on the investment of the latter in promotional activities to support retail sales in their respective territory.

Participants in the stakeholder workshop also pointed to a lack of clarity in the Vertical Guidelines with regard to the possibility for distributors to set up selective distribution systems in some Member States, while resorting to exclusive distribution in others, or to allow small distributors to focus their activities on some Member States only.

NCA confirmed that the VBER and the Vertical Guidelines are not clear about possible limitations on combining selective and exclusive distribution, in particular as regards the possibility to restrict active sales in the case of a combination of the selective and exclusive distribution. The evaluation study corroborates the finding that there is a lack of clarity on how to combine exclusive and selective distribution, in particular as regards the possibility to restrict active sales.

4.6.6. Selective distribution

As set out in Article 1(e) of the VBER, selective distribution refers to a distribution system in which the supplier undertakes to sell the contract goods or services to distributors selected on the basis of specified criteria, while the distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system. As explained in paragraph 175 of the Vertical Guidelines, to assess the possible anti-competitive effects of selective distribution under Article 101 of the Treaty, a distinction needs to be made between purely qualitative selective distribution, where distributors are selected only on the basis of objective criteria required by the nature of the product (e.g. training of sales personnel), and quantitative selective distribution, where selection criteria are used that limit the potential number of distributors more directly (e.g. requiring minimum or maximum sales or fixing the number of dealers). Purely qualitative selective distribution is considered to fall outside Article 101(1) of the Treaty due to the lack of anti-competitive effects, provided that the conditions established by the CJEU in its *Metro* judgment (the so-called "*Metro* criteria") are fulfilled.²¹²

²¹² Judgment of 25 October 1977 in Case 226/76, ECLI:EU:C:1977:167, *Metro SB-Großmärkte GmbH & Co. KG v Commission*. Selective distribution systems, however, are considered to restrict competition if they, especially as a result of market concentration or of the cumulative effects of parallel networks of similar agreements, impair price competition between products of different brands or block access to the market for undertakings using other forms of distribution. See Judgment of 22 October 1986 in Case 75/84, ECLI:EU:C:1986:399, *Metro v Commission*, (*Metro II*).

As explained in paragraph 176 of the Vertical Guidelines, quantitative and qualitative selective distribution systems are block exempted as long as the market shares of the parties to the selective distribution agreement do not exceed 30%, even if combined with other non-hardcore vertical restrictions, provided that active selling by the authorised distributors to each other and to end users is not restricted. The latter restrictions are considered hardcore restrictions pursuant to Article 4(c) and 4(d) of the VBER. The restriction of sales by the members of a selective distribution system to unauthorised distributors within the territory reserved by the supplier for the operation of that system is however permitted pursuant to Article 4(b)(iii) of the VBER. An obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers is excluded from the benefit of the block exemption pursuant to Article 5(1)(c) of the VBER (see section 4.6.4 above).

It should be noted that, as clarified in paragraph 176 of the Vertical Guidelines, the VBER exempts selective distribution regardless of the nature of the product concerned and regardless of the nature of the selection criteria. However, where the characteristics of the product do not require selective distribution or do not require the applied criteria (e.g. the requirement to have one or more brick-and-mortar shops or to provide specific services), such a distribution system does not generally bring about sufficient efficiency-enhancing effects to counterbalance a significant reduction in intra-brand competition. If appreciable anti-competitive effects occur, the benefit of the VBER is likely to be withdrawn.

Outside the safe harbour created by the VBER or in case of a withdrawal of the benefit of the block exemption, selective distribution systems are subject to an individual assessment. Paragraphs 174-188 of the Vertical Guidelines provide guidance on the assessment of selective distribution systems under Article 101 of the Treaty.

The evaluation has identified two main categories of issues regarding the functioning of the VBER and the Vertical Guidelines in relation to selective distribution systems. The first category concerns general issues related to the functioning of selective distribution systems (see section 4.6.6.1 below) and the second category concerns specific issues related to restrictions on online sales in the context of selective distribution (see section 4.6.6.2 below).

4.6.6.1. General findings

First, all stakeholders, including respondents to the public consultation and participants in the workshop, unanimously confirmed the **significant increase in the use of selective distribution at different levels of the vertical supply and distribution chain**, covering an increasing number of geographical areas and products over time. The evidence

provided by the evaluation study confirmed the finding of an increased use of selective distribution systems during the last ten years, which is in line with the results of the Commission's e-commerce sector inquiry.

Second, the evidence gathered during the evaluation indicates that the **level of legal certainty provided by the VBER and the Vertical Guidelines as regards selective distribution is overall acceptable, although there are some areas where clarifications may be needed**, notably to ensure a more coherent application of the rules across different Member States.

The replies of a large majority of the respondents to the public consultation confirmed this finding. However, as illustrated below, the areas where respondents pointed to a need for clarifications concern, inter alia, the relationship between selective distribution systems and exclusive distribution, the application of Article 4(b)(iii) of the VBER, including the related paragraph 55 of the Vertical Guidelines, and the application of paragraph 63 of the Vertical Guidelines.

This finding is also supported by the evidence provided in the evaluation study. It is reported that generally, according to the interviews performed, most stakeholders seem to be satisfied with the way selective distribution agreements are treated under the current regulatory framework.

The need for clarifications regarding some aspects was also highlighted by the NCAs which notably pointed to a lack of clarity with regard to the interaction between the *Metro* criteria and the conditions for exemption of selective distribution under the VBER.

Third, **stakeholders have very diverse opinions about the effects of selective distribution systems on competition set out in the related provisions of the Vertical Guidelines**. This is also reflected in the evidence collected in the context of the evaluation study.

Several stakeholders reported that selective distribution systems result in efficiencies for consumers which are not only reflected in competitive prices but also in non-price aspects such as higher quality and service levels, as well as a uniform brand image and uniformity of pre- and post-sales services offered to customers. They also reported that selective distribution systems protect authorised resellers from free-riding by low service retailers and generate incentives for brand owners and retailers to offer an appropriate level of quality and service, an appropriate product range, a brand presentation that enhances the value of the branded product, as well as to ensure the expertise that is necessary to add value to the branded product while not harming the brand.

The use of selective distribution systems also allows new ways of offering products to customers such as "click and collect". This service allows consumers to gather information, as well as to select and purchase their preferred products online and to pick up the products in a physical store, thus avoiding queues at pick-up and freeing up time for discovering new products in the store. Respondents to the public consultation argued that the ability to provide such services can only take place within a network of authorised retailers where any free-riding concerns are mitigated by the fact that consumers use the sales services offered by the same authorised retailer in different channels (i.e. own website and physical store) or more largely among retailers who all invest in the development of the network and notably the provision of an appropriate level of pre-sales services.

Some respondents to the public consultation referred to the efficiencies linked to selective distribution networks for luxury products and high-tech products. They reported that the control of online sales that can be achieved within a selective distribution system is essential to avoid the risk of sales by unauthorised retailers, which could jeopardise the brand image and substantially reduce its value, including counterfeit sales.

In contrast, some respondents to the public consultation argued that selective distribution systems can be used as a means to implement resale price maintenance, which is a hardcore restriction pursuant to Article 4(a) of the VBER. They explained that, by threatening to stop the supply of products, suppliers can force authorised retailers to follow their price recommendation, which amounts to fixing the resale price in the sense of Article 4(a) of the VBER.

Some respondents reported that the criteria used to select authorised retailers in the context of selective distribution are often not communicated by the supplier. The evidence gathered during the evaluation on the transparency of the selection criteria used by suppliers is however rather mixed. In particular, the evaluation study reported examples of both transparent, clear and objective criteria (for instance in the cosmetics sector) and secret criteria (for instance in the case of smaller brands in various sectors).

Some respondents to the public consultation argued that selective distribution systems are particularly effective and justified for specific types of products, like luxury and high-tech products. They thus argued that the benefit of selective distribution systems depends crucially on the nature of the product concerned and the extent to which the selection criteria used are non-discriminatory, transparent, necessary and proportionate. According to those respondents, the absence of these characteristics would reduce competition in the market and thus create the conditions for maintaining prices at artificially high levels.

The evaluation study indicated that selective distribution systems can have both a pro-competitive and an anti-competitive rationale and that their effects on consumer welfare

depend on the specific market circumstances. According to the literature review,²¹³ the pro-competitive rationale is to encourage the provision of retail services by addressing free-rider problems, such as incentivising retailers to maintain and support the brand image, supporting the launch of new products and protecting retailers in making relationship-specific investments. The anti-competitive rationale is twofold, namely facilitating collusion at supplier level and preventing certain retailers from offering certain products (i.e. foreclosure at retailer level). According to the interviews conducted, the evaluation study found that the most common motivations behind the implementation of selective distribution networks are to protect brand image and to offer a better customer experience. According to some stakeholders, to promote innovation, there is a need for investments not only by the manufacturers but also by retailers. Innovative products often require investments in pre-sales and after-sales services that can be supported through selective distribution agreements. In order to allow for such investments, there is a need to have sufficient margins. If competition between retailers were to be only focussed on price, these margins could be endangered. Therefore, according to the interviews and the survey conducted, supply chains need to shift competition from purely price-based competition to competition on the quality of services provided. The evaluation study however recognised that this rationale cannot be valid across all industries and product categories.

NCA's noted that over the last ten years there has been a tendency among manufacturers to apply qualitative selection criteria that are completely unrelated to the actual requirements of the product concerned. According to them, this seems to suggest that selective distribution could be used as a means to reduce intra-brand competition and discipline deviant market behaviour, with the ultimate aim of stabilising prices at a higher level than under competitive conditions.

Fourth, in the evaluation, stakeholders questioned the **appropriateness of the level of the market share thresholds in the context of selective distribution systems**.

Some respondents to the public consultation suggested that a level of 30% seems rather high in view of the fact that selective distribution systems often include restrictions on online sales and can thus substantially limit the pervasiveness of the online sales channel that many customers could otherwise use.

NCA's also stressed that the exemption of selective distribution up to a market threshold of 30% might generate false positives by exempting some agreements that should not

²¹³ See section 3.1.1.2.1 and Annex XI.II of the evaluation study.

have been exempted, with a not well functioning withdrawal mechanism being the only available instrument to tackle problematic situations below the market share threshold.

Fifth, the evaluation pointed to a specific **issue regarding the functioning of the market share threshold and the willingness of businesses to set up pan-European selective distribution systems.**

A respondent to the public consultation mentioned that basing the exemption on a 30% market share might conflict with the wish of businesses to impose a homogeneous set of rules in a pan-European selective distribution system, if the business holds market shares above this threshold in some of the national markets where it operates. As a result, a pan-European strategy would be undermined by the need to introduce specific amendments to the general criteria for the markets where the business's market shares are above 30%.

