EUROPEAN COMMISSION REVIEW OF THE VERTICAL BLOCK EXEMPTION REGULATION

RESPONSE TO ADDITIONAL PUBLIC CONSULTATION ON PROPOSED GUIDANCE RELATING TO INFORMATION EXCHANGE IN THE CONTEXT OF DUAL DISTRIBUTION

SUBMITTED BY:

BRANDS FOR EUROPE

AIM

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This response is submitted on behalf of **Brands for Europe**; **AIM** (Michelle Gibbons - Director General); the **European Cultural and Creative Industries Alliance** (ECCIA, Andreas Kaufmann - Chairman); and the **Federation of the European Sporting goods Industry** (FESI, Jérôme Pero - Secretary General).

Brands for Europe, is a group of leading brands across numerous industry sectors. The member companies of Brands for Europe are Adidas, Apple, Bose, Canon, Colgate Palmolive, HP, the LEGO Group, Levi Strauss & Co., L'Oréal, Nestlé, Nike, McDonald's, Panasonic, Philips, Pioneer, P&G, Puig, Swatch Group, Unilever, Whirlpool and Yum! (KFC, Pizza Hut, Taco Bell). The group is represented by Baker McKenzie.

RESPONSE TO COMMISSION CONSULTATION:
INFORMATION EXCHANGE IN THE CONTEXT OF DUAL DISTRIBUTION

1. Summary

1.1 Brands for Europe, AIM, ECCIA and FESI are grateful that the European Commission has taken on board the concerns expressed by respondents and, as we understand it, decided not to introduce an additional market share threshold. We also welcome the clarifications proposed in relation to dual distribution at the wholesale level which will certainly increase legal certainty.

1.2 We also appreciate the opportunity to respond to the current consultation and fully support the European Commission's conclusion that information exchange should continue to benefit from the Vertical Block Exemption Regulation (**VBER**) including between parties in dual distribution scenarios.

1.3 We are however concerned by certain aspects of the Commission's proposal – in particular Article 2(5) which would link the availability of the safe harbour to the vague notion of information exchange which is "necessary to improve the production or distribution of the contract goods or services by the parties".

1.4 We acknowledge that Article 13 of the draft Vertical Guidelines attempts to shed light on this concept by providing a non-exhaustive list of examples of information that, when exchanged by the parties in a dual distribution scenario, can "generally be considered" to be necessary to improve the production or distribution of the contract goods or services.

1.5 However, the 'necessary to improve production or distribution' test is inherently unclear. We are concerned that, since the Vertical Guidelines will not be binding on NCAs and national courts, the Commission's approach will result in significant differences in interpretation by those institutions and lead to inconsistent outcomes across the EU and therefore a lack of legal certainty. These are problems which, among others, we recall the VBER consultation is intended to resolve.

1.6 It is for this reason that we urge the Commission to draft Article 2(5) of the VBER in such a way that it operates as a broader exemption for information exchange in the vertical context with specific carve-outs for certain exchanges in a dual distribution scenario which would instead fall to be considered under the Horizontal Guidelines.

1.7 Turning to the specific categories of information exchanges listed in the draft VBER Guidelines, we broadly agree with the proposed classification of various types of information exchange with one major exception: the inclusion in Article 14 (and therefore the denial of the VBER) of customer-specific sales data, including non-aggregated information on the value and volume of sales per customer.

1.8 We consider that the exclusion from the VBER of this type of information exchange will in practice lead to significant issues for suppliers, which will also be to the detriment of their resellers and end customers. Concrete examples showing these issues are identified below in paragraphs 2.11-2.36, supporting by the evidence in Confidential Annexes A-D.

1.9 In short, we see no competition law justification for denying the benefit and legal certainty of the VBER for the exchange of customer-specific sales data. Instead, we urge the Commission to specifically include this type of information exchange in Article 13 (or its equivalent) so that it is covered by the VBER in situations where it is not used to impose any of the hardcore restrictions on the buyer specified in Article 4 of the VBER.

1.10 Finally, we also take the opportunity to suggest how the VBER might address potential competition concerns linked with the hybrid role of online intermediation providers.

1.11 Our proposed alternative wording is contained in the Annex to this document.

2. Suppliers have a legitimate need for customer-specific sales data

2.1 Brands for Europe is extremely concerned at the proposal that suppliers should not be able to collect customer-specific sales data (volume and value) from their buyers. This type of information is a critical component of the business model of many suppliers across a wide variety of sectors. This is especially the case in respect of distribution at the wholesale level, e.g., when manufacturers sell to third party resellers[1] and will therefore have little to no visibility over follow-on sales to downstream levels (e.g. retailers etc.). The same needs can arise in relation to consumer level data as explained below. It is also necessary in the context of franchising arrangements where accurate sell-out information from the franchisees is particularly important to enable the franchisor to guarantee consistent high quality across the entire franchise system. For that reason, it is important that "customer" in paragraph 13(c) of the draft guidance covers a customer of a buyer at any level of the distribution chain. We understand that to be the intention but would be grateful if the draft guidance provided that clarification.

2.2 The Commission has not put forward a theory of harm explaining why the sharing by a reseller of customer-specific sales data could harm consumers. Nor is there any decisional practice under EU competition law showing how such harm could arise.

2.3 We understand that a concern may have been expressed that a supplier could use customer-specific information received from a buyer in order to 'target' customers of that reseller. Alternatively, where a supplier and a buyer, for example, both serve the same customer, it is theoretically possible that a supplier could gain insights from pricing information it receives from the buyer so as to try to encourage the customer to divert purchases directly to the supplier.

2.4 We are not surprised at the fact that competition issues have not arisen about such scenarios. Quite aside from the question of whether these scenarios would even fall within the scope of Article 101(1) TFEU, the principal incentive for the supplier is to compete successfully against rival suppliers by maximizing its sales through all available channels.

