

Explanatory note on the new VBER and Vertical Guidelines

This note summarizes the main changes in the new Vertical Block Exemption Regulation (“new VBER”) and accompanying Vertical Guidelines (“new Vertical Guidelines”) relative to the Vertical Block Exemption Regulation that will expire on 31 May 2022 (“old VBER”) and the accompanying Vertical Guidelines (“old Vertical Guidelines”).

The VBER concerns vertical agreements, namely agreements that relate to the supply and distribution of goods and services. It provides that the prohibition in Article 101(1) of the Treaty does not apply to such agreements if they meet certain conditions. The Vertical Guidelines provide guidance on how to interpret and apply the VBER, as well as on the assessment under Article 101(1) and Article 101(3) of the Treaty of vertical agreements that fall outside the VBER.

The new VBER and new Vertical Guidelines are based on all the evidence gathered during the review of the old VBER and Vertical Guidelines, including the responses to the public consultation on the draft revised texts held between 9 July and 17 September 2021 and the responses to an additional public consultation on the section of the new Vertical Guidelines relating to information exchange in dual distribution, which ran between 4 and 18 February 2022.

The changes made by the Commission reflect the objectives of the review. In particular, the changes aim:

- To readjust the safe harbour to eliminate false positives and reduce false negatives under the VBER; and
- To provide stakeholders with simpler, clearer and up-to-date rules and guidance that can help businesses to self-assess the compliance of their vertical agreements with Article 101 of the Treaty in a business environment reshaped by the growth of online sales and by new market players such as online platforms, and ensure a more harmonised application of the vertical rules across the European Union.

Readjusting the safe harbour to eliminate false positives and reduce false negatives under the VBER

Through the evaluation of the old VBER, the Commission identified four areas in which adjustments to the scope of the safe harbour might be required.

Two of the four areas (dual distribution and parity obligations, which are described in more detail below) concerned possible false positives.

False positives concern vertical agreements and restrictions that are covered by the safe harbour of the block exemption but for which it cannot be assumed with sufficient certainty that they are generally on balance efficiency-enhancing and, thus, fulfil the conditions of the exception provided by Article 101(3) of the Treaty. Where false positives exist, the Commission has an obligation to narrow the scope of the safe harbour in order to align it with Article 101 of the Treaty and the Empowerment Regulation.¹

¹ 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. Through this Regulation, the Council empowered

The two other areas (active sales restrictions and restrictions of online sales, which are also described in more detail below) concerned possible false negatives.

False negatives refer to vertical agreements and restrictions which are not covered by the block exemption but for which it can be assumed with sufficient certainty that they generally fulfil the conditions of Article 101(3) of the Treaty. Given that the exclusion from the safe harbour of vertical agreements and restrictions which in fact meet the conditions of the Article 101(3) exception does not result in a breach of Article 101 of the Treaty or the Empowerment Regulation, there is no imperative for the Commission to act. However, excluding such agreements and restrictions from the safe harbour increases the burden, and thus compliance costs, for businesses and notably small and medium-sized enterprises (“SMEs”) when they self-assess the compliance of their agreements with Article 101 of the Treaty. The Commission therefore strives to reduce any such false negatives to the extent possible.

- Dual distribution refers to situations in which a supplier not only sells its goods or services through independent distributors but also directly to end customers in direct competition with its independent distributors. On the one hand, the review of the old VBER showed that, in view of the increase in the use of dual distribution, the old VBER may exempt vertical agreements where horizontal concerns are no longer negligible, in particular as regards information exchange between suppliers and distributors, and as regards so-called hybrid platforms. On the other hand, that review indicated that extending the dual distribution exemption to wholesalers and importers is appropriate. This extension is reflected in Article 2(4) of the new VBER.

As regards information exchange in dual distribution, Article 2(5) of the new VBER excludes from the exemption information exchange that is either not directly related to the implementation of the vertical agreement or is not necessary to improve the production or distribution of the contract goods or services, or which fulfils neither of those two conditions. Further clarifications about the scope of the dual distribution exception under the new VBER are provided in the new Vertical Guidelines (see section 4.4.3), which includes examples of types of information exchange that are likely to fall within or outside the block exemption in the context of dual distribution, as well as guidance on the legal consequences of engaging in information exchange outside the scope of the block exemption.