At the same time, other respondents underlined the importance of having flexibility to allow specific and differentiated rules to be imposed in different Member States in order to capture the local characteristics of the markets concerned.

Sixth, the evidence gathered during the evaluation indicated that **Article 4(b)(iii) of the VBER is perceived as not providing sufficient legal certainty.**

Respondents to the public consultation argued that Article 4(b)(iii) of the VBER and the related paragraph 55 of the Vertical Guidelines are too limited in scope. Given that this provision does not allow to limit sales outside the territory reserved for selective distribution, members of the selective distribution system are free to sell to unauthorised distributors located outside the reserved territory who can then resell the product back into the reserved territory. According to respondents, this would undermine the ability of businesses to set up selective distribution systems in the most efficient way, thus forcing them to choose between an ineffective "permeable" selective distribution system for a limited territory and a selective distribution system at pan-European level to avoid this issue.

Respondents to the public consultation pointed out that paragraph 55 of the Vertical Guidelines only covers situations where the supplier does not yet market its products in a given country through a selective distribution system. Therefore it does not cover situations where the supplier has chosen to market its products itself. As a result, authorised distributors in other countries can sell to unauthorised distributors in the country in which the supplier has chosen to distribute the products itself. According to the respondents, it should however be the right of the supplier to limit sales by authorised distributors in these circumstances.

For the same reason, respondents to the public consultation argued that as a consequence of the current scope of Article 4(b)(iii) of the VBER, a supplier cannot operate parallel networks of selective distribution systems in different territories.

Participants in the workshop reported that the current framework does not allow selective distribution to be enforced in a sufficiently strict manner against the sales by unauthorised resellers within the EU. They mentioned that the lack of enforceability translates directly into a low quality of services for consumers.

Seventh, the evaluation identified apparent issues in relation to the **compatibility between selective distribution and exclusive distribution**, which are dealt with in the context of exclusive distribution in section 4.6.5 above.

Eighth, the evidence gathered during the evaluation indicated that **paragraph 63 of the Vertical Guidelines, which allows restrictions on active sales within a selective distribution system under certain conditions, is perceived as not providing sufficient legal certainty** and that businesses therefore refrain from applying this provision.

Some respondents to the public consultation explained that this provision introduces a welcome degree of flexibility to the hardcore restriction set out in Article 4(d) of the VBER and the related paragraph 58 of the Vertical Guidelines. This is because it provides appropriate investment incentives to authorised wholesalers by limiting free-riding by authorised wholesalers located in other territories. However, due to the insufficient clarity on how NCAs would intend to assess compliance with paragraph 63 of the Vertical Guidelines, businesses prefer not to run any financial and reputational risk and thus refrain from applying it in practice.

Ninth, all stakeholders, including respondents to the public consultation, participants in the workshops and NCAs, pointed to the fact that over the last ten years **the case law and enforcement practice with regard to selective distribution has developed significantly**. Therefore, the VBER and Vertical Guidelines should be updated by including relevant Union case law. A large number of respondents pointed in this regard to Union Court judgements like *Pierre Fabre*,²¹⁴ *Auto 24*²¹⁵ and *Coty*,²¹⁶ as well as the

²¹⁴ Judgement of 13 October 2011 in Case C-439/09, EU:C:2011:649, *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi*.

²¹⁵ Judgment of 14 June 2012 in Case C-158/11, EU:C:2012:351, *Auto 24 SARL v Jaguar Land Rover France SAS*.

²¹⁶ Judgment of 6 December 2017 in Case C-230/16, EU:C:2017:941, *Coty Germany GmbH v Parfümerie Akzente GmbH*.

enforcement practice of the Commission (e.g. *Guess* case²¹⁷) and NCAs (e.g. the *Stihl* case by the French NCA²¹⁸ and the *Asics* case by the German NCA²¹⁹). In addition, the evaluation study provides an overview of relevant NCA cases during the last ten years and also identifies relevant new case law.

Tenth, the evaluation showed that, over the last ten years, **NCAs have not always assessed the compatibility of selective distribution systems with Article 101 of the Treaty in a consistent manner.**

A large part of the respondents to the public consultation and several participants in the workshop stated that the NCAs follow inconsistent approaches in their assessment of selective distribution systems. Notably, they referred to the qualification as by object restriction of certain criteria imposed on authorised distributors. As an example, they pointed to the divergences between the French NCA (e.g. in the *Stihl* case²²⁰) and the German NCA (e.g. in recent publications on vertical restrictions²²¹).

NCAs requested more guidance on the interpretation of recent case law, which seems to give suppliers operating selective distribution systems greater control over the conditions under which their authorised distributors can resell their products and services. They argued that this case law could be interpreted in a way that may encourage businesses to establish selective distribution systems with the objective of imposing more restrictions on their authorised distributors in cases where the objective of brand protection may not be justified with regard to the nature of the products or services concerned.

The evidence collected by the evaluation study confirms that NCAs approach differently certain restrictions found in selective distribution agreements. Notably regarding online

²¹⁷ See Commission press release of 17 December 2018, IP 18/6844, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_18_6844. A non-confidential version of the prohibition decision is available on DG Competition's website.

²¹⁸ Decision 18-D-23 of 24 October 2018 regarding practices implemented in the retail of outdoor power equipment, <https://www.autoritedelaconurrence.fr/en/decision/decision-18-d-23-24-october-2018-regarding-practices-implemented-retail-outdoor-power>.

²¹⁹ Decision B2-98/11 of 26 August 2015; summary available at: <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2016/B2-98-11.pdf?blob=publicationFile&v=2>.

²²⁰ Decision 18-D-23 of 24 October 2018 regarding practices implemented in the retail of outdoor power equipment, <https://www.autoritedelaconurrence.fr/en/decision/decision-18-d-23-24-october-2018-regarding-practices-implemented-retail-outdoor-power>.

²²¹ See "*Competition restraints in online sales after Coty and Asics - what's next?*", Series of papers on "*Competition and Consumer Protection in the Digital Economy*", October 2018.

sales bans, marketplace/platform bans and dual pricing the legal assessment by NCAs differed to some extent.

Eleventh, the evidence gathered during the evaluation indicated that the VBER and the Vertical Guidelines are perceived to **lack guidance on the resale of spare parts** and notably on the question of whether the resale of spare parts can be restricted to authorised retailers. A respondent to the public consultation who had highlighted this issue explained that in order to maintain the high-quality nature of the products that are subject to selective distribution, a manufacturer needs to limit the resale of spare parts to authorised distributors only.

4.6.6.2. Specific findings related to online sales

First, the evidence gathered during the evaluation indicated that **paragraphs 52-54 of the Vertical Guidelines**, which contain guidance on how to assess some online sales restrictions, are perceived as providing a **generally low level of legal certainty**.

Many stakeholders, including respondents to the public consultation, participants in the workshop and NCAs, pointed to a lack of guidance on the treatment of some online sales restrictions in the context of selective distribution, which reduced legal certainty for this form of distribution.

The evidence gathered in the evaluation study confirmed the need for more guidance on certain online sales restrictions in the context of selective distribution, which is reportedly a distribution model where those types of restrictions are used most often.

Second, the evaluation identified a **large variety of views among stakeholders on the effects of the brick-and-mortar requirement**, which is block exempted under the current rules as explained in paragraph 54 of the Vertical Guidelines.

A large number of respondents to the public consultation (including manufacturers) stressed the importance of this restriction in the context of selective distribution and the need for flexibility regarding its implementation (e.g. phrased as a requirement that authorised retailers sell a certain minimum number of products in value or volume offline). They stated that the brick-and-mortar requirement is necessary to provide offline distributors with the necessary incentives to invest in promoting a product by preventing free-riding by online distributors that focus mainly on price and do not offer comparable pre-sales services. Some respondents also reported that the costs incurred by an offline distributor are significantly higher than the costs of an online distributor. As an example, they pointed to employment costs, which are 2 to 5 times lower online than in traditional retail channels.

Some respondents (including online platforms) however pointed out that this requirement is a way to exclude pure online players from the distribution of certain products and services, regardless of the quality of the services they provide. They argued that pure online distributors have made and are currently making significant investments in the improvement of their services. An example is investments in the overall quality of the website, improvements in the display of pictures and videos (e.g. three-dimensional views), purchasing guides, customer feedback, scoring systems and online customer service to help customers to make the right choice (e.g. through a chat function) operated by staff trained by the suppliers for that purpose. Substantial investments are also made to improve the logistics, e.g. with a view to reducing the delivery time (sometimes even allowing for delivery within the same day) and allowing customers to exchange the product after having tried it out or to refuse the purchase within 14 days, which is not the case if they purchase products offline.

The evaluation study confirmed a widespread use of the brick-and-mortar requirement in selective distribution systems, which reflects the importance of this criterion for suppliers. While recognising that this requirement helps to address free-riding by online distributors on pre-sales services provided in physical stores, the evaluation study however also shows that distribution has evolved towards an omni-channel experience where free-riding can occur in both directions, thus including free-riding on the investments of online distributors by offline distributors.²²² This finding is in line with the results of the e-commerce sector inquiry.²²³

NCA's pointed out that there is a lack of clarity regarding the limits of the possibility for suppliers to require their distributors to operate a brick-and-mortar shop. This concerns notably the question (i) whether there is any ceiling to be applied on the number of required brick-and-mortar shops (e.g. absolute number per geographic area or relevant market vs. a more subjective proportionality requirement), (ii) whether this requirement is only allowed in selective distribution or also for other types of distribution systems, and (iii) whether such a requirement is, in principle, acceptable regardless of the market share of the supplier (i.e. also above the 30% threshold).

Third, NCA's pointed out that **paragraph 54 of the Vertical Guidelines is not sufficiently clear as to whether quality standards for the use of the internet may also be imposed in distribution systems other than selective distribution.**

²²² See sections 3.3.1.5, 3.3.2.5, 3.3.3.5, 3.3.4.5 and 3.3.9 of the study on consumer purchasing in Europe.

²²³ See section 2.1 of the Final report on the E-commerce Sector Inquiry at https://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html.

Fourth, the evidence gathered during the evaluation indicated **concerns as regards the functioning of the equivalence principle enshrined in paragraph 56 of the Vertical Guidelines**, which is meant to ensure that manufacturers do not dissuade distributors from selling online by applying criteria to online sales that are not overall equivalent to those applied to offline sales. The evaluation pointed to mixed evidence suggesting that the equivalence principle is, on the one hand, ill-suited to and, on the other hand, compatible with the current retail landscape. Furthermore, the evidence suggested that the Vertical Guidelines do not provide sufficient guidance on the assessment of the equivalence principle.

