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Evidence-Based Legislation in EU Competition Law

Reform of the Vertical Block Exemption Regulation as a Case Study

*Jasper P. Sluijs**

Abstract

Whereas the European Commission's Better Regulation Agenda advances a broad standard for evidence in legislation, EU competition law more narrowly relies on economic evidence focused on welfare effects. This article explores this inherent tension by means of a case study of the 2018-2022 revision of the Vertical Block Exemption Regulation (VBER). It is found that economic evidence has been only one of many sources of evidence in the VBER revision process, which put particular attention on evidence through stakeholder consultation. This is understandable within the context of the Better Regulation Agenda, but nonetheless striking when considering EU competition law's reliance on economic evidence over non-economic evidence under the Commission's 'More Economic Approach'. Moreover, it is unclear why economic evidence was gathered to evaluate some aspects of the VBER and not on others. Furthermore, the Commission has been strategic in drawing conclusions from economic research and, considering the limitations thereof, seemingly based on its predefined preference for specific policy options.

Keywords: competition law, Better Regulation Agenda, vertical restraints, Vertical Block Exemption Regulation (VBER), More Economic Approach (MEA).

A Introduction

The European Commission's Better Regulation Agenda of 2015 and onwards aims to ensure that EU legislative instruments are "evidence-based, well designed and [will] deliver tangible and sustainable benefits for citizens, businesses, and society".[1] Evidence is defined here as referring to

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1 Commission Communication – Better regulation for better results – An EU agenda COM (2015) 215 final, p. 3.

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> multiple sources of data, information, and knowledge, including quantitative data such as statistics and measurements, qualitative data such as opinions, stakeholder input, conclusions of evaluations, as well as scientific and expert advice.[2]

At the same time, the Commission's More Economic Approach (MEA) in Competition Law relies on a narrow focus on *economic* evidence in terms of consumer welfare effects. Remarkably little research has been conducted on the role of economic evidence in competition law legislation, particularly when considering the vast literature available on economic evidence in competition law enforcement and litigation. Therefore, the present research explores the gathering and application of economic evidence in EU competition law legislation and how economic evidence has informed legislative decisions in the context of the broader evidentiary standard of the Better Regulation Agenda.

Instead of an exhaustive analysis of all legislative instruments in EU competition law, the revision of the Vertical Block Exemption Regulation (VBER) was selected as a comprehensive and representative case study. This research investigates what kind of economic evidence was used and during which stages of the VBER revision process, and how this evidence was factored into the eventual revised regulation. How does the use of economic evidence in the VBER legislative process relate to the Better Regulation Agenda, and what conclusions can be drawn from this for EU competition law legislation in general?

To answer these questions, the first section of this article will outline the importance of economic evidence in EU competition law with particular attention to the MEA of the late 1990s and onwards. The second section, then, introduces vertical restraints as a specific topic in competition law, which concerns anticompetitive behaviour by firms in a (vertical) supply chain. The VBER was intended to regulate these vertical restraints, and an analysis of the VBER's history will lead into an analysis of the revision process of the 2010 VBER that took place between 2018 and 2022.

The third and fourth sections contain the main analytical contribution of this research, analysing and assessing the gathering and application of economic evidence in the two stages of the VBER revision process: the VBER evaluation and the VBER impact assessment. These sections detail what kind of economic evidence was gathered and from which stages of the VBER revision and how this evidence was implemented in the legislative outcomes of the VBER. This analysis will then provide ground for a critical assessment of the application of economic evidence in the VBER revision and the implications thereof within the context of both the Better Regulation Agenda and the MEA.

2 Commission Staff Working Document – Better Regulation Guidelines, SWD (2021) 305 final, p. 5.

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B Economic Evidence in EU Competition Law

Competition law is concerned with protecting the competitive process in markets. Across jurisdictions, competition law is intrinsically tied to economics.[3] 'Competition economics' is not a separate discipline in economic science, but rather an aggregate term for the partially overlapping sub-disciplines in economics that are utilized in relation to competition law: industrial organization (IO), financial economics, behavioural/experimental economics and econometrics.[4] For the purposes of this research, economic evidence is defined as evidence stemming from original research or literature review in competition economics, which is then applied in competition law.

I EU Competition Law and the More Economic Approach

Scholars studying the history of EU competition law typically distinguish between the 'legalistic approach' (also referred to as 'formalistic approach') of Commission and CJEU before the 1990s, and the 'More Economic Approach' (MEA, also referred to as 'effects-based approach') that has been in force since the 1990s.[5] The development of the MEA was spearheaded by the Commission in response to growing criticism from practitioners and academics that competition law was becoming too rigid in its application and should focus on the actual anticompetitive effect of firms on a case-by-case basis.[6] Quantitative, rather than qualitative, evidence should be considered by the Commission and CJEU in competition law enforcement and adjudication.[7]

The measuring stick to determine anticompetitive effects, according to the Commission, would be the economic concept of consumer welfare – the outcome in which consumers are better off than producers or the consumers and producers combined ('total welfare').[8] Across MEA-infused soft law instruments, an image emerges of the Commission primarily focused on the economic effects of anticompetitive conduct – anticompetitive *behaviour* would only be sanctioned

3 Gunnar Niels, Helen Jenkins and James Kavanagh, *Economics for Competition Lawyers* (2nd edition, Oxford University Press 2016) s 1.07.

4 Phillip E Areeda and Herbert Hovencamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (4th edition, Wolters Kluwer Law & Business 2016).

