Summary of the contributions of the National Competition Authorities to the evaluation of the Vertical Block Exemption Regulation (EU) No 330/2010

The European Commission ("the Commission") is currently evaluating the functioning of the Vertical Block Exemption Regulation (EU) No 330/2010 ("VBER") and the related Guidelines on Vertical Restraints ("VGL").

In this context, the Commission asked the National Competition Authorities ("NCAs") to share their experience in applying the VBER. NCAs are bound by the VBER when assessing vertical agreements. In contrast, the VGL are non-binding for the NCAs, but nevertheless taken into account by all of them.

The Commission received 20 contributions.[1]

Overall, the NCAs consider that the Commission should maintain both instruments, while taking the opportunity of the review to clarify and adjust the current rules, notably in light of market developments over the last decade.

The purpose of this summary is to outline the main points raised by the NCAs without regard to the number of contributions addressing a particular point or whether a particular point of view is shared by all the NCAs. Therefore, in the following, reference is made generically to "NCAs". However, for issues on which NCAs expressed diverging views, both sides of the argument are presented.[2]

This summary provides the NCAs' general views on the evaluation of the VBER and the VGL following the five evaluation criteria established by the Better Regulation Requirements,[3] i.e., effectiveness, efficiency, relevance, coherence and EU added value (see section **I**). It also summarizes the comments made by the NCAs as regards the functioning of some specific aspects of the VBER and the VGL (see section **II)**.

I. GENERAL VIEWS OF THE NCAs

Regarding the effectiveness of the VBER and the VGL, NCAs generally share the view that both texts have met their objectives and contributed to promote good market performance in the EU. In particular, they have provided helpful guidance to NCAs and legal certainty to stakeholders for the assessment of vertical agreements and restrictions. However, their effectiveness could be increased by providing clarifications and further guidance on some issues (see section II). Moreover, the VBER and the VGL should be updated to take account of recent market developments, new business models and new technologies. NCAs also suggest integrating the recent case law in relation to vertical restraints into the VBER and/or in the VGL.

[1] One contribution was submitted by one of the Contracting Parties to the EEA Agreement.

[2] The contributions received from the NCAs cannot be regarded as the official position of the Commission and its services and thus do not bind the Commission.

[3] The better regulation requirements are about designing and evaluating EU policies and laws transparently on the basis of evidence and the views of stakeholders and citizens. They are applicable to all policy areas and aim for targeted and proportionate regulation that does not go further than required to achieve a given objective, while bringing benefits at minimum cost.

Regarding the efficiency of the VBER and the VGL, NCAs generally consider that the costs incurred by NCAs for the assessment of the compliance of vertical agreements with Article 101 TFEU would increase in the absence of the VBER and VGL. NCAs also consider that both instruments contribute to reducing the costs borne by stakeholders of ensuring the compliance of vertical agreements with Article 101 TFEU, even though this reduction is difficult to measure. However, as NCAs pointed out, it is difficult for companies, especially SMEs, to self-assess the lawfulness of a vertical agreement based on the VBER and VGL without seeking an opinion from a law firm specialised in competition law, which entails certain costs.

Regarding the relevance of the VBER and the VGL, NCAs generally consider that both texts are useful and should therefore be maintained. However, NCAs indicate that the VBER and VGL should be revised in order to reflect recent market developments. New forms of distribution have emerged due to the increased importance of online sales and new players are now active on many markets (e.g. online platforms). These market developments have influenced and changed the behaviour of market participants and consumers, thus justifying an update of the VBER and the VGL, as well as the provision of guidance on the assessment of new vertical practices.

NCAs generally consider that the VBER and the VGL are coherent with other instruments that provide guidance on the interpretation of Article 101 TFEU. That being said, NCAs note that the VBER and the VGL may be affected by the EU Regulation on promoting fairness and transparency for business users of online intermediation ("Platform to Business (P2B) Regulation"), which regulates certain aspects of the relationship between platforms and their business partners. Consequently, this Regulation should be taken into account during the review process to ensure that both instruments complement and do not contradict each other.

