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EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT REPORT

Accompanying the documents

COMMISSION REGULATION (EU) .../... on the application of Article 101(3) of the Treaty on the Functionning of the European Union to categories of vertical agreements and concerted practices

COMMUNICATION FROM THE COMMISSION Approval of the content of a draft for a Communication from the Commission Guidelines on vertical restraints

{C(2022) 3015 final} - {SEC(2022) 198 final} - {SWD(2022) 139 final}

Executive summary sheet

Impact assessment accompanying the revised Vertical Block Exemption Regulation ("VBER") and the revised Guidelines on Vertical restrictions ("Vertical Guidelines")

A. Need for action

What is the problem and why is it a problem at EU level?

The evaluation confirmed that the VBER and the Vertical Guidelines are useful tools that facilitate the assessment of vertical agreements under EU antitrust law. However, the evaluation also showed that the market has changed significantly since the adoption of these rules, in particular due to the growth of online sales and of new market players such as online platforms. Against this background, the evaluation concluded that certain areas of the rules do not function well or as well as they could. In particular, there is a need to re-adjust the scope of the safe harbour in four areas.

Dual distribution refers to the situation in which a supplier sells its goods or services not only through independent distributors but also directly to end customers. On the one hand, the evaluation indicated that, in view of the increase in the use of dual distribution, the 2010 VBER may exempt vertical agreements where horizontal concerns are no longer negligible, in particular as regards information exchange between the supplier and the distributors, and as regards hybrid platforms. On the other hand, the evaluation indicated that extending the dual distribution exemption to wholesalers and importers might be appropriate.

Parity obligations require a company to offer its goods or services to its contracting party under conditions that are the same or better than the conditions under which they are offered to third parties. The 2010 VBER covers all parity obligations. However, the evaluation showed that retail parity obligations are increasingly used and that across-platform retail parity obligations do not necessarily fulfil the conditions of Article 101(3) of the Treaty and should therefore not benefit from the block exemption.

Restrictions of active sales concern limitations of a distributor's ability to actively approach customer groups or territories. According to the evidence gathered in the evaluation, the 2010 VBER is not sufficiently flexible and active sales restrictions could meet the conditions for an exemption in additional instances.

Under the 2010 VBER, a prohibition to sell online is considered a hardcore restriction. The same approach applies to **certain indirect restrictions of online sales**, such as charging the same distributor a higher wholesale price for products sold online than for products sold offline ("dual pricing") or imposing criteria for online sales that are not overall equivalent to the criteria imposed for sales in brick-and-mortar shops ("equivalence principle"). These restrictions seem no longer adapted to an environment in which online sales have become a self-standing sales channel that no longer needs the same level of special protection as before, whereas physical stores face increased pressure.

What should be achieved?

The general objective of the initiative is to provide businesses with simpler, clearer and up-to-date rules and guidance that can help them to self-assess the compliance of their vertical agreements with Article 101 of the Treaty, in an environment reshaped by the growth of online sales and online platforms, as well as to facilitate the enforcement work of the Commission, NCAs and national courts.

What is the added value of action at EU level (subsidiarity)?

The subsidiarity principle does not apply, as the EU has exclusive competence in the field of competition. Since it provides a safe harbour from EU competition law, which can only be granted at EU level, the VBER offers added value as compared to existing more general and nationally fragmented guidance on the application of Article 101 of the Treaty.

B. Solutions

What are the various options to achieve the objectives? Is there a preferred option or

not?

The baseline for each of the areas that are the subject of the impact assessment is to maintain the rules and guidance of the 2010 VBER and Vertical Guidelines.

As regards *dual distribution*, **Option 1** would continue to block-exempt dual distribution but with a more limited scope. In particular, **Option 1a** would limit the exemption to instances where the parties' aggregate market share in the retail market does not exceed 10%. **Option 1b** would block-exempt all aspects of dual distribution agreements, except for certain types of information exchange. **Option 1c** would exclude from the block exemption the vertical agreements of hybrid platforms. **Option 2** would entirely remove the block exemption for dual distribution. Under **Option 3**, the block exemption would cover dual distribution by wholesalers and importers. The preferred option is a combination of Options 1b, 1c and 3.

As regards *parity obligations*, **Option 1** would exclude across-platform retail parity obligations from the VBER. These parity obligations would therefore require an individual assessment under Article 101 of the Treaty. **Option 2** would exclude all types of parity obligations from the VBER. The preferred option is Option 1.

As regards *restrictions of active sales*, **Option 1** would expand the exceptions under which these restrictions are block-exempted. In particular, **Option 1a** would allow the combination of different distribution systems in the same territory. **Option 1b** would allow a supplier to appoint more than one exclusive distributor in a particular territory or customer group ("shared exclusivity"). **Option 1c** would allow a supplier to restrict active sales by its buyers, but also by customers of its buyers ("pass-on"). Under **Option 2**, a supplier could restrict active and passive sales from outside the territory in which a selective distribution system is operated to unauthorised distributors located inside that territory. The preferred option is a combination of Options 1b, 1c and 2.

As regards *indirect restrictions of online sales*, **Option 1** would remove dual pricing from the list of hardcore restrictions. **Option 2** would remove the equivalence principle from the list of hardcore restrictions. The preferred option is a combination of Options 1 and 2.

What are different stakeholders' views? Who supports which option?

