Position Paper (informal translation)

# Revision of the Block Exemption Regulation for Vertical Agreements and Concerted Practices and the Guidelines on Vertical Restraints

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## 1. Introduction

The Federation of German Industries (BDI) welcomes the fact that the European Commission has announced that it will maintain the Block Exemption Regulation for Vertical Agreements and Concerted Practices (Vertical Block Exemption Regulation) and the Guidelines on Vertical Restraints (Vertical Guidelines) beyond 2022. The Vertical Block Exemption Regulation and the Guidelines provide essential and in practice enormously useful guidance to companies. However, in the draft updated Vertical Block Exemption Regulation and Guidelines now presented, there are some aspects that require further adjustment.

In view of the greatly changed distribution landscape since the adoption of the current Vertical Block Exemption Regulation in 2010, among other things due to the strong increase in online trade or the growing importance and changed role of platforms, and numerous decisions by authorities and courts at European and national level, an update of the Vertical Block Exemption Regulation and in particular the Guidelines was inevitable. The European Commission is setting an important course here, for example by inserting clarifications regarding the admissibility or inadmissibility of restrictions on online sales or by extending to a certain extent the exceptions for restrictions on active sales. In other areas, such as in particular the proposed amendments on dual distribution, the Commission unnecessarily restricts the safe harbour for companies and thus reduces legal certainty. This should be urgently addressed before the adoption of the new Vertical Block Exemption Regulation and the Guidelines.

In general, it is important for manufacturers in the EU that the legal framework for distribution is as far as possible the same in all countries. Distribution and condition systems are increasingly harmonised across several countries - also in view of the increasing international activity of customers. Against this background, it is unfortunate and significantly increases the compliance burden of companies if the interpretation of European antitrust rules differs greatly in different countries. The Commission should use all possibilities to contribute to an interpretation and application of the law that is as uniform as possible throughout Europe.

## 2. Comments on the draft Vertical Block Exemption Regulation and the Vertical Guidelines

### a) Dual distribution, Article 2 (4-7) of the draft Vertical Block Exemption Regulation

In the draft Vertical Block Exemption Regulation, the European Commission proposes a significant tightening of the current general exemption of dual distribution. Thus, Art. 2 (4) of the draft Vertical Block Exemption Regulation provides for limiting the currently protected area for dual distribution to cases in which the joint market share of the participating undertakings at retail level does not exceed 10%. To the extent that the combined market share is higher, dual distribution remains exempt under the Vertical Block Exemption Regulation, but with the exception of the exchange of information between the undertakings participating in the vertical agreement (Art. 2(5) of the draft Vertical Block Exemption Regulation). This is to be assessed according to the provisions for horizontal agreements. Contrary to Art. 2(5) of the draft Vertical Block Exemption Regulation, para. 90d of the draft Vertical Guidelines even suggests that the exemption for dual distribution under Art. 2(5) does not apply if the exchange of information is not in line with the Horizontal Guidelines. In any case, the exemption does not apply at all if the vertical agreement has as its object a restriction of competition between competing suppliers and buyers (Art. 2(6) of the draft Vertical Block Exemption Regulation). In addition, the exemption does not apply where a provider of online intermediation services that also sells goods or services in competition with undertakings to which it provides online intermediation services enters into a non-reciprocal vertical agreement with such a competing undertaking (Art. 2(7) of the draft Vertical Block Exemption Regulation).

The BDI is clearly opposed to these amendments, which would lead to strong legal uncertainty for manufacturers and distributors in existing and future dual distribution systems. Through dual distribution, the manufacturer promotes intra-brand competition, which he is not obliged to do under antitrust law. In doing so, he also strengthens inter-brand competition, as he can extend the reach of his products by involving distributors. The Commission completely disregards this fundamental pro-competitive component. Dual distribution contributes to efficient sales of goods as it enables manufacturers to adapt their distribution system to the conditions of specific markets and the requirements of individual customer groups. Dual distribution thus enables the manufacturer to reach customer groups that lie outside the reach of its direct distribution because, for example, it is not worthwhile for the manufacturer to set up its own distribution in a particular territory. Dual distribution does not only benefit the manufacturer, who can design a more flexible distribution network for his products. Retailers also benefit from the fact that a product achieves a higher profile through the manufacturer's own distribution, for example through its own flagship stores, and brand sales also increase in the retailers' assortment as a result. Finally, customers also benefit not only from the intra-brand competition between (different) dealers and the manufacturer, but also from the strengthening of competition between brands through dual distribution.