2.5 The supplier will always seek to ensure that its entire distribution 'ecosystem' can best meet the demands of customers interested in the brand. The supplier's downstream operations and those of independent resellers are typically complements that can serve different customer preferences and operate under inherently different competitive conditions.

2.6 In fact, the information exchanges below are not confined to, or even specifically triggered by, a scenario of dual distribution. These information exchanges are needed for the proper functioning of vertical relationships.

2.7 If the supplier were to try to limit the ability of its buyers to compete effectively, it would run a serious risk that it would lose sales to rival brands at the level of independent buyers, thus undermining its goal to maximize sales overall. Plus, if a buyer approaches the scale at which it might be more attractive to the buyer to buy direct from the supplier (e.g. due to volume of purchases), then the buyer would typically approach the supplier (and not rely on the supplier approaching it to suggest a modification to its supply chain practices). In fact, in some territories, it is common for suppliers to serve particular accounts directly because the latter has insisted upon this.

2.8 Overall, the supplier has every incentive to ensure that independent buyers remain committed to the brand and invest in promoting the brand and its products. Creating an adversarial relationship

[1] For the purposes of this response, "reseller" refers to any third party who sells the supplier's products at the wholesale level, which for the avoidance of doubt includes buying groups/distributors/wholesalers.

with buyers would be against the supplier's own best interests, as it would undermine its ability to compete against rival brands and potentially raise issues under non-competition laws (e.g. provisions relating to fair trading etc.).

2.9 Certain buyers might express concerns about the supplier's use of their sales data to benefit its own downstream operations. However, buyers are entirely free to decide whether or not to provide the data and, in fact, will often charge for this information. In the end, the question of whether data can be obtained is one of many commercial considerations that a supplier needs to address to maintain a productive relationship with its buyers.

2.10 Suppliers need customer-specific sales data (volume and value) from their buyers for pro-competitive reasons and in particular for the efficient operation of their entire channel network (including their direct and indirect sales). This is explained below.

2.11 Supporting confidential evidence/examples are included in Confidential Annexes A, B, C and D, which we invite the Commission to read in parallel with the points below.

Reseller incentives and rebates

2.12 It is extremely common for suppliers to pay compensation to their resellers by reference to the sales of those resellers to specific customers or specific retail environments. By having access to non-aggregated data about those customer sales, suppliers are able to calculate reseller and OEM sales representative compensation accurately.

2.13 In some cases a retailer will be paid a bonus based on its individual performance (e.g. for growing business, activating certain promotions etc.) and this will be paid via a wholesaler. In some other instances, a rebate may be paid directly by the supplier to the retailer. The evaluation of the retailer's performance is typically made on the basis of the total purchases made by the retailer, irrespective of whether the purchases are made directly from the supplier or the wholesaler. Under all these models, the supplier will need to obtain the data from the reseller regarding the details of its sales in order to be able to remunerate fairly the retailers for their performance. An example of this is described in more detail in Confidential Annexes A and C.

2.14 Suppliers also need to tailor their promotional efforts to the market and that may mean customising promotional offers per retailer and even per location. In order to do this, suppliers need information at retailer level and even store level about their sales to end customers irrespective of whether the retailer purchased the products from the supplier or from a reseller. This allows the supplier to be more competitive and ensure adequate return on investment.

Special pricing for a specific end-customer deal

2.15 A reseller may request a discount for a specific end user deal via a distributor or from the supplier directly. By having access to information about the sales to that end-user, the supplier can verify that the sale was made and that the discount was passed through to the end-customer.

Business planning

2.16 Suppliers rely on customer-specific non-aggregated sales data from resellers in order to help manage their business (e.g. demand planning, promotions). This allows the supplier to improve sales by channel/region/brand (with a focus on launches/promotions). The goal is to allow the supplier's teams to build a category with resellers and to offer relevant propositions to consumers. Knowing what works and what does not work allows teams to tailor propositions to the benefit of the consumers and to drive turnover for resellers.

2.17 Shopping experiences and consumption habits depend on multiple factors, including location, store environment, marketing approach, size and type of store, seasonality etc.. By obtaining information on customer habits at reseller level, and even perhaps at location level, a supplier can

better understand customer habits and therefore adapt its strategy to always improve the customer experience and better compete on the market. See Confidential Annex D for further examples.

Data insights and reseller sales enablement

2.18 Customer level information from the reseller enables the supplier to benchmark a reseller's performance compared to the market, as well as industry and aggregated market insights.

2.19 For example, suppliers use sell-out data from resellers (e.g. commercial customer company names and quantities per SKU) to be able to produce individualized data-based insights (e.g. on customer segments and customer purchase propensity) which helps resellers to develop their own, individualized sales strategy and targeted campaigns. Suppliers can also show an individual reseller how their sales of products and services compare to an aggregated set of anonymized resellers in their country in a specific product group or even on individual SKUs. Without this data, suppliers would not be able to produce data insights, and certainly not at the required degree of granularity. These data insights are pro-competitive and ultimately benefit end-customers by helping resellers to anticipate end-customer needs.

2.20 Often resellers will rely on the capabilities and expertise of the supplier to help them analyse and effectively implement strategies based on their own data. A reseller may struggle to analyse the data with the same sophistication as the supplier and therefore may be at a disadvantage if it could not rely on the supplier to undertake this type of analysis. If the reseller is unable to leverage the supplier's input and this undermines its effectiveness in the market, this could result in the supplier needing to internalize such sales. Suppliers decide to use resellers because it is more efficient and so the move to direct selling could lead to inefficiencies and possibly higher prices due to higher costs.

2.21 In the franchising sector, the gathering of customer-specific sales data is essential for the business since it is aimed at creating a better customer experience and satisfying customer needs. It is essentially a customer centric approach that at the same time helps address the overall business strategy. This kind of transactional data is critical to determine/identify/model segments customers in distinct groups (i.e. clusters) which will then consequently benefit from tailored promotions and experiences. The clusters are determined based on various parameters, such as preferences, frequency, use of promotions etc.. This can be achieved only by acquiring these transactional data. Also loyalty scheme programs, where in place, are dependent on an analysis of customer specific data.

