

## FEEDBACK ON THE PROPOSED GUIDANCE RELATING TO INFORMATION EXCHANGE IN THE CONTEXT OF DUAL DISTRIBUTION, INTENDED TO BE ADDED TO THE VERTICAL GUIDELINES

### 1. INTRODUCTION AND BACKGROUND

Founded in 1973, the *Fédération de la Haute Couture et de la Mode* (FHCM – hereinafter, the “**Fédération**”) represents over a hundred French and international brands and is the voice of the creative and luxury fashion industry.

Members of the Fédération are particularly impacted by rules of the Vertical Block Exemption Regulation (the “**VBER**”) and the accompanying Guidelines on Vertical Restraints (the “**VGL**”) as they heavily rely on vertical agreements for the distribution of products across Europe. The Fédération has been significantly involved in the ongoing review process of these rules conducted by the European Commission (“**Commission**”):

- In April 2019, the Fédération contributed to the Commission’s first public consultation on the review of the VBER and the VGL.
- In November 2020, the Fédération submitted input on the Commission’s inception impact assessment.
- In March 2021, the Fédération submitted its contribution to the second public consultation on the review of the VBER and the VGL.
- In September 2021, the Fédération submitted its feedback on the Commission’s proposed draft VBER and VGL.

### 2. FEEDBACK ON THE PROPOSED GUIDANCE

The Fédération’s members very much appreciate the Commission’s efforts and would like to thank the Commission’s for its proposed guidance on information exchange in the context of dual distribution (the “**Proposed Guidance**”). The Fédération’s members are pleased to say that their views are in large part aligned with those expressed by the Commission in the Proposed Guidance.

In its feedback on the proposed draft VBER and VGL, the Fédération expressed its concerns over the inclusion of a 10% market share threshold in the VBER and considered that treating dual distribution under the vertical rules would be more appropriate and hence that the

exception under Article 2(4) of the VBER should remain unchanged. The Fédération considered that, instead of excluding information exchanges between the parties to the vertical agreement from the safe harbour, the VGL should provide concrete guidance with that regard. The Fédération in particular noted that, while the Commission's Horizontal Guidelines do provide helpful guidance on information exchange, they are not well suited in the context of dual distribution. For these reasons, the Fédération and its members welcome and generally concur with the core principles set out in the Proposed Guidance.

Having said that, the Fédération respectfully submits the following comments to the Commission:

- The Fédération notes that there is a lack of clarity regarding the link between the Proposed Guidance and the corresponding Article of the VBER. For example, it is unclear whether the Commission still contemplates including a 10% market share threshold in the VBER. Such a lack of clarity may result in serious legal uncertainty for suppliers and buyers.
- Similarly, the Fédération would welcome more clarity with respect to the hierarchy of the different provisions of the Proposed Guidance. For example, it is not clear whether the examples listed in certain paragraphs such as paragraph (10) or paragraph (12) concerning specific distribution models are by definition excluded from the “black list” provided in paragraph (14). This could be achieved by adding the following wording in red to paragraph (10):  
*“(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. As such, these exchanges 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 benefit from the exemption provided by Article 2(1) of the Regulation. [...]”*
- The Fédération considers that it is necessary to clarify what the Commission means by: “customer-specific sales data” in paragraph (14)(b). The Fédération understands that this refers to consumers. However, the Commission should clarify this point.
- The Fédération considers that the Commission should opt for the inclusion of a presumption of legality in relation to information exchanges in the context of dual distribution, instead of introducing an exception for the exchange of information between the parties that is: “necessary to improve the production or distribution of the

*contract goods or services by the parties*". This could be achieved by amending paragraph (9) of the Proposed Guidance as follows (in red the proposed wording):

*"(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 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,~~ provided that such exchange of information is not of the type that is expressly excluded by Article 2(5) of the Regulation [i.e. paragraph (14) of the Proposed Guidance]."*

As a result, information exchanges that meet the Article 2(4) requirements would be deemed compliant, to the exclusion of any information exchanges that have been "black listed" under paragraph (14) of the Proposed Guidance.

In this respect, paragraph (10) of the Proposed Guidance could also be adapted accordingly.

- The Fédération considers that the Commission shall add certain sales data and/or performance-related information to be legitimately obtained by suppliers from buyers in the "whitelist" provided in paragraph (13) of the Proposed Guidance as follows (in red the proposed wordings):

*"[...] Sales data and/or performance-related information to ensure the buyer's compliance with its contractual obligations vis a vis the supplier (including but not limited to commercial objectives remunerated by the supplier); Sales data and/or performance-related information following advertising and promotional campaigns for the contract goods or services in which the supplier has invested [...];"*

- The Fédération considers that the Commission shall clarify paragraph (13) (g) of the Proposed Guidance as follows (in red the proposed wordings):

*"[...] (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 provided that this does not enable the supplier to identify ~~relative to~~ the buyer's sales of competing goods or services."*

- With respect to selective distribution, and as clearly mentioned in the Expert Report issued by the Commission, the Fédération considers that the Proposed Guidance shall address the need to exchange information with the authorised reseller to prevent grey market sales. This could be achieved by adding the following wording in red to paragraph (12):

*“(12) [...]. 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 other contractual obligations (notably to ensure that: (i) distributors do not sell such goods or services to unauthorised distributors; and that (ii) clients who acquire such goods or services from distributors do not falsely pretend to act as consumers).”*

- Finally, the Fédération considers that the Proposed Guidance shall embrace certain standards mentioned by the Expert Report such as (i) “Unrelated information” (i.e. information that is not justified by the implementation or facilitation of the pro-competitive vertical agreement; and (ii) “Disproportionate Information” (i.e. information that goes beyond the level of Information required for the procompetitive elements of a vertical agreement because the same effect could be achieved by less detailed information). These standards seem more suited to the information exchange in the context of dual distribution than the following standard retained by the Commission: *“exchange of information between a supplier and a buyer which can contribute to the pro-competitive effects of vertical agreements, including the optimisation of production and distribution”*.

The Fédération wishes to thank the Commission again for the constructive dialogue and for the opportunity to express its position on a number of topics of interest for the fashion industry.

The Fédération stands ready to continue this open dialogue with the Commission and to further discuss these or any other issues, as well as to assist the Commission with any additional information or clarification it might require in the review of the VBER and the VGL.

\*\*\*\*\*