Linklaters LLP – Response

European Commission's Consultation on the new draft Section of the Vertical Guidelines relating to the exchange of information in the context of dual distribution

1 Introduction

(1) Linklaters LLP ("**Linklaters**") welcomes the opportunity to comment on the proposed guidance relating to information exchange in dual distribution schemes, intended to be added to the Vertical Guidelines ("**VGL**").

(2) As a preliminary remark, we would like to commend the European Commission (the "**Commission**") for the open and constructive discussions and exchanges throughout the review process. It is encouraging to see that in response to the comments received during the public consultation on the Draft Vertical Block Exemption Regulation ("**DVBER**") and the accompanying draft vertical guidelines ("**DVGL**") the Commission is now planning to add a new section to the VGL addressing the exchange of information in dual distribution scenarios (the "**Additional Guidance**").

(3) We understand from the consultation document that, in addition to the insertion of the Additional Guidance, the Commission is planning to include a new provision in the VBER. Before commenting on the proposed Additional Guidance (Section **Error! Reference source not found.**), we briefly comment on the envisaged new provision (Section 2).

2 The New Provision

(4) Article 2(5) of the DVBER foresees that the exchange of information within dual distribution schemes is no longer covered by the general exemption as soon as the parties' combined market share at retail level exceeds 10% and that beyond that threshold the legality of information exchanges within dual distribution schemes must be assessed under the rules applicable to horizontal agreements.

(5) In particular, this new threshold triggered significant criticism. Stakeholders considered that it was arbitrarily low and that it did not adequately honour the pro-competitive effects of information exchanges in a dual distribution context. Stakeholders were further concerned about the loss of legal certainty given also the practical difficulties for companies to be comfortable that the 10% threshold is not exceeded.[1] The experts that the Commission engaged to prepare a report on information exchanges in dual distribution scenarios (the "**Expert Report**") also came to the conclusion that information exchanges in dual distribution scenarios do not generally lead to false positives under the current Vertical Block Exemption Regulation ("**VBER**") and questioned the Commission's proposed approach in the DVBER.[2]

(6) We understand from the consultation document that in light of the feedback received the Commission is now envisaging to introduce a new provision (the "**New Test**") according to which

> "*[…] the block exemption would not apply to the exchange of information between the supplier and the buyer that is not necessary to improve the production or distribution of the contract goods or services by the parties.*"

[1] See already Section 3.2 of our response to the public consultation of the DVBER and DVGL of 17 September 2021.

[2] Expert Report, page 3.

(7) While we welcome the Commission's willingness to reconsider the proposed approach, we have strong reservations whether the New Test allows to adequately address the concerns that had been voiced during the public consultation on the DVBER and DVGL and whether it would actually constitute an improvement compared to the scheme that had been proposed in July 2021.

(8) This is because the assessment that companies will need to carry out under the New Test in order to determine whether an information exchange falls into the safe harbour comes very close to the self-assessment that companies would need to carry out under Article 101(3) TFEU in a scenario where information exchanges in dual distribution scenarios would be entirely carved out from the VBER.

(9) We appreciate that under the New Test it would arguably be up to the regulators or claimants to demonstrate that the sharing of information is not necessary to improve the production or distribution of the contract goods or services and that it would thus, compared to Article 101(3) TFEU, result in a shift of the burden of proof to the benefit of the parties. For practical purposes, however, it seems that the New Test would only have marginal benefits for companies in terms of efficiencies and legal certainty compared to a scenario where information exchanges would entirely fall outside the safe harbour.

(10) In particular, the New Test is extremely broad: there is no qualification of the information the exchange of which would result in an inapplicability of the VBER. The wording of the New Tests suggests that even the exchange of information that does not involve any risk of a restriction of competition on the market where the supplier and the buyer compete (e.g., because it is related to other activities or because it is not sensitive) would prevent the information exchange from benefiting from the safe harbour, if not all of the information being shared is "*necessary to improve the production or distribution of the contract goods or services by the parties*". For example, in a hypothetical scenario where a supplier would legitimately share some files with its distributor which also include some unrelated uncritical information that is not "*necessary*" for the distribution it seems that the information exchange would fall outside the safe harbour in its entirety.