Several respondents to the public consultation argued that the equivalence principle is based on a wrong premise because online and offline distribution are inherently different sales environments and thus require different sets of criteria and approaches to account for this difference. They stressed that online sales are carried out at distance and do not allow physical interaction, whereas brick-and-mortar sales are carried out instantaneously and allow for physical interaction, the provision of personalised advice and demonstration of the product at the point of sale. Furthermore, they observed that this principle has been misused by some NCAs, which have used it as a means to impose stringent conditions of equivalence on online and offline sales to the detriment of consumers. This is all the more problematic given that the lack of equivalence between online and offline criteria amounts to a hardcore restriction, which creates major legal uncertainty for businesses in view of the objective differences between the two sales environments.

In contrast, other stakeholders such as the participants in the workshop defended the effectiveness of the principle of equivalence with regard to qualitative and quantitative selection criteria applicable to all distribution channels, including marketplaces. They argued that the equivalence principle benefits consumers by resulting in more competition and choice, as well as better access to a variety of distribution channels, while protecting product quality and integrity. They considered that the ability of retailers to freely choose their distribution channels in the context of selective distribution also benefited consumers.

Moreover, some respondents to the public consultation, mainly retailers and online players, and some NCAs pointed out that the Vertical Guidelines do not explain and illustrate sufficiently clearly when the difference between the criteria applied to online and offline sales would amount to a hardcore restriction. They also argued that further clarifications are needed to ensure that suppliers do not impose online sales restrictions that go beyond the requirements imposed for offline sales, such as the imposition of marketplace bans for online sales, while at the same time allowing offline retailers to sell in non-branded sections of offline stores. They further explained that the Vertical

Guidelines lack a clear list of examples illustrating the implementation of the equivalence principle, as well as a clarification on whether the equivalence principle only applies to selective distribution or also to other distribution models.

Some respondents pointed to the fact that even within the online sales environment there are major differences across the different online sales channels, which require different sets of criteria. By way of example, they referred to sales on third-party online marketplaces and the specificities of this distribution channel such as the rules on product listings, search placement, winning the buy box, customer reviews and logistics/fulfilment.

The evaluation study showed that the effectiveness of the equivalence principle needs to be assessed against the new retail landscape. The evaluation study found that the retail landscape has changed dramatically over the last ten years as a result of new technologies and accelerated digitalisation. Technological developments have notably changed consumer behaviour and expectations. Today's consumer journey is a fluid omni-channel process whereby consumers can switch easily within the online channel (e.g. between online retailers and online platforms), between online and offline channels, and within the offline channel (i.e. between different physical stores), as well as between mono-brand and multi-brand distributors. Consumers therefore expect to have a continuous omni-channel experience when shopping for a particular product or service. In response to this change in consumer behaviour and in order to meet consumer expectations, businesses aim at creating seamless omni-channel environments to allow for the optimisation of consumer choice and a high-quality brand experience. The evaluation study reported that these developments have driven brand owners to cooperate more closely with wholesalers and retailers in the context of selective distribution networks in order to better serve consumers. Hence, differently from the past when there was a desire to exclude online players and notably online platforms from access to branded products, many suppliers are nowadays focusing their strategy on protecting the value of their products, while ensuring a seamless omni-channel sales environment. Suppliers therefore aim, to the extent possible, at setting standards that must be used in all types of distribution channel, be it online or offline. Where the requested criteria cannot all be fulfilled by online players, the requirements are sometimes adapted to fit online business models.²²⁴

Fifth, paragraph 176 of the Vertical Guidelines is perceived as not providing sufficient legal certainty in relation to the possibility to withdraw the benefit of the VBER in certain cases. A respondent to the public consultation mentioned that although

²²⁴ See section 4.3.1 of the evaluation study.

withdrawals are used very exceptionally, the wording of the provision, which links the possibility of withdrawal to the characteristics of the product concerned and the brick-and-mortar requirement creates uncertainties.

Sixth, the evidence gathered during the evaluation indicated a **lack of effectiveness of the withdrawal procedure in the context of cumulative effects resulting from parallel selective distribution networks**, as explained in paragraph 179 of the Vertical Guidelines.

A respondent, who is a pure online player, highlighted that the analysis set out in paragraph 179 of the Vertical Guidelines would lead to false positives, thus allowing selective distribution systems with anti-competitive effects to benefit from the VBER. The respondent argued that a broad use of selective distribution (by large and small suppliers) below the threshold of 50% as of which cumulative effects are considered likely to arise could still be problematic for pure online players because suppliers using selective distribution are more likely to refuse access to their distribution network to such players. Exempting such agreements despite the resulting foreclosure of pure players creates negative effects for competition and eventually consumers.

Similarly, NCAs argued that selective distribution systems benefiting from the VBER despite having effects on competition that are incompatible with Article 101(3) of the Treaty can only be captured through the individual withdrawal of the exemption pursuant to Article 29 of Council Regulation 1/2003. This withdrawal mechanism has however in practice not proven to be an effective tool to tackle such situations.

Seventh, the evidence gathered during the evaluation indicated perceived **lack of guidance on the assessment of certain restrictions on sales through third-party online marketplaces and need to update the rules in light of recent case law**.

Stakeholders pointed unanimously to the importance of having clear guidance on this aspect and of updating the VBER and the Vertical Guidelines in light of the landmark *Coty* judgement.²²⁵ The evaluation study confirmed this necessity.

²²⁵ Judgment of 6 December 2017 in Case C-230/16, EU:C:2017:941, *Coty Germany GmbH v Parfümerie Akzente GmbH*. In this judgment, the Court of Justice confirmed that selective distribution systems designed to preserve the luxury image of products can comply with Article 101(1) of the Treaty. Analysis of whether or not a marketplace ban in a selective distribution agreement escapes the application of Article 101(1) of the Treaty must be based on the so-called Metro-criteria. Even if marketplace bans were to restrict competition in individual cases, they do not constitute a hardcore restriction under Articles 4 b) or 4 c) of the VBER.

However, the evaluation showed that stakeholders have different interpretations of the *Coty* judgment, notably in relation to the applicability of the judgment beyond luxury goods. The evaluation study confirmed this uncertainty, pointing out that it is still not clear to what extent the permissibility of marketplace bans is limited to specific types of products and whether it also affects sales via the authorised distributors' own websites.

In this context, it is worth mentioning that, following the *Coty* judgment, as reported in section 4.1.6 above, a Competition policy brief on the application of the EU competition rules to marketplace bans was issued. The policy brief provides a common point of reference to stakeholders in the Member States on how to apply Article 101 of the Treaty to a prohibition by a supplier on the use of third-party marketplaces by its distributors.

Eighth, the evaluation pointed to **discrepancies in the assessment by NCAs of some restrictions on the use of online marketplaces.**

NCAs indicated diverging opinions on this specific type of restriction. Some NCAs consider that the protection of a supplier's brand image, which is often raised as a justification for platform bans, may actually be used as a pretext to reduce the number of online sellers for a particular product or service and to avoid price transparency and price competition, which can significantly impair the business opportunities of distributors and consumer choice. Therefore, online platform bans should be considered a hardcore restriction under the VBER. Other NCAs favour a case-by-case analysis in order to evaluate whether such a restriction could be objectively justified in a particular case.

Irrespective of the above, the NCAs consider that more guidance is needed on the compatibility of online platform bans with Article 101 of the Treaty. Some NCAs argue that there is no evidence that online marketplaces as such would have an impact on the quality of distribution. Therefore, not quality-based *per se* bans of online marketplaces should not benefit from the VBER, but rather be subject to an individual assessment under Article 101(3) of the Treaty. Moreover, in order to determine whether an online platform ban amounts to a restriction on sales to a specific customer group (i.e. a hardcore restriction under Article 4(b) of the VBER) or rather a restriction on the use of one available (online) distribution channel (i.e. not a hardcore restriction), it is not clear whether it is possible to take into account the market structure, since the role of online platforms and other intermediaries may differ between Member States.

Respondents to the public consultation also expressed different views regarding the treatment of this type of restriction. Some respondents argued that marketplace bans are necessary to protect the brand image and the quality of the product concerned. Other respondents argued the opposite, stressing that online platforms including online marketplaces are an important entry point for consumers, which strengthens market integration and promotes the visibility of small and medium-sized companies that do not

have the financial means to develop their own website, including the necessary logistics and post-sales services, nor the technical and marketing knowledge to increase their visibility through other means. They therefore concluded that online marketplace bans can have a significant impact on competition to the detriment of consumers.

One respondent to the public consultation reported that the debate about the permissibility of this type of restriction should be based on a proper definition of third-party online platforms including online marketplaces, which is neither provided by the VBER nor by the Vertical Guidelines.

Ninth, the evaluation found that a large number of stakeholders, including respondents to the public consultation, participants in the workshop and NCAs, and the evaluation study pointed unanimously to a **lack of guidance on the assessment of restrictions on the use of price comparison websites**.

NCAs reported a lack of guidance on how to qualify prohibitions on the use of price comparison websites and the extent to which the assessment of such provisions should be different from the approach applied to online platform bans. They noted that price comparison websites normally re-direct consumers to the website of the seller, where they can complete the transaction. As a result, a restriction on the use of price comparison websites by distributors in the context of a selective distribution system appears less justified than an online platform ban. This is because final customers carry out the transaction on the website of the authorised distributors, which have been accepted by the supplier as meeting the quality criteria required. Therefore, an absolute restriction on the use of price comparison websites that is not linked to any quality criteria should constitute a hardcore restriction under Articles 4(b) and 4(c) of the VBER.

Participants in the workshop unanimously concluded that there was uncertainty as to whether restrictions on the use of price comparison websites could amount to a hardcore restriction. There was however no agreement on the assessment of these restrictions and whether they would be beneficial to consumers.

Participants in the workshop and the evaluation study pointed to the importance of assessing this restriction in the context of the new retail landscape. As described above in this section, participants in the workshop referred to the current "omni-channel world" where consumers benefit from the fact that products are available anywhere at any time through their preferred channel, taking account of new consumption habits. The evaluation study equally recognised the emergence of an omni-channel approach whereby consumers change easily within the online channel (e.g. between online retailers

and online platforms), between online and offline channels, and within the offline channel (i.e. between different physical stores), as well as between mono-brand and multi-brand distributors.²²⁶

Some respondents to the public consultation also pointed to a lack of clarity as to whether this type of restriction amounts to a hardcore restriction under Article 4(b) and 4(c) of the VBER and, if so, under which conditions.

Finally, the evaluation study and the respondents to the public consultation pointed to the need to take into account recent case law, notably the decision of the German NCA in the *Asics* case.²²⁷

4.6.7. Other online sales restrictions

Paragraphs 52 to 54 and 56 of the Vertical Guidelines provide guidance on the use of the internet and the framework of analysis applied to certain online sales restrictions.