The tightening of the current exemption for dual distribution would have serious consequences for manufacturers and dealers. If the manufacturer wants to maintain dual distribution - and here it is already sufficient if he maintains a single goods shop or an online shop - all existing distribution agreements would have to be re-evaluated individually and - if the proposed new market share threshold was exceeded - also renegotiated and permanently accompanied by antitrust law. This is because a large number of the agreements concluded between manufacturers and dealers, for example within the framework of selective distribution systems, would suddenly have to be examined quite differently under antitrust law with regard to the exchange of information that takes place, namely according to the fundamentally much stricter rules for agreements and conduct between competitors.

It also remains completely unclear which agreements have as their object a restriction of competition between competing suppliers and buyers within the meaning of Art. 2(6) of the draft Vertical Block Exemption Regulation.

- *Introduction of a 10 % threshold at retail level*

The BDI is clearly against the introduction of an additional threshold at retail level. Reasons for the introduction of such an additional threshold are not apparent. The determination of the relevant product and geographic market and the assessment of market shares is - especially in the retail sector - characterised by considerable uncertainties, depending to a large extent on the availability of reliable market share information. Manufacturers would have to reassess each distribution agreement for each individual market. In addition, the increase in a distributor's market share may cause the market share threshold to be exceeded and thus a manufacturer's entire distribution system would have to be renegotiated, as the dual distribution exemption under Article 2(4) of the draft Vertical Block Exemption Regulation would then no longer apply. An additional market share threshold would lead to unnecessary legal uncertainty in a context where negative effects on competition at retail level are highly unlikely. In this respect, the Commission is acting against its own claims to create more legal clarity in order to minimise compliance requirements and costs for companies.

Legal uncertainty in assessing market shares exists, for example, in the distribution of spare parts, where manufacturers' market shares differ for each type of spare part. It is also almost impossible for manufacturers of intermediate products to rely on market shares in a market further downstream. There are also likely to be situations where, with respect to a product, the 10% market share threshold is exceeded between the manufacturer and some distributors but not between the manufacturer and other distributors. This would lead to the manufacturer having to provide internally for different systems of information retrieval and evaluation with respect to the same product.  A common market share threshold at the retail level would also have the effect that manufacturers with small market shares who distribute their goods through strong distributors would no longer be able to operate in parallel with the distributors due to their market power. This would reduce competition in the retail sector and the strong distributors would gain further market power.

The Commission should therefore refrain from introducing an additional market share threshold. Should it nevertheless stick to this proposal, the new threshold should at least be significantly increased. The proposed value of a common market share threshold of 10% is far too low. Such a low market share threshold essentially means that an exempted exchange of information in a dual distribution system can only take place in markets with many market participants, each of which has a very small market share, or in a market where other market participants have a very clear leading position. Both scenarios are unusual, so that the Block Exemption Regulation rules on dual distribution (without the exception for information exchange) would only apply in a few cases.

- *Assessment of the exchange of information in the context of dual distribution*

Provided that the proposed 10% market share threshold is exceeded, the exemption of dual distribution will not be valid for the exchange of information between the companies concerned, which in future is to be assessed according to (still to be redrafted) rules in the guidelines for horizontal agreements.

The Commission ignores here that even in a dual distribution system the exchange of information in a vertical relationship is indispensable to increase the efficiency of the distribution network and to better meet the needs of customers. A manufacturer that distributes products through a distribution network needs information from its distributors and must be able to rely on it in order to best compete across brands. The manufacturer must know the needs of the final customers in order to be able to further develop its products according to these needs and to react to market dynamics. In addition, a manufacturer must also know about promotional activities or special offers of his dealers in order to be able to organise his distribution effectively. For this, he depends on the information and experience of the dealers. In this respect, the relationship between manufacturer and dealer in a dual distribution system does not differ from other vertical relationships. The measures taken unilaterally by the manufacturer significantly strengthen inter-brand competition.

However, the draft Vertical Block Exemption Regulation seems to clearly assume that any information exchange in a dual distribution scenario is highly problematic and poses a high risk to competition. A formal separation between vertical and horizontal aspects of information exchange would be artificial in many respects and fails to recognise that both elements are necessarily inherent in dual distribution. If the transfer of information from the B2B channel to the D2C activities of a manufacturer is subjected to strict horizontal rules, it would probably not be allowed to be exchanged between competitors. But then dual distribution would not work because the manufacturer would not be able to react adequately in its own distribution activities.

It should also be noted that the assessment of horizontal aspects in dual distribution must differ depending on how the manufacturer sets up its distribution system. If the manufacturer is active in parallel to its dealers ("non-exclusive dealer"), the aspect of horizontal information exchange may play a role. If this is not the case, e.g. because the manufacturer only serves reserved customers, the horizontal aspect is reduced: the dealer's customers cannot buy from the manufacturer because the latter completely abstains (actively and passively) from distributing to the dealer's customers. Theoretically, the manufacturer's reserved customers could buy from the dealers (passive distribution), but this should only happen in special cases. Here, for example, an exchange of the customer names of the dealer's customers would not have any horizontally relevant meaning for the manufacturer, since the manufacturer is not in competition with the dealer for these customers at all. If several dealers are used in parallel, the manufacturer must observe the horizontal aspects of "hub & spoke" and may not pass on information received from one dealer directly to other dealers.

