BEUC The European Consumer Organisation

The Consumer Voice in Europe

European Commission's Consultation on Vertical Restraints

BEUC's comments on the revision of the Vertical Block Exemption Regulation

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Why it matters to consumers

Agreements between companies active at different levels of the supply chain, called "vertical agreements" (for example between supplier and retailers), play a key role to ensure efficiency in distribution systems. Nonetheless, they might contain restrictions which may harm consumers if they limit consumers' ability to choose where to buy the products they want. Such agreements may also restrict consumers' ability to benefit from the lowest possible prices and ways to find them.

Summary

The retail landscape has substantially evolved over the last 10 years, especially with the rise of online shopping and marketplaces. The current rules are not adapted anymore and may create uncertainty for businesses and competition authorities alike. The Vertical Block Exemption Regulation (VBER)[1] and Vertical Guidelines[2] need to be updated to reflect current market structures and practices to ensure consumers can benefit from choice, increased product quality and competitive prices.

The revision of the VBER and the Vertical Guidelines should, in particular, address the following elements that are relevant from a consumer perspective:

- **Resale Price Maintenance** (RPM) should remain prohibited (i.e. classified as a hardcore restriction) with no loosening of the rules.
- **Non-compete obligations** can generate potential harmful effects on competition, therefore an exemption of non-compete obligations beyond the current 5 years as well as tacitly renewable clauses would not be appropriate.
- **Dual distribution**: The scope of the exemption should be clarified and better defined in the revised VBER and Vertical Guidelines to ensure legal certainty for business and to ensure that it does not lead to collusion and thus higher prices for consumers
- **Dual pricing:** In the revised VBER and Vertical Guidelines dual pricing (e.g. different wholesale online and offline prices) should continue to be considered as a hardcore restriction. However, where flexibility is needed clear guidance as to the criteria used for the individual assessment of dual pricing (under Article 101(3) TFEU) should be provided so that suppliers cannot misuse dual pricing to the detriment of consumers.
- **Active sales restrictions** should not be considered legal beyond the current limited and well-defined situations.

[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, at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32010R0330. (hereinafter "Vertical block exemption regulation" or "VBER").

[2] Guidelines on Vertical Restraints, 2010, at https://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:130:0001:0046:EN:PDF. (hereinafter "Vertical Guidelines").

- **Passive sales restrictions** are highly detrimental to consumers and the single market and should continue to be considered as a hardcore restriction in the revised VBER.
- **Price parity clauses** should be classified as hardcore restrictions, or at the very least be included in the list of excluded restrictions (Art. 5 VBER).
- **Online sales and marketplace restrictions** should only be allowed in very limited circumstances. Given the ever-increasing importance of e-commerce for consumers, the Commission should ensure that consumer choice is not harmed by any unjustified measures that directly or indirectly restrict retailers' ability to sell their products online.
- **Price comparison websites** have become integral to the online shopping experience of consumers, hence bans on the use of price comparison websites should be qualified as a hardcore restriction in the revised VBER.
- **Sustainability** considerations in vertical agreements should not undermine the basic principles of EU competition law, in particular consumer welfare in what concerns price, choice, and product quality.

1. Introduction

BEUC welcomes the opportunity to comment on the European Commission's consultation on the revision of the VBER and the Vertical Guidelines. 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 distribution 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 to be updated 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 live.

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."[3] However, throughout the consultation (in the IIA and in its public questionnaire), the revision appears to focus primarily on relaxing the rules for businesses rather than considering the impact of restrictive vertical practices on consumer choice across such omni-channel process.

The Commission must therefore ensure in the ongoing review 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.

In this regard, the Commission questionnaire within the public consultation on the VBER was primarily directed towards businesses and therefore it is difficult for a consumer organisation like BEUC to provide meaningful answers to many of the questions.

BEUC therefore urges the Commission to not only consider what business wants but most fundamentally what consumers need.

In the following sections we indicate which are the rules that should be maintained, clarified, and added to the VBER.

