Public consultation
on the draft revised Regulation on vertical agreements
and vertical guidelines

Comments from the Association of
Inhouse Competition Lawyers (ICLA)

ICLA is an informal association of in-house competition lawyers with currently nearly 500 members across the globe. The Association does not represent companies but is made up of individuals as experts in the area of competition law. This paper represents the position of ICLA and does not necessarily represent the views of all of its individual members.

ICLA welcomes the modifications in the revised draft Vertical Block Exemption Regulation (VBER) and Guidelines on vertical restraints (infra also, “the Vertical Guidelines”) and particularly appreciates that the European Commission strives to take into account the feedback received from various stakeholders throughout the evaluation process.

The VBER and the Vertical Guidelines are very important tools for companies to facilitate self-assessments of their vertical agreements, because they provide legal certainty and promote cost-effective compliance. Moreover, they are also relevant for National Competition Authorities (NCAs) in Member States, because they set out a procedural framework for transparent and harmonized application of EU competition law.

In particular, ICLA fully supports the Commission’s proposed changes in the revised VBER and revised Vertical Guidelines to allow for shared exclusivity as well as dual pricing. However, in both cases further clarifications from the Commission would be required to facilitate the application in business reality.

Moreover, ICLA submits that certain points need to be improved and clarified further. We elaborate further below.

I. <u>Agency</u>

The revised Vertical Guidelines should include, for competition law purposes, a clear separation between the “independent distributor” and the “agent/promoter/dealer” of financial, banking or insurance products, as well as for similar service providers in other industries. Indeed, the entity promoting or placing such products should not be confused with the legal qualification of “independent distributor” under EU competition law, but instead be assimilated to the “genuine agent” under competition law, according to the criteria set out by the Commission, thus falling outside the scope of Article 101 (1) TFEU. This would be justified by the fact that the promoter or distributor of financial, banking or insurance products operates as an auxiliary organ, forming an integral part of the principal's undertaking, and does not usually bear any financial or commercial risks listed in the Vertical Guidelines.

In general, it would be helpful if the Commission could provide further guidance to be able to better determine which agency agreements fall outside the scope of Article 101 (1) TFEU. Such guidance should also include an explanation of the Commission's methodology and reasoning, to facilitate the companies' self-assessments. To increase legal certainty and reduce legal costs and other related financial and administrative burdens, we suggest the Commission to consider introducing more specific examples in the Vertical Guidelines. Obviously, for the most peculiar cases, the Commission should also provide guidance on a case-by-case basis.

II. <u>Dual distribution</u>

1. General observations

Vertical relationships also in a dual distribution scenario are generally pro-competitive. They open up intra-brand competition and also inter-brand, providing customers with a choice of suppliers, who are able to compete on price and quality. The updated VBER needs to stress the pro-competitiveness of vertical relationships also in dual distribution relationships, rather than establishing stringent rules on companies setting up their distribution system.

A manufacturer of a product can opt to distribute products relying on an own distribution network only, thereby excluding any intra-brand competition. There is no legal obligation on any manufacturer to involve third party distributors in the distribution of its products. Therefore, dual distribution opens up intra-brand competition and thereby strengthens inter-brand competition, because the reach of the products is extended. Customers who might not be able to source from the manufacturer directly, may now be able to source the product from a distributor.

Dual distribution is common in many industries. Suppliers typically rely in parallel on different routes to market for their products or services. They may opt for indirect distribution by selling to wholesale distributors (in a two-tier supply chain where the wholesaler resells the products or services to retail dealers) or to retail dealers (in a one-tier supply chain). Moreover, they may also decide to sell their products directly online or via their own brick-and-mortar stores. The growth of online sales made it particularly easy for suppliers to sell their products directly through their own online shops. Likewise, the growth of online sales is increasingly blurring the lines between the different levels of the supply chain. Wholesale distributors may also sell directly to end-users through their online stores (in particular with regard to B2B sales, it can be difficult to distinguish whether business customers purchase for resale or for end-use).

These developments mirror changing consumer behaviour, which was highlighted in the European Commission's Staff Working Document on the evaluation of the VBER. As recognized in the document, consumers nowadays expect a seamless omni-channel experience that allows them to switch easily between different sales channels.

