ASOCIACIÓN ESPAÑOLA PARA LA DEFENSA DE LA COMPETENCIA

SPANISH ASSOTIATION FOR THE PROTECTION OF COMPETITION

COMMENTS TO THE COMMISSION'S DRAFT VBER AND ACCOMPANYING GUIDELINES

1. INTRODUCTION

On 9 July 2021, the European Commission published its proposal for a revised Vertical Block Exemption Regulation and its accompanying guidelines (the "**Draft VBER**" and the "**Draft VGL**"). These rules will replace 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) ("**Current VBER**") and Commission Notice – Guidelines on Vertical Restraints (OJ C 130, 19.5.2010, p. 1–46) ("**Current VGL**").

The Spanish Association for the Defence of Competition welcomes the opportunity to provide feedback on the Draft VBER and Draft VGL.

The AEDC's observations have been provided by a working group of lawyers, economists and academics, all specialists in the competition law field. However, these observations have been made on an individual basis and do not necessarily represent the views of all the members of the Association.[1]

The issues covered are structured in the following sections: Section 2 addresses generally conceptual and general approach issues, in particular, definition of vertical agreements and approach to hardcore restrictions; Section 3 deals with dual distribution, Section 4 addresses parity clauses, Section 5 considers active and passive sales restrictions and Section 6 covers online restrictions focusing on dual pricing, restrictions on the use of marketplaces and online price comparison tools.

2. COMMENTS ON CONCEPTUAL FRAMEWORK: VERTICAL AGREEMENTS AND HARDCORE RESTRICTIONS.

2.1 Controversy on what should be considered a "vertical agreement" to the effects of the VBER

2.1.1 Definition of vertical agreement

[1] The members who have contributed to this working group are (by alphabetical order): Marcos Araujo, Juan-José Gisbert, Fernando Las Navas, Patricia Liñán, Carlos Morán, Irene Moreno-Tapia, Edurne Navarro, Carlos Pascual Alberto Pérez, Rafael Piqueras, Mireia Prat, Pablo Solano, Javier Torrecilla, Jaime Torres, Ainhoa Veiga, Patricia Vidal.

The Draft VGL includes a new section (4.2) on the definition of vertical agreements, which to a large extent, resembles Section 2.1 of the Current VGL.

As pointed out in paragraph 50 of the Draft VGL, the definition of vertical agreement in Article 1(1)(a) of the Current and Draft VBER follows that foreseen in Articles 1 and 3 of the Empowerment Regulation. It defines a vertical agreement as an agreement or concerted practice that satisfies three requirements (emphasis added):

– *"entered into between two or more undertakings*
– *each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain,*
– *and relating to the conditions under which the parties may purchase, sell or resell certain goods or services*"

Whereas the legal definition of a vertical agreement could -and should- not be amended, the explanations provided by the Draft VGL fall short as to allow a clear distinction between: (1) what is general trade of goods or services between an undertaking and its customers, that are undertakings as well; and (2) what part of such trade constitutes a vertical agreement for the purpose of the application of the VBER. That raises the issue whether selling or purchasing to or from another company should be considered a vertical agreement when the products are not to be resold.

Under the current wording of the explanations provided by both the Current and Draft VGL, the contracts between such undertaking and its customers are subject to two different regulatory regimes, irrespective of their identity such as the supply of water or energy. It would appear that contracts entered into with undertakings (for instance, a SMEs) could be considered vertical and the VBER could be applied, whereas those signed with consumers would not, and may only be examined under Article 102.

2.1.2 An actual controversy

Two relatively recent cases sanctioned by the Spanish competition authority (CNMC) exemplify the controversy. In both cases, the CNMC opted, following the wording of the explanations provided by the present VG, to apply the VBER to the contracting activity of providers of telecommunications and advertising services to their customers that were companies. The parties affected claimed that the cases should not be dealt under the VBER and should be examined under Article 102, either under individual or collective dominance.[2]

---

[2] See Case S/0422/12 CONTRATOS DE PERMANENCIA, 29 October 2014 and Case S/DC/0617/17 ATRESMEDIA/MEDIASET, 12 November 2019. To illustrate, in the first case, Telefonica had imposed non-compete or single branding obligations to their customers that were SMEs or undertakings. The appeal against the Spanish Competition Authority's infringement decision was upheld by the High National Court, which found that relevant contracts between Telefónica and its clients did not amount to vertical restrictions within an economic sense as the companies that execute those contracts do not operate at any level of the production and distribution chain of mobile phone services. While the Supreme Court confirmed the High National Court's annulment ruling (Judgement 18 February 2019; Rec: 5624/2017), it however did not support that finding, considering that mobile phone services could be viewed as an input for the relevant customers' economic activities.

Leaving aside the specific case, it is submitted that supply and sale agreements between an undertaking and its customers should not initially fall under Art. 101 TFEU.

The above example indicates that the current definition, and also the Draft VGL do not clarify the boundaries of the notion of vertical agreement. Although the new Section 4.2 on the Definition of "vertical agreement" has included some new explanations as compared to the current VG, it still allows for a broad interpretation of what constitutes a vertical agreement.

Starting in para. 48, the new text suggests that agreements between companies can either be horizontal or vertical, depending on whether the parties to the agreement are at the same or different level of the production chain. Such categorization leaves, apparently, no room for the general (and unilaterally imposed) contracting activity of undertakings with their customers, being those undertakings as well, but in which those customers play no role in the distribution or production chain of the contracting goods or services, besides its consumption.

Subsections 4.2.1, 4.2.2 and 4.2.3 explain the three requirements of the notion of a vertical agreement:

– Subsection 4.2.1 explains that there must be at least two parties to the agreement, clearly stating that the VBER "does not apply to unilateral conduct by undertakings".

  It also recalls that, according to case law, general sales terms and conditions, even if imposed by one party and accepted tacitly by the other amount to an agreement for the purposes of the application of Article 101.

  This point is clear according to settled case law, though it does not address the question of whether all the conditions unilaterally imposed by one undertaking in its trade with its customers should be considered as a vertical agreement for the purposes of the VBER.

– Subsection 4.2.2 clarifies that the undertakings must operate at different levels of the production or distribution chain, stating that a vertical agreement exists in two situations: i) the traditional: "producer – wholesaler – distributor" scheme; and ii) when one of the undertakings produces a raw material or provides a service, and sells it to another undertaking that uses it as an input.

  Consequently, this subsection does not either clarifies the boundaries between general trade and vertical agreement since the notion of "input" could be interpreted rather general. Ultimately, any good or service purchased by a company could be considered an "input".

– Lastly, subsection 4.2.3 describes that:

  > *"to fall within the scope of the VBER, vertical agreements must relate to the conditions under which the supplier and the buyer "may purchase, sell or resell certain goods or services". In accordance with the general purpose of a block exemption regulation, which is to provide legal certainty, Article 1(1)(a) VBER must be interpreted broadly as applying to all vertical agreements, irrespective of whether they relate to intermediate or final goods or services."* (para. 57)

Here again, whether the goods or services are final or intermediate is of no help to distinguish between general trade and vertical agreements. The distinction between final and intermediate good is a concept used typically for national accounting purposes, but it does not delve into the economic role of each party within the production or distribution chain. Furthermore, to the effects of identifying a “vertical agreement”, the Draft VGL does not consider the definition of “buyer” in the Draft VBER, that is the same that the one in the Current VBER.

Therefore, the Draft VGL leaves room for a broad interpretation of the concept of vertical agreement, including any trade between two companies at different level of the production chains.

To solve this, we suggest that the Draft VGL elaborates a little further on the distinguishing element of a vertical agreement from an economic perspective, following the rationale of a vertical contract. Typically, vertical contracts refer to those activities (good or services) that a company decide to externalize to other companies instead of carrying those activities internally, since they are an essential element of its main activity.

