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# **Review of the Vertical Block Exemption Regulation & recent enforcement practice**

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(Speaking in a personal capacity. The views expressed are not necessarily those of the European Commission.)

## Review of the Vertical BER - timeline

- Review process is divided in two phases:
  - **Evaluation** phase launched in October 2018 (SWD planned for end of Q2/2020)
  - **Impact Assessment** phase until expiry on 31 May 2022
  
- Evaluation is aimed at **gathering evidence on the functioning** of the Vertical BER & Guidelines on Vertical Restraints.
  
- **Evaluation milestones:**
  - Evaluation roadmap (published on 8 November 2018)
  - Public consultation (between 4 February and 27 May 2019)
  - Evaluation support study (launched in August 2019)
  - Stakeholder workshop (planned for 14/15 November 2019)
  - Ongoing discussions with NCAs (ECN Verticals WG)

# Evaluation criteria

Evaluation follows Better Regulation criteria:

- **Effectiveness:** ability of the VBER to provide legal certainty and to identify vertical agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Art. 101(3) TFEU.
- **Efficiency:** extent to which the VBER has contributed to reducing the overall costs of the self-assessment regime
- **Relevance:** of the current scope of the VBER in light of new market developments (notably e-commerce, platforms and new intermediaries)
- **Coherence:** extent to which the VBER is in line with the broader Commission's competition enforcement policy and practice
- **EU added value:** extent to which the VBER has contributed to ensuring a consistent application of Art. 101 TFEU by the national competition authorities and the courts of the EU Member States

## Results of the Public Consultation

- 164 contributions submitted through online questionnaire. 13 position papers, which largely echoed the issues raised in the contributions to the public consultation.
- Summary of contributions and full contributions published online: [https://ec.europa.eu/competition/consultations/2018\\_vber/index\\_en.html](https://ec.europa.eu/competition/consultations/2018_vber/index_en.html)
- VBER and Guidelines generally considered to provide a **sufficient level of legal certainty**.
- But, **need for revision** to properly reflect new market developments and ensure a consistent application of the rules throughout the EU.
- Conflicting views on whether the list of hardcore restrictions should be reduced/extended.

## Results of the Public Consultation (continued)

- VBER and Guidelines generally considered to be **coherent** with other Commission instruments providing guidance on Article 101 TFEU.
  - Some concern regarding enforcement practice at national level and Geo-Blocking Regulation.
- Some qualitative evidence indicating that the benefits of the VBER and Guidelines outweigh the costs incurred but **no reliable quantitative evidence**. Clear indications that cost incurred would increase if the VBER and Guidelines were not prolonged.
- VBER and Guidelines, as EU level instruments, considered to provide **added value**, as compared to self-assessment based on other guidance.
  - But some concern about inconsistent application of the rules across the EU.

## Results of the Public Consultation (continued)

Areas of the VBER and/or Guidelines that would require a **revision**:

- Guidance on online sales (in the context of distinction between passive/active sales)
  - increasing importance of online sales, increasing importance of online advertising, need to reflect the recent case law on the topic as well as conclusions of e-commerce sector inquiry.
- Hardcore restrictions and guidance relating to selective distribution
  - increasing prevalence of selective distribution in the EU, need to reflect the recent case law on the topic and perceived lack of transparency of the selective distribution criteria.
- Hardcore restriction on RPM and the related guidance in the Guidelines
  - increased use of price monitoring software and price algorithms, to free-riding issues as well as potential efficiencies of resale price maintenance and to the latest economic theories.

## Results of the Public Consultation (continued)

- Other areas needing a revision include: hardcore restrictions, excluded restrictions (especially as regards non-compete obligations), guidance related to agency agreements, the rules applying to vertical agreements entered into between competing undertakings, the market share threshold (in particular its application to the relevant markets) and the guidance on franchising (in particular as regards the transfer of know-how).
  - Due to increased market concentration and the dual role of manufacturers as distributor and competing seller resulting from the increased vertical integration of suppliers
  - Due to incoherent application of rules among Member States (e.g. retail MFNs)

## Enforcement at Commission level

- RPM in Consumer electronics
  - Decisions against 4 manufacturers of consumer electronics (Philips, Pioneer, Asus, Denon & Marantz) of July 2018
- Practices aimed at restricting retail price setting by distributors:
  - Establishment of retail price monitoring system,
  - serial number tracking that allowed to identify the lower-pricing retailers/parallel traders,
  - Enforcement through commercial pressure or retaliatory measures, such as ceasing to supply the relevant products.
- Particular role of price comparison websites and internal software monitoring tools.

# Enforcement at Commission level

## Guess decision of December 2018

- Restricting retailers from:
  - cross-selling among authorised wholesalers and retailers (Art.4 d) VBER);
  - selling to consumers located outside the authorised retailers' allocated territories (Art.4 c) VBER);
  - independently deciding on the retail price (Art.4 a) VBER);
  - using the Guess brand names and trademarks for the purposes of online search advertising;
  - selling online without a prior specific authorisation by Guess, which the company had full discretion to grant or refuse, and which was not based on any specified quality criteria.

## Enforcement at Commission level – other cases

- Territorial restrictions
  - Nike decision of 25 March 2019 (merchandising products)
  - Sanrio decision of 9 July 2019 (merchandising products)
- Pending investigations
  - Distribution of merchandising products (Universal)
  - Geo-blocking of content (Valve & video games publishers)



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# Questions?