

Vertical Block Exemption Regulation and Guidelines

Summary of EuroCommerce response to the Commission's survey

VBER and its guidelines provide the reference framework for retailers and wholesalers' vertical relationships, alone or in combination with the Horizontal Guidelines, as retailers and wholesalers are active as distributors in the supply chain as buyers, sellers and resellers to other businesses (industry or retail) or end users (consumers) through online and offline channels.

Key messages

- ▶ EuroCommerce believes the vertical rules (VBER and VGL) work well but need adaptation, in particular to a digital environment.
- ▶ We voice concern about the proliferation of selective distribution systems in cases not justified by the product's characteristics. Selective distribution systems should be applied only when clear criteria in relation to the nature of the product are met.
- ▶ Bans on sellers' ability to resell on third party marketplaces should be hardcore restrictions; being present on third party marketplaces is increasingly important, especially for SMEs who do not have the means to set up their own online channel.
- ▶ We are concerned that giving additional leeway to manufacturers to further fragment markets (for instance by allowing further flexibility to impose third party marketplace bans or selective distribution systems) will harm the single market, dampen price competition and not significantly enhance consumer welfare.
- ▶ We ask the Commission to consider further guidance on the issues of territorial supply constraints. A recent Commission study outlines the scale, nature and impact of TSCs. We would recommend that the guidelines provide a definition of TSCs and clearly spell out that they are a hardcore restriction.

1. Dual distribution

Dual distribution has developed significantly over the past 10 years, accelerated by digitalisation and the COVID-19 pandemic; suppliers and brands are setting up their own direct-to-consumer channels. This development increases the direct horizontal competition between suppliers and their distribution networks and as such raises uncertainties and questions.

We would ask the Commission to:

- extend the benefit of VBER to dual distribution scenarios where one of the parties is a wholesaler or an importer also active on the retail market;
- clarify that the disclosure of information relating to the supply relationship between a supplier and a retailer/wholesaler does not constitute an anticompetitive exchange of information, even if the supplier competes with its customer on a downstream market;
- clarify that suppliers should be able to use information received from the retailers **only for the purposes of the supply relationship** and to improve their service level and innovate, but **not to boost their direct sales**;
- clarify that private labels are also covered by the exemption in art 2.4.

2. Active sales restrictions

Active sales restrictions should be **kept to a minimum** to avoid restrictions of competition and selective distribution systems should be applied only when clear criteria in relation to the nature of the product are met. Giving additional leeway to manufacturers to fragment markets will in fact further harm the single market, dampen price competition to the detriment of consumer welfare.

3. Indirect sales restrictions

We invite the Commission to clarify the conditions for suppliers to support sales efforts of their distributors in an omnichannel environment:

- **Dual pricing** should remain a hard-core restriction;
- **general marketplace bans** are a hardcore restriction and any exception to this principle should only be possible where it is objective, proportionate, transparent, non-discriminatory and necessary to the specific circumstances.

4. Parity obligations

We suggest that below 30% market share, **parity clauses should continue to be block-exempted** and that more guidance is provided in the VGL to provide clarity to operators.

5. Resale price maintenance

The prohibition of resale price maintenance should be strictly maintained, and greater guidance may be given to ensure a more consistent application and interpretation across countries.

The VGL recognise that RPM may under very limited circumstances have pro-competitive effects:

- in **short-term price campaigns** in distribution system with uniform format (e.g., franchise network or group of independent retailers) (paragraph 225 VGL): such circumstances should include groups of SME independent retailers and franchisees.
- to allow suppliers to resort to RPM, e.g., in the case of a new product introduction. We would ask that this possibility is limited in time - e.g., with a maximum of 6 weeks, so as to prevent application of RPM for unnecessarily long periods.
- We are also concerned with **indirect forms of RPM** (such as channelling) and attempts to restrict retailers from setting their own pricing other than RPM (for instance restrictions of volumes during promotions) and would encourage the Commission to investigate these and provide further guidance.

6. Non-compete obligations

We support the findings of the Commission Staff Working document which concluded that limiting the application of the exemption to non-compete obligations for a maximum of 5 years is not economically justified.

An unlimited term should not preclude an exemption as long as the customer has the possibility of unilateral termination at the latest at the end of the 5 years without special reason and within a reasonable period.

It is essential to maintain the exemption for franchise agreements to allow franchisors to protect their value-added know-how and the assistance provided to franchisees for the contract duration.

7. Sustainability

In its review of VBER and the Vertical Guidelines, and in conjunction with the review of HBER and the Horizontal Guidelines, the Commission should ensure that sustainability considerations are not abused by manufacturers to justify serious restrictions of competition (e.g. linking access to branded products to high and /or vague sustainability criteria, while this is only a disguised form to restrict intra-brand competition in order to have a chilling effect on the downstream retail market).

8. Other issues

The VBER and VGL review process should address the growing number of restrictions imposed by suppliers:

- **Territorial Supply Constraints:** fragmenting the single market and restricting parallel imports is generally a hard-core restriction (Art. 4 VBER); the Commission SWD includes TSCs as a territorial restriction (p. 178-179); a recent Commission study outlines the scale, nature and impact of TSCs. The VGL should provide a definition of TSCs and clearly indicate they are hardcore restrictions. We invite the Commission to analyse legal gaps in the framework on unilateral practices of a non-dominant supplier, suggest possible ways of addressing these and ensure proper enforcement, which addresses territorial supply restrictions (see paragraph 50 VGL).
- **channelling** is a way for suppliers to limit the ability of a distributor to source (premium) products by assigning a given buyer/sales channel only a particular assortment; this has a chilling effect on competition. The benefit of the VBER should be removed where suppliers apply channelling;
- **commercial agents:** we ask that the current exemption is maintained as a way to support commercial agency as an important business model used by many SMEs and which support the Single Market; we are seeking clarifications reflecting market developments and caselaw.