As the Draft VGL (and the Current VGL) recognizes, the very essence of a vertical agreement (which justifies the rationale of its regulatory regime) is that the buyer and the seller play a complementary role in the same production or distribution chain (that of the contracting goods or services) and that they seek to obtain an efficiency from the conditions (restrictions) attached to the transaction. If one of the parties, namely the buyer is a simple consumer of a good or service (which under a broad interpretation could be considered an input) and plays no role, other than consuming, in the production or distribution chain of those goods, then such trade should not be considered a vertical agreement.

Examples of trade between two undertakings at different level of the production chain, but in which the buyer is the end consumer of the contracting goods and plays no role in its production or distribution chain could be:

– A bank selling current account services to SMEs.

– A water company selling water to shops in a shopping mall.

– A coffee company selling machines and coffee capsules to SMEs (for staff drinking purposes).

Examples of trade between two undertakings operating at different levels of the same production or distribution chain, in which they play a complementary role in such chain could be:

– A producer selling to its distributors; either wholesalers or retailers.

– The producer of a component or raw material or service that sells to producers of other goods or services that incorporate them in their production or distribution chain and that are essential for the buyers’ production or distribution chain. Note that the buyer plays a role in the transformation of such component or raw material into another good or service. Therefore, they are both involved in the production or distribution chain of the said component or raw material.

– A platform selling online intermediation services to different categories of producers to help them reach their own customers. Online intermediation services play a relevant role in the respective distribution chains of the producers using the platform and, in many occasions, are also active as competitors in the same chain under a dual distribution scheme.

It is proposed that the Draft VGL clarifies that in order to find a vertical agreement, the buyer and the seller shall play a complementary role in the same production or distribution chain of the contracting goods and services.

2.2 Hardcore restrictions. Resale price maintenance

2.2.1 Considerations on the analytical framework

Without prejudice to the introduction -or recasting- of new exceptions, Article 4 of the Draft VBER maintains the same approach to hardcore/by object restrictions that in the Current VBER and VGL. By this approach, hardcore restrictions deprive an agreement from the exemption and – as the practice shows – it places its evaluation directly under Art. 101 (3) TFEU, including the assessment of the pro-competitive effects repeatedly acknowledged both by the Current VGL and the Draft VGL. This approach drives many companies to settle the cases (such as in *Guess*[3]), sacrificing the plausibility of pro-competitive rationales.

2.2.2 Resale price maintenance

The Draft VBER retains the wording in Article 4 (a) that makes RPM a hardcore restriction disregarding a more tolerant approach. This results from the finding that RPM has represented the majority of the vertical infringement cases in the past decade[4], leading to the appropriateness of retaining RPM as a hardcore/by-object restriction. However, the Draft VGL expands the guidance on RPM (paras. 170 to 186) (notably to consider price monitoring, MAP policies and fulfilment contracts).

Regarding the guidance in the Draft VGL to individually exempt RPM under Article 101(3) TFEU, the following additions are suggested:

> *"(182) However, RPM may also lead to efficiencies, in particular where it is supplier driven. If undertakings invoke Article 101(3) claiming that RPM may lead to efficiencies, it is for them to put forward concrete evidence to substantiate this claim and to show that the conditions of Article 101(3) are indeed fulfilled in the individual case. Three examples of such an efficiency defence are set out below.*
>
> *(a) When a manufacturer introduces a new product (due to its novelty on technology and/or use, for example), or enters a new market, RPM would most likely be necessary for the manufacturer to recoup the investment in producing such a new product or entering the new market. It would also ~~RPM~~ may be an efficient means to induce distributors to better take into account the manufacturer's interest to promote this product, in particular if it is a*

[3] Decision of 17 December 2018, case AT.40428 – GUESS.

[4] See SWD, Evaluation of the Vertical Block Exemption Regulation, pages 48 and 172

completely new product, and to increase sales efforts. If the distributors on the respective market face competitive pressure, this pressure may induce them to expand overall demand for the product and make the launch of the product a success, also for the benefit of consumers. Article 101(3) requires that less restrictive means do not exist. To meet this requirement, suppliers may, for example, demonstrate that it is not feasible in practice to impose on all buyers effective promotion requirements by contract. Under such circumstances, the imposition of fixed or minimum retail prices for a limited period of time in order to facilitate the introduction of a new product or the entry into a new market may be considered on balance pro-competitive.

(b) Fixed resale prices, and not just maximum resale prices, may be necessary to organise a coordinated short-term low-price campaign (of 2 to 6 weeks in most cases, in a maximum of 3 times per year), which will also benefit consumers. In particular, they may be necessary to organise such a campaign in a distribution system in which the supplier applies a uniform distribution format, such as a franchise system being the franchisor the supplier of the products to its franchisees, or not. Given its temporary character, the imposition of fixed retail prices may be considered on balance pro-competitive.

(c) In some situations, the extra margin provided by RPM may allow retailers to provide (additional) pre-sales services, in particular in case of experience or complex products. If enough customers take advantage of such services to make their choice but subsequently purchase at a lower price with retailers that do not provide such services (and hence do not incur these costs), high-service retailers may reduce or eliminate these services that enhance the demand for the supplier's product. RPM may help to prevent such free-riding at the distribution level. The supplier will have to convincingly demonstrate that the RPM agreement is necessary in order to overcome free riding between retailers on these services. In this case, the likelihood that RPM is found pro-competitive is higher when competition between suppliers is fierce and the supplier has limited market power"

3. DUAL DISTRIBUTION

Under the Current VBER, dual distribution (i.e., where a manufacturer directly sells to end-customers in competition with its distributors downstream) is block exempted. The increasing competition from manufacturers in the retail space, particularly from hybrid platforms, became a concerning and contentious issue within the consultation process to which the EC has decided to propose changes to the treatment of vertical agreements between undertakings which are also competitors, removing from the safe harbor agreements between sellers and online platforms that sell in competition with the sellers that operate on the platforms. Additionally, "any information exchange" where parties compete would be available only below a combined market share at retail level below 10% and governed by the horizontal guidelines (under parallel review).

There has been some debate among the members who have contributed to this paper and some views would suggest increasing the 10% market share threshold in Art. 2(4) to 30%, to eliminate paragraph 5 of Article 2, and to clarify that the relationship between a manufacturer and a wholesaler client is considered as dual distribution. The underlying reasoning is shown in the sub-sections below.

3.1 Increase to 30% the current 10% market share threshold of Article 2(4) and delete Article 2(5)

The European Commission is inclined to adopt a stricter approach towards exchanges of information in a situation of dual distribution. The legality of such exchanges is put into question if the combined market share of the parties at retail level is between 10% and 30%. In that case, such exchanges would have to be evaluated under the rules applicable to horizontal agreements. We note, first, that following the horizontal guidelines (under review), the 10% threshold could conflict with the 15% threshold applied to commercialization agreements between competitors.

It is suggested that this proposed change is reconsidered on the basis of the reasons below.

Firstly, the concerns raised through the consultation period regarding the material increase of direct sales to end users from manufacturers' own online shops or through marketplaces, would not justify a change of approach towards exchanges of information in the context of traditional dual distribution.

In a traditional scenario, manufacturers have frequently competed with their wholesalers, and it has also been a well extended practice that manufacturers were also active at the retail level, via direct sales to end users or via a subsidiary active in the retail market.

The automatic access to information of retailers participating in a marketplace by the owner of the market place who also competes with them might not be equivalent - nor raise the same issues - to exchanges of information in traditional dual distribution where the manufacturer sells directly to end users. Except with regard to marketplaces, enforcement actions by the EU or national authorities against vertical information exchanges where the manufacturer competes with its distributors at the retail level have been extremely scarce.

Accordingly, it is suggested that the EU Commission reconsiders the application of the new stricter approach to exchanges of information in the context of traditional dual distribution, which would be understood to be exempted by the Current VBER.

Secondly, some members view competition between a supplier and its wholesalers and/or its retailers as being of a different nature than horizontal:

- while practice shows that enforcers presume that a horizontal exchange of information between competitors is, at least initially, a restriction “by effects”, an exchange of information between a supplier and its wholesalers and/or retailers clients may be considered ancillary to the vertical agreement. It is just another source of market information for suppliers, even if it concerns information relating to the competitors of the suppliers which access is generally understood to be legal (although it would be desirable to have this clarified and explained in the horizontal guidelines); and
- such an exchange of information is also different since it mainly affects intra-brand competition: it relates to the brand that the supplier owns, manufactures the product, drives

the brand image, and designs the commercialization strategy based on the market information it obtains from different sources, its clients amongst them.

