

Summary of the stakeholder workshop on the evaluation of the Vertical Block Exemption Regulation (EU) No 330/2010

In the context of the evaluation of the Vertical Block Exemption Regulation (EU) No 330/2010 (“VBER”) and the accompanying Guidelines on Vertical Restraints (“Vertical Guidelines”), the European Commission (“Commission”) organised a stakeholder workshop (“workshop”) to gather additional information about the functioning of the current rules. The workshop took place on 14 (afternoon) and 15 November (full day) 2019, at Autoworld, Cinquantenaire, in Brussels.

Building on the outcome of the public consultation in which stakeholders had generally reported that the VBER and the Vertical Guidelines were useful and cost-reducing tools for self-assessing compliance of vertical agreements with Article 101 TFEU, the workshop focused mainly on the evaluation criteria of effectiveness and relevance. The objective of the workshop was therefore to deepen the discussion on the issues that stakeholders consider to be not functioning well in the current framework and that, in their view, would deserve re-thinking to ensure that the rules remain relevant for the coming years. Considering that the enforcement of EU competition law is driven by the consumer welfare objective, which includes all relevant parameters of competition (*e.g.*, price, output, choice and innovation), the workshop was intended to focus on how consumers are impacted by the identified shortcomings.

In view of the aforementioned objective, participation in the workshop was limited to stakeholders who had contributed to the public consultation, as well as consumer associations. Approximately 150 participants from companies and business associations representing a variety of sectors attended the workshop. Among the participants, there was a high number representing the supply side (*e.g.*, brands and manufacturers). There were also several participants representing the distribution side (*e.g.*, retailers) as well as several legal professionals and one consumer organisation (see Annex I).

The discussions among stakeholders took place in small groups of changing composition. The discussion topics were selected by the participants themselves within the boundaries of the workshop objective. The participants were free to choose in which discussions they wanted to take part. The role of the Commission was to facilitate the discussion.

The workshop included two main activities in which participants could discuss and exchange their views. Sections I and II each summarize one activity and its outcome. Given the format and the dynamics of the workshop, the participants also expressed opinions on desired policy options for the future. Although such opinions go beyond the backward-looking scope of an evaluation, this summary reports on them for the sake of completeness.

The outcome of the workshop cannot be regarded as the official position of the Commission and its services and thus does not bind the Commission. The summary of the workshop reflects the views expressed by participants and does not prejudice in any way the findings of the ongoing evaluation.

I. GENERAL IDEAS FOR POSSIBLE CHANGES

The first activity aimed at gathering general ideas about areas of the VBER and the Vertical Guidelines that are not functioning well, from a consumer welfare perspective. The discussions took place in the format of World Café conversations.

Stakeholders pointed to 103 perceived shortcomings in the current framework that, in their view, would need re-thinking. Annex II provides the full list of ideas submitted by stakeholders, which can be broadly grouped into the following areas (listed in alphabetical order):

- Agency concept
- Application of the VBER to services
- Dual-distribution and information exchange
- Franchising
- Intellectual Property and the use of territorial restraints
- Interplay between the VBER and other sector-specific regulations in the area of competition
- Efficiencies and long-run consumer benefit (other than lower prices)
- Most Favoured Nation clauses
- Non-compete clauses
- Online sales restrictions and dual pricing
- Resale Price Maintenance
- Selective distribution (including the treatment of online platform bans)

II. SPECIFIC TOPICS DISCUSSED

The second activity aimed at an in-depth discussion of a number of specific topics selected by participants within the boundaries of the workshop objective. Each topic was discussed in a roundtable chaired by the stakeholder who had proposed the topic (“topic owner”). Stakeholders other than the topic owners were free to choose in which discussion(s) to participate. At the end of the discussion, the participants in each roundtable were asked to summarise the main points of their discussion.

In total, 25 roundtable discussions took place during two consecutive rounds of discussion, which covered the following main topics¹ (listed, to the extent possible, in accordance with the structure of the VBER):

i. GENERAL APPROACH OF THE VBER AND THE VERTICAL GUIDELINES

One roundtable discussion focused on the issue of whether the current rules strike the right balance between inter-brand and intra-brand competition when assessing the existence of a restriction of competition pursuant to Article 101(1) TFEU. The roundtable participants were of the opinion that the Vertical Guidelines do not provide sufficient clarity on this issue. In particular, the roundtable participants explained that inter-brand competition should be the starting point of the analysis

¹ Several roundtables touched upon more than one of the main topics mentioned in this summary.

under Article 101(1) TFEU, in which market shares should only serve as an indication of the intensity of competition. According to them, product and market specificities should be assessed in more detail in cases where restrictions on intra-brand competition are considered to be harmful to consumers. In their view, this approach would benefit consumers, as it would strengthen legal certainty, leading to more efficiency and innovation in the supply chain to the ultimate benefit of consumers.