2.22 Additionally, the gathering of these data is of critical importance in order to better estimate products' needs and supply in view of optimizing supply chain as well as operation procedures, which will ultimately benefit the stores' activities. With all this in mind, this data would ultimately help ensure business efficiency and, at the same time, improve the overall customers' journey and engagement with the brand.

2.23 Further examples of why this information is needed are included in Confidential Annex **B**.

Inventory management

2.24 Non-aggregated customer data is critical to provide accurate visibility of inventory. If manufacturers/suppliers do not have accurate visibility of the stock held and sold by their individual resellers and retailers, they cannot reconcile downstream stock levels with their own supply chain data, which is critical for supplying end-customers effectively.

2.25 Sell out data from direct customers alone tells manufacturers/suppliers very little about channel inventory held by channel partners (wholesalers, resellers or retailers) at local (country, region, city) levels. Suppliers need to ensure optimal supply levels at the local level to satisfy customer demand. Partner inventory data is also used to create predictive insights, helping resellers and

retailers to prevent stock-out and signalling opportunities for them to proactively replenish their stock to meet customer demand. Providing a dynamic view of their stock situation relative to an average reseller/retailer inventory helps them to manage their stock replenishment and will be of benefit to end-customers who are less likely to face delays in receiving products.

2.26 Without this inventory information, the risk of oversupply and undersupply increases, resulting in harm to customers. Undersupply obviously delays customer access and can damage brand value as customers cannot purchase them when they need them. Oversupply can delay customer access to new and innovative products, as resellers first try to sell existing stock before demanding new products. It is also not sustainable. This information is of course critical for (mono-brand) franchise systems where the availability of inventory is key for profitability.

2.27 Lack of visibility on channel inventory undermines a supplier's ability to predict future demand or revenues, which not only impacts manufacturing forecasts, but also leads to investor uncertainty (public companies not meeting their revenues forecasts are penalized by investors) and, as a result, an increase on the supplier's cost of capital. This undermines a supplier's competitiveness and ultimately harms customers when a supplier passes on this higher cost of capital through higher prices or lower quality.

Evaluating and rewarding the performance of resellers and understanding product sales

2.28 The supplier will also need to assess the performance of its resellers and naturally this evaluation needs to be carried out by reference to the value and volume of sales to specific customers (of which the supplier may otherwise have no visibility). Aggregated data are not sufficiently precise to assist the supplier to understand how well the reseller is doing in all the retail environments it is required to serve. Resellers may have very limited incentives to effectively supply smaller and/or remote stores if the data was provided in an aggregated format.

Driving demand and quality through product advice/customer education

2.29 The supplier may need to reach out to the customers of its direct buyers (e.g. resellers and/or retailers) to provide advice about its products. The supplier needs to focus its education programs according to the activity and the focus of each retailer and this can only be done if the supplier is able to have a consolidated view of the sales made, including those made directly by it and those made by its resellers. That consolidation necessarily requires the supplier to have access to the sales data from the resellers, in order to know which retailer purchases the supplier's products.

2.30 This educational activity is important for driving demand overall, not only that generated by the supplier with its direct customers. If suppliers did not have access to this specific sales information, they could not know where to direct their education program or which retailers to visit, and this would be likely to have a detrimental impact on the sales of the resellers as well as the supplier overall. Indeed, for these reasons, some suppliers will take decisions about their distribution network in a holistic manner and be largely agnostic as to the channels through which their products flow to end customers. See Confidential Annex **C** for more details on this.

Reseller models for meeting complex customer needs

2.31 In some markets, end customers do not treat 'direct' and 'wholesale' as binary options. Customers may seek to combine elements of a product or service offering from these two channels. For example, there are situations where a supplier sells directly to customers in some geographies but relies on resellers to fulfil the deal in territories where it does not have sufficient capabilities or direct presence. Alternatively, a supplier may sell a solution, but rely on resellers to supply certain hardware or service elements. These reseller-models obviously require that the supplier receives customer-specific information from resellers. See Confidential Annex **D**.

Production planning

2.32 In some markets, e.g. technically complex products such as medical devices, resellers may need to notify the supplier of opportunities/future projects. Resellers may record information relating to these projects in an administrative tool - including products, configurations, and volumes at a customer level. This is crucial because it allows manufacturers to plan the production and supply of their medical products in advance.

Product recall/tracking

2.33 In tightly regulated markets, e.g. medical products, manufacturers may need to be able to take appropriate measures in case of a recall of a product. For example, the EU Medical Device Regulation may require manufacturers to implement a product tracking system, which would require the manufacturer to know which products are installed at an individual customer. This would require the manufacturer's reseller to inform the medical device manufacturer which specific product it has sold to which specific customer.

Reseller programme compliance

2.34 Receiving non-aggregated customer-specific data from resellers enables the supplier to control and enforce selective distribution systems.

Preventing grey market in a selective distribution system

2.35 As highlighted by the Expert Report, in the context of a selective distribution system, receiving non-aggregated customer-specific data from distributors is a way to enable the supplier to make sure that the goods are not sold to unauthorised distributors and therefore to control and enforce its system.

3. A restrictive approach to customer-specific sales data would force business models to change to the detriment of the entire supply chain

3.1 If suppliers no longer had access to customer-specific data from resellers, they would not be able to adopt the practices outlined above. In practice, the cost in terms of lost competitiveness would be too high. Many suppliers would find it necessary to choose between a 100% direct or 100% indirect model at the wholesale level in every country in order to continue to have access to the data.

3.2 Limiting indirect distribution could impact the overall service and product availability. There would inevitably be some customers (e.g., smaller customers or those located in less populated regions) that the supplier could not realistically service themselves.