5 Dieter Schmidtchen, 'Introduction' in Dieter Schmidtchen, Max Albert and Stefan Voigt (eds), *The More Economic Approach to European Competition Law* (Mohr Siebeck 2007); Claudia Seitz, 'Economic Principles in Antitrust Law in the Aftermath of the More Economic Approach' in Klaus Mathis (ed), *Law and Economics in Europe: Foundations and Applications* (Springer Netherlands 2014); Doris Hildebrand, *The Role of Economic Analysis in EU Competition Law: The European School* (4th edition, Wolters Kluwer 2016); Anne C Witt, 'The European Court of Justice and the More Economic Approach to EU Competition Law – Is the Tide Turning?' (2019) 64 *The Antitrust Bulletin* 172; Pier Luigi Parcu, Giorgio Monti and Marco Botta, 'From the Legalistic to the Effect-Based Approach in EU Competition Policy' in Pier Luigi Parcu, Giorgio Monti and Marco Botta (eds), *Economic Analysis in EU Competition Policy* (Edward Elgar Publishing 2021).

6 Witt (n 5), pp. 174-175.

7 Parcu, Monti and Botta (n 5) p. 3.

8 Niels, Jenkins and Kavanagh (n 3) p. 18.

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when finding negative *effects* on consumer welfare.[9] However, the consistency of this approach by the commission in practice and the acceptance of the MEA by the CJEU have been discussed at length in the literature.[10]

II Evidence in Competition Law Enforcement, Litigation and Legislation

With EU competition law premised on the MEA, economic evidence becomes a factor in competition law – only economic evidence can determine what kind of anticompetitive conduct has a negative effect on consumer welfare and how this should be assessed by competition authorities. This may give off the false impression that applying competition law is simply a matter of measuring effects, towards an irrefutable outcome.[11] This is not the case: economic evidence towards welfare effects can be ambiguous and subject to contrasting interpretations by economists.[12] Therefore, the literature on economic evidence in competition law enforcement has mainly been concerned with enforcement and litigation – the arena where attorneys introduce and judges consider competing interpretations of the available economic evidence.[13] In fact, a recent edited volume on the use of economic evidence in EU competition law is almost exclusively concerned with the enforcement practice of the Commission and National Competition Authorities and the ensuing litigation.[14]

The use of economic evidence in competition law legislation, however, has been subject to less academic scrutiny.[15] While EU competition law is to a large extent premised on EU Treaty articles,[16] an growing body of secondary EU legislation has been developed or amended in competition law under the penumbra

9 Guidelines on the Applicability of Art. 81 of the EC Treaty to Horizontal Cooperation Agreements, OJ 2001 C 3/2, §13; Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2004 OJ 2004 C 31/5, §8; Guidance on the Commission's enforcement priorities in applying Art. 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings OJ 2009 C 45/7 §19.

10 Roger Van den Bergh, 'The More Economic Approach in European Competition Law: Is More Too Much or Not Enough?' in Kovac Mitja and Vandenberghe Ann-Sophie (eds), *Economic Evidence in EU Competition Law* (Intersentia 2016); Parcu, Monti and Botta (n 5) p. 4.

11 Gunnar Niels and Reinder van Dijk, 'Competition Policy: What Are the Costs and Benefits of Measuring Its Costs and Benefits?' (2008) 156 *De Economist* 349.

12 Niels, Jenkins and Kavanagh (n 3) p. 461-462.

13 See, for example, Yannis Katsoulacos, Svetlana Avdasheva and Svetlana Golovanova, 'Legal Standards and the Role of Economics in Competition Law Enforcement' (2016) 12 European Competition Journal 277; Rupprecht Podszun, 'Politics of Antitrust Law' (2016) 47 IIC – International Review of Intellectual Property and Competition Law 383.

14 Kovac Mitja and VandenBerghe Ann-Sophie (eds), *Economic Evidence in EU Competition Law* (Intersentia 2016).

15 *See*, for example, Van den Bergh (n 10); Roger Van den Bergh, 'Vertical Restraints: The European Part of the Policy Failure' (2016) 61 The Antitrust Bulletin 167.

16 *See* Arts. 101-109 TFEU.

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of the MEA.[17] This raises the question as to how economic evidence has been factored into the legislative process of these instruments.

The present research does not have the ambition to provide an exhaustive overview of the role of economic evidence in all EU competition law legislation. Rather, it focuses on a particular legislative instrument, the VBER.[18] The VBER makes for a comprehensive and representative case study on the use of economic evidence in EU competition law legislation, as arguably the VBER in its first iteration in 1999 was the initial legislative instrument implemented under the MEA,[19] and the current procedure towards reviewing the VBER is the first legislative endeavour in competition law taking place entirely in the Commission's Better Regulation initiative.

C The Vertical Block Exemption Regulation (VBER)

The extent to which vertical relations should (or should not) be subject to regulation is a controversial topic in EU competition law. Ever since the VBER was enacted in 1999, it has been in a near-constant state of revision, which is about to culminate in the latest iteration of the VBER by June of 2022. Therefore, the process towards the 2022 VBER provides a valuable case study for the application of economic evidence in competition law legislation, within the context of "EU actions based on evidence" under the EU Better Regulation Agenda.

I On Vertical Restraints

Nearly every good that comes to market is the result of a vertical supply chain. Various raw materials are (semi-)assembled into intermediate or final products, which then reach end users through wholesalers and/or retailers. The vertical agreements between these firms, facilitating product development across the supply chain, have been studied by economists since the 1950s,[20] leading to a distinction between vertical integration and vertical restraints.[21] Vertical integration is generally considered the result of an optimal vertical agreement: by collaborating across the supply chain, numerous efficiencies can be realized, and a better-quality product can be produced. Vertical restraints, conversely, follow from

17 These are the Merger Regulation (Regulation 139/2004 OJ 2004 L 24/1); Regulation 1/2003 on public enforcement (OJ 2003 L 1/1); the Damages Directive; and the various Block Exemption Regulations, on , for instance, State Aid, horizontal agreements, vertical agreements and technology transfer (for an overview, *see* https://ec.europa.eu/competition-policy/antitrust/legislation/block-exemption-regulations_en).

18 Regulation 330/2010 on the application of Art. 101(3) of the TFEU to categories of vertical agreements and concerted practices OJ 2010 L 102/1.