In another roundtable discussion, the participants argued that the current framework is not business-model neutral because it seems to favour intra-brand competition over inter-brand competition. According to the roundtable participants, the current framework favours platforms and retailers pursuing a high-volume/low-price strategy over other business models that offer innovative, qualitative choices to consumers (*i.e.* there is currently a stronger focus on price than on other aspects of consumer welfare, such as innovation or quality). The goal should, however, not be to make a particular brand cheaper, but to foster the creation and growth of a variety of brands. The roundtable participants were of the view that facilitating new business models, rewarding innovation and promoting inter-brand competition and business-model neutrality would benefit consumers without having to predetermine winning business models and consumer preferences. It was therefore argued that, unlike what is currently the case, the existence of hardcore restrictions should not prevent vertical agreements from benefiting from the VBER if there is sufficient inter-brand competition.

ii. AGENCY CONCEPT

Participants in one roundtable discussed the agency concept as set out in the Vertical Guidelines. The roundtable participants indicated that the agency exception is positive and should be kept, but that there is currently a lack of clarity as regards the underlying requirements and their application to fulfilment agents and online platforms. The roundtable participants pointed in particular to a lack of clarity regarding the notion of “*market specific*” investments, the number of principals that an agent can have and the impact of the transfer of the title or possession of the goods concerned from the principal to the agent. They also pointed to a need to address specific situations in the Vertical Guidelines on the basis of worked examples. The roundtable participants argued that the resulting increased clarity and legal certainty would help businesses to provide the most efficient distribution service for consumers.

iii. DUAL DISTRIBUTION

Three roundtable discussions related to dual distribution (*i.e.* Article 2(4) of the VBER).

The participants in one roundtable argued that the scope of Article 2(4) of the VBER is too narrow, as it does not encompass wholesaler-retailer relationships. They argued as well that there is a lack of clarity in the Vertical Guidelines regarding the extent to which dual distribution is covered by the VBER.

They also called for a more lenient approach to information exchanges in the context of dual distribution as compared to purely horizontal information exchanges. According to the roundtable participants, there is a distinction between three different situations which is not currently captured in the Vertical Guidelines: (i) information exchanges that cannot be considered a restriction of

competition pursuant to Article 101(1) TFEU (*e.g.* exchanges of information on past and forecasted volumes of contracted good purchased by the buyer); (ii) information exchanges that should be covered by the VBER (*e.g.* the exchange of sales information like actual prices and margins, as well as the timing of promotions); and (iii) information exchanges that cannot be exempted and are thus subject to an effects analysis (*e.g.* information about the buyer's sales of competing products).

The participants in another roundtable argued that the exchange of information in the supply chain should not be considered a vertical restraint and is covered by the VBER in the case of dual distribution. They pointed out that the information exchanged in a vertical scenario allows for the provision of personalised and innovative products and services.

In another roundtable, participants identified as an issue the fact that under the current framework agreements between independent importers and their distributors are not block exempted in the context of dual distribution (in particular as regards the automotive sector). They argued that exempting these agreements would increase legal certainty and thus lead to more investments.

iv. MARKET SHARE THRESHOLD

One roundtable discussion focused on whether the current market share threshold for the application of the VBER is adequate. The roundtable participants perceived the current 30%-threshold as too low. They were of the view that agreements between parties with market shares of 35% or 40% can also be efficiency enhancing and could therefore be exempted. The roundtable participants argued that an increase in block-exempted agreements would lead to more legal certainty for distributors and brand manufacturers, more investments that are beneficial for consumers and lower distribution costs. At the same time, the roundtable participants recognised the risk that such an increased threshold could provide the possibility for powerful brand manufacturers to exclude other competitors from the market in the long term. However, on balance, they believed that a small increase of the threshold would result in most sectors in positive effects, such as increased legal certainty and investments.

