# Commission consultation on its draft revised Vertical Block Exemption Regulation and Vertical Guidelines
# AFEP Comments

The European Commission opened a public consultation at the beginning of July to gather the opinions of stakeholders on its draft revision of the Block Exemption Regulation applicable to vertical agreements (hereinafter "Draft Regulation") and on its draft Guidelines on Vertical Restraints (hereinafter "Draft Guidelines"). The current regime will expire on May 31, 2022.

This consultation follows various stages during which AFEP fully supported the revision, regarding in particular the evolution of digital sales and their better consideration in situations of vertical agreements and in the most recent European case law.

AFEP's comments mainly relate to the Draft Regulation as it structures future conditions relating to vertical agreements. This project intends to:

- review the perimeter of the safe harbour provided for in the Regulation on dual distribution, parity obligations, restrictions on active sales and certain indirect measures restricting online sales,
- provide economic players with an environment more suited to the development of e-commerce and digital platforms,
- simplify the implementation of these texts.

AFEP companies first welcome the publication of these two projects which include numerous positive provisions reinforcing the legal framework and clarifying its implementation by economic players.

They particularly appreciate the improvements made to the online sales framework:

- the fact that the dual display of prices is no longer considered a hard-core restriction (article 4 Draft Regulation and § 195 Draft Guidelines) confirms the expansion of this sales channel and contributes to a better economic distribution of the related costs investments for physical and online commerce; suppliers will thus be able to set different wholesale prices for the same distributor according to the sales channels (physical or electronic);
- the end of the principle of equivalence for selective distribution: suppliers are no longer obliged to impose, for online sales, criteria that are globally equivalent to those practised in physical stores (removal in new Guidelines of § 56 and addition of § 194 and 221). The European Commission herein integrates recent case-law decisions and recognizes different characteristics of these two types of sale which growingly complement each other economically.

Our member companies however propose clarifications and improvements on major points for the distribution networks.

## 1. Dual distribution

With the development of online sales, the dual distribution system has become a very structuring tool for economic players. It multiplies distribution channels for products and services and offers consumers broader offers.

- Proposition of the Commission within the framework of the Draft Regulation (art.2)

The introduction of a new threshold of 10% market share (Article 2.4) is presented by the Commission as a new guarantee to benefit from double distribution in order to avoid possible problems ("false positives"), in particular those linked to horizontal agreements. It aims here in particular at the exchange of information between suppliers and distributors.

The Commission considers that the growth in online sales has facilitated direct sales by suppliers through their own online shops or online marketplaces. "As a result, the current exception for dual distribution is likely to exempt vertical agreements where possible horizontal concerns are no longer negligible."[1]

This translates into:

– the end of the exemption for cases of double distribution that could give rise to horizontal competition problems (Article 2. 4 to 7),
– the extension of this exemption to dual distribution practised by wholesalers and/or importers (article 2. 4 -a).

Concretely, the revised article 2-4 reduces the current safeguard/exemption zone to situations in which the cumulative market share of the parties in the retail market does not exceed 10%.

- AFEP position

Companies are opposed to the introduction of a new threshold in the dual distribution system dealt with in Article 2.

The latter is aimed at situations in which the sales of products or services to end customers is carried out both by the distributors who are members of the network and directly by the network head producer. Thus, suppliers and their independent distributors find themselves in direct competition.

With the exemption provided for in article 2-4 of the current 2010 Regulation and § 28 of the current Guidelines, the development of this distribution method has increased over the past 10 years in many sectors without raising any major competitive difficulties[2]. These provisions made it possible to apply in the digital world what has been practised for a long time in the physical world. Thus, dual distribution has developed particularly in the context of franchises. These are built on the specific know-how put in place the supplier's original points of sale.

Contrary to the approach proposed by the Commission, companies consider that the introduction of a new threshold is a major change that does not help to guarantee the benefit of the exemption linked to double distribution, for various reasons:

– *The inadequacy of the framework of horizontal agreements to the dual distribution system*

Companies point out that horizontal agreements aim to avoid any difficulties between competing companies selling different products in order to maintain efficient competition for the benefit of the consumer. Dual distribution consists of selling the same product through the multiplication of channels, thereby increasing the availability of the same product for the consumer and *de facto* increasing competition in the market for this product.