19 Parcu, Monti and Botta (n 5) p. 4.

20 Joseph J Spengler, 'Vertical Integration and Antitrust Policy' (1950) 58 *Journal of Political Economy* 347; Lester G Telser, 'Why Should Manufacturers Want Fair Trade?' (1960) 3 *The Journal of Law & Economics* 86.

21 John Vickers and Michael Waterson, 'Vertical Relationships: An Introduction' (1991) 39 *The Journal of Industrial Economics* 445.

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suboptimal vertical agreements in which firms across the supply chain exploit each other or try generate excess profits.

The economic literature has covered a wide array of manifestations of vertical restraints.[22] What seems to be beyond debate is that per se the illegality of vertical restraints is ill-advised.[23] If anything, economic evidence points towards a case-by-case approach towards vertical restraints, focusing on the effects of the vertical agreement rather than its appearance.

With the literature pointing to a case-by-case, effect-based approach, it would only make sense to subject vertical restraints to a specific legislative instrument, providing a legal framework on how to approach vertical relations between firms. In EU competition law, this instrument is the VBER.

D The VBER and Its Development

The legal foundation of the VBER lies in Article 101 TFEU, which prohibits agreements between firms that prevent, restrict or distort competition. While Article 101 TFEU applies to horizontal and vertical agreements between firms, it is generally accepted by the European Commission that "vertical restraints are generally less harmful than horizontal restraints and may provide substantial scope for efficiencies".[24] It is therefore that the Commission has developed a system of block exemptions for vertical agreements since the 1980s, recognizing that the exemption of 101(3) is likely too narrow for many vertical agreements.[25]

Initially, the Commission enacted a number of BERs that were focused on specific vertical agreements[26] or specific industries,[27] which were then coalesced into a unified VBER for (nearly) all vertical agreements.[28] The new, unified VBER has remained similar in scope and structure since.[29] The VBER sets a market share

22 Bruno Jullien and Patrick Rey, 'Resale Price Maintenance and Collusion' (2007) 38 *The RAND Journal of Economics* 983; Richard E Romano, 'Double Moral Hazard and Resale Price Maintenance' (1994) 25 *The RAND Journal of Economics* 455; Howard P Marvel and Stephen McCafferty, 'Comparing Vertical Restraints' (1996) 48 *Journal of Economics and Business* 473; William Comanor and Patrick Rey, 'Vertical Restraints and the Market Power of Large Distributors' (2000) 17 *Review of Industrial Organization* 135.

23 *See*, for example, Patrick Rey and Jean Tirole, 'The Logic of Vertical Restraints' (1986) 76 *The American Economic Review* 921; Oana Secrieru, 'The Economic Theory of Vertical Restraints' (2006) 20 *Journal of Economic Surveys* 797.

24 Commission Notice – Guidelines on Vertical Restraints, SEC (2010) 411, §6.

25 Van den Bergh (n 15).

26 Regulation 1983/83 on the application of Art. 85(3) of the Treaty to categories of exclusive distribution agreements, OJ 1983 L 173/1; Regulation 4087/88 on the application of Art. 85 (3) of the Treaty to categories of franchise agreements OJ 1988 L 359/46.

27 Regulation 1475/95 on the application of Art. 81 (3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements OJ 1995 L 145/25.

28 Regulation 2790/1999 on the application of Art. 81 (3) of the Treaty to categories of vertical agreements and concerted practices OJ 1999 L 336/21.

29 Regulation 330/2010 on the application of Art. 101 (3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2010, L 102/1. The Regulation is accompanied by the EU Commission's Guidelines on Vertical Restraints, OJ 2010 C 130/1.

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(30%) and turnover (€ 50 million annually) threshold for firms, above which the Regulation does not apply to begin with. For the firms below those thresholds,[30] any vertical agreement they initiate falls under the 'safe harbour' of the VBER.[31]

For the agreements that fall under the safe harbour that the VBER provides, two main conditions apply. First, the VBER specifies a list of hard-core restrictions that invalidate the *entire* vertical agreement between firms that is subject to the VBER. In the 2010 VBER, these are:[32]

- Resale Price Maintenance: agreements [...] having as their direct or indirect object the establishment of a fixed or minimum resale price or a fixed or minimum price level to be observed by the buyer.[33]
- Territorial restrictions: agreements [...] that have as their direct or indirect object the restriction of sales by a buyer party to the agreement or its customers, in as far as those restrictions relate to the territory into which or the customers to whom the buyer or its customers may sell the contract goods or services.[34]
- Restriction of passive[35] and/or active[36] sales: to end users, whether professional end users or final consumers, by members of a selective distribution network, without prejudice to the possibility of prohibiting a member of the network from operating out of an unauthorized place of establishment.[37]
- Cross-supplies: "agreements that prevent or restrict end users, independent repairers and service providers from obtaining spare parts directly from the manufacturer of these spare parts."[38]

Second, the VBER specifies restrictions that should be excluded from vertical agreement, without invalidating the rest of the agreement. These are:[39]

- Non-compete obligations: arrangements exceeding a duration of 5 years that result in the buyer purchasing from the supplier or from another undertaking designated by the supplier more than 80% of the buyer's total purchases of the contract goods and services and their substitutes during the previous year.[40]
- Post-term non-compete obligations: "any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services."[41]

30 In practice, the VBER applies to firms with market shares between 15% and 30%, as firms below the 15% threshold fall under the *De Minimis* notice, exempting them from Art. 101 TFEU scrutiny. See Notice on agreements of minor importance which do not appreciably restrict competition under Art. 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice, OJ 2014 C 291/01).
31 Vertical Guidelines, *supra* (n 29), at §23.
32 *See* Art. 4 Regulation 330/2010.
33 Vertical Guidelines, *supra* (n 29), at §48.
34 *Ibid*., §50. Note that there are four exceptions to this hard-core restriction, *see* Art. 4(b)(i)-(iv) VBER.
35 Actively approaching customers, *ibid*., §51.
36 Responding to unsolicited requests from customers, *ibid*., §51.
37 *Ibid*., §56.
38 *Ibid*., §59.
39 *See* Art. 5 Regulation 330/2010.
40 Vertical Guidelines, *supra* (n 29), at §66.
41 Art. 5(1)(b) Regulation 330/2010.