On the above, it is suggested that each type of relationship should be analysed under different rules, and not, as the European Commission suggests, by the rules applicable to horizontal agreements if the combined market share of the parties in the relevant market at retail level are between 10% and 30%: the fact that a supplier can be seen to compete with its wholesaler clients, or with its retailer clients if the suppliers carry out direct sales to end users - since in both scenarios the potential ultimate client/customer is the same – should not convert such a primarily vertical relationship into a horizontal one.

Thirdly, an exchange of commercial information between undertakings active at different levels of a vertical supply chain is part of a normal business dialogue that improves the efficiency of distribution networks: commercial discussions allow the supplier to obtain a more accurate view of the market, information necessary for the supplier to improve its distribution network.

In particular:

– Volume sales data of wholesale and retail clients is crucial for the supplier to efficiently organize (i) its production capacities, avoiding shortage or excess production, and (ii) its logistics capacities, so that better availability of products is ensured.

– Client’s data (i.e. the clients of the wholesale and retail clients of the supplier) is crucial for the supplier to analyze its market access, i.e. where its products are being commercialized by its wholesale or retail clients, which would in turn allow the supplier to more efficiently target the work of its sales force and its marketing and commercial campaigns.

– Pricing data of the supplier´s wholesale and retail clients are crucial for the supplier to examine its pricing position and update more efficiently optimise its pricing policy, its marketing and commercial campaigns and the work of its sales force.

– General market information such as market trends, new entrants, actors in difficulties, market rumors, etc.

Some members, contributors to this paper, suggest that such an exchange of information should not be put into question except if (i) it is used by the supplier to unfairly compete with its retail or wholesale clients, (ii) hard core restrictions are involved such as price fixing, client and/or territory partitioning, or (iii) it entails a hub-and-spoke risk. That, these scenarios above would already be covered by the current paragraph 6 of Article 3 of the Draft VBER and/or national legislation.

Alternatively, exchanges of information in a situation of traditional dual distribution should not be analyzed under the rules applicable to horizontal agreements but define and spell out in the Draft VBER and Draft VGL: a new letter f) could be added to Article 4 mentioning which type of information the European Commission considers that clients shall not exchange with suppliers.

3.2 Relationship between a manufacturer and a wholesaler client

While some contributors to this paper consider that the non-retail level agreements between a manufacturer and a wholesaler should be understood to be block exempted, under Art. 1 of both the Current VBER and the Draft VBER, other contributors consider that it is unclear whether the Draft VBER considers the relationship between a manufacturer and a wholesaler client as dual distribution and suggest that it should be clarified that this is the case.

Article 2.4 (a) and (b) apply to: (i) situations where "*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*" and (ii) situations where "*the supplier is a provider of services at several levels of trade, while the buyer provides its services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services*". In both cases, the above provisions apply provided the parties' "*aggregate market share in the relevant market at the retail level does not exceed [10] %*".

While from the supplier point of view the Draft VBER mentions different levels where the supplier may be present ("manufacturer, wholesaler, or importer and a distributor of goods"), from the buyer point of view, the Draft VBER requires that the buyer should be present at the retail level. This raises doubts, according to some contributors, as to whether the relationship between a manufacturer and a wholesaler client, who does not operate at the retail level, is considered as dual distribution to the effects of the revised provisions in the Draft VBER and para. 87 of the Draft VGL. It is submitted that both scenarios should be considered as "dual distribution".

In the above understanding, some contributors suggest the following amendments to Article 2.4.(a) of the Draft VBER:

> "(*a*) *the supplier is a provider of goods at several levels of trade (~~a~~ manufacturer, wholesaler~~,~~ or importer) ~~and a distributor of goods~~, while the buyer is a wholesaler or distributor not competing at the level where it purchases the goods, ~~and not a competing undertaking at the manufacturing, wholesale or import level~~, and their aggregate market share in the relevant market, at manufacture and wholesale or at retail level does not exceed [10]%; or*

The requested amendments are considered by the proposing contributors to significantly increase legal certainty and avoid negative impacts, such as (i) suppliers' less flexibility to engage in distribution channels and be more inclined to sell directly its products; (ii) wholesalers feeling legal uncertainty in their relationship with manufacturers; and (iii) retailers feeling deterred from entering into a distribution relationship with a supplier that is also present in the retail market.

3.3 Application of the general exemption for vertical agreements to dual-role online intermediation service providers

Recital 12 of the Draft VBER sets forth that "*[p]roviders of online intermediation services should not benefit from the block exemption established by this Regulation where they have a hybrid function, that is where they sell goods or services in competition with undertakings to which they provide online intermediation services*" due to the fact that these "*typically affect inter-brand competition and may therefore raise non-negligible horizontal concerns*". In the same vein, article 2(7) of the Draft VBER excludes the applicability of the general exemption to non-reciprocal vertical agreement between competitors where one of the parties is an online intermediation service provider.

The exclusion of dual-role platform operators' risks being inconsistent with Article 1(1)(a) of the Draft VBER, which indicates that the operation at different levels of the production or distribution chain which allows to define an agreement or concerted practice as vertical in order to be eligible for exemption is to be ascertained "*for the purposes of the agreement or the concerted practice*".

Similarly, point 12 of the horizontal guidelines (under review) expressly refers to the (very common) scenario where "*vertical agreements, for example, distribution agreements, are concluded between competitors*" in order to make their assessment subject to such guidelines instead of the Current VBER or the Current VGL, unless otherwise indicated. The fact that this is expressly clarified would mean otherwise vertical relations between competitors would be subject to rules on vertical restraints as is indeed the case of several agreements where the European Commission indeed referred to their analysis also from the vertical perspective, namely sub-contracting, purchasing agreements and commercialization agreements.

On the above, some of the contributors conclude that vertical restraints within the framework of relations with dual-role platforms should be covered by the Draft VBER as long as they refer to the provision of platform services even if relating to agreements with third-party sellers which, aside from customers purchasing platform services, are also competitors of the platform service supplier for users on the buyer side of the platform. Therefore, it is suggested to remove Article 2(7) of the Draft VBER, or at least rephrased it as a concretion of the general rule that the exemption for vertical agreements does apply to competitors in a non-reciprocal relationship except for those aspects affecting the horizontal plane thereof – e.g. an agreement to fix retail prices charged by commercial users on the platform. For the same reason, the applicability of the exemption to non-reciprocal vertical agreements between competitors should not be subject to certain market share threshold not being reached in Article 2(4) of the Draft VBER, as horizontal concerns arising from the concentration of market share should be dealt with under the Horizontal Guidelines which prevail for the purpose of such assessment. If their construction as exceptions was reversed, paragraphs 5 ad 6 of Article 2(4) of the Draft VBER would become unnecessary as well.

4. PARITY CLAUSES

4.1 Introduction

The following comments relate to the Commission's proposals concerning MFNs. Some contributors to this paper believe the Draft VBER should remain unchanged and remains adequate. The intention to update the VGL is welcome and provide guidance to carry out an effects-based approach competitive assessment for parity obligations where market shares of the parties are above 30%. However, we would suggest reconsidering the Draft VGL to include a more detailed guidance and a wider range of factors to allow market players to better self-evaluate. Justifications such as the free riding that may occur on the platforms investment must be included in the counterfactual analysis of Article 101(1) TFEU, not only under Article 101(3) TFEU. A guidance for an effect-based approach focused on restrictive effects may result in the impossibility to defend parity obligations in any context.

In addition, we believe a best-practices approach adding examples based on previous decisions in different sectors might be of great use for market players.

4.2 Need for a reform to include clear guidance for market players and a consistent approach across the EU for MFNs

As found by the support study for the evaluation of the VBER published in 2020, there has been a large-scale growth in the use of Most Favored Nation clauses ("MFNs") across sectors in the last years.

