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Response to the European Commission's consultation on the draft new section dealing with information exchange in dual distribution

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1. Introduction

1.1 Eversheds Sutherland welcomes the European Commission's consultation document on the draft new section dealing with information exchange in dual distribution ('**the new draft section**'), which will form part of the Guidelines on Vertical Restraints ('**draft Guidelines**') accompanying the revised Block Exemption Regulation on vertical agreements ('**draft VBER**').

1.2 Overall, Eversheds Sutherland supports the Commission's approach in providing guidance to businesses in relation to the assessment of information exchanges in dual distribution scenarios. Businesses across various industries and sectors will benefit from additional legal certainty around what is allowed under competition rules.

1.3 Nonetheless, it is unclear to us what the premise of the new draft section is. We note that the latest publicly available version of Article 2(4) draft VBER block exempts all aspects of non-reciprocal vertical agreements between competitors only up to a market share threshold of 10%, and under Article 2(5), where market share is between 10% and 30%, treats information exchange between the parties as horizontal and falling to be assessed under the rules applicable to horizontal agreements.

1.4 By contrast, the new draft section, paragraph 10, refers to Article 2(5) as providing that the exchange of information between a supplier and buyer may not benefit from the exemption where the information exchange "*is not necessary to improve the production or distribution of the contract goods or services*". It is not clear to us whether the 10% threshold has been abandoned in favour of a new 'necessity' test for the assessment of information exchanges. As such, it is difficult meaningfully to comment on the proposed draft section without this context.

1.5 As a general point, given that Articles 2(4) and 2(5) of the draft VBER are designed to provide the conditions for a block exemption for dual distribution agreements, we consider that they should be crystal-clear in order to provide meaningful guidance to businesses. If certain elements of the block exemption are not 'bullet-proof', the whole system of the exemption becomes eroded and ultimately unhelpful in practice.

1.6 In this respect, we note that the Expert Report on the review of the Vertical Block Exemption Regulation ('**Report**')[1] also supports the view that "*an additional market share threshold in the VBER for Information Exchange in dual distribution scenarios would not help to distinguish such situations from pro-competitive practices and/or conduct*". Instead, the authors of the Report suggest that information exchange directly related and proportionate to implement and/or facilitate the main non-restrictive vertical agreement should also in a dual distribution scenario remain within the safe harbour of the VBER up to the general market share threshold provided by Art. 3 VBER. We would support this conclusion and hope that the Commission intends to abandon the additional 10% market share threshold, rather than introduce a combined threshold based on both a 10% market share threshold and a necessity assessment.

1.7 Turning to the various paragraphs in the draft section, we note the following:

1.8 The last sentence of paragraph 6 ("*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*") refers to the need for a narrow construction of the exception for dual distribution. We consider this to be conceptually inconsistent with the idea of a block exemption as a 'safe harbour'. By definition, a safe harbour is meant to provide legal certainty, which cannot be achieved if certain of its components are construed narrowly. Hence, our view is that this sentence should be removed.

1.9 Paragraph 9 states that, providing the conditions of Article 2(4) draft VBER are met, the exemption for dual distribution "*applies to all aspects of the vertical agreement*". Paragraph 10 qualifies the preceding paragraph, noting that the exchange of information between a

[1] Expert Report on the review of the Vertical Block Exemption Regulation, Information exchange in dual distribution, Final Report, 2022, page 55.

supplier and a buyer does not benefit from the exemption where it is not "*necessary to improve the production or distribution of the contract goods or services by the parties*". The relationship between the two paragraphs is not clear to us: the juxtaposition of the two statements, seems to suggest that, even if the conditions of Article 2(4) are met, this is still not sufficient and the conditions of Article 2(5) draft VBER also need to be met specifically in respect of information exchanges. If that is the case, the general statement in paragraph 9 should be amended to make this clear.