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– Competing products in selective distribution: "the combination of selective distribution with a non-compete obligation, obliging the dealers not to resell competing brands in general."[42]

The 2010 VBER was set to expire on 31 May 2022.[43] From around 2018 onwards a new iteration of the VBER has been developed.

E Analysing the Use of Economic Evidence in the VBER Revision Process

The sunset clause of the VBER formally created an opportunity to revisit the goals and scope of the Regulation. However, there have been parallel developments also creating an impetus for VBER reform.

First, the advent of ecommerce led to an increase of price transparency – it became easier for consumers to exploit price differences between member-states for the same product.[44] Firms have responded to this by (1) pursuing dual distribution, in which the manufacturer opens its own (online) retail channels directly competing with independent retailers offering the same products and (2) imposing altogether novel and unregulated vertical restraints, such as Most Favoured Nation clauses (MFN, also referred to as 'price parity clauses'),[45] requiring retailers to operate brick-and-mortar stores, banning sales through online platforms and implementing 'recommended' resale prices.[46]

Second, national enforcement, case law and legislative initiatives put strain on the 2010 VBER. As a response to the rise of dominant online platforms, National Competition Authorities and legislatures developed differentiated approaches towards MFN clauses of platforms like Amazon and Booking.com, negatively affecting legal certainty.[47] Similarly, as regards restriction of online sales NCAs diverged,[48] until the ECJ issued its 2017 *Coty* judgement.[49] Moreover, a strict approach against RPM has come under strong academic scrutiny, arguing for a more lenient approach than the 2010 VBER allowed.[50]

42 Vertical Guidelines, *supra* (n 29), at §69.
43 Rec. 5-7 Regulation 330/2010.
44 Report from the Commission to the Council and the European Parliament, Final report on the E-commerce Sector Inquiry, COM (2017) 229 final.
45 MFN clauses are agreements between a supplier and a retailer whereby the supplier promises the retailer equally favourable conditions as compared to all other retailers the supplier covers. *See* Gönenç Gürkaynak and others, 'Most-Favored-Nation Clauses in Commercial Contracts: Legal and Economic Analysis and Proposal for a Guideline' (2016) 42 *European Journal of Law and Economics* 129.
46 E-commerce Sector Inquiry, p. 6.
47 Margherita Colangelo, 'Parity Clauses and Competition Law in Digital Marketplaces: The Case of Online Hotel Booking' (2017) 8 *Journal of European Competition Law & Practice* 3.
48 Bernadette Zelger, 'Restrictions of Online Sales and Vertical Agreements: Bundeskartellamt vs. Commission? Why Coty and Asics Are Compatible' (2018) 14 *European Competition Journal* 445.
49 Case C-230/16 Coty Germany GmbH v. Parfümerie Akzente GmbH [2017] ECLI:EU:C:2017:941.
50 Maria Ioannidou and Julian Nowag, 'Can Two Wrongs Make a Right? Reconsidering Minimum Resale Price Maintenance in the Light of Allianz Hungária' (2015) 11 *European Competition Journal* 340; Falk Schöning, 'Resale Price Maintenance for On-Line Businesses: The Hard Position of the Federal Cartel Office (Germany)' (2015) 6 *Journal of European Competition Law & Practice* 659.

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I Evaluation of the VBER

Starting in Q4 of 2018, the Commission set out to gather evidence about the functioning of the VBER and vertical guidelines. The outcome of the evaluation would allow the Commission to decide whether the VBER should be left to expire, be extended as is or revised into a new Regulation.[51] The Commission's evaluation roadmap is set up along the evaluation criteria of the Better Regulation Agenda[52] and provides insight into the scope and required the Commission to arrive at one of these three possible conclusions:[53] the evaluation criteria of the roadmap provide opportunity for considering economic evidence: directly by dedicated external support studies or indirectly through consultation with stakeholders or national institutions.

When analysing the documents chronicling the evaluation phase[54] on the use of economic evidence, a few things stand out. First, the NCAs point out an additional effectiveness focal point that is subject to economic evidence: the market share thresholds of the VBER.[55] This specifically relates to market definition on two-sided platform markets,[56] where the assessment of efficiency and anticompetitive effects is more complex than on regular one-sided markets that are vertically related.[57] Moreover, the NCAs require clarification on the application of the market share threshold on oligopolistic markets – where a few interdependent firms are active. Here too additional economic evidence would be appropriate as part of the VBER review process – although there seems to be little consensus on vertical restraints in oligopoly literature so far.[58] Furthermore, the NCAs underscore

51 Evaluation Roadmap: Evaluation of the Vertical Block Exemption Regulation, Ares 2018 5722104 – 08 November 2018.

52 European Commission, Better Regulation Toolbox – Tool #47: Evaluation Criteria and Questions, available at https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox/better-regulation-toolbox-0_en.

53 Evaluation Roadmap (n 51).

54 For an overview, *see* Commission, EU competition rules on vertical agreements – evaluation, available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1936-Evaluation-of-the-Vertical-Block-Exemption-Regulation_en.

55 Commission, Summary of the contributions of the National Competition Authorities to the evaluation of the Vertical Block Exemption Regulation, pp. 4-5, available at https://ec.europa.eu/competition-policy/document/download/54c7bc7c-51be-40e8-a645-822421668ee6_en?filename=vber_ncas_summary.pdf.

56 Two-sided markets are platforms where two different parties are coupled. Think of media or online platforms where advertisers and end-users are able to interact. For an overview of the early literature on two-sided markets, *see* Jean-Charles Rochet and Jean Tirole, 'Two-Sided Markets: A Progress Report' (2006) 37 *The RAND Journal of Economics* 645.

