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European Commission

INCEPTION IMPACT ASSESSMENT

Inception Impact Assessments aim to inform citizens and stakeholders about the Commission's plans in order to allow them to provide feedback on the intended initiative and to participate effectively in future consultation activities. Citizens and stakeholders are in particular invited to provide views on the Commission's understanding of the problem and possible solutions and to make available any relevant information that they may have, including on possible impacts of the different options.

TITLE OF THE INITIATIVE	Revision of the Vertical Block Exemption Regulation and the Vertical Guidelines
LEAD DG (RESPONSIBLE UNIT)	DG COMP – A1 - HT.5455
LIKELY TYPE OF INITIATIVE	Legislative initiative - Commission Regulation
INDICATIVE PLANNING	Q2 2021
ADDITIONAL INFORMATION	https://ec.europa.eu/competition/consultations/2018_vber/index_en.html

The Inception Impact Assessment is provided for information purposes only. It does not prejudge the final decision of the Commission on whether this initiative will be pursued or on its final content. All elements of the initiative described by the Inception impact assessment, including its timing, are subject to change.

A. Context, Problem definition and Subsidiarity Check

Context

Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU") prohibits agreements between undertakings that restrict competition, unless they contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, in accordance with Article 101(3) TFEU. The prohibition of Article 101(1) TFEU covers amongst others agreements which are entered into by two or more undertakings, each operating, for the purposes of the agreement, at a different level of the production or distribution chain, and which relate to the conditions under which the parties may purchase, sell or resell certain goods or services ("vertical agreements"). Vertical agreements are ubiquitous across the EU economy.

The Commission is empowered to adopt block exemption regulations, which define certain categories of agreements for which it can be assumed with sufficient certainty that they fulfil the conditions of exemption under Article 101(3) TFEU. The Commission has made use of this empowerment by adopting several regulations that declare Article 101(1) TFEU not applicable to certain categories of vertical agreements. The currently applicable Vertical Block Exemption Regulation ("VBER") was adopted in 2010 and will expire on 31 May 2022. The Commission also adopted a Notice providing guidance on the assessment of vertical restraints under Article 101 TFEU ("Vertical Guidelines").

The results of the recent evaluation of the VBER, published on 8 September 2020, showed that the rules are still relevant and useful to businesses, but that certain areas of the rules may need to be adapted.

Problem the initiative aims to tackle

The evaluation identified certain areas where the rules might not function well or as well as they could, because they appear not well adapted to market developments (notably the growth of online sales and new market players, like online platforms), not sufficiently clear, do not address certain issues or do not refer to recent case law.

The Impact Assessment will assess policy options for a potential revision of the VBER in certain areas (see section C). The initiative will seek to address the problems identified during the evaluation:

A. by clarifying and simplifying the rules, including incorporating recent case law on the substantive conditions of Article 101(3) and filling in gaps in the rules that would otherwise create scope for divergent interpretations notably as regards restrictions that have emerged or that have become more prevalent since the adoption of the current rules (e.g. restrictions on the use of price comparison websites, online advertising restrictions) and the treatment of new market players, such as online platforms in certain areas of the rules (e.g. agency, dual distribution). In line with the objectives of the European Green Deal, any issues in relation to agreements pursuing sustainability objectives will be taken into account in this context.

B. by addressing issues raised in the following areas:

   a. Improving clarity in relation to the treatment of possible efficiencies resulting from resale price maintenance ("RPM"), which is a hardcore restriction under the VBER. In this context, the Commission will explore the possibility to engage with businesses in discussions on concrete instances regarding the conditions under which efficiencies for RPM can be claimed and the evidence that is required to satisfy the conditions of Article 101(3) TFEU.

b. Reducing costs and administrative burden by not excluding tacitly renewable non-compete obligations from the benefit of the block exemption, as identified in the evaluation, to the extent that the buyer can periodically terminate or renegotiate the agreement.

C. by exploring a possible revision of the current rules in the following areas, identified as requiring a further in-depth assessment on the basis of the evidence gathered during the evaluation:

a. **<u>Dual distribution</u>** (i.e. situations in which a supplier sells its goods or services directly to end customers, therefore competing with its distributors at retail level) is generally covered by the block exemption. It constitutes an exception to the general rule that agreements between competitors are not covered by the VBER, but by the horizontal rules. With the growth of online sales, dual distribution increased significantly and there is a risk of exempting vertical agreements, where horizontal concerns are no longer negligible and the conditions of Article 101(3) TFEU are not satisfied. There may also be a gap in the rules, since market participants that are perceived as being in a comparable dual distribution situation to that of manufacturers or service providers, such as wholesalers and importers, do not benefit from the VBER.