3.3 It is also possible that suppliers may decide against selling direct to retailers simply because they are already selling to wholesalers. That is because, on making one direct sale to a retailer, there is a real risk that a supplier would no longer be able to receive the type of information listed above (without first undertaking a detailed and complicated analysis under the Horizontals Guidelines which do not in fact provide legal certainty). This would immediately place the supplier at a competitive disadvantage compared to rivals that do not sell direct to retailers and which could continue to receive this important information from key resellers.

3.4 If reforms were to push suppliers towards a third party /indirect sales only model, this would mean a loss of a direct relationship which in some cases is insisted upon by a large account which desires that relationship with the supplier.

Summary

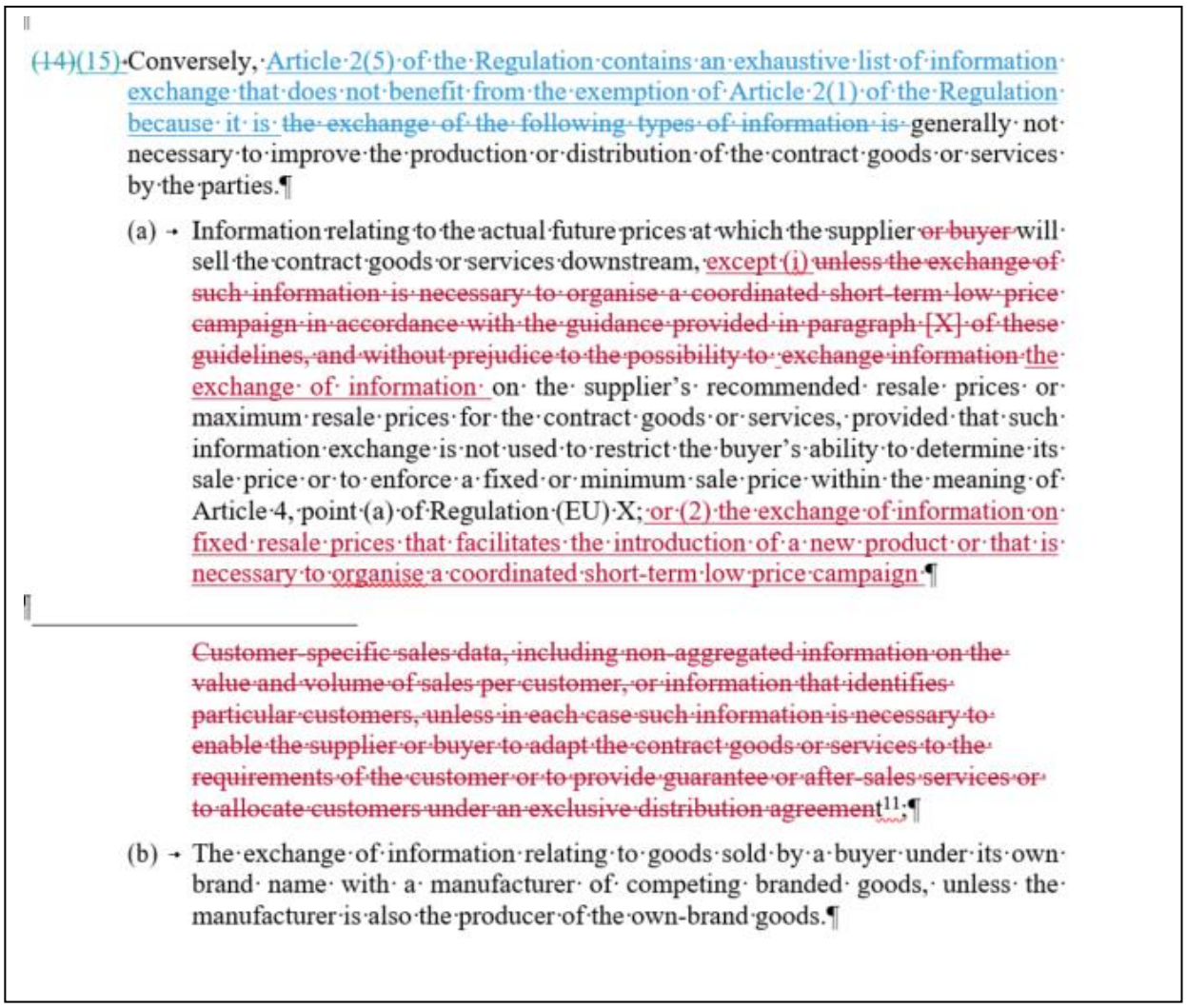
3.5 If suppliers cannot access customer-specific sales data, then then business models above would be at risk due to the loss in legal certainty. Suppliers in a position of dual distribution would be unable to:

- Provide tailored/customer-specific promotions and investment
- Provide and benefit from data insights
- Forecast and manage channel inventory efficiently
- Evaluate the performance of resellers/retailers
- Meet customer demand when this requires collaborating with resellers to provide solutions to end customers
- Drive demand by educating customers on their products and services in the most efficient manner

3.6 The negative effects would be exacerbated by the potentially broad concept of dual distribution according to which even one direct sale to a customer (arguably anywhere in the EU) could result in the supplier losing visibility over an enormous and important part of its distribution network in Europe. The supplier would be reduced to having data from only one customer to which it sells directly.

