

Questionnaire for the public consultation on a block exemption regulation and guidelines on vertical agreements

Fields marked with * are mandatory.

Introduction

Objectives of the public consultation

Article 101(1) of the Treaty on the Functioning of the European Union (“the Treaty”) prohibits agreements between undertakings that restrict competition unless, in accordance with Article 101(3) of the Treaty, they contribute to improving the production or distribution of goods or services, or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits and unless they are indispensable for the attainment of these objectives and do not eliminate competition in respect of a substantial part of the product in question (“efficiencies in line with Article 101(3) of the Treaty”).

The prohibition in Article 101(1) of the Treaty covers, amongst others, agreements entered into between two or more undertakings operating at different levels of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services (so-called “vertical agreements”).

[Commission Regulation \(EU\) No 330/2010](#) on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (Vertical Block Exemption Regulation, “VBER”) and the [Commission Notice providing binding guidance on the Commission for the interpretation of the VBER](#) (“Vertical Guidelines”) define the currently applicable framework. The VBER will expire on 31 May 2022.

Between October 2018 and September 2020, the European Commission conducted an evaluation of the VBER and the Vertical Guidelines, the findings of which were summarized in a staff working document (“SWD”, [SWD\(2020\) 173 final](#)). The results of the evaluation showed that the rules are still relevant and useful to businesses but that certain areas of the rules may need to be adapted. On the basis of these findings, the Commission launched an impact assessment phase looking into policy options for a revision of certain areas of the VBER and Vertical Guidelines with the aim to have the revised rules by 31 May 2022, when the current rules will expire.

On 23 October 2020, the Commission published notably an [inception impact assessment](#) (“IIA”) setting out the scope of the impact assessment phase, with a focus on four areas for which the Commission proposed policy options and asked stakeholders to provide feedback by 20 November 2020. During the impact assessment phase, the Commission will collect views from stakeholders on these policy options, their ability to tackle the issues identified in the evaluation and on any other impacts of the policy options. This questionnaire is one of the key instruments to collect stakeholders’ views and the replies to the questionnaire will inform the drafting of the revised rules.

About you

- * 1 Language of my contribution
- * 2 I am giving my contribution as
- * 3 First name
- * 4 Surname
- * 5 Email (this won't be published)
- * 12 Country of origin

The Commission will publish all contributions to this public consultation. You can choose whether you would prefer to have your details published or to remain anonymous when your contribution is published. **For the purpose of transparency, the type of respondent (for example, 'business association', 'consumer association', 'EU citizen') country of origin, organisation name and size, and its transparency register number, are always published. Your e-mail address will never be published.** Opt in to select the privacy option that best suits you.

Privacy options default based on the type of respondent selected

- * I agree with the [personal data protection provisions](#)
- * 15 Please describe the main activity of your organisation (e.g. product(s) and/or service(s) provided)
1000 character(s) maximum
- * 16 Please describe the sectors that your organisation represents, i.e. sectors in which your members are conducting business.
1000 character(s) maximum
- * 17 Please indicate the 2 digit NACE Rev.2 code referring to the level of "division" that applies to your business (see part III, pages 61 – 90 of Eurostat's statistical classification of economic activities in the European Community, available [here](#)).
- * 18 Please mark the countries/geographic areas where your main business is located.

Austria
Belgium
Bulgaria
Croatia
Cyprus
Czech Republic
Denmark
Estonia
Finland
France

Germany
 Greece
 Hungary
 Ireland
 Italy
 Latvia
 Lithuania
 Luxembourg
 Malta
 Netherlands
 Poland
 Portugal
 Romania
 Slovak Republic
 Slovenia
 Spain
 Sweden
 United Kingdom
 Others in Europe
 America
 Asia
 Africa
 Australia

* 19 Is your company/business organisation a supplier or a buyer of products or services or both?

Supplier
 Buyer
 Both
 Not applicable
 Do not know

20 Please estimate the percentage of your company/business organisation's annual turnover for 2019 and 2020 generated by sales through the Internet ("online sales").

