

Public consultation on the draft revised Regulation on vertical agreements ("VBER") and vertical guidelines (the "Guidelines") (consultation reference: HT.6179)

Submission of Bryan Cave Leighton Paisner LLP

1. Bryan Cave Leighton Paisner LLP ("**BCLP**") is an international law firm with over 75 dedicated competition law specialists based in Belgium, France, UK, Russia and USA. BCLP regularly advises clients on the application of UK and EU competition law to vertical agreements.
2. BCLP welcomes Executive Vice-President Vestager's stated objectives for the revised VBER and accompanying Guidelines to "*keep up with market developments that have transformed the way businesses around the world operate, including the growth of e-commerce and online platforms, during the last decade*" and also to "*reduce compliance costs for businesses, notably small and medium-sized enterprises, by simplifying and clarifying certain provisions perceived as particularly complex and difficult to implement*".¹
3. With these welcome objectives in mind, BCLP submits comments on a single aspect of the draft VBER – and which reflects a consistent and vociferous reaction shared with our team by multiple clients across multiple industries and geographies – namely the proposed reduced market share threshold for the application of the VBER safe harbour to situations of dual distribution (at Articles 2(4) and 2(5) of the draft VBER).
4. As identified in the Commission Staff Working Document dated 8 September 2020 (Evaluation of the Vertical Block Exemption Regulation),² a large majority of respondents to the previous public consultation on VBER indicated that dual distribution is one of the areas where the current rules and guidance cause significant uncertainty for businesses (in particular, in relation to information exchanges). These concerns are heightened, in our experience and that of our clients, as innovative and technology-enhanced ("omni-channel") routes to market become prevalent, and where the traditional, clear distinctions between levels of trade in the supply chain become somewhat blurred – such that there is an increasing number of our clients who are supplying their goods/services on both a B2C and B2B basis.
5. While BCLP welcomes proposals to broaden the scope of the dual distribution safe harbour to catch distribution by wholesalers and importers, we are concerned by the proposal to narrow the block exemption so that it only applies where parties' aggregate market share at the retail level does not exceed 10%. The primary concerns we identify, and which reflect those of our clients, are as set out below.

Self-assessment by businesses to establish their compliance or otherwise with the 10% market share threshold will introduce increased levels of complexity and cost

6. Under the proposed VBER, there is limited headroom for manufacturers and/or root suppliers of services that have direct relationships with their end-customers to achieve growth in market share (for example, by appointing additional resellers) without the risk of established distribution arrangements falling outside the VBER safe harbour and becoming subject to challenge. As set out

¹ https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3561

² SWD (2020) 172 final

further below, practical challenges, costs and uncertainties, associated with the restriction on information exchange in dual distribution between 10% and 30% market share mean that the draft VBER, if adopted in the current form, will have a strong dampening effect on dual distribution. This risk will be felt most keenly by new entrants, potential competitors and challengers that have not yet achieved significant market share, but which are striving to do so, including through innovation and investment in multiple routes to market.

7. Under the current VBER (notwithstanding the 30% market share threshold), as a practical matter, upstream suppliers can take some comfort that, absent dominance and any “hardcore”/excluded restrictions in their distribution arrangements, they can sell directly to end-customers, whilst also making effective use of independent resellers and providers of innovative distribution services to best serve their customers and achieve commercial success. Applying a *de minimis* market share threshold will remove this practical comfort.
8. BCLP respectfully submits that the 10% threshold for dual distribution is inconsistent with other guidance of the Commission relating to marketing co-operation between competitors, including for example the 20% market share threshold applicable to joint distribution arrangements under the Specialisation Agreements Block Exemption Regulation; and the 15% market share safe harbour for commercialisation agreements at paragraph 240 of the Horizontal Agreement Guidelines. Moreover, in the dual distribution context, any reduction in *intra-brand* competition potentially entailed by knowledge which an upstream supplier has of its downstream retailer’s activity must be considered against a counterfactual that the upstream supplier elects not to make sales to independent resellers at all.