(11) In order to ensure that the application of the general exemption to information exchange is not prevented by the exchange of entirely uncritical information, we would invite the Commission to add a qualification (e.g. to specify that the New Test only applies to competitively sensitive information relating to the market(s) where the supplier and the buyer compete) to make sure that the exchange of information that is not "*necessary*" does not lead to the inapplicability of the VBER to information exchanges if it is obvious that the information shared is unproblematic (please also refer to paragraph (16) below).

3 The Additional Guidance

(12) We welcome the proposed guidance on information exchanges in dual distribution scenarios and in particular the inclusion of the lists of positive and negative examples in paragraph 13 and paragraph 14. In the interest of legal certainty and in order to ensure that the guidance is applied consistently across Member States we would, however, invite the Commission to complement the Additional Guidance as outlined below.

3.1 Explaining the underlying rationale

(13) We are concerned that it will be difficult for companies to assess whether the New Test is met and more generally to determine the antitrust risk related to information exchanges in a dual distribution situation based on the Additional Guidance.

(14) This is because the Additional Guidance does not explain the underlying rationale of the proposed new legal framework for dual distribution agreements. In order to make it easier for companies to carry out the assessment when confronted with a situation that does not match the examples listed in paragraph 13 and paragraph 14, it would be extremely helpful if the Additional Guidance would in addition describe the competition risks related to information exchanges that the Commission has identified and explain against this background the underlying principles based on which the Commission has identified the listed positive and negative examples.

(15) We assume that the risk that the Commission is aiming to address through the New Test is that the exchange of information between the supplier and the buyer in a dual distribution situation restricts competition between them on the downstream distribution market(s). We therefore further assume that the Commission is primarily concerned about the exchange of information relating to the parties' activities on the downstream market(s) where they compete. Finally, we assume that the Commission is only concerned about the exchange of information which is sufficiently sensitive so that its disclosure could potentially have an adverse effect on the intensity of competition between the supplier and the buyer on the downstream market.

(16) The complete silence of the Additional Guidance on these aspects will make it very difficult for companies to determine whether the New Test is met and increases the risk that these new rules will not be applied consistently across Member States.

(17) A better understanding of the underlying rationale is equally important for the assessment of the legality of information exchanges in instances where the 30% market share threshold may be exceeded and where the VBER does not apply. The Additional Guidance remains entirely silent on this point. It is not clear whether in the eyes of the Commission the market share of the supplier and the buyer is at all a factor to be taken into consideration when assessing the legality of information exchanges in a dual distribution context.

(18) The use of the term "*generally*" in paragraph 13 and paragraph 14 further suggests that it may be justified it certain situations to conclude that information classified as "*necessary*" is actually "*not necessary*" or *vice versa*. Without any explanation of the underlying rationale and principles that the Commission relied on to identify these examples it will, however, be extremely difficult for companies to make such a judgment call.

(19) Against this background, we invite the Commission to add a paragraph to the Additional Guidance that explains the antitrust risks associated with information exchanges in dual distribution setups that the Commission has identified and discusses the main parameters that will determine whether the exchange of information may potentially have an adverse effect on competition.

3.2 Specifying the information covered by the lists of positive and negative examples

(20) It is not always clear what information would exactly be covered by the examples provided in paragraph 13 and paragraph 14 of the Additional Guidance. We therefore would invite the Commission to define the relevant information more precisely where possible. By way of example:

- In paragraph 13(b), reference is made to information "*relating to the supply of the contract goods or services*". It is not clear to which supplies reference is made. It would be helpful if the Commission could specify whether this refers to (i) downstream supplies of the supplier or the buyer to end-customers, or whether it

also covers (ii) upstream supplies of the supplier or the buyer to other distributors? It also would be helpful to clarify whether this only covers volume data or also value data?

