

# THE VBER CONSULTATION - STAKEHOLDERS CALL FOR AN UPDATE TO REFLECT THE REALITIES OF THE E-COMMERCE MARKET

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## EU / UK Antitrust, Competition & Trade Regulation Alert

By: Christopher S. Finnerty, Mélanie Bruneau, Francesco Carloni, Jennifer P.M. Marsh, Alessandro Di Mario, Philip Torbøl

Stakeholder submissions to the European Commission (Commission) on the EU competition rules governing distribution practices reveal widespread concern that the current framework is inadequate to meet the growing e-commerce market and the ever-more digital manner in which products are sold across the European Union.

In February 2019 the Commission opened a consultation (the "Consultation") to obtain feedback on the Vertical Block Exemption Regulation ("VBER")<sup>1</sup> and the corresponding Vertical Guidelines ("VGL") (see our alert on this [here](#)). The Consultation, which closed in May 2019, received 164 responses, from a wide range of different parties including manufacturers, retailers, industry associations and law firms. The Commission has now released a summary of the contributions it has received.

## ONLINE SALES RESTRICTIONS

One of the key themes arising from the responses was that the existing framework does not adequately assess online sales restrictions in the context of today's substantial and well-established e-commerce market. In particular, many respondents identified that a major issue with the VBER and VGL was how passive sales (i.e., responding to unsolicited requests or orders from individual customers - which cannot be restricted) and active sales (i.e., actively approaching individual customers or potential customers to make sales - which can be restricted where territories or customers have been exclusively allocated) were defined in an online context. This is particularly relevant in the context of online sales, which are typically considered as passive, since any restriction on passive sales is regarded as a hardcore restriction not benefitting from the safe harbour of VBER. As a result, many responses highlighted that the current framework fails to consider that certain online sales restrictions are capable of increasing efficiencies and tackling distribution issues that are often detrimental to consumers.

Most notably, respondents identified that the VBER and VGL do not recognise how online sales restrictions can be used legitimately to tackle the issue of free-riding (where consumers use in-store services at the cost of the retailer but then purchase the product online). For example, the UK National Franchised Dealers Association noted that "unrestrained ecommerce can diminish brand value and place a disproportionate burden on physical operations if they have to shoulder the investment of pre and after sales support (which can undermine the overall viability)." Similarly, Walpole (the official sector body for UK luxury) warned that "the fact that goods are frequently

sold at a reduced margin online...renders more feasible the purchase and re-sale by unauthorised members of the chain."

## ONLINE ADVERTISING RESTRICTIONS

An area that has developed since the current version of the VBER and VGL was drafted, and on which respondents have called for clarity, concerns online advertising, in particular, paid search advertising. While the Commission has confirmed in the case of *Guess* (for further information see our alert [here](#)) that a manufacturer prohibiting resellers from bidding on its name in the context of paid search is an unlawful restriction of competition and may be subject to a substantial fine, the position as to more nuanced / limited restrictions is still unclear.

In particular, this is because in its e-commerce Staff Working Paper<sup>2</sup>, the Commission noted that such restrictions could help avoid confusion with the manufacturer's website. Respondents have therefore requested that the revised VBER and VGL address which, if any, restrictions on paid search advertising are permissible and capable of benefitting from the safe harbour of VBER. For example, Brands for Europe (a group of leading brands and brand organisations across a number of different industries) asked the Commission to clarify "that restrictions on bidding for a particular positioning in the list of results rendered by search engines such as Google AdWords (as opposed to a ban on bidding for Google AdWords) are block exempted". The Fédération de la Haute Couture et de la Mode (the French trade association for the fashion industry) similarly argued that "certain restrictions should be permissible on the use of trademarks as keywords on brand protection grounds" for example (i) preventing "the purchase of a sole trademark as a keyword by retailers", or (ii) manufacturers setting "a maximum quantitative limit for the bids for keywords by reseller, to avoid excessive bidding wars harming both the brands and smaller retailers."

## RESALE PRICE MAINTENANCE

A large proportion of the respondents also raised issues concerning the ability of manufacturers to control the price that their products are sold to consumers. Many have commented that the position on resale price maintenance ("RPM") set out in the VBER and VGL, namely that it is considered a hardcore restriction of competition, is outdated and should be revised in today's e-commerce focused world, in which there is far greater price transparency for products.