The roundtable participants further discussed how making the European rules on market definition binding on national competition authorities could address the issue of markets being defined too narrowly and of divergent market definitions by different authorities. They also discussed the benefits of including a provision in the Vertical Guidelines stipulating that the threshold can be modified in light of the competitive landscape of the market in question.

v. PRICE RELATED RESTRICTIONS

Six roundtables covered price related restrictions with a particular focus on the treatment of retail price maintenance ("RPM") in the existing legal framework.

In several roundtable discussions, the participants stated that the RPM prohibition is adequate and should be maintained, since it allows effective price competition among retailers who have a better understanding than suppliers of the competitive dynamics and the price levels at retail level. They also pointed out that, in most cases, RPM prevents dealers from sharing efficiencies with consumers and that there are less restrictive alternatives to ensure the provision of specific services by distributors such as targeted financial incentives. At the same time, the roundtable participants

acknowledged that RPM can be beneficial for consumers in exceptional cases, *e.g.* by facilitating the launch of new products or making it easier to agree on promotions. These limited exceptions, which are already reflected in the Vertical Guidelines, were however considered insufficiently clear, which makes them not workable in practice and could lead to potential misuse (*e.g.* with regard to what can be considered a “new” product). The participants in one roundtable discussion also indicated that there is a perception that authorities are not sufficiently open to discuss such exceptional situations with individual stakeholders and possibly issue guidance letters. The participants in another roundtable further indicated that the current framework does not sufficiently support joint (online) pricing actions by groups of small and medium distributors, which could allow them to compete effectively against big online platforms.

In other roundtable discussions, the participants discussed the perceived rigidity of the current approach to RPM. The participants in one roundtable argued that vertical agreements with RPM clauses entered into by parties with a negligible market share do not have any negative effect on competition and could therefore benefit from a *de minimis* exemption. The participants in another roundtable expressed concerns about aggressive price competition by low-cost online distributors who are perceived as free-riding on the investments made by quality and service-oriented brand manufacturers. The roundtable participants argued that this is leading to a long-term decrease of products and in-store service quality. They therefore saw a need for extending the circumstances under which RPM is permitted (i) to products requiring a high level of investments in services, quality and safety, and (ii) to markets with strong inter-brand competition. The roundtable participants argued that this would benefit consumers by preserving brand value and trust, product availability and choice of high-quality products, thus resulting in a high-level consumer experience in the long run. The roundtable participants were of the view that a fixed fee, as foreseen by the current rules, does not allow to take into account the efficiency of each store and is impossible to operate in practice for suppliers relying on a large number of stores for the distribution of their products. They explained that marketing promotions can only target sales of specific products and therefore do not allow addressing long-term fixed investments. They also pointed out that rebates in exchange for investments in good consumer experience do not help to protect against opportunistic price drops caused by free-riders. They further highlighted that the possibility to resort to RPM to support the launch of new products does not allow to address long-term investments and free-riding issues in the long run.

Concerns regarding aggressive price competition were also the subject of discussion in another roundtable in which participants pointed out that low prices do not ensure that consumers receive a fitting product or appropriate service, and that customer care experience, product availability and staff (at fair working conditions) are cost and labour intensive. The roundtable participants argued that the Commission’s current approach to vertical agreements does therefore not ensure a sustainable and adaptable supply chain in the long term.

One roundtable discussion focused on the lack of clarity of retail price recommendations. The roundtable participants argued that the VBER and the Vertical Guidelines do not provide sufficient clarity on when such price recommendations can be considered compliant with Article 101 TFEU. They pointed in particular to (i) insufficient guidance on when price recommendations amount to unilateral non-binding recommended retail prices, (ii) a lack of clarity on the assessment of the

interaction between the supplier and the buyer in this regard (see, *e.g.* the guidance issued by the German and Austrian competition authorities), and (iii) a lack of focus on the level from which the enforcement of recommended retail prices emanates (*e.g.* whether it is based on pressure from downstream distributors). The roundtable participants argued that recommended resale prices may result in efficiencies that can be passed on to consumers (*e.g.* product launches and promotions).

Another roundtable discussion centred around maximum prices. The roundtable participants argued that genuine maximum prices benefit consumers since they reduce the overall price level and allow for lower prices in the distribution chain. They indicated that the current rules lack guidance on (i) circumstances in which maximum prices are considered to constitute fixed prices and (ii) situations in which the distributor merely executes an agreement between the supplier and the customer.

vi. ONLINE RELATED ISSUES

Four roundtable discussions covered different issues in relation to the treatment of online sales in the current rules such as (i) restrictions on the use of third-party online platforms,² price comparison tools and search engines; (ii) dual pricing and (iii) more generally, how to protect investments against free-riding by online distributors.

