

The Consumer Voice in Europe

## REVISION OF THE VERTICAL BLOCK EXEMPTION REGULATION AND THE VERTICAL GUIDELINES

BEUC contribution to Inception Impact Assessment



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EC register for interest representatives: identification number 9505781573-45



Co-funded by the European Union

Ref: BEUC-X-2020-114 – 20/11/2020

## Why it matters to consumers

Agreements between companies in a supply chain (i.e. vertical agreements), for example between manufacturers and retailers, are important for products to reach consumers but can harm consumers if they limit consumers' ability to choose where to buy the products they want. Such agreements can also restrict consumers' ability to benefit from the lowest possible prices and ways of finding these. It is therefore essential that consumers' interests are central to any revision of the Vertical Restraints Block Exemption and Vertical Guidelines.

## Summary

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*The Vertical Block Exemption Regulation (VBER)<sup>1</sup> and Vertical Guidelines<sup>2</sup> need to be updated to reflect current market structures and practices.*

*This response to the Inception Impact Assessment (IIA) focusses on the issues of primary concern to consumers.*

*In BEUC's view, the update should reflect in particular the following key issues for consumers:*

- **Price comparison websites:** *The Commission should consider revising the VBER to qualify bans on the use of comparison websites as clear cut violations of the antitrust rules (i.e. they would be qualified as so-called "hardcore restrictions"), with the Vertical Guidelines giving guidance on the exceptional circumstances in which they could be considered legal.*
- **Online marketplace bans:** *should only be allowed in very limited circumstances.*
- **Resale Price Maintenance:** *this should remain prohibited (as a hardcore restriction) with no loosening of the rules.*
- **Parity clauses:** *should be seen as effectively hardcore restrictions. Of the Commission's three options, it should only consider the IIA's Option 3 - removing the benefit of the block exemption for all types of parity obligations by including them in the list of excluded restrictions (Article 5 VBER).*
- **Measures restricting online sales:** *given the ever-increasing importance of online purchasing for consumers, the Commission should ensure that consumer choice is not harmed by any unjustified measures to directly or indirectly restrict distribution to consumers.*
- **Sustainability:** *the treatment of vertical agreements promoting sustainability should not undermine the basic principles of EU competition law, in particular ensuring consumer welfare.*

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<sup>1</sup> 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, at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32010R0330>.

<sup>2</sup> Guidelines on Vertical Restraints, 2010, at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:130:0001:0046:EN:PDF>.

## 1. General remarks

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BEUC agrees with the analysis in the IIA that the VBER and Vertical Guidelines need to be adapted to market developments, notably the growth of online sales and the emergence of new market players, like online platforms, and new business models. The current VBER and the Vertical Guidelines are not sufficiently clear on a number of issues, or fail to address certain issues, and need updating to reflect some recent case law. The Commission also needs to revise the rules and guidance to counter the fact that competition authorities in different Member States have diverged in their interpretation of some vertical restraints, which has resulted in different outcomes for consumers in the EU depending on where they reside.

The Commission's Staff Working Document 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."<sup>3</sup>

Some suppliers have in turn sought to introduce new types of vertical restrictions, such as restrictions regarding sales through online marketplaces, retail price parity clauses, bans on price comparison tools and restrictions on online advertising.

The IIA appears to focus primarily on relaxing the rules for business rather than considering the impact of restrictive vertical practices on consumer choice across the omni-channel process, despite the evidence of potential harms throughout the Commission's Staff Working Document, including at Member State level.<sup>4</sup> The Commission must ensure that consumers continue to enjoy optimal choice by updating the VBER and the Vertical Guidelines to take account of the different ways consumers purchase today and deal with unjustifiable attempts by businesses to restrict consumers' choices. BEUC therefore urges the Commission to not only consider what business wants but most fundamentally what consumers need.

Based on the Commission's Staff Working Document, the IIA categorises possible revisions into three categories:

- A. Rules that need to be clarified or simplified
- B. Issues raised (for clarification)
- C. Possible revision of the current rules.

This paper will follow the same structure.

## 2. Problems to be tackled in the review of the VBER and Vertical Guidelines

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### A. Rules that need to be clarified or simplified

The IIA notes that the VBER needs to be revised to clarify how the rules apply to new restrictions of competition and new types of market players that have emerged or become

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<sup>3</sup> Staff Working Document, page 36.