Proportion of online sales

	0 to 25	25 to 50	50 to 75	75 to 100	not applicable
*2019					
*2020					

21 Please estimate the percentage of your company/business organisation's annual turnover for 2019 and 2020 generated by physical sales channels (“offline sales”).

Proportion of offline sales

	0 to 25	25 to 50	50 to 75	75 to 100	not applicable
*2019					
*2020					

* 22 Please provide explanation if necessary (e.g. variation between 2019 and 2020)
1000 character(s) maximum

* 23 Please describe the relevance of the VBER and the Vertical Guidelines for your organisation.
1000 character(s) maximum

A. How to answer?

You are invited to reply to this public consultation by filling out the eSurvey questionnaire online. The questionnaire is structured as follows: The first part of the questionnaire concerns general information on the respondent. The second part focuses on policy options for a possible revision of the VBER and the Vertical Guidelines in relation to the four areas mentioned in section C of the IIA, namely (a.) dual distribution, (b.) active sales restrictions, (c.) two types of indirect measures restricting online sales and (d.) parity obligations. This is the main part of the questionnaire. It aims at gathering information and views from stakeholders to assess the impact of the policy changes that the Commission is exploring. The third part of the questionnaire addresses other issues and elements to be considered during the impact assessment phase.

The Commission will summarise the **results in a report**, which will be made publicly available on the Commission's [Better Regulation Portal](#).

The questionnaire is available in English, French and German, but you may respond to the questionnaire in any official EU language.

To facilitate the analysis of your reply, we would kindly ask you to **keep your answers concise** and to the point. You may include documents and URLs for relevant online content in your replies. **You are not required to answer every question.** You may respond 'no opinion/no' to questions on topics where you do not have particular knowledge, experience or opinion. Where applicable, this is strongly encouraged in order to ensure that the evidence gathered by the Commission is solid.

You are invited to **read the privacy statement attached** to this consultation for information on how your personal data and contribution will be dealt with.

You have the option of saving your questionnaire as a 'draft' and finalising your response later. In order to do this, click on 'Save as Draft' and save the new link that you will receive from the EU Survey tool on your computer. Please note that without this new link you will not be able to access the draft again and continue replying to your questionnaire. Once you have submitted your response, you will be able to download a copy of your completed questionnaire.

Whenever there is a text field for a short description, you may answer in **maximum 5000 characters**.

Questions marked with an asterisk (*) are **mandatory**.

To avoid any confusion about the numbering of the questions, please note that you will be asked some questions only if you choose a particular reply to the respective previous one(s).

No statements, definitions, or questions in this public consultation may be interpreted as an official position of the European Commission. All definitions provided in this document are strictly for the purposes of this public consultation and are without prejudice to definitions the Commission may use under current or future EU law or in decisions.

In case you have questions, you can contact us via the following functional mailbox: COMP-VBER-REVIEW@ec.europa.eu;

If you encounter technical problems, please contact the Commission's [CENTRAL HELPDESK](#).

B. Policy options for revising the VBER and Vertical Guidelines

During the evaluation phase, the following areas of the rules were identified as not working well or as well as they could. During the impact assessment phase, the Commission is exploring policy options for revising the VBER and/or the Vertical Guidelines in these areas.

B.1 Exception for dual distribution

Agreements between competitors are not covered by the VBER and should be assessed under the competition rules for horizontal agreements. However, Article 2(4) of the VBER and paragraph 28 of the Vertical Guidelines provide an exception to this rule for dual distribution, namely the situation where a supplier sells its goods or services directly to end customers, thereby competing with its distributors at the retail level ("exception for dual distribution"). When the VBER was adopted, the retail activities of suppliers engaging in dual distribution were considered negligible and unlikely to give rise to horizontal competition concerns. However, the growth of e-commerce has enabled suppliers to engage in dual distribution more easily than in the past.

Against this background, the following policy options are considered as indicated in the Inception Impact Assessment regarding the exception for dual distribution (**Options 2 and 3 could be applied cumulatively**):

Option 1: no policy change;

Option 2: limiting the scope of the exception to scenarios that are unlikely to raise horizontal concerns by, for example, introducing a threshold based either on the parties' market shares in the retail market or on other metrics, and aligning the coverage of the exception with what is considered exemptible under the rules for horizontal agreements;

Option 3: extending the exception to dual distribution by wholesalers and/or importers;

Option 4: removing the exception from the VBER, thus requiring an individual assessment under Article 101 of the Treaty in all cases of dual distribution.