The participants in two roundtable discussions expressed concerns about the fact that the current rules do not provide sufficient guidance on the assessment of online sales restrictions. The participants of one roundtable indicated that there is a lack of clarity on whether restrictions on the use of search engines and price comparison tools are considered hardcore restrictions pursuant to the VBER and a lack of clear criteria for determining when such restrictions can be justified. The roundtable participants could, however, not agree on how to assess the different online sales restrictions and which direction would be more beneficial for consumers (*i.e.* short term/price impact vs long term/quality and innovation impact). The participants in another roundtable argued that the VBER lacks a dedicated chapter on online sales issues, which would have to take into account the present “omni-channel world”. According to the roundtable participants, this would benefit consumers by ensuring that products are available to consumers anywhere at any time through their preferred channel, taking account of new consumption habits, and clarifying/updating the existing rules regarding active/passive sales. The roundtable participants also pointed to the current lack of guidance on the *Coty* ruling, notably with regard to its scope and the product categories covered.

The participants in two roundtables discussed the current approach to dual pricing, arguing that the existing prohibition of dual pricing with regard to hybrid distributors does not reflect current business needs. The participants in one roundtable argued that the current approach in paragraph 52 d) of the Vertical Guidelines does not adequately support value-added services in a fair manner, which reflects investments. In their view, an amendment to this approach is needed to ensure fairness, flexibility and differentiation across all sales channels. They explained that this change would provide consumers with more choice and better quality, ensure the availability of a multi-channel environment in the long run and allow for the provision of pre- and aftersales services in all

² Third-party platform bans were also discussed in the context of selective distribution (see section VII).

sales channels. The participants in another roundtable considered that this change would allow preserving brick-and-mortar networks to offer demonstration services and touch-and-feel experiences, and to provide “touch points” in areas with low population density. They also indicated that preserving brick-and-mortar networks could be achieved by allowing resale price maintenance.

The participants in one roundtable argued that there is currently insufficient clarity about how to protect investments against free-riding by online distributors. They pointed in particular to a lack of clarity with regard to the notion of investments (*i.e.* long-term investments/sunk investments vs operational costs) and argued that clarifying this concept could help to ensure the protection of non-price competition (*e.g.* quality, service and innovation), which would benefit consumers by providing them with more choice.

vii. SELECTIVE DISTRIBUTION / EXCLUSIVE DISTRIBUTION

Eight roundtable discussions covered a variety of topics regarding selective and exclusive distribution.

The participants in one roundtable focused on the issue that the current rules do not limit selective distribution to luxury and high-tech products. The roundtable participants discussed (i) the absence of the *Metro* criteria in the VBER, (ii) the lack of access by distributors to qualitative selection criteria and (iii) whether selective distribution should allow for the protection of a supplier’s brand image or particular products depending on their nature and characteristics. The roundtable participants noted strong divergence with regard to the appropriate approach to these issues.

The participants in another roundtable discussed whether the current approach to the principle of equivalence within selective distribution systems leads to a level playing field. They expressed the view that qualitative and quantitative selection criteria in the context of selective distribution systems should be applicable to all distribution channels, including marketplaces, in line with the principle of equivalence. General marketplace bans within selective distribution systems would therefore be prohibited. The roundtable participants argued that this would benefit consumers by resulting in more competition and choice and better access to a variety of distribution channels, while protecting product quality and integrity. The roundtable participants considered the ability of retailers to freely choose their distribution channels in the context of selective distribution systems as also benefitting consumers.

The participants in a third roundtable discussion argued that there was a lack of clarity about the degree of flexibility within selective distribution systems, in particular as regards the possibility for differentiated partnerships and the exchange of data to provide better services to consumers. The roundtable participants argued that differentiation within selective distribution systems should not be considered as contradicting the non-discrimination principle and that information exchange in scenarios of dual distribution is already covered by the VBER.³ They explained that this clarification would provide market players with the opportunity to experiment towards a better consumer experience and contribute to product development by allowing for an enhanced customisation of products and services.

³ The roundtable participants’ arguments with regard to dual distribution are reflected in section III.