2. Rules that should be maintained

2.1. Restrictions on resale price maintenance (RPM)

The current VBER classifies RPM[4] as a hardcore restriction because of its extremely harmful effects on (price) competition. Nonetheless, the Vertical Guidelines explain that in certain exceptional circumstances RPM can be imposed on retailers, such as, for example, during the introduction of a new product for a short period of time.[5] This is subject to a case-by-case assessment under Article 101(3) TFEU where the business seeking justify the imposition of RPM will need to show that the conduct generates sufficient efficiencies for

[3] Staff Working Document, p. 36
[4] Resale price maintenance refers to the imposition by the manufacturer or supplier on the retailer of a fixed or minimum retail sale price.
[5] Vertical Guidelines, para. 225.

consumers to outweigh the anticompetitive effects.[6] However, the experience of consumer organisations suggests that these efficiencies are hard to find in real life.

Many NCAs and other respondents to the public consultations support maintaining RPM as a hardcore restriction (especially since the possibility to justify the use of an RPM under Article 101(3) TFEU would remain).[7] The cases pursued at both EU and national level found that RPM limited effective price competition between retailers and led to higher prices with an immediate effect on consumers.

As RPM generates strong harmful effects for consumers, the revised VBER should maintain the current classification of RPM as a hardcore restriction. The revised Vertical Guidelines should clarify the circumstances where RPM can be exceptionally allowed to ensure legal certainty for businesses and avoid divergent approaches in different Member States. This would be particularly useful regarding novel implementations of RPM which are not covered by the current Guidelines, such as the use of price monitoring software and price algorithms. Finally, the Commission should be very sceptical of any claimed efficiencies of RPM.

2.2. Restrictions on the use of non-compete obligations

A non-compete obligation in the context the VBER should be understood as a single-branding obligation (the retailer is only allowed to sell one brand of a particular product and cannot purchase or sell competing brands) or an exclusive purchase clause (where the retailer is forced to purchase all their stock for a specific product from one specific supplier). Article 1(d) of the VBER and paragraph 66 of the Vertical Guidelines specify that a direct or indirect obligation to purchase 80 percent of the buyer's total purchases of the contract goods is considered as a non-compete obligation.

The competitive concerns regarding non-compete obligations stem from the fact that they can reduce competition between competing brands within a store (because of single-branding, the retailer would only be allowed to sell one brand of computer for example). In addition, forcing the retailer to purchase all their stock from one supplier prevents other suppliers from competing on that market. For these reasons, under the current VBER, non-compete obligations are included in Article 5 and are excluded from the block exemption if their duration is longer than 5 years or if they are tacitly renewable.

Because of their potential harmful effects on competition, the exemption of non-compete obligations beyond the current 5 years, or of tacitly renewable clauses, would not be appropriate. Five years should be sufficient to incentivise investment. If businesses in a vertical relationship consider that maintaining a non-compete clause after 5 years is still in their mutual interests, the limited efforts and costs to sign a new contract is insufficient to justify raising the limit to 10 years or to allow indefinite tacitly renewable non-compete obligations. As the VBER considers non-compete clauses to be harmful to competition, extending the exemption indefinitely for companies' administrative convenience would seem to be an unjustified trade off.

2.3. Passive sales restrictions

Passive sales restrictions go a step further than active sales restrictions. They not only prevent the retailer from actively seeking new customers, but also prohibit him from responding to unsolicited requests from customers located outside his catchment area or his customer group. This type of restriction is much more severe than active sales

[6] Vertical Guidelines, para. 223.
[7] Staff working document, p. 137.

restrictions and seriously restricts the ability of consumers to shop across borders and therefore benefit from the internal market. Passive sales restrictions are considered as hardcore restrictions under the current VBER.[8] Because of their strong anti-competitive effects, passive sales restrictions should continue to be classified as hardcore restriction.

2.4. Active sales restrictions

Active sales restrictions refer to limits placed by a supplier on its retailers regarding the geographical territory in which the retailers can sell or the category of customers to which they can sell. An active sales restriction means that a retailer is not allowed to "actively" approach individual customers to sell goods or services outside of his allowed territory or "catchment area" (this could be a city, a region or even an entire Member State) or to a different customer group (e.g. business users versus private users). However, the retailer remains authorised to respond to unsolicited requests from those customers.