<sup>4</sup> See for example Staff Working Document, pages 43-48.

more prevalent since the adoption of the current VBER. This clarification is in particular necessary to avoid divergent interpretations.

BEUC is concerned in particular by the following:

### **Restrictions on the use of price comparison websites**

Price comparison websites are very useful and valuable for consumers. They give consumers the possibility to more easily find and compare products and offers and thus play an important role in helping consumers to make informed purchasing decisions. The information available on manufacturers' or retailers' websites does not necessarily enable consumers to easily compare products and prices in the same way.

This was confirmed in a report by DG Justice stating: "Comparison tools have a clear potential for empowering consumers. They can help save time and money and find deals that are best suited to each consumer's individual needs. They can also play a key role in enabling consumers to discover offers beyond their country of residence, facilitating cross-border purchases and allowing consumers to fully enjoy the benefits of the EU Single Market."<sup>5</sup> This is confirmed by the experience of BEUC's members: comparison tools run by consumer organisations have shown themselves to be extremely useful for consumers to make informed choices and find the offers that meet their expectations.

However, bans or restrictions on the use of comparison websites have been found by the Commission's Staff Working Document<sup>6</sup> to have become more prevalent in recent years. The E-commerce Sector Inquiry<sup>7</sup>, whilst recognising that manufacturers claim to justify bans on price comparison websites on grounds of brand image and quality of service, also notes that price comparison websites have today increased the quality and the image of their services, making quality criteria a less valid justification. The Sector Inquiry further points out that bans on price comparison websites make it more difficult for (potential) customers to find retailers' websites, decrease price transparency and limit price competition among retailers, sometimes in order to protect the manufacturers' own online offering. The German Federal Cartel Office (Bundeskartellamt), in its *Asics* decision<sup>8</sup>, found a ban on price comparison websites constituted an unjustified restriction of competition.

As price comparison websites normally re-direct consumers to the authorised seller's website to complete the transaction (unlike marketplaces), a restriction on the use of price comparison websites by distributors in the context of a selective distribution system appears to be less justified than a prohibition to sell on online platforms (platform ban).<sup>9</sup> Given the undoubted harm to consumers of bans on comparison tools, we would propose revising the VBER to explicitly clarify that such bans are illegal except in very limited circumstances.

Indeed, as price comparison tools limit transparency in e-commerce and make it harder for consumers in particular to compare prices, one of the most significant competitive parameters, for no credible efficiency gain, BEUC would, like some National Competition Authorities (NCAs),<sup>10</sup> argue that the VBER should consider defining bans on comparison websites as hardcore restrictions. This would send a clear signal on the general anticompetitive nature of such bans but allowing for them to be legal in limited (quality criteria-based) circumstances where they can be demonstrated to generate efficiencies.

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<sup>5</sup> Comparison Tools –Report from the Multi-Stakeholder Dialogue, 2013, at: [https://ec.europa.eu/info/sites/info/files/consumer-summit-2013-msdct-report\\_en\\_0.pdf](https://ec.europa.eu/info/sites/info/files/consumer-summit-2013-msdct-report_en_0.pdf)

<sup>6</sup> Staff Working Document, p.56.

<sup>7</sup> REPORT FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT Final report on the E-commerce Sector Inquiry {SWD(2017) 154 final} ("E-Commerce Sector Inquiry"), at: [https://ec.europa.eu/competition/antitrust/sector\\_inquiry\\_final\\_report\\_en.pdf](https://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf), paras 515-541.

<sup>8</sup> This decision was upheld on appeal up to the Federal Supreme Court.

<sup>9</sup> As noted by NCAs in the Staff Working Document, p. 128.

<sup>10</sup> Staff Working Document, p.56 and 128.

## Online Marketplace bans

Online marketplace/platform bans (mostly found in selective distribution agreements) is an area that certainly needs updating in the VBER and Vertical Guidelines given significantly differing views of both market participants and competition enforcers in Europe and in the light of court rulings such as *Coty*<sup>11</sup> concerning the ability of manufacturers to restrict the sale of their products on online marketplaces.

