

Ecommerce Europe Position Paper on the Draft revised Vertical Block Exemption Regulation (VBER) & Vertical Guidelines

Introduction

Ecommerce Europe welcomes the European Commission's ambition to update the Vertical Block Exemption Regulation (VBER) and the Vertical Guidelines (Draft Guidelines) to better reflect business developments and consumption patterns in the past decade and address the challenges identified by the impact assessment.

Ecommerce Europe represents a wide variety of actors in the digital commerce sector, ranging from SMEs and webshops to online marketplaces. The VBER and its Vertical Guidelines therefore provide an important framework for the vertical agreements between distributors and their suppliers. Ecommerce Europe's members act as buyers, sellers and resellers to end consumers and other businesses through online sales channels, but also increasingly via omnichannel business models.

The proposed update by the Commission makes a strict separation between online and offline sales, and seems to insufficiently take into account the convergence of sales channels. It was further accelerated by the COVID-19 pandemic, but was already well under way in the past years. Furthermore, the proposed changes appear to be strongly skewed in favour of brands and suppliers and give them increasing control over the distribution chain and the pricing of products and services. Ecommerce Europe would therefore argue that for each of the changes, it should be considered whether they serve the two objectives of the VBER:

- To exempt vertical agreements that are not harmful to competition but provide efficiency gains.
- To provide legal clarity and certainty, allowing undertakings to assess on their own whether the requirements of an exemption are fulfilled.

In this paper, Ecommerce Europe will address its main concerns with regards to the Draft VBER and the Vertical Guidelines. Particular focus will be placed with issues that specifically concern the digital commerce industry (including omnichannel retail).

1. Dual Distribution

Dual distribution refers to the situation in which a supplier that uses distributors for the distribution of goods or services, also uses its own distribution channel to sell directly to the end-user. In this case, the manufacturer acts both as a supplier and retailer, and therefore competes directly with the retailers that stock and sell its products.

According to the Commission, changes to the rules on dual distribution are required due to the rise of online sales. Dual distribution is currently covered by the VBER safe harbour. In the new draft, vertical agreements in a dual distribution system would still be exempted under the VBER when the combined market share of the supplier and the distributor in the relevant market at retail level does not exceed 10%. For distribution agreements where the joint market share exceeds 10% in the relevant market at retail level, but the market share threshold is below 30%, there would be a limited safe harbour, covering all aspects of the agreement except for information exchanges between the parties. With regards to the information exchanges, the Commission proposed to assess them in the context of horizontal exchanges under the Horizontal Guidelines.

Ecommerce Europe asks the Commission to further clarify what information may be exchanged in a dual distribution context for the purposes of a proper functioning of the vertical relationship between the supplier

and the distributor. The guidelines should also provide concrete examples of what type of information may not be shared because it would have an anticompetitive effect.

2. Hybrid platforms

Agreements with hybrid platforms (companies that offer not only intermediary services, but also sell products and services) are no longer included in the exemption (Article 1(d) and Article 2(7)). Vertical agreements with online platforms instead have to be assessed on a case-by-case basis¹. While Ecommerce Europe recognises that the business model has become more prominent due to the digital transformation of the last years, we believe there is no ground for a differential treatment of these platforms compared to other dual distributors.

The Draft VBER removes the exemption when a hybrid platform that sells goods or services “in competition with undertakings to which it provides online intermediation services enters into a non-reciprocal vertical agreement with such a competing undertaking”². As a justification for the new provision, the Draft Guidelines³ state that, “the retail activities of suppliers of online intermediation services that have such a hybrid function typically raise non-negligible horizontal concerns, they do not fulfil the rationale of the dual distribution exception”. Additionally, the Draft VBER argues that “retail activities of providers of online intermediation services that have such a hybrid function typically affect inter-brand competition”⁴. Ecommerce Europe calls on the Commission to clarify how the above justifies the proposed different rules for hybrid platforms. In particular, because when competition between two undertakings only exists on the retail level, the Draft VBER generally continues to apply. Specifically, Article 2(4) of the Draft VBER, block exempts agreements if “the supplier is a manufacturer, wholesaler, or importer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing wholesale or import level [...]” as such the situation is comparable with the model of dual distribution. In addition, we believe that the exclusion of online hybrid platforms only is discriminatory against the online channel as similar models where a company offers intermediary services on the one hand, but is also a competitor in the sale of goods on the other (e.g., a sales agent with its own retail business (dual role agent), commission business) also exist in the offline world.

