

Consultation response

AmCham EU high-level principles for the Vertical Block Exemption Regulation

AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €3 trillion in 2020, directly supports more than 4.8 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

Executive summary

The American Chamber of Commerce to the European Union (AmCham EU) supports the European Commission's conclusion, following its consultation on policy options, with respect to the vertical block exemption regulation (VBER) and related guidelines (VGL) and concurs that the VBER and VGL contribute significantly to legal certainty and uniform application of EU competition law to vertical agreements. AmCham EU appreciates the Commission's efforts to update the VBER and VGL, notably to reflect the evolution of online commerce and legal developments in relation to vertical agreements over the past 10 years. AmCham EU is grateful for the opportunity to provide comments to the draft revised VBER and VGL, with positions which in many respects are consistent with AmCham EU's comments in response to the public consultation of May 2021.

Without revisiting all of AmCham EU's previous comments, AmCham EU offers the following suggestions as the European Commission finalizes the new VBER and VGL. These suggestions relate to four main areas: definition of relevant markets and shares and the treatment of information exchanges in the dual distribution context, resale price maintenance (RPM) and hybrid platforms.

In these as in other areas, AmCham EU members share the Commission's objective of providing the greatest possible degree of transparency and legal certainty to assist businesses in understanding and complying with EU antitrust law.

High-level principles

Market definition and shares

As in the past, the VBER's scope is defined in part by reference to the market shares of participants to vertical cooperation agreements. Proposed provisions in relation to information exchange in the dual distribution context also draw distinctions based on participants' market shares. Defining relevant antitrust markets has always been a complex exercise, but the growth of online commerce and the blurring of lines between online and traditional distribution channels has added further complexity.

AmCham EU encourages the European Commission to provide further guidance on its approach to the definition of relevant markets and measurement of market shares. While such guidance could be provided in the context of the European Commission's review of its 1997 market definition notice, including a section on market definition in the VGL would ensure that the required guidance is available in parallel with the application of the new VBER and VGL and that all market definition issues relevant to the VBER and VGL are fully addressed. Moreover, any revisions to the 1997 market definition notice should be drafted with the revised VBER and VGL in mind.

Dual distribution

The proposed VBER would limit the exemption (above a 10% market share) for exchanges of information where suppliers employ dual distribution strategies. Sharing of information between suppliers and their distributors

and retailers is important to the success of suppliers' distribution strategies and promotes inter-brand competition and ultimately benefits consumers.

As stated in AmCham EU's previous submissions, we believe that the VBER should continue to exempt dual distribution systems with no exclusion for information sharing arrangements. However, should the Commission maintain the proposed approach, stakeholders will require additional guidance on the treatment of information sharing arrangements in this context. Neither the VGL nor the current guidelines on the application of EU antitrust law to horizontal cooperation agreements provides guidance on the assessment of information sharing arrangements in this context. AmCham EU is mindful that the Commission has included questions on information sharing in the dual distribution context in its ongoing consultation on its horizontal block exemption regulations and related guidelines. However, AmCham EU respectfully suggests that relevant guidance be included in the VGL to ensure that such guidance is available to stakeholders on a timely basis and that all relevant issues are fully addressed.

Also, in this area, the Commission has created a new exemption for wholesalers and importers, but the Commission has not provided any definitions for these terms and one can easily confuse the concept of wholesaler with a distributor. Again, AmCham EU respectfully recommends that the Commission provide more guidance in the final VBER and VGL.

Resale price maintenance

AmCham EU welcomes the Commission's initiative to consolidate and expand the treatment of RPM in the proposed VGL and agrees with the Commission's assessment that RPM can be pro-competitive, particularly in the specific cases discussed in the VGL. In light of that recognition, AmCham EU is surprised that the proposed VBER continues to treat all RPM as a hardcore restriction. The effect of this approach will be to deter market participants from employing RPM even in the specific circumstances in which the Commission itself recognizes that RPM can be pro-competitive.

For the sake of consistency, and to avoid unintended consequences, AmCham EU respectfully recommends that the specific situations in which RPM is recognized as pro-competitive be specified as exceptions in Article 4(a) or that RPM be treated as an excluded restriction under Article 5 rather than as a hardcore restriction. Moreover, the Commission should provide guidance on the VGL – for instance in paragraph 182 - about the conditions for the application of Art. 101(3) TFEU to exempt RPM in general and, at least, in those specific cases identified by the Commission as eligible for exemption

Agency

AmCham EU notes that, while the proposed revisions to the materials on agency are extensive, they are strongly focused on the physical world, and little has been done to update the pre-existing guidance in a manner suited to the digital age. AmCham EU therefore respectfully requests that more attention be devoted in the VGL to the risks that may or may not be taken by an agent in the field of digital goods and services. In particular, AmCham EU asks that the scope of the sole proposed new paragraph on "agency and the online platform economy" (paragraph 44) be reconsidered. The current draft implies that no online intermediary should ever qualify as an agent, irrespective of its nature, size, activities or degree of market power; such an assumption is unreasonably broad and could preclude producers of digital goods and services from accessing valid routes to market. More clarity and guidance is therefore needed on the circumstances in which digital providers can lawfully use agency agreements to deliver virtual product to customers.

Hybrid platforms

The proposed VBER and VGL take a new, approach to hybrid platforms that was not specifically addressed in previous consultations. Article 1(d) and Article 2(7) of the draft VBER exempt the vertical agreements of hybrid platforms from Article 101(1) TFEU only under narrow circumstances, if at all. Article 2(7) withdraws the benefit of the block exemption for hybrid platforms that enter into agreements with "competing undertakings" on the retail level (for example, with other retailers selling on the platform).

AmCham EU notes that the proposed change is not supported by case law and would result in significant legal uncertainty. As a result, AmCham EU respectfully requests the deletion of Article 2(7) (and making conforming changes elsewhere in the VBER and VGL).