Selective distribution systems can involve pro-competitive efficiencies such as brand protection, optimising the consumer experience, quality and innovation. However, from the consumer perspective, it is essential that the rules do not encourage businesses to establish selective distribution systems with the objective of imposing more restrictions on authorised distributors in cases where this is not justified by the nature of the products or services concerned (in line with the criteria set out in the *Metro* court ruling<sup>12</sup>).

There is no doubt that online marketplaces benefit retailers and consumers as long as they comply with competition law and all other relevant laws. Restrictions on their use reduces the number of online sellers for a particular product or service and reduces consumer price transparency and price competition. Online marketplace bans are thus detrimental to distributors' business opportunities and to consumer choice. Online platforms/marketplaces can be an important way for small and medium-sized companies (SMEs) to access consumers. They can promote the visibility of SMEs that do not have the financial, technical and marketing knowledge to increase their presence through other routes. In such circumstances, online marketplace bans can have a substantial impact on competition to the detriment of consumers. It is noted that some NCAs consider that online platform bans should be considered hardcore restrictions under the VBER.<sup>13</sup>

Furthermore, from the consumer perspective BEUC would, despite some rulings in national courts and the extension of *Coty's* scope as expressed in the Commission's Competition policy brief<sup>14</sup>, agree with those who interpret *Coty's* scope more narrowly. Furthermore, even if the *Coty* court ruling found that marketplace bans within a selective distribution system were not hardcore restrictions, given the negative effect of such bans on consumers, the VBER and Vertical Guidelines should make clear in which limited circumstances marketplace bans are acceptable under Article 101 and when they are not.

## Sustainability

BEUC welcomes the suggestion to clarify how sustainability should be taken into account in vertical agreements. Competition policy can contribute to achieving the Green Deal goals but the foundations of competition policy, including consumer welfare, must not be undermined in the process.

This contribution does not require a fundamental change to the interpretation and application of EU competition law. Rather, the Commission should first and foremost focus on clarification and guidance to market players on how the present legal framework is already well equipped to ensure that genuine initiatives to meet Green Deal goals can be pursued by business. The approach suggested by the European Parliament to disapply standard Article 101(1) and Article 101(3) analysis for certain types of vertical agreements promoting sustainability (environmental, animal health or animal welfare standards higher

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<sup>11</sup> Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* [2017] ECLI:EU:C:2017:941.

<sup>12</sup> Case 26/76 *Metro v Commission (No 1)* [1977] ECLI:EU:C:1977:167.

<sup>13</sup> Staff Working Document, p. 127f.

<sup>14</sup> See <https://ec.europa.eu/competition/publications/cpb/2018/kdak18001enn.pdf>.

than those mandatory under Union or national legislation)<sup>15</sup> is not an appropriate way forward and must not be replicated.

## **B. Issues raised (for clarification)**

### **Resale Price Maintenance**

Economists often argue that resale price maintenance (RPM) can involve efficiencies beyond the limited exceptions, such as new product launches, set out in the Vertical Guidelines and RPM should therefore not be considered as a hardcore restriction of competition. The experience of consumer organisations suggests that these efficiencies may exist in the theories of economists but are much harder to find in real life.

On the one hand, the Commission's Support Study report did not find any negative effects of RPM specifically in the book sector.<sup>16</sup> On the other, the majority of respondents to the public consultation supported retaining RPM as a hardcore restriction.<sup>17</sup> Cases pursued at both EU and national level<sup>18</sup> found that RPM limited effective price competition between retailers and led to higher prices with an immediate effect on consumers. The IIA suggests that the Commission intends to explore with businesses concrete instances where efficiencies for RPM can be claimed. Even if consumers could theoretically benefit from such efficiencies, the Commission should be very sceptical of business self-interest.

In 2007, the US Supreme Court in the *Leegin* case ruled that RPM should be subject to the rule of reason. At the state level, however, several states continued to have a *per se* prohibition on RPM. About seven years after *Leegin*, an empirical study<sup>19</sup> compared prices across a broad variety of products between states that did and did not have a local *per se* prohibition of RPM. The study found prices increased in rule of reason states relative to *per se* states (coupled with declining quantities). This suggests quite strongly that RPM does not enhance consumer welfare but rather the opposite: it harms consumers.

