POSITION PAPER

17 September 2021

Draft Vertical Block Exemption Regulation (VBER) and Draft Guidelines on Vertical Restraints
Commission Consultation

Introduction

BusinessEurope is pleased that the Commission proposes to retain the concept of block exemption and renew the VBER and Guidelines upon expiry on 31 May 2022. We welcome the publication of draft rules on this important issue and, overall, we welcome the proposed revisions even though we regret proposals that substantially limit the safe harbor for dual distribution.

Vertical relationships between companies are becoming increasingly necessary to generate efficiencies and benefits to society and provide customers with complete solutions and product portfolio offerings. Small and large businesses make frequent use of its regime. The VBER and the Guidelines provide valuable guidance for undertakings on the application of Article 101 TFEU. Vertical relationships are generally procompetitive; they open-up intra-brand competition and strengthen inter-brand competition, providing customers with a choice of suppliers, who are able to compete on price and quality.

Society has undergone significant changes since 2010, which has impacted commercial relations and will continue to have a substantial impact in the coming years. BusinessEurope therefore encourages the Commission to take a pragmatic approach to business' needs, so that the final VBER and Guidelines provide more legal certainty for diverse and hybrid situations in which businesses may find themselves in the future. Businesses are adapting to technological innovations and changing consumer trends. This requires flexibility in the organisation of vertical relationships, and we appreciate that the new rules reflect these developments even though the VBER is of course not only about distribution of consumer goods via the Internet but applies to all vertical relationships, including, for example, industrial supply, supply of services, etc.

It is key for BusinessEurope that competition law remains neutral by refraining from favouring one sales channel over another. To stay ahead with the dynamic reality, the Guidelines should be continuously amended or supplemented when authorities' decision-making practices and case law become a source of legal uncertainty. They should also memorialise the established case law. Further, the Commission should set a standard for enforcement against certain practices at national level to avoid fragmentation.

Hereunder, we set out these points in more detail.

Dual distribution

Regarding dual distribution, we oppose the proposals that restrict the scope of the block exemption. The proposal to limit the safe harbor for information exchange in dual distribution situations in cases when the total retail market share of the parties does not

exceed 10%, would be difficult to implement in practice given the narrow geographical scope of retail markets. Further, it is almost impossible for a company with multiple distributors in various countries, to individually assess each distribution agreement individually and constantly monitor that the combined market share threshold of 10% is not exceeded for each and every product. It will significantly increase legal uncertainty and compliance cost for businesses, especially SMEs. It further means that a company essentially has the choice of either two different distribution systems with different standards for information exchange (one for those where the market share threshold of 10% is not met, and one for those where the market share threshold of 10% is exceeded), or, alternatively, to apply the more stringent rules on information exchange to the entire distribution system, irrespective of the retail market shares.

We would like to underline that in a vertical agreement, the systematic information exchange is vital to ensure that a manufacturer can constantly improve the relevant product or the marketing strategy to the benefit of the end customer, thereby increasing inter-brand competition. The Commission does not define the exchange of information it intends to target, so at the very least, further guidance is needed regarding the type of information that may cause concerns in dual distribution cases.

Dual distribution remains a vertical agreement, and therefore the benefit of dual distribution opening-up intra-brand competition and intensifying inter-brand competition should clearly be the focus of the Commission's revision of the VBER, rather than any hypothetical, horizontal concern. This is even relevant as European suppliers will increasingly choose hybrid/dual distribution models combining independent distributors and their own direct (online) sales channels.

Agency agreements

We welcome including a separate section on agency agreements as there is a clear need for more guidance on these contracts. For example, regarding how to measure the significance of the agent's risk with reference to the revenues generated by the agent. In this context, we suggest considering the overall profile of the dealer as a factor in weighting the significance of the actual risk, excluding the turnover which may fluctuate based on temporary developments in the dealer's business success. We also support clarifications on the "dual role agents" and the detailed examples on the allocation of expenses when the distributor acts as an agent for some products of the same supplier.

Likewise, we support the agent, temporarily, for a very short period, acquiring ownership of the goods covered by the contract when selling them on behalf of the principal provided that the agent does not bear the costs or risks associated with such transfer of ownership.

Online intermediation services and MFN Clauses

We welcome the introduction of the definition of online intermediation services in Art. 1(1)(d) VBER and taking account of Regulation (EU) 2019/1150 to ensure consistency.