NCAs generally consider that the VBER and VGL provide clear added value in the assessment of the compatibility of vertical agreements with Article 101 TFEU. Therefore, any lapse of the VBER and the VGL would seriously undermine harmonisation in the enforcement of Article 101 TFEU across the EU.

II. SPECIFIC ISSUES RAISED BY NCAs

When evaluating the functioning of the VBER and VGL, NCAs have identified a number of specific issues. In the following, these issues are grouped in six main categories: (**i**) the scope of application of the VBER, (**ii**) hardcore restrictions, (**iii**) vertical issues related to e-commerce, (**iv**) retail most favourite nation or price parity clauses ("retail MFNs"), (**v**) frequently used distribution systems, and (**vi**) withdrawal/disapplication of the VBER.

i. THE SCOPE OF APPLICATION OF THE VBER

1. Regarding the definition of vertical agreements (Article 1(1)(a) of the VBER and recitals 24-26 VGL)

NCAs indicate that the current definition of vertical agreements does not take into account the emergence of new market players, notably online platforms and the nature - vertical or horizontal - of their commercial relationship with the companies that use them to sell their products and services.

2. **Regarding vertical agreements that generally fall outside the scope of Article 101(1) TFEU ("agency agreements"; recitals 12-21 VGL)**

NCAs indicate that certain recitals of the VGL dealing with the treatment of agency agreements do not capture well the distinction between independent traders and agents acting on behalf of a supplier, especially with regard to the difference in the legal and/or commercial risks incurred.

More specifically with regard to online platforms, there seem to be diverging views among NCAs as to whether they can qualify as genuine agents. Some NCAs consider that certain characteristics of online platforms indicate that they cannot form an integral part of the principal's distribution system and should therefore not be treated as genuine agents (e.g. platforms usually bear the entire risk of investing in their infrastructure, deal with many different - often smaller - principals and can have a strong bargaining position). Other NCAs take the view that, depending on the circumstances, online platforms could qualify as an agent, with the result that Article 101(1) TFEU does not apply to intra-brand restrictions agreed between the platform and the principal.

In light of the above, NCAs advocate for more guidance on relevant factors to be taken into account in the assessment whether online platforms can qualify as agents, which should be carried out on a case-by-case basis. Such guidance could take into account the following aspects: (i) in some circumstances online platforms appear to bear more than insignificant risks; (ii) the nature of the relationship between suppliers and online platforms is very different from a traditional agency model where large suppliers act as principals using various smaller (independent) sales agents to sell their goods or services, as the online platform that acts as an agent is often the undertaking with the strongest market position; and (iii) online platforms invest heavily in data-gathering and processing capabilities and keep data of third-party customers exclusively for themselves.

3. **Regarding the conditions for the application of the block exemption (Article 2 of the VBER)**

Vertical agreements entered into between an association of undertakings and its members (Articles 2(2) and 8 of the VBER and recitals 29-30 VGL)

NCAs indicate that the VGL do not provide sufficient guidance on the fact that the restrictions in vertical agreements (e.g. recommended resale prices and maximum resale prices) between an association and its members or between an association and upstream suppliers, which satisfy Article 2(2) of the VBER, can only benefit from the safe harbour that the VBER provides if the conditions set out in Articles 3 to 5 of the VBER are fulfilled and these agreements are also acceptable under the horizontal rules.

NCAs also point out that more examples should be added in recitals 29 and 30 of the VGL to illustrate how to apply Article 2(2) of the VBER in practice. This includes agreements entered into in the context of voluntary chains consisting of a number of independent retailers as opposed to the so-called "capital chains" where all the retailers are owned by one company.

Finally, NCAs indicate that the 50 million euros turnover threshold in Article 2(2) of the VBER could lead to the exemption of agreements that do not generate efficiencies. At the same time, NCAs appear to call into question whether this threshold is relevant at all in the current market conditions.

Non-reciprocal vertical agreements between competitors (Article 2(4) of the VBER and recitals 27-28 of the VGL)

NCAs indicate that the wording of Article 2(4) of the VBER does not provide sufficient clarity in relation to several aspects.