In light of this, and in the absence of specific evidence to justify Article 101(3) exceptions, the revised VBER and Guidelines should not fundamentally change as regards RPM. However, guidance could be improved, for example in relation to the use of price algorithms (particularly in the context of recommended retail prices), in relation to other practices which effectively amount to RPM, or attempts at circumvention of the prohibition, and in relation to any specific sectoral effects of RPM.

## **C. Possible revision of the current rules**

The IIA considers a number of policy options for potential revision of the scope of the VBER safe harbour.

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<sup>15</sup> Amendment 144 in EP Common agricultural policy – amendment of the CMO and other Regulations. This suggests that for certain types of vertical agreements promoting sustainability (environmental, animal health or animal welfare standards higher than those mandatory under Union or national legislation) the application of Article 101(1) should be excluded provided that the advantages for the public interest outweigh the disadvantages to consumers and that the restrictions are indispensable to the attainment of the objective. Available at: [https://www.europarl.europa.eu/doceo/document/TA-9-2020-0289\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2020-0289_EN.html)

<sup>16</sup> Support studies for the evaluation of the VBER: Final Report, ("Support Study") at: <https://ec.europa.eu/competition/publications/reports/kd0420219enn.pdf>, page 318ff.

<sup>17</sup> Staff Working Document, p. 171.

<sup>18</sup> See Staff Working Document, p. 125-6, 172.

<sup>19</sup> The Empirical Effects of Minimum Resale Price Maintenance: Alexander MacKay, David Aron Smith University of Chicago, Analysis Group, 2014.

## Dual distribution

With changes in market practices leading to situations where suppliers sell their goods or services directly to end customers in competition with their distributors at retail level, BEUC agrees that the application of the VBER needs to be reassessed to ensure that this does not lead to higher prices or other forms of harm to consumers. This is particularly important in a context where the Staff Working Document notes that manufacturers are seeking greater control over their distribution networks with a view to better controlling price.<sup>20</sup>

## Active sales restrictions

Allowing greater restriction of active sales in the interest of “business needs”<sup>21</sup> must be considered very carefully as it will very likely lead to a reduced choice of suppliers for consumers.

## Passive sales restrictions

In the context of any review of the distinction between active and passive sales, BEUC considers that it is necessary to ensure that restrictions on passive sales in the broadest sense continue to be defined as clear cut violations of the antitrust rules (i.e. hardcore restrictions). Even if the internet has offered consumers the possibility (at least theoretically) to access products and services across the Single Market, passive and active sales concern two completely different scenarios. In active sales, traders are allowed to target consumers in a certain territory while passive sales are about consumers proactively searching for products and services outside the geographical market in which they live. Such products might better meet consumers’ individual expectations. This distinction is also valid online because of natural barriers such as language and shopping habits. Therefore, we encourage the Commission to continue to make clear, both in the VBER and Vertical Guidelines and in its enforcement actions, that there is no place for passive sales restrictions in the Single Market since they eliminate cross-border competition.

## Indirect measures restricting online sales

No changes should be made to the VBER or Vertical Guidelines which could lead to higher prices or reduced choice for consumers shopping online. On the contrary, given the importance of online purchasing by consumers and the fact that the Staff Working Paper notes that online sales restrictions are becoming more prevalent, it is necessary to stress that in most cases such restrictions, whether direct or indirect, should be considered incompatible with competition law.

## Parity obligations

Price parity or so-called ‘Most Favoured Nation’ (MFN) clauses have, according to the Staff Working Document, been used much more frequently in recent years across several sectors including mass market goods.<sup>22</sup>

It has been argued that the economic effects of price parity clauses are largely identical to those of resale price maintenance<sup>23</sup> or in fact worse than pure RPM because the online retailer controls the minimum price that is being set in the market and can manipulate that price by increasing its commission.<sup>24</sup> The E-commerce Sector Inquiry noted that parity clauses can provide disincentives for retailers to compete on those parameters which fall

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<sup>20</sup> Staff Working Document, page 32.

<sup>21</sup> IAA, page 2.

<sup>22</sup> Staff Working Document, p. 38 and 181.

<sup>23</sup> Staff Working Document, p 182.

