



ERT

Expert Paper

Vertical Agreements

March 2021

Introduction

The Working Group on Competition Policy of the European Round Table for Industry (ERT) welcomes the European Commission consultation on the revision of the Vertical Block Exemption Regulation¹ (VBER) and the Notice providing guidance on the assessment of vertical restraints² (Vertical Guidelines)³.

Vertical relationships open up inter-brand and intra-brand competition, fostering competition on price, quality of service, customer care and innovation. The distribution landscape has changed dramatically over the last decade since the VBER was adopted. New distribution models have emerged, and businesses are continuously adapting to an ever-changing digital market economy. Businesses are also adapting to the challenges of climate change and, more recently, to the impact of the COVID-19 pandemic.

We therefore welcome the Commission's initiative to update the VBER to reflect the need for more flexibility in the design of distribution systems to allow businesses at innovation, manufacturing, supply and distribution levels to continue to adapt to future changes and challenges and to respond to evolving customer needs. In this context:

- First, we urge the Commission to extend a more pragmatic approach to dual distribution and the treatment of certain intermediaries who are effectively acting on behalf of either the supplier or the purchaser.
- Second, we endorse the aim of clarifying and simplifying the rules, including further guidance on the substantive conditions of an exemption for resale price maintenance, including at the wholesale level.

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¹ 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. 1–7

² Commission Guidelines on Vertical Restraints, OJ C 130, 19.05.2010, p. 1

³ The European Commission Public Consultation can be accessed [here](#).

This paper builds on ERT's 2019 flagship paper "Competing at Scale"⁴ and the presentation delivered during the course of the Commission's Evaluation phase of the VBER review⁵. ERT maintains its view that whilst the VBER has generally contributed to legal certainty, it ought to adopt a more flexible approach to better allow suppliers to structure their supply chain so as to meet the demands of customers and consumers - particularly in areas such as:

- **Dual distribution**, which is primarily a vertical supplier-buyer relationship that creates complementary value for customers as the current guidelines correctly recognise. The rationale for exempting dual distribution has not changed, and we do not support the proposal to introduce an additional market share threshold at the retail level. Competition at the retail level only exists because of the underlying vertical agreement which extends the scope of the distribution of the brand. It is for this reason that the block exemption should explicitly cover the collection by the supplier of pricing, volumes, customer information and other data in the context of dual distribution.
- **Fulfilment services in distribution networks**, where (often at the demand of customers) intermediaries take title and/or risk to products but do not act genuinely independently in respect of the commercial conditions of the agreement concerned (i.e., price and rebates, range or choice of end-customer) and thus are not acting as a "fully" independent distributor. The revised VBER should extend to distribution models that rely on the use of such intermediaries.
- **Exclusive or selective distribution networks**, where the rules are currently particularly rigid and unduly complex.
- **Online sales**, which have developed into a well-functioning sales channel over the last decade, whereas physical stores are facing increasing pressure.

The revised VBER and Vertical Guidelines should acknowledge the pro-competitiveness

and commercial reality of vertical relationships, provide firms with confidence and clarity to be able to adjust to changing market forces, and avoid overly granular rules.

1. Global challenges and global competitiveness

Global markets are going through a fourth industrial revolution. The competitive landscape is drastically changing. At the same time, the climate agenda has become time-critical, requiring companies to fundamentally change the way they operate.

In an increasingly interconnected world of distribution channels, platforms and ecosystems, vertical collaboration between firms is increasing for reasons of increased efficiency, interoperability, achieving environmental or regulatory targets, and developing technological as well as other standards. The VBER should acknowledge the pro-competitive effects of such vertical collaborations and draw the legal consequences from such an acknowledgment.

R&D partners, suppliers, distribution partners and retailers need to cooperate with one another broadly to meet the challenges of today, to prepare for the opportunities of tomorrow, and to ensure that products and services are at the forefront of the EU twin transitions of digitisation (e-commerce) and sustainability.

