

Commission Staff Working Document Evaluation of the Vehicle Block Exemption Regulation

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The purpose of the evaluation is to gather evidence on the functioning of the VBER, together with the Vertical Guidelines; this evaluation will serve as basis for the Commission to decide whether it should let the VBER lapse, renew or revise it.

The evaluation has shown that the VBER, together with the Vertical Guidelines, has overall achieved its general objective of facilitating the enforcement work of the Commission, NCAs and national courts, as well as helping businesses conduct the self-assessment of their vertical agreements, and that its specific objectives are still relevant. Nonetheless, the evaluation has also shown that the specific objectives of providing legal certainty to stakeholders and providing a common framework of assessment for NCAs and national courts have not been fully met.

The evaluation has pointed to some more general issues as regards the VBER and Vertical Guidelines, which need to be taken into account when considering any next steps following the evaluation. In particular, these issues regard: market developments, complexity of the rules, lack of legal clarity, the need of a common framework assessment for NCAs.

Overview of issues identified during the evaluation process

Analysing the issues that emerge from the study, we can highlight a few that are of major concern for CECRA members and are object of CECRA's advocacy's strategy.

Agency agreements: issues emerged from the survey mainly regarding the following topics: the definition of agent, the application of the agency exception to online platforms, the possibility of applying the agency exception to tripartite relationships between suppliers, intermediaries and final customers, the 5-year limitation for non-compete clauses.

Dual distribution: stakeholders raised the following issues regarding dual distribution: issue of information exchanges; respondents from the distribution side of the motor vehicle sector argued that the increase of direct sales by manufacturers (and the corresponding decrease of sales by distributors) has an impact on the viability of the investments they are required to make as dealer.

NCAs indicated that there is a lack of clarity about the relationship between hybrid platforms, and the sellers present on such platforms.

Market share thresholds: Stakeholders raised issues concerning difficulties assessing the market share of the supplier and the buyer; this assessment is challenging and costly for businesses. Other respondents considered the 30% threshold as inadequate to properly capture vertical relations.

Some respondents in the motor vehicle sector pointed to a lack of coherence between the market share thresholds in the VBER and those applying to selective distribution systems. For these respondents, the VBER should exempt selective distribution when the market share of the supplier is above 30% but does not exceed 40%.

Parity Clauses: Most SMEs in the mass market sector (both suppliers and retailers) see parity clauses as a way to reduce frequent negotiations on terms or prices, but also as a means of giving preferential treatment to their business partners and ensure their loyalty. From the perspective of retailers, parity clauses are mainly used to avoid that customers visit their brick-and-mortar stores and then finalise the purchase online. The evaluation also showed a divergent treatment of retail parity clauses by NCAs.

Non-compete obligations: For some respondents, limiting the application of the VBER to non-compete obligations with a maximum duration of five years is not economically justified since businesses often enter into longer commercial relationships, coupled with long-term investments.

Franchising: Franchisor side considered that a post-term non-compete obligation that is limited to one year and does not cover the entire exclusive territory allocated to the franchisee, and does not provide for sufficient protection of know-how. In contrast, respondents representing the franchisees argued that post-term non-compete clauses are disproportionate, even if limited to one year.

General findings

Selective Distribution: All stakeholders, unanimously confirmed the significant increase in the use of selective distribution at different levels of the vertical supply and distribution chain, covering an increasing number of geographical areas and products over time. The evidence gathered on this topic indicates that clarifications is needed to ensure a more coherent application of the rules across different Member States. Concerning NCAs, the evidence collected by the evaluation study confirms that they approach differently certain restrictions found in selective distribution agreements.

VBER and the Vertical Guidelines are perceived to lack guidance on the resale of spare parts and notably on the question of whether the resale of spare parts can be restricted to authorised retailers.

Online Sales: VBER does not have a dedicated section dealing with online sales, which reduces the legal certainty of Article 4 of the VBER as regards these restrictions and leads to legal uncertainty.

The Brick-and-mortar requirement is necessary to provide offline distributors with the necessary incentives to invest in promoting a product by preventing free-riding by online distributors that focus mainly on price and do not offer comparable pre-sales services. The costs incurred by an offline distributor are significantly higher than the costs of an online distributor.

The evaluation pointed to discrepancies in the assessment by NCAs of some restrictions on the use of online marketplaces.

Data: Some respondents stressed the fact that data has become an essential input for online services, production processes, logistics, smart products and artificial intelligence. Given that data has a significant impact on their competitiveness, businesses depend on timely access to it. Moreover, data is critical to ensuring healthy inter-brand competition. More specifically, both suppliers and certain service providers increasingly ask retailers to share relevant business data with them. Some suppliers also try to obtain data on end customers and their purchasing behaviour. In light of this, stakeholders expressed the need to clarify the rules on data collection and information exchange in distribution agreements.

Spare parts: In sectors where OEMs have sufficient market power to put pressure on spare parts manufacturers, OEMs make them refuse the supply of independent repairers and service providers. Consequently, independent repairers and service providers are not in a position to assert their rights. Some respondents proposed as a countermeasure to add independent wholesalers to the list of independent market players that should have unrestrained access to spare parts could counteract any such market power by OEMs.