Paragraph 52 of the Vertical Guidelines states that the *"internet is a powerful tool to reach a greater number and variety of customers than by more traditional sales methods"*. Through the internet, a distributor can extend its reach beyond its territory of operation and the customer groups it serves. Therefore, all distributors should, in principle, be allowed to use the internet to sell products and services. Selling products or services through a website is, in general, considered a form of passive selling. The underlying idea is that easy access for the customer to the distributor's website stems from the simple use of the internet by the customer and not from proactive action on the part of the distributor aimed at approaching the customer. The paragraph also explains that if a consumer visit to a website results in a sale, this is considered passive selling, irrespective of the language option offered on the website.

Under the VBER, the same rules apply to online and offline sales. Therefore, restrictions on the use of the internet that limit *"the territory into which, or the customers to whom"* the distributor can sell are considered hardcore restrictions pursuant to Article 4(b) of the VBER. This includes restrictions of passive sales by exclusive distributors, whereas

²²⁶ See section 4.3.1 of the evaluation study.

²²⁷ Decision B2-98/11 of 26 August 2015; summary available at: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2016/B2-98-11.pdf?__blob=publicationFile&v=2. In this decision, the German NCA found that the prohibition on allowing a third party to use the ASICS brand names in any form on the third party's website in order to guide customers to the website of the authorised ASICS retailer and the prohibition on the support of price comparison engines through setting up application-specific interfaces constituted restrictions of competition by object in breach of Article 101(1) of the Treaty.

active sales restrictions protecting an exclusively allocated territory or customer group are allowed pursuant to Article 4(b)(i) of the VBER. Also restrictions on the ability of an authorised distributor to actively or passively sell to end users and to other members of a selective distribution system are considered hardcore restrictions pursuant to Articles 4(c) and (d) of the VBER, respectively.

Paragraphs 52(a) to (d) of the Vertical Guidelines provide further guidance and examples on restrictions on the use of the internet that are considered hardcore restrictions under the VBER. Paragraph 53 of the Vertical Guidelines provides guidance on the distinction between active sales (i.e. when a distributor actively approaches certain customers or certain customer groups) and passive sales (i.e. when a distributor responds to unsolicited requests from customers) in the online context and thus on the compatibility of certain restrictions with the VBER. Paragraph 54 of the Vertical Guidelines explains the equivalence principle, which is meant to ensure that suppliers do not dissuade distributors from selling online by applying criteria to online sales that are not overall equivalent to those applied to offline sales (see section 4.6.6 above).

The evaluation indicated that **the assessment of some online restrictions is one of the areas in which the VBER and the Vertical Guidelines are perceived to lack clarity and not be up to date in light of the market developments** since the adoption of the VBER.

A majority of the respondents to the public consultation (across all sectors and types of respondents) indicated that **the level of legal certainty provided by the VBER regarding certain types of online sales restrictions is slightly low or low**.

All respondents particularly stressed the fact that, since the adoption of the VBER and the Vertical Guidelines, the development of online sales and the digitalisation of the economy have had a major impact on vertical relationships.

This was confirmed by the evaluation study, which found that the impact of increasing online sales on offline sales has been felt across all goods sectors, including those more resistant to a shift by consumers to online channels. Business interactions have changed, requiring that both brand owners and distributors constantly adapt their strategies to rapidly evolving markets conditions, including competition from new online intermediaries.

Also consumer behaviour has changed, with consumers nowadays expecting a seamless experience throughout their purchasing journey, whether offline, online or using both channels in combination. In this respect, the evaluation study confirmed that the consumer journey is nowadays a fluid omni-channel process in which consumers change easily within the online channel (i.e. between online retailers and online platforms),

between online and offline channels, within the offline channel and between mono-brand and multi-brand retailers.²²⁸ The study on consumer purchasing behaviour pointed to economic literature, which further explains that the combination of several distribution channels, especially online and offline has a positive impact on the quality perception of the consumer, on the decision to purchase and on the consumer experience. The multi-channel environment satisfies consumers' shopping needs better, as they can choose the channels that are most convenient to them.

Considering this context, the respondents to the public consultation noted that the current rules, which were originally meant to address offline restrictions, are not sufficiently clear or do not provide enough guidance to assess restrictions linked to the development of e-commerce, notably in the context of selective distribution systems. Some respondents further explained that the fact that the VBER and the Vertical Guidelines are not fully adapted to the new e-commerce environment creates uncertainty regarding the treatment of online restrictions. Finally, some respondents indicated that the VBER and the Vertical Guidelines are not up to date, as they do not reflect recent case law and decisional practice by the Commission and the NCAs in relation to online restrictions. According to these respondents, the lack of clarity of the current rules in this regard and the fact that they are outdated lead to a low level of legal certainty and increase compliance costs for businesses.

In addition, a majority of respondents pointed to the fact that the current rules lead to false negatives by excluding from the benefit of the block exemption online restrictions that generate efficiencies in line with Article 101(3) of the Treaty and should thus be covered by the VBER. Even more respondents expressed similar views regarding the Vertical Guidelines, which they do not consider to be adapted to the online environment. Notably, they do not take into account the fact that competition nowadays takes place between various omni-channel networks, including both online and offline channels, rather than between the offline channel, on the one hand, and the online channel, on the other hand. The current rules neither reflect the fact that the increase in price transparency due to the use of the internet also increases competition on quality and leads suppliers to adapt their distribution strategy in order to protect their brand and reputation. Finally, for some respondents, the rules fail to take into account the fact that free-riding is bi-directional, thus not only concerning free-riding by online on offline, but also by offline on online. The study on consumer purchasing behaviour points to consumer behaviour that is coherent with the existence of free-riding in both directions.

²²⁸ See section 4.3.1 of the evaluation study.

Similarly, a majority of the NCAs stressed the major impact that the massive growth of e-commerce during the last decade has had on distribution strategies and the challenges that enforcers face when applying the VBER to online restrictions. They expressed a need for clarifications in light of recent market developments and new case law concerning online sales restrictions. They also pointed to the need for more complete, coherent and up-to-date guidance regarding specific issues such as online sales restrictions in the context of selective distribution, restrictions on the use of online intermediaries and more generally on the assessment principles applicable to the online environment. They particularly stressed that the lack of appropriate guidance regarding online sales restrictions has led to inconsistencies in the application of the current rules in different Member States.

The views expressed in some roundtable discussions during the stakeholder workshop reflected similar concerns and calls for the adaptation of the current rules in light of new market developments and recent case law.

More specifically, stakeholders made general comments on how the VBER, together with the Vertical Guidelines, address issues in relation to online sales (see section 4.6.7.1 below). They also commented on specific online restrictions and on some particular aspects of the analytical framework to be applied thereto, including the current approach to dual pricing practices (see section 4.6.7.2 below), the definition of active and passive sales and their application to online sales (see section 4.6.7.3 below) and the assessment of restrictions on the use of trademarks and brand names in the online context (see section 4.6.7.4 below).

4.6.7.1. General comments on the VBER and the Vertical Guidelines

Some respondents to the public consultation noted that the VBER does not have a dedicated section dealing with online sales, which reduces the legal certainty of Article 4 of the VBER as regards these restrictions. Some respondents added that the assessment of online sales in the context of the rules on territorial restrictions is not appropriate and leads to legal uncertainty. Other respondents highlighted the fact that the VBER does not contain any provisions dealing explicitly with online sales by retailers.

Some respondents to the public consultation noted that only the Vertical Guidelines touch upon certain internet related issues, but that they lack precision in that respect, which causes legal uncertainty. Moreover, they stressed that the Vertical Guidelines are not binding for national courts and national competition authorities. Therefore, there is no guarantee that internet related issues will be dealt with in a coherent manner throughout the EU.

4.6.7.2. Dual pricing

Stakeholders identified several issues regarding the treatment of dual pricing under the VBER. Some of their comments focused on the lack of clarity of the rules, while others stressed the fact that some aspects of the prohibition on dual pricing are either not workable in practice or ineffective in view of recent market developments.

First, some stakeholders stressed the **lack of clarity of the rules relating to dual pricing in the Vertical Guidelines**.

Some respondents to the public consultation and some NCAs pointed out that it is not clear whether the prohibition of dual pricing set out in paragraph 52(d) of the Vertical Guidelines only applies in cases where the same distributor has both online and offline operations ("hybrid distributor") and the supplier charges the distributor different net wholesale prices depending on the sales channel used or whether the prohibition also applies where suppliers charge different wholesale prices to pure offline and pure online distributors.

Moreover, some respondents to the public consultation noted a lack of clarity as to whether the rules laid down in the Vertical Guidelines differ from the views expressed by the Commission in the final report of the e-commerce sector inquiry, which states that "*[d]ual pricing for one and the same (hybrid) retailer is generally considered as a hardcore restriction under the VBER*", whereas "*[c]harging different (wholesale) prices to different retailers is generally considered a normal part of the competitive process*".

Respondents to the public consultation pointed out that a clarification of the rules on dual pricing would avoid an inconsistent application throughout the EU. They indicated that some NCAs have adopted a very strict position on dual pricing. Some of them consider that the granting of discounts to pure offline retailers for services rendered in brick-and-mortar shops (e.g. reserving shelf space for certain products of a particular supplier) constitutes an illegal dual pricing policy, as it creates a structural disadvantage for pure online retailers which cannot benefit from these discounts. In contrast, other NCAs accepted that suppliers grant different commercial conditions to different types of retailers.

A few NCAs also pointed to different approaches at national level regarding online price discrimination. While some NCAs have adopted a very strict interpretation of the rules and consider that pure online players should be offered the same price as all other distributors, other NCAs have a more empirical approach and consider that the effects of any such practice should be assessed to determine their compatibility with the VBER and Article 101 of the Treaty. The evaluation study also mentioned a national case that went beyond the prohibition on suppliers to discriminate between the online and offline sales

channels of hybrid retailers, as the NCA qualified as a hardcore restriction differences in price applied to pure online and pure offline distributors. Against this backdrop, the evaluation study suggested that there is a lack of clarity in the Vertical Guidelines regarding the rules on dual pricing.

Some NCAs also stressed a lack of clarity as to whether paragraph 52(d) of the Vertical Guidelines applies to all types of distribution systems or only to selective distribution. They noted that the latter approach would likely create a loophole, allowing suppliers to impose more restrictions on their distributors when selective distribution is in place.

Second, for some stakeholders, **specific aspects of the approach to dual pricing are either not workable in practice or no longer adapted to the current market environment** due to new market developments over the last years.

Respondents to the public consultation (mainly suppliers, lawyers and associations of lawyers) consider the current approach to dual pricing not well adapted to the current market environment for the following reasons.