1 Do you or your suppliers engage in dual distribution?

Yes

No

No opinion

3 Based on your experience, do you consider that the exception for dual distribution set out in Article 2(4) of the VBER and paragraph 28 of the Vertical Guidelines should be maintained?

Yes

No

No opinion

5 Based on your experience/knowledge, what would be the impact on the following aspects if the exception for dual distribution was to be removed, which would mean that dual distribution was subject to a self-assessment in all cases?

Please use the follow-up question to give concrete examples of the likely impacts.

	Very negative	Negative	Neutral	Positive	Very positive	No opinion
a. Competition on the market						
b. Harmonised application of the competition rules by competition authorities and national courts						
c. Legal certainty for businesses						
d. Efficiency of distribution systems						
e. Cross-border trade						
f. Costs for businesses						
g. Consumer welfare						
h. Investment / Economic growth						
i. Sustainability objectives						

7 Do you have experience/knowledge of instances where situations of dual distribution currently covered by the exception may raise horizontal competition concerns?

Yes

No

No opinion

9 Based on your experience/knowledge, do you consider that an additional threshold should be introduced to ensure that only dual distribution situations that do not raise horizontal competition concerns are block-exempted?

Introduce an additional threshold based on the combined market share at the retail level (i.e. dual distribution would be block-exempted if the combined market share of the parties to the agreement does not exceed a certain level in the retail market)

Introduce an additional threshold, but not based on the combined market share at the retail level

No need for an additional threshold

No opinion

15 Based on your experience/knowledge, what would be the impact of introducing an additional threshold of 20% combined market share in the retail market (in line with the threshold in Article 3 of the Block Exemption Regulation for specialisation agreements) on the following aspects?

Please, use the follow-up question to give concrete examples of the likely impacts.

	Very negative	Negative	Neutral	Positive	Very positive	No opinion
a. Competition on the market						
b. Harmonised application of the competition rules by competition authorities and national courts						
c. Legal certainty for businesses						
d. Efficiency of distribution systems						
e. Cross-border trade						
f. Costs for businesses						
g. Consumer welfare						
h. Investment / Economic growth						
i. Sustainability objectives						

19 Do you have experience/knowledge of instances where agreements between a wholesaler, which is also active at the retail level, and its distributors could raise horizontal competition concerns?

Yes

No

No opinion

21 Do you have experience/knowledge of instances where agreements between an importer, which is also active at the retail level, and its distributors could raise horizontal competition concerns?

- Yes
- No
- No opinion

23 In your experience/knowledge, how would a potential extension of the scope of the exception for dual distribution to wholesalers impact the following aspects?

Please use the follow-up question to give concrete examples of the impacts.

	Very negative	Negative	Neutral	Positive	Very positive	No opinion
a. Competition on the market						
b. Harmonised application of the competition rules by competition authorities and national courts						
c. Legal certainty for businesses						
d. Efficiency of distribution systems						
e. Cross-border trade						
f. Costs for businesses						
g. Consumer welfare						
h. Investment / Economic growth						
i. Sustainability objectives						

25 Based on your experience/knowledge, how would a potential extension of the scope of the exception for dual distribution to importers impact the following aspects?

Please use the follow-up question to give concrete examples of the impacts.

	Very negative	Negative	Neutral	Positive	Very positive	No opinion
a. Competition on the market						
b. Harmonised application of the competition rules by competition authorities and national courts						
c. Legal certainty for businesses						
d. Efficiency of distribution systems						
e. Cross-border trade						
f. Costs for businesses						
g. Consumer welfare						
h. Investment / Economic growth						
i. Sustainability objectives						

27 Based your experience/knowledge, would any of the following actions be able to ensure that the scope of the exception for dual distribution is appropriate (i.e. instances that may raise horizontal competition concerns are not block-exempted and instances that do not raise horizontal competition concerns or that satisfy the criteria of Article 101(3) of the Treaty are block-exempted)? You can select more than one of the following options:

Introduce an additional threshold

Extend the scope of the exception to include wholesalers that engage in dual distribution

Extend the scope of the exception to include importers that engage in dual distribution

No action required, the current scope of the exception for dual distribution is appropriate

Remove the exception for dual distribution (dual distribution would no longer be block-exempted and would therefore require an individual effects-based assessment under Article 101 of the Treaty)

Other

30 Based on your knowledge/experience, please indicate whether you have any other comments or suggestions with regard to the exception for dual distribution. You may also provide additional information which may be relevant for this section (copies of any documents, reports, studies etc.). Please upload the information in files with a maximum size of 1 MB each, using the button below.

Only files of the type pdf, txt, doc, docx, odt, rtf are allowed

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B.2 Active sales restrictions

Agreements or concerted practices aimed at restricting the territory into which, or the customers to whom, a buyer can sell the contract goods or services (“territorial and customer restrictions”) are considered hardcore restrictions under the VBER (i.e. they cannot benefit from the safe harbour) and by object restrictions under Article 101 of the Treaty. This means that the buyer should generally be allowed to actively approach individual customers (“active sales”) and respond to unsolicited requests from individual customers (“passive sales”). While the current rules generally do not allow restrictions of passive sales (except as provided by Articles 4(b)(iii) and 4(b)(ii) of the VBER), they do permit restrictions of active sales in certain limited cases, notably to protect investments by exclusive distributors (i.e. active sales into exclusive territories can be restricted (4(b)(i) of the VBER) and to prevent sales by unauthorised distributors in territories where a supplier operates a selective distribution system (i.e. members of this system can be restricted from selling to non-members (4(b)(iii) of the VBER).

The evaluation has shown that the current rules are perceived as preventing suppliers from designing their distribution systems according to their business needs. The main issues raised in this context include the possibility of combining exclusive and selective distribution in the same or different territories. Moreover, the current rules are

considered as not allowing for the effective protection of selective distribution systems against sales from outside the territory in which the system is operated.

Against this background, the following policy options are proposed regarding the exception for active sales restrictions (**Options 2 and 3 could be applied cumulatively**):

Option 1: no policy change

Option 2: expanding the exceptions for active sales restrictions to give suppliers more flexibility to design their distribution systems according to their needs, in line with Article 101 of the Treaty;

Option 3: ensuring more effective protection of selective distribution systems by allowing restrictions on sales from outside the territory in which the selective distribution system is operated to unauthorised distributors inside that territory.

*** 31 Do you or your supplier(s) apply any of the active sales restrictions that are permitted by Article 4 of the VBER?**

Yes
No

*** 33 Based on your experience/knowledge, do you consider that the current rules allowing certain active sales restrictions should remain unchanged?**

Yes
No
No opinion

35 Do you have experience or knowledge of instances where the combination of exclusive and selective distribution systems in the same territory (e.g. an EU Member State) but at different levels of the distribution chain may not fully comply with the current rules (e.g. exclusivity at the wholesale level within a selective distribution system)?

Yes
No
No opinion

37 Do you have experience or knowledge of concrete benefits that are created by combining exclusive and selective distribution systems in the same territory (e.g. an EU Member State) at different levels of the distribution chain (e.g. exclusivity at the wholesale level within a selective distribution system)?

Yes
No
No opinion

39 Do you have experience or knowledge of instances where the combination of exclusive and selective distribution systems in different territories (e.g. different EU Member States, with exclusive distribution in Member State X and selective distribution in Member State Y) may not fully comply with the current rules?

Yes
No
No opinion

41 Do you have experience or knowledge of concrete benefits that are created by combining exclusive and selective distribution systems in the different territories (e.g. different EU Member States with exclusive distribution in Member State X and selective distribution in Member State Y)?

Yes
No
No opinion

43 Based on your experience/knowledge, what actions would ensure that the exceptions for active sales restrictions provide suppliers with more flexibility to design their distribution systems according to their needs?

allow exclusivity at the wholesale level within a selective distribution system
other action (please specify below)

44 Please explain your answer
5000 character(s) maximum

45 Based on your experience/knowledge, what would be the impact on the following aspects of allowing exclusivity at the wholesale level within a selective distribution system?

