Independent Retail Europe

REVISION OF THE VERTICAL BLOCK EXEMPTION REGULATION AND GUIDELINES

- COMMENTS OF INDEPENDENT RETAIL EUROPE -

16 September 2021

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COMMENTS OF INDEPENDENT RETAIL EUROPE ON THE REVISION OF THE VERTICAL BLOCK EXEMPTION REGULATION AND VERTICAL GUIDELINES

1. Dual distribution – art 2(4) and 2(5) of the draft revised VBER

a. An alternative solution is needed to address competition concerns without disrupting legitimate agreements

With the growth of e-commerce, the share of dual distribution agreements has considerably increased over the last years. Considering that this evolution may raise potential competition concerns in some specific cases, articles 2(4) and 2(5) of the draft revised VBER propose to limit the benefit of the block-exemption to dual distribution agreements with a combined retail market share lower than 10% (with a flexibility for aspects not related to information exchanges if the market share is below 10% and 30%).

While we agree that this issue needs to be addressed seriously, we have major concerns about the proposed change, as:

- It disregards the origin of the potential competition concern;
- It risks to disrupt a large number of existing distribution agreements;
- It will lead to major legal uncertainty (as dual distribution would not legally be block-exempted but subject to a self-assessment), create substantial new costs (related to complex self-assessments to determine the relevant retail market shares, overlaps and market definitions);
- It is likely to reinforce the market power of large manufacturers (as they would be inclined to reserve more and more successful products to their own direct distribution channels, therewith reducing competition, instead of promoting it).

We believe that another equally effective solution can be implemented to address competition issues with dual distribution that would avoid these concerns.

In dual distribution agreements, one of the main potential horizontal competition concerns arises from information exchange (depending on the type of data). Certain information is indispensable to perform the supply contract (e.g. volume, time, logistics, recommended prices, etc.), while other data is not necessary to perform the supply contract. **Exchanges of 'non-necessary' data in dual distribution are in most cases the result of requests for this data imposed by suppliers on retailers.** The main competition concerns to be addressed therefore arise exclusively from the use of some of those 'non-necessary' data by suppliers to gain a market advantage for their own direct distribution channels.

In order to address the potential horizontal concerns that may arise in specific dual distribution contexts from information exchanges, we invite the Commission to include in the VBER a new provision that would regulate more strictly information exchanges falling into the scope of the dual distribution exemption. Such provision should **state clearly that information exchanges benefiting from the dual distribution exemption are limited to data that is strictly necessary for the implementation of the supply agreement.** Guidance could be provided to delineate the scope of this 'strictly necessary information'. Any 'non-necessary' data exchange would then have to be self-assessed under the Horizontal Guidelines.

- **Article 2 VBER should state that information exchanges that are 'absolutely necessary' to perform the supply agreement benefit from the safe harbour.**
- **Any 'non-necessary' information exchange in dual distribution should be self-assessed under the Horizontal Guidelines.**
- **The Vertical Guidelines should include a provision explaining what is covered by the concept of 'necessary information'.**

b. Information exchanges in franchise and similar uniform distribution systems

Concerning dual distribution, the draft revised VBER seems to be inconsistent in its approach to uniform-format distribution systems operating under one brand, such as franchise systems, which is likely to hinder those types of distributors specifically.

Indeed, paras. 150 and 151 of the draft revised VGL correctly state that:

- provisions that are strictly necessary for the functioning of such distribution systems, such as an obligation on the franchisee to communicate to the franchisor any experience gained in exploiting the franchise (para. 82(d) VGL), can be considered as falling outside Article 101(1) and;
- franchise agreements are in general covered by the VBER where both the supplier's and the buyer's market shares do not exceed 30%.

However, pursuant to Article 2(5) of the draft revised VBER, only the vertical aspects of franchise agreements would be exempted in the future, because the exchange of information between franchisors and franchisees appears to be subject to a self-assessment under the revised Horizontal Guidelines (see also footnote 65 of the draft VGL, which refers to para. 86-95). The rules therefore lack clarity, seem to be contradictory and, if the most restrictive reading prevails, would hurt the viability of such business models.

So far, under the current VBER and VGL, franchisors benefit from the VBER's safe harbour for their information exchanges. Article 2(5) of the draft revised VBER would result in legal uncertainty for such systems.

