



The draft VBER and VGL

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Speaking in a personal capacity. The views expressed are not necessarily those of DG Competition or the European Commission.

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Plan for talk

- Process & Timing
- Evaluation results
- New drafts: helicopter view
- Active sales restrictions
- Online restrictions generally
- Platform parity obligations
- Dual distribution

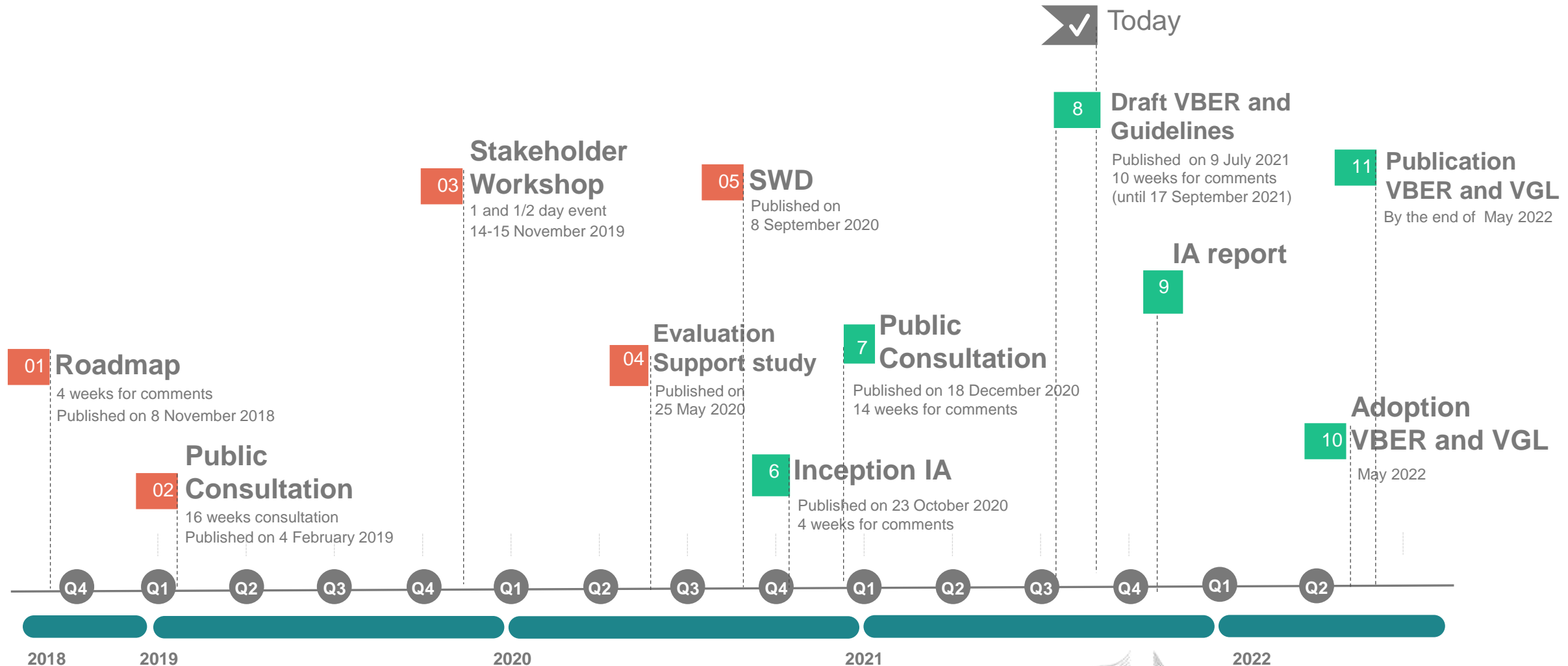


Process & Timing

Evaluation phase

Impact Assessment phase

Path for the VBER review



European Commission

COMPETITION



Evaluation results

Staff Working Document (8 September 2020)