Two roundtable discussions focused on the need to ensure the enforceability of selective distribution against sales by unauthorised resellers within the EU. The participants in one roundtable argued that there is a lack of clarity in the Vertical Guidelines on whether free-riding on the efforts and investments of authorised retailers in selective distribution networks constitutes unfair competition. They considered that such a clarification would benefit consumers because, in their view, this would contribute to ensuring product quality and safety, as well as a high level of pre- and aftersales services, and by supporting long-term investments in innovation. They argued that direct action against non-authorised resellers in all EU Member States could equally benefit consumers.

The participants in another roundtable discussion argued that there is a lack of specific tools to enforce selective distribution rules against unauthorised resellers or any other players offering directly or indirectly for sale products that are subject to selective distribution. They argued that creating consistency with the level of protection granted in this regard at national level (*e.g.* Article 442.2 of the French Commercial Code) would benefit consumers in terms of product safety, integrity, authenticity, liability and aftersales services. They also argued that the resale outside a selective distribution system could be a legitimate reason to consider the absence of exhaustion of intellectual property rights.

Two roundtable discussions covered the interplay between exclusive and selective distribution in the current framework. One roundtable discussion identified as an issue the prohibition of combining exclusive distribution at wholesale level with selective distribution at retail level within the same territory. The roundtable participants argued that allowing this combination would prevent free-riding (as already specified in paragraph 63 of the Vertical Guidelines) and encourage investments resulting in better service quality at retail level. They indicated that there is a need to clarify paragraphs 57 and 63 of the Vertical Guidelines. The participants in another roundtable discussion pointed to the need for a clarification in the Vertical Guidelines with regard to Article 4(b)(iii) of the VBER and notably the concept of “territory” to allow big distributors to set up selective distribution systems in some countries, while resorting to exclusive distribution in others, or to allow small distributors to focus on some countries only. They argued that this would allow for the provision of personalised services in accordance with national habits or expectations, ensure quality, safety and innovation, and maintain brand culture, while preventing counterfeiting.

The participants in another roundtable discussion⁴ pointed to the current lack of flexibility of the rules that do not allow extending the benefit of the VBER to situations of shared exclusivity with two exclusive distributors. They argued that this would be useful for the agricultural sector (*e.g.* with regard to agro equipment) and benefit consumers through more investments spurred by increased legal certainty.

viii. FRANCHISING

The participants of one roundtable focused on franchising related issues, including the transfer of know-how. They argued that in view of the absence of a definition of franchising and know-how in the VBER, it is not clear that both concepts are directly associated, with know-how being a crucial

⁴ The roundtable participants’ arguments with regard to dual distribution are reflected in section III.

characteristic of this distribution model, and that franchising can be confused with other business models. They also called for clearer examples in the Vertical Guidelines of how vertical restraints may affect both franchisors and franchisees. The roundtable participants argued this would be beneficial for consumers since franchising supports the creation of small and medium enterprises (*e.g.* by creating value, employment, entrepreneurship and a close seller-consumer relationship) and contributes to town centre dynamics and modernising commerce & services by professionalising the whole commercial chain, including the digital economy without losing the local link with consumers.

ix. NON-COMPETE OBLIGATIONS

The participants of one roundtable discussed why the 5-year limit for non-compete obligations pursuant to Article 5 of the VBER is the “*magic number*”. They agreed that the current temporal scope of the safe harbour is working well. However, they considered that paragraph 133 of the Vertical Guidelines lacks clarity as regards the fact that there is no presumption of illegality of non-compete obligations exceeding 5 years and that paragraph 146 of the Vertical Guidelines is too narrow. The roundtable participants nevertheless argued that a 10-year time limit in Article 5 could also be considered efficiency enhancing. The roundtable participants argued that non-compete obligations with a longer duration would benefit consumers by incentivising long-term investments and allowing for lower sales prices thanks to the ability of suppliers to spread their investments over a longer time period.

x. ACCESS TO DATA

The participants of one roundtable discussed whether the current rules enable fair and non-discriminatory third-party access to machine generated/IoT data, which they perceive as necessary to ensure innovative and independent aftermarkets (*e.g.* repair and maintenance services). The roundtable participants indicated that the current rules lack a generic access provision for such data to enable end-users to maintain their own products or choose their preferred service provider. They argued that this would allow consumers to retain genuine alternative choice (thus preventing lock-in) and control over their data, enhance innovation-based competition (including by small and medium enterprises) and enable market entry. The roundtable participants further discussed possible overlaps with Article 102 TFEU, pointing to practical limitations to enforcing the provision effectively under the current legal framework, and possible data access legislation.

ANNEXES

I. Participation List

II. List of perceived shortcomings in the current framework