



# Computer & Communications Industry Association (CCIA) Submission to European Commission on Consultation on Draft revised Regulation on vertical agreements and vertical guidelines 17 September 2021

The Computer & Communications Industry Association (“CCIA”) welcomes this opportunity to provide comments to the European Commission (“EC”) public consultation on the draft revised Regulation on vertical agreements (“VBER”) and vertical guidelines (“VGL”).<sup>1</sup> The European Commission has made extensive plans to support digitisation of the economy and deepen the single digital markets.<sup>2</sup> As part of Europe’s broad regulatory framework, the VBER and VGL will set terms of trading between suppliers and their retailers or distributors for the next 15 years, both offline and online. They are meant as a reflection of current legal and economic thinking around vertical agreements, providing a safe harbour only for vertical agreements “for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty” (recital 5 of the draft VBER). CCIA is concerned that certain aspects of the VBER and VGL drafts presented on 9 July may not meet this criteria, and if implemented may inadvertently undermine Europe’s digital goals, making European retailers less competitive at the expense of European consumers.

## 1. Introduction

Digital distribution models have been growing over the last years,<sup>3</sup> and will continue to grow. Consumers benefit from an abundance of choice on digital shelves equally available across the entire single market. Prices are driven down by vigorous competition across the EU between suppliers, on digital intermediaries that make it easier than ever for consumers to learn about the products, services, and sellers they choose to deal with. Digital intermediaries pass on the benefits of their scale, network and learning effects, and dramatically lower transaction costs for small and medium sized enterprises (“SMEs”). These benefits are particularly important given the existence of supply constraints in certain European geographies.<sup>4</sup>

The Commission’s proposed revisions would make it easier for big brands and suppliers to discriminate against online sales channels, on both price and non-price terms, and to carve up the single market. The draft VBER would relax rules currently prohibiting suppliers from imposing higher prices on online sales channels or imposing stricter criteria on online sellers seeking

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<sup>1</sup> Commission “Public consultation on the draft revised Regulation on vertical agreements and vertical guidelines” (Launched 9 July 2021), available [here](#).

<sup>2</sup> European Commission “2030 Digital Compass: the European way for the Digital Decade” (9 March 2021), available [here](#).

<sup>3</sup> Eurostat “E-commerce statistics for individuals” (accessed 17 Sep 2021), available [here](#).

<sup>4</sup> DG GROW “Study on territorial supply constraints in the EU retail sector” (19 November 2020), available [here](#).

admission into selective distribution systems. CCIA disagrees with the Commission's desire to "increase the joint profit of the vertical supply and distribution chain"<sup>5</sup> by limiting retailers' freedom to compete online. Such reductions in online competition will come at the expense of consumers.

These changes also send a negative signal to national competition authorities where prohibitions against online sales restrictions are already underenforced, inadvertently reducing legal certainty and increasing the scope for national fragmentation. For Europe to achieve its digital ambitions, it needs a deeply integrated digital single market with increased use of digital services, including e-commerce. CCIA suggests below amendments to the draft VBER and draft VGL to help Europe more quickly achieve its digital goals. In particular, we are critical of (1) the classification of online intermediation services as suppliers and not agents, (2) the widened flexibility on online market place bans, (2) the loss of the equivalence principle, (3) the policy reversal on dual pricing, (4) the unknown effect of the pass-on provisions, and (5) the discriminatory exclusion of hybrid platforms.

## 2. Online Intermediation Services and Agency

Article 1(d) of the VBER and para. 44 of the VGL state that online intermediation services are to be treated as suppliers under the VBER, and that they "can therefore in principle not qualify as agents for the purpose of applying Article 101(1)". CCIA notes that there are a wide range of different online intermediary business models, both in relation to e-commerce but also other sectors of the economy, each with varying degrees and allocations of control, risk, reward and independence with respect to their business users. For example, new innovative delivery platforms that offer a delivery service to customers of brick & mortar retailers would potentially be considered suppliers, limiting their business model flexibility and reducing competition. Codifying a presumption for competitive analysis would be unhelpful and lead to assessment errors, particularly as markets are likely to evolve over time.

