

17th September 2021

European Commission

Directorate-General for Competition, Unit A1
Antitrust Registry
1049 Bruxelles / Brussel
Belgique / België
Ref.: HT.6179

Dear Madame, Dear Sir,

The members of Promarca - the Swiss Association of branded goods and the voice of brands - are Swiss companies active in Europe, or affiliates of European companies active in Switzerland.

The Vertical Block Exemption Regulation and the respective Guidelines are relevant instruments for the activities of these companies. This is the reason why Promarca responds to the public consultation published by the European Commission on 9 July 2021.

Please note that we support the submission of AIM, the European Branded Goods Association and that we will therefore confine ourselves to comment just a few elements of the revision of the Vertical Block Exemption Regulation (VBER) and the respective Guidelines.

Our main issue is, that European competition authorities need to consider the particularities of branded goods when analyzing vertical agreements. Permanent long term investments and the protection of brand reputation are essential elements to create and keep the value of a brand and this should to be taken into account by the authorities even more so as branded products are important elements of effective competition.

1. Market place bans

According to the Draft Guidelines of the VBER, marketplaces are online platforms which connect merchants and potential customers with a view to enabling direct purchases. The guideline provides clarity on the permissibility of restrictions of on-line sales via on-line marketplaces and confirms that restrictions through on-line marketplaces are block exempted in vertical agreements if the market share thresholds are met and that this exemption applies to all products.

The idea that a supplier may lawfully prevent retailers from using third-party websites or marketplaces is welcomed by the branded goods industry. Clearly a platform ban cannot be equated with a sales restriction, regardless of product category. But to avoid any risk of deterioration of the brand with on-line presentations, brand owners need to enjoy a maximal level of flexibility regarding third-party marketplaces. It should not be forgotten, that reputation can be put a risk quickly, that it takes years to build up trust in brands and that trust is a mean to

reduce transactional costs. Therefore, the Commission should be open to quality- and brand-related justifications that may be brought forward by a supplier in case of a marketplace ban and reconsider the fact that retailers are allowed to create their own brand shops within the marketplace.

2. Resale price maintenance (RPM)

The VBER prohibits price-fixing practices, whether fixed or minimum prices, because such practices are presumed to restrict competition. Nevertheless, economics has shown, that such a per se prohibition does not appear justified as long as there is sufficient inter-brand competition.

The Commission's greater willingness to accept potential pro-competitive effects arising from RPM is a step in the right direction. The branded goods industry welcomes the clarification of the exceptional circumstances under which RPM may be exempted, especially with regards to new products, but a specific mention of seasonal products would round off the whole and maximize legal certainty. Additionally, brand reputation aspects have to be taken into consideration, as price settings can definitely harm the reputation of branded products and have an important impact on the investments in a brand and on its reputation.

3. Dual role of retailers and competition with private label brands

The Draft Guidelines on Vertical Restraints contains a clarification per which a distributor is to be a considered competitor of a supplier of branded goods in the same relevant market, only when it produces these goods "in-house".

Since a retailer which outsources production of its private label to a third-party manufacturer has full control of all product specifications, such products should be considered as "in-house" products. Private labels are not only designed to compete with branded products, but they do so. They are presented on the shelves in store nearby the branded goods products, or online, to attract the attention of the consumer. They benefit from the investments of the branded goods without any own efforts, which harms competition, as branded goods are important "drivers" of efficient competition.

The Commission should be aware of foreclosure issues that may arise, if a distributor in a dual role position (distributor of branded goods and of its own private labels) misuses the information that a manufacturer had to provide to be listed in the assortment.

Private label shares have increased in almost all European countries during the past years, Switzerland remaining the country with the highest private label share (52%). The creeping increase should not be ignored and the Commission should take into consideration how competition works today between branded goods and private labels on the upstream manufacturing market as well as on the downstream selling market.

4. Dual pricing and the equivalence principle

Requiring a distributor to pay a different price for products intended to be resold online than products to be resold offline was previously considered a hardcore restriction. The Draft Guidelines on Vertical Restraints makes clear, that it no longer should be. This change is welcomed by the branded goods industry. It will allow a fairer repartition of costs and incentivize and reward appropriate levels of investments made online as well as offline. Finally, possible harm for branded goods should also be considered if online resale does not mirror the value of branded goods.

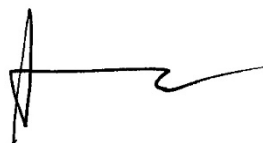
However, it is not possible for the suppliers to have to justify their dual pricing strategies based on *"the differences in the costs incurred in each channel by the distributors at retail level"* because suppliers are not in a position to know the costs incurred by their customers for their offline and online operations respectively and may therefore not know how to set their "dual price" in a way that is in line with the guidelines.

The Commission should furthermore clarify that *"an appropriate level of investments"* may take the form of both financial and non-financial investments. Without such a precision, the term "appropriate" leaves too much room for interpretation.

For more details on the position of the branded goods industry, please refer to the submission of the European Branded Goods Association AIM.

Sincerely yours,

PROMARCA



Anastasia Li-Treyer
Director General

Promarca, founded in 1929, currently represents the interests of 103 companies in the Swiss fast moving consumer goods sector. These branded companies generated annual sales of about 12.3 billion Swiss francs, incl. exports, last year. Thanks to the entities managed worldwide with their registered office in Switzerland, the branded goods industry provides more than 30'000 jobs. These companies launch more than 6'000 new products on the Swiss market every year.