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# CPI ANTITRUST CHRONICLE DECEMBER 2020

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*By Andrea Amelio, Isabel Pereira Alves  
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CPI Antitrust Chronicle December 2020

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## I. INTRODUCTION

On September 8, 2020, the Commission published the Staff Working Document ("SWD")<sup>2</sup> on its **review of the Vertical Block Exemption Regulation ("VBER")**.<sup>3</sup> This publication marked the end of the first phase of the two-stage review process that will result in the adoption of the new vertical rules that should come into force when the current rules expire on May 31, 2022.

The Commission launched the review process of the current VBER and the Vertical Guidelines<sup>4</sup> on October 3, 2018. In this so-called evaluation phase, which ended with the publication of the SWD, the Commission aimed at gathering evidence from stakeholders on the functioning of the VBER together with the Vertical Guidelines. In the ongoing second phase, called the impact assessment phase, launched in October 2020, the Commission proposes the policy options for revising the current rules.

During the evaluation phase the Commission carried out various consultation activities to gather evidence on the functioning of the VBER together with the Vertical Guidelines, such as a public consultation that took place during the first half of 2019, a dedicated stakeholder workshop held in November 2019, and an external evaluation support study.<sup>5</sup>

The SWD reflects the evidence on the functioning of the VBER, together with the Vertical Guidelines, gathered during the evaluation phase, and will help the Commission decide whether the VBER should be lapsed, renewed under its current form, or revised.

This article will describe the legal framework of the VBER, the framework of the review that led to the adoption of the SWD, the methodology followed during the evaluation process, and the main findings of the evaluation.

<sup>2</sup> Commission staff working document of the Vertical Block Exemption Regulation, Brussels, 8 September 2020, SWD (2020) 173.

<sup>3</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, OJ L 102, 23.4.2010, p. 1.

<sup>4</sup> Guidelines on Vertical Restraints, OJ C 130, 19.5.2010, p. 1.

<sup>5</sup> See staff working document, pages 22 to 27.

## II. LEGAL FRAMEWORK<sup>6</sup>

Article 101(1) of the Treaty on the Functioning of the European Union (“the Treaty”) prohibits agreements (including those concluded between undertakings operating at different levels of the supply and distribution chain, or “vertical agreements”) that restrict competition, unless they contribute to improving the production or distribution of goods, or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefits, in accordance with Article 101(3) of the Treaty.

In order to assess whether a vertical agreement complies with Article 101 of the Treaty, the Commission first needs to check whether said agreement restricts competition (Article 101(1) of the Treaty), and second, to determine whether it produces pro-competitive effects that outweigh the restrictive effects on competition (Article 101(3) of the Treaty).

To facilitate the enforcement work of the Commission, the Council adopted Regulation 19/1965,<sup>7</sup> which empowers the former to define, by way of regulation, certain categories of agreements that generally fulfil the conditions for exemption under Article 101(3) of the Treaty. Therefore, vertical agreements that fall within the scope of such a block exemption regulation (“BER”) benefit from a presumption of legality (so-called “safe harbor”) and no longer require an individual assessment.

The current VBER adopted in 2010, together with the Vertical Guidelines, is based on the premise that the efficiency-enhancing effects of vertical agreements outweigh any anti-competitive effects, depending on the degree of market power of the companies involved and the competition they face on the market.<sup>8</sup> In line with this approach, the VBER exempts agreements in which the market share of the supplier and the buyer do not exceed the 30 percent thresholds and which do not contain certain types of severely anti-competitive restrictions (“hardcore restrictions”).<sup>9</sup>

The VBER, together with the Vertical Guidelines, aim to facilitate the enforcement work of the Commission and, in view of the decentralized enforcement system, the work of the national competition authorities (“NCAs”) and national courts as well, by providing them with a common analytical framework to assess vertical agreements. It also aims to help businesses to self-assess the compliance of their vertical agreements with Article 101 of the Treaty, thus reducing costs.

## III. FRAMEWORK OF THE EVALUATION

The Commission conducted the evaluation of the VBER, together with the Vertical Guidelines, in all EU Member States.<sup>10</sup> According to the Better Regulation Framework,<sup>11</sup> it did so in an open, transparent manner, informed by the best available evidence and backed by the comprehensive involvement of stakeholders.