In addition, Article 2(6) of the new VBER excludes from the block exemption vertical agreements relating to the provision of online intermediation services (‘OIS’) where the OIS provider (namely the platform) also sells goods or services in competition with the firms to which it provides intermediation services (namely where it has a hybrid function). The new Vertical Guidelines contain more guidance on this exclusion (see section 4.4.4), in particular on the exact scope of the definition and the legal consequences of the exclusion of vertical agreements entered into by ‘hybrid’ platforms. The guidance indicates that the Commission is unlikely to prioritise enforcement against the vertical agreements of hybrid platforms where the agreement does not contain by object restrictions and the platform does not enjoy significant market power.

- Parity obligations, sometimes also referred to as Most Favoured Nation clauses (“MFNs”) are obligations that require an undertaking to offer the same or better conditions to its counterparty as those offered on other sales/marketing channels (e.g. on other platforms and/or on the

the Commission to adopt block exemption regulations for certain categories of agreements and concerted practices falling under Article 101 of the Treaty.

undertaking's direct sales channels, such as its website). Under the old VBER, all types of parity clause are block-exempted, but in recent years the use of retail parity clauses (relating to the conditions under which products are offered to end users) has been the subject of frequent enforcement action.

As this enforcement action has generally focused on retail parity clauses imposed by platforms relating to the conditions offered on other platforms, the new VBER removes the benefit of the block exemption for such across-platform retail parity obligations. This type of parity obligation is therefore added to the list of excluded restrictions (see Article 5(d) of the new VBER). The consequence of this change is that this type of parity obligation must be assessed individually under Article 101 of the Treaty.

Conversely, the new VBER still block exempts all other types of parity obligation, including retail parity obligations relating to direct sales channels (so-called narrow parity). These narrow retail parity obligations as well as wholesale parity obligations continue to benefit from the safe harbour provided by the VBER, provided the general conditions for the application of the VBER are fulfilled, in particular the 30% market share threshold in Article 3 of the VBER. However, the new VBER and the new Vertical Guidelines include a warning relating to the use of narrow retail parity obligations in concentrated platform markets. Where such obligations are used by platforms covering a significant share of users (cumulative effect) and there is no evidence of efficiencies, the benefit of the block exemption is likely to be withdrawn. Further guidance on the assessment of parity obligations is provided in sections 6.2.4 and 8.2.5 of the new Vertical Guidelines.

- Active sales restrictions concern limitations of the buyer's ability to actively approach individual customers and they generally constitute hardcore restrictions which prevent the block exemption of agreements that contain such restrictions. The old VBER contains only narrow exceptions to this rule. The evidence gathered in the review of the old VBER and the old Vertical Guidelines indicates that certain aspects of the rules on active sales restrictions are unclear and limit suppliers in designing their distribution systems according to their business needs.

In light of this evidence, Article 1(1)(l) in conjunction with Article 1(1)(n) of the new VBER provides a definition of active sales restrictions. In addition, the new VBER includes proposed changes to the rules on active sales restrictions concerning mostly Article 4(b) to (d) of the new VBER.

In Article 4(b), the possibility of shared exclusivity is introduced, allowing a supplier to appoint up to a maximum of 5 distributors per exclusive territory or customer group. The new Vertical Guidelines explain that above this maximum there is a risk that the exclusive distributors will free-ride on each other's investments, thereby eliminating the incentive of each distributor to invest and thus the efficiency that exclusive distribution is intended to achieve.

Another change regarding exclusive distribution concerns the possibility for the supplier to oblige its distributors to pass on restrictions of active sales to their customers. The new VBER and new Vertical Guidelines clarify that the block exemption also applies where a supplier requires its distributors to 'pass on' to their immediate customers restrictions on making active sales into territories or customer groups exclusively allocated to other distributors. However, such pass-on is not block-exempted further down the distribution chain.