- Current rules facilitate self-assessment and help reduce compliance costs
- Overall effective, but considerable room for improvement:
 - ❖ Simplification
 - ❖ Clarifications
 - ❖ Updates, e.g.
 - ❖ Enforcement practice and case-law
 - ❖ Market developments – especially growth of online (new practices; is the balance right? does online need same protection as 12 years ago?)
- Scope of the block exemption seems overall appropriate:
 - ❖ Diverging views on hardcore restrictions (less on thresholds)
- Need to strengthen common framework for assessment:
 - ❖ Notably in areas with limited guidance / new restrictions (e.g. online restrictions)



New drafts

Helicopter view

Helicopter view of new draft VBER

- New definitions in Art. 1
 - Online intermediation services, excl. distr. system, active/passive sales and restrictions of these
- Rules on dual distribution at the same time widened and narrowed (Art. 2 (4))
 - Now covers not only manufacturers but also wholesalers and importers
 - But now new low specific market share threshold
- New structure of Art. 4 on hardcore restrictions
 - Now organized by distribution system (exclusive, selective, “free”)
 - Several substantive changes in Art. 4: pass-on of restrictions possible; “shared” exclusivity possible; enhanced protection of selective distribution systems
- Lots of new stuff on online
 - Definition of “online intermediation services”; VBER basically does not apply to online intermediation services that also sell goods and services; “wide” retail MFN excluded restriction under Art. 5

Helicopter view of new draft VGL

- Substantial changes in the VBER of course also reflected in VGL
- Besides that, the VGL has been reshuffled in a big way
 - Figuring out what is new, what is simply moved around, and what has been dropped from the old VGL takes quite a bit of time



Active sales restrictions

Active sales restrictions (background)

- Active sales restrictions concern limitations of the buyer's ability to actively approach individual customers.
- The currently applicable rules of the VBER contain only narrow exceptions in which active sales restrictions are allowed.
- The evidence gathered so far in the review of the VBER and the Vertical Guidelines indicates that these rules are unclear and limit suppliers in designing their distribution systems according to their business needs.
- In the context of the public consultation that ended on 26 March 2021, a majority of stakeholders called for a change regarding active sales restrictions.
- Mixed feedback on the options proposed, which mostly triggered requests for clarification.
- An expert report pointed to changes that could provide businesses with more flexibility.

Active sales restrictions (proposals in draft revised VBER)

- Article 1(l): definition of active sales.
- Article 4(b): possibility to appoint one or more exclusive distributors (“shared exclusivity”).
 - **Para. 102 of draft revised VGL: “in proportion to territory / customer group, to preserve investment incentives”.**
- Article 4(b)-(d)(i): possibility to pass on active sales restrictions, provided respective customers have entered into a distribution agreement with the supplier or with a party that was given distribution rights by the supplier.
 - **Paras. 206 and 226 of draft revised VGL: to protect investment incentives, while avoiding fragmentation of single market.**
- Article 4(b)/(d)(ii): enhanced protection of selective distribution systems against active and passive sales to unauthorised distributors.

Specific online sales restrictions (background)

- Dual pricing: charging the same distributor a higher wholesale price for products intended to be sold online than for products to be sold offline.
- Equivalence principle: need to impose criteria for online sales that are overall equivalent to the criteria for offline sales in a selective distribution system.

Evidence gathered so far indicates that online sales have developed into a well-functioning sales channel and therefore no longer need special protection by qualifying certain indirect measures restricting online sales as hardcore restrictions.

Specific online sales restrictions (proposals in draft revised VBER)

- Dual pricing no longer qualifies as a hardcore restriction

Para. 195 draft revised VGL: it can benefit from the safe harbour, in so far as its object is to incentivise or reward the appropriate level of investments respectively made online and offline

- Equivalence principle no longer imposed

Para. 221 draft revised VGL: in the context of a selective distribution system, the criteria imposed by suppliers in relation to online sales no longer have to be overall equivalent to the criteria imposed on brick-and-mortar shops

- The proposed changes are subject to the same limiting principle as online sales restrictions more generally. The proposed revised VBER only block-exempts dual pricing and the lack of equivalence if these restrictions do not, directly or indirectly, have as their object to prevent buyers or their customers from effectively using the internet for the purposes of selling their goods or services online.