3.7 We therefore recommend the revisions below, as also shown in the Annex. We recommend clarifying that the provision of customer-specific sales data is legitimate unless the information exchange is used to impose a hard core restriction on the buyer:

(c) Aggregated or customer-specific sales data and information relating to customer purchases of the contract goods or services, customer preferences and customer feedback, including , non-aggregated information on the value and volume of specific contract goods or services per customer, and information that identifies particular customers, ~~without prejudice to paragraph (14) below;~~ provided that such information exchange is not used to impose any of the hardcore restrictions on the buyer specified in Article 4 of the Regulation;



(14)(15) Conversely, Article 2(5) of the Regulation contains an exhaustive list of information exchange that does not benefit from the exemption of Article 2(1) of the Regulation because it is the exchange of the following types of information is generally not necessary to improve the production or distribution of the contract goods or services by the parties.¶

(a) → Information relating to the actual future prices at which the supplier or buyer will sell the contract goods or services downstream, except (i) unless the exchange of such information is necessary to organise a coordinated short-term low price campaign in accordance with the guidance provided in paragraph [X] of these guidelines, and without prejudice to the possibility to exchange information the exchange of information on the supplier's recommended resale prices or maximum resale prices for the contract goods or services, provided that such information exchange is not used to restrict the buyer's ability to determine its sale price or to enforce a fixed or minimum sale price within the meaning of Article 4, point (a) of Regulation (EU) X; or (2) the exchange of information on fixed resale prices that facilitates the introduction of a new product or that is necessary to organise a coordinated short-term low price campaign.¶

¶

Customer-specific sales data, including non-aggregated information on the value and volume of sales per customer, or information that identifies particular customers, unless in each case such information is necessary to enable the supplier or buyer to adapt the contract goods or services to the requirements of the customer or to provide guarantee or after-sales services or to allocate customers under an exclusive distribution agreement[11];¶

(b) → The exchange of information relating to goods sold by a buyer under its own brand name with a manufacturer of competing branded goods, unless the manufacturer is also the producer of the own-brand goods.¶

4. A broad exemption for information exchange in vertical agreements subject to carve-out is appropriate for the VBER

4.1 Brands for Europe notes that the Commission intends to include the following 'carve-out' wording in Article 2(5): *"…the exchange of information between a supplier and buyer does not benefit from the exemption provided by Article 2(1) of the Regulation where the information exchange is not necessary to improve the production or distribution of the contract goods or services by the parties".*

4.2 We acknowledge that Article 13 of the draft Vertical Guidelines attempts to shed some light on this concept by providing a non-exhaustive list of examples of information that, when exchanged by the parties in a dual distribution scenario, can "generally be considered" to be necessary to improve the production or distribution of the contract goods or services.

4.3 However, the 'necessary to improve production or distribution' test is inherently unclear. We are concerned that, since the Vertical Guidelines will not be binding on NCAs and national courts, the Commission's approach will result in significant differences in interpretations by those institutions and led to inconsistent outcomes across the EU and a lack of legal certainty. These are problems which, among others, we recall the VBER consultation is intended to resolve.

4.4 It is for this reason - as well as to be consistent with the approach of the VBER and other block exemptions - that we suggest that Article 2(5) of the VBER should operate instead as a broader exemption for information exchange in the vertical context with specific carve-outs for certain

exchanges in a dual distribution scenario which would instead fall to be considered under the Horizontal Guidelines:

Proposed Article 2(5)

"*The exemption provided for in paragraph 1 shall apply to the exchange of information between the parties, provided that such information exchange is not used by the supplier to impose any of the hardcore restrictions contained in Article 4, except for the exchange of the following information between the parties to a vertical agreement that fulfils the conditions of Article 2(4)(a) or 2(4)(b):*

(a) Information relating to the actual future prices at which the supplier will sell the contract goods or services downstream, except for (i) the exchange of information on the supplier's recommended resale prices or maximum resale prices for the contract goods or services, provided that such information exchange is not used to restrict the buyer's ability to determine its sale price or to enforce a fixed or minimum sale price within the meaning of Article 4 (a); and (ii) the exchange of information on fixed resale prices that facilitates the introduction of a new product or that is necessary to organise a coordinated short-term low price campaign; or

(b) The exchange of information relating to goods sold by a buyer under its own brand name with a manufacturer of competing branded goods, unless the manufacturer is also the producer of the own-brand goods;

which has to be assessed under the rules applicable to horizontal agreements."

4.5 Consistent with this approach we also consider that Article 2(6) of the draft VBER should be deleted as this refers generally to 'by object' restrictions. Article 2(6) is no longer required in the light of our proposal above. In any event, we consider that making the availability of the exemption conditional on the absence of undefined 'by object' restrictions is entirely at odds with the stated goal of the VBER, which is to define the specific restrictions or practices that prevent the application of the block exemption in order to simplify the process of compliance for market participants.

5. Article 2(7) – tailoring the carve-out regarding online intermediation

5.1 Although the draft wording which is the subject of this consultation does not refer to online intermediation services (OIS), we thought we would take this opportunity to include some suggestions here.

5.2 By way of background, we had acknowledged in our September submission that the retail activities of OIS providers can raise horizontal concerns, in particular with regard to the potential misuse of information obtained by the OIS provider through its platform activities in informing its retail strategy (in addition to the potential abuse of market power by large OIS providers).

5.3 We argued that the wording proposed for Article 2(7) was unnecessary because the potential horizontal issues arising from this kind of conduct are already excluded from the scope of the VBER.

5.4 If the Commission feels that the deletion of Article 2(7) would not allow it to adequately address the competition concerns associated with the hybrid role of OIS providers, we would suggest an alternative approach which would be to amend Article 2(7) so that it specifies and explicitly carves out from the VBER the area of the Commission's concern – which we understand to be

the OIS provider's access to information relating to the sales activities of the supplier that is using the provider's online intermediation services. This approach would address these concerns, whilst maintaining the VBER safe harbour protection for the vertical relationship between the supplier and the OIS provider.

Proposed new 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 the undertaking~~s~~ to which it provides online intermediation services enters into a non-reciprocal vertical agreement with ~~such a competing~~ that undertaking, except in relation to the access by the provider of online intermediation services to information generated in the context of the provision of the online intermediation services, which has to be assessed by the rules applicable to horizontal agreements

ANNEX: PROPOSED REVISIONS TO THE DRAFT NEW SECTION DEALING WITH INFORMATION EXCHANGE IN DUAL DISTRIBUTION

Draft new section dealing with information exchange in dual distribution

The European Commission ('Commission') is currently reviewing the Commission Notice providing Guidelines on Vertical Restraints ('Vertical Guidelines')[1], within the broader context of the review of Commission Regulation (EU) No 330/2010 ('Vertical Block Exemption Regulation', 'VBER')[2]. During the impact assessment for this review, the Commission launched a public consultation on the draft revised rules, reflecting the Commission's proposed changes to the VBER ('draft revised VBER') and Vertical Guidelines ('draft revised Vertical Guidelines'). This public consultation took place from 9 July 2021 to 17 September 2021.