It is regrettable that the Commission, with regard to the future assessment of the exchange of information in dual distribution systems, refers in its draft to the rules on information exchange in the Horizontal Guidelines, but does not yet give any indication as to how these are to be drafted in the future. The Horizontal Guidelines will also be revised by the end of 2022 and will - according to the current consultation on the Horizontal Block Exemption Regulations and Guidelines - contain specific rules on dual distribution systems. For a better assessment of legal certainty in the present consultation, it would have been very helpful if the

Commission had already presented its corresponding considerations on the new Horizontal Guidelines. In order to eliminate the great legal uncertainty created by the draft Vertical Block Exemption Regulation in this respect, the Commission should clarify even before the adoption of the new Horizontal Guidelines that a manufacturer has a legitimate interest in using information legally obtained in the context of a vertical supply relationship also in its own distribution activities without exposing itself to the accusation of a cartel agreement.

Should the system now proposed in Art. 2 of the draft Vertical Block Exemption Regulation remain in place, it is in any case important that the future Horizontal Guidelines contain legally secure and clear specifications for the assessment of the exchange of information in dual distribution systems. It is imperative to clarify that the distribution relationship must be considered as the basis of the relationship when assessing the permissibility of the exchange of information. This is because without the authorisation to distribute, the dealer would not be a competitor of the manufacturer - this is a decisive difference to the classic cases of information exchange between competitors.

In order to be able to maintain dual distribution, a clear statement is needed that the manufacturer and the distributor can cooperate in the usual manner for vertical relationships without having to fear the accusation of an unlawful "exchange of information" - even if the manufacturer may receive information that could be relevant in the context of a direct, horizontal relationship.

The admissibility of the exchange of information should also not depend on the obligation of "Chinese walls" within the manufacturer's organisation. It is not possible or practicable from the manufacturer's point of view to run its various distribution channels completely independently of each other. For example, the supplier must be allowed to take into account a distributor's campaign strategy through information lawfully obtained in the vertical relationship when planning its own advertising campaigns in its direct distribution channel.

Against this background, the Horizontal Guidelines should clarify that the lawful collection of information in a vertical context, followed by a unilateral decision based on that information, does not in principle constitute a concerted practice or a prohibited "exchange" of sensitive information. Even independently of information exchange issues, a clarification on the distinction between permissible unilateral adjustment to the market behaviour of competing retailers on the one hand and prohibited concerted practices with these retailers on the other hand would be welcome in the context of dual distribution systems. For example, it remains unclear whether a concerted practice already exists if a manufacturer unilaterally makes adjustments to its direct distribution system after receiving a complaint from one of its retailers.

- *Exclusion of online intermediation services*

There is no apparent reason to generally exclude online intermediation service providers from the benefit of the safe harbour if they have a hybrid function, i.e. if they sell goods or services in competition with businesses to which they provide online intermediation services. This is an unjustifiable discrimination against certain intermediation service providers. Such a strict rule could also hamper the efforts of European platform companies to expand their activities and thus compete against the large American and Chinese platforms. By removing the benefits of the Vertical Block Exemption Regulation for certain market participants, the Commission also overlooks the great advantages that such online intermediation services also bring for customers. Customers benefit from a greater variety of products, more choice, greater price transparency and thus more competition for the products that are (also) sold through an intermediation service provider.

Due to the proposed provision in Art. 2(7) of the draft Vertical Block Exemption Regulation, there is a concern that e.g. a "traditional" product manufacturer could lose the block exemption for vertical contracts just because it additionally provides its distributors with an online platform as a sales promotion tool for the sale of its products. This seems inappropriate and also incomprehensible with regard to para. 12 of the recitals, which refers to allegedly typical negative effects for inter-brand competition. It is difficult to see how the above constellation of a manufacturer's platform offer for its dealers should harm inter-brand competition. It should therefore at least be clarified that Art. 2(7) of the draft Vertical Block Exemption Regulation does not apply to product manufacturers (as "main activity") who additionally offer online platforms for the sale of their products.

- *Dual distribution by wholesalers and importers*

The extension of the dual distribution exemption to wholesalers and importers in Art. 2(4)(a) of the draft Vertical Block Exemption Regulation is welcome. Agreements between wholesalers or importers who are active at the retail level and their distributors should not be regarded differently in their effects than agreements between distributors and manufacturers who are themselves active at the retail level.