Furthermore, Article 4(c) of the new VBER grants selective distribution systems enhanced protection: suppliers may now prohibit buyers and their customers from selling to unauthorized

distributors located in a territory where the supplier operates a selective distribution system, regardless of whether those buyers and customers are themselves located inside or outside that territory.

- As regards certain indirect measures restricting online sales, the changes relative to the old VBER relate to 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) and the equivalence principle (i.e. imposing criteria for online sales that are not overall equivalent to the criteria imposed for sales in brick-and-mortar shops). The evidence gathered during the review of the old VBER and the old Vertical Guidelines indicates that online sales have developed into a well-functioning sales channel that no longer requires special protection relative to offline sales channels. It is therefore no longer justified to treat dual pricing or the imposition by suppliers of differing criteria for online and offline sales as hardcore restrictions.

Therefore, the new Vertical Guidelines make clear that suppliers may set different wholesale prices for online and offline sales by the same distributor, as this may incentivise or reward an appropriate level of investments. While the difference in the wholesale prices must be reasonably related to differences in costs or investments between the online and offline sales channels, the parties are not required to carry out complex cost calculations or share detailed cost information in order to demonstrate this. The block exemption of dual pricing is also subject to certain safeguards. Namely, the difference in the wholesale price for online and offline sales should not have the object of restricting cross-border sales or of preventing the effective use of the internet by the buyer. Also, while the parties are free to set up a system that allows them to implement dual pricing effectively (for example, monitoring which items are actually sold online or offline for the purpose of ex post billing), any such system should not limit the amount of products the buyer can sell online.

Furthermore, in the context of a selective distribution system, the criteria imposed by suppliers in relation to online sales no longer have to be overall equivalent to the criteria imposed on brick-and-mortar shops, to take account of the fact that the two channels are inherently different in nature. In this case as well, criteria specific to online sales are subject to the same limiting principle as online sales restrictions more generally, namely they should not have the object of preventing the effective use of the internet by the buyer or its customers to sell the contract goods or services.

Provide stakeholders with simpler, clearer and up-to-date rules and guidance that can help businesses to self-assess the compliance of their vertical agreements with Article 101 of the Treaty in a business environment reshaped by the growth of online sales and by new market players such as online platforms, and ensure a more harmonised application of the vertical rules across the EU

One of the main objectives of the review was to provide stakeholders with up-to-date guidance on online restrictions and ensure a harmonised approach to such restrictions across the EU. To that end, the new VBER and the new Vertical Guidelines incorporate the guiding principles for the assessment of online restrictions drawn from the case law of the Court of Justice of the EU, namely in *Pierre Fabre* and *Coty*,² and relied upon by DG COMP.³

² Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence* EU:C:2011:649; Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* EU:C:2017:941.

Article 4(e) of the new VBER provides, in the light of the case law, that restrictions on online sales are hardcore when they, directly or indirectly, in isolation or combination with other factors, have the object of preventing buyers or their customers from effectively using the Internet to sell the contract goods or services, including restrictions that have the object of preventing the use of one or more entire online advertising channels.

Section 6.1.2 of the new Vertical Guidelines provides further guidance on such hardcore restrictions. It explains when certain online conduct amounts to active or passive selling, for the purpose of assessing restrictions on selling into exclusive territories or customer groups. For instance, while the operation of a website is a form of passive selling, translating that website into a language not commonly used in the territory of the distributor is a form of active selling. The guidance also explains that preventing the use of an entire online advertising channel (for example, search engine advertising or price comparison services) is a hardcore restriction, as the ability to advertise allows a distributor to attract potential customers to its website, which is a prerequisite for being able to sell online. Conversely, online advertising restrictions that do not exclude the use of entire online advertising channels are block exempted, for example, if such restrictions are linked to the content of online advertising or set certain quality standards. The new Vertical Guidelines also include specific guidance on restrictions of the use of online platforms and price comparison services (see sections 8.2.3 and 8.2.4).