Against this background, we welcome the Commission's initiative towards a more flexible approach to designing innovation, manufacturing and distribution systems and providing the certainty necessary to encourage co-operation with innovation and distribution partners. We encourage DG Competition to take a broad and forward-looking approach that takes into account the global competitive environment, technological developments, sustainability goals and whether intensified cooperation has a neutral or positive effect on consumers/society at large.

⁴ ERT, Competing at Scale – EU Competition Policy fit for the Global stage, October 2019, page 5 ([link](#))

⁵ ERT, Presentation to DG COMP, 29 April 2019

2. Dual distribution, digitalisation and the competitive landscape

Dual distribution was a common phenomenon even before the current VBER entered into force. The rationale for exempting dual distribution has not changed - i.e., the focus remains on the importance of inter-brand competition at the upstream level. This applies both to online and offline dual distribution. We also support the Commission's option to continue to extend the exemption to dual distribution when it is applied by a wholesaler or an importer, since wholesalers and importers are essentially in the same position as the supplier, vis-à-vis resellers.

We do not support the Commission's proposed option to introduce an additional market share threshold at the retail level, as (i) such an approach would be arbitrary, (ii) it would burden companies with an uncertain self-assessment, which would highly depend on the availability of reliable market share information, and (iii) it may eventually lead companies to give up dual distribution, even in the absence of any actual or likely harm to competition. An additional market share would also have to be constantly monitored by companies and ultimately if reached, would force a company to change its distribution system, which would be unpractical and burdensome. Competition at the retail level only exists because of the underlying vertical agreement which extends the scope of the distribution of the brand and it would be inappropriate to treat this in the same way as inter-brand competition.

There is also some confusion as to whether dual distribution should be treated as a purely vertical relationship, or whether there are certain horizontal aspects to it. Continuing to block exempt dual distribution would be consistent with the commercial and economic reality that underpins supplier-buyer relationships. It is critical that the VBER and Guidelines continue

to treat the supplier and distributor relationship in a dual distribution context as a vertical relationship, and to clarify that the relationship does not additionally require a horizontal assessment. Requiring both a vertical and a horizontal assessment is arbitrary, would not address any underlying competition concerns, and would fail to recognize that the appointment of distributors/wholesalers extends the reach of the brands in question to additional channels, customers or geographies.

The revised VBER should acknowledge that information sharing in a vertical relationship (including in situations of dual distribution where the need to share information on identity of customers, targets, volumes and prices is no different to any other vertical relationship) is beneficial to enhance the efficiency of the distribution network, and serve customer needs better. The revised **VBER should explicitly state that the collection by the supplier of pricing, volumes, customer information and other data in the context of dual distribution is block exempted**, provided the data are not used to restrict the freedom of the reseller in a manner that would be considered hardcore under the VBER (e.g., by way of prohibited resale price maintenance or territorial/customer hardcore restrictions).

Digitalisation brings new business models and drastically changes the functioning of certain markets. Platforms and ecosystems operate across various markets at different levels of the value chain with integrated products and services. Data are a key input and driver of digital markets and co-operation in the form of data sharing or data pooling will be crucial for success in these markets. **Data pooling and data sharing between parties that are primarily in a vertical relationship should be block exempted** under the VBER, and not be analysed as horizontal relationships. This should remain the case irrespective of the position ultimately adopted by EU legislators in respect of core platform services under the Digital Markets Act.

3. Flexibility in designing distribution networks

A simple and straightforward solution to greater flexibility and the emergence of more innovative and efficient vertical relationships would be to apply **a 40% market share threshold to the upstream market participant only**. The second market share threshold relevant to the purchasing market of the downstream market participant should hence be removed. It should also be clarified that the relevant market definition in a vertical assessment may be different to that in a merger control case⁶. Absent market power, there are only few vertical restraints that entail in certain situations risks to competition so as to merit complex and restrictive rules and guidelines.