Vertical agreements are generally considered pro-competitive below the market share threshold in Article 3 of the VBER and avoiding hard core restrictions. Moreover, it must be recognized that the competition between a supplier and its distributors is by definition of a different nature than competition between independent distributors as the supplier owns the brand, designs the products and drives the brand image. The increased relevance of dual distribution since the adoption of the current VBER does not alter the nature of competition. Likewise, it does not make the relationship between a supplier and its distributor “more horizontal”. It remains primarily a vertical relationship. The “competitive relationship” is subsidiary to and will not exist without the vertical agreement. Where suppliers use several channels to reach market, these are complementary more than anything. For example, a supplier’s B2C shop may carry a wider range of products, accessories and spare parts than a retailer would. A retailer would on the other hand carry also competing products. In a B2B relationship (where it be supplier – wholesaler or sale of industrial/B2B products), the services/conditions offered by a supplier and a distributor are often not the same (volumes, stock, payment terms, etc.). Suppliers may also be engaging in “demand creation”, i.e. directly engaging with end customers either alone or with distributors. For instance, if volume is too low, the supplier may not be interested and may refer to distributors. Or a distributor has the initial contacts, but the end-customer later prefers to deal directly with the supplier.

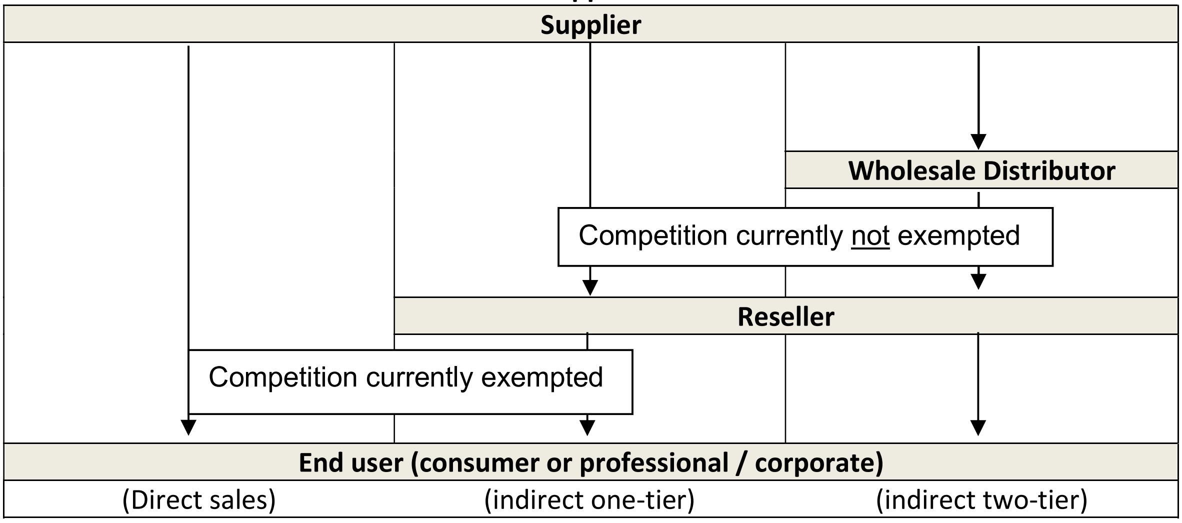
It appears that in the proposed draft VBER, the Commission is performing a paradigm shift: Dual distribution agreements will be treated (at least partly) as horizontal agreements, unless the parties remain below the very low market share threshold of 10% (which is lower than the *de minimis* share for vertical agreements as pointed out below). The Commission has not really provided any explanation or detail on the horizontal concerns posed by dual distribution that would justify such paradigm shift. In ICLA’s view, the mere fact that direct sales by manufacturers to end users have increased within the last years, through manufacturers’ own online shops or through marketplaces, does not justify a change of approach dual distribution. The changes proposed will have significant impact and it is hard to understand the rationale or justification for this, i.e. is this really eliminating a false positive or is it creating a false negative. The proposal also fails to achieve the stated aim of “reducing compliance cost for business”. When so much will be left to individual assessment, compliance costs increase. Furthermore, there is also a clear risk of creating more different approaches across the EU.