This creates specific issues, since parties in franchise systems and similar uniform distribution formats inherently need to share certain competitively sensitive information. This arises from the franchisor's core obligation to pass on to the franchisees system-relevant know-how gained from its own locations and from those operated by other franchisees. A franchisor can only perform the active role expected from it to manage and further develop the franchise system if a certain information flow is guaranteed. Furthermore, the franchisor has a contractual secondary obligation to provide timely information about important matters affecting the franchise system as a whole. For these reasons, the CJEU recognised in *Pronuptia* that the franchisor may impose certain information obligations on the franchisees in order to ensure the control of the system, the protection and further development of its know-how and the uniformity and reputation of the system. This case established that certain restrictions, that are indispensable for the implementation of the system, are not to be considered a restriction of competition. However, the type of information that may be considered as 'indispensable' and any limits of information sharing within franchise systems have never been substantiated.

In light of the above, we invite the Commission to include in Article 2 VBER an exemption for franchise agreements to all aspects of those agreements (including any horizontal restrictions by effect) where the franchisor's and the franchisee's aggregate market share in the relevant market at retail level does not exceed 30%.

In addition, we would welcome more guidance as to the type of information the franchisor may ask from the franchisee in compliance with competition rules. For example, a clear assessment about whether certain sales data of franchisees may be exchanged with the franchisor (to enable the latter to better advise the former how to improve his business) would bring legal certainty. Should the Commission consider that such information exchange may result in anti-competitive effects, we would invite the Commission to also comment on whether (and to what extent) 'Chinese walls' within the franchisor's organization would be sufficient to address any such concerns

- ➔ **Include in Article 2 VBER an exemption (including any horizontal restrictions by effect) for information exchanges within franchises and similar uniform distribution format systems, where the franchisor's and the franchisee's aggregate market share in the relevant market at retail level does not exceed 30%.**
- ➔ **Provide guidance as to the type of information the franchisor may ask from the franchisee in compliance with competition rules, and whether (and to what extent) 'Chinese walls' within the franchisor's organization need to be implemented.**

2. Provisions on online intermediation services

a) The definition of online intermediation services ignores groups of independent retailers' business model

The draft revised VBER proposes to define online intermediation services (Article 1(d)) and consider them as suppliers in all circumstances, while providing that the VBER will not apply to such services which are competing with their users (Article 2(7)).

This change raises serious concerns, as it does not consider at all the existence of groups of independent retailers operating under one brand, and assimilates the closed/internal online platforms run by groups of independent retailers exclusively for their members (to allow them to sell online under the name of the group) to open/third-party platforms (such as Amazon, Alibaba, etc.).

This lack of consideration for the existence of the closed/internal platform model used by groups of independent retailers is very clear when reading the draft revised VGL para. 44 where many parts of the descriptions inaccurately reflect the characteristics of closed/internal platforms operated by such groups:

« Providers of online intermediation services generally act as independent economic operators and not as part of the undertakings of the sellers to which they provide online intermediation services.

Strong network effects and other features of the online platform economy can contribute to a significant imbalance in the size and bargaining power of the contract parties and result in a situation where the conditions of sale of the contract goods or services and the commercial strategy are determined by the provider of online intermediation services rather than the sellers of the goods or services that are intermediated. In addition, providers of online intermediation services often serve a very large number of sellers in parallel, which prevents them from effectively forming a part of any of the sellers' undertakings"

Groups of independent retailers are very different in their organisation from integrated companies. They bring together in a cooperative or associative organisation under a common brand, member retailers who independently own and operate their store, share the same values, and participate in the overall strategy of the group. These retailers task a central office of the group with the purchasing of goods and services for the whole group to attain efficiencies and economies of scale for the benefit of the group and its member retailers, and with the provision of a support network to the member independent SME retail entrepreneurs.

Because of this cooperative/associative business model, these groups cannot create classical "company websites" to sell online under the group's name. The online sales activities of the member retailers **must take place through an online internal/closed** "**group-platform**" reserved to the members of the group. Usually, the central office of the group is tasked by the member retailers to develop and operate such a group-platform.