Please use the follow-up question to give concrete examples of the likely impacts.

	Very negative	Negative	Neutral	Positive	Very positive	No opinion
a. Competition on the market						
b. Harmonised application of the competition rules by competition authorities and national courts						
c. Legal certainty for businesses						
d. Efficiency of distribution systems						
e. Cross-border trade						
f. Costs for businesses						
g. Consumer welfare						
h. Investment / Economic growth						
i. Sustainability objectives						

46 Please explain your answers above and give concrete examples of the impacts you indicated. Please specify the letter of the row of the impact you are referring to.

5000 character(s) maximum

47 Do you have experience or knowledge of benefits that can result from restricting sales from outside the territory in which a selective distribution system is operated to unauthorised distributors inside that territory?

Yes

No

No opinion

49 Based on your experience/knowledge, what would be the impact on the following aspects of allowing restrictions on sales from outside the territory in which a selective distribution system is operated to unauthorised distributors inside that territory?

Please use the follow-up question to give concrete examples of the likely impacts.

	Very negative	Negative	Neutral	Positive	Very positive	No opinion
a. Competition on the market						
b. Harmonised application of the competition rules by competition authorities and national courts						
c. Legal certainty for businesses						
d. Efficiency of distribution systems						
e. Cross-border trade						
f. Costs for businesses						
g. Consumer welfare						
h. Investment / Economic growth						
i. Sustainability objectives						

50 Please explain your answers above and, if possible, give concrete examples of the impacts you indicated. Please specify the letter of the row of the impact you are referring to.

5000 character(s) maximum

51 Based on your experience/knowledge, which of the following actions could ensure an appropriate list of permitted active sales restrictions in the VBER (i.e. block-exempting restrictions that do not raise competition concerns or that satisfy the criteria of Article 101(3) of the Treaty, and not block-exempting restrictions that may raise competition concerns)? You can select more than one of the following options:

Extend the scope of the exceptions to allow exclusivity at the wholesale level within a selective distribution system

Extend the scope of the exceptions to allow restrictions on sales from outside the territory in which a selective distribution system is operated to unauthorised distributors inside that territory

Maintain the current rules

Other

54 Based on your experience, please provide any other comments or suggestions you may have on the rules on active sales restrictions. You may also provide additional information which may be relevant for this section (copies of any documents, reports, studies etc.). Please upload the information in documents with a maximum size of 1 MB each using the button below.

Only files of the type pdf, txt, doc, docx, odt, rtf are allowed

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B.3 Indirect restrictions of online sales

Online sales are generally considered a form of passive sales and restrictions preventing distributors from selling through the internet are considered hardcore restrictions that cannot benefit from the safe harbour and as by object restrictions under Article 101 of the Treaty. The current rules apply the same approach to two types of indirect measures that may make online sales more difficult. Paragraph 52(d) of the Vertical Guidelines provides that charging the same distributor a higher wholesale price for products intended to be sold online than for products sold offline (“dual pricing”) is a hardcore restriction. Paragraph 56 of the Vertical Guidelines states that the same applies to imposing criteria for online sales that are not overall equivalent to the criteria imposed for sales in physical shops (“equivalence principle”) in the context of selective distribution. A supplier may, for example, require delivery within specified timeframes in online stores as an equivalent to a requirement for immediate delivery in physical stores or require the creation of an online helpdesk for online stores as equivalent to the service provided in physical stores.

Over the last decade, online sales have developed into a well-functioning sales channel, whereas physical stores are facing increasing pressure. During the evaluation, stakeholders indicated that the rules on dual pricing prevent them from

incentivising investments, notably in physical stores, by not allowing them to differentiate wholesale prices based on the costs of each channel. Stakeholders also pointed to a lack of legal certainty in the application of the equivalence principle, as online and offline sales channels are inherently different, and it is difficult to assess when a divergence in the criteria used for each channel amounts to a hardcore restriction under the VBER.