However, the Vertical Block Exemption Regulation should also take into account the specificities of commodity markets in this context. On commodity markets it is common that traders or even industrial customers buying at the wholesale level also have the possibility to sell back (excess) quantities at the wholesale level. It should be clarified that selling back quantities to the wholesaler or at the wholesale level does not result in a trader or industrial customer becoming a "competing undertaking" at the wholesale level. The mere possibility of selling back excess quantities, which allows the distributor or industrial customer to adjust its supply to demand, enables competition and should not render the Vertical Block Exemption Regulation inapplicable.

### b) Concept of market share thresholds, Article 3 of the draft Vertical Block Exemption Regulation

The Commission should review the system of market share thresholds for the applicability of the Vertical Block Exemption Regulation. At the very least, consideration should be given to raising the threshold in Article 3 of the Vertical Block Exemption Regulation. A market share threshold of at least 40% would be more manageable in practice and more appropriate in terms of competition policy. The second market share threshold introduced in 2010 should be deleted completely. The double market share threshold contradicts the need to achieve the greatest possible legal certainty. It is often practically impossible for suppliers to determine the demand shares of their customers on the markets for the contract goods. The latter is particularly true in cases where the contract goods are further processed or used. In practice, it is often necessary to work with estimates here, which contribute little to legal certainty. In addition, a direct exchange between the contracting parties on the market share thresholds is often prevented by confidentiality obligations and interests, i.e. the verification of the second market share threshold is also not practicable. In addition, it would be helpful if the European Commission would provide companies with more concrete guidance on how to determine the market share thresholds. Since vertical restraints of competition can have a beneficial effect on inter-brand competition in particular, it should again be examined whether vertical restraints of competition could not in principle be subject to the abuse principle.

## c) Hardcore Restrictions and Exemptions, Article 4 of the draft Vertical Block Exemption Regulation

The Commission proposes to replace the provisions on territorial or customer group restrictions in Art. 4 b of the current Vertical Block Exemption Regulation by three different sets of provisions (Art. 4 b-d of the draft Vertical Block Exemption Regulation) in order to clarify the scope of the restrictions for exclusive distribution, selective distribution and free distribution. This contributes to a better understanding of Art. 4 of the Vertical Block Exemption Regulation. In addition, section 4.6 of the draft Vertical Guidelines provides welcome clarifications on these different distribution systems.

- *Exclusive distribution*

Art. 4b of the draft Vertical Block Exemption Regulation newly creates the possibility of shared exclusive distribution, which exists if a supplier appoints more than one exclusive distributor in a certain territory or for a certain customer group. The BDI welcomes this extension of the Vertical Block Exemption Regulation, which will give manufacturers greater flexibility in designing their distribution systems.

Another positive change with regard to exclusive distribution is that the supplier can oblige its buyers to pass on the restriction on active selling to their customers. According to Art. 4b i) of the draft Vertical Block Exemption Regulation, such a pass-on is possible if the buyer's customer has concluded a distribution agreement with the supplier or with a party that was given distribution rights by the supplier. This change should help to better protect the investment incentives of exclusive distributors.

It is positive that para.104 of the draft Vertical Guidelines provides that a group of customers "exclusively allocated" in the context of an exclusive distribution system may also consist of only one customer in certain circumstances. In principle, it is also to be welcomed that para. 105 clarifies that there can also be "non-reserved" territories or customer groups which the supplier reserves for himself or which he can allocate to other distributors at a later point in time. Here, however, even greater simplification and flexibility would be achieved by allowing the provider to allocate the active sales rights to a trader for a certain territory or customer group without having to explicitly address the other territories or customer groups and possibly reserve them for himself.

Para. 107 provides that exclusive distribution agreements can in principle benefit from the Vertical Block Exemption Regulation even if they also contain other vertical restraints, as long as these are not hardcore restraints. However, questions remain open here (Amount of business volume? Appreciability of the anti-competitive effects?), which should be clarified by more detailed explanations.

- *Selective distribution*

It is to be welcomed that Art. 4c of the draft Vertical Block Exemption Regulation now provides that selective distribution systems in the territories concerned shall be better protected against sales by unauthorised distributors. This can help to avoid free riders and better protect the authorised distributors of the selective distribution system, who have made investments, for example, in product presentations and after-sales service, from imports by unauthorised resellers. It can also generally better protect the stationary trade in the selective distribution area from (active) online trade from other areas.

Further comments on the rules on selective distribution in the draft Vertical Guidelines can be found below under 2g).

- *Legal certainty with regard to customer restrictions*

The prohibition of customer restrictions is often interpreted to mean that it also contains a prohibition to oblige the buyer to further process or re-use the contract goods and not to resell them stand-alone without adding further value. In practice, this leads to the result that certain strategic products are not sold to system providers at all, to the detriment of customers.