2. Current scope of the exception for dual distribution in Art. 2(4) of the revised VBER

The scope of the exemption for dual distribution currently defined in Art. 2(4) of the revised VBER falls short of properly recognizing all relevant dual distribution scenarios. The wording of the draft VBER and Vertical Guidelines appears to grant the benefit of the block exemption only to dual distribution agreements concerning the sale and distribution of goods and services between suppliers and buyers that compete on the retail market. However, dual distribution exists in all types of vertical relationships – including those not commonly seen as retail. As an example, many industrial component suppliers will use a combination of direct sales and sales through distributors. While it is possible to calculate market shares in the downstream market, it is hard to characterise this as a retail market. Under the current drafting, such dual distribution would now fall outside the VBER altogether.

Moreover, the current wording fails to recognize that dual distribution is not limited to the retail level, but may exist on all levels of a multi-tiered vertical supply chain. For example, manufacturers may directly supply retail dealers and in parallel supply wholesale distributors who in turn resell these products/services to retail dealers which then supply end users. However, the competition between manufacturers and distributors at the wholesale level of trade emanating from a manufacturers' choice of different routes to market is currently not block exempted under the proposed wording.

Illustration of different routes to market for suppliers:



ICLA respectfully submits that it struggles to understand the European Commission's reasoning behind limiting the exemption in Art. 2(4) of the draft VBER to competition to the retail level. There are no valid legal or economic grounds for a different treatment of dual distribution on the wholesale vs. retail level of trade. In fact, provisions elsewhere in the draft revised VBER suggest that the competitive pressure exerted by wholesale distributors is of lesser importance. That is, Article 4(b)(iv), 4(c)(i), third hyphen, and Article 4(d)(iv) explicitly exclude the restriction of sales to end users by wholesale distributors from the list of hardcore restrictions. Moreover, it appears to ICLA that the 30% threshold for the application of the safe harbour as per Article 3 of the VBER is sufficient to address any potential anti-competitive concerns that may originate from a possible concentration on the wholesale level of trade.

On the other hand, maintaining the limited scope of the exemption for dual distribution will have significant negative consequences, not only for manufacturers but also in particular for distributors active on the wholesale level of trade (many of which may be SMEs). These distributors typically do not have any control over the routes to market employed by their suppliers. However, if their suppliers choose to supply retail dealers also directly, all distribution agreements between the distributor and these manufacturers would need to be reviewed individually in a self-assessment and constantly monitored for the duration of the agreement. These distribution agreements may include several vertical restrictions that are normally – and rightfully – exempted under the revised VBER, such as: restrictions to sell to unauthorised dealers in selective distribution; legitimate active sales restrictions; restrictions for wholesale distributors to sell directly to end users; non-compete obligations of less than five years, and maximum resale price agreements. Making all these restrictions subject to an individual self-assessment will inevitably result in legal uncertainty, significantly increase costs and ultimately make vertical supply chains less efficient. Moreover, companies may ultimately give up dual distribution in its entirety, even in the absence of any actual or likely harm to competition, because ultimately the compliance costs are too high to outweigh the benefit of a dual distribution system.

ICLA therefore respectfully urges the Commission to review once more the draft wording in Art. 2(4) of the VBER and clarify that the scope of the exception for dual distribution is not limited to competition on retail market, but includes all types of dual distribution on all levels of the vertical supply chain, including competition between a supplier and its wholesale distributors on the wholesale level of trade.

This could be achieved by applying the following changes in Art. 2(4)(a) and (b):

> *(a) "the supplier is a manufacturer, wholesaler, or importer and a distributor of goods, while the buyer is a distributor*, wholesaler or importer, *and not a competing undertaking at the ~~manufacturing, wholesale or import level~~ relevant upstream level, and their aggregate market share in the relevant market ~~at retail level~~ at the downstream level does not exceed [10]%;*
>
> *(b) the supplier is a provider of services at several levels of trade, while the buyer provides its services at the ~~retail level~~ relevant downstream level and is not a competing undertaking at the level of trade where it purchases the contract services, and their aggregate market share in the relevant market at ~~retail level~~ the downstream level does not exceed [10]%."*

