

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

- 1.1 Clifford Chance welcomes the opportunity to respond to the consultation of the European Commission (**Commission**) on the draft proposed guidance on information exchange in dual distribution (the **Draft Guidance**) for inclusion in the revised vertical guidelines. Our observations below are based on the substantial experience of our antitrust lawyers of advising on vertical agreements under EU competition law, and in a large number of other jurisdictions. However, the comments in this response do not necessarily represent the views of every Clifford Chance lawyer, nor do they purport to represent the views of our clients.
- 1.2 For the reasons set out in our response to the consultation on the Draft Vertical Block Exemption Regulation (**Draft VBER**) and the related Draft Guidelines, we consider that the proposal to remove information exchange between suppliers and their distributors (in a dual distribution model) from the scope of the VBER is unlikely to have any significant beneficial impact in terms of stimulating greater intra-brand competition. In particular, we consider that it is inconsistent with commercial reality to expect a supplier to compete with its distributor in the same way as distributors compete with each other. Suppliers do not have an incentive to compete fiercely with their own distributors, as any sale won to a distributor automatically entails the corresponding loss of the supplier's sales to the distributor. Their relationship is fundamentally that of business partners, not rivals. Suppliers below the 30% market share threshold provided for in the VBER will likely compete at retail level by winning customers from other competing brands. In turn, *intra-brand* competition will take place between the distributors themselves.
- 1.3 We note that the cases examined by the Expert Report¹ all involved information exchange between distributors or wholesalers that were facilitated by the supplier, cases which can be dealt with in the framework of the Horizontal Guidelines as in the past, or conduct that was in any event a hardcore restriction under the VBER (e.g. resale price maintenance) and which was enforced through information exchange between the supplier and distributor. None appears to be related to a restriction of competition between a supplier and its dual distributor. Consequently, it remains the case that the Commission has presented no evidence that information exchange in dual distribution arrangements that are currently covered by the VBER give rise to anticompetitive harms that merit stricter regulation. This is more the case, taking into account that both the current and the draft VBER only include in their blacklist certain restrictions assumed by distributors *vis-a-vis* their supplier in relation to the territory where and the customers to which they may sell the contract good or services – to the extent these restrictions limit *intra-brand* competition between the distributors themselves – but do not refer to similar restrictions assumed by the supplier *vis a vis* its distributors. It is therefore the case that, under the revised VBER, restrictions on the supplier in relation to the territory or customers where it may sell the contract goods or services would continue to be block exempted but information exchanges between the same parties would not. In the same line, we note that the Expert Report concluded that exchange of

¹ *Expert Report on the review of the Vertical Block Exemption Regulation Information exchange in dual distribution.*

information is "an integral part of vertical agreements also in most dual distribution scenarios" and that "information exchange in dual distribution scenarios does not generally create a "false positive" under the current VBER".²

- 1.4 We agree with the statement in the consultation document that information exchanges between suppliers and their dual-distributors can give rise to substantial efficiencies, in particular the optimisation of production and distribution processes. Our concern is that, by restricting the free flow of information regarding the parties' activities under the distribution arrangement, the Commission's proposed approach will have a substantial chilling effect on the resulting efficiencies, for the reasons set out in our response to the consultation on the Draft VBER.
- 1.5 While helpful, the proposed modification to retain the cover of the VBER for exchanges that are "necessary to improve the production or distribution of the contract goods or services by the parties" does not fully address our concerns, as there will inevitably be a variety of types of efficiency-enhancing information exchange that do not fall clearly into one of the permitted categories (set out in paragraph 13). The reference to exchanges which are necessary to improve the production or distribution of the contract goods or services by the parties constitutes an undefined legal concept which does not guarantee the necessary legal certainty sought by the mechanism of block exemptions. In particular, the list of examples seeking to clarify the undefined legal concept is only an open list and would not be included in the VBER itself but in the Vertical Guidelines, which is a document that does not bind National Competition Authorities and/or national courts. In addition, some of the examples are not exclusively linked to the specific nature of information exchanges which lead to efficiencies in a vertical agreement but include certain variables in relation to the level of aggregation of the information that, in practical terms, will force companies to undertake the individual effects analysis for information exchange which is contemplated in the Horizontal Guidelines (see, for example, sections (c) or (g) of paragraph 13). Moreover, the rationale behind some of the examples are not completely straightforward (e.g., whereas section (c) only exempts aggregated information regarding customer purchases, preferences or feedback, section (e) exempts the exchange of disaggregated resale prices unless leading to resale price maintenance).
- 1.6 Parties are unlikely to carry out a specific assessment of whether any given exchange improves the production or distribution of the contract goods, so they will simply avoid them. For example, information regarding a distributor's forecasts of market demand and market trends may be useful to allow a supplier to optimise production, but are not covered by the Draft Guidance and might be viewed as an indirect indicator of the distributor's future pricing (in line with e.g. Case C-286/13 *Dole*) and therefore falling within the prohibited category.
- 1.7 Moreover, losing the ability to exchange information on the prohibited categories of information set out in paragraph 14 will also result in foregone efficiencies, as pricing information and granular data on customer preferences help suppliers to better understand which aspects of their products are most valued by specific types of end-users. Allowing data that is aggregated according to different categories of end user does not allow the same level of efficiency to be obtained, as granular data is required