Selective distribution has developed this dual distribution system in various sectors (luxury goods, automobiles, etc.). It involves the sharing of information between the supplier and the distributors to create a real sale consistency around the product in a pro-competitive approach, making it possible to best meet the demands of both the market and of the consumer. Sensitive information likely to fall within the scope of vertical agreements (price, market share, etc.) is anonymized to nevertheless allow reflection on future strategies.

[1] Background note accompanying the public consultation of the draft revised VBER and Vertical Guidelines, page 2
[2] However, it should be noted that two recent decisions by the Danish competition authority considered that sensitive information exchanges between Hugo Boss and two of its distributors were not covered by the Vertical Agreements Block Exemption Regulation (HUGO BOSS / Kaufmann and HUGO BOSS / Ginsborg - Decisions of June 24, 2020).

Information exchanges are integral to the functioning of dual distribution (management and delivery of stocks, for example). In this case, they are not *per se* synonymous with anti-competitive practice. It would therefore be desirable for the Commission to define the exchanges it intends to target.

The exclusion of the exemption for the exchange of information between parties holding on the retail market between 10 and 30% of market share appears to be a source of legal uncertainty and is not justified in view of the low risk of such exchanges of information putting pressure on competition. This provision reinforces the misleading idea that vertical agreements are presumed unlawful and that any situation not covered by the Exemption Regulation is necessarily restrictive of competition.

Companies recommend that the exchange of information between the suppliers and the distributor be covered in principle by the exemption within the limits of those necessary for distribution agreements.

– *The complexity created by the introduction of a new threshold*

This new threshold could lead, first of all, to a lack of efficiency for a large part of the Vertical Block Exemption Regulation which has demonstrated all its dynamic support for the European economy, with many sectors of activity having used dual distribution. The extension of the non-exemption would considerably reduce the scope of this distribution system.

Companies are also wondering how suppliers and distributors will be able to assess their cumulative retail market shares to remain below the 10% threshold, while the texts relating to horizontal agreements lay down the prohibition of exchanging on such data.

In addition, it is not uncommon for a supplier/network head to have thousands of distributors in the European market, making this type of calculation costly or even risky when the distributor is himself a multi-brand and consequently holds a significant market share. It will be difficult to discern very precisely what falls under a particular supplier without exchanging sensitive information and then falling within the scope of Article 101 TFEU.

In the event that the supplier's market share would remain stable and that of the distributor would increase, their contract would no longer benefit from the block exemption and would therefore no longer be presumed valid under the provisions of competition law.

This assumption can occur at any time, without any control on the part of the supplier, and is due for example to the internal or external growth of the distributor or of the group to which he belongs, to his decision or that of his group to represent other brands, or to the disappearance of certain competitors of the distributor.

The burden of proof would be reversed as soon as one of the operators exceeds the market share threshold. It will be up to the supplier and its distributor to demonstrate, with the risks that such an approach entails, the economic efficiency of their contract to try to justify that it is valid under Article 101 § 3 of the Treaty.

Faced with this unnecessary complexity, companies ask for the withdrawal of the new provisions provided for in article 2 and the maintenance of the only market share threshold of article 3 which targets the upstream supply market in order to maintain the full economic efficiency of the Vertical Block Exemption Regulation.

## 2. The role of online intermediation services (art 2.7)

The scope covered by the provisions of Article 2.7 deserves to be clarified in order to promote its implementation.

- Proposition of the Commission within the framework of the Draft Regulation

Article 2.7 excludes from the exemption providers of online intermediation services if they have hybrid functions, i.e. if they sell goods or services in competition with companies to which they provide online intermediation services.

- AFEP position

Companies are questioning the reasons for the Commission to exclude hybrid platforms regardless of their size or activity from the exemption.

Indeed, in most cases, these players do not produce or sell any product on their own and therefore would not be likely to compete with those of the companies to which they provide online intermediation services.

If the abuse of "free-riders" must be able to be ruled out, the solution proposed in Article 2.7 seems too extensive.

