European Commission  
Directorate-General for Competition, Unit A.4  
1049 Brussels  
Belgium

Re: Joint Comments on the European Commission’s Consultation on the Current Regime for the Assessment of Vertical Agreements

Dear Sir/Madam:

On behalf of the American Bar Association Antitrust Law and International Law Sections, we are pleased to submit the attached comments in response to the European Commission’s consultation on the Current Regime for the Assessment of Vertical Agreements.

Please note that these views are being presented only on behalf of the Antitrust Law and International Law Sections. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

If you have any questions after reviewing this report, we would be happy to provide further comments.

Sincerely,

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Chair, Antitrust Law Section

Robert L. Brown  
Chair, International Law Section

Attachment
I. Introduction

The American Bar Association’s Antitrust Law Section and International Law Section (the Sections) are pleased to offer some comments to the European Commission in response to its consultation on Commission Regulation (EU) No 330/2010 (the Vertical Block Exemption Regulation, or VBER). The Sections also offer comments on the related Guidelines on Vertical Restraints.¹

All firms rely on other firms for at least certain input or distribution requirements. Indeed, in a modern, open market economy, it is difficult to envisage that any product could be supplied by a single vertically integrated undertaking – one that handles all activities from supply of raw materials through every stage of production, distribution, retailing, etc. on its own. Therefore, vertical agreements are an essential and ubiquitous feature of a well-functioning and competitive market.

Vertical agreements play an especially important role for firms that aspire to sell their products in a new geographic market. Despite the new opportunities created by e-commerce, partnering with a local distributor is still the most common method for targeting new markets. Many such agreements will contain certain vertical restraints; the Union courts have always accepted that vertical restraints may confer economic efficiencies and be necessary to set up a rational distribution system.²

However, self-assessing the legality of particular vertical restrictions with certainty can be difficult, at least in the absence of clear enforcement standards and appropriate “safe harbors”. The theories of harm that may lead to a finding of anticompetitive “effects” (see paragraphs 100-105 of the Vertical Guidelines) are often complex to apply in practice, e.g. since the outcome depends on multiple factors other than the terms of the agreement (paragraph 111). It can be equally challenging to determine whether a type of vertical restraint that is normally deemed to amount to a restriction “by object”, is nevertheless justified in a particular context.³ Such

difficulties increase firms’ compliance costs as well as the risk of divergent application of Article 101 TFEU by Member State courts and competition authorities.4

The immense practical importance5 of the VBER must be understood against this background. The VBER provides legal certainty and consistency and reduces transaction costs. The Vertical Guidelines also operate as a valuable guide to interpreting the VBER and to explaining the framework of analysis applicable to vertical agreements that are not covered by the VBER. As such, the VBER and the Vertical Guidelines make it easier for firms to target new markets across the EU using efficient distribution systems and to contribute to the goal of a competitive internal market.

The Sections therefore consider that the VBER, as well as the Vertical Guidelines, should be renewed upon the expiry of the VBER. The renewal is also an opportunity to introduce changes to the Vertical Guidelines to take into account developments since 2010 and to improve the clarity of certain provisions.

The relevance of the VBER is illustrated by the interest attracted by the 2009 review: 164 respondents participated in the consultation on the draft VBER and Vertical Guidelines.6 The current consultation will likely attract at least as much interest from a variety of stakeholders, including businesses, trade associations, legal practitioners and economists, and other public authorities. Such a large number of contributions from a diverse set of respondents is very positive. However, it is possible that some commentators will urge the Commission to try to address issues that the Sections submit should not be addressed through those by the VBER and Vertical Guidelines, but would be better addressed by unfair trading laws or sector-specific regulation (for example, through the directive on unfair trading practices in the food supply chain7 or the regulation on promoting fairness and transparency for business users of online intermediation services8). Attempting to address such issues through the VBER and Vertical Guidelines could conflict with the goals of the competition laws and diminish the usefulness of the VBER and Vertical Guidelines.