3. Market share threshold

The introduction of a combined market share threshold of 10% for the retail level is absolutely unnecessary and does not add to legal certainty, but rather would burden companies with an uncertain self-assessment, which would highly depend on the availability of reliable market share information. Market shares for particular retailers may also vary from one country to another or from one product category to another. It would require a company to individually assess each distributor relationship on a market-by-market basis (in a case where a distributor distributes a variety of products). In addition, companies need to constantly monitor the market developments and whether the market shares have reached the threshold of 10%, with the consequence of reassessing its relationship to distributors and eventually having to establish new rules vis-à-vis certain distributors or changing the distribution system in general. Suppliers may also have to decide whether they need to treat their distributor differently depending on whether the combined market share with one distributor is at 8% and with another distributor is at 12%. As a result, a manufacturer would have to have two different sets of rules, internally, for information exchanges with distributors below 10% and for distributors exceeding 10%, which includes different sets of rules for information gathering, for the quality of the information and the processing and analysing of the information. This would create practical difficulties in setting up a coherent sales and marketing organization for suppliers.

It would also mean that even small suppliers who also sell direct would not be able to rely on the VBER if their downstream customers have larger market shares. And given the very low market share threshold of 10%, it will occur in many sectors and/or countries that there will be one or more customers having market shares of above 10%. For some suppliers, it may then be seen as better to avoid overlap with distributors, i.e. avoiding selling main products through their online shops.

This incredible burden may eventually lead companies to give up dual distribution in its entirety, even in the absence of any actual or likely harm to competition. This will reduce intra-brand competition and also impede the multichannel experience expected by consumers and the choice of available sales channels for consumers. Ultimately, this will harm businesses and consumers.

In ICLA's view, a combined market share threshold of 10% is too low. Such a low market share threshold essentially means that an information exchange in a dual distribution system can only be block-exempted in markets with a lot of market participants each holding a very low market share or in a market where other market participants than the once subject to the distribution agreement in question have a very clear market leading position. Such market characteristics are very unusual, and these provisions of the VBER will therefore only be applicable in very few instances or potentially even be totally irrelevant. The proposed revisions are thus unsatisfactory and unnecessarily though. The 10% market share threshold appears arbitrary. It is lower than EU *de minimis* guidance on vertical agreements and the EU guidance on agreements on distribution with competitors, both set at 15% (Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements).

The Commission completely overlooks in this regard that vertical relationships are generally pro-competitive. They open up intra-brand and also inter-brand competition, providing customers with a choice of suppliers, who are able to compete on price and quality. We urge for the updated VBER to stress the pro-competitiveness of vertical relationships also in dual distribution relationships, rather than establishing stringent rules on companies setting up their distribution system.

The VBER needs to acknowledge that only in very few situations a vertical agreement might pose risks to competition. These are situations of resale price maintenance ("RPM") without economic justification or exclusionary strategies where market shares are high and hence inter-brand competition is low.

Moreover, as stated at Section 2 above, with its current proposal to calculate the market share threshold at the "retail level", the Commission falls short of recognizing that dual distribution exists in all types of vertical relationships and on all levels of a vertical supply chain. For example, if a supplier competes with its wholesale distributors at the wholesale level of trade (i.e., supplier and wholesale distributors both supplying retail dealers), wholesale distributors will not be able to calculate their market share at the retail level of trade where they are not active. Therefore, ICLA submits that if the Commission should decide to maintain the market share threshold, it would at the very least need to abandon the focus on the retail level. In this respect, please refer to the proposed revised wording at the end of Section 2 above.

4. Treatment of information exchange in dual distribution

The revised VBER completely overlooks that also in a dual distribution system, information sharing in a vertical relationship is beneficial to enhance the efficiency of the distribution network, and serve customer needs better. It is widely accepted that an exchange of commercial information between operators at different levels of a vertical supply chain – i.e., between a supplier and its distributor(s) – is part of a normal business dialogue. It is also recognised that such a business dialogue is generally a source of efficiency. For example, such commercial discussions allow the supplier to benefit from feedback from its distributors on the price positioning of its products, and on consumer demand that are likely to improve the effectiveness of its distribution network and the quality of the product. More specifically, a manufacturer distributing products via a distribution network needs to have information from its distributors and for the sake of best possibly competing in the market needs to be able to rely on them (e.g. on the identity of customers, targets, volumes and prices). The manufacturer must know and understand customer needs, in order to be able to address those needs and further develop the product to compete in the market. For example, it is key for suppliers to receive information from distributors to understand market demand, to understand how to best allocate promotional funds/investments and to manage stock and production. For distributors, it may also be interesting to receive better pricing for special projects (for instance due to high volume, high visibility or high strategic value). There is therefore no difference between the manufacturer-distributor relationship and any other vertical relationship. Moreover, receiving information from distributors enables a manufacturer to compete more efficiently against competing manufacturers, thereby strengthening inter-brand competition.