This group-platform has all the characteristics of an 'intermediation service' as described by the draft revised VBER, the crucial difference being that it is exclusively created at the request of the member retailers and that it exclusively allows member retailers to use it. **It is therefore not a third-party intermediary service between independent entities, but the cooperative/associative version of a 'company website', whereby the users of the group-platform (the member retailers), as the joint owners of the group-platform, all have a structural link with the platform operator (the central office of the group).**

This distinction is clearly overlooked by the draft revised VBER, in the same manner as it was overlooked by the P2B Regulation (which is a source of inspiration for the definition of online intermediation services in the draft revised VBER). However, this distinction is getting traction in the European Parliament in the discussions on the Digital Services Act.

Therefore, contrary to the assertion of para.44 of the draft revised VGL, such 'internal/closed' group platforms operated by groups of independent retailers can actually be considered as part of the member retailers' undertakings, while it is unrealistic to argue that there would be imbalances in the bargaining power of the parties, since the group (and therefore the platform operator) is controlled by the member retailers benefiting from the internal/closed platform service. Moreover, such closed/internal platform would not be in competition with its members (as members controlling the group would not accept it), but only act as an enabler to allow the members to sell online, or possibly act as a back-up when members are unable to sell the products to consumers (e.g. due to low stocks).

The definition of online intermediation services in its current form and their automatic assimilation to suppliers, if unchanged, would inevitably make burdensome and legally uncertain the possibility for cooperative retail groups, such as groups of independent retailers operating under one brand, to operate online and to allow their member retailers to sell online in a competitive manner versus their direct competitors (integrated retail chains and pure online retailers).

We therefore invite the European Commission to considerably amend its definition of online intermediation services in the draft revised VBER, as well as the relevant provisions of the draft revised VGL, to ensure that they exclusively cover open third-party online intermediation services, and expressly exclude from such definition the closed/internal services provided by groups of independent retailers for their members.

- **The definition of online intermediation services (Article 1(d) draft revised VBER) should exclusively cover 'third-party' intermediation services.**
- **Closed/internal online intermediation services operated by groups of independent retailers for the sole benefit of their members should be explicitly excluded from the definition of online intermediation services.**
- **Amend the explanations (para. 44 and other relevant paragraphs) in the draft revised VGL on provisions on online intermediation services to explicitly and exclusively refer to third-party intermediation services, and clarify that the concept does not cover closed/internal services operated by groups of independent retailers for the sole benefit of their members.**
- **Any closed/internal online intermediation service operated by a (cooperative/associative) group of independent retailers operating under one brand for the sole benefit of its members should continue to be considered as an agency service fully subject to the VBER exemption under all circumstances, even if the service operates in a hybrid role.**

b) Online intermediation services with a hybrid role (Article 2(7) of the revised VBER)

Article 2(7) of the draft revised VBER states that suppliers of online intermediation services that sell goods or services in competition with companies to which they provide such services, shall fall outside the scope of the VBER. In this respect, we assume that Article 2(7) is intended to also refer to Article 2(5) draft VBER, even if it explicitly refers to Article 2(4) (a) and (b) draft VBER only.

While we, in principle, appreciate a close monitoring of strong, open third-party platform providers, the exclusion of all non-reciprocal vertical agreements with hybrid suppliers of online intermediation services (« hybrid providers ») from the exemption of Article 2(4) draft VBER goes, in our view, a step too far. In particular, Article 2(7) draft VBER will disadvantage and hinder newcomers on the market as well as SME platform providers to compete with large platform providers to the detriment of end-consumers. The obligation to assess such vertical agreements with hybrid providers on a case-by-case basis will create a high degree of legal uncertainty and will create obstacles that SMEs in particular will not be able to cope with. While large platform providers are in the position to undertake an individual in-depth competitive assessment and take potential residual risks, SMEs have neither the financial nor the human resources to do the same.

In addition, we do not see any justification for the unequal treatment of small/medium hybrid providers versus small/medium suppliers active in dual distribution. In our view, it is not obvious that retail activities of small/medium hybrid providers « typically raise non-negligible horizontal concerns » as the Commission found in para. 92 draft VGL. Therefore, given their insignificant market shares at retail level, **the exemption of Article 2(4) draft VBER should at least apply to hybrid providers whose retail activities are not able to raise obvious horizontal concerns**.