The lack of guidance in this area has resulted in a disparity of approaches amongst national competition authorities ("NCAs") and national laws, bringing legal uncertainty to market players and creating a fragmented market within the EU. For example, the German competition authority concluded that wide MFNs as well as narrow MFNs were anticompetitive (the decision was reversed by the Düsseldorf Higher Regional Court in 2019 which found the narrow MFNs permissible) and some authorities accepted commitments from platforms to remove the wide MFNs, such as Expedia and Booking.com, but allowed narrow MFNs to be used. There are also national laws forbidding MFNs in several countries such as Austria, France and Italy.

The harmonization and development of a consistent approach across the EU is crucial to avoid disparity between the NCAs and to create a safe European antitrust environment for companies.

In view of the above, further guidance on this area is required in the Draft VGL. It could be done providing more clarity on potential competition concerns, potential efficiencies, and a best-practice approach to analyze the competitive effects.

4.3 The Draft rules on parity obligations and potential for improvement

Article 5(1)(d) of the Draft VBER introduces across-platform retail parity obligations to end users (so-called wide MFN clauses) as an excluded restriction to the exemption of Article 2. All other parity clauses are covered by the Draft VBER, as it is stated in paragraph 239 of the Draft VGL.

Section 8.2.5 of the Draft VGL provides guidance for the assessment of the across-platform retail parity obligations defined in Article 5(1)(d) VBER and for other types of parity obligations in individual cases above the market share threshold: (i) across-platform retail parity obligations, (ii) retail parity obligations relating to direct sales channels (narrow parity); and (iii) parity obligations relating to non-retail conditions.

4.3.1 Formal aspects: an effects-based analysis and a detailed guidance for the assessment of parity obligations

The Draft VBER foresees the application of the block exemption to all types of parity obligation in vertical agreements except for across-platform retail parity obligations to end users (so-called wide MFNs). The conditions may concern prices, inventory, availability or any other terms or conditions of offer or sale.

Lessons from recent cases, the economic literature and various ex post analysis carried out by competition authorities suggest that the assessment of MFNs under Article 101 warrants an effects-based approach. MFN clauses (wide and narrow) have the potential for both pro- and anticompetitive effects.

Academic literature shows that the net effect of MFNs depends on the specific market and commercial setup assumed in the models. Empirical studies examining MFNs in different sectors (e-books, consumer electronics and other consumer goods) also show that the effects vary depending on the market context.

Analyzing the effects of the parity obligation in a specific context of a case is important to be able to appropriately assess the risks and benefits and the net effect on consumers for all kinds of MFN clauses.

These restrictions are likely to lead to efficiencies capable of outweighing the anticompetitive effects, particularly when the market shares of the parties are below 30%. Therefore, we believe there is no need to exclude them from the exemption and to modify the Current VBER. It seems that the Current VBER remains adequate for the assessment of MFNs and they should continue outside the excluded restrictions list in Article 5 of the Draft VBER.

Section 8.2.5 of the Draft VGL distinguishes between three types of parity clauses and provides guidance for the assessment of the across-platform retail parity obligations defined in Article 5(1)(d) Draft VBER and for other types of parity obligations in individual cases above the market share threshold: (i) across-platform retail parity obligations (section 8.2.5.1), (ii) retail parity obligations relating to direct sales channels (narrow parity) (section 8.2.5.2); and (iii) parity obligations relating to non-retail conditions (section 8.2.5.3).

The proposed text for across-platform retail parity obligations in section 8.2.5.1 may result in an indirect prohibition of the use of clauses defined in Article 5(1)(d) VBER and wide MFN clauses in general. We therefore suggest eliminating the text below from the Draft. In particular:

> "*Retail parity obligations which cause a buyer of online intermediation services not to offer, sell or resell goods or services to end users under more favourable conditions using competing online intermediation services, as defined in Article 5(1)(d) VBER, are more likely than other types of parity obligation to produce net anti-competitive effects. Across-platform retail parity obligations may restrict competition as follows*: (…)".

We welcome the guidance to carry out the assessment provided in para. 337-348 of the Draft VGL, applicable to retail and non-retail conditions. However, we suggest to include a more detailed guidance and further develop the factors for the assessment of the competitive effects for all kinds of MFN clauses including additional relevant factors, such as: (i) the competitive dynamics of the market in the mid and long term (weak or strong competition and other distribution channels considering a broad market), (ii) the potential reduction in the incentives of the supplier platforms to compete between each other (i.e, incentives to compete if they receive lower commissions from the supplier); and (iii) the potential outcome for consumers related with the reduction of search costs and the improvement of quality (analysis of potential consumer search and consumer behavior). While, in principle, higher platform competition should increase intra-brand competition, and potentially reduce commissions, there may be decreasing returns to additional competition if there are already enough platforms in the market. In addition, consumer trust is also a benchmark, and a large number of platforms does not necessary result in better outcomes if the quality is low .

The most common justification for the use of parity obligations is to address a free-rider problem (i.e., the platforms may not have incentives to compete if they cannot receive the benefits for their investments). This has been considered as an objective justification in previous decisions and it is duly included as a possible efficiency justification in the Draft VGL (paras. 351 and 352). However, we consider it shall also be evaluated in the competitive analysis through the consideration of potential outcomes in a counterfactual world without the MFN and not taken into account only under article 101(3) TFEU.

The key aspect is to ensure that both inter-brand and intra-brand competition are enhanced to the benefit of consumers. For example, if the supplier and the platform markets are both fragmented, MFN clauses of any type are likely benign and most likely pro-competitive. They could enhance inter-brand competition.

In principle, higher platform competition should increase intra-brand competition, and potentially reduce commission costs. However, it may result in a decrease of quality of the service and increase of search costs for consumers if there are already sufficient platforms in the market.

The lack of clear guidance may continue promoting divergent approaches amongst NCAs and legal uncertainty.

In light of the above, we believe that a more detailed guidance for the assessment shall be developed in the Draft VGL. Furthermore, a best-practices approach adding examples based on previous decisions in different sectors might be useful for market players (for instance, guidance based on the reasons for the EU Commission's decisions to drop its investigation in cases AT.40617 Airline ticket distribution- Amadeus- and AT.40618 Airline ticket)[5].

5. ACTIVE (AND PASSIVE) SALES RESTRICTIONS

5.1 Introduction

Restrictions on the distributor's sales in certain territories or to certain customers, which the supplier reserves to himself or to other distributors, are a particularly important element in exclusive and selective distribution systems. Through them, manufacturers try to ensure an efficient distribution system for their products. At the same time, distributors thus obtain protection for their investments in the establishment of their business and the promotion of the products they distribute, especially in the case of new products.

Although these restrictions are generally considered hardcore restrictions and are prohibited by Art. 4 of the Current VBER, it nevertheless provides for some exceptions in order to allow manufacturers and distributors to achieve the above objectives. The differentiation between active and passive sales appears in this provision in relation to these exceptions.

[5] https://ec.europa.eu/commission/presscorner/detail/en/mex_21_3785

5.2 Active and passive sales definition

The Current VBER does not contain a definition of active and passive sales, while the Current VGL only devote para. 51 to explaining the distinction between active and passive sales. The Commission's stakeholders' consultations revealed that there was a lack of clarity as to the definition of active and passive sales which caused legal uncertainty, given their importance for the purposes of allowing certain restrictions that would otherwise be considered hardcore restrictions.

The Commission has addressed this complaint and has introduced in Art. 1 of the Draft VBER a definition of active and passive sales (paragraph 1(l) and (m)). Paras. 197 to 201 of the Draft VGL contain further explanations on the distinction between active and passive sales, with reference to online sales. These amendments are to be welcomed insofar as they will serve to facilitate the interpretation of Art. 4 VBER.

5.3 Restriction of active and passive sales definition and online sales

Paragraph 1(n) Article 1 of the Draft VBER also adds a definition of the restrictions on active and passive sales. However, we doubt its usefulness. The first sentence seems unnecessary, as it merely states that "*restriction of active or passive sales means a restriction of active sales within the meaning of Article 1 (l) or passive sales within the meaning of Article 1(m)*".