Through its direct sales channel, a manufacturer would also not receive the same level of detail and type of information compared to what it might receive from the indirect sales channels, i.e. its distributors. For example, a multinational may decide to only sell to certain, large customer or only into some territories where it makes economically sense to set up an own distribution network, while distributing its products to smaller customer or into smaller territories via distributors. If such a manufacturer is not able to receive information from its distributors on general pricing requirements, customer needs or similar commercially important information, it will not be able to react to such customer needs appropriately. Ultimately, this will be to the detriment of end users, businesses and consumers.

The Commission should also acknowledge that a vertical exchange of information between the supplier and its distributors may also be the only means to create a level playing field for competition between distributors and online platforms which have access to large amounts of data as part of their business model.

For these reasons, information exchange with a distributor in dual distribution should not be treated in the same way as information exchange between competing manufacturers. This is shown by a simple example: in order to ensure supply, it is common that wholesaler and retailer clients provide manufacturers with their stocks and estimation of their future orders/sales. In a typical horizontal relationship, the exchange of this type of information – stocks / future orders and sales – may raise concerns in application of the rules applicable to horizontal agreements. Applying the same standard to day-to-day vertical information exchange would result in an enormous lack of legal certainty. It would put at risk effective distribution and hence due availability of goods in the

European market. However, the draft VBER assumes clearly that any exchange of information in a dual distribution scenario is highly problematic and poses a high risk to competition. This even seems to be the case outside of any hardcore violation like agreement on prices, the allocation of customers or territories or the maintenance of resale prices.

We urge the Commission to consider the efficiency-enhancing effects that information exchange in a vertical relationship may have, and identify the types of vertical information exchanges are unproblematic, because they cannot be considered a restriction of competition and fall outside the scope of Article 101(1) TFEU (for example, information on quantities sold, customer information, quantities on stock and quantities returned by customers, as well as demand forecasts).

In addition, the revised vertical rules should also identify the conditions under which the VBER provides a safe harbour for information exchanges in a dual distribution scenario, because the efficiencies generated from such exchanges generally outweigh any potential anti-competitive concerns (e.g., sales and margin information, information on promotional activities, information on recommended resale prices).

Finally, the revised rules need to clarify the legal test and standard of proof in order to assess whether an information exchange that originates from a vertical supply relationship constitutes horizontal collusion or not. A test and standard of proof that is not sufficiently clear risks casting a suspicion of illegality on all discussions between a supplier and its distributors relating to their commercial activities, despite the fact that there are legitimate business reasons that justify such exchanges.

The proposed application of the very low 10% market share threshold fails to recognize the pro-competitive effects of vertical information exchanges and also fails to provide the required legal certainty for businesses. The draft VBER foresees, that above a combined market share threshold of 10%, the exchange of information needs to be assessed under the general rules on horizontal agreements. As the consultation on the revision of the horizontal guidelines has shown, these rules are far from clear.

Subjecting the exchange of information in a dual distribution scenario to the general rules on horizontal agreements between competitors, does not leave any room to sufficiently take into account the general benefits and pro-competitiveness of a vertical agreement. Essentially, the VBER will prove to be irrelevant in this regard.

5. By object restriction in Art. 2(6) of the revised VBER

Art.2(6) of the draft VBER is a new provision applicable to dual distribution and introduces an important caveat. In its current form, the provision appears to introduce a limitation to the exemption with a generic reference to by object restrictions, which is known to be difficult to assess. ICLA feels this reintroduces an element of individual assessment in a regulation that is meant to provide and enhance legal certainty. Therefore, ICLA encourages the Commission to delete this paragraph in the final version of the revised VBER.