Furthermore, as stated above, internal/closed online intermediation services provided by groups of independent retailers for the sole benefit of their members shall not be covered by the provisions of Article 2(7), as they will never act in competition with their member retailers (this would not be accepted by the members who are in practice controlling the group), even if the platform model allows the central office of the group (operating the platform) to sell directly to consumers (e.g. typically when members are not able to sell directly the products (e.g. because the products are not in their stock or the retailer cannot deliver the product himself, etc.).

- ➔ **Review Article 2(7) of the draft revised VBER on the inapplicability of the VBER to hybrid online intermediation services in light of its strong impact on SME platforms and SMEs.**
- ➔ **Ensure that Article 2(7) of the draft revised VBER does not apply to closed/internal services operated by groups of independent retailers operating under one brand for the benefit of their member retailers.**

3. Dual pricing – para. 195 of the draft revised VGL

As pure online distributors have developed well-functioning online sales channels, they put offline retailers and hybrid retailers with physical shops under pressure, as a result of their inherently lower cost-structure.

Manufacturers should therefore be allowed to acknowledge sales support provided in physical stores and to incentivise accordingly associated investments (e.g. by means of special discounts) even if this means that brick-and-mortar and hybrid retailers are being offered lower prices than pure online sellers (because there is no equivalent sales support offered online).

We therefore welcome as a positive development the abolition of the dual pricing prohibition (para. 195 of the draft revised VGL).

To fully support brick & mortar, we invite the Commission to extend the acceptability of dual pricing also to pure brick & mortar retailers (explicitly allowing suppliers to charge lower prices to pure offline retailers than to pure online retailers – as some national competition cases show that this possibility is not always recognised). We also invite the Commission to clarify further that, in general, dual pricing for different types of sales channel only amounts to an infringement of Article 101 TFEU if, for any particular sales channel, this results in an inability to sell the products with a sustainable margin.

Furthermore, clarifications are needed to define 'online' vs 'offline' sales in an omnichannel context for the purpose of dual pricing. For instance, what about the case where a product is 'reserved' or bought online, but requires a specific service in a physical point of sale belonging to the hybrid retailers? We therefore suggest to include in para. 195 a sentence clarifying that online sales which require the support of a physical point of sale belonging to the hybrid retailer for an in-store service

should be able to benefit from the provision on dual pricing, in order to benefit from lower prices, to compensate the specific in-shop investment required, even though the sale was initiated online.

- **We welcome the evolution in para. 195 VGL to allow dual pricing for hybrid retailers.**
- **Para. 195 should be extended to explicitly recognise that a supplier may charge lower prices to pure brick & mortar retailers than to pure online retailers.**
- **Further clarify that any differentiated/dual pricing for different types of sales channel only amounts to an infringement of article 101 TFEU if, for a particular sales channel, it results in an inability to sell the products with a sustainable margin.**
- **Clarify in para. 195 the difference between online/offline sales for the purpose of dual pricing in an omnichannel context. Any online sale by a hybrid retailer requiring the support of a physical retail shop belonging to the hybrid retailer for an in-store service should be eligible for compensation through dual pricing (and should therefore be able to benefit from lower wholesale prices as for any offline sale).**

4. Selective distribution

a. Equivalence principle and online sales restrictions in selective distribution – para.221 draft revised VGL

We welcome para. 221 of the draft revised VGL, which states that in the context of a selective distribution system, the criteria imposed by suppliers in relation to online sales no longer have to be overall equivalent to the criteria imposed on brick-and-mortar shops, as these channels are inherently different in nature.

We support this clarification (as well as the recognition that the difference should not have as object to prevent sales on a given distribution channel), as this will help to better support specific services offered by brick & mortar and hybrid retailers.

- **We support para. 221 and the end of the equivalence principle in selective distribution system, provided that the difference of criteria is not meant to prevent sales in a given distribution channel**

b. Clarifications brought in para. 134 of draft revised VGL

We welcome the clarifications brought in section 4.6.2 of the draft revised VGL in relation to the application of the *Metro criteria* and in particular on admissible qualitative criteria.

We recommend to add to para. 134 further clarifications about the concept of 'aura of luxury', to delineate it more precisely.