Especially in areas where there is usually no pure dealer level (e.g. OEM markets), a manufacturer should be allowed to dictate to its customer that it must incorporate the contract goods into its own products and may not readily resell them stand-alone. In addition, there is a contradiction of values with the permissible prohibitions on further processing ("buyer may not integrate the products into its products"), as these are covered by the Vertical Block Exemption Regulation as pure restrictions on use. However, it would be desirable to clarify in the guidelines that it is compatible with the Block Exemption Regulation to prohibit the buyer from certain uses.

Furthermore, the guidelines should clarify that any form of delineation of customer groups is permissible which allows the reserved customers to be clearly distinguished from the non-reserved customers, whether on the basis of abstract criteria such as minimum purchase quantity or distribution channel or on the basis of a list of customers attached to the contract.

- *Indirect measures*

Para. 187 et seq. of the draft Vertical Guidelines explain the hardcore restrictions under Art. 4 b-d of the draft Vertical Block Exemption Regulation in more detail. According to para. 189 i), the sale of products with a limited number of languages on the packaging is considered an indirect measure to induce the trader not to sell to certain customer groups or to customers in certain areas. This insertion should be deleted again. Here the Commission obviously has an individual case from the near past in mind (AB InBev - parallel imports) in order to give general guidance for all companies. Apart from the fact that it is hardly practicable to print explanations in all official EU languages on every product, this regulation would be a clear obstacle for companies - and especially for SMEs - to want to operate across borders.

As consumer habits and preferences differ in different EU countries, it is certainly not uncommon for suppliers, especially those with national distribution branches, to offer products targeted at a specific country or sub-region. Such products naturally have only a limited number of languages on the packaging. However, this practice alone is not indicative of agreements or concerted practices with trading partners aimed at preventing cross-border sales. The same applies to "the use of differentiated labels, specific language clusters or serial numbers ", all of which are listed in para. 191 as possible tools to monitor compliance with territorial sales restrictions. Different product variants for different geographical areas are not uncommon, but rather meet the respective requirements of customers and are usually labelled with different serial numbers to distinguish them from the standard version and/or variants for other regions.

## d) Non-compete clauses, Article 5 (1a) and Article 1 (1e) of the draft Vertical Block Exemption Regulation

So far, the Verticals Block Exemption Regulation only exempts non-compete clauses from the prohibition of cartels if their duration is limited from the outset to a maximum of five years (Article 5 (1a) Vertical Block Exemption Regulation). A non-compete provision that is automatically renewed for a certain period of time if it is not terminated by the buyer (so-called "evergreen clause"), however, expressly does not meet the requirements of the current Vertical Block Exemption Regulation. It is very welcome that, according to para. 234 of the draft Vertical

Guidelines, non-compete clauses that can be tacitly extended beyond a period of five years are now also to be covered by the block exemption, provided that the buyer can actually renegotiate or terminate the vertical agreement with reasonable notice and at reasonable cost. An evergreen clause with a simple termination option is in practice considered equivalent to an expiry of the contract with an option to renew. The requirement to exercise a simple ordinary right of termination is not a particular hurdle in business transactions that requires special attention under antitrust law. Moreover, in many areas of economic life there is also a justified need to conclude agreements with longer terms if these are associated with efficiency gains or long-term investments are made.

For the sake of clarification, Art. 5(1a) of the Vertical Block Exemption Regulation should also be amended accordingly.

The wording of the definition "non-compete obligation" (Art. 1 (1e) of the draft Vertical Block Exemption Regulation) in connection with the inclusion of "connected undertakings" in the definition of the terms "undertaking", "supplier" and "buyer" (Art. 1 (2) of the draft Vertical Block Exemption Regulation) leads, if interpreted literally, to the fact that for the calculation of the 80% of the total purchase of contract goods and services provided for in Art. 1 (1e) of the draft Vertical Block Exemption Regulation the demand of the entire company group would have to be taken into account. However, insofar as the competition authorities have defined a narrower market for the specific contracting parties of the non-compete obligation and the relevant contract goods or services, such a literal interpretation leads to contradictory results. Moreover, it is difficult for individual companies as buyers and often also for suppliers to determine what constitutes the overall demand of a group of companies. For this reason, it would be welcome if the definition of "non-compete obligation" in Art. 1(1e) of the draft Vertical Block Exemption Regulation could be supplemented by a clarification that the relevant market for the calculation of the 80% of the total purchase is limited to the purchase of the direct contractual partner bound by the non-compete obligation. This approach would make the applicability of the exception clause much more practicable for companies and thereby significantly increase legal certainty for both buyers and suppliers. A broad literal interpretation also leads in practice to unsolvable problems in calculating the total purchase, especially in the case of companies operating throughout Europe, since all mutual contracts of the groups of companies of the contracting parties would have to be included in the calculation.