6. Exclusion of online intermediation services

There is no apparent reason to generally exclude providers of online intermediation services from the benefit of the safe harbour, if they have a hybrid function, namely when they sell goods or services in competition with enterprises to which they provide online intermediation services. This is without justification discriminatory of certain intermediation service provider, without there being a competition law reasoning.

It appears as if the Commission is worried about certain hyperscalers that may have a significant market share in certain markets and wants to ensure that these companies do not generally benefit from the application of the VBER. However, the VBER would not be applicable anyways, if their market share is above 30% on the upstream market.

If their market share is below 30% there is no reason to believe that merely because the services are provided online there is a general doubt as to the compatibility with EU competition law.

With removing the benefits of the VBER to certain market participants, the Commission completely overlooks the great benefits such an online intermediation service business brings to customers. Customers benefit from a greater variety of products, greater choice, greater price transparency and hence there is more competition for those products sold via an intermediation service provider.

In any event, it appears that the Commission has introduced this limitation in response to the growing market power of large platforms that operate marketplaces for distributors active at the retail level of trade, while at the same time selling directly to consumers. However, providers of online intermediation services also exist at the wholesale level of trade. For example, wholesale distributors may operate platforms that enable vendors to sell directly to resellers and facilitate the billing and invoicing processes via the platform. At the same time, these wholesale distributers may also act as resellers of these vendors' products and services to their customers. The hybrid function of these distributors does not raise the same horizontal concerns as those identified by the Commission in relation to the retail activities of large online platforms. Removing the benefit of the VBER for online platforms will hamper efforts of European companies that want to enter the platform market with hybrid models and thus staying competitive on the market. ICLA therefore submits that in case the Commission decides to maintain the current proposed exclusion in Art. 2(7) of the revised VBER, it should at the very least adjust Article 2(7) of the draft VBER and limit its scope to large platforms operating at consumer retail level at which this article seems to be aimed. This could be achieved by aligning with the wording used in Art. 5(1)(d) of the draft VBER, which refers to sales to end users.

III. Second market share threshold in Art. 3 VBER

The second market share threshold relating to the downstream purchasing market should be removed. Market shares generally, but in particular those for purchasing markets, are difficult to determine, absent of any third-party reports or studies (which are very often not defining markets based on competition law principles).

The difficulties are even more present when it comes to purchasing markets. This is because a manufacturer has very little knowledge about sourcing capacity of customers' competitors.

The second market share threshold has not proven to be helpful in identifying those vertical relationships that are potentially problematic from a competition law perspective. Rather, the 30% market share for the purchaser on the purchasing market has only created additional administrative costs on companies.

Again, a vertical relationship is generally pro-competitive. Only in very limited circumstances, such as situations of RPM without economic justification or exclusionary strategies where market shares are high and hence inter-brand competition is low, a vertical agreement might pose risks to competition.

IV. Shared exclusivity

ICLA fully supports the Commission's proposed changes in the revised VBER and Vertical Guidelines to allow shared exclusivity. As stated in ICLA's previous submission, shared exclusivity may increase intra-brand competition, while at the same time enable a manufacturer to protect the distributors' investment to serve a specific territory or customer group. However, there is still unclarity, whether it is possible to simply exclusively allocate the active sales rights for one customer or into one territory, without having to make a reference to other customer groups or territories.

For example, the current draft VBER foresees in Art 4(b)(i) that active sales restrictions are only possible "into a territory or to a customer group reserved to the supplier or allocated by the supplier exclusively to one or a limited number of other buyers". I.e., rather than a manufacturer granting a distributor active sales rights for one specific territory or customer group, the manufacturer still has to explicitly reserve the territory/customer group to itself or to another distributor. According to the Vertical Guidelines (para. 105), the distributor should be informed accordingly. Therefore, it appears that the requirements of Art. 4(b)(i) would not be met if a manufacturer does not reserve the other customers/territories to itself or allocate them exclusively to other distributors. It is in this regard unclear how the concept of "reserving a territory/customer group" works in a free distribution system according to Art 4(d).

In ICLA's view, it would be much more flexible for a manufacturer to just purely provide active sales rights to distributors for particular territories or customer groups without having to allocate exclusive rights/reserve to itself.

V. Active / passive resale restrictions

ICLA welcomes the definitions of active and passive sales in the draft VBER and the explanations in the revised Vertical Guidelines.