The generally applicable nature of the VBER is one of its major strengths. It would be helpful, however, for the Vertical Guidelines to address a number of areas where it is difficult to apply the current VBER and Vertical Guidelines in a digital context, since they were drafted ten years ago mainly with offline distribution in mind.9

4 The contradictory outcomes of the national investigations into online booking platforms and their use of price parity (MFN) clauses is a well-known example. There is disagreement both as to whether such clauses are covered by the VBER, and as to the compatibility of so-called “narrow” price parity clauses with Article 101 TFEU outside the scope of the VBER.
5 STEPHEN WEATHERILL, CASES AND MATERIALS ON EU LAW 467 (11th ed. 2014).
9 For example, it would be helpful to clarify, following the CJEU’s Coty ruling, that a ban on the use of online marketplaces is not a hardcore restriction (see Section V(a) of this document). As already mentioned, the application of the VBER and Article 101 TFEU to MFN clauses is another issue that has caused divergent interpretations in different Member States. We note that the Commission’s sector inquiry into e-commerce discusses the applicability of the VBER to certain practices that are common in digital markets; this work should prove useful for the update of the VBER and the Vertical Guidelines.
As regards the role played by online platforms, it is also important to note that the on-going discussion among scholars, authorities and practitioners mainly concerns firms that hold dominant positions. If a platform is dominant, the vertical agreements it enters into will fall within the scope of Article 102 TFEU. The VBER and the Vertical Guidelines apply without prejudice to Article 102 (see §1 of the Vertical Guidelines) and it is important to distinguish the “special responsibility” of dominant firms from the framework of analysis applicable to non-dominant firms under Article 101.

The Sections appreciate the opportunity to respond to the European Commission’s consultation, and would be pleased to respond to any questions the Commission may have.

II. The VBER

a. Market Share Thresholds

The Sections do not offer a view as to whether the use of market share thresholds is appropriate for purposes of defining a safe harbor for vertical agreements or as to whether the current thresholds are too low. The Sections note the long-established use of such thresholds and the difficulty of developing alternatives suitable for the purposes of the VBER. The Sections also note that there are likely to be divergent views as to whether the current thresholds are too high or too low, and these views may differ depending on the type of restraint in question.

The Sections note, however, that the definition of antitrust markets is particularly difficult in many online contexts, in particular where distribution of goods or services takes place entirely or partly through online platforms. In these contexts, the Sections recommend that the Vertical Guidelines clarify how the market share thresholds should be applied in the context of online and dual distribution structures. (See further below.)

b. Dual Distribution (Article 2(4) VBER) and Information Exchange

While Article 2(4) VBER excludes vertical agreements between parties to competing undertakings from VBER’s coverage, it creates an exception for certain non-reciprocal agreements (commonly referred to as dual distribution). A non-reciprocal dual distribution arrangement is present (1) when the supplier is both the manufacturer and the distributor of the goods, while the buyer is only a distributor and not also attempting to compete at the manufacturing level; or (2) when the supplier is a provider of services operating at several levels of trade, while the buyer operates only at the retail level and is not also attempting to compete at the level where it purchases the supplier’s contract services. The approach outlined in Article 2(4) represents the mainstream approach taken by competition authorities, as it does not presume horizontal competitive concerns are raised merely from the fact that a manufacturer engages in dual distribution. As a result, non-reciprocal arrangements should continue to be treated as an exception from VBER’s exclusion of competing undertaking as outlined in Article 2(4) and should not be analyzed under the more onerous standards that apply to agreements between competitors. One of the questions that the Commission could clarify, however, is the treatment of information exchanges in the context of dual distribution systems, i.e. in circumstances where the supplier is, at least in part, competing with its own distributors, but where it is nonetheless not unusual for the supplier to require its distributors to report certain information regarding their sales to final customers.
In 2017, the Commission expressed concerns in Section 3.1.3 of its E-Commerce Sector Inquiry Report\(^\text{10}\) (“E-Commerce Report”) that “the exchange of competitively sensitive data, such as on prices and sold quantities, between [online] marketplaces and third party sellers or manufacturers with own shops and retailers may lead to competition concerns where the same players are in direct competition for the sale of certain products or services.”\(^\text{11}\) These agreements do not seem to be excluded from the scope of Regulation 330/2010, Article 2(4),\(^\text{12}\) implying that information exchange agreements between distributors and suppliers can be exempted, even in the case of a dual distribution system (and the competitive relationship between supplier and distributors downstream. However, the position is not clear cut. For example, a footnote to paragraph 212 of the Vertical Guidelines, in relation to category management agreements, emphasizes that “Direct information exchange between competitors is not covered by the Block Exemption Regulation, see Article 2(4) of that Regulation and paragraphs 27-28 of these Guidelines.” Further, it is not clear whether the exchange of information can be considered an agreement “relating to the conditions under which the parties may purchase, sell or resell certain goods or services” in the sense of Article 1(1)(a) of the Regulation, and therefore whether it forms part of a "vertical agreement" subject to exemption.