As explained in the background note accompanying the public consultation on the draft revised VBER and Vertical Guidelines, it was proposed to limit the safe harbour for dual distribution by specifying in Article 2(5) of the draft revised VBER that the vertical agreement would remain block-exempted except for information exchanges between the parties[3]. As mentioned in the summary of the comments received in response to the public consultation, this proposal was not supported by stakeholders[4]. In particular, all categories of stakeholders requested more guidance on the types of information that can be exchanged between the parties in a dual distribution relationship, and many considered that the reference in the drafts to an assessment under the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements ('Horizontal Guidelines')[5] was not appropriate or at least not sufficient[6].

To gather further evidence and inform the drafting of guidance on the specific topic of information exchange in dual distribution, the Commission commissioned an expert report, which is published on the page of the Commission's website relating to the VBER review[7]. In light of the above, the Commission has decided to launch a public consultation on the following draft new section dealing with information exchange in dual distribution, which is intended to be included in the Vertical Guidelines.

Introduction

Dual distribution is the scenario where a supplier sells goods or services not only at the upstream level but also at the downstream level, thereby competing with its independent distributors. In that scenario, in the absence of hardcore restrictions, and provided that the buyer does not compete with the supplier at the upstream level, the potential negative impact of the vertical agreement on the competitive relationship between the supplier and buyer at the downstream level is less important than the potential positive impact of the vertical agreement on competition in general at the upstream or downstream level.

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[1] Guidelines on Vertical Restraints, OJ C 130, 19.5.2010, p. 1.

[2] Commission Regulation (EU) No 330/2010 of 20 April 2010 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, OJ L 102, 23.4.2010, p. 1.

[3] https://ec.europa.eu/competition-policy/document/download/e0eacfbb-9dbe-4dc5-8fdf-b0e9c74a7f15_en, p. 3.

[4] https://ec.europa.eu/competition-policy/document/download/d120e232-0893-4dee-91e4-a663f5e94f71_en, p. 2.

[5] Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11, 14.1.2011, p. 1–72.

[6] https://ec.europa.eu/competition-policy/document/download/d120e232-0893-4dee-91e4-a663f5e94f71_en, p. 3.

[7] https://ec.europa.eu/competition-policy/public-consultations/2018-vber_en.

The exchange of information between a supplier and buyer can contribute to the pro- competitive effects of vertical agreements, in particular the optimisation of production and distribution processes. However, in dual distribution, the exchange of certain types of information may raise horizontal concerns.

The Commission is consulting on the following guidance on the assumption that the regulation replacing the VBER ('Regulation (EU) X') would include a provision stating that the block exemption does 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. The present consultation is nonetheless without prejudice to any future decision by the Commission in relation to any regulation replacing the VBER.

Draft new section dealing with information exchange in dual distribution, which is intended to be included in the guidelines that will replace the Vertical Guidelines and accompany Regulation (EU) X

(1) As regards vertical agreements between competitors, it should first be noted that, pursuant to Article 2[X] of Regulation (EU) X, on which guidance is provided in section [X] of these guidelines, the Regulation does not apply to vertical agreements the subject matter of which falls within the scope of any other block exemption regulation, unless otherwise provided for in that regulation.

(2) Article 2(4), first sentence, of Regulation (EU) X establishes the general rule that the exemption provided by Article 2(1) of the Regulation does not apply to vertical agreements entered into between competing undertakings. Article 2(4), second sentence, of the Regulation contains two exceptions to this rule. It provides that the exemption provided by Article 2(1) of the Regulation applies to non-reciprocal vertical agreements between competing undertakings that fulfil the conditions of either Article 2(4), point (a) or point (b) of the Regulation. Non-reciprocal means in particular that the buyer of the contract goods or services does not also supply the contract goods or services or competing goods or services to the supplier. If the buyer does make such supplies, the vertical agreement is reciprocal, in which case the exemption provided by Article 2(1) of Regulation (EU) X does not apply.

(3) Vertical agreements between competing undertakings that do not meet the conditions of Article 2(4), second sentence, of Regulation (EU) X must be assessed under Article 101 of the Treaty, taking into account the Horizontal Guidelines, including any exchange of information between the parties. Conversely, non-reciprocal vertical agreements that meet the conditions of Article 2(4), point (a) or point (b) of Regulation (EU) X have to be assessed under that Regulation and these guidelines, unless otherwise indicated in these guidelines.

(4) Article 1(1), point (c) of Regulation (EU) X defines a competing undertaking as an actual or potential competitor. Two undertakings are treated as actual competitors if they are active on the same relevant (product and geographic) market. An undertaking is treated as a potential competitor of another undertaking if, absent the vertical agreement between the undertakings, it is likely that the former would, within a short period of time (normally not longer than one year), make the additional necessary investments or incur other necessary costs to enter the relevant market in which the latter undertaking is active. This assessment must be based on realistic grounds, having regard to the structure of the market and the economic and legal context. The mere theoretical possibility of entering a market is not sufficient. There must be real and concrete possibilities for the undertaking to enter the market, without any

insurmountable barriers to entry. Conversely, there is no need to demonstrate with certainty that the undertaking will in fact enter the relevant market and that it will be capable of retaining its place there[8].