Online restrictions generally

Need for harmonisation with respect to online restrictions

- The evaluation pointed to diverging interpretations of the rules across the EU with regard to online restrictions
- Article 1(n): guiding principle on the assessment of online sales restrictions, in line with case law:

a restriction that, directly or indirectly, in isolation or combination with other factors, has as its object to prevent 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 is [a hardcore restriction under the VBER]

Clarification of how VBER applies to platforms

- Article 1.1(d): definition of supplier of online intermediation services (in line with P2B Reg.):
‘supplier’ includes an undertaking that provides online intermediation services irrespective of whether it is a party to the transaction it facilitates;
- Explains that platforms cannot qualify as genuine agents or benefit from the VBER in cases of dual distribution (“hybrid platforms”)

Paragraph 44 VGL: **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)**

Article 2(7): **the exceptions of Article 2(4)(a) and (b) shall not apply where a provider of online intermediation services that also sells goods or services in competition with undertakings to which it provides online intermediation services enters into a non-reciprocal vertical agreement with such a competing undertaking**

Update of Vertical Guidelines wrt. online restrictions

- Update the Vertical Guidelines to provide enhanced guidance on the application of Article 101 TFEU to online restrictions

Paragraphs 313-322 VGL: restrictions in the use of online marketplaces

Paragraphs 323-332 VGL: restrictions in the use of price comparison tools

- Reflect in the Vertical Guidelines the main principles of the Working Paper on the application of Article 101 TFEU on distributors that also act as agents for certain products for the same supplier

Paragraphs 34-38, 43 VGL



Platform parity obligations

Platform parity obligations (background)

- Parity obligations require a business to offer the same or better conditions to its contracting party as those offered on any other sales channel, or on the company's direct sales channels.
- All parity clauses are currently covered by the VBER.
- Evaluation showed increasing number of enforcement actions, which focused on parity clauses relating to indirect sales channels (e.g. other platforms).

Results of the public consultation that ended on 26 March 2021 and feedback from NCAs

- Competition concerns can arise where parity obligations cover both direct and indirect channels (“wide MFNs”).
- Efficiencies from parity obligations relate mostly to direct channels (“narrow MFNs”).
- Mixed replies/feedback on the need to distinguish further between different types of parity obligations.

Parity obligations (proposals in draft revised VBER)

- Article 5(1)(d) removes the benefit of the block exemption for across-platform retail parity obligations imposed by providers of online intermediation services.
 - These parity obligations relating to indirect channels are added to the list of excluded restrictions, which means they would have to be assessed individually under Article 101 of the Treaty.
 - Narrow retail and wholesale parity obligations still covered by the VBER.
- Draft revised VGL provide further guidance on the assessment of parity obligations.



Dual distribution

Dual distribution (background)

- Dual distribution concerns scenarios where a supplier does not only sell through independent distributors but also directly at retail level in competition with its distributors.
- It is currently covered by the VBER as an exception to the rule that the VBER does not apply to vertical agreements between competing undertakings.
- Evaluation showed significant increase during the last years due to the growth of online sales.
- False positive: possible horizontal concerns no longer negligible.
- False negative: exclusion of wholesalers and importers despite being in a similar situation with manufacturers covered by the current exception.

Dual distribution (proposals in draft revised VBER)

- Article 2(4): extension to cover wholesalers and importers, while limiting safe harbour to cover only instances where the parties' aggregate market share at retail level does not exceed 10% (threshold reflects the rules set out in the De Minimis Notice)
- Article 2(5): where this market share exceeds 10% but the 30% market share thresholds in Article 3 VBER are not exceeded, all aspects remain exempted except for information exchange (i.e. individual assessment required; no presumption of illegality!)
- Article 2(6): says that exemption in Art. 2(4) does not cover by object restrictions
- Article 2(7): clarification that vertical agreements with providers of online intermediation services that have a hybrid function are not covered

Thank you!



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