Furthermore, Ecommerce Europe believes the vertical agreements with hybrid platforms are just as likely to create efficiencies as other dual distributors and should therefore continue to benefit from the safe harbour. Vertical agreements with hybrid platforms are beneficial to different actors in the supply chain. They can help SMEs to get access to new audiences, which has been particularly important following the outbreak of COVID-19 last year, but also help established retailers and brands increase their sales. Other efficiencies can for instance be found in the agreements between hybrid platforms and suppliers or resellers. These kinds of purchase and distribution agreements have nothing to do with the intermediary service offered by the platform, but would still be impacted by the new rules. In practice, it can be expected that a case-by-case assessment of vertical agreements would lead to significant transaction costs, which might particularly impact SMEs. Furthermore, Ecommerce Europe believes the blanket provision withholding the safe harbour for hybrid platforms is not justified, for the reason that “hybrid” is not a criterion which by itself gives rise to competition concerns. It seems very disproportionate to implement a blanket provision without considerations for size, market share, characteristics of the agreements, characteristics of the market etc. Therefore, Ecommerce Europe recommends removing the special provisions for hybrid platforms. However, if the Commission were to maintain the current text, it should clarify that the removal of the exemption only applies to vertical agreements for the provision of online intermediation services.

3. Dual pricing

In the last year, to respond to the unprecedented situation caused by COVID-19, businesses in Europe have accelerated their digital transformation. Companies that previously only operated via offline sales channels, have started to develop also a digital presence. Ecommerce Europe believes that the trend

¹ Draft Guidelines, Paragraph 92

² Draft VBER, Article 2(7)

³ Draft Guidelines, Paragraph 91

⁴ Draft VBER, Recital 12

towards an increasingly omnichannel retail sector was inevitably coming, but the pandemic has expedited the convergence of the different distribution channels. Omnichannel commerce solutions, such as click-and-collect, have experienced a significant growth, and consumers have increasingly started to mix online and offline shopping experiences (e.g., comparing prices online but buying offline and vice-versa). Ecommerce Europe is therefore concerned about the proposed changes in the Draft VBER and Draft Guidelines with regards to dual pricing.

In the current Guidelines, it is stated that an arrangement according to which a "distributor shall pay a higher price for products intended to be resold by the distributor online than for products intended to be resold offline" is considered a hardcore restriction of passive selling⁵. In contrast, in the new Draft Guidelines, it is stated that "a requirement that the same buyer pays a different price for products intended to be resold online than for products intended to be resold offline can benefit from the safe harbour of the VBER, in so far as it has as its object to incentivise or reward the appropriate level of investments respectively made online and offline"⁶. While it is also mentioned that "where the wholesale price difference has as its object to prevent the effective use of the internet for the purposes of selling online it amounts to a hardcore restriction", Ecommerce Europe is concerned that such a provision would in practice be used to promote offline retail only. This has previously already been identified in cases that were brought before the German competition authority, where producers tried to make it unattractive for retailers to use online sales channels.⁷

With regards to the feasibility of implementing dual pricing, Ecommerce Europe would like to point out several concerns. First, the possibility for a supplier to set different prices for online and offline sales by distributors, does not seem to take into account the development towards an increasingly high number of omnichannel businesses. In particular SMEs that previously only operated brick-and-mortar stores, have migrated parts of their business online. As the Commission explicitly states that dual pricing may not be used to prevent online sales, it appears also to be the Commission's expectation that dual pricing can lead to higher prices for products that sellers aim to sell online. Increasing the price of goods intended for the online sales channels of in particular SMEs, could significantly lower their profit margins and hamper fair competition. By making it less economically attractive for businesses to sell online, companies might need to resort to increasing their prices, which is ultimately also not in the benefit of the consumer. While, the price increase might first be expected for online business models, it could also have a spill-over effect to offline sales prices. The Draft Guidelines address this risk by requiring that any "such difference in price should be related to the differences in the costs incurred in each channel by the distributors at retail level". Where such a difference does not exist, according to the Draft Guidelines, dual pricing remains prohibited. In all other cases, to comply, suppliers and distributors have to determine the differences between the individual costs, in order to assess whether the price difference is in line with the costs difference. Ecommerce Europe questions how feasible it is to expect from the retail industry to manage such individual case-by-case assessments. Moreover, the provision requires retailers to provide evidence of the higher costs. However, this is strategically important information that is commercially highly sensitive and should not have to be shared with the supplier especially in dual distribution cases.

The Commission states that different prices may be set for online and offline sales, as long as the objective is to "incentivise or reward the appropriate level of investments respectively made online and offline"⁸. Ecommerce Europe asks the Commission to clarify which investments are referred to exactly. It seems rather complicated to link specific investments purely to online or offline sales. For instance, an investment in a digital shop could also be a way to draw customers to the brick-and-mortar shop, or an advertisement for a physical store might also create extra traffic on a webshop. We would like to point out that there is a wide range of investments beyond the most apparent ones, such as the investment in a store in a shopping street, which would need to be taken into account. In addition, there is a difference between costs and investments. Investments are amortised at one point of time whereas costs are reoccurring on a regular basis.