Some respondents to the public consultation explained that market conditions have drastically changed since the adoption of the VBER and the Vertical Guidelines. These respondents consider that e-commerce has become ubiquitous and the online sales channel, in which some players have grown in size, may no longer need protection. On the contrary, it is now rather the brick-and-mortar channel, which incurs higher costs than online resellers, that needs to be protected against free-riding by online sellers on their pre-sales efforts and investments. Moreover, the underlying logic of the Vertical Guidelines on dual pricing, which only allows suppliers to apply different wholesale prices to pure online players and pure offline players, is not in line with the current commercial trend, which aims to provide an omni-channel experience to consumers. Most retailers therefore offer both online and offline services to meet the consumer expectation of a seamless experience throughout the purchasing journey. This means that nowadays only few retailers are exclusively present in a physical environment.

In view of these changes, some respondents (mainly suppliers) argued that dual pricing should be withdrawn from the list of hardcore restrictions. They explained that the current rules deprive brand owners of the flexibility they need to incentivise and reward their hybrid distributors for their investments and efforts to provide consumers with a physical product experience, as well as advice and service from well-trained staff at brick-and-mortar stores. In their view, the current approach can even disincentivise high-service retailers from continuing to invest in high-quality services provided in their brick-and-mortar stores. They consider that brand owners should have the flexibility to offer hybrid retailers a specific discount for products that are sold in-store to support their related sales efforts and investments. According to them, this would be even more

justified for vertical agreements covered by the VBER, as it is highly unlikely that dual pricing by a supplier with a market share below 30% could limit competition, where the retailer's market share is also below 30%. Moreover, in markets with strong inter-brand competition, dual pricing would not allow the supplier to increase the price for its products above competitive levels.

A few respondents to the public consultation also noted that paragraph 64 of the Vertical Guidelines seems to indicate that dual pricing can only be justified when online sales lead to substantially higher costs for the supplier. However, this does not address the issue that also hybrid retailers face significant costs in operating their brick-and-mortar stores due to costs related to e.g. store rental, training of staff and investments in the attractiveness of the store. They argued that in order to incentivise hybrid retailers to keep investing in customer experience and services, while maintaining an attractive price level, brand owners must be able to remunerate those hybrid retailers for their investments.

Other respondents to the public consultation stressed the fact that the rules on dual pricing create unjustified discrimination between different types of retailers. Pure online players consider that they are being discriminated against, as they face higher wholesale prices than offline players, without any justification since they also make considerable efforts to create a quality-based environment. In contrast, hybrid retailers consider that they are put at a disadvantage compared to pure offline players since they cannot be rewarded for their efforts and investments in high-quality in-store services. As hybrid retailers compete directly with pure online retailers and pure brick-and-mortar retailers, suppliers should be able to treat them in the same way.

Some participants to the workshop expressed similar views on the current approach to dual pricing. They also considered that it does not reflect current business needs and does not support value-added services and the investments they require in a fair manner. For them, a change of approach would ensure fairness, flexibility and differentiation across all sales channels. It would provide consumers with more choice and better quality, ensure the availability of a multi-channel environment in the long run and allow for the provision of pre-sales and after-sales services in all sales channels. For other participants, it would also preserve brick-and-mortar networks.

Some NCAs expressed diverging views on the effects that the growth of online sales has had on brick-and-mortar stores. Some of them recognised that brick-and-mortar stores have difficulties competing with online stores, given the significant investments required for offline sales. They argued that allowing suppliers to differentiate net wholesale prices between offline and online sales in such situations could be justified from an economic point of view and correspond to the public interest, which they considered would mean

that dual pricing may have to be dropped from the list of hardcore restrictions. In contrast, other NCAs indicated that dual pricing may have a similar effect as total online sales bans, since they can incentivise hybrid retailers to reduce their online sales, which would justify maintaining the current hardcore approach to dual pricing.

Third, there is a consensus among the respondents to the public consultation that have commented on dual pricing (suppliers, retailers and associations of undertakings) that the **fixed fee that a supplier can offer to support the (offline or online) sales efforts of a distributor is not workable in practice**. They however pointed out that this provision shows that it is considered acceptable to support a distributor's sales efforts. Respondents further explained that applying the same fee to all distributors hardly makes sense in view of the diversity of their situations (notably with regard to the costs they incur) and the difference in market conditions (notably depending on their location). As regards the latter, for instance, a certain fixed fee could represent a small amount for a reseller located in a city centre, while being significant for a reseller located in a rural area. They further argued that it is impracticable for brand owners to apply a different fee to each distributor, as it would require fixing a fee every year for each of their retailers, or even every point of sale, in order to determine the investments to be offset in relation to the sales effort made. Such a system is too expensive and burdensome to be put in place.

In view of the above, some stakeholders suggested that other fair measures of remuneration should be used to incentivise hybrid retailers to invest in brick-and-mortar shops and reward high-quality services such as a percentage of the actual sales made by the retailer or a different volume related discount for sales realised in brick-and-mortar stores. Other respondents added that variable fees or discounts could allow suppliers to support brick-and-mortar sales insofar as congruent or equivalent sales efforts in online and offline trade are taken into consideration, which would ensure that no distribution channel gets an undue advantage without objective justification.

Fourth, some NCAs raised **several other issues in relation to dual pricing**. They indicated that, according to paragraph 601 of the Staff working document to the e-commerce sector inquiry, efficiency justifications could be considered under Article 101(3) of the Treaty notably "*where it can be shown that a dual pricing arrangement is indispensable to address free-riding between offline and online sales channels in the case of hybrid retailers that are part of the distribution*" system.²²⁹ They highlighted that the Vertical Guidelines do not provide guidance on the criteria that could be used to perform

²²⁹ Commission staff working document accompanying the final report from the Commission to the Council and the European Parliament on the E-commerce Sector Inquiry, 10 May 2017, Brussels, SWD (2017) 154 final.

such an individual assessment. Moreover, more guidance is required regarding acceptable alternatives to a fixed fee for remunerating specific services offered by physical stores. Finally, they also pointed to the fact that the current rules do not contain guidance on online price discrimination.

4.6.7.3. Definition of active and passive sales in the context of online sales and online marketing

Some stakeholders provided comments on the definition of active and passive sales, as set out in paragraph 51 of the Vertical Guidelines. While they recognise the importance of this distinction for the assessment of both exclusive and selective distribution systems, stakeholders stressed the fact that the current distinction lacks clarity and should be adapted to reflect new market developments. Moreover, any adaptation of the Vertical Guidelines should be taken into account in the interpretation of the Geo-blocking Regulation, which refers to the notion of passive sales as defined in the Vertical Guidelines.

First, some respondents to the public consultation stressed that **the distinction between active and passive sales is key to determining whether a restriction is considered as a hardcore restriction under the VBER**. This is particularly important for exclusive distribution systems where only active sales into the territory or to the customer group allocated to another exclusive distributor can be restricted. Therefore, a clear distinction between active and passive sales for both the offline and the online sales environment is needed to secure the required investments by distributors and to incentivise them to launch new products in territories or for customer groups that are exclusively allocated to them.

Second, some stakeholders (including some respondents to the public consultation, as well as some participants in the workshop) stressed the **lack of clarity of the current distinction between active and passive sales, in particular in the context of online sales**.

Some respondents to the public consultation highlighted the fact that Article 2 of the VBER does not contain a definition of active and passive sales. They consider that the clarity of the distinction between active and passive sales could be enhanced if this provision were to include definitions of these notions. The VBER could define active sales as *"actively approaching individual customers or actively approaching a specific customer group or customers in a specific territory through promotions specifically targeted at that customer group or targeted at customers in that territory"*, and passive sales as *"responding to unsolicited requests from individual customers including delivery of goods or services to such customers"*.

Some respondents to the public consultation also consider that the current approach of the Vertical Guidelines, which state that every distributor must be allowed to use the internet to sell products or services, is appropriate to prevent manufacturers and brand owners from imposing online sales restrictions on independent retailers. In the same vein, according to the respondents to the public consultation, the Vertical Guidelines also appropriately assume that operating a website is a form of passive selling and consider that offering different language options on a website or even using a national domain name does not in itself change the passive nature of the sales. According to the same respondents, to further clarify the scope of passive sales, the Vertical Guidelines should however specify that the definition of active sales provided by the case law on consumer rights, which suggests that a webpage accessible by customers located in another country or offering different language options can be seen as actively targeting those customers, is irrelevant for the purposes of a competition law assessment. Moreover, some respondents to the public consultation noted that the Vertical Guidelines do not provide enough examples of specific online practices that can be considered active or passive selling. In particular, some respondents pointed to a lack of clarity as to how to assess advertising by a distributor on a webpage with a reference to the territory in which a specific customer is located (e.g. "/france" in the domain name).

Some NCAs consider that distinguishing active from passive sales is one of the biggest challenges they face when applying the VBER to new types of online sales. According to them, the lack of clarity of the distinction stems from the fact that the VBER does not provide a real definition of the two notions. They also noted that the Vertical Guidelines do not contain enough examples of online sales restrictions and that the examples provided are not sufficiently detailed to give clear guidance on the distinction between active and passive sales.

Third, some stakeholders consider that the **current distinction between active and passive sales is not working well and is not up to date with regard to the new digital interactivity** resulting from the development of e-commerce.

Some respondents to the public consultation pointed out that paragraph 52 of the Vertical Guidelines, which contains a presumption according to which transactions made over the internet are passive sales, is not functioning well, as it would no longer reflect business reality. Likewise, some participants in the workshop argued that this presumption would not reflect the reality of the digital economy and would fail to capture the business model of digital players. Some respondents consider that website operators do not need to promote themselves through direct campaigns in order to reach consumers. Operating a website would therefore appear as an active approach in itself. By contrast, other respondents argued that operating a website always requires that its owner implements promotional techniques in order to be found by the consumers (e.g. online marketing

activities through social media). To the extent that such promotional techniques would always fall into the definition of active sales, the presumption that online sales are passive in nature would no longer be relevant.

The evaluation study also reported on a perceived inadequate distinction between active and passive online sales. It further explained that the stakeholders interviewed disagree with the distinguishing criteria set out in the Vertical Guidelines. According to the evaluation study, some stakeholders pointed to the classification of specific online sales practices as being problematic, such as the fact that having a translated webpage is classified as passive rather than active selling. Contrary to the definitions provided in the Vertical Guidelines, these stakeholders view such practices as active selling. The study specified that this issue was raised not only by retailers and distributors, who feel their market position is undermined, but also by manufacturers, who experience a diminishing effectiveness of their distribution approach, which is endangering their operation in specific markets altogether.

Some respondents to the public consultation argued that the presumption that online sales are passive sales is not suited to the current business reality. According to them, only a case-by-case analysis would enable competition authorities to grasp the complexity of online sales and to properly assess their compatibility with competition rules. This case-by-case analysis should take into account the fact that active sales include all online marketing activity that specifically targets individual consumers, consumer groups or specific territories, or any action directed towards a specific territory or customer group. In addition, they considered that a list of practices that may be considered as active sales could be provided in the Vertical Guidelines (i.e. using a country extension different from the one of the Member State where the distributor is located (such as ".fr" for France or ".de" for Germany) and using specific languages for certain countries (except for English which is assumed to be understood by a large share of EU consumers)).