On the other hand, we would like to suggest some changes to the guidance to explicitly make clear that unilateral conduct not only falls outside the VBER, but also outside Article 101 TFEU. Many of the examples given in paragraphs 189 of the draft Guidelines are unilateral decisions frequently taken by a supplier during its normal course of business (termination of supply, volume allocation etc.), which would fall outside Article 101 TFEU altogether. Other examples given may be perfectly legitimate depending on the circumstances, for instance in the context of audits related to a selective distribution system.

In the same way, in paragraph 191, the Commission is referring to the use of certain monitoring systems such as labelling or serial numbers as increasing the likelihood of a practice being considered as a restriction of the buyer's sale to specific territories / customers. Again, manufacturers will through their own unilateral decision choose to use serial numbers (for instance for product liability, service or insurance reasons) or differentiate labelling (due to space limitations, costs reasons etc.). This is frequently done in practice and the mere existence of such monitoring systems put in place by a manufacturer of its own decision should not be seen as increasing the likelihood of a practice being considered as restricting sales.

VI. Dual pricing

ICLA welcomes the revised approach towards dual pricing, according to which such agreements can benefit from the safe harbour of the VBER. However, ICLA members take the view that a further revision of the proposed wording in paragraph 195 of the draft Vertical Guidelines would significantly enhance its application in business reality. In particular, it would be difficult to demonstrate in each case that the difference in price is closely related to the difference in costs. Dual pricing should be allowed, unless the aim of the difference in pricing is to prevent *de facto* the use of the internet as a sales channel.

Due to the diverging interpretations of the current guidelines at national level, ICLA would also suggest that the distinction between dual pricing and differential pricing (i.e., different pricing to different distributors) is explicitly clarified in the draft Vertical Guidelines.

VII. Resale Price Maintenance

ICLA welcomes the Commission's decision to recognize that fulfilment contracts do not constitute RPM. However, the current wording in para. 178 raises several questions that should be clarified.

First, the current scope of this exception is limited to fulfilment agreements between a supplier and a specific end-user while excluding fulfilment agreements in a two-tiered supply chain between a supplier and a buyer operating at the retail level of trade that is executed by a wholesale distributor. However, we see no economic reason that would justify a distinction between these two scenarios. In both cases, competition has already taken place at the time of agreement on the commercial terms between the supplier and the buyer. The fact that both parties (intentionally) rely on an intermediary to fulfil the arrangement does not result in any harmful effect on competition. Moreover, the current focus on the end-user may lead to the unintended consequence that consumers may be deprived from the opportunity to benefit from fulfilment contracts, because they will typically not be in a position to negotiate themselves more favourable terms and pricing directly with a large supplier. At the same time, the requirement that the end user participates in the fulfilment contract will not allow a large retail distributor to negotiate a fulfilment contract with a supplier that is executed by a wholesale distributor and then pass down the price reductions to consumers. ICLA therefore invites the Commission to clarify that fulfilment agreements do not constitute RPM also on other levels of the supply chain that do not involve an end user. This could be done by applying the following changes to para. 178:

> 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 reseller or end user (hereinafter "fulfilment contract") does not constitute RPM where the reseller or end user has waived its right to choose the undertaking that should execute the agreement. In such a case, the fixing of the resale price does not result in a restriction of Article 101(1) since the resale price is no longer subject to competition in relation to the reseller or end user concerned. However, this only applies in case the fulfilment contract does not constitute an agency agreement falling outside the scope of Article 101(1), as described in particular in paragraphs (40) to (43) of these Guidelines for instance because the buyer acquires the ownership of the contract goods intended for resale or because it assumes more than insignificant risks in relation to the execution of the contract. In contrast, where the reseller or end user has not waived its right to choose the undertaking that should execute the agreement, the supplier cannot fix the resale price without infringing Article 4(a) VBER. However, it may set a maximum resale price with a view to allowing price competition for the execution of the agreement.

Moreover, an end-customer will often want to both negotiate the price with the supplier and (naturally) have final approval of which company becomes its contractual partner. Therefore, for the fulfilment contract to fall outside the scope of RPM, it should not make a difference whether the end-customer completely waives its right to select or whether the end-customer reserves the right to finally approve the undertaking that will execute the contract. In other cases, the supplier, the intermediary and the buyer may choose to enter into a tri-partite fulfilment agreement that covers the terms and conditions, incl. the pricing, as well as the rights and obligations of each party. As these variations of the fulfilment model do not bring about any harm to competition, para. 178 should be expanded to clarify that they do not to constitute RPM.