First, the meaning of Article 2(4) of the VBER lacks clarity with regard to the relationship between hybrid platforms and retailers. In particular, NCAs consider that it is not clear if hybrid platforms, acting both as suppliers of intermediation services and retailers, should benefit from Article 2(4) of the VBER, since the hybrid model might not correspond to the *ratio legis* of this exception.

Second, Article 2(4) of the VBER arguably lacks clarity on the interplay with the Horizontal Guidelines ("HGL"). For instance, recital 27 of the VGL does not clearly stipulate if the horizontal aspects of a mixed horizontal/vertical agreement must always be assessed under the HGL first. NCAs note that it is only if this first assessment leads to the conclusion that the cooperation between competitors would, in principle, be acceptable under the HGL that a second assessment under the VBER should be carried out.

Third, the conditions of application of dual distribution to service providers should be clarified. Notably, the VGL should specify whether, in order to qualify as "a provider of services" for the purpose of Article 2(4)(b), the supplier must himself be at the origin of the service concerned or if the mere reselling of the service supplied by another (upstream) undertaking is sufficient.

4. Regarding the market share threshold (Articles 3 and 7 of the VBER and recitals 86-95 VGL)

NCAs indicate that, based on their experience and subject to the points set out below, the 30% market share threshold is generally appropriate.

NCAs point out that it may not be clear as to whether, for the purpose of assessing the market shares of the supplier and the buyer, it is necessary to define one or, conversely, different (separate) geographic markets (i.e. the relevant geographic market on which the supplier sells the contract goods or services and the relevant geographic market on which the buyer purchases the contract goods or services).

NCAs highlight difficulties regarding the application of the market share threshold in relation to online platforms. First, NCAs point to the case of a "distributor platform"[4] where the calculation of the market share could be based on each market on which the platform "purchases" the products sold via the platform. In contrast, when determining the market share of a "supplier platform"[5] it has to be established whether the relevant market is confined to the supply of platform services or if other suppliers of comparable services (e.g. in the offline world) have to be taken into account, and if so to what extent. Second, NCAs point out that platforms often operate on multi-sided markets. In these

[4] Distributor platforms can be understood those directly involved in the conclusion of individual transactions *via* the platform and could therefore qualify as a buyer of the product or service vis-à-vis the manufacturers and as a supplier vis-à-vis end customers.

[5] Supplier platforms provide only the infrastructure for seller and buyers to interact and conclude a particular transaction.

cases, it is not clear whether the parties to a vertical agreement have to determine whether the 30% market share threshold is met on each side of the market or whether only one side of the market should be considered.

NCAs also indicate that (the level of) the market share thresholds could be inadequate when it comes to online platforms. First, turnover-based market shares may be less relevant as indicators for market power of platforms than other metrics such as, for example, resources, access to data and network effects. Second, a 30% market share threshold could be too high since platforms may have a certain degree of market power even below this threshold (due to access to data and network effects) and when considering the difficulties with withdrawing the application of the VBER. Third, as the degree of market power of multi-sided platforms might be different depending on the characteristic of the market concerned and relevant consumer behavior (e.g. multi-homing or single homing), the market share threshold for multi-sided platform may have to be differentiated in order to better reflect different market circumstances.

In addition, NCAs stress that the 30% market share threshold does not seem to function properly when applied to oligopolistic markets. In markets with two to four large players, the individual market shares might fluctuate around 30%, so that even if all members of the oligopoly apply identical practices, some may benefit from the VBER, while others may fall outside its scope. This could create arbitrary results and possible market distortions. This calls for a deeper assessment of cumulative effects of similar vertical restrictions and the possible introduction of an additional oligopoly threshold in combination with a lower market share threshold (e.g. individual market share of at least 15% for each undertaking plus a combined oligopoly market share of 50%).

ii. HARDCORE RESTRICTIONS

NCAs generally recognise the importance of the list of hardcore restrictions in Article 4 of the VBER. However, based on their experience with applying the VBER, NCAs point out that some notions referred to in Article 4 are not sufficiently clear.