57 Robin S Lee, 'Vertical Integration and Exclusivity in Platform and Two-Sided Markets' (2013) 103 *American Economic Review* 2960; Tommy Staahl Gabrielsen, Bjørn Olav Johansen and Teis Lunde Lømo, 'Resale Price Maintenance in Two-Sided Markets' (2018) 66 *The Journal of Industrial Economics* 570.

58 Paul W Dobson and Michael Waterson, 'The Competition Effects of Industry-wide Vertical Price Fixing in Bilateral Oligopoly' (2007) 25 *International Journal of Industrial Organization* 935; Volker Nocke and Patrick Rey, 'Exclusive Dealing and Vertical Integration in Interlocking Relationships' (2018) 177 *Journal of Economic Theory* 183.

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the value of economic evidence in assessing the effects of hard-core restraints, particularly RPM and territorial restrictions.[59]

The commissioned (and integrated) support studies most explicitly make use of economic evidence in the VBER evaluation.[60] The aim of the support studies is to provide

> evidence-based grounds for a possible revision of the VBER [...] through identification and analysis of provisions which may no longer be up to date with the latest market developments and business practices, and/or overlap with other provisions or give rise to possible inconsistencies.

Specifically, the study focuses on the relevance, effectiveness and efficiency of selective distribution, exclusive distribution, RPM, MFN clauses and cumulative (aggregate) effects and employs literature review, comparative legal analysis, survey data, stakeholder interviews and original econometric analysis.

Of the nine evaluation questions of the support study,[61] particularly questions on effectiveness that explicitly rely on economic evidence, the focus is specifically on:[62]

1 RPM in the market for book publishing
2 MFN in hospitality markets using publicly available data at country level
3 MFN in hospitality markets using proprietary hotel-level booking data
4 Cumulative effects of MFN clauses in hospitality markets using proprietary hotel-level booking data

Concerning RPM, the support study finds that in the economic literature welfare effects are premised on the specific market context that the researchers have focused on.[63] This finding is reinforced by the original econometric analysis, which finds that RPM in books publishing (typically through fixed book prices) lead to higher output and marginally lower prices. It is noted here, however, that the book publishing market has unique features, leading to the recommendation that "the results found for this sector may not be fully applicable to other sectors and caution is advised when translating them". At best, therefore, the research concludes that RPM has the potential to increase consumer welfare in specific circumstances.[64]

On MFN agreements, the support study covers the pro- and anticompetitive motivations that the economic literature distinguishes for implementing MFN clauses.[65] These motivations are then synthesized by (again) focusing on market factors, concluding that MFN agreements are more likely to have a negative welfare effect on concentrated markets, or, in the case of (online) platforms, their market

59 Summary of the contributions of the National Competition Authorities (n 55), pp. 5-6.
60 European Commission, Support studies for the evaluation of the VBER, final report (2020), available at https://ec.europa.eu/competition/publications/reports/kd0420219enn.pdf.
61 *Ibid*., pp. 35-37.
62 *Ibid*., p. 49.
63 *Ibid*., p. 87.
64 *Ibid*., p. 90.
65 *Ibid*., pp. 100-104.

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power.[66] The original econometric research on the welfare effects of MFN clauses in hospitality markets using publicly available data shows that in the three national markets in which MFN was prohibited (Italy, Austria and Belgium) hotel prices decreased and no significant effect on demand was observed. This leads to the conclusion that a prohibition of MFN agreements has increased consumer welfare, again with reference to the particularities of the hospitality market.[67] The research on hotel-level data confirms this outcome, leading to the conclusion that MFN agreements "appear to have a significantly negative impact on competition in these markets such that banning the use of these clauses leads to better outcomes for consumers".[68] As for cumulative effects, based on a large number of observations, the research finds a correlation between a higher prevalence of RPM by booking platforms and higher prices of hotel listings. This effect is weaker on the low end of the hospitality market and stronger on the high end.[69]

The evaluation of the VBER culminated into a Commission Staff Working Document summarizing the evaluation process and reporting the outcome per evaluation criterion.[70] In the section answering the specific evaluation questions, the Staff Working Document bases its conclusions on a wide range of evidence, particularly consultation with the public, stakeholders and NCAs and comparative legal research into enforcement and litigation practice across member-states.[71] These conclusions are supplemented by a list of 116 areas ('issues') where the VBER is not functioning well or not as well as it could,[72] which is elaborated on in an annex. In this annex, reference is made to the economic literature review and econometric evidence gathered on RPM[73] and MFN[74] agreements. Regarding RPM, the economic literature review and econometric evidence lead to the issue of "mixed evidence regarding the classification of RPM as a hard-core restriction according to the VBER".[75] Concerning MFN clauses, the economic literature review and econometric evidence do not seem to have been factored into any of the four issues flagged by the Commission.[76]

Overall, the Commission concludes there is a continued need for a VBER and that the 2010 VBER has been relatively effective in providing a coherent legal and enforcement framework for vertical agreements.[77] At the same time, the Commission highlights areas for reform. In broad terms, reforms should address the findings that the 2010 VBER is (1) ill-equipped to address new market developments related to online (platform) sales and (2) is too complex in its

66 *Ibid*., p. 105.
67 *Ibid*., p. 112.
68 *Ibid*., p. 113.
69 *Ibid*., pp. 120-121.
70 Commission Staff Working Document – Evaluation of the Vertical Block Exemption Regulation, SWD(2020) 172 final.
71 *Ibid*., pp. 29-48.
72 *Ibid*., pp. 75-87.
73 *Ibid*., pp. 173-174.
74 *Ibid*., pp. 182-184.
75 *Ibid*., p. 80.
76 *Ibid*., pp. 81-82.
77 *Ibid*., pp. 91-92.

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application of mainly hard-core or excluded restrictions to complex distribution systems.[78]

With this outcome, the road has been paved for the second stage of the VBER revision process. After all, there are typically multiple approaches towards addressing the areas for reform that have been highlighted. These approaches are considered in the impact assessment phase.