However, we do not share the Commission's apparent overall concern expressed by generally excluding online intermediation services from the safe harbor if they have a hybrid function, i.e. when they sell goods or services in competition with enterprises to which they provide their online intermediation services (Art. 2(7) VBER). If the Commission is concerned about certain particular providers with significant market

power in certain areas, it would be more appropriate to remove the benefit of the VBER in individual circumstances, provided the 30% market share threshold isn't already exceeded so that the VBER does not apply anyway in the first place.

In this context, we also oppose excluding wide Most Favored Nation Clauses under Art. 5(1)(d) as it will remove the benefit of the VBER for all companies which act as a provider of online intermediation services, regardless of their market share and the products in question. We fear that this will create significant legal uncertainty, also with respect to the definition of online intermediation service provider in the context of Regulation 2019/1150.

Second market share

As to the market share thresholds foreseen in the VBER more generally, we suggest removing the second market share threshold relating to the downstream purchasing market. Market shares are difficult to determine, in particular, in relation to purchasing markets. A manufacturer typically has little knowledge about sourcing capacity of customers' competitors. Moreover, the second market share threshold has not proven to be helpful in identifying those vertical relationships that are potentially problematic from a competition law perspective bearing in mind that vertical relationships are generally pro-competitive.

Dual pricing

Regarding dual pricing, we welcome that this practice can benefit from the safe harbor of the VBER under the conditions set out in para 195 of the Draft Guidelines. However, we believe that the cost analysis/knowledge that is required on the part of the supplier to qualify for an exemption is impracticable. It is not clear how a supplier can have access to such information and be able to proceed with the dual pricing in a way that reflects the cost differences of each channel, especially since the Draft Guidelines propose to adopt a stricter approach towards information exchange. We suggest that more guidance is given in this context.

Resale price maintenance

We support proposed clarifications in para. 178 of the Draft Guidelines regarding fulfillment contracts and resale price maintenance (RPM) and welcome the proposal that price monitoring does not per se constitute RPM.

Having said this, we do not support retaining the hardcore restriction on RPM (fixed/minimum). The price is not always the most important competition parameter (depending on the distribution system) and, in this respect, the efficiency justifications/assessment of RPM in the context of Art. 101(3) TFEU are not materially different in the Draft Guidelines compared to the existing ones.

If there is sufficient inter-brand competition, there is no need to punish restrictions of intra-brand competition. The appropriate framework analysis for RPM is a rule of reason approach. Providing more thorough guidance regarding RPM practices assessment and giving some examples on the cases when a particular RPM practice may have efficiency gains would be desirable.

Active sales and online intermediation services

Proposed changes to the definition of active sales and inclusion of some forms of online use which expand the scope of the restrictions that a supplier may impose on the distributors should enable active sales to better meet the specificities of e-commerce and online intermediation services. The supplier being allowed to 'pass on' the active sales restriction is also a positive amendment. We also welcome the proposals regarding the ability of suppliers to impose restrictions on distributors for the use of a specific online sales channel, such as online marketplaces, which clarify that such restrictions apply irrespective of the distribution system used by the supplier.

Other proposed clarifications regarding the restrictions permitted for each distribution system should contribute to the simplification of Art. 4 VBER. The proposals regarding parity obligations should also increase legal certainty and resolve existing fragmentation allowing businesses to improve pre- and after sales service depending on the nature of the purchase (online or offline) even though the proposals may require online stores to offer specialized services.

Shared exclusivity

We welcome proposals that allow a supplier to designate more than one exclusive distributor in a particular territory or for a particular customer group (shared exclusivity) as this should provide more flexibility to suppliers. However, to avoid fragmentation and uncertainty, we suggest that more guidance is given about the possible application of the proportionality criterion based on para. 107 of the Draft Guidelines. Also, we would welcome more flexibility and clarity instead of the narrow requirements under para. 105 of the Draft Guidelines of the concept of "reserving a territory / customer group" in a free distribution system according to Art 4(d) VBER.

Non-compete obligations

We support exempting non-compete obligations that are tacitly renewed beyond five years in case the buyer can effectively renegotiate or terminate the agreement as, in practice, a period of five years is too short, especially in markets with high entrance costs. Tacitly renewable non-compete obligations should be exempted at least so long as the parties have the possibility to effectively terminate the non-compete obligation. We suggest including this principle in the VBER itself and not just in the Guidelines.

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