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**COMMISSION STAFF WORKING DOCUMENT**  
**EXECUTIVE SUMMARY OF THE EVALUATION**

**of the**

**Vertical Block Exemption Regulation**

{SWD(2020) 172 final}

## Background and Objectives

EU competition law aims to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers. Article 101 of the Treaty thus prohibits agreements that restrict competition. As an exception to this rule, agreements that restrict competition are not prohibited if they improve the production or distribution of goods or promote technical or economic progress, while allowing consumers a fair share of the resulting benefits. These conditions are set out in Article 101(3) of the Treaty. The Commission applies Article 101 of the Treaty in parallel with the national competition authorities and national courts.

Under the existing legal framework, businesses have to self-assess whether their agreements comply with Article 101 of the Treaty. The assessment under Article 101 consists of two steps. The first step, under Article 101(1), is to check whether an agreement restricts competition. The second step, under Article 101(3), is to determine the pro-competitive effects produced by that agreement and to check whether they outweigh the restrictive effects on competition.

Vertical agreements are agreements that relate to the supply and distribution of goods and services. They are ubiquitous across the EU economy. The Commission made use of the empowerment granted by the Council to adopt a Vertical Block Exemption Regulation (“VBER”) covering these vertical agreements.

The VBER declares that if vertical agreements meet certain conditions, then the prohibition in Article 101(1) of the Treaty does not apply to them. The VBER therefore creates a safe harbour for those agreements. Together with the VBER, the Commission also adopted Guidelines (“Vertical Guidelines”). These provide guidance on how to interpret and apply the VBER and how to assess vertical agreements that the VBER does not exempt.

The general objective of the VBER and the Vertical Guidelines is to facilitate the enforcement work of the Commission, as well as the work of the national competition authorities and national courts, and to help businesses conduct the self-assessment of their vertical agreements, thus reducing costs.

The VBER and the Vertical Guidelines have three specific objectives. First, they aim to make it easier for businesses to self-assess their agreements by providing legal certainty. Since the VBER exempts all agreements that meet its conditions, businesses no longer need to perform the two-step assessment under Article 101 of the Treaty for those agreements. They only have to assess whether the agreement meets the conditions set out in the VBER. Second, the VBER aims to avoid false positives and, to the extent possible, false negatives. This means that the VBER aims to exempt only those agreements that meet the conditions of Article 101(3) of the Treaty, in order to be in line with the Treaty and the requirements of the empowerment granted by the Council. At the same time, to reduce the burden for businesses when self-assessing the compliance of their agreements with Article 101 of the Treaty, the VBER also

aims to exempt as many agreements that meet the conditions of Article 101(3) of the Treaty as possible. Third, the VBER and the Vertical Guidelines aim to provide a common framework of assessment for national competition authorities and national courts, in order to ensure consistency in the application of Article 101 of the Treaty.

The VBER expires on 31 May 2022. In view of this, the purpose of the evaluation is to gather evidence on the functioning of the VBER, together with the Vertical Guidelines, in order for the Commission to decide whether it should let the VBER lapse, renew or revise it.

To carry out the evaluation, the Commission drew on multiple sources of information and consulted extensively with stakeholders. It carried out a public consultation, a targeted consultation of national competition authorities, a stakeholder workshop and an external evaluation support study. The Commission also relied on evidence gathered from its enforcement experience and that of national competition authorities, as well as other initiatives, such as the e-commerce sector inquiry.

### Main findings

The evaluation confirmed the need for a block exemption and guidance on how to apply Article 101 of the Treaty to vertical agreements. Stakeholders unanimously confirmed that the VBER and the Vertical Guidelines are relevant, as they are useful tools that greatly facilitate the self-assessment of vertical agreements.

However, the evaluation has also shown that the market has significantly changed since the adoption of the VBER and the Vertical Guidelines. In particular, the growth of online sales and online platforms has had a significant impact on distribution models. The evolving nature of platform business models has led to an increase in the number of contractual relationships and the increased use of vertical agreements. At the same time, consumers nowadays expect to have a continuous omni-channel experience across a variety of different channels such as offline and online shops, marketplaces and other online platforms. This has led suppliers to increase the number of different distribution and sales channels they use to promote their products and services. Stakeholders therefore need rules that help assess the vertical agreements and restrictions they use nowadays, in light of these market developments.

The evidence gathered in the evaluation, however, suggests that the specific objectives of the VBER, together with the Vertical Guidelines, have not been fully met. In particular, the evidence gathered in the evaluation suggests that there is scope for improving the level of legal certainty provided by the rules. Addressing the areas of the rules where the evaluation has identified a lack of clarity or gaps, and the areas where the rules are no longer adapted to recent market developments would improve legal certainty, as well as the ability of the rules to provide a common framework of assessment for national competition authorities and national courts. Moreover, while the evidence suggests that the lists of hardcore restrictions and excluded restrictions are generally appropriate, there may still be scope in some areas of the rules to further reduce the risk of false negatives.

The benefits of the VBER are inherently difficult to quantify, as are the costs of applying the VBER. The evidence gathered during the evaluation has not allowed to make a quantitative comparison of costs and benefits. However, it shows that the costs would increase in the absence of the VBER and Vertical Guidelines, especially for small and medium-sized enterprises (“SMEs”). Moreover, the evidence suggests that there is significant room for simplification and further cost reduction, notably by reducing the complexity of the rules and by updating the rules in order to bring them in line with the current needs.

The VBER and the Vertical Guidelines are overall coherent both with other Commission rules and guidance on the application of Article 101 of the Treaty, as well as with other EU legislation with relevance for vertical supply and distribution agreements. The VBER and the Vertical Guidelines also provide clear EU added value, as they offer a safe harbour, which can only be granted at EU level.

Nonetheless, the evaluation has identified a number of issues, in particular as regards the clarity of the rules and their ability to address new market developments, which limit their effectiveness, efficiency and coherence.

#### Follow-up

The evaluation identified a number of areas of the rules that are not functioning well, or as well as they could, for various reasons. The main issues raised relate to the fact that the VBER and the Vertical Guidelines are not well adapted to new market developments that took place since the adoption of the rules. Any follow-up to address these issues, however, is subject to an impact assessment, also taking into account the implementation costs of any possible changes.

In addition to the areas of the rules identified as requiring follow-up, the evaluation also pointed to some more general issues, which need to be taken into account when considering the next steps:

First, there is a need for rules that are, to the extent possible, future-proof. This means that they should not only address known issues but also contain bright-line principles that can cater for possible new types of vertical agreements and restrictions.

Second, there is a need to address the complexity of the rules, which reduces legal certainty and makes the rules challenging to use, especially for SMEs.

Third, the fact that national competition authorities and national courts have taken divergent approaches in some areas has affected the benefit of providing a common framework of assessment. While there are already mechanisms that aim to overcome these divergences, it may be necessary to consider further options to limit the impact of this issue.