We also welcome the explicit recognition in para. 134 that communication of the qualitative criteria to potential retailers increase the likelihood to meet the *Metro* criteria, but suggest to strengthen it: **a refusal to communicate the criteria (to be part of the SDS) upon request from a retailer should lead to a presumption of non-conformity with the *Metro* criteria**.

- **Add clarifications to delineate the concept of 'aura of luxury'**
- **Strengthen para. 134 VGL about communication of the metro criteria to potential resellers by making a refusal to communicate them a presumption of non-conformity.**

c. Competition issues raised by selective distribution combined with dual distribution

While selective distribution in itself does not raise competition concerns if the *Metro* criteria are met, competition concerns actually may arise in practice when selective distribution is combined with dual distribution. In such cases, it is not uncommon for supplier to tailor its selective distribution system to weaken the market position of the retailers in competition with its own direct sales channel.

In this specific setting, a question arises as to whether the selective distribution system can be justified at all. The concerns will be all the more serious when the supplier does not apply similar criteria for its own direct sales channels than the one imposed on members of the selective distribution system.

We invite the Commission to add specific provisions about this aspect, to avoid the abuse by dual distribution suppliers of Selective Distribution Systems as a means to favour unduly their own direct sales channel. Such provisions should also consider cases where the dual distribution supplier refuses to grant access to part of its catalogue to the retailer members of the selective distribution system, or do not have access to the same discounts/extra-services as those offered by the dual distribution supplier through its direct sales channels.

- **Include specific provisions in the VGL about the competition risks raised by selective distribution combined with dual distribution**
- **Clarify in the VGL that, when such a combination exists, suppliers should apply similar qualitative criteria to their own direct distribution channel.**

5. Private label products – Article 2(1) draft revised VBER and para. 85 draft revised VGL

We welcome the explicit recognition in para. 85 of the draft revised VBER that retailers of private label products (which were sub-contracted for their production) shall benefit from the VBER exemption when also distributing branded products.

However, we consider that both 'sub-contracted' and 'in-house' private label products should fall under the VBER exemption.

- **We welcome the recognition that retailers selling 'sub-contracted' private label products benefit from the VBER exemption**
- **Amend para. 85 of the draft revised VGL to include 'in-house' private label products in the scope of the VBER exemption.**

6. Agency agreements

We welcome the additional clarifications brought by the draft revised VGL (paras. 34-38) on the conditions for the application of the provisions on agency agreements to hybrid roles (when an agent is at the same time an independent distributor). In particular, we welcome the clarification that, though such settings carry some risks, they are not falling *per se* out of the scope of the VBER.

To bring the necessary clarity and assess each situation in practice, we call on the Commission to further include guidance as to when a retailer can act as an agent for a supplier although offering similar products (i.e. belonging to the same product market) independently (i.e. in its own name and on its own account). As an example, under which conditions could an electronics retailer offer Apple iPhones as an agent, while selling Samsung mobile phones independently, etc.

➔ **Add further guidance in paras. 34-38 on hybrid agents as to the applicable conditions for a retailer to act as an agent for a supplier, while selling independently similar products.**

7. The case of associations of retailers with mixed vertical and horizontal agreements (para. 66 draft revised VGL)

Groups of independent retailers, by their nature, are organised through a set of both horizontal and vertical agreements which are inter-related, meaning that their legal treatment under competition law is different (and more complex) than their integrated competitors. For instance, groups of independent retailers are bound by horizontal agreements when pooling their purchasing capacity, whereby the central office of the group responsible for the purchase has in many cases developed into a separate legal entity with a vertical relationship to the member-retailers as regards the supply of goods.

When faced with such mixed situations, the European Commission's Guidelines on horizontal agreements require assessing the horizontal agreements first, and if the assessment leads to the conclusion that these agreements are acceptable, a complementary evaluation must be carried-out to assess the group's vertical agreements.