F Impact Assessment of the VBER

The VBER Impact Assessment works right from the first draft of the proposed new VBER to the time the final version of the new VBER is adopted by the Commission. First, the Commission proposed regulatory options in its Inception Impact Assessment (IAA) of October of 2020. These options are then subjected to consultation.

The IAA starts from the two broad areas for reform mentioned in the Commission Staff Working Document: the VBER should better address new (online) market developments and become less complex in its application.[79] Given the need for reform in these areas, the Commission outlines concrete reform proposals:[80]

1 A generic attempt to simplify the VBER and better align it with recent CJEU case law
2 Specific simplifying measures:
   – Clarifying the status of RPM as a hard-core restriction
   – No longer categorically excluding non-compete obligations over 5 years, under certain conditions
3 Exploring revisions of the scope of the VBER in response to specific phenomena, mainly those related to new (online) market developments:
   – Dual distribution
   – Active sales restrictions
   – Indirect online sale restrictions, such as dual pricing
   – MFN clauses

For the revisions under (3), the Commission lists up to four policy options, ranging from a baseline scenario of no policy change to various policy responses to the phenomena outlined.[81] For these policy options the impact assessment will require a further analysis of evidence gathered during the evaluation. Furthermore, the Commission states it will draw on consultation with the public, NCAs and expert advice.[82]

78 *Ibid*., pp. 92-93.
79 European Commission, Inception Impact Assessment – Revision of the Vertical Block Exemption Regulation and the Vertical Guidelines Ares (2020) 5822391.
80 *Ibid*., §A.
81 Ibid., §C.
82 Ibid., §D.

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In the public consultation responses,[83] contributions by NCAs[84] and the three commissioned expert reports,[85] no additional economic evidence is relied on explicitly, either based on original research or on literature review. The public consultation survey mainly solicits opinions on the various regulatory options and does not provide a clear consensus.[86] The expert reports concern legal research, rather than economic analysis. The NCA contributions do refer to economic evidence implicitly, by mentioning their own (empirical) observation of welfare effects, competitive concerns or efficiencies generated related to vertical agreements:

- NCAs report a perceived lack of evidence for efficiencies generated by RMP, thus arguing that in the absence thereof RMP should remain a hard-core restriction.[87]
- Some (but not a majority of) NCAs stressed the pro-competitive effects and efficiency of dual distribution, whereas the overall consensus was that the new VBER should continue to exempt dual distribution if only for legal certainty.[88]
- Regarding dual pricing (as an indirect means of online sales restrictions) the NCAs' consensus seems more normative than empirical: dual pricing should remain a hard-core restriction, because "it would be difficult to show in practice that an individual dual pricing practice has anti-competitive effects".[89]
- A majority of NCAs have observed anticompetitive effects of MFN clauses. Even though most of these effects were concerned in hotel booking and meal delivery markets, these were deemed to materialize on many other markets as well. Consequently, the NCAs recommend the Commission to include MFN clauses under the excluded restrictions of the revised VBER.[90]

83 European Commission, Summary of the contributions received in the context of the open public consultation on the impact assessment for the review of the Vertical Block Exemption Regulation (EU) No. 330/2010, Ares (2021) 4119477 – 24 June 2021.

84 European Commission, Summary of the replies of the national competition authorities of the European Competition Network provided during the targeted consultation for the impact assessment of the review of Regulation (EU) No. 330/2010 (2021), available at https://ec.europa.eu/competition-policy/document/download/71915692-b99a-4206-839d-29e58872a10f_en?filename=VBER_IA_summary_contributions_from_NCAs.pdf.

85 Commeo, Expert Report on the review of the Vertical Block Exemption Regulation Information exchange in dual distribution (2021), available at https://ec.europa.eu/competition-policy/document/download/a2b573cc-e07b-4f67-8009-7ba3c7bd9431_en?filename=kd0122032enn_VBER_dual_distribution_2.pdf; Contrast, Expert report on the review of the Vertical Block Exemption Regulation Active sales restrictions in different distribution models and combinations of distribution models (2021), available at https://ec.europa.eu/competition-policy/document/download/8f01bfe6-b940-48a0-abd4-3c2f1a063947_en?filename=kd0821131enn_VBER_active_sales.pdf; Alison Jones, Expert report on the review of the Vertical Block Exemption Regulation: Cases dealing with online sales, and online advertising, restrictions at EU and national level (2021), available at https://ec.europa.eu/competition-policy/document/download/a1dc005a-fe39-4b6a-b033-91eb2069d7a5_en?filename=kd0921156enn_VBER_online_sales.pdf.

86 Commission, Summary of the contributions (n 83).

87 European Commission, Summary of the replies (n 84), p. 5.

88 *Ibid*., p. 2.

89 *Ibid*., p. 4.

90 *Ibid*., pp. 4-5.

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Next, the Commission circulated a first draft of the revised VBER,[91] accompanied by a background note explaining the revisions vis-à-vis the 2010 version of the VBER.[92] The draft of the new VBER was again subjected to public consultation, the results of which are pending at the moment of writing this article.

The draft version of the revised VBER contains "changes proposed by the Commission based on the evidence gathered so far".[93] The most significant changes as compared to the 2010 version of VBER include the following:

– As the evidence gathered "indicates that the originally rather limited scenarios of dual distribution have become prevalent since the adoption of the currently applicable VBER", the existing exemption is narrowed. Dual distribution will only fall under the ambit of the VBER inasmuch as the agreement is not concluded horizontally, between competitors.[94]
– Since the evidence gathered on active sales restrictions suggests that the VBER is unclear on this topic and "limit[s] suppliers in designing their distribution systems according to their business needs",[95] active sales restrictions are for the first time explicitly defined in the revised draft of the VBER, and specific manifestations are excluded from the hard-core restrictions of Article 4.
– As the evidence gathered suggests that "that online sales have developed into a well-functioning sales channel and therefore no longer needs special protection", dual pricing is removed from the hard-core restriction of Article 4.[96]
– MFN clauses by online intermediation services are added to the list of excluded restrictions.[97]
– RPM remains a hard-core restriction, but more detailed guidance is provided in applying this hard-core restriction.[98]