A few respondents suggested that, if the provisions on passive sales in the Vertical Guidelines were to remain unchanged, the Vertical Guidelines should identify further circumstances in which passive sales restrictions would likely be considered as objectively justified.

Fourth, other respondents consider that the **prohibition of passive sales restrictions is too strict and can lead to false negatives** by excluding from the benefit of the VBER practices that would be efficiency-enhancing. They further explained that the current rules can prevent businesses from implementing certain (limited) passive sales restrictions that would enhance the efficiency of their distribution system and benefit consumers without any risk of limiting competition. However, this view is not shared by

all stakeholders. Notably some NCAs consider that the qualification of online transactions as passive sales should be maintained in the Vertical Guidelines.

Finally a few respondents to the public consultation stressed the **need to preserve coherence between EU rules**, notably between the VBER and the Geo-blocking Regulation.

4.6.7.4. Restriction on the use of trademarks and brand names in the online context

Some stakeholders also expressed a need for clarifications regarding online advertising and more specifically the use of trademarks and brand names in the context of online advertising.

First, stakeholders expressed **a need for more guidance as regards the treatment of restrictions on online advertising**.

Some respondents to the public consultation expressed concerns that, in the absence of clear guidance, manufacturers and brand owners might try to limit the ability of their retailers to use online advertising. They further explained that in order to trigger sales through a retailer's website, the customer first has to find and reach the website. This requires raising consumer awareness about the existence of the website at an early stage of the purchasing process through targeted advertising campaigns in general search engines and/or social media. It also requires being able to reach a potential customer through online advertising when he or she is looking for a specific product on a search engine. The evaluation study confirmed that advertising is an essential component of the customer experience, especially in the digital world, where it is often the first contact point between the customer, the product and/or the brand concerned.

The respondents considered that, without online advertising, the customer cannot find the website of a specific retailer at the critical moment of the purchasing process. Therefore, a prohibition of online advertising is *de facto* a prohibition of online sales. Consequently, they argued that restrictions on online advertising should be considered as hardcore restrictions, with the exception of non-discriminatory and reasonable quality requirements.

Some NCAs also consider that further guidance is needed regarding online advertising restrictions. Some of them expressed the view that some online advertising restrictions may *de facto* amount to a ban on online sales for smaller distributors. Consequently, they consider that such restrictions should be treated as a restriction of passive sales and thus a hardcore restriction under the VBER.

Second, all stakeholder groups highlighted the **importance of using trademarks and brands names in the context of online advertising**, but they also stressed that **neither the VBER nor the Vertical Guidelines provide guidance in this regard**.

The consumer purchasing study²³⁰ indicated that search engines are the most used channels for product discovery today. The keywords used when searching with search engines give an indication of which information is important to consumers. According to the study results, consumers predominantly use keywords containing product or brand names, or product descriptions (keywords). The analysis of Google Trend data yielded similar results. For several years now, consumers have been using more product-specific search queries compared to brand or retail related searches for almost all types of products considered. It should be noted in this context that research via search engines is strongly influenced by information consumers perceive through other types of media (i.e. TV advertising, review sites or social networks). The study also indicated that search engine advertisements and sponsored links affect consumer behaviour in the ensuing purchasing stage.

Moreover, the consumer purchasing study²³¹ showed that brand names can play a significant role for the search terms used by consumers. Some consumers tend to add a brand name to their search queries even if they are not aware of the product name when looking for a product or a service online or on e-commerce platforms. In this regard, the study referred to a research aiming at identifying the relation between the search engine queries performed by the consumers online with brand attitude. As per the findings of this research, users who are actively looking for products in a specific category of products have a high likelihood of searching with brand names in the search query. It is also recognised that if consumers have a positive attitude towards a brand, they are highly likely to directly make a search query for that specific brand. This research also found that the two most important factors that contribute to the increment in searching for a brand are the familiarity of the brand among consumers and the level of consideration consumers put in the brand. Finally, it also identified that there is a significantly increased likelihood for a consumer to make a search query for a specific brand if the customer already owns products from that particular brand.

Furthermore, the consumer purchasing study²³² noted that businesses are developing complex brand bidding strategies to maximise sales revenues. On that particular matter, the study refers to a recent research that challenged the general assumption that the

²³⁰ See section 4 of the consumer purchasing study.

²³¹ See section 3.2.2.1.1 of the consumer purchasing study.

²³² See section 3.2.2.1.2 of the consumer purchasing study.

highest position on a search results page also yields the maximum sales revenues. According to the research, in the short term, the highest overall revenue would be obtained by bidding for the third rank in keyword advertising and not for the first position. However, the research also indicated that this result might change in the long run if all advertisers were to apply the same strategy. With regard to brand bidding strategies, the research indicated that search engine advertising costs drop at a faster rate than revenue and that brand bidding strategies should not focus on single keywords, but rather on a portfolio of keywords.

In addition, several NCAs²³³ and the Commission²³⁴ have recently dealt with brand-bidding restrictions in cases or policy documents. In the *Guess* case, the Commission found that a ban on retailers bidding on the Guess brand name and trademark to obtain a better position in Google AdWords, which was part of a broader strategy aimed at restricting trade between Member States, was an infringement of competition by object. This finding was based notably on the fact that, by restricting the ability of its retailers to bid for its trademark, Guess aimed to maximise sales through its own website and to reduce its advertising costs. Moreover, in the Staff Working Document on the e-commerce sector inquiry,²³⁵ the Commission emphasised the growing importance of online advertising and indicated that restrictions on such advertising may raise competition concerns if they restrict the effective use of the internet as a sales channel by limiting the ability of retailers to direct customers to their website. At the same time, the Commission indicated that restrictions on the ability of retailers to use the trademark and

²³³ See e.g. Avis de l'Autorité de la Concurrence française du 18 septembre 2012 relatif au fonctionnement concurrentiel du commerce électronique, 12-A-20, paragraphs 357 and 358, <https://www.autoritedelaconcurrence.fr/fr/avis/relatif-au-fonctionnement-concurrentiel-du-commerce-electronique>; Final report - Digital comparison tool, 27 September 2017, UK Competition and Market Authority, <https://assets.publishing.service.gov.uk/media/59c93546e5274a77468120d6/digital-comparison-tools-market-study-final-report.pdf>; Working paper - Price effects of non-brand bidding agreements in the Dutch hotel sector, Stefan Haasbeek, Jan Sviták and Jan Tichem, June 7 June 2019, Netherlands Authority for Consumers & Markets, <https://www.acm.nl/sites/default/files/documents/2019-06/working-paper-acm-price-effects-of-search-advertisement-restrictions.pdf>. In the *Asics* decision of 26 August 2015 (B2-98/11), the Bundeskartellamt found that a prohibition on the use by an authorised retailer of the ASICS brand name in any form on the retailer's website in order to guide customers to the website was a hardcore restriction. In the *Adidas* decision of 27 June 2014 (B3-137/12), the Bundeskartellamt closed proceedings after the company amended its conditions for online sales of sports shoes to allow retailers authorised to sell its products to advertise those products with the help of search engine advertising.

²³⁴ See Commission press release of 17 December 2018, IP 18/6844, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_18_6844. A non-confidential version of the prohibition decision is available on DG Competition's website.

²³⁵ See paragraphs 632, 997 to 999 of the Staff Working Document.

brand name of the manufacturer in the retailer's own domain name can help to prevent confusion with the manufacturer's website.

Despite these decisions and reports, stakeholders consider that the way such advertising restrictions should be dealt with is unclear. In this regard, the evaluation study also found that there is a lack of clarity as regards the circumstances in which a prohibition of the use of brand names as keywords in search engine advertising may be justified. This lack of clarity detracts from the legal certainty provided by the rules.

Moreover, there is no consensus among stakeholders on how such restrictions should be assessed. According to some NCAs, brand-bidding restrictions require a case-by-case analysis to take proper account of the specific form of these restrictions and their economic context. Participants in the workshop also stressed the lack of clarity about the assessment of restrictions on the use of search engines, notably with regard to the question of whether they are considered hardcore restrictions under the VBER or whether they can be justified.

Respondents to the public consultation expressed different views. For some of them, the classification of the brand-bidding restrictions in the *Guess* case as a restriction of competition by object should be reflected in the Vertical Guidelines. Conversely, other respondents (mainly brand owners, associations of brand owners and lawyers) view the *Guess* decision as case and fact specific and see a need for clarifications on the circumstances in which brand-bidding restrictions can be block exempted or justified on a case-by-case basis.

As regards the **circumstances in which brand-bidding restrictions could be justified**, some respondents to the public consultation pointed to a lack of clarity as to whether the principles enshrined in the *Coty* judgment also apply to online search advertising restrictions. If this were to be the case, this would imply that online brand-bidding restrictions do not amount to a prohibition of online sales when they pursue legitimate objectives, provided that they are not applied in a manner that goes beyond what is necessary to achieve those objectives.

Some respondents raised the question whether the protection of the brand image, which is based on a common identity, the reputation of the network, as well as the uniformity of the business concept applied, should be considered as legitimate objectives. According to them, pursuing such an objective can be justified, as brand owners, who invest heavily in the promotion of their products and the protection of their brand image, can be legitimately granted more flexibility to control the use of their brand as a keyword on search engines. In the same way, some respondents argued that brand-bidding restrictions can be justified when the brand owner pursues a centralised online marketing strategy.

For other respondents to the public consultation, there is a need for clarification as to whether restrictions by the manufacturer on the use of keywords purchased by resellers could be justified to avoid a bidding war between the members of a selective distribution network, which could lead to unnecessary costs and predominantly benefit the search engine operators. They argued that such a restriction could be justified and even be pro-competitive in view of the significant cost savings that would result from the rationalisation of bidding campaigns and considering the fact that this would prevent network members from cannibalising each other's sales.

Other respondents to the public consultation pointed to a lack of clarity as to whether competition concerns regarding brand-bidding restrictions are limited to possible foreclosure effects, which arise where inter-brand competition is weak and strong suppliers or retailers that hold market power can limit access to products or to important distribution channels.

As regards **the type of restrictions that could be justified**, several respondents to the public consultation pointed to a need for clarification as to whether brand owners could restrict brand bidding for a particular positioning in the list of results provided by a particular search engine. They argued that showing the link of brand owners at the top of the search results page could avoid confusion and therefore benefit consumers.

