**Comments**

**by the Federal Ministry for Economic Affairs and Energy**

**and the Bundeskartellamt**

**regarding the draft revised VBER and VGL as published on 9 July 2021**

The Federal Ministry for Economic Affairs and Energy and the Bundeskartellamt (German competition authority) welcome the review of the Vertical Block Exemption Regulation (VBER) and the Vertical Guidelines (VGL) and appreciate the opportunity to comment on certain key aspects of the draft revised VBER and VGL.

The review of the VBER is the first opportunity in ten years to discuss in detail the need for change in the assessment of vertical restraints and implement corresponding changes notably in response to the challenges of the fast-growing internet economy. In particular e-commerce has established itself as a supplementary distribution channel of high importance which has contributed to better product and price transparency for the end-consumers and which makes it possible for smaller retailers to enter the market and to expand their reach. However, this has, at the same time, increased competitive pressure on both manufacturers and retailers who reacted with new forms of restrictive practices in order to secure their margins. Furthermore, online platforms have emerged which act as intermediary between manufacturers and retailers and – due to network effects – have obtained a strong influence on the sale of goods and/or services. Under these circumstances, an update of the VBER and the VGL is indeed necessary.

The Federal Ministry for Economic Affairs and Energy and the Bundeskartellamt welcome the proposed new structure of the VBER and the clarifications added in the VGL. In the opinion of the Federal Ministry of Economic Affairs and the Bundeskartellamt, the new structure can facilitate the understanding of the general principles of the verticals regime and therefore also render the self-assessment easier for undertakings. Unfortunately, the structural changes and additional explanations cannot fully compensate for the overall complexity of the rules.

Please find below our central remarks.

## 1. Significantly shorten the duration of the VBER regime

- The developments in the online sector over the past twelve years have shown dynamic changes in the world of distribution. These have resulted in enforcement difficulties because certain developments or types of restrictions, particularly in the online- and platform sector, could not - or hardly - be addressed under the current VBER. This was one of the main reasons for legal uncertainty and diverging case practice across the EU over the last years.
- Against this background, it is of utmost importance that the legal framework is adapted more frequently in order to adequately reflect market developments. The Federal Ministry for Economic Affairs and Energy and the Bundeskartellamt therefore strongly advocate to substantially shorten the duration of the new VBER. A period of 6-7 years would still allow the competition authorities and undertakings to gain sufficient experience with the new rules before entering into the next revision process. We would like to draw attention to the fact that in the current draft of the DMA, a review is envisaged every 3-5 years (see Art. 38(1) DMA-proposal).

## 2. Scope of the VBER

- Pursuant to the structure of the VBER, any vertical restrains contained in a vertical agreement are block-exempted unless the parties to the agreement exceed the 30% market share threshold and/or the agreement contains hard-core restrictions defined by the VBER. As a result, new types of restrictions, which are not (yet) covered by the rules of the VBER, are block-exempted even though they may have severe negative effects on competition and – due to the difficulties for National Competition Authorities (NCAs) to effectively apply the withdrawal mechanism – can possibly no longer be addressed under Art. 101 TFEU. This in turn can lead to under-enforcement.
- Furthermore, the internal logic of the VBER regime depends on a classification of an undertaking as either supplier or buyer within the distribution chain. The business model of intermediaries, such as online platforms offering intermediation services, does not fit in this system and the application of the VBER rules for suppliers/buyers to an intermediary acting on multi-sides markets would not accurately reflect the economic situation and the potential anticompetitive effects of such agreements.
- For this reason, the scope of the VBER should not be too broad and we need to make sure that it does not cover cases in which the effects of a particular agreement on competition are yet unclear. Furthermore, excluding certain cases from the scope of the VBER would merely lead to an individual assessment of the agreements in question. In our opinion, that would guarantee more tailor-made solutions and avoid the risk of under-enforcement of Art. 101 TFEU.
- The Empowerment Regulation supports this approach. According to Regulation No 19/65/EEC: „*The Commission […], may exercise such powers after sufficient experience has been gained in the light of individual decisions and it becomes possible to define categories of agreements and concerted practices in respect of which the conditions of Article 85 (3) may be considered as being fulfilled."* In our view, the Commission and the NCAs have not yet gained sufficient insights into the broad spectrum of potential restrictions in connection with online platforms, also in light of the variety of platform business models, to acquire the above level of certainty, since there have been relatively few cases so far.
- The VBER should therefore not block exempt restrictions involving online platforms since it is unclear which effects the restrictions have for consumer welfare. Only if it is sufficiently probable (e.g. can be assumed without further investigation) that the restriction fulfils the criteria set forth in Art. 101(3) TFEU, the agreement should be block-exempted. In all other cases, e.g. when the effects on competition are unclear or efficiencies are not sufficiently likely, the agreement should be subject to a case-by-case analysis.
- For the abovementioned reasons, the Federal Ministry of Economic Affairs and Energy and the Bundeskartellamt also strongly suggest that – if platforms are to be included in the VBER at all – a separate chapter with a specific set of rules for online intermediaries is created within the VBER.