Apart from these positive changes, ICLA regrets that the Commission chose to retain RPM as a hardcore restriction, despite the fact that business practice in particular outside of the EU, where RPM is assessed by the rule of reason, shows that RPM can lead to efficiencies that outweigh any potential restriction of competition. In particular, RPM may lead to efficiencies including in the following instances not included in para. 182 of the revised Vertical Guidelines.

Manufacturers that are concerned with maintaining a strong brand name and a reputation for quality or durability with end customers might want to use minimum resale price contracts so that their products are not offered at a discount. When prices are discounted by wholesalers and retailers, the end customer may ultimately purchase the product at a price point that undermines the brand image perception that the manufacturer wants to protect. This can ultimately create repercussions as consumers might associate lower prices with lesser quality. For example, for certain (luxury, exclusive or high end) products high prices are an essential element of the brand image. In addition, suppliers may wish to protect the reputation or image of the product and prevent it from being used by retailers as a loss leader to attract customers. The loss of image and reputation might make it more difficult for the manufacturer to maintain its prices in the future. This may force the manufacturer to cut costs and thus reduce product quality, which ultimately would be detrimental to consumers.

Finally, it should be noted that manufacturers which would like to have more control over their final price could choose not to distribute products through independent distributors but rather to organise the distribution themselves, which ultimately means that no intra-brand competition whatsoever remains. One may argue that this outcome would be less beneficial to consumers.

It would be helpful to receive additional guidance in the Vertical Guidelines, by listing the relevant assessment criteria as well as the precise circumstances under which RPM does not raise competition law concerns, including by way of examples.

Currently, it is not clear whether and under what circumstances a possible efficiency defence could be successful. For example, would elements such as the protection of strong brand name and reputation or avoiding free riding have a reasonable chance to be taken into account? The final Vertical Guidelines should contain more clarity on this point.

Finally, there should be clarity that in case of significant competition on a given market, maximum or recommended resale pricing should by default not lead to competition concerns. While para. 185 in the revised Vertical Guidelines goes into the right direction, it falls short of making a clear statement in this regard.

VIII. Non-compete clauses – duration above 5 years

It is very welcomed that according to the revised Vertical Guidelines, non-compete obligations that are tacitly renewable beyond a period of five years are covered by the block exemption, provided that the buyer can effectively renegotiate or terminate the vertical agreement containing the obligation with a reasonable notice period and at a reasonable cost, thus allowing the buyer to effectively switch its supplier after the expiry of the five-year period. ICLA encourages the Commission to clarify this directly in the text of the VBER itself to ensure that national competition authorities are bound by this and do not take a different position.

IX. Most Favored Nation (MFN) Clauses

ICLA welcomes the Commission's decision to maintain the safe harbour for wholesale parity clauses. Such clauses where a customer requires its supplier to offer the same or better purchase price/conditions compared to those it makes available to other customers have not given rise to significant competition law concerns in the past.

However, the revised VBER foresees a more restrictive approach towards wide MFN clauses used by online intermediaries. While the first MFN clauses are falling outside of the application of the revised VBER (Article 5(1)(d)), MFN clauses (narrow or wide) used by other market participants are still caught and are block exempted.

There is no reason for removing the safe harbour for wide MFN clauses used by online intermediaries. Rather, it adds significant uncertainty, because the question whether a company benefits from the block exemption under the VBER turns around the qualification as a provider of online intermediation services. While account should be taken of the definition in the Regulation 2019/1150, the Vertical Guidelines state that also the VBER needs to be considered when assessing whether an undertaking acts as a provider of online intermediation services. It is unclear in which regard the VBER impacts the definition of online intermediation service provider and which facts need to be considered. There is and will remain great uncertainty.

There is also no competition law reason why a provider of online intermediation services may not benefit from the VBER even if its market share is below 30%. Rather, because of concerns the Commission seems to have with some companies, it seems to refuse the benefits of the VBER to all providers of online intermediation services, irrespective of the respective product in question or the concrete market structure.