According to other respondents, the Commission should clarify whether it can be justified to prevent the purchase of only the trademark as a keyword by retailers, while allowing them to purchase a combination of keywords including the trademark and not preventing them from using trademarks for advertising purposes in order to avoid confusion between brands and retailers.

Some manufacturers also asked for more guidance on whether they can legitimately set a maximum quantitative limit on keyword bids by resellers in order to avoid excessive bidding wars, which harms both the brand and smaller retailers.

Manufacturers also suggested that the Vertical Guidelines should clarify under what circumstances it would be possible to require distributors to give the supplier prior notice of the keywords and association of keywords they intend to use for the purposes of online advertising. According to these manufacturers, this possibility would however raise the question of the interplay between competition law and trademark law, and the need for guidance on whether and when a brand manufacturer can legitimately prevent the use of its brand name by competitors (i.e. other brands or its own authorised retailers), on the basis of its intellectual property rights.

Finally, manufacturers note that clarifications are also needed as to whether a manufacturer can monitor or limit the use of keywords or brands as domain names, and

which compulsory elements the brand owner may require authorised distributors to display in order to facilitate the identification of such authorised retailers for the benefit of consumers (e.g. the use of specific logos and trademarks).

4.6.8. Franchising

Franchise agreements contain licences of intellectual property rights ("IPRs") relating in particular to trademarks or signs and know-how for the use and distribution of goods or services. In addition to the licence of IPRs, the franchisor usually provides the franchisee for the duration of the vertical agreement with commercial or technical assistance.²³⁶ Paragraphs 189-191 of the Vertical Guidelines explain how the VBER applies to vertical restrictions contained in franchise agreements. The coverage by the VBER of the licensing of IPRs contained in franchise agreements is dealt with in paragraphs 24-46 of the Vertical Guidelines, which concern the scope of the VBER, and Article 2(3) of the VBER, which sets out under which conditions the block exemption applies to vertical agreements containing provisions related to IPRs.

The evidence gathered during the evaluation indicates that a majority of the respondents to the public consultation consider that **paragraphs 189-191 of the Vertical Guidelines provide an appropriate level of legal certainty.**²³⁷ Nevertheless, a significant number of respondents (primarily legal professionals and some business associations representing the franchise sector) considered these paragraphs to provide a lower level of legal certainty, but only a few respondents stated that the rules on franchising should be revised. Similarly, while agreeing that these provisions are generally adequate, NCAs also pointed to some aspects for which there is a lack of clarity.

The **main issues raised by stakeholders in relation to the treatment of franchise agreements** under the VBER are the following:

First, stakeholders raised the issue of the lack of a definition of franchising in the VBER. Respondents to the public consultation argued that a definition of franchising in the VBER itself would be useful in providing a harmonised definition at EU level and in distinguishing this type of distribution from other distribution models such as selective and exclusive distribution. Respondents indicated that in the current rules, franchising is not adequately treated as a distinct type of distribution, whose fundamental specificity is the transfer of know-how, and which has overall a pro-competitive effect, as recognised

²³⁶ Vertical Guidelines, paragraph 189.

²³⁷ The views of the respondents as regards Article 2(3) of the VBER and the corresponding paragraphs of the Vertical Guidelines are assessed in more detail in section 4.2.3 above.

by the CJEU in the *Pronuptia* judgment.²³⁸ They argued that, as a result, there is a lack of clarity on the rules that apply to franchise agreements and the relationship with other distribution models such as selective and exclusive distribution. This issue was also raised by participants in the stakeholder workshop.

Second, respondents to the public consultation indicated that the definition of know-how in the VBER is not in line with the definition of know-how in the Directive on the protection of trade secrets, in particular as regards the requirement of "substantiality", which is mentioned in the VBER but not in the Directive on the protection of trade secrets. Respondents further argued that it is often difficult to distinguish clearly between know-how which is "significant" and know-how for which this is not the case, since the definition in the VBER does not provide sufficient guidance on how to understand the concept of significance. In addition, some respondents mentioned that the notion of "secret" is also unclear and difficult to interpret, as there are often parts of the franchisor's experience that are public knowledge, while the combination of individual elements of the franchise system may nevertheless be secret. Respondents further pointed out that also this part of the definition of know-how in the VBER is not in line with the corresponding definition in the Directive on the protection of trade secrets.

Third, as regards specific restrictions and their application to franchising, participants in the stakeholder workshop generally pointed to a lack of clear examples as to how specific vertical restrictions may affect both franchisors and franchisees. Respondents to the public consultation pointed in particular to a lack of clarity as to whether territorial exclusivity is permissible under franchise models or whether franchising has to be treated the same way as selective distribution in this respect. Respondents also pointed to a lack of clarity on permissible online resale restrictions on franchisees. In particular, respondents indicated that it is unclear whether the principles set out by the CJEU in the *Coty* judgment also apply to franchising. In this regard, some respondents argued that franchisors should have the possibility to control their distribution channels, including the right to prohibit the resale of their products by their franchisees via third-party platforms in order to better protect the identity and reputation of their franchise networks and their brand. Respondents also argued that the rules should clarify that in some circumstances online search advertising restrictions are helpful to protect the brand image of a franchise system. Other respondents, however, argued that franchisees should remain free to make effective use of third-party online marketing and sales channels, provided that no damage results to the brand and reputation of the franchisor. This includes the possibility of bidding on the franchisor's brand name in the context of online advertising.

²³⁸ Judgment of 28 January 1986 in Case 161/84, ECLI:EU:C:1986:41, *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis*.

Further clarity on these issues is therefore needed. In addition, where the franchisees play a role in the exploitation of the franchisor's web shop, non-compete arrangements seem to be justified according to some respondents. However, the current rules are not clear on the extent to which such restrictions are permitted.

Fourth, as regards non-compete obligations, respondents to the public consultation, notably those representing franchisees, indicated that the threshold of 80% of the buyer's total purchases of the contract goods or services pursuant to Article 1(1)(d) of the VBER is artificial and not workable in the franchising context.²³⁹ This is because, in practice, franchisees will typically not source the remaining 20% from another supplier for logistical reasons. Franchisors are aware of this and can therefore set the purchase obligations slightly below the 80% threshold, thus avoiding the characterisation as a non-compete obligation, while achieving the same result in practice.

Fifth, respondents also indicated that the VBER and Vertical Guidelines are not sufficiently clear as to whether and under which circumstances non-compete clauses in franchise agreements may have the same duration as the franchise agreement itself. Some respondents also pointed to issues regarding post-term non-compete clauses, arguing that it is not justified for such clauses to be limited to one year, as well as to the premises and land from which the buyer has operated, rather than to the (broader) territory granted to the franchisee. Other respondents, however, argued that such clauses are disproportionate, even if limited to one year. These issues are assessed in more detail in section 4.6.4 above.

Sixth, respondents also pointed to issues regarding the treatment of RPM as a hardcore restriction in the context of franchise agreements. These issues are assessed in more detail in section 4.6.1 above.

Seventh, respondents to the public consultation also raised issues with regard to the market share thresholds in the context of franchising. Respondents argued that the market share threshold should only apply to the franchisor and/or that the threshold should be higher than under the current rules (e.g. 40%). As to the market definition, they argued that when markets are defined locally, this may lead to an international franchise system being block exempted in one country but not in another, which is inefficient and hinders the development of a uniform franchise concept and strategy across the EU.

Eighth, respondents also mentioned a lack of clarity in the VBER and Vertical Guidelines as regards the treatment of joint purchasing through the franchisor and the

²³⁹ Article 1(1)(d) of the VBER defines a non-compete obligation as an obligation on the buyer to purchase from the supplier more than 80% of the buyer's total purchases of the contract goods or services.

treatment of (vertical) information exchange in franchise systems, in particular as regards the need for ongoing business monitoring and benchmarking.

Ninth, NCAs indicated that there is insufficient legal certainty with regard to the combination of franchising with exclusive distribution, which aims to grant an exclusive territory to a particular franchisee and is very common in practice. In particular, the VBER does not provide guidance on the assessment and thus the legality of distribution systems that combine elements of exclusive distribution and franchising.

4.6.9. Other issues

Stakeholders also made comments on how the VBER, together with the Vertical Guidelines, address certain substantive issues such as data sharing (see section 4.6.9.1 below), aftermarkets (see section 4.6.9.2 below), as well as issues related to the withdrawal and disapplication procedures (see section 4.6.9.3 below).

4.6.9.1. Data sharing

Some respondents to the public consultation stressed the fact that **data has become an essential input** for online services, production processes, logistics, smart products and artificial intelligence. Given that data has a significant impact on their competitiveness, **businesses depend on timely access to it**. Moreover, according to these respondents, data is critical to ensuring healthy inter-brand competition.

More specifically, both suppliers and certain service providers increasingly ask retailers to share relevant business data with them. These include data on market dynamics and trends that can help suppliers to optimise product innovation and logistics (e.g. which brands to sell in which quantities and with which promotional support). At the same time, some suppliers also try to obtain data on end customers and their purchasing behaviour, as well as retail prices and distribution strategies. Some of them also try to obtain data on the retailers' commercial relationship with customers, which can be problematic if the supplier competes with its distributors on the retail market, notably through its online shop. In the same vein, some service providers also attempt to gain access to data on the interaction of end customers with the retailer's online shop. In some cases, such data access is part of the service they provide (for instance, when the service provider conducts analysis for the retailer on consumer interaction with the online shop), while not being necessary for the service.

Moreover, certain marketplaces and pure online players are active not only as retailers, but also control search engines and other social networks, which allows them to collect and analyse large amounts of data. The significant amount of data they are collecting

from retailers and their wide customer base gives them a significant competitive advantage over brand manufacturers.

In light of these developments, stakeholders indicated that there is a **need to clarify the rules on data collection as well as information exchange in distribution agreements, including for dual distribution** (see section 4.2.4 above).

Respondents to the public consultation explained in this regard that extensive data transfers between the parties to a vertical agreement can increase prices, as they grant suppliers and service providers insights into the retailers' businesses, enable them to reassess the value of their products or services for the specific retailer and to increase their prices accordingly (so-called "behavioural discrimination"). Therefore, they argued that contractual provisions on data transfer should not be block exempted. According to some respondents, the Vertical Guidelines should clarify that a supplier can collect pricing and other data from its retailers for pro-competitive reasons. However, the exemption should not apply to information exchange which, due to an underlying anti-competitive intent, clearly restricts competition. According to other respondents, an exemption under the VBER should be limited to data transfers concerning the buyer's business to the extent that it is necessary to improve the use, sale or resale of goods or services by the buyer or its customers. Besides, the VBER should not be applicable to data transfers that may have the same effect as non-compete obligations.