This approach seems too restrictive and AFEP considers that these companies should be qualified as agents and as suppliers only when they produce and sell products on their platform in direct competition with their suppliers.

The notion of "competition between companies" should hence be clarified to cover only supply-side services and not online retail. Otherwise, the entire online sales ecosystem would be impacted since online intermediation services mostly offer goods or services from several brands.

It would also be desirable for the Regulation to limit the concept of online intermediation service providers to the most structuring players, for whose it is their main activity. This approach would thus be consistent with the guidelines proposed by the Commission in the draft Digital Market Act ("DMA").

## 3. The status of agent in digital sectors (article 1-1 of the Draft Regulation and § 44, 63-64 of Draft Guidelines)

The Commission is changing its approach regarding the relationship between the provider of products and services and the platform. It now analyses this relationship from the perspective of a buyer/provider of intermediation services.

As a result, some clarifications deserve to be made to qualify this new relationship and to determine the room for flexibility of the seller/buyer in setting its price on a platform/provider of intermediation services.

- Proposition of the Commission within the framework of the Draft Regulation and Guidelines

The Draft Regulations and Guidelines now consider that an online platform is a "supplier" (of online intermediation services) within the meaning of the Regulation and that "in principle" an online platform cannot be considered as an "agent" within the meaning of competition law (Draft Guidelines, § 44 and 63-64). Thus, § 44 specifies that "undertakings providing online intermediation services are categorised as suppliers under the VBER and can therefore in principle not qualify as agents for the purpose of applying Article 101(1)."

- AFEP position

This position adopted by the Commission is unprecedented and came late in the review process. It therefore surprises companies and needs, if maintained, to be specified or clarified.

Indeed, if an online intermediation platform cannot "in principle" be an agent within the meaning of competition law, and insofar as an intermediation online platform cannot be considered as an "independent distributor" (absence of purchase/resale), the question of the qualification of the relationship between the seller of products or services and the online intermediation platform on which these products or services are distributed remains. Companies also ask if an online platform not being an agent "in principle" means that there may be exceptions to this principle.

Some provisions of the Draft Guidelines create confusion on this issue and in particular on whether sellers can *in fine* freely set their selling prices on an online intermediation platform:

- § 44 describes a situation in which the "conditions of sale of the contract goods or services and the commercial strategy are determined" by the platform "and not by the sellers of the goods or services that are intermediated";

- § 177 mentions that a distributor (who would not be a true agent within the meaning of competition law) "should be left free to reduce the effective price paid by the customer without reducing the income for the principal". However, if, as indicated above, an online intermediation platform is neither an agent nor an independent distributor but a simple intermediary facilitating transaction between the seller and the end customer, the Guidelines should clarify that in any case the online intermediation platform cannot unilaterally lower the price actually paid by the customer;

- § 179 indicates that online platforms may induce sellers to sell their goods or services on the platform "at a competitive level" or to "reduce their prices" (even if the platform does not appear to be able to impose a fixed price or a minimum price to the operations that it intermediates).

The new approach of the Commission (the seller of a good or a service on the online platform does not act as a "supplier" but now as a "buyer" of online intermediation services) also requires clarification of § 192 (f) of the Draft Guidelines (relating to the restriction of the use of a trademark as a keyword in search engines). Indeed, the hypothesis referred to in § 192 (f) is based on a "classic" distribution scheme in which a supplier, who sells goods or services to a distributor for resale to end customers, imposes such restrictions on its reseller. This is therefore a fundamentally different hypothesis from the one of a relationship with online intermediation platforms.

Because it is the heart of their activity and the reality of the market, these platforms have the capacities to advertise on the internet the online intermediation services that they offer (in particular by advertisements specifically targeting their brands) and to be visible on the internet. In addition, the restriction envisaged by the Commission (subject to its specific conditions) is not such as to prevent an online intermediation platform "from making effective use" of the Internet or of one or more channels of online advertising when a seller of goods or services wishes to restrict or limit the use of his mark in search engines. Likewise, such a restriction would not be "likely to significantly reduce the overall amount of online sales on the market" considered or prevent "the effective use of one or more online advertising channels " by buyers or their clients (Draft Guidelines, § 188).