This dual examination represents a dual burden for groups of independent retailers, compared to their integrated competitors (limiting their agility to operate on the market), while it may lead to misinterpretations of the true nature of an agreement and its effects. Given that the Vertical Guidelines themselves recognise that "*vertical restraints are generally less harmful than horizontal restraints and may provide substantial scope for efficiencies*", we consider that **joint purchasing agreements between independent retailers within the context of a group of independent retailers should always be considered pro-competitive if they fulfil the conditions set out in the Horizontal Guidelines**, and there should therefore be no need to check these agreements against the Vertical Guidelines, or at the very least, the Vertical Guidelines should recognise that such a presumption of legality applies for joint purchasing agreements within groups of independent retailers when these already meet the conditions of the Horizontal Guidelines.

➔ **For associations of retailers with a mix of vertical and horizontal agreements: clearly provide in the Vertical Guidelines that the conditions of the VBER are presumed to be fulfilled for joint purchasing agreements if these already fulfil the conditions of the Horizontal Guidelines.**

8. Resale Price Maintenance

a) Minimum Advertised Prices (para. 174 draft VGL)

Para. 174 of the draft revised VGL introduces for the first time provisions to clarify the status of Minimum Advertised Prices (MAPs) policies. While we welcome the clarification of the status of MAPs in the Vertical Guidelines, we have serious concerns as to how the provision is formulated, as it suggests that some forms of MAPs (particularly those which are not accompanied by sanctions against

retailers charging lower prices) may be admissible or may not amount to RPM. This proposed wording has already been considered by representatives of large branded product manufacturers as a new possibility for product manufacturers to dictate prices in retail shops[1].

This is all the more surprising as the European Commission always stood firm in its position that MAPs amount to RPM between suppliers and retailers and should therefore be considered as a hardcore restriction (e. g. COMP/37.975 PO/Yamaha, see in particular para 124 to 127).

Indeed, as the European Commission explained publicly: "*While MAPs leave the final decision on what price a retailer charges to the retailer, they aim at influencing retail prices by limiting the possibility of retailers to inform potential customers of available discounts.* ***A key incentive for price competition between retailers is removed****. Retailers will not be able to attract additional consumers by advertising lower prices. Advertising is an important element of the competitive process as it increases the information available for consumers. Retailers will frequently have no incentive to deviate from the minimum advertised price. Therefore,* ***MAPs will likely amount to a restriction of competition within the meaning of Article 101(1) without any credible efficiency defense under Article 101(3)****"*[2].

In addition to the Commission's own reservations above, the idea that a retailer would be able to deviate his sales price from the advertised price is illusory in view of the Unfair Commercial Practice Directive 2005/29/EC (Article 6(1)(d)), as well the EU Price Indication Directive (which states that prices on shelves as well as in online shops also constitute advertising prices). A differentiation between advertising prices and retail prices is therefore hardly possible, also in light of the various forms of price labelling used in the retail sector.

Any supplier-driven binding requirement on any 'advertising price' therefore represents a binding requirement on retail prices, amounting to RPM, as it will prohibit in practice the possibility to display lower prices in (offline/online) shops. Indeed, this will remove any interest for the retailer to charge lower prices for branded articles given the impossibility to advertise and display different prices even in shops. Price advertising with branded articles will become less frequent, or the higher minimum advertising prices imposed by the supplier will also lead to higher shelf prices. It will be detrimental not only to consumers, but also to SME retailers, because the MAPs would in practice correspond to the new shelf prices of the strongest retailers as their permanent low price (as they can afford it to attract consumers) – while SME retailers (who cannot afford to have permanently the same practice) would lose the possibility to compete with occasional price promotions below the MAPs, therefore losing the possibility to challenge the strongest retailers.

Given the removal of the most important incentive for price competition, and of the possibility in practice of price competition, it must be clear that **MAPs will always amount to RPM between suppliers and retailers**, and therefore constitute a hardcore restriction. MAPs, like other forms of RPM, should therefore only be admissible on a case by case basis if they meet the conditions of Article 101(3).

We therefore invite the European Commission to amend the wording of para. 174 of the draft revised VGL, to leave no doubt about the possible interpretation. To this end we suggest to replace the text "*may also amount to RPM*" by "*are a form of RPM*".

1 See article from Lebensmittel Zeitung of 20.08.2021
2 See European Commission reply of 25.11.2015 to Petition No 2383/2014 by MEP Norbert Perstinger

➔ **In para. 174: clarify the wording to avoid any interpretation that may suggest that MAPs may not always be considered as RPM. Replace "*may amount to RPM*", by "*are a form of RPM*".**

b) Short term low price campaign (para. 182)

Para. 182 of the draft revised VGL lists some recognised examples where RPM leads to efficiencies that fulfil the conditions for an exemption under Article 101(3).

