
**RESPONSE TO THE EUROPEAN COMMISSION'S CONSULTATION ON THE
REVIEW OF THE COMPETITION RULES APPLICABLE TO VERTICAL
AGREEMENTS**

1. INTRODUCTION

1.1 The European Association of Chemical Distributors (*FECC*) welcomes the opportunity to respond to the European Commission (the *Commission*)'s public consultation on the current review of the rules and policy applicable to the assessment of supply and distribution agreements (so-called 'vertical agreements'), namely Commission Regulation 2790/1999 on the application of Article 81(3) to categories of vertical agreements and concerted practices (*VBER*), and the Commission Guidelines on Vertical Restraints (*Guidelines*).

1.2 FECC represents approximately 1,200 European chemical distributors, which meet the demand of over one million downstream users. Its membership includes both national associations and companies, including a large amount of SMEs, active throughout Europe. However, please note that the comments contained in this paper are those of FECC and do not necessarily represent the views of any of its individual members.

1.3 FECC's members enter into a wide range of vertical agreements. Further to the entry into force in 2004 of Commission Regulation 1/2003, it is the companies' responsibility to assess the compliance of these agreements with the EC competition rules (so-called 'self-assessment'). It is therefore crucial that the VBER and the Guidelines provide clear and ready-to-apply guidance on the relevant rules.

1.4 FECC's contribution thus focuses on the practical issues which will likely be raised by the day-to-day application of the draft VBER and Guidelines. On this basis, FECC puts forward a few suggestions that in its opinion will improve the rules and policy applicable to the assessment of vertical agreements.

2. APPLICATION OF THE 30% THRESHOLD TO BOTH THE BUYER'S AND THE SUPPLIER'S MARKET SHARE

(i) It is not necessary to apply the two thresholds on a cumulative basis

2.1 The existing rules look at the market share of the supplier on the downstream market where it sells its products as the key factor to assess the applicability of the VBER. In principle, if the producer's market share on its downstream market is below 30%, the relevant vertical agreement is deemed to be in line with the EC competition rules without the need of an in-depth assessment.



2.2 On the contrary, the draft VBER indicates that the market shares of both the supplier and the buyer should be required not to exceed 30% “*on any of the relevant markets affected by the agreement*” for the block exemption to apply. The draft Guidelines interpret this as referring to the supplier’s share on the market where it supplies the buyer, and the buyer’s share on the market where it resells. The Commission has made clear that these changes were justified by the increased market power at the level of buyers/distributors.

2.3 FECC is not convinced that the insertion in the VBER of the additional 30% threshold applicable to the distributor’s downstream market share is the best way to deal with the Commission’s concerns on the buyer’s market power. The introduction of this additional threshold would significantly narrow the scope of application of the VBER and will require an in-depth assessment also in relation to agreements which in practice will not lead to any conceivable foreclosure risks.

2.4 In particular, the proposed changes to the VBER and the Guidelines are more in line with a “full” antitrust assessment than with the spirit of a block exemption. As it is observed at Para. 96 of the existing Guidelines “*a vertical agreement may not only have effects on the market between supplier and buyer but may also have effects on downstream markets*”. However, under the existing regime the assessment of the impact on additional downstream markets is limited to the individual assessment of agreements not covered by the block exemption. Similarly, Para. 13 of the reasoning of the current VBER indicates that the Commission “*may withdraw the benefit of the block exemption; this may occur in particular where the buyer has significant market power in the relevant market in which it resells the goods*” which are the object of the agreement at stake. Abandoning such an approach and require a *de facto* “full” analysis in all cases would be disproportionate and would unnecessarily limit the application of the VBER, to the detriment of legal certainty.

2.5 Against this background, FECC would suggest to apply the 30% threshold to either the market share of the supplier or the market share of the buyer, based on where the restrictive effects of the agreement at stake are most likely to occur, based on the content of such agreement. In particular, if an exclusivity clause is stipulated in favour of the buyer, then the relevant market share thresholds shall apply to the buyer; otherwise it is the supplier’s market share that should be taken into account.

(ii) It is unclear why the 30% threshold should apply to the buyer’s downstream market share, as opposed to its share on the purchasing market

2.6 FECC is not convinced that the market share of the buyer on the downstream market where it sells its products is an appropriate response to the Commission’s concerns over the increased power of buyers/distributors.

2.7 In this respect, we note that the draft Guidelines mainly underline the risk of potential foreclosure of rival buyers to important sources of supply. It is therefore not apparent why the application of the draft VRBE should depend on the buyer’s share on its downstream market. This approach would exclude many harmless agreements, where the buyer has no

real power on its purchasing market, from the benefit of the block exemption. Conversely, the concerns related to the possible foreclosure of rival buyers would not be addressed.

2.8 Furthermore, the relevant downstream market might consist of a “basket” of products mostly different from the very product which is the object of the vertical agreement at stake. It is therefore difficult to understand why such downstream market should be crucial to determine whether the agreement in issue should benefit of the block exemption, while the buyer’s position on the purchasing market will be immaterial in this respect.

2.9 Against this background, FECC submits that – when looking at the market share of the buyer – relevance should be given to the buyer’s share on its purchasing market. An assessment of the buyer’s market power on the downstream market is only necessary where a “full” assessment needs to be carried out, as it is the case under the existing Guidelines.