The rest of the paragraph is devoted to online sales, but the wording seems confusing and difficult to understand. We believe that specific regulation of restrictions on online sales is necessary, and in this respect, we consider that the explanations contained in paras. 188 to 196 of the Draft VGL are an improvement of the Current VGL. However, in our opinion, paragraph 1 (n) of the Draft VBER is not sufficiently clear and may give rise to doubts of interpretation.

5.4 Exclusive distribution

Unlike the Current VBER, Article 4 of the Draft VBER devotes a specific section to each of the exclusive, selective and free distribution systems (sections b), c) and d) respectively). In this way, we believe that the article improves clarity with respect to the current rule.

With regard to exclusive distribution, the current regulation of restrictions, which according to the Commission's evaluation has generally worked well so far, is essentially maintained. However, some changes are introduced which deserve to be commented on.

Firstly, the possibility for a supplier to appoint more than one exclusive distributor in a given territory or for a given customer group and to restrict the active sales of other distributors in that territory or for that customer group is introduced in Art. 4 (b) (i) of the Draft VBER. This amendment is to be welcomed as it is in line with the needs of manufacturers in some sectors or territories, where the appointment of a single exclusive distributor is not sufficient for the efficient distribution of products. A limitation on the number of exclusive distributors that the supplier may appoint, as set out in Art. 1 (g) of the Draft VBER and para. 102 of the Draft VGL, seems reasonable.

Secondly, the possibility is introduced for the supplier to oblige its buyers to pass on to their customers the restriction on active sales in the territory or to the group of customers reserved to other distributors. In our view, this change is a significant improvement on the current situation, where pass on is expressly prohibited, as it may serve to prevent some distributors from using third parties to circumvent the prohibition on active sales in territories or to customers reserved to other distributors.

However, although the possibility of pass on is explained in para. 206 of the Draft VGL, we believe that the wording of point (b) (i) of Art. 4 of the Draft VBER is confusing and may be difficult to understand, particularly in the Spanish version of the document. For this reason, we suggest that, without changing the substance of this point, a more understandable wording should be sought that does not create doubts for those who have to apply the VBER.

Thirdly, paragraph (b) (ii) of Art. 4 of the Draft VBER introduces the possibility of prohibiting the supplier's exclusive distributors from active and passive sales to unauthorised distributors in another territory where the supplier has established a selective distribution system. We consider this amendment to be positive, insofar as it allows manufacturers to apply exclusive distribution systems in some territories and selective distribution systems in other territories, and to protect the distributors of the latter.

5.5 Selective distribution

Similarly to exclusive distribution systems, paragraph (c) (i) of art. 4 of the Draft VBER strengthens the manufacturer's capacity to protect its selective distribution networks by introducing the same two new features discussed above: namely the possibility of appointing a limited number of exclusive buyers, and the possibility of obliging authorised distributors to pass on to their buyers the restriction of active sales in the territories or to the groups of customers assigned to other exclusive distributors. While we welcome these amendments, the same comments as in the previous section apply with regard to the lack of clarity in the wording of the Draft VBER on the possibility of pass on.

On the other hand, the clarifications included in para. 134 and 135 of the Draft VGL regarding the "Metro criteria" and their application to selective distribution systems based on quantitative criteria are to be welcomed. However, in our view, a direct statement regarding the categories of products which nature justifies a selective distribution system would be desirable. In the Draft VGL, following the Metro and Coty judgements, the examples of high-quality or high-technology products and luxury goods are cited. We believe that the Draft VGL should clarify whether selective distribution systems that apply to categories of goods - other than those mentioned - are considered to fall under the prohibition of Art. 101 (1). This would avoid the danger, highlighted by the NCAs, of extending the use of selective distribution systems to impose more restrictions on the distributors than otherwise allowed even though the objective of brand protection may not be justified in relation to the characteristics of the products concerned.

5.6 Free distribution

Finally, the Draft VBER devotes section (d) of Article 4 to free distribution systems. Paragraphs (i) to (v) literally reproduce the same paragraphs of paragraph (b) of art. 4 referring to exclusive distribution systems, and we therefore refer to the above comments on them.

5.7 Franchising

The Draft VBER does not specifically address franchising.

The Draft VGL explain that franchising agreement are covered by the Draft VBER if its conditions are met. The Draft VGL further explain that vertical restrains contained in franchise agreements will be assessed under the rules applicable to the distribution system that most closely relates to the nature of the specific franchise agreement, typically, exclusive or selective distribution (paragraph 151):

> *"For instance, a franchise agreement that gives rise to a closed network since members are forbidden from selling to non-members shall be assessed under the rules applicable to selective distribution. In contrast, a franchise agreement that grants territorial exclusivity and protection from active sales by other franchisees shall be assessed under the rules applicable to exclusive distribution."*

We note that such a difference might not be always easy to establish as franchise agreements are characterized by including features of both exclusive and selective distribution systems (selection of franchisees based on common criteria combined with territorial protection). Clarification on this point would be welcomed.

Additionally, guidance as to whether the restriction of cross supplies is acceptable in franchise agreements that "relate to the nature of selective distribution systems" would be also welcomed. We also miss guidance on the connected issue of the possibility – which is essential to franchising- of establishing approved suppliers' scheme to protect the identity and reputation of the franchise network, following Pronuptia ruling[6].

6. ONLINE RESTRICTIONS

6.1 General observations on online restrictions

Following the conclusions that the European Commission reached in its Final report on the E-commerce Sector Inquiry of May 2017 (the "E-commerce Report")[7], the Draft VBER and the Draft Guidelines both place significant effort in shedding light on the treatment of online restrictions.

Although such clarifications are certainly welcomed, our view is that there is still room for the improvement in the approach to online restrictions in both the Draft VBER and the Draft VGL, especially on dual pricing, marketplaces restrictions and price comparison tools. Such potential improvements are dealt with separately in Sections 6.2., 6.3. and 6.4. below.

6.2 Dual pricing

6.2.1 Existing regime on dual pricing and the need for a reform

---

[6] Judgment of 28 January 1986, Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis, C-161/84, ECLI:EU:C:1986:41.

[7] Final report on the E-commerce Sector Inquiry {COM(2017).

Dual pricing in offline trade has traditionally been looked at by EU competition law with suspicion lest it could be used to limit exports in cases like *Distillers*[8] or *GSK*.[9] When the rules on competition for online sales were first structured along the lines of territorial restrictions, dual pricing was hastily condemned. It was also believed that price discrimination may negate the aggressive price competition associated with the growth of the nascent e-commerce by raising online retailers' costs, or to dissuade distributors from pursuing online sales channels. As a result, the current rules provide for limited possibilities to address differences in the costs of investments between the offline and online sales channels.

The E-commerce Report[10] appeared to indicate a more flexible reading of the law, usefully making the following differentiation:

– Charging different (wholesale) prices to *different retailers* could be generally considered a normal part of the competitive process.[11] That would arguably limit the potential issues in dual pricing to the treatment of retailers engaging simultaneously on both online and offline sales.

– As concerns this latter category, named "hybrid",[12] the Final Report noted that dual pricing would be a hardcore restriction under the current rules. It however observed that (i) a fixed fee to support the distributor's offline sales could be agreed, and (ii) dual pricing might be acceptable following a self-assessment under Article 101(3) of the TFEU. In this latter respect it suggested that the example given in paragraph 64 of the Vertical Guidelines (where online selling leads to "*substantially higher costs*" for the manufacturer than offline sales) was not the only possible situation in which the criteria of Article 101(3) TFEU could be fulfilled.[13]

The conclusion of that evolution is now reflected in paragraph 195 of the Draft VGL, that attempt to strike a difficult balance between providing more flexibility for dual pricing and ensuring that this mechanism is not used in a manner detrimental to competition.