Although the example provided under para. 182(b) on short-term low-price campaigns was already included in the existing guidelines, the wording has been slightly altered:

- First of all, the proposed new wording has been split into two sentences. The first sentence seems to turn the existing exemption into a general exemption (independently of the type of distribution), since the second sentence states that such price fixing campaigns *"in particular"* may be necessary in uniform-format distribution systems. This rewording in two separate sentences, together with the introduction of the words 'in particular' in the second sentence, seems to suggest that the possibility would be available to all suppliers and product manufacturers – whatever the format of their distribution system. Such a change would inevitably be seen as an encouragement for suppliers /product manufacturers to more and more fix resale prices at retail level for regular campaigns across all their distribution channels. This would undermine price competition at retail level as well as the whole section 6.1.1 on RPM.
- Secondly, para. 182(b) seems to assume that the pro-competitive effects (in a more generic exemption for all distribution formats – see above) will always materialise for any distribution format. We strongly challenge such an assertion. **Indeed, the pro-competitive benefits arising from the existing exemption to RPM for short-term price promotion campaigns under para. 225 of the current VGL was limited to a very specific case: franchise systems and other similar distribution systems applying a uniform distribution format** (**such as groups of independent retailers operating under one brand).** This narrow exemption is justified by the very specific nature of these uniform distribution models operating under one brand, which, without such limited exemption, would not be able to promote exclusively within their membership, such price promotion campaigns (despite the fact that their mere existence is dependent on the possibility to have joint activities and a joint communication towards consumers under the common brand name). The pro-competitive benefits, in particular for consumers, only materialise because of the narrow distribution format – due to its specificity, as the potential reduction of intra-brand competition would be limited to the group/franchise itself. **In a wider context (such as a generic exemption for any kind of distribution format), the pro-competitive benefits are unlikely to always materialise**.
- Thirdly, para. 182(b) refers more openly to distribution systems in which suppliers apply a uniform distribution format, only using franchises as an example (by opposition to the existing VGL para. 225 which highlighted more directly the franchise systems). While we welcome this minor rewording and the more open recognition of other uniform distribution formats, we consider that it still needs to be improved to **better recognise the business model of groups of independent retailers operating under one brand**. Indeed, this widespread business model (providing more than 6.6 million direct jobs in the EU and representing a substantial share of

the retail market) should be more widely recognised in the VGL/VBER, and be put in this new para. 182(b) on an equal footing with other similar uniform formats such as franchises (which benefit from dedicated sections and provisions in the VGL).

Therefore, we have concerns about some of the proposed changes to the 'short-term low price campaigns' exemption introduced by para. 182(b) of the draft revised VGL, while we believe that the uniform-business model of groups of independent retailers could be better recognised. We therefore invite the European Commission to restore the original scope of the exemption used under para. 225 of the existing Vertical Guidelines (limited to uniform distribution formats) and include an equal recognition of groups of independent retailers.

Suggestion of wording for para 182(b) VGL:

Fixed resale prices, and not just maximum resale prices, may be necessary to organise ***in a distribution system applying a uniform distribution format, such as franchises or groups of independent retailers operating under a common brand***, a coordinated short-term low price campaign (of 2 to 6 weeks in most cases), which will also benefit consumers. ~~In particular, they may be necessary to organise such a campaign in a distribution system in which the supplier applies a uniform distribution format, such as a franchise system.~~ Given its temporary character, the imposition of fixed retail prices may be considered on balance pro-competitive.

Should the European Commission insist on opening this specific exemption to other contexts and (non-uniform) distribution formats, stronger safeguards would be needed. In such cases, it would be essential to:

- Preserve the legal certainty of coordinated price promotion campaigns within distribution systems applying a uniform distribution format (such as franchises or groups of independent retailers operating under one brand).
- Clarify that in other distribution contexts (i.e. outside of the specific uniform distribution format mentioned above), the exemption may apply in specific circumstances only, with the need for a case by case demonstration of the pro-competitive and consumer benefits Furthermore, as retailers accepting the terms imposed on them by product manufacturers/suppliers would be at risk of breaching competition law, specific guidance would be needed to help retailers assess (and possibly refute) the 'efficiencies' asserted by the suppliers.