Against that background, the following policy options are proposed for these two types of indirect restrictions of online sales **(Options 2 and 3 could be applied cumulatively)**:

Option 1: no policy change;

Option 2: no longer treating dual pricing as a hardcore restriction, with safeguards to be defined in line with the case law;

Option 3: no longer treating as a hardcore restriction the imposition of criteria for online sales that are not overall equivalent to the criteria imposed for sales in physical stores in a selective distribution system, with safeguards to be defined in line with the case law.

55 Do you have experience or knowledge of benefits that can be generated by dual pricing between online and offline sales?

Yes
No
No opinion

57 Do you have experience or knowledge of instances where dual pricing between online and offline sales would raise competition concerns?

Yes
No
No opinion

59 Based on your experience/knowledge, what would be the impact on the following aspects of block-exempting dual pricing between online and offline sales?

Please use the follow-up question to give concrete examples of the likely impacts.

	Very negative	Negative	Neutral	Positive	Very positive	No opinion
a. Competition on the market						
b. Harmonised application of the competition rules by competition authorities and national courts						
c. Legal certainty for businesses						
d. Efficiency of distribution systems						
e. Cross-border trade						
f. Costs for businesses						
g. Consumer welfare						
h. Investment / Economic growth						
i. Sustainability objectives						

61 Case law provides that prohibiting online sales is a hardcore restriction that cannot benefit from the safe harbour provided by the VBER. What would in your view be the appropriate safeguard to ensure that dual pricing between online and offline sales would not result in a prohibition of online sales?

5000 character(s) maximum

62 Do you have experience or knowledge of benefits that can be generated from the application of different criteria for online and offline sales in selective distribution systems?

- Yes
- No
- No opinion

64 Do you have experience or knowledge of instances where the application of different criteria for online and offline sales in selective distribution systems would raise competition concerns?

- Yes
- No
- No opinion

66 Based on your experience/knowledge, if the application of different criteria for online and offline sales in selective distribution systems were to be block-exempted, what would be the impact on the following aspects?

	Very negative	Negative	Neutral	Positive	Very positive	No opinion
a. Competition on the market						
b. Harmonised application of the competition rules by competition authorities and national courts						
c. Legal certainty for businesses						
d. Efficiency of distribution systems						
e. Cross-border trade						
f. Costs for businesses						
g. Consumer welfare						
h. Investment / Economic growth						
i. Sustainability objectives						

68 Case law provides that prohibiting online sales is a hardcore restriction that cannot benefit from the safe harbour provided by the VBER. In your view, what would be the appropriate safeguard to ensure that the application of different criteria for online and offline sales in a selective distribution system would not result in a prohibition of online sales?

5000 character(s) maximum

69 Based on your experience/knowledge, which of the following actions should be taken in relation to the two types of indirect restrictions on online sales mentioned in this section?

You can select more than one of the following options:

No longer treating dual pricing between online and offline sales as a hardcore restriction, with safeguards to be defined in line with the case law

No longer treating the application of different criteria for online and offline sales in selective distribution systems as a hardcore restriction, with safeguards to be defined in line with the case law

Maintaining the current rules: these types of indirect restrictions of online sales should continue to be treated as hardcore restrictions

Other

70 Please explain your answer, in particular why you consider your preferred action(s) to be more appropriate than other possible actions.

5000 character(s) maximum

71 Please explain your answer, indicating what would be the appropriate action and its likely impact on the aspects mentioned in the table on question 66.

5000 character(s) maximum

72 Would your reply to this question be different, if the rules on active sales restrictions included more permitted exceptions (see section B.2 above)?

Yes

No

No opinion

74 Based on your experience/knowledge, please provide any other comments or suggestions you may have on the rules for these two types of indirect restrictions on online sales. You may also provide additional information which may be relevant for this section (copies of any documents, reports, studies etc.). Please upload the information in files with a maximum size of 1 MB each, using the button below.

Only files of the type pdf, txt, doc, docx, odt, rtf are allowed

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B.4 Parity obligations

Parity clauses require a company to offer the same or better conditions to its contract party (for example, an online platform) as it offers on certain other sales channels. So-called wide parity clauses generally relate to the conditions offered on all sales channel (including other platforms and the company's direct sales channels), whereas so-called narrow parity clauses generally relate only to the company's direct sales channels (for example, the company's website).