(5) A wholesaler or retailer that provides specifications to a manufacturer to produce goods for sale under the wholesaler's or retailer's brand name is not considered a manufacturer of such own-brand goods and consequently not a competitor of the manufacturer for the purpose of applying Article 2(4) of Regulation (EU) X. Therefore, the exemption provided by Article 2(1) of the Regulation can apply to a vertical agreement entered into between a wholesaler or retailer that sells own-brand goods that have been manufactured by a third party and a manufacturer of competing branded goods. By contrast, in view of the differences in the investments that they make, wholesalers and retailers that manufacture goods in-house for sale under their own brand name are considered to be manufacturers and therefore the exemption provided by Article 2(1) of the Regulation does not apply to vertical agreements entered into by such wholesalers or retailers with manufacturers of competing branded goods. Such agreements must be assessed individually under Article 101 of the Treaty, taking into account the Horizontal Guidelines.

(6) Article 2(4) of Regulation (EU) X contains two exceptions to the general rule that the exemption provided by Article 2(1) of the Regulation does not apply to vertical agreements between competitors. Both exceptions, namely Article 2(4), points (a) and (b) of the Regulation, concern scenarios of dual distribution, where a supplier of goods or services is also active at the downstream level, thereby competing with its independent distributors that are not active at the upstream level. The rationale for these exceptions is that, in dual distribution, the potential negative impact of the vertical agreement on the competitive relationship between the supplier and buyer at the downstream level is considered to be less important than the potential positive impact of the vertical agreement on competition in general at the upstream or downstream levels. ~~Whether a vertical agreement fulfils the conditions of Article 2(4), point (a) or point (b) of the Regulation is to be construed narrowly, due to the exceptional nature of these provisions.~~

(7) The exception provided by Article 2(4), point (a) of Regulation (EU) X concerns the scenario where the supplier sells the contract goods at several levels of trade, namely as a manufacturer, importer, or wholesaler and also as a wholesaler or retailer, whereas the buyer sells the contract goods at a downstream level, namely as a wholesaler or retailer, and is not a competing undertaking at the upstream level where it buys the contract goods.

(8) The exception provided by Article 2(4), point (b) of Regulation (EU) X concerns the scenario where the supplier is a provider of services operating at several levels of trade, whereas the buyer provides services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services.

(9) If the conditions of Article 2(4), point (a) or (b) of Regulation (EU) X are fulfilled, the exemption provided by Article 2(1) of the Regulation applies to all aspects of the

[8] See Commission Notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5). See also the Commission's Thirteenth Report on Competition Policy, point 55, and the judgments of 30 January 2020, *Generics (UK) and Others* v *Competition and Markets Authority*, Case C-307/18, EU:C:2020:52, paragraphs 36 to 45; 25 March 2021, *H. Lundbeck A/S and Lundbeck Ltd* v *European Commission*, Case C-591/16 P, EU:C:2021:243, paragraphs 54 to 57.

vertical agreement in question, including any exchange of information between the parties ~~that is necessary to improve the production or distribution of the contract goods or services by the parties~~, except those exchanges of information that are excluded by Article 2(5) of the Regulation .

(10) The exchange of information between a supplier and a buyer can contribute to the pro-competitive effects of vertical agreements, including the optimisation of production and distribution processes. This also applies in the scenario of dual distribution. The degree to which ~~Whether~~ an exchange of information is necessary to improve the production or distribution of the contract goods or services by the parties may depend on the particular distribution model. For example, under an exclusive distribution agreement, it may be necessary for the parties to exchange information relating to the territories or customer groups that are allocated to the buyer or reserved to the supplier. Under a franchise agreement, it may be necessary for the franchisor and franchisee to exchange information relating to the application of a uniform business model across the franchise network[9]. Lastly, in a selective distribution system, it may be necessary for the supplier to obtain information from distributors relating to their compliance with the selection criteria and with their other obligations under the selective distribution agreement, notably to ensure that distributors do not to sell such goods or services to unauthorised distributors.

~~(10)~~(11) However, not all exchanges of information between a supplier and buyer in a dual distribution scenario are efficiency enhancing. For this reason, Article 2(5) of Regulation (EU) X provides a limited number of- exceptions to the general principle that~~, in such a scenario,~~ the exchanges of information between a supplier and buyer, including in a dual distribution scenario ~~does not~~ benefit from the exemption provided by Article 2(1) of the Regulation.~~, except for where the information exchange is not necessary to improve the production or distribution of the contract goods or services by the parties.~~

~~(11)~~(12) For the purpose of applying Article 2(5) of the Regulation and this guidance, information exchange includes any communication of information by one party to the other, irrespective of the characteristics of the exchange, for instance whether the information is communicated by only one party or by both parties, or whether the information is exchanged in writing or orally. It is also immaterial whether the parties expressly agree the form and content of the information exchange or if it takes place on an informal basis, including, for example, where one party communicates information without the other party having requested it.

~~(12)~~(13) ~~Whether an exchange of information is necessary to improve the production or distribution of the contract goods or services by the parties may depend on the particular distribution model. For example, under an exclusive distribution agreement, it may be necessary for the parties to exchange information relating to the territories or customer groups that are allocated to the buyer or reserved to the supplier. Under a franchise agreement, it may be necessary for the franchisor and franchisee to exchange information relating to the application of a uniform business model across the franchise network[9]. Lastly, in a selective distribution system, it may be necessary for the supplier to obtain information from distributors relating to their compliance with the selection criteria.~~

~~(13)~~(14) The following is a non-exhaustive list of examples of information that, when exchanged by the parties to a vertical agreement that fulfils the conditions of Article 2(4), point (a) or (b) of Regulation (EU) X ~~can generally be~~are considered to be necessary to improve the production or distribution of the contract goods or services

by the parties and can therefore benefit from the exemption provided by Article 2(1) of the Regulation. Unless indicated otherwise, the examples cover information communicated by the supplier or the buyer, irrespective of the frequency of the communication and irrespective of whether the information relates to past, present or future conduct.

