

Revision of the Vertical Block Exemption Regulation

Explanatory note

On 9 July 2021, the Commission published for public consultation a draft revised Vertical Block Exemption Regulation (“VBER”).¹ The VBER deals with so-called vertical agreements, namely agreements that relate to the supply and distribution of goods and services. These agreements are ubiquitous across the EU economy. The VBER declares that if such vertical agreements meet certain conditions, the prohibition in Article 101(1) of the Treaty does not apply to them. The draft revised VBER is accompanied by draft revised Guidelines on Vertical Restraints (“Vertical Guidelines”)² that provide further guidance on how to interpret and apply the VBER but also on the assessment under Article 101(1) and Article 101(3) of the Treaty of vertical agreements that are not exempted by the VBER.

The purpose of the public consultation is to gather stakeholder feedback on the draft revised VBER and draft revised Vertical Guidelines, and in particular on the changes that the Commission proposes, which are meant to address the issues identified in the evaluation set out in the Commission Staff Working Document published on 8 September 2020.³

The evaluation showed that the VBER and the Vertical Guidelines are useful tools that significantly facilitate the assessment of vertical agreements under Article 101 of the Treaty, and help reduce compliance costs for businesses. However, it also showed room for improvement of the functioning of the VBER and the Vertical Guidelines, notably the need to adapt them to market developments that have occurred since the adoption of the current rules.

Since the launch of the impact assessment phase in October 2020, the Commission has gathered further evidence on the areas for improvement, including through an open public consultation that ran from 18 December 2020 to 26 March 2021, as well as in discussions with stakeholders and national competition authorities. The drafts of the revised VBER and the revised Vertical Guidelines take into account all the evidence collected so far. The public consultation on these drafts forms an integral part of the fact-finding carried out by the Commission. It will inform the impact assessment, on which the final versions of the revised VBER and the revised Vertical Guidelines will be based.

At this stage, the drafts of the revised VBER and the revised Vertical Guidelines include the changes proposed by the Commission based on the evidence gathered so far as summarised in this explanatory note, in line with the following three objectives of the review:

- Readjusting the safe harbour to eliminate false positives and reduce false negatives under the VBER (**objective 1**);
- Providing stakeholders with up-to-date guidance for a business environment reshaped by the growth of e-commerce and online platforms, and ensuring a more harmonised application of the vertical rules across the European Union (**objective 2**); and

¹ 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.

² Guidelines setting out the principles for the assessment of vertical agreements under Article 101 of the Treaty on the Functioning of the European Union OJ C 130, 19.5.2010, p. 1.

³ See Commission Staff Working Document – Evaluation of the Vertical Block Exemption Regulation, SWD(2020) 172 final.

- Reducing compliance costs for businesses by simplifying complex areas of the current rules and streamlining the existing guidance (**objective 3**).

1. Readjusting the safe harbour to eliminate false positives and reduce false negatives under the VBER

Through the evaluation, the Commission identified four areas as possibly requiring changes with a view to readjusting the safe harbour provided by the VBER to its intended scope.

Two of the four areas (dual distribution and parity obligations, which are described in more detail below) concern possible false positives.

False positives concern vertical agreements and restrictions that are currently covered by the safe harbour of the VBER but for which it cannot be assumed with sufficient certainty that they are generally on balance efficiency enhancing and, thus, fulfil the conditions for an exemption pursuant to Article 101(3) of the Treaty. In case of false positives, the Commission has an obligation to reduce the safe harbour to bring it in line with Article 101 of the Treaty and the Empowerment Regulation.⁴

The two other areas (active sales restrictions and online restrictions, which are also described in more detail below) concern possible false negatives.

False negatives refer to vertical agreements and restrictions which are currently not covered by the VBER but for which it can be assumed with sufficient certainty that they generally fulfil, under certain conditions, the requirements for an exemption pursuant to Article 101(3) of the Treaty. Considering that the exclusion of generally exemptible vertical agreements and restrictions from the safe harbour does not result in a breach of Article 101 of the Treaty or the Empowerment Regulation, there is no imperative for the Commission to act. However, excluding generally exemptible vertical agreements from the safe harbour increases the burden, and thus compliance costs, for businesses and notably small and medium-sized enterprises (“SMEs”) when self-assessing the compliance of their agreements with Article 101 of the Treaty. The Commission therefore strives to reduce any such false negatives to the extent possible.