Parity obligations can be agreed at wholesale or retail level, and they can relate to price or non-price conditions (e.g. inventory or the availability of goods or services).

All types of parity obligations are currently block-exempted by the VBER. The evaluation showed an increase in the use of parity obligations across sectors, notably by online platforms. National competition authorities and courts have identified anti-competitive effects of obligations that require parity with other indirect sales or marketing channels (e.g. other platforms or other online or offline intermediaries).

Regarding parity obligations, the following policy options are proposed:

Option 1: no policy change;

Option 2: removing the benefit of the block exemption for obligations that require parity relative to specific types of sales channels, by including such obligations in the list of excluded restrictions (Article 5 VBER). These obligations would thus require an individual effects-based assessment under Article 101 of the Treaty. Conversely, parity obligations relating to other types of sales channels would continue to be block-exempted, on the basis that they are more likely to create efficiencies that satisfy the conditions of Article 101(3) of the Treaty. For example, the benefit of the block exemption could be removed for parity obligations that relate to indirect sales and marketing channels, including platforms and other intermediaries, while maintaining this benefit for parity obligations that relate to direct sales and marketing channels, including own websites;

Option 3: removing the benefit of the block exemption for all types of parity obligations, by including them in the list of excluded restrictions (Article 5 VBER), thus requiring an individual effects-based assessment in all cases.

*** 75 Do you have experience/knowledge of parity obligations?**

Yes
No

*** 78 Do you have experience or knowledge of instances where parity obligations raise competition concerns?**

Yes
No

*** 86 Do you have experience or knowledge of instances where parity obligations create benefits?**

Yes

No

96 Based on your experience/knowledge, what would be the impact on the following aspects of removing the benefit of the block exemption for parity obligations that relate to indirect sales/marketing channels?

	Very negative	Negative	Neutral	Positive	Very positive	No opinion
a. Competition on the market						
b. Harmonised application of the competition rules by competition authorities and national courts						
c. Legal certainty for businesses						
d. Efficiency of distribution systems						
e. Costs for businesses						
f. Consumer welfare						
g. Investment / Economic growth						
h. Sustainability objectives						

98 In your opinion, what would be the impact on the following aspects of removing the benefit of the block exemption for parity obligations that relate to direct sales/marketing channels?

	Very negative	Negative	Neutral	Positive	Very positive	No opinion
a. Competition on the market						
b. Harmonised application of the competition rules by competition authorities and national courts						
c. Legal certainty for businesses						
d. Efficiency of distribution systems						
e. Costs for businesses						
f. Consumer welfare						
g. Investment / Economic growth						
h. Sustainability objectives						

100 Based on your experience, what would be the impact on the following aspects of removing the benefit of the block exemption for all parity obligations?

	Very negative	Negative	Neutral	Positive	Very positive	No opinion
a. Competition on the market						
b. Harmonised application of the competition rules by competition authorities and national courts						
c. Legal certainty for businesses						
d. Efficiency of distribution systems						
e. Costs for businesses						
f. Consumer welfare						
g. Investment / Economic growth						
h. Sustainability objectives						

B.5 Other aspects

B.5.1. Resale price maintenance (“RPM”) refers to restrictions that set a fixed or minimum resale price to be observed by the buyer. Given that RPM eliminates price competition between a supplier’s distributors and, based on enforcement experience, is generally unlikely to lead to efficiency gains, it is considered a hardcore restriction under the VBER (i.e. it cannot benefit from the safe harbour) and a by object restriction under Article 101 of the Treaty. However, the Vertical Guidelines recognise that supplier-driven RPM may, in certain circumstances, lead to efficiencies, e.g. to achieve an expansion of demand during the launch of a new product or to avoid the undercutting of a coordinated short-term low price campaign in a franchising system.

The evaluation has identified a lack of clarity and guidance as regards the conditions under which such efficiencies can be argued and the evidence needed to meet the threshold for an individual exemption under Article 101(3) of the Treaty. Stakeholders pointed out that, as a result, companies prefer not to run the financial and reputational risk of including RPM restrictions in their vertical agreements.