<sup>24</sup> OECD, Policy Roundtable Vertical Restraints for On-line Sales, 2013, p.197 at: <http://www.oecd.org/competition/VerticalRestraintsForOnlineSales2013.pdf>

within the scope of the clause which may ultimately lead to a reduction of intra-brand competition.<sup>25</sup> Parity clauses may reduce competition between online retailers and marketplaces, disincentivise price-cutting and make market entry or expansion for competing marketplaces more difficult or collusion easier. As highlighted in the contributions of BEUC and of our German member *Verbraucherzentrale Bundesverband* to the commitments on the Amazon E-book's case, narrow parity clauses in online booking could have a similar effect to wide parity clauses.

Parity clauses have been the subject of much debate and differing views among the Member States' national competition authorities in the Booking.com cases. Whereas the Bundeskartellamt considered such clauses to be harmful to consumers, both where applied to other platforms (so-called wide MFN clauses) and to a hotel's own website (narrow MFN clauses), other NCAs (French, Italian and Swedish) only considered the former to be a problem. This inconsistency needs to be resolved in a way that promotes competition and maximum consumer welfare.

Studies commissioned by both the Bundeskartellamt (published in August 2020<sup>26</sup>) and by the European Commission support the Bundeskartellamt's position. The Commission's two studies concluded that legislative bans on all price parity clauses on hotel booking platforms in various Member States and a ban on narrow parity clauses in the observed countries led to lower hotel prices without a negative effect on demand, thus increasing consumer welfare.

The Bundeskartellamt also found that consumers very rarely free-ride by using Booking.com to research hotels and then book a lower price through the hotel website. Only in 1 percent of cases surveyed where consumers find accommodation on Booking.com do consumers then book it via another channel. The Staff Working Document also concludes that free-riding by consumers is modest.<sup>27</sup>

In the VBER consultations, a significant number of respondents also argued that retail price parity clauses should be clearly qualified as hardcore restrictions.<sup>28</sup>

Given the evidence that such clauses result in consumers paying higher prices and the evidence on low levels of free-riding risks – unless the Commission has solid empirical evidence to the contrary in the hospitality or other sectors, BEUC suggests that parity obligations should be seen as *effectively* hardcore restrictions for sectors in which they have clearly been demonstrated to be harmful. Examples of exceptional situations where parity obligations should not be considered harmful could be set out in the Vertical Guidelines. For these reasons, of the Commission's three options, it should only consider the IIA's Option 3 - removing the benefit of the block exemption for all types of parity obligations by including them in the list of excluded restrictions (Article 5 VBER), thus requiring an individual effects-based assessment in all cases.

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<sup>25</sup> Sector Inquiry, para 622-3.

<sup>26</sup> Die Auswirkungen enger Preisparitätsklauseln im Online-Vertrieb – Ermittlungsergebnisse aus dem Booking-Verfahren des Bundeskartellamtes, at: [https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Schriftenreihe\\_Digitales/Schriftenreihe\\_Digitales\\_7.pdf?\\_\\_blob=publicationFile&v=3](https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Schriftenreihe_Digitales/Schriftenreihe_Digitales_7.pdf?__blob=publicationFile&v=3)

<sup>27</sup> Staff Working Document, p. 42. The Commission's study on consumer purchasing behaviour in Europe estimated that free-riding is relevant for 2-15% of all consumers/purchases between online and offline channels, depending on the products considered in the study; free-riding between different types of online channels is relevant to an even lesser extent, with 1-9% of purchases; and free-riding within the same type of online channel concerning 3-25% of purchases.

<sup>28</sup> Staff Working Document, p. 167. See also para 48 Vertical Guidelines.



## Conclusion

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As the Commission Staff Working Document and the comments of the Regulatory Scrutiny Board noted the limited role played by consumers in the Commission's evaluation<sup>29</sup>, we trust that the follow up to the IIA will take due note of this contribution and that this will have a "meaningful impact on the evaluation" of next steps.<sup>30</sup>

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<sup>29</sup> "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." Commission Staff Working Document Evaluation of the Vertical Block Exemption Regulation {SWD(2020) 173 final} ("Staff Working Document"), page 97, at: [https://ec.europa.eu/competition/consultations/2018\\_vber/staff\\_working\\_document.pdf](https://ec.europa.eu/competition/consultations/2018_vber/staff_working_document.pdf)

<sup>30</sup> Staff Working Document, page 89.



*This publication is part of an activity which has received funding under an operating grant from the European Union's Consumer Programme (2014-2020).*

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