## 3. Determining the platform's role in the assessment

- If however the Commission's proposal to integrate online platforms in the current logic of suppliers/buyers in the Commission's opinion has to be maintained for compelling reasons, at least further clarification with regard to the role of online intermediaries is needed:

- Art. 1(1)(d) VBER states that "*'supplier' includes an undertaking that provides online intermediation services irrespective of whether it is a party to the transaction it facilitates; … .*" Recital 63 VGL furthermore states that *"… Furthermore, it is clarified in Article 1(1)(d) VBER that a provider of* online *intermediation services is a supplier under the VBER including where it is party to a transaction that it facilitates."*

- It is our understanding that the definition of online platforms as suppliers in Art. 1(1)(d) VBER shall not exclude the assessment of the respective platform (also) as a buyer where the individual agreement is not exclusively linked to the offering of online intermediation services. We therefore deem it important that - if platforms are to be included in the VBER - a clarification is added which explains the conditions under which an online platform can be considered a buyer of the products and/or services sold via its website, i.e. where the provision of online intermediation services ends and where the buying or selling of products and/or services via the website begins.

- We understand that the wording in Art. 1(1)(d) VBER and recital 63 VGL was introduced in order to avoid platforms escaping the supplier definition simply by becoming a party to the transaction. This is an important and valid point considering that online platforms often have strong bargaining power.

- Unfortunately, the sentences could be misunderstood as stating a general rule that automatically qualifies online platforms as suppliers under the VBER whenever they (also) provide online intermediations services. This approach would disregard the very versatile nature of online platforms as well as the fact that there are cases, in which e.g. a smaller platform or new entry to the platform market may find itself confronted with a strong retailer with equivalent market power that imposes restrictions on the platform.

**4. Market share threshold in Art. 3 VBER**

- In the platform economy, the current turnover-based market share thresholds may be misleading or at least less significant as indicators for market power than for example access to data and network effects. Therefore, in case of platforms a second threshold with other quantitative metrics than turnover, such as number of monthly users (as foreseen in the DMA-proposal) or volume of transaction, should be introduced in order to exclude platforms which function as a gatekeeper from the scope of the VBER.

- The Bundeskartellamt has dealt with several cases in which individual providers of online intermediation services stayed closely below the turnover based threshold and as a result fell within the scope of the VBER, even though their market power was not negligible and the competitive effects of their behavior were severe, in particular as there were strong cumulative effects spanning the whole market. This becomes even more prevalent in online environments, where multi-homing is common. Generally, such cases fall into the scope of Art. 6 VBER, allowing the Commission to declare that the VBER does not apply to specific restrictions relating to the respective market. However, in the experience of the Bundeskartellamt, this provision has hardly ever been used and also constitutes a rather complicated and time-consuming approach for sectors where parallel networks of similar agreements are a rather common feature.

- According to recital 63 VGL "*… a provider of* online *intermediation services is a supplier under the VBER including where it is party to a transaction that it facilitates."* It should be clarified that where online platforms are considered a supplier under the definition in Art. 1(1)(d) VBER, the relevant market for the market share threshold in Art. 3 VBER is the market for

online intermediation services. It should be furthermore clarified that this also applies where the agreement with the platform concerns the price or the conditions for selling the product to the end user via the platform (see recital 179 VGL), i.e. that also in this case, the relevant market for the calculation of the market share threshold is the one for online intermediation services.

- In oligopolistic markets, with for example 2-4 large players, the respective turnover based market shares might fluctuate around 30%. As a result, the VBER might be applicable to some companies but not to others. In order to avoid arbitrary results, an additional, twofold threshold should be introduced for these cases. The first requirement would be a combined market share of three or fewer undertakings of more than 50%. If this condition is met, the exemption provided for in Article 2 shall not apply to any undertaking that holds a share of at least 15% on the relevant market.