The new VBER and the new Vertical Guidelines also provide specific rules and guidance relating to the platform economy, taking into account that this part of the economy plays an increasingly important role in the distribution of goods and services. Article 1(1)(d) of the new VBER clarifies that providers of online intermediation services qualify as suppliers under the VBER and Article 1(1)(e) of the new VBER defines online intermediation services, taking inspiration from a definition in the P2B Regulation.⁴ Section 4.3 of the Vertical Guidelines provides guidance on this definition and on how the VBER applies to agreements entered into by undertakings that qualify as providers of online intermediation services, in particular as regards the application of the lists of hardcore and excluded restrictions. Section 3.2.3 of the Vertical Guidelines also explains why undertakings active in the online platform economy generally do not qualify as genuine agents (whose agreements fall outside Article 101(1) of the Treaty). Furthermore, as mentioned above in the context of the dual distribution exception, Article 2(6) of the new VBER provides that agreements relating to the provision of online intermediation services do not benefit from the safe harbour provided by the VBER where the provider has a hybrid function (also competes as a seller in the relevant market).

The changes are consistent with the Digital Markets Act (“DMA”), on which the Commission, the European Parliament and the EU Member States reached a political agreement on 24 March 2022. This is notably because the focus of the DMA is on digital gatekeepers, which are undertakings that enjoy market power and therefore do not benefit from the safe harbour provided by the VBER.

The new Vertical Guidelines also incorporate the February 2021 Working Paper on distributors that also act as agents for certain products for the same supplier, while providing additional

³ See DG Competition’s Policy Brief “EU competition rules and marketplace bans: Where do we stand after the Coty judgment?” of April 2018, available at <https://ec.europa.eu/competition/publications/cpb/2018/kdak18001enn.pdf>.

⁴ Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186, 11.7.2019, p. 57.

clarifications.⁵ As regards resale price maintenance (“RPM”), the new Vertical Guidelines notably clarify that the imposition of minimum advertised prices will be treated as an indirect form of RPM. They also provide guidance on so-called fulfilment or drop shipping contracts (where a supplier and buyer agree the price and other main terms of a sale, but use a third party ‘fulfiller’ to handle delivery and other logistical arrangements).

At the same time as ensuring a more harmonized application of Article 101 of the Treaty, the new Vertical Guidelines aim to strengthen the ability of the national competition authorities to withdraw the benefit of the VBER in individual cases to the extent possible within the existing legal framework by providing guidance on the applicable conditions and procedure (see section 7.1 of the new Vertical Guidelines).

As regards agreements that pursue sustainability objectives, the introductory section of the new Vertical Guidelines recognises that sustainable development is a priority objective of the Union’s policies and clarifies what is understood by sustainability objectives. This section makes clear that sustainability agreements are not a distinct category of agreement under Union competition law, but that the achievement of sustainability objectives is capable of constituting an efficiency within the meaning of Article 101(3) of the Treaty. Later sections of the new Vertical Guidelines then provide examples of such efficiencies, including the use of sustainability-related criteria in a selective distribution system and the imposition of exclusivity obligations to incentivise investments in green energy plants.

The new VBER and new Vertical Guidelines also aim to reduce compliance costs of businesses, notably SMEs, by clarifying certain provisions perceived as particularly complex and thus difficult to implement. In particular, the hardcore territorial and customer restrictions listed in Article 4(b) of the old VBER, which stakeholders considered as particularly complex, have been restructured into three distinct groups, one for each of the main types of distribution system, namely exclusive distribution, selective distribution and free distribution. In addition, section 4.6 of the new Vertical Guidelines provides a detailed explanation of the characteristics of each of these distribution systems.

Finally, the structure of the new Vertical Guidelines is simplified, as compared to the old Vertical Guidelines, to provide a clearer framework of analysis for vertical agreements. For example, the new structure combines the previously scattered guidance on RPM in one dedicated section (see section 6.1.1 of the new Vertical Guidelines).

⁵ Available at https://ec.europa.eu/competition/consultations/2018_vber/working_paper_on_dual_role_agents.pdf.