The statement in the E-Commerce Report creates uncertainties. Given the vertical nature of information sharing in a dual distribution context, however, competitive harm should not be presumed where the existence of a hardcore agreement may not be plausibly inferred, especially where manufacturers and online marketplaces often institute firewalls or place limit other limits on data access with respect to competing retailers and given that (according to the E-Commerce Report), downstream sellers often continue to compete on other platforms on a non-exclusive basis or choose to make platform specific investments voluntarily. The Commission should therefore (i) clarify that information exchanges in the context of a dual distribution agreement are covered by the VBER, in the same manner as pure vertical information exchanges, and (ii) consider incorporating into the Vertical Guidelines guidance as to which kinds of information exchanges are likely to be problematic and how to address the competition concerns alluded to in the e-commerce sector inquiry. Additionally, the Commission should consider providing a potential safe harbor to the data collection practices of manufacturers and online marketplaces that represent less than a 30% share of a relevant market, particularly to the extent such parties are already in compliance with the Commission’s other data protection measures.

More recently, the special advisors’ “Competition Policy for the Digital Era” report to the Commission\(^\text{13}\) raised concerns that an e-commerce platform’s access to third party data and its ability to set terms of use could enable the platform to “self-preference” its own products or services. Nonetheless, particularly where sellers have voluntarily chosen to use the platform or are able to access other reasonably competitive alternate distribution channels (both on-line and offline) on a non-exclusive basis, a platform should have the discretion to set the terms of use in order protect its own investment incentives, preserve opportunities for cross-platform competition and encourage the further development of e-commerce alternatives to brick-and-mortar retailing (which still


\(^{11}\) Id. at 14, para 56.

\(^{12}\) See VERTICAL: GUIDELINES, para 28.

represents the vast majority of retail sales for many products). To this end, caution should be taken in defining a ‘market’ for these purposes based on the channel of distribution rather than by the relevant set of products and services being sold—particularly in cases where third-party sellers have other viable on-line and off-line outlets or the ability to make their own platform-specific investments. In addition, the Commission should adopt an approach that is “channel neutral”, especially where brick-and-mortar outlets can give preferential treatment to their private brands and leverage valuable customer information collected at the point of sale. In any event, in the absence of an inferred or express hardcore agreement, the Commission should have to demonstrate anticompetitive effects of information sharing between a supplier that is a dual distributor and third party distributors before harm is presumed.

c. **Hardcore Restraints – RPM and Territorial/Customer Restraints**

**Resale Price Maintenance (RPM):** Under Article 4(a) VBER, a vertical agreement containing a limitation on a reseller’s/distributor’s ability to determine the minimum selling price for goods is a hardcore restriction and thus not subject to the protections of the VBER. The Vertical Guidelines acknowledge nonetheless that supplier-mandated minimum resale prices can be procompetitive in some circumstances. In recognition of these procompetitive benefits, the Sections recommend that Commission reaffirm that it is only the case that RPM will not be presumed legal (and do not benefit from the VBER’s safe harbor); hardcore characterization does not necessarily mean that RPM restricts competition or does not satisfy the conditions of Article 101(3). The Sections thus believe that it is important that the Vertical Guidelines continue to recognize the potential for procompetitive benefits and to provide further guidance on how those benefits are to be reflected and given real and sufficient weight within the Article 101 framework. In particular, we recommend that the Guidelines reflect greater flexibility in their description of the circumstances in which RPM may be defensible in connection with the introduction of a “new” product. As European competition authorities have so far failed to recognize exceptional cases in which the benefits of RPM outweigh any concerns, better guidance is needed to encourage investment. Without this, and especially in the light of the Commission’s recent enforcement actions concerning RPM, there is the potential for a chilling effect of this potentially procompetitive behavior. The continued recognition of the procompetitive benefits of RPM in the Vertical Guidelines would help counteract this effect.