The Commission evaluated the VBER, together with the Vertical Guidelines, against five criteria: effectiveness, relevance, efficiency, EU added value, and coherence.<sup>12</sup> More specifically, the Commission tested whether the objectives of the VBER were met during the period of its application (effectiveness), continue to be appropriate (relevance), and whether the VBER, taking account of the costs and benefits associated with applying it, was efficient in achieving its objectives (efficiency). It also considered whether the VBER, as legislation at the EU level, provided

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<sup>6</sup> See staff working document, pages 7 to 13.

<sup>7</sup> Regulation No 19/65/EEC of 2 March of the Council on application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices, OJ 36, 6.3.1965, p. 35, as amended by Council Regulation (EC) No 1215/1999 of 10 June 1999, OJ L 148, 15.6.1999, p. 1.

<sup>8</sup> 1999 VBER, recital 7.

<sup>9</sup> For completeness, the VBER also fit into the procedural framework of analysis of EU competition rules. In the 2000s, Council Regulation 1/2003 abolished the pre-notification of agreements to the Commission as established by the previous Council Regulation 17/62. Businesses therefore can no longer notify their agreements to the Commission in order to benefit from immunity from fines. They have to self-assess the compliance of their agreements with Article 101 of the Treaty. In addition, Council Regulation 1/2003 decentralized the application of Article 101(3) of the Treaty by empowering national competition authorities and national courts to apply both Article 101(1) and Article 101(3) of the Treaty, which in the past was a prerogative of the Commission only.

<sup>10</sup> Since the VBER has been fully applicable in the United Kingdom during the period under review, the evaluation includes evidence gathered from stakeholders in the UK, in particular from the UK's Competition and Markets Authority.

<sup>11</sup> [https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox\\_en](https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox_en).

<sup>12</sup> Commission staff working document, Better Regulation Guidelines, Brussels, July 7, 2017, SWD (2017) 350.

added value (EU added value) and is consistent with other Commission documents providing guidance on the application of Article 101 of the Treaty and related legislation with relevance for vertical agreements (coherence).<sup>13</sup>

In order to properly carry out the evaluation and to assess each criterion, the Commission identified a benchmark for the analysis. The main point of comparison was the hypothetical situation of not having a VBER and Vertical Guidelines in place. The evaluation therefore looked at the functioning of the VBER, together with the Vertical Guidelines, as compared to a situation where the assessment of whether vertical agreements comply with Article 101 of the Treaty would have to be done only in light of other Commission documents that help self-assessment, i.e. relevant case law at EU and national level, as well as the enforcement practices of the Commission and the NCAs.<sup>14</sup>

In order to properly conduct the evaluation, the Commission designed a methodology of analysis aiming at gathering an extensive set of information. The sources of information included a public consultation, a targeted NCA consultation, a stakeholder workshop, an evaluation support study, spontaneous stakeholder submissions, and evidence gathered through other Commission initiatives. For each of the sources, the Commission identified the appropriate information to be gathered for informing the assessment of the five criteria.<sup>15</sup>

The public consultation generated 164 contributions submitted through the online questionnaire, and 13 position papers submitted without the online tool. With this public consultation the Commission aimed at gathering the different positions of stakeholders directly involved in the application of the VBER and the Vertical Guidelines on all five criteria.<sup>16</sup> Likewise, the targeted consultation of NCAs generated 20 contributions, including one from one of the EFTA States. The information provided by NCAs contributed to the assessment of all five evaluation criteria.<sup>17</sup> Building on the outcome of the public consultation, the Commission carried out a stakeholders workshop to gather additional evidence about the functioning of the VBER, together with the Vertical Guidelines.<sup>18</sup> The Commission also relied on an extensive evaluation support study (“the support study”) with a particular focus on the evaluation criteria of effectiveness, efficiency, and relevance. Through the support study the Commission aimed at gathering qualitative and quantitative information, notably by surveying stakeholders, carrying out econometric analyses to evaluate the effects of certain restrictions, and reviewing NCAs’ enforcement practices.<sup>19</sup> The Commission also received several spontaneous submissions from stakeholders who had either not participated in the public consultation or who wanted to supplement their contribution to the public consultation with additional evidence.<sup>20</sup> These included studies carried out by stakeholders to provide the Commission with additional evidence. Lastly, the Commission also relied on information gathered through other Commission initiatives, like the sector inquiry into the electronic trade of consumer goods and digital content in the EU, its own enforcement and policy briefs.<sup>21</sup>

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13 See staff working document, pages 20 to 22.