CCIA suggests para. 44 of the VGL be revised to state that: "Undertakings providing online intermediation services are categorised as suppliers under the VBER (see also paragraphs (60) to (64) of these Guidelines) ~~and can therefore in principle not qualify as agents for the purpose of applying Article 101(1)~~. Moreover, many providers of online intermediation services generally act as independent economic operators and not as part of the undertakings of the sellers to which they provide online intermediation services, and would accordingly not qualify as agents for the purpose of applying Article 101(1)."

## 3. Online Marketplace Bans in Selective Distribution Systems

Under existing court precedent, selective distribution systems ("SDS") are permissible only if they meet three cumulative criteria: (i) resellers are chosen on the basis of objective criteria of a qualitative nature that are laid down uniformly for all potential resellers and not applied in a

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<sup>5</sup> Draft VBER, available [here](#), recital 13.

discriminatory fashion, (ii) the characteristics of the contract goods or services necessitate a selective distribution network in order to preserve their quality and ensure their proper use, and (iii) the criteria laid down do not go beyond what is necessary.

By law, this flexibility is only afforded to selective distribution systems because the limitations incorporated are necessary to preserve pro-competitive benefits related to the unique quality of the goods which would be lost in other distribution models. Whether online channels can provide an equivalent service to offline channels is fact-specific and not easy to apply, as recognised by national competition authorities.<sup>6</sup> CCIA's submission to the Commission's inception impact assessment consultation highlighted that fact-specific assessment is increasingly necessary because digital ecosystems are increasingly capable of addressing concerns about how products are displayed and how to ensure their proper use (e.g. with the use of augmented reality and other virtual technologies). At the same time, the Commission's own e-commerce sector inquiry found that SDS are often used as cover for the imposition of restrictions that go beyond what is necessary to maintain the integrity of the product.<sup>7</sup> Given these evolving technologies, the risks inherent to an SDS, and the possibility of qualitative criteria to distinguish between marketplaces (and as recognised as sufficient to address similar concerns in the context of digital advertising), CCIA submits that blanket marketplace bans generally do not fulfil the criteria for a pro-competitive SDS, and certainly not "with sufficient certainty" that they should benefit from block exemption.

CCIA suggests reducing the risk of anticompetitive marketplace bans by revising para. 194 of the draft VGL to say that "... a restriction on the use of a specific online sales channel, such as online marketplaces, or setting quality standards for selling online, can benefit from the block exemption, irrespective of the distribution system used by the supplier in as far as such restriction does not, directly or indirectly, in isolation or combination with other factors, have as its object or effect, to prevent, directly or indirectly, the buyers or their customers from effectively using the internet for the purposes of selling their goods or services online or from effectively using one or more online advertising channels".

The draft VGL recognises that market place bans clearly go beyond what is necessary in a number of cases. These include "where a supplier includes the operator of an online marketplace as an authorised distributor in its selective distribution system, or, where it restricts the use of online marketplaces by some authorised distributors but not others, or where it restricts the use of an online marketplace, but uses that marketplace itself to distribute the contract goods or services".<sup>8</sup> CCIA appreciates the draft VGL's acknowledgement that such practices "appear unlikely to fulfil the requirements of appropriateness and necessity". However, CCIA considers that such descriptive language is ambiguous, and ignores the experience of NCAs regarding SDSs. This

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<sup>6</sup> NCA Consultation Replies, available [here](#), pg. 4 ("In their replies, NCAs acknowledged that the equivalence principle is difficult to apply in practice.")

<sup>7</sup> Commission "Final report on the E-commerce Sector Inquiry" (COM (2017) 229 Final, 10 May 2017), available [here](#), para. 252.