This first draft of the revised VBER was again subjected to public consultation by September 2021.[99] A number of responses provided additional economic evidence

91 Communication from the Commission, Approval of the content of a draft for a Commission Regulation on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, C (2021) 5026 final.
92 European Commission, Revision of the Vertical Block Exemption Regulation Explanatory note (2021), available at https://ec.europa.eu/competition-policy/document/download/e0eacfbb-9dbe-4dc5-8fdf-b0e9c74a7f15_en?filename=draft_VBER_and_vertical-guidelines_explanatory%20note.zip.
93 *Ibid*., p. 1.
94 C(2021) 5026 final (n 91), Arts. 2(4)-(5).
95 Commission Explanatory note (n 92), p. 4.
96 *Ibid*., p. 4.
97 C(2021) 5026 final (n 91), Art. 5(1)(d).
98 Commission Explanatory note (n 92), p. 6.
99 Commission, Summary of the comments received in response to the public consultation on the draft revised rules for the review of the Vertical Block Exemption Regulation (EU) No. 330/2010 (2021), available at https://ec.europa.eu/competition-policy/document/download/d120e232-0893-4dee-91e4-a663f5e94f71_en?filename=contributions_summary_draft_revised_VBER_and_VGL.pdf.

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in this late state of the legislative process, either premised on original research[100] or on literature review.[101] At the moment of writing this article, the Impact Assessment Report and the final draft of the revised VBER have not yet been circulated, which makes it impossible as of yet to analyse if and how the Commission has factored in this additional economic evidence.

The evaluation of the 2010 version of VBER and the impact assessment of the revised VBER have considered economic evidence in a variety of ways. After this systematic analysis of the practical usage of economic evidence in the VBER revision legislative process, it is now opportune to critically assess this trajectory.

G Assessing the Use of Economic Evidence in the VBER Reform Process

With the impact assessment in its final stages, and the new VBER set to enter into force directly following the expiry of the 2010 version of VBER, it is opportune to reflect on the application of economic evidence in the VBER revision legislative process. For the sake of clarity, this assessment will differentiate between the evaluation and impact assessment phases.

I Economic Evidence in the VBER Evaluation

In the elaborate VBER evaluation process, the intended use of evidence is clearly outlined. Economic evidence is one of many evidentiary inputs for the evaluation, alongside public and stakeholder consultation, surveys and external support studies in law and behavioural science. This wide array of evidentiary sources fits under the Commission's Better Regulation initiative, where (particularly) consultation has been emphasized as a crucial factor in legislative processes.[102]

The introduction of decidedly non-economic evidence in the VBER evaluation can be considered as being at odds with EU competition law's general purported focus on welfare effects as prime evidence. At the same time, the Commission's stated reliance on consumer welfare as the North star for competition policy has been criticized in the literature: some authors point out how consumer welfare at best is one out of many goals of competition law,[103] and others point to the CJEU's case law continuing to go beyond consumer welfare as a narrow focus of competition

100 RBB Economics, VBER – Dual Distribution (2021), available at https://ec.europa.eu/competition-policy/document/download/5f28ad25-55b9-4452-8007-656a8f86416c_en?filename=contributions_draft_revised_VBER_and_VGL.zip; Kühn and Guasch, The Competitive Constraints from Private Label Offers on Branded Grocery Pricing (2021), available at https://ec.europa.eu/competition-policy/document/download/5f28ad25-55b9-4452-8007-656a8f86416c_en?filename=contributions_draft_revised_VBER_and_VGL.zip.

101 E Deutscher, S Ennis, and M Hviid, CCP Response to Consultation on Revised Vertical Block Exemption Regulation (2021), available at https://ec.europa.eu/competition-policy/document/download/5f28ad25-55b9-4452-8007-656a8f86416c_en?filename=contributions_draft_revised_VBER_and_VGL.zip; Kühn and Ennis, Minimum Advertised Prices: How They Differ from RPM, available at https://ec.europa.eu/competition-policy/document/download/5f28ad25-55b9-4452-8007-656a8f86416c_en?filename=contributions_draft_revised_VBER_and_VGL.zip.

102 *See*, for example, Commission Communication – Better regulation for better results (n 1).

103 Pablo Ibáñez Colomo and Andriani Kalintiri, 'The Evolution of EU Antitrust Policy: 1966–2017' (2020) 83 *The Modern Law Review* 321; Van den Bergh (n 10).

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law.[104] When competition law enforcement and litigation in practice considers evidence beyond consumer welfare to begin with, a narrow focus on consumer welfare can hardly be expected in legislation.

While economic evidence could have been factored in for all of the evaluation criteria of the VBER, it is not controversial that economic evidence has been relied on selectively for some criteria, focusing mainly on effectiveness. What does stand out is that where stakeholders (particularly NCAs) have explicitly requested additional economic evidence to be considered, the Commission has not pursued this. Issues flagged by NCAs concerning market share thresholds, vertical restraints on two-sided markets and oligopolistic markets would have been appropriate to be informed by evidence from economic support studies.

Instead, the Commission's efforts in securing economic evidence, either through original research or literature review, have been focused on two contentious topics in VBER reform: RPM and MFN clauses. Although RPM and MFN clauses certainly would qualify for gathering of economic evidence in the evaluation phase, it is unclear why other contentious topics such as dual distribution, dual pricing and online platform bans were not subjected to the same evidentiary focus.

In considering the additional economic evidence on RPM and MFN, the Commission duly acknowledges the limitations of the evidence. In both cases, the underlying research is premised on specific markets (book publishing and hospitality), which may limit a generic application of the evidence generated. Pointing out these limitations follows from the Commission's own recommendations on the use of economic evidence.[105] However, these stated limitations are then dealt with differently in the Commission's follow-up. On the one hand, the economic evidence concerning RPM on the book publishing market – demonstrating potentially positive effects on consumer welfare – is nuanced because of its specificity. This evidence does not lead the Commission to reconsider RPM as a hard-core restriction in the VBER. On the other hand, the negative effects on consumer welfare of MFN clauses in hospitality markets are considered to be relevant beyond hospitality and lead the Commission to include MFN clauses under excluded restrictions.