14 See staff working document, page 20.

15 See staff working document, page 25.

16 See staff working document, page 22.

17 See staff working document, page 23.

18 See staff working document, page 23.

19 See staff working document, pages 23 to 24.

20 See staff working document, page 24.

21 See staff working document, pages 24 to 25.

## IV. FINDINGS OF THE EVALUATION

The findings of the evaluation can be grouped into three main categories. The first group of findings relates to the main market trends and developments to which the VBER and the Vertical Guidelines were subject to. The second group contains the high-level findings on the functioning of the VBER and the Vertical Guidelines. The third group refers to the specific findings on the functioning of specific provisions of the framework.

### *A. Market Trends and Developments<sup>22</sup>*

Since the adoption of the VBER and the Vertical Guidelines, the development with the biggest impact on distribution models has been the growth of online sales and online marketplaces. The findings of the support study show that, overall, the share of individuals purchasing online has increased by 100 percent since 2008. As for the use of online intermediaries, such as search engines, online marketplaces, and price comparison tools, they are particularly important for consumers purchasing online.<sup>23</sup>

The growth of e-commerce has reshaped distribution models and strategies. As e-commerce facilitates buyer's access to sellers outside their territory, distribution systems which rely on territorial sales restrictions, such as exclusive distribution, have become less attractive. By contrast, selective distribution, which provides suppliers with a tighter control over their distribution networks, is prominently used. The development of online channels has also fostered an increase in direct sales. More suppliers are now offering their goods to consumers online, therefore directly competing with their distributors. Moreover, new types of vertical restrictions, most of which are related to online sales, are being applied to distributors.

The growth of online sales also has an influence on consumer's purchasing behavior. Today's consumers expect a seamless experience throughout their purchasing journey, which should be a fluid omni-channel process in which consumers change easily within and in between online and offline channels. If consumers tend to make a complementary use of several sales channels, online channels now play a major role in the process, especially in its information and evaluation phase. Search engines have become the most used channels for product discovery. To meet consumer's expectations, suppliers have increased the number of channels they use to distribute and promote their products, and have adopted a more prevalent multi-channel sales approach. Such a multi-channel environment better serves consumers' needs, but it also raises discussion about free riding between the different sales channels.<sup>24</sup>

### *B. General Findings*

The evidence gathered in the evaluation suggests that the VBER, together with the Vertical Guidelines, is a useful instrument overall that increases legal certainty, compared to a situation without the VBER and the Vertical Guidelines. However, the identification of lack of clarity, difficulty of application or rules no longer adapted to recent market developments, as well as gaps, pointed to possible improvements in the framework. The existence of diverging interpretations by NCAs and national courts also pointed towards a need to strengthen the common analytical framework that the VBER provides for these institutions.<sup>25</sup>

It was also found that, overall, the VBER, together with the Vertical Guidelines, meets the objective of avoiding false positives, i.e. it generally does not exempt agreements for which it cannot be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty, and of avoiding false negatives, i.e. it does not fail to exempt agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3).<sup>26</sup>

The evaluation also indicated that the costs borne by stakeholders in applying the VBER, together with the Vertical Guidelines, are proportionate and would be higher in its absence. The estimation remained qualitative, however.<sup>27</sup>

<sup>22</sup> The Commission took into account various sources, notably the results of the e-commerce inquiry of 2017 (see [https://ec.europa.eu/competition/antitrust/sector\\_inquiries\\_e\\_commerce.html](https://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html)), the evaluation support study and the consumer purchasing study (see [https://ec.europa.eu/competition/consultations/2018\\_vber/index\\_en.html](https://ec.europa.eu/competition/consultations/2018_vber/index_en.html)).

<sup>23</sup> See staff working document, pages 33 to 34.

<sup>24</sup> See staff working document, pages 35 to 43.

<sup>25</sup> See staff working document, pages 89 to 90.

<sup>26</sup> See staff working document, pages 89 to 90.

<sup>27</sup> See staff working document, page 90.

With regard to relevance, the rules proved not to be sufficiently well adapted to the current market environment, as they do not entirely take into account the abovementioned market developments that have taken place since their adoption.<sup>28</sup>

The coherence of the VBER and the Vertical Guidelines and a general exemption at EU level were found to be satisfactory overall.<sup>29</sup>

### ***C. Some Specific Findings***

The evaluation collected a large body of evidence on all the areas of the VBER and Vertical Guidelines that are not functioning well, or not as well as they could, as well as the underlying reasons. This article will only illustrate a small subset, notably seven issues including dual distribution, market share thresholds, non-compete obligations, exclusive distribution, retail price maintenance, parity clauses, and certain online restriction.