- Dual distribution covers situations in which a supplier not only sells its goods or services through independent distributors but also directly to end customers in direct competition with its independent distributors. The evidence gathered so far during the review of the VBER indicates that the originally rather limited scenarios of dual distribution have become prevalent since the adoption of the currently applicable VBER and Vertical Guidelines. This is notably due to the growth of online sales, which has facilitated direct sales by suppliers, either through their own web-shops or via online marketplaces. As a result, the current exception for dual distribution is likely to exempt vertical agreements where possible horizontal concerns are no longer negligible.

The proposal provided in Article 2(4) to (7) of the draft revised VBER excludes from the existing safe harbour scenarios of dual distribution that may give rise to horizontal concerns. Article 2(4) of the revised draft VBER limits the current safe harbour for dual distribution to instances where

⁴ 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. Through this Regulation, the Council empowered the Commission to adopt block exemption regulations for certain categories of agreements and concerted practices falling under Article 101 of the Treaty.

the parties' aggregated market share in the retail market does not exceed 10%, in line with the existing market share threshold for agreements between competitors used in the De Minimis Notice.⁵

Article 2(5) of the draft revised VBER provides for an additional but more limited safe harbour for dual distribution where the supplier and its distributors have an aggregated market share at retail level above 10% but still do not exceed the 30% market share threshold in Article 3 of the VBER. In such a scenario, to maintain the safe harbour to the extent possible and increase legal certainty for businesses, all aspects of their vertical agreement remain exempted, except for information exchanges between the parties to the vertical agreement. For dual distribution scenarios under Article 2(4) and (5) to benefit from the revised safe harbour, it is also clarified in Article 2(6) of the revised draft VBER that the vertical agreements should not include any by object restrictions under Article 101(1) of the Treaty, nor any hardcore restrictions under Article 4 of the revised VBER.

Further clarifications about the revised scope of the dual distribution exception are provided in the draft revised Vertical Guidelines (see section 4.4.3 of the revised draft Vertical Guidelines), where reference is also made to the Horizontal Guidelines.⁶ These Horizontal Guidelines are currently also under review and could in the future provide further guidance on horizontal and vertical information exchanges in situations of dual distribution to further increase legal certainty for businesses.

In addition, the draft revised VBER reflects the proposed change to expand the scope of the dual distribution exception to include wholesalers and importers (see Article 2(4)(a) of the draft revised VBER). However, Article 2(7) of the revised VBER excludes providers of online intermediation services from the benefit of this exception if they have a hybrid function, namely when they sell goods or services in competition with undertakings to which they provide online intermediation services.

- Parity obligations, sometimes also referred to as Most Favoured Nation clauses ("MFNs"), can be defined as obligations that require an undertaking to offer the same or better conditions to its contract party as those offered on any other sales/marketing channel (e.g. other platforms) or on the company's direct sales channel (e.g. own website(s)). All parity clauses are currently block exempted under the VBER, but have been increasingly subject to enforcement actions by competition authorities during the last years.

As these enforcement actions have focused on parity clauses relating to indirect sales channels, the revised draft VBER removes the benefit of the block exemption for such across-platform retail parity obligations imposed by providers of online intermediation services. This type of parity obligation is added to the list of excluded restrictions, see Article 5(d) of the revised draft VBER. The consequence of this proposed change is that this type of parity obligation would have to be assessed individually under Article 101 of the Treaty.

⁵ Commission Notice on agreements of minor importance which do not appreciably restrict competition under 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice), OJ C C 291, 30.8.2014, p. 1.

⁶ Guidelines on the applicability of Article 101 of the Treaty to horizontal cooperation agreements, OJ C11, 14.1.2011, p. 1; as amended by Corrigenda OJ C33, 2.2.2011, p. 20.

Conversely, the draft revised VBER still block exempts retail parity obligations relating to direct sales or marketing channels (so-called narrow parity). These narrow retail parity obligations as well as wholesale parity obligations continue to benefit from the safe harbor provided by the VBER, provided the general conditions for the application of the VBER are fulfilled, in particular the 30% market share threshold in Article 3 of the VBER. Further guidance on the assessment of parity obligations is provided in sections 6.2.4 and 8.2.5 of the draft revised Vertical Guidelines.