⁵ Current Guidelines, Paragraph 52 and Paragraph 52(d)

⁶ Draft Guidelines, Paragraph 195

⁷ Gardena B5-144/13, Dornbracht B5-100/10, Bosch Siemens Hausgeräte B7-11/13

⁸ Draft Guidelines, Paragraph 195

Furthermore, as suppliers are also increasingly selling their goods directly to consumers online⁹, it could be an incentive to charge higher prices for online sales by their resellers to reserve the distribution channel for themselves. To be able to set different prices for online and offline sales by omnichannel retailers, it would somehow need to be tracked which sales are conducted via either sales channel. This requires resellers to provide additional transparency, which could potentially raise concerns about anticompetitive information exchange.

The proposed provisions on dual pricing would also take away a certain degree of flexibility of omnichannel sellers with regards to their sales and stocks. For instance, sellers may want to sell excess brick-and-mortar stock online, but would be prohibited from doing so. The flexibility of being able to sell the same stock through multiple channels is one of the advantages of adopting an omnichannel business model, and is also used to for environmental reasons to prevent having leftover stock and reduce waste. In particular during the various lockdowns due to the pandemic, this would have had severe consequences for retailers. In any case, different prices for buying products that will be sold online than for those that will be sold offline to the customer would represent a hardcore restriction and could only be done with retroactive bonuses. Such differentiation between the two channels would also lead to the creation of a new grey market.

Ecommerce Europe would like to stress that we generally welcome the objective to encourage or award investments in offline or online sales. However, we expect that the practical consequences of the new provisions will be quite far-reaching. We therefore call on the Commission to maintain the wording in the existing guidelines. If specific circumstances would arise in which differential pricing would be required, and which would meet the Article 101(3) TFEU with "sufficient certainty", individual exemptions could be introduced. If the Commission would decide to leave the proposed provisions unchanged, we would strongly call on the Commission to consider the described consequences and ensure that the new rules are unambiguous and do not allow the suppliers to misuse dual pricing in any way.

4. Online sales criteria in selective distribution systems

In the current Vertical Guidelines, it is stated that "any obligations which dissuade appointed dealers from using the internet to reach more and different customers by imposing criteria for online sales which are not overall equivalent to the criteria imposed for the sales from the brick-and-mortar shop" are hardcore restrictions¹⁰. In the new draft Guidelines, the Commission states that given the different characteristics of online and offline sales "a supplier operating a selective distribution system may impose on its authorised distributors criteria for online sales that are not identical to those imposed for sales in brick-and-mortar shops"¹¹, as long as they are not intended to prevent online sales.

In line with the points raised with regards to dual pricing, Ecommerce Europe believes that the Commission should be cautious with creating unequal rules for online and offline sales. We are concerned that, in practice, this change can lead to stricter requirements for distributors aiming to sell goods and services via online sales channels. It is important to note that the current VBER does not require the criteria for online and offline sales need to be identical. Instead, they should "pursue the same objectives and achieve comparable results and that the difference between the criteria must be justified by the different nature of these two distribution modes". The wording in the new Guidelines, which does not include this equivalence principle, will likely lead to a differential treatment of online and offline sales channels. This would only be justified if one could say that offline channels would offer better services than online channels, which is not the case, as for both online and offline sales channels, there are higher and lower quality stores and also differences between platforms. Therefore, suppliers should instead address the differences by providing criteria that achieve "comparable results" through all distribution channels, as is currently the case. Ecommerce Europe thus believes that either the current wording of the VBER should be maintained or that the equivalence principle should be reintroduced.

⁹ In Germany, these direct sales reached a share of 2.2% and a turnover of € 1.8 billion in 2020, representing a growth of 14.5%. (bevH (2015/2016/2017/2018/2019/2020): Interaktiver Handel in Deutschland)

¹⁰ Current Guidelines, Paragraph 56

¹¹ Draft Guidelines, Paragraph 221

5. Active and passive sales

The Draft VBER states that ‘active’ sales include “offering on a website language options different than the ones commonly used on the territory in which the distributor is established”¹². The Draft Guidelines add that this “indicates that the distributor’s activities are directed at the territory in which that language is commonly used and thus amounts to a form of active selling”¹³. Ecommerce Europe believes that offering different language options does not change the passive nature of such selling. Determining which languages are “commonly” used could also create diverging interpretations. For instance, a seller in Belgium could target the German speaking minority without necessarily targeting German and Austrian consumers. The offering of the language in such a case does not constitute active selling to Germany and Austria. Instead, the end-consumer chooses to visit these websites. Ecommerce Europe therefore urges the European Commission to reconsider the inclusion of language options into the definition of active selling.