**Dual distribution** refers to scenarios in which a supplier not only sells its goods or services through independent retailers, but also sells them directly to end customers, and therefore is competing with its distributors at retail level. Dual distribution, which is generally exempted under Article 2(4) of the VBER, constitutes an exception to the general rule that agreements between competitors are not covered by the VBER and have to be assessed under the horizontal rules.<sup>30</sup>

The evidence gathered during the evaluation indicated that stakeholders perceive a qualification of dual distribution as a vertical relationship, that its exemption from the prohibition in Article 101(1) of the Treaty is adequate, and should therefore remain part of the VBER.<sup>31</sup> However, the evaluation has also shown that the rules do not adequately reflect a number of issues. Among these, it is worth mentioning that the support study has shown that suppliers use online channels to increase their market presence at the retail level. Therefore, the dual distribution exception initially meant to cover scenarios where suppliers were using direct sales to get an understanding of the market and foster brand recognition (e.g. through the operation of a flagship store) may now be too broad, and exempt situations where horizontal issues are no longer negligible.<sup>32</sup>

As for the use of **market share thresholds** set for the application of the VBER, they are based on the premise that the likelihood of efficiency-enhancing effects outweighing any anti-competitive effects that result from restrictions contained in vertical agreements depends on the degree of market power held by the parties to the agreement. In line with this approach, Article 3 of the VBER contains 30 percent market share caps for both the supplier and the buyer, above which the block exemption does not apply.

The evidence gathered during the evaluation indicated that some stakeholders consider the current market share thresholds as generally working well. Nevertheless, they raised some issues related to the lack of clarity and consistency of the rules with regard to the definition of the relevant market, and to the fact that the 30 percent market share thresholds may be too high, in particular when applied to online intermediaries, while other stakeholders took the view that the market share thresholds are too low.<sup>33</sup>

**Non-compete obligations** of an indefinite duration or exceeding five years are excluded from the benefits of the VBER and therefore require an individual effects-based assessment under Article 101 of the Treaty. Non-compete obligations that are tacitly renewable beyond a period of five years are deemed to have been concluded for an indefinite duration. The evaluation has indicated that the broad exclusion of non-compete clauses from the benefit of the block exemption may result in false negatives, by covering non-compete obligations that satisfy the conditions laid down in Article 101(3) of the Treaty.<sup>34</sup>

In particular, the exclusion of tacitly renewable non-compete obligations is considered by some stakeholders as unjustified, to the extent that the buyer can terminate or renegotiate the agreement at any time with a reasonable notice period and at reasonable cost. The overly broad scope of the exclusion could also result in an unnecessary administrative burden and additional transaction costs for businesses, since it forces

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<sup>28</sup> See staff working document, pages 90 to 91.

<sup>29</sup> See staff working document, page 90.

<sup>30</sup> See Vertical Guidelines, paragraph 28.

<sup>31</sup> See staff working document, page 156.

<sup>32</sup> See staff working document, pages 156 to 159.

<sup>33</sup> See staff working document, pages 159 to 165.

<sup>34</sup> See staff working document, page 185.

them to periodically renegotiate their contracts despite there being a willingness on both sides to continue the contractual relationship beyond five years.<sup>35</sup>

**Exclusive distribution** refers to a distribution model in which the supplier agrees to sell its products for resale to only one distributor in a particular territory. Pursuant to Article 4(b)(i) of the VBER, provided that the market shares of the parties to the exclusive agreement do not exceed the 30 percent thresholds, the supplier can prevent other exclusive distributors from actively selling in territories which are either reserved for itself or allocated to other exclusive distributors.<sup>36</sup>

The evidence gathered during the evaluation indicates that the rules on exclusive distribution have generally worked well. The support study, however, found that exclusive distribution is not a widespread practice, with only a limited number of stakeholders reporting the use of this distribution model. This could be due to the fact that exclusive distribution does not enable suppliers to sufficiently protect investments in the context of the growth of online sales. The main concern raised in the context of this practice is in relation with selective distribution. Notably, the evaluation pointed to some issues, such as a lack of clarity regarding the possibility to combine selective and exclusive distribution in different territories. Some stakeholders also consider that there is insufficient guidance on the circumstances in which exclusive and selective distribution may be combined in the same territory, but at different levels of the supply chain, without raising concerns under Article 101(1) of the Treaty.<sup>37</sup>