## e) Parity clauses, Article 5(1d) of the draft Vertical Block Exemption Regulation

The draft Vertical Block Exemption Regulation provides for a distinction between broad parity clauses used by online intermediaries and all other parity clauses. While the former clauses shall no longer fall within the scope of the revised Block Exemption Regulation (Art. 5(1d) of the draft Vertical Block Exemption), the latter clauses will continue to fall under the block exemption.

This differentiation can lead to considerable uncertainty, as the question of whether an undertaking benefits from the block exemption under the Block Exemption Regulation revolves around its classification as a provider of online intermediary services. However, this does not only include the large and well-known online traders (who would presumably not fall within the scope of the Block Exemption Regulation anyway due to their market share), but possibly also all companies that operate an online platform on the side in addition to their traditional business fields. It would be disproportionate here to deny the benefits of the Vertical Block Exemption Regulation to all companies that (also) act as providers of online intermediary services, regardless of the respective product or the concrete market structure.

An exclusion of the broad parity clauses used by online intermediaries from the Vertical Block Exemption Regulation and thus a solution via individual exemptions would be very burdensome and would lead to inconsistent results in the Member States. Due to the great legal uncertainty associated with an individual case decision, many companies would refrain from concluding such clauses. Instead of withdrawing the exemption from parity clauses through online intermediary services, consideration could be given to further requirements for these distribution channels.

## f) Commercial agency contracts, para. 27 et seq. of the draft Vertical Guidelines

The BDI welcomes the fact that the Commission has recognised the high degree of legal uncertainty in the assessment of the "dual character" of a commercial agent who also acts as a distributor and has supplemented the Vertical Guidelines with comments from its working paper of February 2021 on "Distributors that also act as agents for certain products for the same supplier". Nevertheless, uncertainties remain. In particular, para. 31h of the draft Vertical Guidelines repeats almost verbatim the unclear wording of para. 16g of the current Guidelines, which defines the "dual function" of the commercial agent. In view of the fact that a misinterpretation of the rules automatically constitutes a hardcore restriction subject to a fine, more clarity is urgently needed here (What does "required by the principal" mean and why should a supplier bear the costs of its distributor at all? What is the relevant product market?). What is needed is much clearer wording in the Guidelines, ideally combined with clear "safe harbours" for certain “dual function” cases in the Vertical Block Exemption Regulation itself. The chapter in the Guidelines should also be revised linguistically, e.g. the explanations in para. 37 are difficult to understand.

In para. 31f, it should be provided that the principal can oblige his commercial agent to carry out sales promotion measures, provided that he himself bears the costs for this.

In para. 34 et seq. it is explained how the risk allocation requirements are to be applied in a situation where the "commercial agent products" and the "retailer products" can be clearly distinguished from each other. These clarifications are welcome, but this scenario is only one of many possible "dual role" scenarios: For example, a retailer may be appointed as an agent for a specific customer group (e.g. consumers) while acting as a retailer for the same products for another customer group (e.g. professional users). Alternatively, the "commercial agent products" and the "retailer products" are not so much differentiated by their functionalities or features, but by their brand.

According to para. 35, in cases where a commercial agent carries out other activities for the same or other suppliers at his own risk, the Commission sees a risk that the conditions imposed on the commercial agent for his agency activities influence and restrict his sales incentives and freedom of choice when selling products as an independent dealer. However, it is difficult to see why a supplier who decides to use an agent who is already active as a retailer for other suppliers on the same market should be restricted in his choice of distribution model simply because the agency agreement might have an influence on the sales arrangements for other brands' products. A situation where the agent is a retailer on the same market but only acts for other suppliers should not be covered by the special rules for "dual function" agents at all, i.e. such agency agreements should be considered genuine provided that the other risk-sharing requirements are met.

The examples in para. 41 and 42 are also unclear. For example, in para. 41 a single branding provision in agency agreements is considered potentially critical under competition law, but in para. 42 the appointment of the same agent for several competitors is also considered critical. This leads to legal uncertainty. A single branding provision in agency agreements should not be critical because the supplier can also decide to sell the product exclusively himself and the genuine commercial agent is integrated into the sales organisation of the manufacturer.

### g) Selective distribution systems, para. 129 et seq. of the draft Vertical Guidelines

The section in the draft Vertical Guidelines on selective distribution outside the *Metro* criteria and outside the scope of the Vertical Block Exemption Regulation (para. 137 et seq.) shows the great scepticism with which the Commission views selective distribution. There is no discussion of the legitimate objectives and positive effects of selective distribution, especially with regard to the protection of the brand image. A selective distribution system that fails the *Metro* criteria should not per se be regarded as a restriction of competition by object. Rather, it is always the effects that matter. The whole section in the guidelines is permeated with concerns about higher prices. However, it has long been recognised in EU case law that such effects are inherent in selective distribution systems, and the Court of Justice has even suggested that ensuring a certain level of prices is a legitimate concern (Case 26/76 Metro v Commission [1977] ECR p. 1875, at para. 21).