- Active sales restrictions concern limitations of the buyer's ability to actively approach individual customers. The currently applicable rules of the VBER contain only narrow exceptions in which active sales restrictions are allowed. The evidence gathered so far in the review of the VBER and the Vertical Guidelines indicates that these rules are unclear and limit suppliers in designing their distribution systems according to their business needs.

In light of this evidence, Article 1(1)(l) in conjunction with Article 1(1)(n) of the revised draft VBER provide a definition of active sales restrictions. In addition, the draft revised VBER includes proposed changes to the rules on active sales restrictions concerning mostly Article 4(b) to (d) of the revised draft VBER.

In Article 4(b), the possibility of shared exclusivity is introduced, allowing a supplier to appoint more than one exclusive distributor in a particular territory or for a particular customer group. At the same time, the proposed change establishes a link between such shared exclusivity and the efficiency of the exclusive distribution system to ensure that it does not lead to a fragmentation of the single market. To that end, the draft revised Vertical Guidelines clarify that the number of appointed distributors should be determined in proportion to the allocated territory or customer group in such a way as to secure a certain volume of business that preserves their investment efforts.

Another change regarding exclusive distribution concerns the possibility for the supplier to oblige its buyers to pass on to their customers. According to Article 4(b) of the revised draft VBER, such a pass-on is possible where the customer of the buyer has entered into a distribution agreement with the supplier or with a party that was given distribution rights by the supplier. The change aims to enhance the protection of the investment incentives of exclusive distributors.

Furthermore, Article 4(c) of the draft revised VBER grants selective distribution systems enhanced protection from sales by unauthorised distributors located within the selective distribution territory.

- As regards certain indirect measures restricting online sales, the proposed changes relate to dual pricing (i.e. charging the same distributor a higher wholesale price for products intended to be sold online than for products to be sold offline) and to the equivalence principle (i.e. imposing criteria for online sales that are not overall equivalent to the criteria imposed on brick-and-mortar shops). The evidence gathered so far in the review of the VBER indicates that online sales have developed into a well-functioning sales channel and therefore no longer needs special protection by qualifying certain indirect measures restricting online sales as hardcore restrictions.

Therefore, Article 4 of the draft revised VBER no longer qualifies dual pricing as a hardcore restriction. Consequently, it allows suppliers to set different wholesale prices for online and offline sales by the same distributor, in so far as this is intended to incentivise or reward an appropriate level of investments and relates to the costs incurred for each channel.

Furthermore, in the context of a selective distribution system, the criteria imposed by suppliers in relation to online sales no longer have to be overall equivalent to the criteria imposed on brick-and-mortar shops, given that both channels are inherently different in nature.

The proposed changes are subject to the same limiting principle as online sales restrictions more generally. Therefore, the proposed revised VBER only block exempts dual pricing and the lack of equivalence if these restrictions do not, directly or indirectly, have as their object to prevent buyers or their customers from using the internet for the purposes of selling their goods or services online.

2. Provide stakeholders with up-to-date guidance to help businesses to assess their agreements in a business environment reshaped by the growth of e-commerce and online platforms and to ensure a more harmonised application of the vertical rules across the EU

One of the main objectives of the review is to provide stakeholders with up-to-date guidance on online restrictions and ensure a harmonised approach to such restrictions across the EU. To that end, the draft revised VBER and the draft revised Vertical Guidelines incorporate the guiding principles for the assessment of online restrictions drawn from the case law of the Court of Justice of the EU, namely in *Pierre Fabre* and *Coty*,⁷ and relied upon by DG COMP.⁸

Article 1(1)(n) of the draft revised VBER, provides a clear threshold for assessing hardcore restrictions in an environment reshaped by the growth of online sales. Restrictions that, directly or indirectly, in isolation or combination with other factors, have as their object to prevent the buyers or their customers from effectively using the Internet for the purposes of selling their goods or services online or from effectively using one or more online advertising channels are defined as restrictions of active or passive sales, and thus as hardcore restrictions under Article 4 of the VBER.