<sup>8</sup> Draft VGL, available [here](#), para. 319.

language would likely lead to diverging national interpretations and lax enforcement against demonstrably anticompetitive restrictions.

CCIA suggests that para. 319 of the draft VGL be revised to say that in the enumerated circumstances “... restrictions on the use of such online marketplaces ~~would appear unlikely to~~ generally do not fulfil the requirements of appropriateness and necessity, and therefore fall outside the application of the Vertical Block Exemption Regulation.”

#### 4. The Equivalence Principle

The current VGL “regards as a hardcore restriction any obligations which dissuade appointed dealers from using the internet to reach more and different customers by imposing criteria for online sales which are not overall equivalent to the criteria imposed for the sales from the brick and mortar shop”.<sup>9</sup> This “equivalence principle” has been a valuable limitation on attempts by big brands and suppliers to distort competition between online and offline channels. The draft VGL weakens this limitation, explicitly allowing for the imposition of different qualitative criteria and discrimination between online and offline channels.<sup>10</sup> The removal of the equivalence principle would relax rules on online sales restrictions, but it is not clear that there is “sufficient certainty” that such restrictions satisfy the conditions of Article 101(3) TFEU. Indeed, there is no broad consensus between competition authorities in the EEA as to their effects, with many maintaining that they should be “hardcore” restrictions.<sup>11</sup> Furthermore, the draft VGL’s differentiated treatment of restrictions on online sales channels, and restrictions on digital advertising<sup>12</sup> and price comparison tools<sup>13</sup>, is somewhat paradoxical.

Short of reinstating the equivalence principle, CCIA suggests that para. 188 of the draft VGL be revised to say: “ ... a restriction capable of significantly diminishing ~~the overall~~ a buyers’ amount of online sales in the market constitutes a hardcore restriction of active or passive sales within the meaning of Article 4(b) to (d) VBER.”

#### 5. Dual Pricing

The current VBER and VGL condemn dual pricing as a “hardcore restriction of passive selling given the capability of these restrictions to limit the distributor’s access to a greater number and variety of customers ”.<sup>14</sup> The draft VGL represents a dramatic 180 degree reversal of this long-standing policy. Para 195 of the VGL exempts dual pricing where “in so far as it has as its object to

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<sup>9</sup> Commission “Guidelines on Vertical Restraints” (“Current VGL”) (19 May 2010), available [here](#), para. 56 (“This does not mean that the criteria imposed for online sales must be identical to those imposed for offline sales , but rather that they should pursue the same objectives and achieve comparable results and that the difference between the criteria must be justified by the different nature of these two distribution modes.”)

<sup>10</sup> See e.g. Draft VGL, para. 221.

<sup>11</sup> NCA Consultation Replies, available [here](#), pg. 2.

<sup>12</sup> Draft VGL, para. 196.

<sup>13</sup> Draft VGL, paras. 323-333.

<sup>14</sup> Commission “Guidelines on Vertical Restraints” (“Current VGL”) (19 May 2010), available [here](#), para. 52.

incentivise or reward the appropriate level of investments respectively made online and offline.” National Competition Authorities have already raised concerns that it is “not sufficiently certain that dual pricing would typically fulfil the four conditions of Article 101(3) TFEU”, and “a majority of NCAs supported maintaining the status quo, which classifies dual pricing and breaches of the equivalence principle as hardcore restrictions”.<sup>15</sup> CCIA agrees with the majority of NCAs who support maintaining the status quo. In particular, the ambiguous and broad safe-harbour for dual pricing introduced in para. 319 of the VGL (i.e. where the dual pricing “has as its object to incentivise or reward the appropriate level of investments respectively made online and offline”) will exacerbate the already existing underenforcement against dual pricing.