The dampening of price competition typically associated with selective distribution is usually offset by an increase in quality competition. There has been an increased need for selective systems in recent years. However, these should only be the focus of antitrust authorities if there is evidence of accompanying prohibited practices, such as price fixing or discrimination on unfair grounds.

- *Protection of brand image*

The case study in para. 147 of the draft Verticals Guidelines implies that there must always be retailers with "low service and low prices" selling brands of suppliers that maintain a high quality image. This is contradictory and inconsistent, as this high quality image risks being lost if products are sold by such retailers with "low service and low prices". In the case study, the assessment of brand manufacturer A's contract, which provides for a maximum number of retailers per territory and therefore does not meet the *Metro* criteria, depends on the fact that manufacturers B and C have not themselves opted for selective distribution, even though their brands are equally worthy of protection. Moreover, the case seems to be set out in such a way that only the quantitative element leads to the selective distribution system not fulfilling the *Metro* criteria. However, the omission of the quantitative element would not result in brand manufacturer A's products being available from retailers with "little service and low prices", as A would in all likelihood be allowed to apply strict quality criteria that would exclude such retailers.

The case study in para. 148 raises similar concerns. The five manufacturers of sports goods are market leaders and all have "strong brand images acquired through advertising and sponsoring". The draft Vertical Guidelines argue that the block exemption should be withdrawn in this case - with the aim that these "leading brands" are available in shops with "low service and low prices", losing the image they have built and maintained at considerable cost.

- *Combination of selective and free distribution*

The draft Verticals Guidelines do not address one particular scenario that is quite common among branded manufacturers: the fact that selective distribution is only used for a relatively small or very clearly defined subset of products, while other products - all belonging to the same upstream market - are sold to a large number of retailers, without any restrictions under free distribution.

In such cases, the general market share threshold is not an appropriate indicator of the possible impact of this selective distribution system on competition. If a supplier has a market share of 40 % but uses selective distribution only for a small selection of its products, estimated to represent 5 % of the total downstream retail market, it is difficult to see why this selective distribution system cannot benefit from the exemption compared to a situation where a supplier with an upstream market share of 25 % sells all its products through selective distribution and these products represent a much higher share of the downstream retail market than 5 %.

Para. 140 of the draft Vertical Guidelines uses this approach when dealing with cumulative effects: it distinguishes between the "share of the market covered by selective distribution" (the share of the relevant downstream retail market subject to selective distribution) and the "aggregate market share of the five largest suppliers" (the market share of suppliers in the upstream sourcing market).

The fact that suppliers often choose not to distribute their entire product range selectively should be taken into account more consistently in the context of cumulative effects. Even if there are a large number of selective distribution systems on the market (para. 139) and even if the majority of leading suppliers apply selective distribution, there is not necessarily a “foreclosure of certain types of distributors (i.e. price discounters)" (para. 139).

It may well be that each of these leading suppliers offers a wide range of products of the same upstream product market to all types of distributors and that they all also cooperate with price discounters - only that they do not sell a certain brand or the highest quality variants to these price discounters because this narrow range is subject to selective distribution. In such a scenario, consumers can still benefit from the specific advantages of these distribution formats, such as "lower prices, more transparency and wider access to the product" (para. 139).

Even if the five largest suppliers apply selective distribution (para. 140), it is not necessarily more likely that other distributors will be excluded from the market: If each of them pursues a distribution strategy that combines selective distribution (only) in the premium or luxury segment with free distribution in (much larger) other merchandise sales, concerns about foreclosure are unlikely.

- *Achieving a minimum number of sales*

In the context of the cumulative effects of selective distribution, para. 140 of the draft Vertical Guidelines indicates that requiring distributors to achieve a certain minimum number of sales annually is unlikely to have negative effects, but only in certain circumstances.

Such minimum sales requirements should generally be justified as they are a good indicator of a dealer's commitment to the brand and the selective distribution system. The inclusion of a dealer in a selective distribution system often involves some "initial investment" on the part of the manufacturer, e.g. financial support for the appropriate design of display areas. In return, the manufacturer expects the dealer to show a minimum level of commitment to selling the selective products, evidenced by a minimum turnover. The turnover clause in this case does not serve to limit the number of dealers, but as proof of a certain level of "commitment" to the brand and the product and as a measurable variable for success and experience in selling the selective products. Indirectly, the clause allows the manufacturer to focus its distribution efforts on those dealers who show appropriate commitment and development potential. A more positive statement would be welcome to the effect that such requirements are either not quantitative in nature (and can therefore benefit from the *Metro* criteria) or that they pursue legitimate objectives and are generally most unlikely to have a negative impact.