Some have argued that RPM generates efficiencies, in particular when used to prevent free-riding, and should therefore not automatically be considered as hardcore under the VBER and VGL (or indeed as a by-object restriction of competition). For example, the Dutch Distribution, Franchise and Agency Association (Vereniging voor Distributie-, Franchise- en Agentuurrecht) argued that it would in fact "help consumer interests to allow RPM if there is strong/sufficient interbrand competition." Similarly, the National Chamber of Italian Fashion (Camera Nazionale della Moda Italiana) stated that "RPM may contribute to coordinated short term low price campaigns and better presale services for consumers." With respect to franchising specifically, the European Franchise Federation pointed out that "RPM contributes to promoting the common identity & reputation of the franchise network as well as the uniformity in the business concept."

Furthermore, with the advent and increasing use of price monitoring software and algorithms, respondents have

requested that the VBER and VGL include more explicit guidance on how these tools can be used lawfully, suggesting a more flexible approach, where their use as part of distribution strategies does not necessarily always amount to unlawful RPM. AIM (the European Brands Association) explained in this respect that "monitoring of retail price is part of the normal commercial activity of well-managed companies, it is to be expected from all companies and it should not pose specific concerns, unless retaliation...has taken place". AIM argued, in particular, that "resale data is critical for manufacturers to define their future strategy" and to "understand how the market responds to their price recommendations."

## MARKETPLACES

Finally, many respondents called for the principles established in the European Court of Justice case of *Coty*<sup>3</sup> (see our alert on this [here](#)) regarding bans on online marketplace sales, namely that a prohibition on such sales is permissible under certain conditions, to be unequivocally reflected in the VBER and VGL (as per the Commission's interpretation set out in its Policy Brief of April 2018).<sup>4</sup> In this respect, the Fédération Française de la Parfumerie Sélective (a French trade association for luxury perfumes) called for the Commission to expressly stipulate in the VGL that "clauses resulting in the prohibition of the use of visible third-party platforms do not constitute hardcore restrictions". Brands for Europe went even further and suggested that "the VGL should clarify that restrictions relating to price comparison websites should not be treated differently to those relating to third party platforms."

## CONCLUDING REMARKS

While the Consultation is only a preliminary stage of the Commission's evaluation process, the responses received provide good insight into the market's perception of the VBER and VGL, in particular their shortcomings in today's challenging commercial environment, as well as the likely areas of concern that the Commission will be seeking to address going forward. The next step of note in the evaluation process is the stakeholder workshop organized by the Commission, which is intended to take place in Brussels this autumn.

## HOW K&L GATES CAN HELP YOU

It is our "bread and butter" to design and enforce modern, effective and legally compliant go-to-market strategies for product manufacturers worldwide, including in Europe. We therefore have a deep understanding of the challenges brands are facing and pride ourselves in designing highly tailored, creative and pragmatic solutions to these issues.

Coupled with this we have broad experience in advocating our clients' interests before the Commission and national authorities, including in relation to the Consultation. If you would like to have your voice heard or have already actively participated in the Consultation, we would be happy to speak with you and work with your business to promote its interests, with a view to shaping a sensible and workable legal framework.

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## NOTES

[1] Regulation 330/2010

[2] [http://ec.europa.eu/competition/antitrust/sector\\_inquiry\\_swd\\_en.pdf](http://ec.europa.eu/competition/antitrust/sector_inquiry_swd_en.pdf)

[3] Coty Germany (C-230/16)

[4] <http://ec.europa.eu/competition/publications/cpb/2018/kdak18001enn.pdf>

## KEY CONTACTS



**CHRISTOPHER S. FINNERTY**  
PARTNER

BOSTON  
+1.617.261.3123  
CHRIS.FINNERTY@KLGATES.COM



**MÉLANIE BRUNEAU**  
PARTNER

BRUSSELS  
+32.2.336.1940  
MELANIE.BRUNEAU@KLGATES.COM



**FRANCESCO CARLONI**  
PARTNER

BRUSSELS, MILAN  
+32.2.336.1908  
FRANCESCO.CARLONI@KLGATES.COM



**JENNIFER P.M. MARSH**  
PARTNER

LONDON  
+44.20.7360.8223  
JENNIFER.MARSH@KLGATES.COM

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