Although active sales restrictions may impede retailers' freedom to reach new consumers under limited circumstances they may lead to some efficiencies, and therefore be beneficial for consumers. For example, active sales restrictions may encourage a retailer to make additional investments to increase sales (e.g. pre- and post-sales services, promotional campaigns, staff training) and avoid free-riding from rivals. The consultation suggests that suppliers should be allowed to use more active sales bans than are permitted today, for example in combination with selective distribution systems. This could, however, lead to reduced consumer choice, especially within the context of selective distribution systems. Thus, in the absence of incontrovertible evidence of the need for change, active sales restrictions should not be considered legal beyond the current limited and well-defined situations.

3. Rules that should be updated or clarified

3.1. Dual distribution

Dual distribution refers to the situation where a manufacturer sells products simultaneously to retailers (that then resell to final consumers) and directly to final consumers. In this case, the manufacturer acts both as a supplier and retailer, and therefore competes directly with the retailers that stock and sell their products. With the advent of e-commerce, a growing number of manufacturers have introduced their own online shops. Although we refer here to manufacturers, a wholesaler or an importer can also engage in dual distribution. Under the current VBER, only dual distribution implemented by a manufacturer is block exempted.

Dual distribution can have positive and negative effects on competition. Manufacturers selling their products directly to consumers can have two advantages for consumers. First, it can increase consumer choice by potentially increasing the number of retailers consumers can choose from for particular products. Second, it can lead to more competitive prices as selling directly to consumers avoids double marginalisation, potentially leading to lower prices for consumers.

[8] Article 4(b) Vertical Block Exemption Regulation. It should be noted that Article 4(b)(iii) of the Vertical Block Exemption Regulation allows a ban on passive sales in only one specific situation: the supplier can prohibit passive sales to unauthorised distributors within a selective distribution system. Since the essence of a selective distribution system is have control over the retailer to ensure specific investment, services, quality, etc., this limited exception should remain in the revised VBER without being extended.

Nonetheless, a potential anti-competitive effect of dual distribution is that it can facilitate collusion between manufacturers and retailers, as they will inevitably exchange (sensitive) information that would normally be prohibited between competitors. This could drive up consumer prices and drive other retailers out of the markets.

Since dual distribution is increasingly common, the revised VBER and Vertical Guidelines should clarify when the risks of collusion (potentially leading to higher prices for consumers) mean that dual distribution should not fall within the scope of the VBER and should require an individual assessment under 101(3) TFEU.

3.2. Dual pricing

Dual pricing refers to the situation where a supplier charges different wholesale prices to its buyers (i.e. the retailers) depending on whether the goods are intended to be sold online or offline. For example, a retailer could adopt a hybrid strategy and sell its goods both online and offline ("hybrid retailer"). Under the current VBER and its Vertical Guidelines, dual pricing applied to hybrid retailers constitutes a hardcore restriction of competition.

Price discrimination between online and offline retail is not allowed on the grounds that it would restrict consumers' ability to buy online. However, in recent years, following the rise of e-commerce (a situation exacerbated by the current pandemic), it has been considered whether to introduce flexibility into the system in order to help brick-and-mortar stores to compete with online stores

One needs to be mindful of the fact that if dual pricing is allowed, it could have an effect similar to a total online sales ban if manufacturers would charge excessive wholesale prices to online retailers. This would amount to a ban on passive sales which is listed in Article 4 of the VBER as a hardcore restriction since it would not be economically attractive for retailers to offer products online. Furthermore, there is a risk that prices would go up for consumers as a result of the increase of online prices, which might also push offline prices up. Manufacturers are increasingly selling their product directly online; they might have incentives to keep wholesale prices for online retailers higher rather than discounting prices for brick-and-mortar shops.