102 Taking into account that RPM is considered a hardcore restriction under the VBER and that, as stated in the Vertical Guidelines, RPM may exceptionally lead to efficiencies, do you have experience or knowledge of concrete instances where RPM has led to efficiencies, or could have led to efficiencies if the parties had not refrained from using RPM?

Yes, I have experience or knowledge of concrete instances where RPM has led to efficiencies

Yes, I have experience or knowledge of concrete instances where RPM could have led to efficiencies if the parties had not refrained from using RPM

No

No opinion

104 The evaluation has shown a lack of clarity and guidance as regards the conditions under which efficiencies can be argued for the use of RPM and the evidence needed for this purpose, in your view, what measures could be taken to address this lack of clarity and guidance?

Please substantiate your reply.

5000 character(s) maximum

B.5.2. Non-compete obligations of an indefinite duration or exceeding 5 years are excluded from the benefit of the VBER and therefore require an individual effects-based assessment under Article 101 of the Treaty. Non-compete obligations that are tacitly renewable beyond a period of 5 years are deemed to have been concluded for an indefinite duration. The evaluation has indicated that this broad exclusion of non-compete clauses from the benefit of the block exemption may result in false negatives, by covering non-compete obligations that satisfy the conditions of Article 101(3) of the Treaty. In particular, the exclusion of tacitly renewable non-compete obligations could be considered unjustified, to the extent that the buyer is able to terminate or renegotiate the agreement at any time with a reasonable notice period and at reasonable cost. Moreover, the overly broad scope of the exclusion is considered to create an unnecessary administrative burden and additional transaction costs for businesses, since it forces them to periodically renegotiate their contracts despite there being a willingness on both sides to continue the contractual relationship beyond five years.

In this context, the Commission is exploring the possibility of block-exempting tacitly renewable non-compete obligations for the duration of the agreement, provided that the buyer can terminate or renegotiate the agreement at any time with a reasonable notice period and at reasonable cost.

105 Do you have experience or knowledge of instances where it would not be appropriate to block-exempt a tacitly renewable non-compete obligation?

Yes
No
No opinion

B.5.3 Sustainability agreements

In recent years, there have been increasing discussions about the compatibility of agreements between supply chain operators to foster sustainability objectives with Article 101 of the Treaty. No specific issues relating to sustainability agreements in the vertical supply chain were identified during the evaluation. However, in line with the objectives of the European Green Deal, specific considerations as regards the impact of the current framework for vertical agreements on sustainability objectives will be taken into account in the impact assessment phase of the VBER review.

107 Do you have experience or knowledge of situations where the current rules create obstacles for vertical agreements that pursue sustainability objectives?

Yes
No
No opinion

109 Do you see a need for specific guidance on vertical agreements that pursue sustainability objectives? If so, what type of guidance would be necessary? Please explain your reply. What particular aspects should this guidance cover?
5000 character(s) maximum

B.5.4. Impact of the Covid crisis

The COVID-19 crisis that began in March 2020 has had a significant impact on the economy. In particular, there appears to have been a significant increase in e-commerce as a result of the measures taken to contain the spread of the pandemic. Given that these developments are very recent, they could not be taken into account during the evaluation phase of the VBER review. However, as indicated in the staff working document, in view of their importance, the effects of the COVID-19 crisis on the supply and distribution arrangements should be evaluated and, if possible, quantified at this stage of the review of the rules.

110 Do you have experience or knowledge regarding the impact of the Covid-19 crisis on market trends that are relevant for the revision of the VBER and Vertical Guidelines (e.g. innovation in or impacts on distribution models and strategies or on consumer behaviour)?

Yes
No
No opinion

112 Please feel free to upload a concise document, such as a position paper, explaining your views in more detail or including additional information and data. Please note that the uploaded document will be published alongside your response to the questionnaire which is the essential input to this open public consultation. The document is an optional complement and serves as additional background reading to better understand your position.

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113 Do you have any further comments on this initiative on aspects not covered by the previous questions?

3000 character(s) maximum

*** 114 Please indicate whether the Commission services may contact you for further details on the information submitted, if required.**

Yes

No

If you're human, leave this field blank