b. **<u>Active sales restrictions</u>.** Agreements aimed at restricting the territory into which or the customers to whom the buyer can sell are considered hardcore restrictions not covered by the VBER. The buyer should thus generally be allowed to actively approach individual customers (“active sales”) and respond to unsolicited requests from individual customers (“passive sales”). While the current rules generally do not allow restrictions of passive sales (with the exception e.g. of passive sales to unauthorised distributors within a selective distribution system), they do allow restrictions of active sales in limited cases, notably to protect investments by exclusive distributors and to prevent sales by unauthorised distributors located in a territory in which a supplier operates a selective distribution system. Suppliers consider the current rules to be particularly complex, unclear and preventing them from designing their distribution systems according to their business needs. Stakeholders expressed the wish to establish “shared exclusivity” between two or more distributors in a particular territory, and to effectively combine exclusive and selective distribution in the same or different territories. Moreover, suppliers and distributors consider that the current rules prevent the effective protection of the territory in which a selective distribution system is operated against sales from outside that territory to unauthorised distributors located inside the selective distribution territory.

c. **<u>Indirect measures restricting online sales</u>**. Online sales are generally considered a form of passive sales and restrictions preventing distributors from selling through the internet are considered hardcore restrictions not exempted by the VBER. The current rules apply the same approach to certain indirect measures that may make online sales more difficult, such as charging the same distributor a higher wholesale price for products intended to be sold online than for products sold offline (“dual pricing”). The same applies to imposing criteria for online sales that are not overall equivalent to the criteria imposed in brick-and-mortar shops (“equivalence principle”) in the context of selective distribution. Online sales have developed into a well-functioning sales channel over the last decade, whereas physical stores are facing increasing pressure. Suppliers and hybrid retailers consider that by not allowing them to differentiate wholesale prices based on the costs of each channel, the current rules prevent them from incentivising associated investments, notably in physical stores. Stakeholders also consider that there is a lack of legal certainty in the application of the equivalence principle, as online and offline sales channels are inherently different and it is difficult to assess when a divergence in the criteria used for each channel amounts to a hardcore restriction under the VBER.

d. **<u>Parity obligations</u>** (so-called most-favoured nation clauses) require a business to offer the same or better conditions to its contracting party as those offered on any other sales channel, or on the company’s direct sales channels (this distinction may, but does not necessarily correspond to the notions of “wide” and “narrow” parity obligations used in certain competition cases). Parity obligations can be agreed at wholesale or retail level, and can cover price or non-price conditions (e.g. inventory or availability of goods or services). All types of parity obligations are currently block exempted under the VBER. The evaluation showed an increase in the use of parity obligations across sectors, notably by online platforms. National competition authorities and courts have identified anti-competitive effects of obligations that require parity with other indirect sales or marketing channels (e.g. other platforms or other online or offline intermediaries).

Basis for EU intervention (legal basis and subsidiarity check)

The Commission adopted the VBER on the basis of Regulation 19/65/EEC of 2 March 1965 of the Council on the application of Article 85(3) of the EC Treaty (now Article 101(3) TFEU).

B. Objectives and Policy options

In the areas in which the evaluation showed that a revision of the scope of the VBER may be warranted, the initiative will explore policy options aimed at improving the rules, while ensuring the compliance of vertical agreements with Article 101 TFEU, including the internal market objective. The baseline scenario against which the proposed options will be assessed is a renewal of the VBER and the Vertical Guidelines without substantive change.

Against this baseline scenario, the following policy options are proposed:

a. **Regarding dual distribution**, the following policy options are proposed (Options 2 and 3 may be introduced cumulatively):

   Option 1: baseline scenario (no policy change);

   Option 2: limiting the scope of the exception to scenarios that are unlikely to raise horizontal concerns by e.g. introducing a threshold based on the parties' market shares in the retail market or other metrics and aligning the coverage of the exception with what is considered exemptible under the horizontal rules;

   Option 3: extending the exception to dual distribution by wholesalers and/or importers;

   Option 4: removing the exception from the VBER, thus requiring an individual assessment under Article 101 TFEU in all dual distribution cases.

b. **Regarding active sales restrictions,** the following policy options are proposed (Options 2 and 3 may be introduced cumulatively):

   Option 1: baseline scenario (no policy change);

   Option 2: expanding the exceptions for active sales restrictions to give suppliers more flexibility to design their distribution systems according to their needs, in line with Article 101 TFEU;

   Option 3: ensuring more effective protection of selective distribution systems by allowing restrictions on sales from outside the territory in which the selective distribution system is operated to unauthorised distributors inside that territory.

c. **Regarding two specific types of indirect measures restricting online sales**, the following policy options are proposed (Options 2 and 3 may be introduced cumulatively):

   Option 1: baseline scenario (no policy change);

   Option 2: no longer regarding dual pricing as a hardcore restriction, with safeguards to be defined in line with the case law;

   Option 3: no longer regarding the imposition of criteria for online sales that are not overall equivalent to the criteria imposed in brick and mortar shops in a selective distribution system as a hardcore restriction, with safeguards to be defined in line with the case law.

d. **Regarding parity obligations**, the following policy options are proposed:

   Option 1: baseline scenario (no policy change);

   Option 2: removing the benefit of the VBER and including in the list of excluded restrictions (Article 5 VBER) obligations that require parity relative to specific types of sales channels, thus requiring an individual effects-based assessment under Article 101 TFEU for such obligations. Conversely, parity obligations relating to other types of sales channels would continue to benefit from the block exemption, on the basis that they are more likely to create efficiencies that satisfy the conditions of Article 101(3) TFEU. For example, the benefit of the VBER could be excluded for parity obligations that relate to indirect sales and marketing channels, including platforms and other intermediaries;

   Option 3: removing the benefit of the block exemption for all types of parity obligations by including them in the list of excluded restrictions (Article 5 VBER), thus requiring an individual effects-based assessment in all cases.