Thus, the revised VBER should maintain dual pricing as a hardcore restriction. Where flexibility is needed, the Vertical Guidelines could provide guidance as to the criteria used for the individual assessment of dual pricing under Article 101(3) TFEU.

4. Rules that should be added

4.1. Price parity clauses

Price parity clauses (also referred to as "most favoured nation" or "MFN" clauses) refer to a contractual agreements between an upstream and a downstream company in a vertical relationship. These clauses typically specify that the seller will offer his good or services to the buyer on terms (generally price) that are at least as favourable as those offered to any other buyers. Although a price parity clause could be signed between any two parties in a vertical relationship, they are most often found between an online platform and individual supplier, for example an online hotel booking platform may require such a clause from a hotel to prevent the latter from offering lower prices to another booking platforms or on its own websites.

The current VBER and Vertical Guidelines do not address sufficiently the assessment of price parity clauses.[9] This has led to different approaches among national competition authorities and national courts.[10] In addition, the use of parity clauses has increased in recent years due to the rise of marketplaces and online booking platforms.[11] Despite the distinction often made between "wide" and "narrow" parity clauses,[12] both types of clause are harmful to consumers since they severely limit price competition between different distribution channels. In addition, the possible efficiencies are at best very limited and at worst non-existent.

The justification often used for parity clauses is that, for example, a consumer will use an online hotel booking platform to research and compare hotels, and then directly contact their preferred hotel to obtain a lower price since the hotel will not have to pay a fee to the booking platform. In practice, although this sometimes happens with very price sensitive consumers, the practice is not common enough to justify the imposition of parity clauses that have such harmful effects. The German Federal Cartel Office (*Bundeskartellamt*) 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.[13]

Because of their strong anti-competitive effects, the revised VBER should classify all price parity clauses as hardcore restrictions. This would ensure legal certainty for businesses, prevent divergent approaches in the Member States, and promote competition. In addition, even if classified as a hardcore restrictions, the door remains open for a business to adduce robust evidence that shows the price parity clause generate efficiencies and should be exempted under Article 101(3) TFEU.

4.2. Online sales and marketplace bans

An online sales ban imposed by the manufacturer prohibits the retailer from selling the product in question, even on the retailer's own website. In contrast, under a marketplace ban, the retailer is allowed to sell the product online through its own website but not through an online marketplace (or platform). This can reduce consumer choice and price competition since marketplaces represent an important channel to reach consumers and generate sales.

Online marketplace/platform bans (mostly found in selective distribution agreements) is an area that certainly needs consideration in the VBER and Vertical Guidelines given significantly differing views of both market participants and national competition authorities. Furthermore, recent court rulings such as *Coty*[14] concerning the ability of

[9] Staff Working Document, p. 61.
[10] Mark-Oliver Mackenrodt, 'Price and Condition Parity Clauses in Contracts Between Hotel Booking Platforms and Hotels' (2019) 50 IIC - International Review of Intellectual Property and Competition Law 1131; Andrea Mantovani, Claudio Piga and Carlo Reggiani, 'On the Economic Effects of Price Parity Clauses - What Do We Know Three Years Later?' (2018) 9 Journal of European Competition Law & Practice 650.
[11] Staff Working Document pp. 38 and 181.
[12] For example, a wide parity clause signed between booking platform A and a hotel will ensure that the hotel cannot offer their rooms at lower prices through any other distributions channels (e.g. the hotel's own website, a rival online booking platforms, or even walk-in customers). In contrast, a narrow parity clause will only prevent the hotel from offering a better price on its own sales channel (its website).
[13] 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.
[14] Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* [2017] ECLI:EU:C:2017:941.

manufacturers to restrict the sale of their products on online marketplaces have raised more questions than they answered.