All categories of stakeholders have welcomed the review of the VBER and Vertical Guidelines. The views of particular stakeholders vary in the four areas that are the subject of the impact assessment.

As regards **dual distribution**, stakeholders generally did not support Option 2, which would remove the exemption for dual distribution entirely. Conversely, stakeholders across all categories generally supported Option 3 to include wholesalers and importers in the scope of the exemption. As regards Option 1a, stakeholders across all categories were not supportive, notably due to the practical difficulties this would imply. Views were mixed as regards Option 1b, although most stakeholders agreed on the importance of information exchange in dual distribution but also the fact that this can raise horizontal concerns. NCAs were particularly supportive of Option 1c on the exclusion of hybrid platforms from the exemption.

As regards **parity obligations**, Option 1 was supported by some NCAs, as well as by a significant share of online intermediaries, distributors, law firms and business associations representing both suppliers and distributors. Option 2 was also supported by some NCAs, a consumer association and a majority of suppliers.

As regards **restrictions of active sales**, Option 1a was supported primarily by suppliers, but raised some concerns for NCAs, retailers and a consumer association. Options 1b and 1c were supported by most stakeholders, provided their application is subject to clear limits. Option 2 was supported by stakeholders across all categories.

As regards **indirect restrictions of online sales**, Option 1 was supported by suppliers, law firms, some distributors and some NCAs, whereas online intermediaries and some distributors raised concerns, which can be addressed by the limiting principle. Option 2 was supported by

most categories of stakeholders.
C. Impacts of the preferred option
What are the benefits of the preferred option (if any, otherwise of main ones)?
The main benefit of the preferred option as regards dual distribution would be to reduce the negative impact on competition that may arise from information exchange in dual distribution and from hybrid platforms engaging in dual distribution. Moreover, it also has the benefit of reducing compliance costs for wholesalers and importers that engage in dual distribution. As regards parity obligations, the preferred option is expected to reduce the use of across-platform retail parity obligations and consequently to reduce their negative impacts. The main benefits of the preferred option as regards active sales restrictions are that it would reduce compliance costs and provide increased flexibility for suppliers to protect the investments of exclusive and selective distributors. As regards dual pricing and the equivalence criteria, the preferred option would lead to reduced compliance costs for suppliers and decreased costs for distributors if they no longer have to comply with criteria that are not appropriate to the channel they use.
What are the costs of the preferred option (if any, otherwise of main ones)?
While some restrictions would no longer be block-exempted, which would increase costs for stakeholders who would no longer be able to rely on the simpler rules provided by the VBER to self-assess their agreements, other restrictions currently excluded from the VBER would be block-exempted, which would decrease costs for stakeholders. Thus, on balance, the initiative is not expected to significantly increase compliance costs for businesses. The initiative would also reduce costs by simplifying complex areas of the rules and streamlining the guidance.
What are the impacts on SMEs and competitiveness?
The preferred option for **dual distribution** would address anti-competitive effects while still allowing dual distribution to deliver its pro-competitive effects and would thus have a positive impact on competition. SMEs would benefit from the preferred option to essentially the same extent as other businesses, since the rules include clear and helpful guidance to allow them to identify what information exchange is excluded from the VBER and in which cases dual distribution involving hybrid platforms (especially those without market power) would not raise competition concerns. The preferred option for **parity obligations** would have a positive impact on competition for the supply of online intermediation services, and therefore for businesses, including SMEs, that use these services to sell their products. It would also be beneficial to new or smaller online intermediaries seeking to enter or expand in intermediation services markets. As regards **active sales restrictions**, the preferred option would overall increase the efficiency of exclusive and selective distribution systems (including for SMEs). As the application of shared exclusivity and the pass-on are subject to clear limits, this would also increase intra-brand competition. The preferred option as regards **indirect restrictions of online sales** would have a positive impact on competition, as well as more generally on businesses and SMEs, as it would enable them to maintain their competitiveness, including of their physical stores.
Will there be significant impacts on national budgets and administrations?
Overall, the initiative would not have significant practical implications as regards the assessment that enforcement authorities carry out when enforcing Article 101 of the Treaty. This is because it would not fundamentally alter the core structure and framework of assessment provided by the VBER. Furthermore, the initiative as such would not have significant impacts on national budgets.
Will there be other significant impacts?
Beyond the direct impact on businesses, competition and the internal market, the preferred options are expected to generate also indirect impacts for consumers. The initiative is

expected to lead to increased consumer choice, due to the inclusion of wholesalers and importers in the scope of the dual distribution exemption; increased intra-brand competition due to shared exclusivity; better pre-sales and after-sales services due to a better protection of distributors' investments; increased competitiveness of physical stores and improved efficiency of online and offline distribution due to the exemption of dual pricing and the application of non-equivalent criteria. The initiative also affects enforcement authorities, by either reducing enforcement costs or having a neutral impact on them, depending on the area concerned.
Proportionality?
The preferred option for each area of the rules would be proportionate, as it avoids going beyond what is necessary to readjust the scope of the VBER safe harbour.
D. Follow-up
When will the policy be reviewed?
This initiative is planned to be in place for 12 years. In the meantime, the Commission will monitor the functioning of the revised rules, primarily through its own enforcement experience and that of the NCAs; the questions of interpretation that arise before the national and Union courts, and informal discussions with stakeholders. No later than June 2030, the Commission will take stock of the functioning of the revised rules and draw up an evaluation report, *inter alia* on the basis of the information gathered through the continued monitoring.