There remains a lack of clear guidance on information exchange in the context of dual distribution, and there are significant practical challenges for upstream suppliers of services in establishing robust information barriers and clean team protocols

9. An effective distribution relationship necessitates a degree of information exchange beyond headline prices and volumes agreed for the B2C sale from the root supplier to its distributor. By way of example, discussions of future products/services and their commercial positioning, likely future changes in retail demand and supply challenges are all critical items of information.
10. An inevitable inference of Article 2(4) and 2(5) of the proposed draft VBER is that if upstream suppliers are to continue to sell directly to retail customers (for products and services where they have aspirations of a more than *de minimis* market share) and to be able to take advantage of proposed draft VBER, they must ring-fence all information exchange between “direct” (B2C) and “indirect” (B2B) distribution channels. For most businesses, information controls of this nature will be impractical and/or prohibitively costly. For example, there may be insufficient staff to separate out sales and other core functions between direct and indirect channels. Robust information barriers can be a challenge to operate (certainly outside the regulated context), given office and IT environment design, and many of our clients are concerned that it may not be possible to sustain an “information barrier defence” if the mere receipt of commercial information from a downstream retailer, ancillary to implementing an effective distribution arrangement, disapplies the block exemption above *de minimis* market shares.
11. BCLP notes multiple concerns from clients that requirements to introduce these controls will dissuade businesses from expanding and innovating their distribution networks and will encourage them instead to focus solely on their own captive/direct sales, ultimately at the expense of the reach of their products to end-customers.

Concluding comments

12. The Commission has identified that dual distribution is one of the four areas of the current VBER which carries “false positives” risks, i.e. vertical agreements/restrictions that are covered by the safe harbour but for which it cannot be assumed with sufficient certainty that they are on balance efficiency-enhancing and, thus, fulfil the conditions for exemption under Article 101(3). The proposal at Article 2(4) of the draft VBER is intended to exclude from the safe harbour scenarios of dual distribution that may give rise to horizontal concerns, by introducing a market share threshold equivalent to that used in the *De Minimis* Notice. Article 2(5) then provides for an additional but narrower safe harbour where the supplier and its distributors have an aggregated market share below 30%, however, this safe harbour excludes information exchanges.
13. In contrast to the intention to allay concerns about “false positives”, BCLP is of the view that the market share threshold proposal will increase uncertainty for businesses, cause stakeholders to incur unnecessary cost and stifle businesses attempts to expand and invest in their distribution channels. This uncertainty will be compounded by the lack of substantive guidance on information exchange in the context of dual distribution, which, under the new regime, will only be block exempted for parties who fall under the 10% market share threshold.
14. As such, BCLP propose that the market share threshold for the block exemption in Article 4(2) of the draft VBER should be adjusted to 30%.
15. Furthermore, BCLP request that further specific guidance be provided by the Commission on the legitimate scope of information exchange in the context of dual distribution arrangements in order to provide a helpful starting point for businesses trying to self-assess against the new regime. By way of example, the Commission may wish to identify in its Guidance: (i) examples of categories of information it regards as directly related and necessary for the effective implementation of a distribution arrangement; and (ii) examples of information exchange in the dual distribution context, which it regards as “hardcore” or where it regards individual exemption as unlikely to be available (such as an upstream supplier acting as a conduit for horizontal collusion between *third party* downstream retailers).³
16. BCLP respectfully submits that the above comments are consistent with the Commission’s stated objectives to gather feedback from stakeholders, simplify complex areas of the rules accordingly and provide up-to-date guidance for the current and emerging business environment.

Bryan Cave Leighton Paisner LLP (AHOC/DBYL)
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³ Albeit the Commission provides some guidance in relation to information exchange between competitors in the Horizontal Agreement Guidelines (and which is cross-referenced in the draft Vertical Guidelines), we respectfully submit that the prevalence, and the specific vertical context, of dual distribution is such that further guidance in respect of information exchange in the dual distribution context would be merited in the Vertical Guidelines.