## 5. 1. Dual distribution Art. 2(4) – 2(7) VBER

### a) The newly introduced 10% threshold

- The Federal Ministry for Economic Affairs and Energy and the Bundeskartellamt generally support the idea of limiting the exception of dual distribution to cases in which horizontal effects are of lesser importance because the manufacturer is mainly active on the upstream market and has only limited ancillary activities in the retail market (recital 86 VGL). In general, a quantitative threshold seems necessary and appropriate.
- However, the current threshold which is (solely) based on the common market share of the supplier and the buyer on the downstream market, does not seem suitable to achieve this result (i.e. to only apply the exception to cases in which the manufacturer is mainly active on the upstream market). In order to adequately ensure that the exception is applied as intended, we propose to introduce a different threshold, which considers the manufacturer's direct distribution rate on the downstream market.

### b) Exclusion of hybrid platforms from the VBER regime

- The competitive effects of restrictions imposed by or on platforms are difficult to determine. This applies even more so to hybrid platforms, since their specific features allow for competitive effects on several markets, and since agreements can be used to indirectly govern the relations to other market sides. Against this background, we generally welcome the clarification in Art. 2(7) VBER that the exception for dual distribution does not apply to vertical agreements between hybrid providers of online intermediation services and competing buyers of online intermediation services.
- The wording of Art 2(7) VBER is however limited to agreements between a hybrid platform and competing undertakings to which it (also) provides online intermediation services. The Federal Ministry for Economic Affairs and Energy and the Bundeskartellamt therefore welcome the clarification in recital 91 VGL, according to which restrictions regarding the extent to which or the conditions under which online intermediation services can be provided to third parties shall not be covered by the VBER. As these agreements to the detriment of third-parties don't relate to the "*conditions under which the parties to the agreement may purchase, sell or resell certain goods or services"* and are hence no vertical agreements under

Art. 1(1)(a) VBER, it might be even more effective to make clear that this is a general rule by moving this sentence into section 4.2.3.

## 6. Active sales restrictions

- The Federal Ministry for Economic Affairs and Energy and the Bundeskartellamt welcome the additional clarifications as to when online activities qualify as active/passive sales both in the VBER and in the VGL. However, some concerns remain as regards the proposed qualification of price comparison tools and search engines as active sales.
- With regard to active sales restrictions, we would like to draw attention to the fact that selective distribution systems are already treated very leniently under the current framework. Selective distribution systems can be used to control, or lock out, price aggressive dealers and ultimately control end customer prices. Therefore, it needs to be kept in mind that under Art. 101(3) TFEU, restrictions imposed on retailers need to be proportionate to secure reasonable distribution. This basic understanding should be reflected in the VBER.
- According to the proposed wording of Art. 1(1)(g) and Art. 4(b) VBER, it would be possible to allocate, within an exclusive distribution system, a territory or customer group to multiple buyers in the future. Such systems of combined exclusivity could ultimately resemble a quantitative selective distribution system without objective selection criteria. We see the risk that this novel possibility to assign exclusivity to several retailers at once will be used to circumvent the rules on selective distribution agreements.

  The safeguard included in the wording of the current draft VBER seems to be primarily directed at the protection of the retailers within the distribution system and not suitable to prevent market foreclosure: Recital 102 VGL states in this regard that "*…, the number of appointed distributors should be determined in proportion to the allocated territory or customer group in such a way as to secure a certain volume of business that preserves their investment efforts*."
- As far as the new rules relate to manufacturers operating different types of distribution systems (e.g. selective and exclusive distribution systems) in neighboring territories or even in the same territory on different levels of the distribution chain, the Federal Ministry for Economic Affairs and Energy and the Bundeskartellamt see the justification or rather the necessity of the respective distribution system in question. We therefore propose to include a strict (mandatory) assessment of whether the nature of the product in question calls for the implementation of the respective distribution system and if the restraints stay within the scope of what is necessary.
- In combination with a broad definition of active sales in particular in the online sector, these new rules otherwise carry the risk of under-enforcement especially as long as the **withdrawal** procedure cannot be used effectively (see below under 11.).

## 7. Restriction of passive sales

### a) Effective use of the internet

- In today's world, the visibility and the searchability of an online offer are significant competitive factors. The internet has a huge potential to extend the geographic reach of dealers and to overcome national borders. Also because market segmentation still is a genuine concern, we should therefore be careful not to be too lenient with regard to online restrictions and we

should make sure not to exempt practices, which result in significant restrictions of online trade that are not linked to quality requirements.

- Against this background, the Federal Ministry for Economic Affairs and Energy and the Bundeskartellamt generally welcome the new effect-based approach of the Commission, according to which practices that prevent the effective use of the internet are considered hard-core restrictions under Art. 4 VBER, which will leave room for a case-by-case analysis of the competition authorities. However, some concerns remain regarding the clarifications in the VGL as to when restrictions of online sales channels or online advertising channels can be seen as preventing the effective use of the internet.