The revised rules should expressly acknowledge that a supplier is free to choose the distribution system that it deems most appropriate - this includes having the flexibility to operate exclusive or selective distribution in some territories, without being required to set up a single European-wide system. More generally, there should be less of a straight jacket approach to exclusive and selective distribution systems.

In this context, ERT supports the introduction of **expanded exceptions for active sales restrictions** to cover at least the following instances:

- Active sales restrictions remain valid where a territory has been reserved to the supplier or to another distributor even where the supplier or the distributor does not actually make actual sales in that territory (e.g., because the product has not been launched yet) nor has existing plans to do so (but might do in the future).
- Active sales restrictions remain valid in respect of certain sales that are generated online through targeted online advertising. Online markets have blurred the distinction between “active” and “passive” sales, and it is no longer realistic to note that all online sales are “passive” as such, especially when the site is multi-language. For instance, the Commission recognised in its Staff Working Document in the e-Commerce Sector Inquiry⁷ that a website using a national domain name (e.g., “.fr” or “.de”) operated by a distributor in order to target customers of a country that is exclusively allocated to another distributor is a form of active selling.
- A supplier should be able to require its exclusive distributor to pass-on active sales restrictions down the distribution chain.
- A supplier should be able to appoint two or more distributors (in the same way as it is able under the existing VBER framework to sell alongside the exclusive distributor) for a given exclusive territory/customer group (“shared exclusivity”), particularly where the distribution of a product requires significant investment.

We also welcome the Commission’s proposal to allow suppliers to operate **exclusivity at wholesale level within a selective distribution system**. Exclusive wholesalers selling to authorised retailers should be protected from active sales from outside their territories to avoid free riding. In addition, ERT agrees that more effective protection of selective distribution systems is needed by exempting restrictions on sales from outside the territory in which the selective distribution system is operated to unauthorised distributors inside that territory.

ERT is in favour of reducing businesses’ costs and administrative burden by including **tacitly renewable non-compete obligations within the scope of the block exemption**,

⁶ See page 4 of ERT Expert Paper on Market Definition Notice Review, October 2020, accessible [here](#).

⁷ Commission staff working document accompanying the document *Report from the Commission to the Council and the European Parliament Final report on the E-commerce Sector Inquiry* (COM(2017) 229 final)

to the extent that the buyer or the supplier can periodically terminate or renegotiate the agreement. This would facilitate longer term commercial relationships that are often underpinned by material investments over time and remove unnecessary administrative burden on companies.

Another theme that has emerged from the evaluation of the VBER is that over the last decade online sales have developed into a well-functioning sales channel, whereas physical stores are facing increasing pressure. The current framework is overly protective of e-commerce, a channel which has recorded unprecedented growth. Digitalisation, accelerated also by the COVID-19 lockdown restrictions, will have long lasting effects on physical stores.

ERT supports the proposed options to **expand the application of the block exemption to dual pricing and dual promotional or other support between online and offline sales and the application of different criteria for online and offline sales.**

By not allowing suppliers to differentiate wholesale prices based on the costs of each channel, the current rules prevent them from incentivising associated investments, notably in physical stores. This is particularly important with regard to complex products that require broad consultancy and advice as well as physical customer experience (e.g. product tests) which will foster better customer experience and sales results. However, in line with the goal of simplifying the regulatory environment, the revised rules should avoid as much as possible tying the lawfulness of any given conduct to the nature of the goods in question. In that light, online sales criteria that fall short of a de facto ban on online sales ought to be block exempted without complex rules on notions such as offline equivalence⁸.

4. Fulfilment services and agency

The revised VBER should extend to distribution models common in the modern economy, such as the use of intermediaries whose role is that of facilitating the supply/purchase relationship by providing logistics services (e.g., shipping/transport services, inventory management services). In these circumstances, the manufacturer/supplier deals directly with the customer (often at the insistence of the customer), including in relation to price negotiations, and the intermediaries simply provide a logistical service at the request or direction of either the seller or the buyer.