1. Regarding the concept of hardcore restrictions and restrictions "*by object*"

NCAs note that the VBER does not establish a clear distinction between hardcore restrictions and restrictions "by object" and that the VGL do not provide more clarity in this regard.

2. Regarding the distinction between active and passive sales

NCAs point out that the VBER does not contain any definition of "active sales" and "passive sales". In fact, Article 4(b)(i) of the VBER only states that active sales restrictions do not qualify as hardcore restrictions in the context of exclusive distribution agreements. The VGL only contain a few paragraphs setting out examples of active and passive sales restrictions, which do arguably not provide sufficient legal certainty in this regard. For example, recital 53 of the VGL does not clearly state whether exclusive distribution agreements are the only context in which restrictions of active sales are exempted from the hardcore restriction defined in Article 4(b) of the VBER. In addition, recital 56 of the VGL does not specify whether the criterion of "overall equivalence" between the sales restrictions imposed on brick-and-mortar shops and those imposed on internet dealers applies to all types of distribution systems or only to selective distribution.

NCAs also consider that only relying on examples contained in the VGL may not provide sufficient guidance on how to deal with internet sales (as active or passive sales) notably with regard to the increasing ability to target advertisement online.

There is also a need for more guidance regarding sales that take place outside the conventional selling process. Notably, it is not clear if bids submitted in reply to a public call for tender should be considered active or passive sales. This distinction is however important since a qualification as active sales would limit the participation of bidder from outside the territory. Such limitation could lead to market segmentation along national lines, which is contrary to EU procurement rules and the EU's single market objective.

3. Regarding various hardcore restrictions

Resale price maintenance (Article 4(a) of the VBER and recitals 48-49 VGL)

NCAs expressed different views regarding the legal treatment of resale price maintenance ("RPM") in the VBER. Some NCAs raise the question whether the presumption of illegality set out in the VBER - albeit rebuttable - is consistent with RPM arguably being on balance welfare enhancing under certain circumstances. Others point to the enforcement practice in recent years, which has shown (i) the widespread use of such restrictions, (ii) their severe effects on competition and the lack of (substantiated) efficiency claims, as well as (iii) the existence of less restrictive means to achieve the same results (i.e. RPM is not indispensable). They therefore consider that RPM rightfully figures in the list of hardcore restrictions in the VBER.

There is agreement among NCAs that the VBER and the VGL do not provide sufficient legal certainty on "grey areas" of RPM. Notably, more guidance is needed to address the lack of clarity as regards the circumstances in which recommended resale prices amount to RPM. NCAs also point to difficulties with applying the VBER to atypical price restrictions that can constitute RPM. In particular, Article 4(a) of the VBER and recital 48 of the VGL do not specify whether certain practices restricting the ability of buyers to determine their selling price should be considered RPM (e.g. practices prohibiting discounts applied by retailers, or practices compelling retailers to apply a price within a specific range defined by the supplier). In addition, the distinction between clear-cut RPM and hub & spoke scenarios is currently not reflected in the VBER and the VGL.

NCAs consider that the increasing price transparency - resulting from boosted e-commerce and online advertising - and the development of advanced price monitoring software may exacerbate the negative effects of RPM strategies. These elements are currently not taken into account in the RPM-related parts of the VGL, notably when it comes to the notion of "supportive" measures to identify price-cutting distributors (see recital 48 of the VGL). Similarly, the VGL section on "resale price restrictions" does not provide examples of the types of practices that may amount to a form of pressure or incentive to apply a fixed or a recommended resale price, thus resulting in RPM in the sense of Article 4(a) of the VBER.

NCAs further indicate that the VBER and the VGL arguably do not provide sufficient legal certainty with regard to the assessment of resale price restrictions in the context of selective distribution networks. In this particular context, suppliers may argue that the protection of their brand image or the characteristics of their products or services would justify practices that restrict the ability of buyers

to determine the resale price. NCAs would therefore like the VGL to specify whether (and, if so, to what extent) suppliers can indeed use these justifications to interfere in the pricing policy of their retailers.