Section 6.1.2 of the draft revised Vertical Guidelines provides further guidance on such hardcore restrictions. It explains when certain online conduct amounts to active or passive selling. For instance, while the operation of a website is a form of passive selling, translating that website in a language not commonly used in the territory of the distributor is a form of active selling. It also provides that a restriction of the use of price comparison websites, or paid referencing in search engines, amounts to a hardcore restriction under the VBER, as the ability to advertise allows a distributor to attract potential customers to its website, which is a prerequisite for being able to sell online. Conversely, online advertising restrictions that do not exclude specific online advertising channels are block exempted, for example, if such restrictions are linked to the content of online advertising or set certain quality standards. Other updates reflected in the draft revised Vertical Guidelines include the introduction of a section dealing with restrictions of the use of online platforms and price comparison tools (see sections 8.2.3 and 8.2.4).

The draft revised VBER and the draft revised Vertical Guidelines also provide specific rules and guidance relating to the platform economy taking into account that this part of the economy plays an increasingly important role in the distribution of goods and services. Article 1(1)(d) of the revised draft VBER includes a definition of online intermediation services provider, which is based on a

⁷ Case C-439/09 *Pierre Fabre Dermo-Cosmetique SAS v Président de l'Autorité de la concurrence* EU:C:2011:649; Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* EU:C:2017:941.

⁸ See DG Competition's Policy Brief "EU competition rules and marketplace bans: Where do we stand after the Coty judgment?" of April 2018, available at <https://ec.europa.eu/competition/publications/cpb/2018/kdak18001enn.pdf>.

similar definition in the P2B Regulation.⁹ The definition clarifies that online intermediation services providers qualify as suppliers under the VBER. The implications of this clarification and the application of other rules to online intermediation services providers are set out in the Vertical Guidelines (see section 4.3). The relevant guidance also includes an explanation as to why undertakings active in the online platform economy cannot qualify as genuine agents (see section 3.2.3). Furthermore, as mentioned above in the context of the proposed changes to the dual distribution exception, Article 2(7) of the draft revised VBER provides that hybrid online intermediation providers do not benefit from the safe harbour provided by the VBER.

The proposed changes are consistent with the proposal for the Digital Markets Act (“DMA”).¹⁰ This is notably because the focus of the DMA is on digital gatekeepers, which are undertakings that enjoy market power and therefore do not benefit from the safe harbour provided by the VBER.

The draft revised Vertical Guidelines also incorporate the February 2021 Working Paper on distributors that also act as agents for certain products for the same supplier.¹¹

In addition, the draft revised VBER aims to ensure a more harmonized application of Article 101 of the Treaty to vertical agreements across the EU. This is to be achieved by incorporating in the VBER itself certain guiding principles, such as those applicable to online sales restrictions, as well as new rules, for example regarding the definition and qualification of online intermediation services providers as suppliers. At the same time, the draft revised Vertical Guidelines aim to strengthen the ability of the national competition authorities to withdraw the benefit of the VBER in individual cases to the extent possible within the existing legal framework by providing guidance on the applicable conditions and procedure (see section 7.1 of the draft revised Vertical Guidelines).

3. Reduce compliance costs for businesses by simplifying the current rules and streamlining the existing guidance

The draft revised VBER and draft revised Vertical guidelines also aim to reduce compliance costs of businesses, notably SMEs, by clarifying certain provisions perceived as particularly complex and thus difficult to implement.

In particular, the provisions on territorial and customer restrictions in Article 4(b) of the current VBER, which stakeholders considered as particularly complex, have been replaced with three distinct sets of provisions clarifying the scope of the prohibition for each of the main distribution systems, namely exclusive distribution, selective distribution and free distribution. In addition, section 4.6 of the draft revised Vertical Guidelines provide a detailed explanation of the characteristics of each of these distribution systems.

Finally, the structure of the draft revised Vertical Guidelines has been simplified to provide a clearer framework of analysis for vertical agreements. For example, the new structure combines the previously scattered guidance on RPM in one dedicated section (see section 6.1.1 of the draft revised Vertical Guidelines).

⁹ 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, OJ L 186, 11.7.2019, p. 57.

¹⁰ Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), {SEC(2020) 437 final} - {SWD(2020) 363 final} - {SWD(2020) 364 final}.

¹¹ Available at

https://ec.europa.eu/competition/consultations/2018_vber/working_paper_on_dual_role_agents.pdf.