The Commission should also consider modifying the language defining the restriction to clarify what constitutes hardcore behavior. The VBER permits suppliers to use maximum resale prices and recommend resale prices to the extent this behavior does not “amount to . . . minimum resale price[s] as a result of pressure from, or incentives offered by, any of the parties.” In its E-Commerce Report, however, the Commission suggests that the mere monitoring of online retail prices alone—without additional evidence of actual compulsion or agreement—could “limit the incentives for retailers to deviate from [] pricing recommendations.” The Sections believe this statement could significantly chill the legitimate use of recommended or maximum RPM and recommend clarifying that Article 4(a)—in so far as it relates to maximum and recommended resale prices effectively becoming RPM—refers only to an agreement or concerted practice to fix resale prices and not unilateral acts that may simply encourage adherence to recommended prices.

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14 Article 4(a) VBER.
15 E-COMMERCE REPORT at para. 33.
Dual pricing for products intended to be resold online or offline: The Sections respectfully submit that the Vertical Guidelines’ approach to dual pricing is not workable in the current context and should be updated to reflect the economic and commercial reality.

According to paragraph 52(d) of the Vertical Guidelines, the following is an example of a hardcore restriction of passive selling: “an agreement that the distributor shall pay a higher price for products intended to be resold by the distributor online than for products intended to be resold offline. This does not exclude the supplier agreeing with the buyer a fixed fee (that is, not a variable fee where the sum increases with the realised offline turnover as this would amount indirectly to dual pricing) to support the latter's offline or online sales efforts”. A supplier might choose to charge a distributor a lesser price for products or services sold offline than online in order to compensate the distributor for increased costs it bears related to the sale of the product offline and protect it from free riding by distributors distributing online or because the supplier’s costs of sales is higher for online distributor sales. The possibility to offer a “fixed fee” has been often criticized: it would imply the need for the supplier to assess, on a case-by-case basis, the value of the sales efforts of each distributor, a process which would be long, costly and of uncertain results.

The Commission shows some flexibility in this respect in paragraph 64 of the Vertical Guidelines, when dealing with dual pricing to address higher costs to the manufacturer: “However, in some specific circumstances, such an agreement may fulfil the conditions of Article 101(3). Such circumstances may be present where a manufacturer agrees such dual pricing with its distributors, because selling online leads to substantially higher costs for the manufacturer than offline sales. For example, where offline sales include home installation by the distributor but online sales do not, the latter may lead to more customer complaints and warranty claims for the manufacturer. In that context, the Commission will also consider to what extent the restriction is likely to limit internet sales and hinder the distributor to reach more and different customers.” While this statement makes sense, it does not address the main issue behind dual pricing systems, which is free riding.

The E-Commerce Report, in contrast, shows a more open approach, recognising that a dual pricing arrangement may be indispensable to address free-riding (see paragraph 37). Commissioner Vestager expressed the issue in the following terms (that are clearly applicable to dual pricing): “Pricing restrictions can help to stop physical shops from disappearing. Without them, people might go to a brick-and-mortar shop only to get a feel for a product, but then buy it more cheaply online.”

Nonetheless, some national authorities, and in particular the Bundeskartellamt (“BKA”), have taken a very restrictive approach vis-a-vis price discrimination between on-line and off-line resellers. In the LEGO case, the BKA held that the inclusion of additional criteria for rebates that were specific to offline resellers (such as numbers of meters of available shelf space) meant greater discounts for off-line resellers. This approach may allow free-riding by pure on-line resellers who do not incur the same costs, and could ultimately lead to marginalization or even the exit of brick-and-mortar retailers, particularly the smaller ones. The Sections

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therefore recommend that the Commission clarify that dual pricing systems are, as a matter of principle, generally acceptable, particularly in the context of selective distribution systems where brick-and-mortar dealers are requested to make substantial investments in the look and feel of the shop and on the “shopping experience”. Also, the Commission should provide guidance detailing the specific circumstances where dual pricing may be problematic.

d. Non-Exempt Restraints and Non-Compete Obligations

Article 5 of the VBER provides that non-compete obligations are not exempted, except under specific circumstances.