Territorial/customer restrictions and exceptions to these restrictions (Article 4(b) of the VBER and recitals 50-55 of the VGL)

NCAs question the effectiveness of the VBER regarding the prevention of territorial restrictions, which are contrary to the EU's single market objective. In fact, many stakeholders – mostly SMEs – that are facing problems in relation to territorial supply restrictions, applied by their suppliers, may not be able to judge whether these restrictions infringe Article 101 TFEU.

NCAs point to difficulties with applying Article 101(3) TFEU to territorial restrictions that raise obstacles to market integration but also create efficiencies. It is notably unclear how to balance efficiencies for consumers (e.g. more efficient distribution) against harm to market integration in such situations, given that the two effects are difficult to quantify by the same measure.

NCAs also note that Article 4(b) of the VBER and recital 55 of the VGL are not clear about possible limitations on combining selective and exclusive distribution.

iii. VERTICAL ISSUES RELATED TO E-COMMERCE

1. Regarding online sales restrictions (recitals 52-54 of the VGL)

NCAs indicate that clarifications and adjustments in light of recent market developments and new case law are particularly needed with regard to online sales restrictions. In fact, the massive growth of e-commerce during the last decade has had a profound impact on distribution strategies. As a result, NCAs have been facing challenges when applying the VBER to new types of vertical restrictions. NCAs consider that further guidance is needed for the assessment of such restrictions, notably due to their often complex nature. NCAs highlight that the VBER and the VGL are not up-to-date as regards the type of online restrictions that are allowed in the context of selective distribution, notably in light of recent national and Union case law.

NCAs also point to the need for more complete, coherent and up-to-date guidance on the assessment of online sales restrictions, especially with regard to restrictions on the use of third-party online platforms and price comparison websites, as well as on brand bidding in online advertising. In particular, NCAs indicate that it is not clear, if and under which circumstances these restrictions are considered hardcore restrictions and whether there is a difference in approach with regard to restrictions relating to “where” or “to whom” distributors sell a product or service as compared to restrictions relating to “how” distributors sell a product or service. NCAs note that it is also not clear whether the assessment of online sales restrictions differs depending on the distribution system used (e.g., selective distribution, franchising or exclusive distribution). Further clarity seems to be needed on whether these three types of restrictions are considered restrictions of active or passive sales in the meaning of the VBER and how they should be assessed if the market share thresholds in Article 3 VBER are exceeded and the exemption therefore does not apply.

The NCAs’ views on specific online sales restrictions are explained in more detail below.

Restrictions on the use of third-party online platforms

NCAs indicate that there is a lack of clarity, both in the VBER and in the VGL, as regards the rules applicable to bans on sales via third-party online platforms ("online platform bans"). NCAs expressed different views regarding this type of restriction.

Some NCAs consider that the protection of a supplier's brand image, which is often raised as a justification for platform bans, may actually be used as a pretext to reduce the number of online sellers for a particular product or service and to avoid price transparency and price competition, which can significantly impair the business opportunities of distributors and consumer choice. Therefore, online platform bans should be considered a hardcore restriction. Other NCAs favour a case-by-case analysis in order to evaluate whether such a restriction could be objectively justified in a particular case. In any event, the NCAs consider that more guidance is needed on the compatibility of online platform bans with Article 101 TFEU.

Some NCAs argue that there is no evidence that marketplaces as such would have an impact on the quality of distribution. Therefore, not quality-based "per se" bans should not benefit from the VBER safe harbour but rather be subject to an individual assessment under Article 101(3) TFEU. Moreover, in order to determine whether an online platform ban amounts to a restriction on sales to specific customer groups (i.e. a hardcore restriction) or rather a restriction on the use of one available (online) distribution channel (i.e. not a hardcore restriction), it is not clear whether it is possible to take into account the market structure, since the role of online platforms and other intermediaries may differ between Member States.

With reference to the Coty judgment delivered by the ECJ on 6 December 2017, NCAs point out that it is not clear whether the judgement applies only to luxury products or more generally also to other types of products. NCAs also find it unclear whether platform bans applied outside the context of a selective distribution system should be considered as "by object" or "by effect" restriction, or whether this restriction should be considered at all an infringement of Article 101 TFEU.

