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12th ANNUAL INTERNATIONAL CONFERENCE OF CONCURRENCES REVIEW

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12th New Frontiers of Antitrust / Demain la concurrence

#2 Vertical restrictions: VBER, everything changed?

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*Interview with Svend Albaek (DG Comp),
by Alexis Walckiers (E.CA Economics)**



Svend Albaek (Adviser to Chief Economist at DG COMP) has been interviewed by Alexis Walckiers (Director at E.CA Economics) in anticipation of the 12th edition of the New Frontiers of Antitrust Conference to be held online with a series of 4 webinars from June 8th to 11th, 2021.

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Alexis Walckiers: After publishing its roadmap in November 2018, the European Commission held a Stakeholder workshop in November 2019, and published its Staff working document in September 2020, which was open for public consultation until March of this year. Can you please remind us of the expected next steps of the Commission's review of its Vertical Block Exemption Regulation (VBER)?

Svend Albaek: The next step is that the Commission will publish drafts of the VBER itself and of the Vertical Guidelines. This should be happening fairly soon. There will then be a period where the public and different stakeholders can comment on the drafts. After that, we go back to the drawing board to finalise the new VBER and Guidelines so that the Commission can adopt the final documents by May 2022 when the current documents expire. Throughout this final stretch, we will coordinate closely with the Member States.

Since the last review of the VBER, a major economic development is presumably the transformation of consumers' shopping journeys online and in what the guidelines refer to as brick-and-mortar shops. Over the years, online and off-line experiences have become more intertwined: they have remained substitutes to some extent but exhibit some complementarities too. The Commission has gained considerable insights into online shopping during its E-Commerce Sector Inquiry. Can you please explain what are the main challenges to take these evolutions into account when reviewing of the VBER?

The growing importance of online sale was already on the radar screen at the time of the last review, which led to the 2010 VBER and Vertical Guidelines. It was already then clear that online sales could lead to some challenging issues, for instance with respect to the distinction between active and passive sales. That led to the insertion of several clarifications and examples in the 2010 documents. But online sales are obviously much more important today than they were 11 years ago and now raise new issues, as also demonstrated by the fact that we found it necessary to have the E-Commerce Sector Inquiry. Moreover, the Covid pandemic has probably pushed online sales even further in a way that will not be reversed entirely when the outbreak will hopefully soon be over.

What we have learned from both the Sector Inquiry and the current review process is that this development has led to changes in the choice of distribution models. It seems that selective distribution systems are used more often, while exclusive distribution is used less. Direct retail sales by suppliers have also increased. Similarly, new types of restrictions, such as restrictions regarding sales through online marketplaces, restrictions on online advertising and retail parity clauses have emerged. Stakeholders are also expressing concerns about free-riding between online and offline sales channels, as well as on the appropriate delineation between active and passive sales.

For these issues, we, therefore, are being asked to adapt the rules to the current context by either giving more guidance or changing the current guidance. As always, we have to find the right balance between protecting competition and giving businesses sufficient flexibility and legal certainty to organise their sales channels in an efficient way.

In relation to online and offline shopping, the question of so-called dual pricing has attracted quite some attention [dual pricing is the possibility for a manufacturer to charge a retailer different wholesale prices depending on whether the goods are to be sold online or offline]. Can you please tell us what according to you are the main issues at stake?

As I mentioned in my reply to Question 2, one of the big issues in the review is whether suppliers should be allowed more possibilities to protect sales in brick-and-mortar shops against free-riding from online sales. The existing Guidelines consider it a hardcore restriction to charge higher prices for products intended to be sold online than for products intended to be sold offline. There is a provision that suppliers can compensate retailers if the costs of selling offline are higher than selling online. However, this cannot be done through charging different prices but must instead be done via fixed fees. Stakeholders have expressed concerns on this, considering it as being impractical in many situations; dual pricing would supposedly be a simpler and more efficient way to incentivize retailers to invest in offline sales activities. We are therefore considering whether it is appropriate, given the current context, to allow some dual pricing in the future. However, this should obviously not be an open door for suppliers that want to obstruct online sales, so for us, the issue is again whether we can find a good balance.

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