The policy change towards dual pricing is to be welcomed. For some time, stakeholders have argued that a more flexible view on price differentiation would allow for differentiation between sales channels, depending on the actual sales efforts, and would encourage hybrid retailers to support investments in more costly (typically offline), value added services. A clarification on the law on this point would also be of use given the risk of divergent views that have emerged among NCAs in this

---

[8] Judgment of 10 July 1980, *Distillers v Commission*, 30/78, ECLI:EU:C:1980:186.

[9] Judgment of 6 October 2009, *GSK v Commission*, C-501/06 P, ECLI:EU:C:2009:610.

[10] Final report on the E-commerce Sector Inquiry {COM(2017) 229 final}.

[11] *Ibid.* para. 37. Note however the warning in footnote 18, suggesting a restrictive reading.

[12] The Draft Vertical Guidelines use this term for two different, albeit not entirely distinct situations (cfr. paras. 91-92 and 185), a point that might cause confusion.

[13]E-commerce Sector Inquiry {SWD(2017) 154 final}, para. 35.

field.[14] However, the new rules are remarkably unclear and might not just provide for the requisite level of certainty. The comments that follow are aimed at suggesting improvements to that effect.

6.2.2 The draft new rules on dual pricing and potential for improvement

Paragraph 195 of the DRAFT VGL proposes that dual pricing benefits from the safe harbour of the Draft VBER. The proposal deserves comments both on formal aspects and regarding the conditions attached to it. Clarifications are also needed on the legality of potential ancillary requirements that would inevitably come along with dual pricing. The following specific comments address these issues.

6.2.2.1. Formal aspects

The reform proposes that dual pricing is addressed in the Draft VGL and not in the Draft VBER itself. While there is no specific explanation of the underlying reasons, it should not come as a surprise given how the exceptions to blacklisted restrictions, such as absolute territorial protection and price fixing in the Current VGL, have been addressed in the past.

That said, and in contrast to those exceptions (which provide both for an explanation and almost automatic rules concerning when it may apply), paragraph 195 fails to provide a similar level of certainty. It is therefore proposed

(i) that the paragraph indicates the underlying justification (namely, that online and brick-and-mortar shops are inherently different in nature, as the Explanatory Memorandum acknowledges as well as paragraph 221 of the Draft VGL in the context of selective distribution) and

(ii) that it provides for clear conditions, free from complicated factual assessments, on when would the exemption apply. The subsections that follow discuss the current conditions on further detail to that effect.[15]

That said, and in contrast to those exceptions (which provide both for an explanation and almost automatic rules concerning when it may apply), paragraph 195 fails to provide a similar level of certainty. It is therefore proposed

---

[14] The **Bundeskartellamt** is arguably the most proactive European Competition Authority in prosecuting anticompetitive dual pricing. An interesting example is the investigation into the discount practices of Lego, which were based *inter alia* on the amount of shelf space dedicated to Lego products within physical retail outlets. The Bundeskartellamt condemned the practice as involving a structural disadvantage for online retailers. The case was ultimately settled on the basis of commitments. Bundeskartellamt Press Release, "*LEGO changes its discount system—Fairer conditions for online sales*," 18 July 2016, available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/18_07_2016_Lego.html. For other cases, where such dual pricing in relation to online sales was found to constitute an infringement at national level, see the decisions of the Bundeskartellamt in *Dornbracht*, Decision of 13 December 2011, B 5-100/10; *Gardena*, Decision of 27 November 2011, B 5-144/13; and *Bosch Siemens Hausgeräte*, Decision of 23 December 2013, B 7-11/13.

Conversely, the French Autorité de la Concurrence has found that differentiated wholesale prices on objective and proportionate bases may as a general rule result in economic efficiencies as it favors competition between offline and online distributors on an equal footing (Opinion 12-A-20 of 18 September 2012 relative au fonctionnement concurrentiel du commerce électronique, para. 220).

[15] Paras. 61 or 221 of the 2010 Vertical Guidelines.

(i) that the paragraph ***indicates the underlying justification*** (namely, that online and brick-and-mortar shops are inherently different in nature, as the Explanatory Memorandum acknowledges) and

(ii) that it provides for ***clear conditions, free from complicated factual assessments***, on when would the exemption apply. The subsections that follow discuss the current conditions on further detail to that effect.

6.2.2.2. Conditions attached to the exemption: the purpose of the dual pricing

The proposed text makes the exemption conditional on what seem to be a subjective or purposive condition, whereby dual pricing would be permitted only ***in so far as it has as its object to incentivise or reward the appropriate level of investments respectively made online and offline***. The vagueness of this drafting is reinforced by the new Recital 13 of the Draft VBER.

That requirement arguably requires market players, and eventually enforcement agencies and courts to inquire the purpose or even the intentions that underlie a dual pricing strategy. Again, and purely for the sake of legal certainty, these conditions could be usefully contrasted with the almost automatic manner in which the exclusions to the prohibitions on absolute territorial protection and price fixing are provided for in the current Vertical Guidelines.

By expressly presenting this as a limitation, the guidance reads as if it were presumed that there is an anticompetitive intention that might be displaced if there is evidence that the agreement has an acceptable purpose. This contradicts the intuition that dual pricing *should be presumed to have as its purpose to incentivise the different levels of investment* of the various channels.

It is therefore proposed to draft the relevant sentence as follows:

> *"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~~* ***as it may be presumed that*** *it has as its object to incentivise or reward the appropriate level of investments respectively made online and offline…"*

6.2.2.3. Price-to-cost comparison

A second element presented as a condition for the exemption is that ***the difference in price should be related to the differences in the costs incurred in each channel by the distributors at retail level***.

The proposed solution takes distribution costs as a starting point, raising the practical issue of its quantification. Suppliers would have to prove the different costs incurred in by online and offline sales, which would be sector-specific and require ongoing surveillance. It is moreover unclear how the term "related" should be construed, and consequently what level of price difference would be "acceptable" to be exempted.

Again, and for the sake of legal certainty, these conditions could be usefully contrasted with the almost automatic way the exclusions to the prohibitions on absolute territorial protection and price fixing are provided for in the current Vertical Guidelines.

In that respect it has been suggested to offer quantitative guidance (*e.g.* online prices not exceeding 15% of offline prices).[16] While understanding the aim of this option, we believe it may be difficult to set a single price difference threshold that may be fit for every industry.

We would therefore suggest removing this requirement, so that the level of the price difference is only governed by the requirement already present in the draft ***that the price difference is not so abnormally high as to make online sales wholly unprofitable*** (or, in the wording of the DRAFT VGL, *"where the price difference makes the effective use of the internet for the purposes of selling online unprofitable or financially not sustainable"*).

6.2.2.4. Information needed from distributors to enforce dual pricing

By its very nature, dual pricing comes along with price vigilance and reporting aimed at preventing that the low-priced goods enter the separate higher prices channel. The Draft VGL silence this element, which involves the exchange of sensitive pricing and sales information and raises difficult issues of market dependence.

Price monitoring in this context could arguably be considered ancillary to dual pricing. Under that perspective, indispensable safeguards and controls by the supplier should be considered permitted. Restrictions going beyond those that are indispensable might, on the other hand, benefit from the exceptions on information exchanges in the context of dual distribution in Article 2(4) Draft VBER, but only within the 10% market share limit.[17]

Guidance would be welcomed on what restrictions might qualify as indispensable. In that context a clarification would be especially important on the following:

– Whether the supplier may directly access the sales information of the distributor, or it would be necessary to involve a third party with appropriate ring-fencing of sensitive information, and if the latter is chosen, how should the ensuing costs be apportioned.

– Whether it would be acceptable that the supplier charges the higher price upfront and liquidate price differences periodically once actual sales in each channel have been confirmed, or conversely charge the lower price and later claim the eventual differences or a system based on provisional estimates.

6.2.3. Final comments

We commend the Commission on its proposals on dual pricing, which strike a difficult balance between competition law principles and market realities. We especially welcome its acceptance of the principle that online and brick-and-mortar shops are inherently different in nature. We are broadly in agreement with the softening of the rules in this respect, enabling the parties to treat truly different channels under separate rules.

