

System upgrade? Vertical agreements in the digital age

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The Vertical Block Exemption Regulation (VBER) has, together with the European Commission's 2010 Guidelines on Vertical Restraints (Guidelines), been the cornerstone of EU competition rules on vertical agreements for almost a decade.¹ Created for a world in which e-commerce was still a relatively recent phenomenon, the future of the VBER and the Guidelines is now under review. The outcome of that review is very much open for debate as the Commission has said it is gathering evidence to determine whether the current rules should lapse, continue or be adapted to reflect market developments, such as the increased importance of online sales and the emergence of online platforms. To this end, on 4 February 2019 the Commission launched a [public consultation](#) to gather views from stakeholders.

Vertical agreements have come under increasing Commission scrutiny in recent years, in part due to the Commission's [E-Commerce Sector Inquiry](#). The Inquiry [Final Report](#) noted the "*prevalence of certain vertical restraints faced by online retailers*" and found that selective distribution systems were often operating so as to "*exclud[e] pure online players*", without any apparent link to distribution quality or other efficiencies.

Such practices have also been highlighted in recent, high profile cases. In December 2017 in [Coty](#), the European Court of Justice confirmed that luxury goods manufacturers can lawfully prevent distributors selling their products on third party platforms such as eBay and Amazon. In September 2018 in [Ping](#), the UK Competition Appeal Tribunal found that a total online sales ban amounted to an illegal restriction on distributors, despite recognising Ping's legitimate commercial aim in adopting the sales policy. More recently, in the [Guess decision](#) earlier this year, the Commission found that Guess had infringed competition rules by including certain restrictions in its distribution agreements (namely, requiring permission for the sale of Guess merchandise online, restricting sales to consumers located outside certain territories, preventing retailers setting prices independently and prohibiting use of its brand names and trademarks in online search advertising).

In the context of explosive growth in e-commerce on the one hand, and the desire of companies to manage the way their goods are distributed online on the other, further clarity on these issues, whilst welcome, will require careful consideration. Businesses with an interest in the outcome of the review may want to use the current opportunity to make their views known. The responses received in the consultation - which can be expected to be numerous and reflective of widely divergent views - will play a significant part in shaping the Commission's approach.

The public consultation will last until 27 May 2019, following which the Commission will publish the findings in a summary report. An open public stakeholder workshop is planned for the last quarter of 2019, with discussions with Member State competition authorities taking place in parallel. The Commission currently anticipates adopting the updated VBER in the second quarter of 2020.

¹ Vertical agreements are agreements between two or more undertakings operating at different levels of the production or distribution chain, relating to the conditions under which they may purchase, sell or resell certain goods or services.