VBER

We are grateful for the opportunity to participate in the stakeholder discussions with DG COMP around the reform of the vertical and horizontal rules over the last 12 months, and we thank DG COMP for this additional opportunity to comment on the issue of information exchange in dual distribution settings.

In summary, we consider that DG COMP did take account of the feedback received, in particular as the current draft seems to have abandoned the "10-30 percent" market share threshold that figured in the previous version of the draft guidelines.

We appreciate that the new draft tries to balance out the different interests of suppliers, wholesalers, and retailers in relation to dual distribution. Looking at it from a point of view of consistency, coherence, and practicability, we only have a few remaining comments and suggestions:

1. Recital 5, rightfully, confirms that the relationship between a non-manufacturing retailer and a private label manufacturer falls within the scope of the VBER.

   However, Recital 5 also states that where the retailer manufactures products in-house himself and enters into a specifications-based supply agreement with a competing manufacturer, such a situation falls outside the VBER because both are considered competitors. We think that this interpretation is too narrow.

   To take an example: A successful fine food retailer with a small production shop for a recipe-based branded sausage enters into a specifications-based contract manufacturing agreement with a large-scale food producer. We understand that according to the draft, such a situation would not be covered by the VBER, although it resembles the "second source"-scenario block exempted under the Technology Transfer BER where both parties are competitors (Article 4 (1), lit. (c)(iv)). Also, there seems to be a contradiction between Recital 45 of the July 2021 draft guidelines, according to which the Subcontracting Notice continues to apply. While subcontracting agreements fall outside the scope of Article 101 (1), the specifications-based manufacturing contract pursuant to new Recital 5 is not even exempted. A final clarification would certainly be welcomed.

   We propose adding the following wording to Recital 5, e.g., in a footnote:

   "The guidance provided in these guidelines is without prejudice to the application of the Commission notice of 18 December 1978 concerning its assessment of certain subcontracting agreements in relation to Article 85 (1) of the EEC Treaty."

2. Recital 14 lit. (b) excludes from exemption any individual customer information besides two exceptions. In our view there may be other legitimate reasons for exceptionally disclosing the identity of an individual customer to the supplier. One such example is that the intermediate buyer and reseller of a large volume of industrial input products pitched to a final user in a competitive tender may wish to quote an extraordinarily low price to gain "new" business. This intermediate buyer may want to ask the manufacturer-supplier for a "special price" for this

particular transaction. The manufacturer-supplier may wish to verify the details of the transaction in such a case. Other examples include fulfilment scenarios, the monitoring of maximum price obligations and suppliers' (premium) partner programs implemented by wholesalers. We therefore suggest making clear that there may be other legitimate reasons, e.g., by adding language such as "*or where the parties can invoke another legitimate objective*".

We remain available for any question or further clarifications that you may have. Please contact Dr. Bertold Bär-Bouyssière (bertold.baer-bouyssiere@dentons.com), Dr. René Grafunder (rene.grafunder@dentons.com) or Caglagül Koz (caglaguel.koz@dentons.com).