Restrictions on the use of price comparison websites

NCAs would welcome guidance on how to qualify prohibitions on the use of price comparison websites and to what extend the assessment of such provisions should be different from the approach applied to online platform bans. While a restriction on the use of third-party platforms seems to benefit from the safe harbour provided by the VBER, an absolute restriction on the use of price comparison websites that is not linked to quality criteria may constitute a hardcore restriction under Articles 4(b) and 4(c) of the VBER. In fact, price comparison websites normally redirect consumers to the website chosen to complete the transaction. As a result, in the context of a selective distribution system, a restriction of the use of price comparison websites by distributors appears less justified than an online platform ban. This is because final customers carry out the transaction on the website of the authorised distributors, which should, in principle, meet the quality criteria required by suppliers.

Restrictions on online search advertising

NCAs indicate that there is a lack of clarity and guidance as regards online advertising restrictions.

Online advertising restrictions, such as those that limit the use of the manufacturer's brand for advertising purposes ("brand bidding restrictions"), may *de facto* amount to a ban on online sales for smaller distributors with low traffic on their own websites which can only reach online consumers by means of advertisements on search engines or social networks. At the same time, the impact of such brand bidding restrictions in a vertical relationship may depend on the specific form of these restrictions and on their economic context.

Other requirements with regard to the use of the internet to resell goods

NCAs indicate that recital 54 of the VGL is not sufficiently clear as to whether quality standards for the use of the internet may also be imposed in distribution systems other than selective distribution.

NCAs also point out that there is a lack of clarity regarding the limits of the possibility for suppliers to require their distributors to operate a brick-and-mortar shop. This concerns notably the question (i) whether there is any ceiling to be applied on the number of required brick and mortar shops (e.g. absolute number per geographic area or relevant market vs. more subjective proportionality requirement), (ii) whether this requirement is only a concern for selective distribution or also for other types of distribution systems, and (iii) whether such a requirement is, in principle, acceptable regardless of the market share of the supplier (i.e. also above 30%).

2. Regarding dual pricing (recital 52 of the VGL)

NCAs have diverging views on the effects that the growth of online sales has had on brick-and-mortar stores. On the one hand, NCAs recognise that brick-and-mortar stores have difficulties competing with online stores given the significant investments required for offline sales. Suppliers cannot however compensate hybrid distributors for such investments by applying dual pricing since this constitutes a hardcore restriction. Since allowing suppliers to differentiate net wholesale prices between offline and online sales in such situations could be justified from an economic point of view and correspond to the public interest, dual pricing may have to be dropped from the hardcore list. On the other hand, NCAs indicate that dual pricing may have a similar effect as total online sales bans, since they can incentivise hybrid retailers to reduce their online sales, which would justify maintaining the current approach regarding dual pricing.

NCAs also note that the VGL lacks guidance on the criteria for the individual assessment of dual pricing under Article 101(3) TFEU and on possible alternatives for remunerating specific services rendered by physical stores that would not raise competition concerns.

NCAs further indicate that recital 52(d) of the VGL may not provide sufficient clarity on whether it only applies to situations where a manufacturer charges the same retailer different prices depending on the sales channels used (i.e. online or offline), or also to situations where a manufacturer applies different prices for offline, hybrid and online retailers. NCAs also consider that there is a lack of guidance regarding the treatment of restrictions having an equivalent effect and the question whether

recital 52(d) of the VGL applies to all types of distribution systems or only to selective distribution. NCAs highlight that the latter approach would likely create a loophole allowing suppliers to impose more restrictions on their distributors when no selective distribution is in place.

Finally, NCAs point out that the VBER and the VGL do not provide guidance on online price discrimination, suggesting that this may be an area to address for the future.