1.10 As mentioned above, paragraph 10 refers to an exchange being "*necessary to improve the production or distribution of the contract goods or services by the parties*". It is currently unclear what is 'necessary'. We presume this language intentionally replicates the similar language used in Article 101(3) TFEU. If that is the case and 'necessity' is used as a proxy for 'indispensability', we note that this is a very high threshold to meet. For the purposes of Article 101(3), it does not suffice that something is necessary, but it must be indispensable, in the sense that there is no other, less restrictive means to achieve the intended outcome. This would, essentially, oblige parties to dual distribution arrangements to self-assess the 'necessity' of their agreements to generate efficiencies on the basis of a really strict test. We would be opposed to such an interpretation and would welcome further clarity on what exactly 'necessary' means and how it will be assessed.

1.11 We consider that paragraph 12 should also refer to non-exclusive and shared distribution systems for completeness.

1.12 We welcome the list of examples provided in paragraph 13, in particular since the relevant paragraph makes it clear that this applies "*irrespective of the frequency of the communication and irrespective of whether the information relates to past, present or future conduct*". The examples that are provided are practical and will provide helpful guidance to businesses engaging in dual distribution, subject to clarifications in respect of our comments above.

1.13 The 'adverse' examples set out in paragraph 14 are introduced as "*generally not necessary to improve the production or distribution of the contract goods or services*". As already mentioned, this language is unclear on its own. The addition of the qualifier 'generally' seems to suggest that, as a general rule, these exchanges will be unlikely to benefit from the block exemption; even though the language used recognises that there might be exemptions, we are concerned that this part of the guidance could in effect operate as a presumption, which will need to be rebutted by the undertakings concerned.

1.14 Paragraphs 15 and 16 seek to provide a frame of reference for information exchanges that do not benefit from the exemption, by providing that these will be assessed individually under Article 101 TFEU and taking into account the Horizontal Guidelines. As mentioned in our response to the Commission's consultation on the draft VBER, we consider that these information exchanges are still a necessary part of a vertical relationship and should be assessed under the Vertical Guidelines. The fact that an exchange does not meet the criteria of Article 2(5) draft VBER (which are currently unclear to us) does not change its nature from a vertical to a horizontal relationship; hence, assessing the same relationship under two different sets of guidelines is inconsistent and creates uncertainty.

1.15 Further, the relevant paragraphs seem to conflate various different provisions, namely the block exemption (which provides a 'safe harbour'), individual assessment under Article 101(3) TFEU and the Horizontal Guidelines. The result of this will be that there may be circumstances where the whole agreement in question will benefit from the safe harbour provided by the VBER, but then certain components of the agreement (i.e. the information exchange) will still be subject to self-assessment, which will follow the criteria set out in the Horizontal Guidelines. Our view is that this does not provide a clear framework for the assessment of the relevant agreement and, from a systematic perspective, creates confusion between the various steps of assessing an agreement.

1.16 Paragraph 17 quite helpfully mentions certain mitigating measures that can be taken by businesses. The language used in the paragraph seems to suggest that these measures will only need to be taken where an information exchange does not meet the criteria of Article 2(5). However, if the exception is only provided to "necessary" exchanges, taking such measures could indirectly become a relevant factor in practice for the assessment of what

is "necessary". For this reason, we believe this paragraph should be reformulated to make it clear how mitigating measures may be relevant in assessing an exchange.

1.17 For completeness, it is noted that Paragraph 38 of the draft Guidelines provides an example illustrating how a dual-distribution relationship would be assessed under the revised VBER in circumstances where a supplier provides its products through both (i) independent distributors; and (ii) a genuine agent (who also acts as an independent distributor in the same and other product markets). The wording of this example suggests that such a genuine agency relationship would only fall outside of Article 101(1) TFEU provided that the supplier meets all relevant investments for all the products belonging to the same product market, even if such products are differentiated. As a result, the use of a 'dual-role' agent would become very burdensome and costly.

1.18 We would therefore request clarity on the theory of harm that underlies the Commission's approach to such 'dual-role' agency/distribution arrangements. In respect of information exchange concerns, in order to ensure consistency we would firmly suggest that the risk of the information exchanges that would occur in such a scenario should be managed in the same way as exchanges in a normal dual distribution situation. If the theory of harm relates to the potential for increased pricing pressures on products sold in the course of the agent's role as an independent distributor, we are of the view that such concerns are more appropriately dealt with through current restrictions on RPM rather than discouraging such 'dual-role' relationships through an obligation to cover excessive costs.