Furthermore, Ecommerce Europe calls on the Commission to clarify in the Guidelines whether the “place of establishment” in Article 4(b)(iii) and 4(d)(ii) refers only to physical points of sale or whether it also includes a website or online presence.

6. Marketplace bans

The Draft Guidelines state that “a direct or indirect ban on sales on online marketplaces”¹⁴ is permissible, unless it has the indirect object of preventing the effective use of the internet for the purposes of selling online. The Draft Guidelines recognise some of the benefits of online marketplaces¹⁵, stating that they “have become an important sales channel for suppliers and retailers, providing them with access to a large number of customers, as well as for end users. [...] allow retailers to start selling online with lower initial investments. [...] facilitate cross-border sales and increase the visibility of, notably small and medium-sized, retailers that do not operate their own online shop or are not well known to end users.” However, the Draft Guidelines also make certain assumptions about online marketplaces, namely that suppliers may wish to restrict the use of marketplaces to “protect the image and positioning of their brand, to discourage the sale of counterfeit products, to ensure sufficient pre- and post-sale services or to ensure that the retailer maintains direct a relationship with customers”¹⁶.

Ecommerce Europe would like to stress that the need to ‘protect the image and position of the brand’ should not be allowed to form the basis for a blanket provision banning sales via marketplaces. As with any store, both online and offline, there are good and bad practices. However, marketplaces generally do not negatively impact brand image or positioning. If in specific cases this would be demonstrable, individual requirements should be used to address them. Furthermore, a marketplace ban does not contribute to discouraging the sale of counterfeit products. In fact, it would have the opposite effect as the brand would prohibit legitimate sellers from selling on marketplaces. Finally, a sale via an online marketplace does not mean that there is no direct communication between the customer and the distributor for pre- and post-sale services, nor does it lead to a loss of the direct relationship with the customer.

Ecommerce Europe believes that the marketplaces ban is outdated and does not reflect the current developments in the retail market, in which platforms help SMEs reach visibility and are essential as product search engines. We welcome the clarifications provided in Paragraphs 316 and 317 of the Draft Guidelines, which explain that it does not entail a restriction of all online sales channels, but rather only one specific channel. However, we believe that there is no sufficient justification to ban the use of online marketplaces and therefore urge the Commission to reconsider the proposed provisions. We ask the Commission to consider the benefits of marketplaces for SMEs, that independently would not have the required resources

¹² Draft VBER, Article 1(1)(l)

¹³ Draft Guidelines, Paragraph 199

¹⁴ Draft Guidelines, Paragraph 194

¹⁵ Draft Guidelines, Paragraph 314

¹⁶ Draft Guidelines, Paragraph 315

or knowledge to increase their sales through other channels. An online marketplaces ban could therefore have a substantial impact on (price)competition, ultimately leading to reduced consumer choice.

Similar to the current VBER¹⁷, the Draft Guidelines¹⁸ maintain that suppliers are allowed to require retailers to operate a brick-and-mortar shop, which can lead to an exclusion of online players from the distribution of the products. Ecommerce Europe believes this notion is also based on outdated perception of online retail and is no longer justified. Furthermore, it seems to benefit mostly suppliers, as consumers could go to the showrooms financed by retailers but then buy online directly from the producers at a lower price.

7. Agency and the online platform economy

Ecommerce Europe does not support the blanket exclusion of online platforms (online intermediation services) from agency activities¹⁹. In our view, it should be the element of risk bearing in connection with the intermediated transactions that is decisive. Therefore, it is not evident why online platforms cannot also act as sales agents if they do not encounter substantial economic risks in the sales transaction. We believe the Commission overlooks the fact that online platforms can certainly be integrated into the sales structures of the principal in the context of the sales activity and fails to recognize the often two-sided relationships in online platforms. It is also not apparent why the starting position in the online economy is different from that of well-known and long-established agency models, for example in brick-and-mortar retail. Finally, the fact that online platforms make market-specific investments is no different from other forms of agency business in which the agent makes efforts (such as marketing or software) on its own initiative to increase the number of sales.

Conclusion

Ecommerce Europe stands ready to support the European Commission in its process of updating this fundamental regulation and its guidelines. For any questions on our contribution, please contact maikejansen@ecommerce-europe.eu.

¹⁷ Current Guidelines, Paragraph 54

¹⁸ Draft Guidelines, Paragraph 194(b)

¹⁹ Draft Guidelines, Paragraph 44