- In paragraph 13(c) and paragraph 14(b), it is not clear whether the term "*customer*" only refers to end-customers or whether it also covers other distributors supplied by the supplier or the buyer.

3.3 Expanding the lists of positive and negative examples

(21) Although we appreciate that it is not possible to provide an exhaustive list of positive and negative examples, we would still invite the Commission to expand, to the extent possible, the lists of examples provided in paragraph 13 and paragraph 14 based in particular on the scenarios that are currently discussed under paragraph 12 of the Additional Guidance and the examples discussed in the Expert Report.[3]

- As far as exclusive distribution is concerned, it would be particularly helpful if the Commission could clarify whether and under which conditions direct sales by a supplier within such system shall be qualified as a dual distribution scenario, in instances where the supplier that has reserved a certain territory or certain customers to itself has committed not to compete with its distributors (neither actively nor passively).[4]

- Likewise, as regards selective distribution schemes, it would be helpful if the Commission could confirm in line with the findings of the Court of Justice in *Metro I*[5] that suppliers are entitled to request from their authorised distributors the information necessary to verify that the latter comply with their obligations under the selective distribution scheme and that the sharing of such information would be exempted under the New Test.

- In respect of franchises, the New Test and guidance does not address the nuances inherent in the franchise systems, which is likely to create more legal uncertainty for those business models. For example, uniformity of the business model is key, and the franchisor would generally require greater level of visibility over the franchise outlets and marketing plans. In this context, some of the negative examples may be overly restrictive. In particular, the exclusion of customer-specific sales data in paragraph 14(b), especially in more complex franchisor-master franchisee-franchisee models, would likely hamper the proper running and optimisation of the franchise business.

- Based on the negative example provided under paragraph 14(c) we understand the Commission is also concerned about the exchange of information between a buyer that sells own-brand goods that are manufactured by a third party and a manufacturer of competing branded goods. Contrary to what the wording of paragraph 14(c) appears to suggest we consider that such concerns could arise not only if the information exchange relates to the own-brand goods of the buyer but also

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[3] Expert Report, Section II, pages 20 et seqq.

[4] We note that the Expert Report questions whether such scenarios shall be qualified as dual distribution (see page 23, Section 2.1).

[5] C-26/76, Metro v. Commission, para. 27: "*To be effective, any marketing system based on the selection of outlets necessarily entails the obligation upon wholesalers forming part of the network to supply only appointed resellers and, accordingly, the right of the relevant producer to check that that obligation is fulfilled.*"

if they concern the branded goods of the manufacturer and would invite the Commission to clarify that point.

3.4 Inserting practical examples

(22) We also propose that the Commission includes a few case studies in the Additional Guidance to illustrate the examples provided in paragraphs 13 and 14.

3.5 Explaining the interplay between the New Test and Article 2(6) DVBER

(23) Finally, we invite the Commission to clarify the interplay between the New Test and Article 2(6) DVBER.

(24) According to Article 2(6) DVBER, a dual distribution relationship falls entirely outside the safe harbour if it has the object to restrict competition horizontally. Our understanding is that this could also include instances where the parties would exchange highly sensitive information (e.g., future pricing data) that constitutes an object restriction.[6]

(25) Paragraph 15 of the Additional Guidance, in contrast, foresees that if an exchange of information does not meet the New Test, the remaining provisions of the vertical agreement still benefit of the exemption if the general conditions are met, which we welcome. Since future pricing data is mentioned as a negative example under paragraph 14(a) of the Additional Guidance, it seems that the sharing of future pricing data would not result in the vertical agreement losing the benefit of the safe harbour in its entirety.

(26) We therefore would be grateful if the Commission could clarify which of the two rules would prevail.

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[6] Commission staff working document, Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice, Section 2.6.