In addition, some respondents to the public consultation stressed **the importance of data sharing in the advertising sector**. These respondents indicated that the French and the German NCA published a joint report on big data and its implications for competition law in May 2016.²⁴⁰ While the German NCA followed up on the report with investigations in the social media sector, the French NCA initiated a sector inquiry into online display advertising.²⁴¹ The final report of the sector inquiry identifies Google and Facebook as the leading players in the online advertising sector. As regards data access and data sharing, the report finds that vertical integration and access to unrivalled volumes of data provides these two main market players with significant competitive advantages over the other intermediaries active in the sector. More generally, the report describes restrictions on the ability to collect and access data as practices potentially detrimental to competition. In view of these findings, some respondents stressed the need

²⁴⁰ Joint paper by the French and German NCAs on competition law and data of 16 May 2016, <https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?blob=publicationFile&v=2>.

²⁴¹ Sector-specific investigation into online advertising of the French competition authority, 6 March 2018, <https://www.autoritedelaconcurrence.fr/en/press-release/6-march-2018-sector-specific-investigation-online-advertising>.

to act as quickly as possible when addressing potential anti-competitive advertising practices in digital markets.

4.6.9.2. Aftermarkets

Article 4(e) of the VBER contains an aftermarket related hardcore restriction for practices preventing or restricting end users, independent repairers and service providers from obtaining spare parts directly from the manufacturer of these spare parts. Original equipment manufacturers ("OEMs"), who buy such parts from the manufacturer and incorporate them into their own products, may however require their own repair and service networks to buy spare parts directly from them. Paragraph 59 of the Vertical Guidelines contains further guidance on this provision.

The evidence gathered during the evaluation indicates that a large majority of stakeholders (both respondents to the public consultation and NCAs) consider that **Article 4(e) of the VBER is working well**. Nevertheless, **a few respondents to the public consultation pointed to some issues** such as a lack of clarity with regard to certain elements of the provision and some difficulties linked to its application.

First, as regards the **lack of clarity of Article 4(e) of the VBER**, a few respondents indicated that the distinction between spare parts and components is not explained. Moreover, the fact that guidance regarding spare parts related restrictions is scattered between Article 4(b)(iv) and Article 4(e) of the VBER makes it difficult to understand the rules. A few other respondents stressed that the Vertical Guidelines are not sufficiently clear on the possibility to apply Article 4(e) of the VBER also in the context of specific distribution systems (i.e. exclusive or selective distribution) and how this provision is applied to products for which quality and safety are essential. More specifically, the Vertical Guidelines do not specify whether, in a selective distribution system, spare parts can only be purchased from authorised sources. They explain that such a restriction could be justified to guarantee the quality and safety of the product and to avoid problems linked to the use of counterfeit spare parts.

Second, some respondents to the public consultation stressed that **Article 4(e) of the VBER is difficult to apply in practice**, particularly in sectors where OEMs have sufficient market power to put pressure on spare parts manufacturers to make them refuse the supply of independent repairers and service providers. In most cases, the pressure triggering this refusal to supply is not reflected in any agreement or in any exchanges between the OEMs and the spare parts manufacturers. Consequently, independent repairers and service providers are not in a position to assert their rights under Article 4(e) of the VBER. Some respondents added that, in view of this particular context, adding independent wholesalers to the list of independent market players that should

have unrestrained access to spare parts could counteract any such market power by OEMs. Moreover, a few respondents to the public consultation also pointed to the fact that Article 4(e) of the VBER fails to address situations where OEMs foreclose access to the aftermarket for independent market players by refusing to share technical information that is essential to provide aftermarkets or repair services.

Third, a few respondents to the public consultation (mainly business associations and lawyers) pointed out that the **Vertical Guidelines do not provide enough guidance on single branding obligations for spare parts** in vertical agreements between OEMs and their own service network. They indicated that, according to paragraph 59 of the Vertical Guidelines, such obligations benefit from the block exemption. In their view, however, an obligation for authorised repairers to use spare parts supplied by the OEM should simply not be considered as a restriction under Article 101 of the Treaty. To support their view, they refer to the Supplementary Commission Guidelines on vertical restrictions in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles,²⁴² which recognise that an obligation on an authorised repairer to use spare parts supplied by the car manufacturer is justified for repairs made under warranty, as it is the car manufacturer who is liable to ensure that such repairs are carried out in a professional manner, as well as for repairs made outside warranty to maintain the brand image of the manufacturer. According to these respondents, the same justifications can apply in relation to other goods than motor vehicles. Therefore, the Vertical Guidelines should specify that single branding for spare parts in the context of an OEM's own service network are justified also outside the scope of the VBER.

4.6.9.3. Withdrawal and disapplication procedures

The presumption of legality conferred by the VBER may be withdrawn by the Commission pursuant to Article 29(1) of Council Regulation 1/2003, where it finds that in a particular case an agreement exempted under the VBER has effects which are incompatible with Article 101(3) of the Treaty.²⁴³ Moreover, pursuant to Article 29(2) of Council Regulation 1/2003, the competition authority of a Member State may in the same circumstances also withdraw the benefit of the VBER in respect of the territory of that Member State, or a part thereof, which has all the characteristics of a distinct geographic market.²⁴⁴

²⁴² Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles, OJ C 138, 28.5.2010, p. 16.

²⁴³ See also VBER, recital 13.

²⁴⁴ See also VBER, recital 14.

Paragraph 78 of the Vertical Guidelines clarifies that when the territory of a single Member State, or a part thereof, constitutes the relevant geographic market, the Commission and the national competition authority concerned have concurrent competence to withdraw the benefit of the VBER. The Commission has however the exclusive power to withdraw the benefit of the VBER when an agreement restricts competition on a relevant geographic market wider than the territory of one Member State. Paragraph 15 of the VBER explains that in determining whether the benefit of the VBER should be withdrawn pursuant to Article 29 of Council Regulation 1/2003, the anti-competitive effects that may derive from the existence of parallel networks of vertical agreements that have similar effects, which significantly restrict access to a relevant market or competition therein, are of particular importance (so-called cumulative effects).²⁴⁵ Paragraphs 74-78 of the Vertical Guidelines provide further guidance regarding the application of this procedure.

In addition, Article 6 of the VBER allows the Commission to declare, by means of a regulation, that the VBER no longer applies to parallel networks of similar vertical restrictions that cover more than 50% of a relevant market. The effect of such a disapplication regulation is to remove the benefit of the VBER and to restore the full application of Article 101 of the Treaty.²⁴⁶ As explained in paragraph 79 of the Vertical Guidelines, such a regulation is not addressed to an individual business, but concerns all businesses whose agreements are defined in the regulation.

The evidence gathered during the evaluation indicates that **stakeholders consider the provisions in the VBER and the Vertical Guidelines in relation to the withdrawal and disapplication procedures to be overall appropriate.**

However, in their comments, some stakeholders **pointed to a number of issues in relation to both procedures**, which would need to be addressed in order to facilitate their application. Most of them stressed the fact that both procedures have only been considered very rarely and have *de facto* never been applied at European or national level. Some of them also pointed to the low degree of legal certainty concerning the procedure set out in the respective provisions and raised other issues linked to the application of both procedures.

First, comments made by respondents to the public consultation and notably by NCAs indicated that the **lack of application of both provisions derives from the lack of clarity, the complexity and the limited effect of the current rules.**

²⁴⁵ See also Vertical Guidelines, paragraph 75.

²⁴⁶ See VBER, recital 16.

As regards the lack of clarity and the complexity of the rules, the NCAs that commented on the withdrawal procedure explained that an NCA that envisages withdrawing the benefit of the VBER must not only establish that a particular vertical agreement falls under Article 101(1) of the Treaty, but also demonstrate that this agreement does not fulfil the conditions of Article 101(3) of the Treaty. Moreover, they referred to the fact that the standard of proof to be met for withdrawing the benefit of the VBER is particularly unclear. They pointed notably to the limited guidance provided in the Vertical Guidelines concerning the counterfactual analysis that has to be carried out in order to demonstrate that the agreement falls within the scope of Article 101(1) of the Treaty.

Both respondents to the public consultation and NCAs also stressed the **limited effects of both procedures** for the following reasons.

As regards the withdrawal procedure, respondents stressed that it only applies *ex nunc* (i.e. it does not have retroactive effects) and only concerns a few businesses in the relevant market. They also pointed out that a withdrawal decision is not deterrent for businesses due to the absence of fines. Some respondents to the public consultation argued that a withdrawal decision could even be counter-productive and create distortions of competition since it only applies to agreements entered into by businesses whose contribution to the cumulative effect is significant.

In addition, NCAs took issue with the fact that their power of withdrawal is limited to their own national market, which creates difficulties in situations where the relevant market extends to a common language area composed of several Member States. In such situations, it is the Commission that has the exclusive power to act.

As regards the disapplication procedure, respondents indicated that its only effect is to restore the full application of Article 101 of the Treaty. This means that, in addition, a formal infringement decision has to be taken to intervene against any particular vertical restriction.

Second, some respondents to the public consultation indicated that **the withdrawal and disapplication procedures provide a lower degree of legal certainty**.

For a few respondents to the public consultation, the simple fact that the Commission and NCAs can withdraw the benefit of the VBER creates legal uncertainty.

Other respondents refer to paragraph 176 of the Vertical Guidelines, which gives the Commission the possibility to withdraw the benefit of the VBER where the characteristics of the contract product do not require selective distribution or do not require the applied selection criteria, such as the requirement for distributors to have one

or more brick-and-mortar shops or to provide specific services. According to them, the possibility to withdraw the benefit of the VBER for selective distribution systems creates legal uncertainty, notably considering that the very same paragraph indicates that selective distribution systems are exempted regardless of the nature of the product concerned and the selection criteria applied.

A few other respondents linked the lower degree of legal certainty to the fact that the application of both procedures is based on elements over which businesses do not necessarily have control, in particular the existence of restrictions of competition resulting from the cumulative effect of parallel networks of similar vertical agreements implemented by competing suppliers or buyers.

Third, stakeholders raised **other issues linked to the application of both procedures**.

A few respondents to the public consultation discussed the relevance of retaining the possibility for NCAs to withdraw the benefit of the VBER. They argued that, in light of divergences between NCAs on certain topics, having withdrawal decisions at national level could lead to a fragmentation of the internal market. Conversely, other respondents pointed out that the national competence to withdraw is in line with the effects-based approach enshrined in the VBER and poses no threat to the uniform application of competition rules within the European Union. They argued that granting NCAs this competence is rather a way to recognise that market conditions may vary between Member States.

Other respondents (mainly pure online players) pointed to the fact that the 50% threshold enshrined in Article 6 of the VBER as one of the conditions for the disapplication procedure does not capture the foreclosure effect that can result from the wide application of a particular type of restriction by large and small businesses. In their view, this threshold should either be lowered or the withdrawal procedure should also be applied to situations where cumulative effects arise regardless of the market shares of the suppliers concerned.