### b) Dual pricing systems

- In the experience of the Bundeskartellamt, dual pricing, i.e. a requirement that the buyer pays a different price for products intended to be resold online than for those intended to be resold offline, incentivizes hybrid retailers to reduce the number of products sold online and can even have similar effects to a total ban of online sales. Any dual pricing model that does not clearly relate to the different cost structures of online and offline sales will usually have the objective to restrict online sales rather than to create a level playing field by mitigating disadvantages.

- Against this background, the Federal Ministry for Economic Affairs and Energy and the Bundeskartellamt would have preferred dual pricing systems to remain a hardcore restriction under the VBER. Having said that, we do not object the approach taken by the Commission according to which dual pricing is to be allowed as long as it incentivizes the appropriate level of investments made online and offline and relates to the actual cost difference of the two distribution channels.

- However, we propose to rethink the current wording of recital 195 VGL, according to which it is sufficient that the price difference “is not entirely unrelated” to the difference in costs incurred and a restriction is block exempted unless it prevents the “effective use of the internet”. In order to ensure that a pricing model is in fact mitigating disadvantages (and not only used as a pretense to restrict online sales), we would suggest to allow for a generalized surcharge on online purchase prices based on the actual cost differences. One might even reflect on including a maximum percentage in the VGL.

## 8. RPM

### a) General remarks

- The Federal Ministry for Economic Affairs and Energy and the Bundeskartellamt agree that Resale Price Maintenance (RPM) should remain a hardcore restriction and welcome the additional guidance introduced in the VGL. The case practice in recent years has shown a widespread use of these restrictions and their severe anti-competitive effects which usually cannot be outweighed by potential efficiencies. Negative effects do not only include direct effects such as the elimination of intra-brand competition but also the facilitation of collusion between buyers or suppliers. By avoiding price competition, RPM furthermore reduces innovation and may result in foreclosure effects.
- The Federal Ministry for Economic Affairs and Energy and the Bundeskartellamt welcome the new clarification added in recital 179 VGL, according to which restrictions by an online

platform that concern the price for the good and/or service sold via the platform may constitute a hardcore restriction under Art. 4(a) VBER.

**b) Minimum advertised price policies (MAPs)**

- The Federal Ministry for Economic Affairs and Energy and the Bundeskartellamt first of all appreciate the clarification in recital 174 VGL that MAPs can also amount to RPM and can therefore be considered a hardcore restriction under Art. 4(a) VBER.
- However, as the current public debate in Germany shows, the second half of the sentence, which includes examples for restricted practices, can be misinterpreted in practice as requiring an additional restrictive behavior by the supplier (i.e. as MAPs alone not amounting to RPM). The proposed wording of recital 174 VGL may create the misunderstanding that the anticompetitive effects of RPM and MAPs typically differ and that the latter thus should be treated more leniently.
- This proposition would ignore the economic rationale of a retailer und thus the actual effects of MAPs: Many retailers offer their products at a retail price recommended by the manufacturer. Nevertheless, retailers regularly choose to lower the prices for certain products at least temporarily. The reason for such a price cut might be that they want to increase the sales of the given product or to attract new customers that may buy additional, non-discounted, products. Such a price reduction can be profitable if indeed additional customers can be attracted by advertising the price discount. Without advertisement, the retailer will not be able to attract new customers but at the same time it will reduce its margin when selling the discounted product to 'regular' customers that would have visited the store and made purchases also without the discount. Such a non-advertised discount would normally reduce the profits of the retailer. As a consequence, a MAP policy will actually also impact the retail price set in the store, since it strongly reduces – typically eliminates – the incentives of the retailer to offer discounts and is very likely to impede price reductions, the same way RPM does. This effect arises also without any additional measures taken by the manufacturer.
- Possible efficiencies generated by MAPs are usually the same that are generated by RPM measures. As RPM is considered a hardcore restriction under the VBER, so should MAPs.
- Taking this into account, the Federal Ministry for Economic Affairs and Energy and the Bundeskartellamt propose to change the wording of recital 174 VGL in order to clarify that MAPs usually are considered as a form of RPM with the consequence that MAPs constitute a hardcore restriction pursuant to Art. 4(a) VBER – also without the supplier additionally influencing the price-setting.[1]
- Furthermore, we would like to draw attention to the fact that potential effects of MAP-policies also strongly depend on the definition of "advertised" prices. Especially in the internet, a distinction between "in-store prices" and "advertised/out-of store prices" is hardly possible and one could interpret many prices displayed online as "advertised" prices. The proposed wording therefore carries the risk to block-exempt RPM measures for products sold online.