3. Regarding online platforms

NCAs indicate that the VBER and the VGL do not provide sufficient guidance on how to treat online platforms, which do not fit squarely into the traditional supplier/buyer relationship reflected in the conceptual framework of the VBER. NCAs suggest providing the necessary guidance in the context of a dedicated platform section in the VBER, or at least in the VGL. Any such guidance should address the following aspects:

First, NCAs point out that the definition of a vertical agreement in Article 1(a) of the VBER and recital 25 of the VGL does not work well in the online context, since online platforms often do not distribute products in the traditional sense, but operate at a level of trade which is neither purely vertical nor horizontal with respect to suppliers. NCAs therefore indicate that they lack criteria to determine whether agreements between suppliers and online platforms are to be treated as vertical or rather horizontal agreements.

Second, NCAs suggest that restrictions imposed by platforms on sellers are often different in nature from those commonly used in traditional vertical relationships and may not - at least not directly - "relate to the conditions under which the parties may purchase, sell or resell certain goods or services", thus falling outside the definition of vertical agreements in the sense of the VBER.

Third, NCAs observe that vertical restrictions are more likely to be used by "downstream" platforms, which tend to have significant market power, in order to restrict their own "upstream" suppliers. This means that the balance of power between suppliers and retailers has shifted in favour of online platforms and that the specificities of online platforms are currently not properly taken into account by the VBER and the VGL.

NCAs also point to uncertainty regarding the treatment of intra-brand restrictions imposed by powerful online platforms, taking into account that (i) network effects often ensure that successful online platforms grow to a significant size and gain bargaining power over their customers, (ii) online platforms are capable of influencing the parameters of the transactions they facilitate for the benefit of their own business interest, and (iii) hybrid platforms function as gatekeepers to certain (online) distribution channels and as retailers competing on the downstream market with the companies using their platform's services.

NCAs highlight that, based on their experience, there is a need to distinguish between "supplier platforms", which provide only the infrastructure for sellers and buyers to interact (see footnote 2 above), and "distributor platforms", which are directly involved in the conclusion of individual transactions via the platform and can therefore qualify as buyers of products vis-à-vis the manufacturers and as suppliers vis-à-vis end customers (see footnote 3 above). The difference between both concepts lies in the degree of participation of the platform in the transaction it facilitates and its responsibility for it. The VBER and the VGL currently do not clarify the consequences

of classifying a third-party online platform as either a “supplier platform” or a “distributor platform” with respect to the application of the rules on dual distribution, the hardcore restrictions, excluded restrictions, and the calculation of market shares.

Finally, the experience of NCAs show that online platforms with a degree of market power often require their business partners to supply commercially sensitive and/or valuable data about the transactions concluded on the platform. NCAs flag that unjustified requests for supplier data can have potential anti-competitive effects downstream (as a means for the online platform to strengthen its market position by gathering and using data that allow it to compete more effectively at the downstream level).

iv. RETAIL MOST-FAVORED NATION (“retail MFNs”) OR PRICE PARITY CLAUSES

NCAs indicate that the VBER and the VGL do not provide sufficient guidance on the legal qualification and assessment of retail MFNs. This might result in divergence in the treatment of retail MFNs between Member States, thereby limiting legal certainty for stakeholders, notably platforms and their business partners. However, NCAs agree that a distinction should be drawn between wide and narrow retail MFNs.

NCAs specify in this regard that the VBER and the VGL do not capture the fact that wide retail MFN clauses (which require suppliers to offer the platform the same or better prices and conditions as those offered on any other sales channel) are more problematic than narrow retail MFNs (which generally only bind the supplier's direct online channel). They also do not reflect that it is less likely that efficiencies resulting from the use of wide retail MFNs (e.g. avoiding “free-riding” and recovering investments made by platforms) could outweigh the restrictive effects on competition (e.g. weakening competition between platforms and impeding the entry of platforms willing to charge lower commissions, thus ultimately increasing the price for consumers).