---

[16] This idea has also been pointed out by some contributions to the open consultation on the impact assessment for the review of the VBER: "[a]*lternatively, as suggested by other respondents, the Vertical Guidelines could set a threshold based on a fixed percentage under which the wholesale price for online sales is assumed reasonable in relation to the wholesale price for offline*" (page 10).

[17] This assumes the restrictions would not be considered restrictive by object.

We however suggest that further guidance on the requirements for that exception to apply, with less complex conditions, and especially further guidance on acceptable monitoring mechanisms would be necessary.

6.3 Restrictions on the use of marketplaces

6.3.1 Existing framework

The E-commerce Report already stated that "[t]he information obtained in the e-commerce sector inquiry indicates that the importance of marketplaces as a sales channel varies significantly depending on the size of the retailers, the Member States concerned, and the product categories concerned," "that marketplace bans do not generally amount to a de facto prohibition on selling online or restrict the effective use of the internet as a sales channel irrespective of the markets concerned," and "that the potential justification and efficiencies reported by manufacturers differ from one product to another," so "the findings of the sector inquiry indicate that (absolute) marketplace bans should not be considered as hardcore restrictions within the meaning of Article 4(b) and Article 4(c) of the [Current] VBER."

The landmark judgement of the Court of Justice of 6 December 2017 in case C-230/16 Coty Germany GmbH v Parfümerie Akzente GmbH (the "Coty judgement") confirmed that view. The Coty judgement considers that contractual restriction imposed by suppliers on reseller's ability to sell products via online marketplaces ("platform bans") could be discounted based on the ancillary restraint theory applicable to selective distribution, which is codified in Article 4(c) of the Current VBER and the Draft VBER. But the ECJ´s ruling also considers that marketplace bans as not falling under the hardcore restriction of passive sales in Article 4(b) of the Current VBER and, therefore, eligible for general exemption if the market share threshold is not exceeded. The reasons stated are that (i) the assessment of hardcore restrictions should not depend on product categories or market conditions; and (ii) consistency between paragraphs (b) and (c) of Article 4 of the Current VBER (and the Draft VBER) requires that marketplace bans not amount to passive sale restrictions either in the context of selective distribution and outside it.

However, *Coty* left some relevant questions opened:

(i) In relation to the first part of the judgment, the question arises as to whether the ancillary restrains reasoning could be extended to products other than luxury products that equally justify the use of selective distribution (high quality, technically complex or dangerous products, for instance). Some NCAs have suggested a narrow interpretation, while the Advocate General Wahl expressed its view in favour of widening the interpretation as to cover high-quality products too.

(ii) In relation to the second part of the Coty judgment on the potential exemption of platforms bans under Current VBER, the question is whether the platform ban should always be considered a non-hard-core restriction - and thus potentially benefit from the Current VBER exemption- irrespectively of the market conditions or circumstances surrounding the restriction. The question arises in connection with cases where alternatives for buyers to online sales through marketplaces is not realistic (e.g., where commercialisation of the products through their own websites is very difficult or practically impossible for reasons beyond the supplier's control.

In addition, different NCAs have followed divergent views on to the precise reach and effects of the Coty judgement.

6.3.2 The draft new rules on dual pricing and potential for improvement

6.3.2.1. Clarification on the qualification of platform bans as non-hardcore restrictions

The Draft VBER does not contain an express reference to platform bans. But Recital 13 states that all "restrictions on online sales benefit from the block exemption established by the VBER provided that they are not aimed at preventing, directly or indirectly, the effective use of the Internet by buyers or their customers for the purpose of selling their goods or services online, for example, because they are capable of significantly reducing the total volume of online sales on the market".

The Draft VGL (points 194 and 316 and 317) clarify that platform bans are block exempted in vertical agreements if the 30% market share cap is not exceeded and the agreement does not include any hardcore restriction or any excluded restriction that cannot be severed from the rest of the vertical agreement. The Draft VBER makes clear that the exemption of platform bans applies to all products and to all distribution models.

The Draft VGL consider that online restrictions (including platform bans) are not hardcore because they do not restrict the sales to a specific territory or customer group and allows buyers to sell their goods via other online channels (e.g., operating their own website or using online advertising channels). The Draft VBER also acknowledges that suppliers may be willing to restrict to their buyers the use of online marketplaces for reasons other than to preventing the use of Internet (for example, to protect their brand image and positioning, to discourage the sale of counterfeit products, or to ensure the pre and post-sale services and the maintenance of a direct relationship between the retailers and customers).

It follows that, to the extent that in a certain market, most of the sales are produced through marketplace´s, the other online channels being residual, the marketplace ban would amount to *a de facto* prohibition of online sales and therefore a hard-core restriction that would not be exempted by Draft VBER (except if the ban is necessary and proportionate to protect a legitimate interest). The Draft VBER seems to refer to this in its Recital 13 where it makes the treatment of online market restrictions as non-hard core, conditional to the fact that they should not be "(…) capable of significantly reducing the total volume of online sales on the market".

We would welcome clarification on the circumstances in which a platform ban that shall be considered a hard-core restriction. Indeed, given the practical implications of the assessment, we consider that the Draft VGL should provide guidance regarding the specific situations in which a platform ban could be equated to an absolute restriction of online sales and, therefore, to a hardcore restriction not covered by the Draft VBER. In particular, the Draft VGL should incorporate criteria that allow self-assessment with an acceptable degree of certainty on this point. Some of these criteria might include:

- Markets where buyers do not have the capacity (due to their size or characteristics) to commercialise products online without recourse to third party platforms.
- Markets in which the costs of marketing via the Internet are particularly high because they require specific investments (markets that require personalised attention for purchasing, for example).

Some Contributors consider that such guidance should go further and include numerical ranges to help with the self-assessment.

Additionally, we consider that the wording of points 316, 317 and 327 of the Draft VGL should be revisited in order for the rationale behind the default rule that restrictions on the use of marketplace are not hardcore and restrictions on the use of advertising services are hardcore to be construed in a logic that sits more at ease with the traditional by object narrative. For some Contributors, this should depart from the current approach relying in some sort of precast assessment of the effect that one or the other will have in closing off internet access to consumers and consumer transparency and choice (the latter not even being immediate theories of harm but rather mediate aims of competition policy).

Some Contributors go further and propose setting out a general prohibition on outright restrictions on the use of (certain categories of) online intermediation services in Article 4 of the Draft VBER as a hardcore restriction, together with an exception for restrictions that are either necessary and proportionate to legitimate objectives (e.g. brand image, security, or prevention of counterfeit). The Draft VGL could include a clarification that restrictions which do not amount to outright restrictions and are, thus, not hardcore, which is already in line with the logic behind point 316 thereof. These Contributors explain that this approach would apply to both online marketplaces and online advertising which fits the current single regime for “online intermediation services” in the Draft VBER, and then the Draft VGL would be used to make clear that there are more serious potential concerns when it comes to price comparison tools although this difference should be relativized (see below). This would be grounded on the following:

- The treatment of restrictions on use of online marketplaces for the purposes of vertical restraints assessment should be ascertained as a matter of the degree of harm condition for a restriction to be considered by object (i.e. a hardcore vertical restriction) – which has been interpreted in recent case law in the sense that “contradictory and ambivalent” evidence of pro-competitive and anti-competitive effects may prevent the fulfilment of such condition and then make the analysis of effects necessary. Consequently, for these other Contributors, a clear stance should be taken on which type of restrictions on the use of marketplaces (or other online intermediation services) is a hardcore restriction. These Contributors state that it would be possible to go beyond the concept of passive sales which limited the Court of Justice in Coty due to the current wording of Article 4 of the Current VBER and establish a new instance of inacceptable restriction of the reseller’s freedom consisting of e.g. an outright ban of a certain category of marketplaces (or other online intermediation services). This would avoid inconsistency with paragraphs (b) and (c) of Article 4 of the Current VBER (and the Draft VBER) and allow to reconcile the Coty case with the Pierre Fabre ruling, where the Court of Justice held that a ban on the use of internet sales for cosmetics by requiring these to be sold in a physical space where a qualified pharmacist was present amounted to a hardcore restriction not benefitting from the ancillary restraint theory available for selective distribution.