Many of these intermediaries technically buy and (re-)sell and take risk and/or title, but they do not act genuinely independently from either the buyer or the vendor when performing the logistic or administrative services. In most such cases, strong buyers negotiate their prices directly with their suppliers, leaving it to the wholesaler to simply fulfil the sale either at the direction of the buyer or the supplier. Intermediaries in these cases do not have control over the commercial conditions of the sale (including price or end-customer) and are therefore in reality not acting as a genuine independent distributor, or even as an agent.

The current agency rules do not cover this situation because the intermediaries at some point take title and/or risk to the contracted goods (e.g., because of tax or accounting reasons). The revised rules should facilitate such transactions without forcing recourse to complex agency arrangements which incurs costs for no good reason other than the avoidance of the risk that this could be considered a hard-core restriction under the VBER. The revised VBER should therefore extend to the use of intermediaries that principally provide fulfilment services at the direction of either the supplier or the customer.

⁸ See Judgment of the Court (Third Chamber) of 13 October 2011 *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi*. Case C-439/09

Furthermore, ERT is concerned about the overly formalistic approach adopted by the Commission in its recent Working Paper on “dual role” agents⁹. It is not consistent with the Commission's intention to provide business with more legal certainty and less complex guidance. The approach noted in this Working Paper is not practical and fails to recognise the practical complexity surrounding the relevant dual role scenarios. It is **disproportionate in this context to require parties to show that all relevant risks linked to the sale of goods are borne by the principal**, including in relation to products sold outside an agency agreement where these are in the same market as other products sold by the same party under an agency agreement. For instance, the specific example set out in the Commission's Working Paper fails to take into consideration that very often an agency model is used for a particular line of products, and the market-specific investments already made by the distributor, in its capacity as a distributor, far outweigh the investments needed for the particular line of products for which the otherwise distributor is appointed as a genuine agent.

5. Need for increased clarity and updated procedures

ERT welcomes the initiative to clarify areas where the rules are perceived as unclear or complex, to fill gaps, contribute to a more harmonised interpretation and enforcement and reflect the latest case law of the Court of Justice of the EU. These clarifications would provide businesses with more legal certainty, enabling them to more effectively self-assess compliance of vertical agreements with Article 101 TFEU and reduce their legal costs and other related financial and administrative burdens.

In this context, we welcome the opportunity to provide comments on the circumstances in which the conditions of Article 101(3) of the Treaty on the Functioning of the European Union (TFEU) are fulfilled in respect of resale price maintenance (RPM) both at wholesale¹⁰ and retail level. The current rules are too stringent and do not acknowledge sufficiently the possible pro-competitive effects of RPM, including in a franchise context. The current rules in combination with the practice of national competition authorities have the effect that companies are not considering RPM even in cases where there would be pro-competitive effects as the risk that these effects and arguments are rejected outright, without proper consideration, is too high. The Vertical Guidelines should recognise, as did other competition authorities in the past, that **RPM might help address free-riding concerns**. For example, the Commission should clarify that fixed resale prices for product launches are likely to meet the requirements of Article 101(3) TFEU in the case of any distribution model. There is also no reason to limit the exemption for short term low price campaigns to franchising systems only or to promotion periods of maximum 6 weeks particularly when campaigns require significant investments.

Last but not least, ERT welcomes the Commission's initiative under the Temporary Framework Communication to provide companies with guidance in cases of specific cooperation initiatives that have an EU dimension and are needed to tackle the COVID-19 pandemic. We encourage the Commission to expand its initiative beyond the current crisis, and to remain open to providing informal and faster guidance in respect of proposed agreements with an EU dimension and of a certain magnitude and complexity¹¹.

⁹ See European Commission's working paper: *Distributors that also act as agents for certain products for the same supplier*

¹⁰ See comment above about customers insisting on negotiating directly with suppliers but purchasing from an intermediary.

¹¹ Temporary framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current Covid-19 outbreak (2020/c 116 i/02)



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This response is submitted by the Competition Working Group of the European Round Table for Industry.

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