The overall image that comes to mind when considering the Commission's use of economic evidence in the VBER evaluation is one of selectivity. It remains unclear why some contentious topics in vertical agreements merited gathering of economic evidence, while others did not – even when explicitly requested by NCAs. Within the context of the Better Regulation initiative, it can hardly be expected that legislation in competition law should be reliant primarily and exhaustively on economic evidence. However, given the Commission's own ambition to "[explain] better what we are doing, and why",[106] it would only make sense to explicitly show

104 Parcu, Monti and Botta (n 5); Witt (n 5).

105 Commission Staff Working Paper: Best Practices for the Submission of Economic Evidence and Data Collection in Cases Concerning the Application of Arts. 101 and 102 TFEU and in Merger Cases, SEC (2011) 1216 final, §43.

106 Commission Communication – Better regulation for better results (n 1), p. 5.

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in which specific matters economic evidence is (not) taken into consideration during the evaluation stage of a legislative process.

H Economic Evidence in the VBER Impact Assessment

The Commission's Inception Impact Assessment provides for a transparent outline of the specific areas subject to reform in the new VBER and of the policy options that are considered therein. Especially when comparing policy options, additional evidence is of value, and the Commission rightly seeks further input on dual distribution, active sales restrictions, indirect online sale restrictions, such as dual pricing and MFN clauses.

Although the Commission seems to have been open to consider additional economic evidence, the ensuing impact assessment seems entirely premised on other sources of evidence, mainly consultations and legal research. With many of the stated policy options there would still be opportunity to gather additional economic evidence, either based on literature review or on original econometric research. For instance, the options of either limiting or extending the scope of the exception for dual distribution would allow for research on comparative welfare effects for both consumers and producers. Similarly, the effects of removing or keeping dual pricing from the list of hard-core restrictions could be compared in terms of consumer welfare, and this comparison would have been valuable in considering these policy options.

Instead, the eventual narrowing of the dual distribution exemption and removal of dual pricing as a hard-core restriction in the revised VBER seem premised primarily on the weightage given to public and stakeholder responses. Concerning online sales restrictions and RPM, the outcomes of consultations are used as evidence of the lack of clarity in the 2010 version of VBER about these topics, without (so far) explicit consideration of the various regulatory options. Finally, MFN clauses have been added to the list of excluded restrictions without explicit comparison of the policy options of the Inception Impact Assessment.

It should be noted at this point that at the moment of writing this article the impact assessment is not yet finished completely. The currently pending Impact Assessment Report could shed light on the lacunae highlighted above.

I Conclusion

The present research has analysed the use of economic evidence in EU competition law legislation by means of a case study of the 2018-2022 revision of the VBER. The investigation focused on what kind of economic and non-economic evidence was used and in what stages of the VBER revision and how that evidence informed legislative choices. These findings were related to the European Commission's Better Regulation Agenda, which relies on an evidentiary standard that is much broader than economic evidence.

First, the role of economic evidence in EU competition law in general was scrutinized, explaining the importance attached to economic evidence in terms of

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(consumer) welfare effects as a driver for competition law enforcement and litigation under the Commission's More Economic Approach (MEA) that has been in force since the late 1990s onwards.

The analysis of the MEA led into an exposé of anticompetitive behaviour within supply chains ('vertical restraints') in EU competition law and the way the VBER and its predecessors have attempted to regulate vertical restraints throughout the years. An analysis followed of the motivation behind the VBER reform initiatives, which attempted to make application of the VBER less complex for stakeholders and better aligned with (online) market developments.

The main analytical part of this research, then, reviewed the gathering and processing of economic evidence in the evaluation and impact assessment of the VBER. In the VBER evaluation, economic research was one of the many sources of evidence. This is understandable given the Commission's broad evidentiary standard of the Better Regulation Agenda, but nonetheless striking when considering EU competition law's reliance on economic evidence over non-economic evidence under the MEA. Moreover, the Commission has been selective in its gathering and strategic in its application of economic evidence. It remains unclear why economic evidence was gathered to evaluate only some aspects of the VBER but not others. Furthermore, the Commission has been subjective in drawing conclusions from economic evidence. On the one hand, sector-specific econometric findings on positive welfare effects of vertical agreements that are currently illegal under the VBER were not considered generally applicable. On the other hand, the equally narrow sector-specific econometric conclusions on negative welfare effects on new vertical restraints that the Commission intended to make illegal were considered generally applicable.

The VBER impact assessment stage was characterized by a lot of opportunity for gathering and processing of economic evidence. Particularly when outlining various policy options in competition law, it would only make sense to compare the welfare effects of these options. Somewhat surprisingly, this comparative economic research has not been undertaken. Instead, the Commission's legislative choices were mainly premised on stakeholder and public consultation and legal research.

The overall picture that emerges from this case study research is that economic evidence does not and cannot have the same weight in competition law legislation as it has in competition law enforcement and litigation. This, however, creates a tension with the MEA in competition law. The broad evidentiary standard and the emphasis on consultation of the Better Regulation Agenda are at odds with the narrow focus on consumer welfare effects as a driver for competition policy.

It is a testament to the transparency standards of the Better Regulation Agenda that EU competition law legislative procedures and the use of (economic) evidence therein can now be scrutinized in the first place. Only because of this transparency in the VBER revision process, it is now possible to formulate concrete recommendations for the use of economic evidence in competition law legislation. When considering economic evidence in competition law legislation, this should be done according to the transparency standards of the Better Regulation Agenda. First, the Commission should ascertain why economic evidence is (not) gathered

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on specific legislative aspects; second, the Commission should process economic evidence objectively and not strategically.