– The way the treatment of restrictions on the use of online platform is embedded in points 316 and 317 as well as 194 and 196 of the DRAFT VGL (and absent from the Draft VBER, except for the reference in Recital 13) seems excessively linked to an effects-based logic. It appears that the rationale behind considering restrictions on the use of marketplaces as non-hardcore restrictions (and behind considering restrictions on the use of online advertising and price comparison tools as hardcore) relies too much on empiric probability of closing off online channels. This departs from the by object analysis of restrictions on reseller's freedom to decide at which price, to whom and where they resell the products, which has proven useful in the past for enforcement efficiency and legal certainty. An approach whereby an outright ban on the use of either (certain) marketplaces and advertising platforms is equated to a hardcore restriction, while less intense limitations are not, would (i) be justified by the logic on interfering with the reseller's freedom to reach specific customers located on ones side of the platform (users of the marketplace or targets of the online advertising); (ii) iron out the allegedly unjustified difference between marketplaces and non-transactional online platforms (see below); and, (iii) contrary to what it might seem, allowing for a more nuanced treatment and more efficient enforcement of restrictions on the use of online platforms as legal certainty is introduced regarding what is clearly hardcore (outright bans) while the rest can be exempted or subject to an effects assessment.

However, some other Contributors do not agree with such this proposal and have highlighted that listing hard core platforms bans in the Draft VBER will entail an undesirable return to the blacklist regime, particularly in a field where there is no experience enough as to qualify different platform restrictions that have just recently emerged (or will emerge) as hard core.

In any event, is clear to all Contributors that the Commission should provide further guidance as to the criteria under which a platform ban shall be considered as a hard-core restriction and therefore not covered by the exemption for non-hard core online restrictions under the Draft VBER.

6.3.2.2. Clarification of situations where platform bans should be justified to avoid sale of counterfeit products

We welcome the Draft VGL guidance in paragraph 319 for the assessment of platform bans that fall outside the safe harbour of the Draft VBER.

We particularly welcome the clarification that the reasoning contained in Coty Judgement as regards the treatment of platform bans as restrictions ancillary to selective distribution agreements is not limited to luxury product but applies to all other category of products that could benefit from Metro doctrine.

Paragraph 315 of the Draft VBER expressly recognizes how a legitimate justification for a certain manufacturer, as recognized in the Draft VBER itself could impose restrictions to marketplaces, trying to minimize the risk of sales for counterfeit products. However, paragraph 322 says that any quality-related justifications will be unlikely to meet the conditions foreseen in article 101 (3) TFEU where the supplier itself uses the online marketplaces that are covered by the restriction. It seems, in this regard, that it could be legitimate for a manufacturer to decide to restrict the sales of its products based on the counterfeit product justification, as long as the supplier itself does not commercialise its products in the marketplace. It would be advisable, in this regard, to obtain greater clarity regarding the situations in which a manufacturer places its products in a marketplace and prohibits all or some of its distributors from doing so in order to avoid the situations for sales of counterfeit products and develop those cases in which this justification would be allowed.

6.3.3 Restrictions on the use of price comparison tools

The distinction between transactional platforms (marketplaces) and non-transactional platforms (other online intermediation services such as advertising platforms and price comparison tools) is used by some authors (and has been echoed by the European Commission's precedents) to exclude merchant platforms from the market for comparison shopping services due to limited demand and supply substitutability. In this regard, the Preliminary Report on the E-commerce Sector Inquiry concluded that "[m]arketplaces and price comparison tools differ in a number of respects, including the fact that no transaction takes place on the price comparison tool's website/app" but "interested potential customers are being directed to the website of the (authorised) distributor from which the product can be purchased and which generally fulfils all the quality criteria requested by the manufacturer", and, thus, "[p]rice comparison tools are therefore not a distinct online sales channel, but offer retailers the ability to present their online offerings on a widely used website and thereby increase the findability of their online offering and generate traffic on their own website."

The E-commerce Sector Inquiry Report considered that "[a]bsolute or per se price comparison tool bans which are not linked to quality criteria limit the ability of distributors to use this promotion method in order to generate traffic for their own website" and "may also exclude an effective method for retailers to generate traffic to their website, which is providing (potential) customers increased price transparency across a range of different retailers". However, the Report also acknowledged that "[r]estrictions on the usage of price comparison tools based on objective qualitative criteria may be used more often to generate efficiencies" so "[m]anufacturers operating selective distribution systems are in principle allowed to require quality standards in relation to the promotion of their products on the internet."

The Draft VGL pick up on this empirical distinction between transactional and non-transactional services. Such distinction is centred around the pro-competitive potential of price comparison tools (and online advertising services in general) to allow buyers to reach a broader user base and foster consumer transparency and choice, rather than on demand and supply substitutability considerations (e.g., in-platform purchasing functionality, after-sale support, target at professional sellers, different remuneration systems).

We consider that this distinction could go beyond what would be justified for competition economics underlying vertical restraints by taking as benchmark to be considered a hardcore restriction what would be desirable in terms of consumer welfare. This poses the risks of subverting the caselaw on by object restrictions which sets out the higher standard of degree of harm rather than desirability for competition and the objective of block exemption regulations, i.e. creating uncertainty rather than immediate pursuit of consumer welfare (which is rather the final cause of the general competition law system).

Our view is that the different regimes in the Draft VGL should be nuanced and maybe merged while keeping a paragraph that points out the differences in terms of more likelihood to be considered a hardcore restriction and less likely pro-competitive effects for online advertising services. Additionally, the regime applicable to price comparison tools should be explicitly extended to all online advertising multisided platforms.

In particular, paragraphs 327 and 328 of the Draft VGL could make clear that only outright restrictions on the use of online advertising services may amount to a hardcore restriction of passive sales while the others will follow an effects analysis for which consumer access, transparency and choice may in fact be relevant. Moreover, the very existence of two separate sections for online marketplaces and online price comparison services could be called into question since it may introduce unnecessary confusion where a paragraph referring to the particularities of the latter (i.e. potential restriction of passive sales and less likely pro-competitive effects) could suffice. It should also be noted that the distinction might cause market players merging the categories anyway.

This is an opportunity to clarify the Hasselblad caselaw, whereby a clause in a selective distribution agreement which prevented dealers from advertising their prices would be contrary to Article 101(1) of the Treaty, which the European Commission has revived in Guess to find fault with an exclusive right reserved for Guess to use the Guess brand names and trademarks in online search advertising. These precedents could be nuanced in light of more recent case law on the degree of harm to be demonstrated to establish by object restrictions, which states that “in order to justify an agreement being classified as a restriction of competition ‘by object’, without an analysis of its effects being required, there must be sufficiently reliable and robust experience for the view to be taken that that agreement is, by its very nature, harmful to the proper functioning of competition”, taking into account, in particular, “contradictory or ambivalent evidence in that regard, such indications or evidence” (i.e. pro-competitive effects that may deny the existence of a restriction by object).

Some Contributors go further and suggest that the inconsistency would be better solved if Article 4 of the Draft VBER is modified to set forth that outright bans on both online marketplaces and online advertising platforms are hardcore restriction (unless necessary and proportionate for a legitimate aim). The Draft VGL could then be used to clarify that online advertising services feature a greater potential for restriction (or less potential for countervailing efficiencies) in cases where there is no hardcore restriction and hence the effects analysis applies.

Finally, the Draft VBER, maybe in Article 1(1)(d), would benefit from a clarification that price comparison tools and other online advertising platforms are included in the concept of online intermediation services, although if Article 4 of the Draft VBER were to be modified in the proposed sense a distinction between transactional marketplaces and non-transactional advertising platform could be relevant in that the latter could be characterised as hardcore when they amount to a restriction of passive sales. The description of core platform services in Recital 2 of the Proposal for a Digital Markets Act could prove useful in this regard. At least, further clarification would be needed in the DRAFT VGL on the fact that all online advertising services should follow the same approach to price comparison tools as long as they are multi-sided platforms.

****