Reversing the Commission’s policy towards dual pricing as proposed will negatively impact the growth of e-commerce in Europe, and disproportionately harm SMEs. Enabling price discrimination by distribution channel will in reality mean multi-channel SMEs having to account to brands for their stock and will be unable to adjust to customer demand by making their “offline stock” available through online sales channels without paying a penalty (the difference between the two prices). Limiting retail flexibility in this way will increase logistics and storage costs, reduce competitiveness, and ultimately harm consumers. For example, if this were the rule before Covid-19 then SMEs with stock for offline sale would have been effectively prevented from selling this stock online, with disastrous consequences. This policy change also forces retailers to account to suppliers for their costs (“differences in the costs incurred in each channel”). This could ultimately amount to or encourage hub-and-spoke information exchange and price harmonisation.

There are also harmful consequences for those consumers who prefer to shop online, whether because of lack of mobility, disability, rural location, or lack of time. Less enforcement against anti-competitive dual pricing means higher online prices and less convenience, disproportionately harming the most vulnerable and disadvantaged. This will also reduce competitive pressure on offline channels, leading to an overall price rise which will make all European citizens poorer. Ultimately, this will delay Europe’s digitisation ambitions as fewer consumers will use digital services, and new e-commerce companies in Europe will have a smaller customer base.

Furthermore, it is not clear how this policy change will actually serve to incentivise retail investments. Any supplier is free to set its sales prices to its resellers. In doing so, the supplier can take account of the characteristics of the reseller, its prior investments and its sales channels. There is no obligation for a supplier to have a single wholesale price for all its resellers or for all territories. Similarly, there is no obligation for the supplier to sell its products to all interested resellers. This already allows the supplier to factor in characteristics, such as online and offline sales, when deciding about its price level and contractual partners.

Short of eliminating this discriminatory policy reversal, CCIA suggests that para. 319 of the draft VGL be revised to say: “A requirement that the same buyer pays a different price for products

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<sup>15</sup> NCA Consultation Replies, available [here](#), pgs. 3-4 (“Furthermore, they argued that, if dual pricing was no longer considered a hardcore restriction, it would be difficult to show in practice that an individual dual pricing practice has anti-competitive effects.”)

intended to be resold online than for products intended to be resold offline can benefit from the safe harbour of the VBER, in so far as it has as its object to incentivise or reward the appropriate level of investments respectively made online and offline, it is necessary to do so, and it does not distort competition between online and offline channels. Such difference in price should be strictly related to the differences in the costs incurred in each channel by the distributors at retail level. To that end, the wholesale price difference should ~~take into account~~ be based on the different investments and costs incurred by a hybrid distributor so as to incentivise or reward that hybrid distributor for the appropriate level of investments respectively made online and offline, as where the wholesale price difference is entirely unrelated to the difference in costs incurred in each channel or where the sale of excess stock is concerned, such price difference ~~is unlikely to~~ will not bring about efficiency-enhancing effects. Therefore, where the wholesale price difference has as its object effect to prevent limit the effective use of the internet for the purposes of selling online, or to limit effective stock management, it amounts to a hardcore restriction, as set out in paragraph (188) of these Guidelines. ~~This would, in particular, be the case where the price difference makes the effective use of the internet for the purposes of selling online unprofitable or financially not sustainable.~~

## 6. Extension of Restrictions and Pass-On Provisions

The draft VBER would allow the "pass on" of the active sales restriction of the exclusive sellers to all customers "that have entered into a distribution agreement with the supplier or with a party that was given distribution rights by the supplier."<sup>16</sup> The supplier could thereby require all sellers in an exclusive distribution network, a selective distribution network, and outside of such networks, to adhere to direct and indirect restrictions on online sales.

Indirect restriction where a brand requires an online intermediary to exclude unauthorised sellers from their platforms (often called "gating"), in effect makes them responsible for enforcing these restrictions. CCIA cautions that enabling these restrictions further, given the current level of underenforcement, is likely to discourage the use of online sales channels in Europe. Even the expert report prepared by the Contrast economist group for the European Commission suggests that the efficiencies of such "pass on" obligations cannot be determined with sufficient certainty to justify extending the VBER safe harbour to them.<sup>17</sup> CCIA suggests subjecting such "pass on" obligations to individual assessment until their pro-competitive benefits are sufficiently certain.