The Sections disagree with the position that all non-compete clauses are fundamentally anticompetitive and accordingly should never be exempted under the VBER. The Sections believe that the VBER should maintain the exemption of non-compete obligations under certain circumstances.

The Sections suggest that the Commission consider expanding the definition of non-compete obligations in Article 1(1)(d) VBER to include obligations imposed on a seller. Currently, only restrictions prohibiting a reseller/distributor from manufacturing, purchasing, selling or reselling goods or services which compete with the contract goods or services are considered to be non-compete obligations.

The Sections further recommend that the Commission should clarify and expand on its discussion of the circumstances under which non-compete obligations following the termination of a vertical agreement (“post-term obligation”) may be exempted. Under Article 5(3) VBER, post-term non-compete obligations are only exempted if (i) they relate to goods or services which compete with the contract goods or services, (ii) the obligation is limited to the premises and land from which the buyer has operated during the contract period, (iii) the obligation is indispensable to protect know-how transferred by the supplier to the buyer, and (iv) the duration of the obligation is limited to a period of one year after the termination of the agreement.

The Sections note that although it is not clear from the VBER whether these conditions are cumulative, the Vertical Guidelines seem to imply that they are (see para. 68). We think that this should be noted expressly in the Vertical Guidelines.

The Sections also observe that condition in Article 5(3)(b), i.e., the fact that post-term non-compete obligations should be limited to “the premises and land from which the buyer has operated during the contract period” seems too narrow. The Sections believe that the geographic scope of post-term non-competes should be expanded to at least the vicinity of the premises from which the buyer operated. It would otherwise be too easy for buyers to circumvent a legitimate non-compete obligation. Without changing the VBER, the Commission could specify in the Vertical Guidelines that “premises and land” should be interpreted as a reasonable geographic area in the vicinity of the premises in which the buyer operated during the agreement.

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19 In C-117/12, La Retoucherie de Manuela v. La Retoucherie de Burgos, the ECJ considered the literal meaning of the words “premises and land” and concluded that this should be interpreted strictly.
The Commission should also consider whether it would make sense to allow sellers to impose on buyers post-term non-compete clauses applicable to the entire territory that was assigned to them under the agreement. This could for example make sense in the context of franchise agreements.

In addition, the Sections believe that there is no need to generally consider contracts with automatically renewable terms to exceed the five-year limit on non-compete obligations. It should suffice to have the opportunity to terminate the agreement to prevent its extension beyond a five year term as this gives competitors a sufficient opportunity for market entry.

V. The Vertical Guidelines

a. Selective Distribution

As recognised in the E-Commerce Report, the significant growth of e-commerce over the past ten years has prompted manufacturers to rely increasingly on selective distribution. The Report also concludes that the general approach of the VBER vis-a-vis selective distribution does not need to be changed, although selective distribution may facilitate the implementation of certain vertical restraints that may raise competition concerns in individual cases.20 We generally agree with this approach, but would recommend that the new Guidelines should be amended to provide additional clarity in the following key areas.

Online marketplace bans and similar bans (price comparison websites, auctions). It would be helpful for the guidelines to codify the *Coty* judgment21 and make clear that online marketplace bans imposed in the context of selective distribution system are not a hardcore restriction within the meaning of the VBER and that this finding applies to all products, and not just to luxury goods.22 Indeed, online marketplace bans are clearly distinguishable from absolute bans to sell online, given that (i) their scope is much narrower, and (ii) the manufacturers may have legitimate concerns about the impact of online marketplace sales on the brand value of their products (including concerns linked to free-riding and brand positioning, as manufacturers have no control over the way in which the products are sold in the marketplace). For the same reason, the Commission should clarify that this approach applies to similar prohibitions (such as bans on the use of price comparison websites or other auction-type sites or marketplaces) that could also negatively affect the brand value of the products in question.