² Expert Report, page 46.

in order to be able to ascertain the appropriate categories of end-user in respect of which data should be gathered. Given the already limited incentives that suppliers have to compete with their dual-distributors, the loss of those efficiencies are unlikely, in our view, to be outweighed by enhancements to intra-brand competition.

1.8 Consequently, our view remains that it would be preferable to maintain the position that applies under the current VBER or at the most, that a closed list of agreements which are not considered necessary to improve the production or distribution of the contract goods or services by the parties is included in the VBER itself and is limited to information exchanges that restrict *intra-brand* competition between distributors and/or *interbrand* competition between suppliers of different brands.

1.9 As regards the text of the Draft Guidance, we have the following comments:

1.9.1 It is not clear whether the 10% threshold set forth in Article 2(4) of the draft VBER has been eliminated so that all information exchange needs to be necessary for the improvement of the production or distribution of the contract goods or services in order to benefit from the VBER, irrespective of the market share of the parties. There is no mention of the 10% threshold in the Draft new Section of the Vertical Guidelines, which describes the content of Article 2(4) of the VBER. As previously stated in our response to the consultation on the Draft VBER and the Draft Guidelines, the deletion of the 10% threshold would be welcomed because introducing an additional threshold would exacerbate the complexity of the system and would make it excessively difficult to maintain and operate a coherent overall distribution system. This is particularly true in markets of a local geographic scope, such as the daily consumer goods distribution markets, where, for example, dual distribution between a franchisor and its franchisees could be exempted or not depending on the location of the franchisee.

1.9.2 It is not clear what is intended by the use of the word "actual", when referring to "actual future prices" in paragraph 14(a). For instance, is this intended to exclude information relating to an intended percentage discount or buy-one-get-one-free offer (e.g. as part of a promotional campaign) that does not disclose the monetary price to be charged?

1.9.3 The reference contemplated in paragraph 17 to the adoption of certain precautions such as the aggregation of the relevant information, the reduction of the frequency or the implementation of the design of firewalls when the agreement does not benefit from the block exemption provided for in Article 2(1) pursuant to 2(5) of the VBER "*in order to minimise the risk that the information exchange will raise competition concerns*" is concerning. The adoption of any of such measures according to the criteria of the Horizontal Guidelines would necessarily exclude – and not minimize - any horizontal competition concern. In addition, it is not clear whether the adoption of such measures could also be considered when analysing whether an information exchange below the 30% threshold and not expressly included in the examples provided for in paragraphs 13 and 14 of the Draft Guidance fulfils the condition set forth in Article 2(5) of the VBER, in particular taking into account that some of the examples provided by the Draft Guidance contemplate aggregation

measures (in particular, points c) and d) of paragraph 13 and point b) of paragraph 14).

- 1.9.4 In any case, the Commission should take note that the implementation of firewalls may not be possible for small suppliers and that, even for larger suppliers, a requirement to implement firewalls would create considerable inefficiencies, as they would be required to split out functions that are currently tightly integrated and would be unable to assess and use information across all their sales channels in a holistic and coherent way.

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