**9. Parity clauses, Art. 5 lit. d) VBER**

- In general, the Federal Ministry for Economic Affairs and Energy and the Bundeskartellamt welcome that the topic of parity obligations imposed by platforms on their users is now

[1] This would be in line with the existing case practice by DG Comp (PO/Yamaha, COMP/37.975) and the opinion of the Commission in the past (see PETI-CM-PE 572, 975).

expressly dealt with in the VBER and the VGL. This is a highly necessary adaption to the developments in the case practice and reflects the relevance of such restrictions in the business world.

- We furthermore agree with the suggestion to qualify parity clauses as excluded restrictions in Art. 5 VBER. However, in our view, the relevant provision in Art. 5 lit. d) VBER, which is limited to cross-platform parity clauses, is clearly too narrow. The Federal Ministry for Economic Affairs and Energy and the Bundeskartellamt advocate for a uniform treatment of all types of parity clauses in order to avoid block-exempting restrictions, which may have a substantial negative effect on competition and where it cannot be assumed without further investigation that these restrictions fulfil the criteria set forth in Art. 101(3) TFEU.
- While the Federal Ministry for Economic Affairs and Energy and the Bundeskartellamt agree that different types of parity clauses can have a different potential for anti-competitive effects, in the case practice of the Bundeskartellamt, the distinction between online and offline channels played a more important role than the (mere) distinction between direct and indirect sales channels. Under the revised Art. 5 lit. d VBER restrictions regarding offline channels would be block exempted, which in our opinion would not be adequate.
- It is even a step back compared to the status quo acquired by commitments and court rulings across the EU, since broader notions of „narrow" parity clauses which are currently forbidden would be block exempted in the future. The investigations in the booking.com case of the Bundeskartellamt showed that so called narrow parity clauses are not necessarily more likely to generate efficiencies that satisfy the conditions of Art. 101(3) TFEU than wide parity clauses. This decision by the Bundeskartellamt was recently upheld by the Bundesgerichtshof, the highest federal court in Germany. In this connection we would like to stress three points: First the observations made in this case are not at all restricted to the online hotel market and – in our opinion – can be transferred to other markets. Second, the negative effects of booking's narrow parity clauses are not solely linked to its market position, but would probably be comparable at least in a market scenario with several strong platforms – a very likely setting in platform markets (see above under 4.). Finally, even if all parity clauses were to be included in Art. 5 lit. d), undertakings would still have the possibility to submit efficiency arguments.

**10. Dual role of agents**

- Adapting the VBER framework to the changing market conditions is not an easy task. The Federal Ministry for Economic Affairs and Energy and the Bundeskartellamt appreciate the efforts made by the Commission to provide legal certainty for undertakings with regard to agency agreements. However, we have doubts with regard to the new clarifications concerning companies acting in a dual role as agents and independent distributors at the same time. In our opinion, a situation where on the basis of an agency agreement, the relationship between a supplier and his agent can be split within one product market, should be – if at all allowed – considered as an exception.
- We understand that the new provisions are meant to require a free choice on the side of the agent as regards his dual role. We see the risk that in practice, such free choice might only exist on paper. The Federal Ministry for Economic Affairs and Energy and the

Bundeskartellamt would therefore suggest to consider the market power of both parties and to introduce a market share threshold.

- Furthermore, we have concerns regarding the proposed rules for the reimbursement and the allocation of costs, which will be very difficult to implement in practice.
- Finally, we see the risk that suppliers may use such hybrid agency agreements to circumvent the rules on RPM. This potential problem should be addressed in the VGL.

**11. Withdrawal of the exemption**

- Due to e-commerce, the competition landscape in online business and thus also the vertical relationships are becoming increasingly complex and may therefore require an individualized assessment also in cases *prima facie* covered by the VBER. In order to enable the competition authorities to carry out such an assessment, it is necessary to examine how to make the existing toolbox for the withdrawal of the block exemption more manageable in practice. The Federal Ministry for Economic Affairs and Energy and the Bundeskartellamt welcome the respective clarifications in the VGL, which may be helpful in particular cases. However, in our opinion it is very important for the majority of cases in which a withdrawal of the benefit of the VBER appears appropriate, to improve the preconditions for national competition authorities to withdraw the benefit of block exemption regulations under Art. 29 (2) Regulation 1/2003.

Berlin/Bonn, 17. September 2021