The Commission should thus clarify § 192 (f) so that it refers exclusively to the hypothesis of a "classic" distribution scheme in which a supplier would restrict the ability of its independent distributor (reseller) to purchase the supplier's brand as a key word on search engines. The Draft Guidelines should be clarified so that the other hypotheses of restrictions on online advertising, in particular in the context of relations with online intermediation platforms, are covered by the categorical exemption or, if not, are subject to a full competitive analysis in view of all the elements of the economic and legal context of each case.

The general exclusion of agent status "in principle" for all providers of online intermediation services needs to be clarified.

If, however, the Commission were to maintain its new approach of considering that in principle an online platform cannot be an agent within the meaning of competition law, the Guidelines should clarify the rights and obligations of sellers of goods or services and the online intermediation platform facilitating the conclusion of transactions between sellers of goods or services and end customers.

In particular, the Draft Guidelines should mention the compliance with Article 101 (1) TFEU of an agreement between a seller of goods or services and an online platform under which it belongs to the seller (and not to the platform) to set the commercial and pricing conditions for goods or services sold through the online platform.

## 4. Parity obligations (article 5 -d)

The Draft Regulation removes the benefit of the category exemption for retail parity obligations on all indirect sales channels ("most-favoured-nation clause" or wide parity clauses) imposed by an online intermediation service. With some exceptions, these clauses were previously exempted by category up to the exemption thresholds of 30% market share.

- Proposition of the Commission within the framework of the Draft Regulation (Article 2)

As this type of parity obligation is now excluded from the exemption, these clauses will be assessed individually, depending on their effect, with regard to Article 101 TFEU.

This exclusion is consistent with the provisions envisaged by the Commission in the DMA. In general, competition authorities increasingly consider that these wide clauses raise real competition difficulties by creating a link of economic dependence between platforms and their trading partners.

At the same time, the Draft Regulation maintains the benefit of the block exemption from narrow parity obligations which target direct sales or direct marketing channels (direct sales websites). These narrow parity obligations and the wholesale parity obligations still benefit from the security zone provided for by the Draft Regulation, subject to compliance with its general conditions of application, in particular the market share threshold of 30 % (article 3).

- AFEP position

Companies adhere to the exclusion provided for in article 5.1 d) from the benefit of the categorical exemption for wide parity clauses imposed by providers of online intermediation services.

Companies however regret that the Commission is still hesitant to recognise the particularly harmful nature of narrow parity clauses even though the last 10 years have shown both decision-making practice and abundant literature on the subject[3].

Experience has shown that removing broad parity clauses is not enough and that more needs to be done.

[3] Support Studies for the Evaluation of the VBER, European Commission, 2020
Report from Jacques Crémer, Yves Alexandre de Montjoye, Heike Schweitzer on competition policy in the digital age, 2019
National laws in France, Belgium, Italy and Austria in the online hotel distribution sector which have prohibited the broad and narrow parity clauses imposed by online intermediation platforms
Recent Booking.com judgment in Germany (May 2021)

Companies ask that Article 5.1 (d) of the Draft Regulation be amended so that narrow parity clauses are also excluded from the benefit of the block exemption. Their anti-competitive effects when imposed by providers of online intermediation services are now sufficiently demonstrated that these clauses can no longer be presumed to comply with competition law. An individual analysis is required on a case-by-case basis.

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## About AFEP

Since 1982, AFEP brings together large companies operating in France. The Association, based in Paris and Brussels, aims to foster a business-friendly environment and to present the company members' vision to French public authorities, European institutions and international organisations. Restoring business competitiveness to achieve growth and sustainable employment in Europe and tackle the challenges of globalisation is AFEP's core priority. AFEP has more than 110 members. More than 8 million people are employed by AFEP companies and their annual combined turnover amounts to €2,600 billion.
AFEP is involved in drafting cross-sectoral legislation, at French and European level, in the following areas: economy, taxation, company law and corporate governance, corporate finance and financial markets, competition, intellectual property and consumer affairs, labour law and social protection, environment and energy, corporate social responsibility and trade.

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