

European Commission activity / Vertical Agreements. The European Commission publishes its findings of the evaluation of the Vertical Block Exemption regulation.

Review of VBER. The European Commission (EC) recently published its [Staff Working Document](#) containing its findings on the evaluation the Vertical Block Exemption Regulation (VBER) and its Guidelines. The VBER, which provides a safe harbor for contractual restraints (for instance between suppliers and distributors), is due to expire on 31 May 2022 and the EC initiated in 2018 a revision process to assess whether to let the VBER lapse, prolong its duration or revise it. During this first evaluation phase the EC has gathered evidence from various sources (businesses and their advisors, consumer bodies and national competition authorities) on the functioning of the VBER and its Guidelines.

E-platforms and e-commerce as key actors. The main finding of the Staff Working Document is that stakeholders perceive the VBER and its Guidelines as useful tools facilitating the self-assessment of vertical agreements. However, stakeholders have also expressed the need to update the VBER and its Guidelines to cover the latest developments, notably the impact on distribution activities on the last two decades of online sales and e-platforms, which have grown substantially in this period and are perceived as still having increasing potential in the Covid-19 world. The competition law concerns derive from potential online sales restrictions impacting distributors and consumers expecting to have an omnichannel experience across offline and online stores.

Key areas of interest. Therefore, even if still relevant, the VBER and its Guidelines require an update to take into account the market developments since 2010. Specific issues identified in the Staff Working Documents in relation to which more clarity and guidance is requested by stakeholders include:

- (a) Uncertain areas related to selective distribution models, such as covered restrictions, their combination with exclusive distribution models or the application of the equivalence principle for offline and online/marketplace criteria.
- (b) Dual distribution, as many manufacturers compete downstream with their resellers by selling directly to consumers through their websites or marketplaces, also potentially leading to the exchange of commercially sensitive information.
- (c) Compatibility of marketplace restrictions with Article 101 TFEU in view of the different interpretations of the *Coty* judgment, especially across different national competition authorities.
- (d) Dual pricing (in this context referring to the setting of differentiated tariffs to resellers depending on whether the products are sold online or in brick-and-mortar shops).
- (e) Distinction between active and passive sales, specifically in relation to online sales.
- (f) Restrictions on online advertising and on the use by resellers of price comparison websites as permitted brand protection measures (a matter left undecided by the *Coty* case).
- (g) Cases in which resale price maintenance is deducted from the combination of price recommendations and price monitoring by electronic algorithms in an e-platform context.
- (h) Assessment of retail parity clauses remains elusive.
- (i) Qualification of e-platforms as agents of the principal or supplier's distribution system (with whom e-platforms often enter into agency agreements, even though the risk allocation might not always be conducive of genuine agency) or as independent resellers.

Additionally, stakeholders have also referred to general issues such as the existence of divergences of treatment across national competition authorities and national courts impairing legal certainty across the EU; the need to exempt additional vertical agreements which could normally satisfy the conditions of Article 101.3 TFEU, or complexity of some rules

Next steps. The EC has indicated that it will launch, in the coming weeks, an impact assessment to look into the issues identified during the evaluation, followed by a public consultation by the end of 2020. It is expected that the EC will publish a draft of the new VBER in the course of 2021, with a view to having revised rules in place by 31 May 2022, when the current VBER will expire.

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