NCAs point out that the VBER and the VGL do not take into account that narrow retail MFNs are generally more likely to be justified than wide retail MFNs. When assessing narrow retail MFNs, particular attention should be paid to the market power of the platforms concerned, and the cumulative effects that may occur if those platforms are used by a large proportion of the suppliers and/or distributors active on the markets concerned. In a recent case, it was considered that a narrow retail MFN clause had similar effect as wide MFNs as the supplier’s direct online channel constituted an important distribution channel.

v. FREQUENTLY USED DISTRIBUTION SYSTEMS

1. Selective distribution (recitals 174-188 of the VGL)

NCAs point out that over recent years there has been a tendency among manufacturers to apply qualitative selection criteria that are completely unrelated to the actual requirements of the product concerned. In this context, NCAs highlight that selective distribution systems may serve as a means to reduce intra-brand competition and discipline deviant market behaviour. In fact, the ultimate goal of certain selection criteria, in combination with appropriate retaliation mechanisms, seems to be the stabilisation of retail prices.

NCAs indicate that the VBER does not capture the fact that the potential negative effects of selective distribution systems may increasingly outweigh any potential positive effects. In light of this, the unconditional exemption of selective distribution below the market share threshold of 30% may have to be reassessed. This appears all the more justified since the only available instrument to address selective distribution systems benefiting from the VBER while having effects on competition that are incompatible with Article 101(3) TFEU is the individual withdrawal of the exemption pursuant to Article 29 of Regulation 1/2003, which has however in practice not proven to be an effective tool.

NCAs also point to a need for more clarification regarding the assessment of vertical restraints in the framework of selective distribution systems. Notably, the interplay between the Metro criteria and the exemption requirements of the VBER is considered unclear. Account should be taken of the recent jurisprudence in this area and the questions that have remained unsolved after the ECJ's Coty judgment should be addressed.

Finally, NCAs indicate that the case law seems to give suppliers with selective distribution systems greater control over the conditions under which their distributors resell their products and services. This may encourage companies to establish selective distribution systems to impose more restrictions on their distributors than otherwise allowed even though the objective of brand protection may not be justified with regard to the products or services concerned. Guidance is needed to avoid the conflicting application of competition law in different jurisdictions on this matter.

2. Franchising (recitals 189-191 of the VGL)

NCAs indicate that the treatment of franchise agreements in the VBER and VGL do not provide sufficient legal certainty with regard to the combination of franchising with exclusive distribution (aimed at providing an exclusive territory to a particular franchisee), which is very common in practice. The VBER does not provide any guidance on the assessment and thus the legality of distribution systems that combine elements of exclusive distribution and franchising. In fact, pursuant to Article 4(b)(i) of the VBER, a restriction of active sales to another buyer's exclusive territory is permitted in the context of an exclusive distribution system, while pursuant to Article 4(c) of the VBER, the restriction of active sales to end users by retailers of a selective distribution system (with franchising being a subcategory of selective distribution) is considered a hardcore restriction. Also recitals 56-57, 152, 176 and 185 of the VGL are unclear regarding the circumstances under which selective and exclusive distribution can be combined.

vi. WITHDRAWAL AND DISAPPLICATION OF THE BLOCK EXEMPTION

1. Regarding the disapplication and withdrawal of the block exemption (Article 29 of Regulation 1/2003, Article 6 of the VBER and recitals 74-85 of the VGL)

NCAs question the effectiveness of the disapplication procedure, since Article 6 of the VBER, which allows the Commission to disapply the VBER in respect of specific restraints where parallel networks of similar vertical restraints cover more than 50% of the relevant market, has not been used so far.

NCAs also question the effectiveness of the withdrawal procedure, since Article 29 of Regulation 1/2003, which allows the Commission and the NCAs to withdraw the benefit of the VBER in individual cases, seems difficult to apply in practice. This is notably due to the underlying requirement that the

territory of the Member State or a part thereof concerned must constitute a distinct geographic market. NCAs also point out the lack of guidance with regard to the withdrawal procedure, particularly the standard of proof regarding the withdrawal requirements.

2. Regarding the enforcement policy in individual cases (Section VI of the VGL)

NCAs point out that the VGL treat the assessment of individual cases of hardcore restrictions falling outside Article 101(1) TFEU and those fulfilling the conditions of Article 101(3) TFEU in the same section. New guidance should distinguish between these two scenarios.

***