Regarding **retail price maintenance**, i.e. restrictions to the buyer's ability to determine its sales price, which are considered as hardcore violations, the evaluation indicated that the majority of respondents to the public consultation consider that Article 4(a) of the VBER and the related paragraphs of the Vertical Guidelines generally provide an appropriate level of legal certainty. However, a significant number of respondents to the public consultation pointed to a slightly low level of legal certainty.<sup>38</sup>

Among the findings, it is worth noticing that respondents and other stakeholders have stressed a lack of legal certainty due to limited guidance on the circumstances under which recommended or maximum resale prices could amount to RPM and as regards the conditions under which RPM can benefit from the exemption of Article 101(3) of the Treaty.<sup>39</sup>

Regarding **parity clauses**, the evaluation recognized that these have become more common over time, and that the VBER and the Vertical Guidelines do not provide sufficient guidance on how to assess their compatibility with Article 101 of the Treaty. Furthermore, the evaluation found a divergent treatment of retail parity clauses by NCAs and national courts, notably regarding the treatment of narrow parity clauses in the hotel booking sector.<sup>40</sup>

Lastly, regarding **certain online restrictions**, the evaluation has indicated that the assessment of these restrictions is one of the areas in which the VBER and the Vertical Guidelines are perceived to lack clarity and not be up to date in light of recent market developments.<sup>41</sup>

In this context, stakeholders point to a number of issues regarding indirect measure that make online sales more difficult.

Some stakeholders consider that the qualification of *dual pricing* (i.e. charging the same distributor a higher wholesale price for products intended to be sold online than for products to be sold offline) as a hardcore restriction is no longer adapted to the current business needs. This derives from the fact that, as some stakeholders pointed out, online sales have developed during the last decade into a well-functioning sales channel that no longer needs special protection. Moreover, brick-and-mortar stores are facing increasing pressure from online sales. This situation has been exacerbated (at least for now) due to the pandemic, during which online sales experienced an unprecedented peak. Both suppliers and offline-focused retailers have therefore called for more flexibility to allow them to support brick-and-mortar stores in an appropriate manner. It has also been mentioned that the underlying logic of the Vertical Guidelines on dual pricing, which only allows suppliers to apply

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<sup>35</sup> See staff working document, page 186.

<sup>36</sup> See Vertical Guidelines, paragraph 151.

<sup>37</sup> See staff working document, pages 188 to 192.

<sup>38</sup> See staff working document, pages 168 to 169.

<sup>39</sup> See staff working document, pages 168 to 175.

<sup>40</sup> See staff working document, pages 180 to 185.

<sup>41</sup> See staff working document, pages 208 to 209.

different wholesale prices to pure online players and pure offline players, is not in line with the current commercial trend, which aims to provide an omni-channel experience to consumers.<sup>42</sup>

Some stakeholders also expressed a need for clarification regarding online advertising, and more specifically the use of trademarks and brand names in the context of online advertising. All stakeholder groups highlighted the importance of using trademarks and brands names in the context of online advertising.<sup>43</sup> As indicated above, the support study indicated that search engines have become the most used channels for product discovery, and brand names can play a significant role as search terms used by consumers. However, there is no consensus among stakeholders on how restrictions on the use of trade marks in advertising and restrictions to bid for trademarks with certain search engine should be assessed.<sup>44</sup>

## V. CONCLUSION

The evaluation has shown that the VBER and the Vertical Guidelines are useful tools that significantly facilitate the enforcement work of the Commission, NCAs and national courts, and help businesses to self-assess the compliance of their vertical agreements with the Treaty. Nevertheless, the evaluation has identified a number of issues, in particular with regard to the clarity of the rules and their ability to address new market developments.

In light of the findings, the Commission has launched the impact assessment phase, which will look into different policy options for a possible revision of the rules in the areas identified during the evaluation as not functioning well. Like the evaluation phase, the impact assessment will include several consultation activities to gather the views of stakeholders in this regard.

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42 See staff working document, pages 211 to 215.

43 See staff working document, pages 218 to 219.

44 See staff working document, page 221.



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