(a) Technical information relating to the contract goods or services, such as information relating to the registration, certification or handling of the contract goods or services, notably when such goods or services must comply with

[9] See Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty (OJ C 101, 27.4.2004, p. 97) for the Commission's general methodology and interpretation of the conditions for applying Article 101(1) of the Treaty and in particular Article 101(3) thereof, paragraph 31.

regulatory measures, and information that enables the supplier or buyer to adapt the contract goods or services to the requirements of the customer;

(b) Information relating to the supply of the contract goods or services, including information relating to production, inventory, stocks, sales volumes and returns;

(c) Aggregated or customer-specific sales data and information relating to customer purchases of the contract goods or services, customer preferences and customer feedback, including ~~,~~ non-aggregated information on the value and volume of specific contract goods or services per customer, and information that identifies particular customers, ~~without prejudice to paragraph (14) below;~~ provided that such information exchange is not used to impose any of the hardcore restrictions on the buyer specified in Article 4 of the Regulation;

(d) Information relating to the prices at which the contract goods or services are sold by the supplier to the buyer;

(e) Information relating to the supplier's recommended resale prices or maximum resale prices for the contract goods or services and information relating to the prices at which the buyer resells the goods or services, provided that such information exchange is not used to restrict the buyer's ability to determine its sale price or to enforce a fixed or minimum sale price within the meaning of Article 4, point (a) of Regulation (EU) X[10] (except for the exchange of information on fixed resale prices that facilitates the introduction of a new product or that is necessary to organise a coordinated short-term low price campaign), and without prejudice to paragraph (14), point (a) below concerning information relating to actual future downstream sale prices;

(f) Information relating to the marketing of the contract goods or services, including information on new goods or services to be purchased and sold under the vertical agreement, as well as information on promotional campaigns for the contract goods or services, without prejudice to point (e) of this paragraph or paragraph (14) below;

(g) Performance-related information, including aggregated information communicated by the supplier to the buyer relating to the marketing and sales activities of other buyers of the contract goods or services, provided that this does not enable the buyer to identify the activities of particular competing buyers, as well as information relating to the volume or value of the buyer's sales of the contract goods or services relative to the buyer's sales of competing goods or services.

~~(14)~~(15) Conversely, Article 2(5) of the Regulation contains an exhaustive list of information exchange that does not benefit from the exemption of Article 2(1) of the Regulation because it is ~~the exchange of the following types of information is~~ generally not necessary to improve the production or distribution of the contract goods or services by the parties.

(a) Information relating to the actual future prices at which the supplier ~~or buyer~~ will sell the contract goods or services downstream, except (i) ~~unless the exchange of such information is necessary to organise a coordinated short-term low price campaign in accordance with the guidance provided in paragraph [X] of these guidelines, and without prejudice to the possibility to~~ exchange information the exchange of information on the supplier's recommended resale prices or maximum resale prices for the contract goods or services, provided that such

information exchange is not used to restrict the buyer's ability to determine its sale price or to enforce a fixed or minimum sale price within the meaning of Article 4, point (a) of Regulation (EU) X; or (2) the exchange of information on fixed resale prices that facilitates the introduction of a new product or that is necessary to organise a coordinated short-term low price campaign

[10] See Section [6.1.1. of these guidelines] for further guidance on RPM, including on indirect means to achieve RPM.

~~Customer-specific sales data, including non-aggregated information on the value and volume of sales per customer, or information that identifies particular customers, unless in each case such information is necessary to enable the supplier or buyer to adapt the contract goods or services to the requirements of the customer or to provide guarantee or after-sales services or to allocate customers under an exclusive distribution agreement~~t[11];

(b) The exchange of information relating to goods sold by a buyer under its own brand name with a manufacturer of competing branded goods, unless the manufacturer is also the producer of the own-brand goods.

~~(15)~~(16) Exchanges of information between a supplier and buyer in a dual distribution scenario which ~~that, pursuant to~~ Article 2(5) of Regulation (EU) X carves out from ~~, do not benefit from~~ the exemption provided by Article 2(1) of the Regulation, ~~,~~ must be assessed individually under Article 101 of the Treaty, taking into account the Horizontal Guidelines. The other provisions of the vertical agreement between the supplier and buyer may nonetheless benefit from the exemption provided by Article 2(1) of the Regulation, provided that the agreement otherwise complies with the conditions set out in the Regulation.

~~(16)~~(17) Exchanges of information between a supplier and buyer in a dual distribution scenario that do not benefit from the exemption provided by Article 2(1) of Regulation (EU) X due to the application of Article 2(5) of Regulation (EU) X do not necessarily infringe Article 101 of the Treaty. However, such exchanges are subject to the presumptions established by the case law of the Court of Justice of the European Union relating to exchanges of information between competitors. In particular, undertakings that participate in a concerted practice and that remain active on the market are presumed to take into account information exchanged with their competitors in determining their conduct on the market[12].

~~(17)~~(18) The parties to an exchange of information ~~that~~which Article 2(5) of Regulation (EU) X , carves out from ~~pursuant to Article 2(5) of Regulation (EU) X, does not benefit from~~ the exemption provided by Article 2(1) of the Regulation may take precautions to minimise the risk that the information exchange will raise horizontal concerns[13]. For example, they may exchange only aggregated sales information or ensure an appropriate delay between the generation of the information and the exchange. Another possible precaution is to use technical or administrative measures, such as firewalls, to ensure, for example, that information communicated by the buyer is accessible only to the personnel responsible for the supplier's upstream activities and not to the personnel responsible for the supplier's downstream direct sales activity.

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[11] The guidance provided in these guidelines is without prejudice to the application of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

[12] See the judgments of 10 November 2017, *ICAP* v *Commission*, Case T-180/15, EU:T:2017:795, paragraph 57, 4 June 2009, *T-Mobile Netherlands and Others*, Case C-8/08, EU:C:2009:343, paragraph 51, 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission*, Case C-286/13 P, EU:C:2015:184, paragraph 127, 21 January 2016, *Eturas UAB and Others*, Case C-74/14 ECLI:EU:C:2016:42, paragraphs 40-44.

[13] See the chapter on information exchange in the Horizontal Guidelines.