Brick-and-mortar requirement. The E-Commerce Report concludes that the brick-and-mortar distribution requirement, which excludes pure “online” resellers, may not be justified in all cases, and may require further scrutiny in individual cases.23 However, requiring manufacturers to include pure online players in their selective distribution systems might have adverse effects on off-line resellers, who are called to make significant investments for the promotion of the products in question. Therefore, to preserve the incentives of off-line resellers to continue to invest in the branding and marketing of these products, the Sections urge the Commission

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20 *See E-COMMERCE REPORT* at para 251.
22 *See, e.g.*, ASICS case in Germany 12 December 2017 (Case KVZ 41/17) where the Federal Court upheld the BKA Asics decision of 2015, which found that ASICS’ ban on the use of price comparison sites and certain other platforms was a hardcore restriction. The Court held that the Coty precedent was not applicable because ASICS was not a luxury brand.
23 *See E-COMMERCE REPORT* at paras. 26-27.
to preserve the current framework, which allows for the imposition of the brick-and-mortar requirement.\textsuperscript{24} In addition, the Guidelines already allow the Commission to take action in individual cases where the brick-and-mortar shop does not bring sufficient efficiencies to counterbalance the exclusion of pure online resellers.\textsuperscript{25}

b. Exclusive and Selective Distribution

The Sections have some concerns regarding the description of how exclusive and selective distribution can be combined in the Vertical Guidelines, and, in particular, whether the restriction of active sales into other territories or customer groups (which is permitted in an exclusive distribution system) would also be valid in this context. More precisely, the Sections recommend clarifying the relationship between paragraphs 56 and 152 of the Vertical Guidelines. Paragraph 56 seems to allow the restriction of active sales in a selective distribution system when this is done in order to protect an exclusive distribution system that operates in another territory: “Accordingly, dealers in a selective distribution system, as defined in Article 1(1)(e) of the Block Exemption Regulation, cannot be restricted in the choice of users to whom they may sell, or purchasing agents acting on behalf of those users except to protect an exclusive distribution system operated elsewhere (see paragraph (51))” However, paragraph 152 seems to point in the opposite direction, noting that the combination of exclusive and selective distribution is only covered by the exemption when active sales into other territories are not restricted: “A combination of exclusive distribution and selective distribution is only exempted by the Block Exemption Regulation if active selling in other territories is not restricted”.

The Sections suggest that active sales restrictions be considered to be valid in the framework of a system combining exclusive and selective distribution. The reasons for allowing active sales restrictions in exclusive distribution are arguably equally applicable in the case of selective distribution systems. In that regard, the Sections note that paragraph 63 of the Vertical Guidelines suggests that an individual exemption under Article 101(3) TFUE could be available in the following situation, concerning wholesalers: “In the case of a selective distribution system, cross supplies between appointed distributors must normally remain free (see paragraph (58)). However, if appointed wholesalers located in different territories are obliged to invest in promotional activities in ‘their’ territories to support the sales by appointed retailers and it is not practical to specify in a contract the required promotional activities, restrictions on active sales by the wholesalers to appointed retailers in other wholesalers’ territories to overcome possible free riding may, in an individual case, fulfil the conditions of Article 101(3).” This assessment may apply more generally to free riding in selective distribution systems, so that active sales restrictions become more widely acceptable in the combination of exclusive and selective distribution models. The problem goes beyond the strict active sales restrictions: for instance, the setting out of sales geographic targets in the geographic area entrusted to selective distributors (which should be acceptable) may also run counter to paragraph 56 of the Vertical Guidelines.

In sum, the Sections respectfully submit that the rules should be clarified to allow active sales restrictions in these situations, under the conditions laid down for exclusive distribution agreements;

\textsuperscript{24} See Vertical Guidelines, para. 54.
\textsuperscript{25} See Vertical Guidelines, para. 176.
alternatively, there should be a clarification in any case about what the rules are, overcoming the contradiction between paragraphs 56 and 152 of the Vertical Guidelines, for the sake of legal certainty.