## h) Resale Price Maintenance, para. 170 et seq. of the draft Vertical Guidelines

The unclear wording in para. 174 of the draft Verticals Guidelines has led to the controversial question of whether the Commission intends to allow certain forms of minimum advertised price polices (“MAPs”) as an exception to the prohibition of RPM in the future. If the Commission had this intention, it should include this possibility as an exception to a hardcore restriction according to Art. 4 a) in the Vertical Block Exemption Regulation itself and formulate legally secure and clear criteria in para. 174.

The clarification in para. 178 is to be welcomed, according to which under certain circumstances the fixing of the resale price in a vertical agreement between a supplier and a buyer that executes a prior agreement between the supplier and a specific end consumer ("fulfilment contract ") does not constitute a RPM. However, the exemption should also apply where the final consumer has not expressly waived the choice of the undertaking to execute the agreement. Even in cases where, at the time of the price agreement between the manufacturer and the final consumer, it is not yet certain which dealer will carry out the transaction, the price has already been "eliminated" as a competitive factor. Accordingly, in these cases there is no reason to protect the buyer from price fixing, because he has already negotiated the price himself.

Further explanations and case studies on efficiencies in RPM cases in the Vertical Guidelines would be a welcome step. Since in the case of RPM there is immediately the risk of a hardcore restriction and thus a considerable risk of fines, most companies are extremely reluctant to impose such RPM in exceptional cases, even in the case of efficiencies. In order to strengthen legal certainty, the Commission should, in addition to further explanations in the Guidelines, also consider clear, sufficiently narrow and precisely formulated "de minimis" exceptions to the fundamental prohibition of vertical price maintenance in the Vertical Block Exemption Regulation itself.

## i) Restrictions regarding online distribution

Important changes in the draft Vertical Block Exemption Regulation and the Guidelines include the provisions on a possible restriction of online distribution. Thus, in Art. 1 (1n) of the draft Vertical Block Exemption Regulation, the restriction of online sales is defined in the context of the definition of restriction of active and passive sales. Unfortunately, the sentence in question, which extends over 14 lines in the German version, is difficult to understand and should be simplified linguistically.

Furthermore, the new draft of the Guidelines contains important guidance with regard to online restrictions. It is to be welcomed that the Commission wants to offer manufacturers greater flexibility in future with regard to their distribution arrangements in relation to online and offline trade. Certain forms of trade are inherently more costly than others but offer tangible benefits to consumers in terms of quality and service. Some forms of trade convey a brand's image better than others and create brand affinity. Manufacturers should be allowed to develop efficient distribution strategies that adequately take into account this diversity and also specifically promote bricks-and-mortar sales. It should be possible to tailor agreements between manufacturers and retailers to the distribution channel used in each case. This would make the different distribution channels much more efficient. The regulations in the currently applicable Vertical Block Exemption Regulation and in the Guidelines have disproportionately restricted the manufacturers' freedom of distribution in this context. In addition, online trade has grown strongly in the past decade - and even more so as a result of the lockdown measures in the context of the Corona pandemic - and no longer requires special protection.

The BDI therefore welcomes the proposed changes, according to which it will be possible in future, for example, to set different wholesale prices for online and offline sales by one and the same distributor. Furthermore, in the context of a selective distribution system, the criteria set by the suppliers for online sales no longer have to be equivalent overall to the criteria for traditional retail shops, as these are two fundamentally different distribution channels.

However, it is problematic that the possibility of different pricing is subject to strict conditions which are not always clear and legally certain for the manufacturer. For example, para. 195 of the draft Guidelines provides that dual pricing systems are only possible if they are intended to create incentives for an appropriate level of investment, the price difference is proportionate to the different costs and online sales do not become unprofitable or financially unsustainable. Otherwise, it would be a hardcore restriction. For reasons of legal certainty - especially also against the background that in the past there have been different approaches between the various national competition authorities with regard to restrictions on online trade - it would be helpful if the possibility of differential pricing could be included directly in the Block Exemption Regulation without additional conditions. The considerations in para. 195 would then only play a role in a possible withdrawal of the benefits of the Block Exemption Regulation. The same applies to the permissible restrictions mentioned in para. 194 which are to be covered by the block exemption, such as market place bans or the requirement for a trader to operate at least one bricks-and-mortar shop. Otherwise, it is possible that businesses will make little use of the newly created flexibility.

## About BDI

BDI transports the interests of German industry to the political leaders. In this way it supports the companies in global competition. It has an extensive network in Germany and Europe, in all important markets and in international organisations. BDI provides political support for international market development. And it provides information and economic policy advice on all industry-relevant issues. BDI is the leading organisation of German industry and industry-related service providers. It speaks for 40 industry associations and more than 100,000 companies with around eight million employees. Membership is voluntary. 15 state representatives represent the interests of industry at regional level.

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