There is no doubt that online marketplaces benefit retailers and consumers as long as they comply with competition law. Restrictions on their use reduces the number of online sellers for a particular product or service and reduces 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. [15]

The revised VBER and Vertical Guidelines should explicitly classify a general online sales ban as a hardcore restriction of competition in its own right to ensure both clarity and legal certainty for businesses. In addition, the revised VBER and Vertical Guidelines should make clear that marketplace bans should not be permitted except in rare circumstances, as defined in the case law of the European Court of Justice.[16]

4.3. Price comparison websites

Price comparison websites play a useful and valuable role for consumers when shopping both online and offline. They enable faster and easier comparison between rival products and lower search costs, thereby making it easier for consumers to find the product that best matches their needs and preferences. 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."[17] 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.

Bans on the use of price comparison websites have become more prevalent in recent years.[18] The E-commerce Sector Inquiry[19], 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

[15] Staff Working Document, p. 127.
[16] The Court of Justice of the European Union clarified in the *Coty* case in 2017 that in the context of a selective distribution system, a manufacturer could impose a ban on sales through third-party platforms since it could safeguard the strong brand image of luxury products. This ruling created some uncertainty about the scope of this exemption and the meaning of "luxury" products.
[17] 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
[18] Staff Working Document, p.56.
[19] Report from the Commission 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 , paras 515-541.

offering. The German Federal Cartel Office (*Bundeskartellamt*), in its *Asics* decision,[20] found a ban on price comparison websites constituted an unjustified restriction of competition.

Unlike online marketplaces, price comparison websites generally re-direct consumers to the authorised seller's website to complete the transaction. Therefore, bans on the use of price comparison websites, even in the context of a selective distribution systems, appear to be less justified than a prohibition to sell on online platforms since no sale transaction normally takes place on the comparison websites.[21]

As suggested by some national competition authorities,[22] bans on the use of price comparison websites should be classified as a hardcore restriction under the revised VBER, while the Vertical Guidelines could further define the quality-based criteria that may be used to justify exemption in exceptional circumstances where it can be demonstrated that such a ban would generate efficiencies that are passed on sufficiently to consumers.

4.4. Sustainability

The revised VBER should not extend the scope of the exemption to vertical agreements that purport to promote sustainability objectives. Although reaching those goals is essential, competition rules should not be weakened or circumvented to that end. Nonetheless, the revised Vertical Guidelines should explain how sustainability will be taken into account when assessing vertical agreements. There is sufficient flexibility under Article 101(3) TFEU to take account of sustainability considerations.[23]

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 in the agricultural sector (environmental, animal health or animal welfare standards higher than those mandatory under EU or national legislation) is not an appropriate way forward as it risks harming consumers. 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 can achieve sustainability and environmental goals.

The treatment of vertical agreements promoting sustainability should not undermine the basic principles of EU competition law, in particular consumer welfare. The Commission should provide guidance on how the existing legal framework applies to vertical sustainability agreements.

5. Conclusion

The new VBER and Vertical Guidelines will be in place for the next ten years; therefore, it is important for the Commission to strike the right balance between business and consumer interests. Manufacturers, suppliers, and retailers should generally have the possibility to develop and organise their distribution and sale methods as they see fit to ensure efficiency. Nonetheless, this freedom should not be unlimited and should not come at the cost of consumers. Agreements containing certain types of vertical restraints are known to have harmful effects on competition. It is essential to ensure that the most harmful vertical restraints remain prohibited as hardcore restrictions and that the burden of proof falls on

[20] This decision was upheld on appeal up to the Federal Supreme Court.
[21] As noted by NCAs in the Staff Working Document, p. 128.
[22] Staff Working Document, p.56 and 128.
[23] BEUC paper on How competition policy can contribute to the European Green Deal, at: https://www.beuc.eu/publications/beuc-x-2020-113_green_deal_and_competition_consultation_20_november.pdf

the businesses to show the conduct is objectively justified. In that context, the Vertical Guidelines play a vital clarification role. In addition, the Commission should address new and emerging vertical restraints that were not present or not yet widely used at the time of the adoption of the current VBER. By adopting a clear position, the Commission has the opportunity at the same time to ensure legal certainty for businesses and promote consumer welfare in the form of competitive prices and greater choice. Finally, this would encourage a coherent approach at the European level and prevent national competition authorities from adopting sometimes diverging approaches towards certain types of vertical restraints.

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