C. Preliminary Assessment of Expected Impacts

Likely economic impacts

The initiative aims to promote effective competition and economic efficiency in the internal market by ensuring that the VBER and the Vertical Guidelines reflect market developments and address business needs in accordance with Article 101 TFEU. The main stakeholder groups directly affected by the initiative are businesses active in the EU and National Competition Authorities and national courts that enforce Article 101 TFEU in the EU.

Compared to the baseline scenario, all options would have an economic impact on businesses active in the EU, since the rules are applicable across all markets.

Certain options, notably on active sales, online sales and partially on dual distribution, explore changes that would extend the benefit of the block exemption to provisions currently not covered, but for which it can be assumed with sufficient certainty that they satisfy the conditions of 101(3) TFEU. In addition to increasing legal certainty, these policy options would give businesses more flexibility to shape their distribution systems, which may encourage the emergence of new or more efficient distribution systems, innovation and increased investment in the EU. In addition, these policy options would reduce costs for businesses that would no longer have to self-assess the compliance of such provisions in their vertical agreements with Article 101 TFEU.

Conversely, other policy options, notably on parity obligations and partially on dual distribution explore the exclusion of certain practices from the benefit of the block exemption, in order to ensure that the VBER does not exempt vertical agreements that do not satisfy with sufficient certainty the conditions of Article 101(3) TFEU. These policy options may increase costs for some businesses that will have to self-assess the compliance of their agreements with Article 101 TFEU. However, these policy options would reduce the likelihood of vertical agreements with anti-competitive effects being implemented, thereby increasing consumer welfare.

The initiative also seeks to clarify areas where the rules are perceived as unclear or complex, fill gaps and contribute to a more harmonised interpretation and enforcement. Combined with the policy options, these improvements would provide businesses with more legal certainty, enabling them to more effectively self-assess the compliance of their vertical agreements with Article 101 TFEU and reduce their legal costs and other related financial and administrative burdens.

The initiative would also facilitate and reduce the cost of the enforcement work of National Competition Authorities.

Furthermore, by ensuring that vertical agreements that create efficiencies meeting the conditions of Article 101(3) TFEU are block exempted, the initiative will increase consumer welfare in the internal market. Benefits passed on to consumers may be price related, but consumers may also benefit from increased choice and the emergence of new and more efficient supply and distribution models.

Likely social impacts

The initiative is not expected to have a social impact.

Likely environmental impacts

The initiative is not expected to have an environmental impact.

Likely impacts on fundamental rights

The initiative is not expected to have an impact on fundamental rights.

Likely impacts on simplification and/or administrative burden

The proposed policy options aim at simplifying the current rules to the extent possible, while ensuring compliance with Article 101 TFEU. By improving areas where the evaluation identified high complexity or a lack of clarity resulting in difficulties with applying the rules in practice, the initiative would ensure that the VBER and the Vertical Guidelines reach their general objective of helping businesses self-assess the compliance of their agreements with Article 101 TFEU and providing National Competition Authorities and national courts with a common framework of analysis. By increasing legal certainty, the simplification would reduce the administrative burden of National Competition Authorities enforcing Article 101 TFEU.

D. Evidence Base, Data collection and Better Regulation Instruments

Impact assessment

The Impact Assessment is expected to be finalised and submitted to the Commission’s Regulatory Scrutiny Board in the fourth quarter of 2021.

Evidence base and data collection

The Impact Assessment will be supported by the evidence gathered during the VBER evaluation, as well as from various other sources, including a public consultation, close cooperation with National Competition Authorities, discussions with expert groups, such as the Commission’s Economic Advisory Group on Competition Policy, or expert advice commissioned for specific issues. The outcome of the ongoing evaluation of the Motor Vehicles Block Exemption Regulation will also be taken into account.

Consultation of citizens and stakeholders

The Commission intends to launch an open public consultation towards the end of 2020 and a targeted consultation of consumer organisations to gather feedback on the policy options proposed and their ability to tackle the issues identified in the evaluation. In 2021, the Commission will publish a draft of the revised VBER and Vertical Guidelines for stakeholders’ comments.

Will an Implementation plan be established?

An implementation plan is not needed, given that the Impact Assessment concerns the review of an existing set of rules that serves as a basis for the enforcement practice of the Commission and National Competition Authorities.