## 7. The Exclusion of Hybrid Platforms from the benefits of VBER

Online intermediaries, including those that operate Hybrid Platforms, are drivers of SME growth and competitiveness, granting SMEs access to tremendous efficiencies of scale and scope.<sup>18</sup>

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<sup>16</sup> Draft VBER, Article 4(b)(i), Article 4(c)(i), Article 4(d)(i).

<sup>17</sup> Commission "Expert report on the review of the Vertical Block Exemption Regulation" (Contrast, 2021), available [here](#), pg. 60.

<sup>18</sup> Oxera "How platforms create value for their users: implications for the Digital Markets Act" (12 May 2021), available [here](#).

According to the Commission's Staff Working Document on the Evaluation of the VBER "[a]lternative online distribution models such as online marketplaces have made it easier for retailers to access customers. By using these third-party platforms, small retailers may, with limited investments and effort, become visible to potential customers and sell products to a large customer base and in multiple Member States."<sup>19</sup> According to the European Commission eCommerce Sector Inquiry, "[s]mall retailers may, with limited investments and effort, become visible and sell products through third party platforms to a large customer base and in multiple Member States."<sup>20</sup>

The draft VBER and VGL would exclude online intermediaries engaged in dual distribution (so-called Hybrid Platforms) from the benefit of block exemption.<sup>21</sup> Excluding Hybrid Platforms from the benefits of the VBER would not only put such platforms at a competitive disadvantage (disincentivising the pro-competitive impact of such dual-role business models)<sup>22</sup>, it would also harm the many SMEs who would lose the benefit of the VBER when dealing with such Hybrid Platforms. This is particularly troubling given SMEs reliance on the VBER and VGL.

There is no reasoned justification for this prejudicial treatment of Hybrid Platforms in the VBER and VGL as compared to other dual distributors. The VBER and VGL cite unsubstantiated "non-negligible horizontal concerns", but do not justify how these concerns arise for Hybrid Platforms but not other dual distributors. This is particularly concerning given that horizontal concerns are addressed by the market share thresholds introduced in the draft VBER Article 2(4),<sup>23</sup> and are in any case not the subject of the VBER. The Commission's VBER Staff Working Document does not provide any justification for the distinction between Hybrid Platforms and other dual distributors either.<sup>24</sup> CCIA urges the Commission to review and revise this discriminatory policy which prejudices an important distribution channel for many SMEs in Europe and thereby reduces competition.

Respectfully submitted,  
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<sup>19</sup> Commission "Staff Working Document Evaluation of the Vertical Block Exemption Regulation" (8 September, 2020), available [here](#), pg. 32.

<sup>20</sup> Commission "eCommerce Sector Inquiry" (10 May 2017), available [here](#), pg. 5.

<sup>21</sup> Draft VBER, recital 12, Art 2(7); Draft VGL, paras 91-92.

<sup>22</sup> N. Dryden, S. Khodjamirian, J. Padilla "Not All Online Platforms are Equal: The Simple Economics of Hybrid Marketplaces" (21 May 2020), available [here](#); A. Haigu, T. Teh, J. Wright "Should Platforms Be Allowed to Sell on Their Own Marketplaces?" (15 June 2020), available [here](#).

<sup>23</sup> Summary of the replies of the national competition authorities of the European Competition Network provided during the targeted consultation for the impact assessment of the review of Regulation (EU) No 330/2010 ("NCA Consultation Replies"), available [here](#), pg. 2 ("most of the NCAs supported the introduction of a market share threshold to take into account the horizontal concerns that can arise in instances of dual distribution").

<sup>24</sup> Commission "Staff Working Document Evaluation of the Vertical Block Exemption Regulation" (8 September, 2020), available [here](#).