(iii) Practical issues related to the application of the 30% threshold on the buyer’s market

2.10 Article 3 of the draft VBER generally refers to the market shares of the supplier and the buyers on “*any of the relevant markets affected by the agreement*”, while Para. 23 of the draft Guidelines interprets the reference to the buyer’s market share as referring to “*the market(s) where it resells the contract goods or services...*”. FECC submits that it crucial that the relevant markets for these purposes be clearly defined in the VBER itself. Otherwise there is a risk that national authorities and courts may decide to interpret “*relevant markets*” in a different way from the Commission, to the detriment of legal certainty.

2.11 There will also be many situations in which the buyer’s downstream market, to which the 30% threshold apply according to the draft Guidelines, will be difficult to identify. In the interest of facilitating self-assessment, FECC would welcome the insertion in the draft Guidelines of a number of practical examples on how the new thresholds are to be applied in practice. The current draft dedicates very little space to the illustration of one of the key changes with respect to the existing system.

2.12 Furthermore, in the case of a dual distribution system, where the supplier is also active on the buyer’s downstream market, the sharing of such current and commercially sensitive data would represent serious anti-competitive conduct. This is often the case in the fields distribution of chemical products and FECC would welcome some guidance on how to address these concerns.

3. DELETION OF THE EUR 100 MILLION *DE MINIMIS* EXCEPTION

3.1 Under article 2(4)(a) of the existing VBER, when a buyer with a turnover of no more than EUR 100 million enters into a non-reciprocal vertical agreement with a competitor, such agreement may benefit from the block exemption. This provision has been deleted from the draft VBER. This means that a full antitrust assessment of the vertical agreement at stake

will need to be carried irrespective of the turnover generated by the buyer. The Commission has provided no justification for such deletion.

3.2 FECC submits that the deletion of the EUR 100 million exception is unjustified and disproportionate. As opposed to manufacturers, companies which are active at the distribution level often achieve a turnover which is by far more significant than their real market power. Therefore, buyers generating a turnover below EUR 100 million have no conceivable market power. Excluding these companies outright from the benefit of the VBER can therefore not be justified by the Commission's increased concerns over the importance of larger distributors.

3.3 The deletion of the EUR 100 million exception will result in a very high burden on a number of SMEs which will need to seek *ad hoc* legal advice on agreements that under the current regime fall under the VBER. The proposed change clearly goes against the principle of reducing regulatory burdens on SMEs, which should be inherent to the spirit of any block exemption, and is gravely disproportionate.

4. DEFINITION OF VERTICAL AGREEMENTS VS. UNILATERAL CONDUCT

4.1 At Para. 25 of the draft Guidelines, the Commission proposes new guidance on the definition of "agreement" within the meaning of Article 81 of the EC Treaty. Such definition is key to decide whether a given situation shall be treated as unilateral conduct (potentially falling under Article 82 of the EC Treaty) or as an agreement subject to Article 81 of the EC Treaty.

4.2 While in principle this could be a useful update of the Commission's guidance in light of the most recent case-law of the EC courts, the approach adopted in the draft Guidelines seems to dangerously assimilate unilateral conduct (not caught by Article 81 of the EC Treaty) to concerted practices/tacit acquiescence (caught by Article 81 of the EC Treaty).

4.3 In particular, the Commission correctly points out in the draft Guidelines that, in order to show tacit acquiescence, it is necessary to show that: (i) one party requires explicitly or implicitly the cooperation of the other party for the implementation of its unilateral policy, and (ii) the other party complied with that requirement by implementing that unilateral policy. However, the Commission goes on and states that "*if after a supplier's announcement of a unilateral reduction of supplies in order to prevent parallel trade, distributors reduce immediately their orders and stop engaging in parallel trade, then those distributors tacitly acquiesce to the supplier's unilateral policy*".

4.4 This is not in line with the case-law of the EC courts. The Commission itself quotes Case T-41/96, *Bayer AG v. Commission*, which rather established that "[t]he Commission was [...] wrong in holding that the actual conduct of the wholesalers constitutes sufficient proof in law of their acquiescence in the applicant's policy designed to prevent parallel imports".

4.5 In particular, it is unclear to FECC why the conduct of distributors in the example made by the Commission at Para. 25 of the Guidelines should qualify as acquiescence. More likely, it is the expression of the mere acknowledgement that there is no point in continuing to request larger volumes, once the producer has made it clear that it is not prepared to supply such volumes.

4.6 A significant number of FECC's members are SMEs which distribute products supplied by large manufacturers. The wording of Para. 25 of the draft Guidelines, which suggests that the Commission could look at the reaction of distributors to a unilateral decision of suppliers as an evidence of tacit acquiescence raises significant concerns and is not justified by the case-law of the EC courts.

5. RESALE PRICE MAINTENANCE

5.1 FECC welcomes the higher degree of flexibility provided by the "case-by-case" approach to resale price maintenance (*RPM*) suggested in the draft Guidelines. However, it is difficult to reconcile the more "open" approach of the draft Guidelines with the fact that the draft VBER continues to classify RPM as a hardcore restriction, and with the rather detailed list of the negative effects of RPM listed at Para. 220 of the draft Guidelines themselves.

5.2 In the interest of legal certainty, FECC would thus welcome a more detailed reasoning at Para. 221 of the draft Guidelines on the possible efficiencies to which RPM may lead, and on how in practice these efficiencies might be achieved.

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