In para. 182 (b) draft revised VGL:

- ➔ **Restore the original scope of the exemption under existing para. 225 VGL, as the pro-competitive benefits, including consumer benefits, exclusively materialize with a high degree of certainty in the specific context of distribution systems applying a uniform distribution format, such as groups of independent retailers operating under one brand and franchises.**
- ➔ **Ensure that groups of independent retailers' business model is recognised equally as franchises in para 182(b) by adding a direct reference to their business model next to the reference to franchises.**

➔ **If despite the concerns expressed the Commission opens the 'short-term price campaigns' exemption to all kinds of distribution, stronger safeguards are needed to avoid use/abuse by suppliers in non-uniform distribution formats, while preserving the legal certainty for distribution systems applying a uniform distribution format such as franchises and groups of independent retailers operating under one brand**. Such safeguards should make clear that the pro-competitive benefits may occur only in specific circumstances/individual cases. Guidance should be provided as to how retailers can assess the efficiencies argued by suppliers.

c) RPM and pre-sale services - para. 182(c)

Even though this paragraph is almost identical as under the existing VGL, we would like to raise that RPM is not particularly suitable for preventing the challenges of free riding. It does not reward special services provided by certain traders, but presses all traders into a uniform price corset regardless of their individual services. This may even allow potential free riders to improve their margins because of their lower costs. This provision may also be abused, as it can be used by product manufacturers/suppliers to present large parts of their assortments as 'complicated' in order to introduce wide price fixing practices to improve their margins at the expense of consumers. Deletion of this paragraph should be considered, or at least stronger safeguards introduced.

d) Benefits of RPM within a group of independent retailers operating under one brand on their joint internet platform

As pointed out by the Commission Staff Working Document on the evaluation of the VBER, the fact that the VBER considers RPM as a hard-core restriction has led to RPM being viewed as a 'per se' infringement of competition law. The uncertainty around the possibility to resort legally to RPM and difficulty to prove that it may satisfy the conditions for an exemption under Article 101(3) TFEU, in combination with the high investments that are necessary to develop an efficient multichannel retail service, means that groups of independent retailers operating under one brand have stayed away from using intra-group RPM for their joint online operations. The result is the impossibility for groups of independent retailers to establish an efficient, joint internet platform under the group name which enables them to compete effectively with integrated retailers, without making radical changes to their specific cooperative business model, thereby putting them at a competitive disadvantage.

Indeed, in the absence of a recognised possibility to use intra-group RPM for the exclusive purpose of establishing an efficient joint internet platform - unless national authorities explicitly recognise the pro-competitive effects of curbing individual retailers' prices -, groups of independent retailers:

- cannot have a unified price policy on their joint online platform without radically altering their specific cooperative business model – something that integrated chains and direct selling manufacturers all put in place without restraints;
- can, as a result, not develop a uniform brand image online through their joint online platform without radically altering their specific cooperative business model- a problem that integrated chains and direct selling manufacturers do not face;
- can, as a result, not develop a joint online service with an equivalent level of efficiency to those of integrated chains and direct selling manufacturers;
- face, due to this absence of a consistent pricing strategy on the joint online platform (unless radically altering their specific cooperative business model), a drastically reduced non-paid

search ranking (e.g. in Google because search engines do not recognise their content as unique and so the combined purchases from the independent retailers belonging to the same group are not used to determine the search ranking – a problem that integrated chains do not face);
- find it very difficult to feature on price comparison tools because without sales data aggregation based on a common price on the joint online platform, prices cannot be easily compared – a problem that integrated chains and direct selling manufacturers do not face, and which strongly distorts online retail markets given the importance of price comparison tools to be competitive in online retail markets.

Previously, independent retail groups were able to successfully compete on the retail market without intra-group RPM because most shopping entailed visiting exclusively a local physical store. Brand identity was not undermined by operating with different prices across different and separate locations. However, the growth and importance of internet retailing alongside physical store retailing means that **competition is now focused on a unified online retail proposition where online brand identity relies on the consistency of a single price proposition online**. In this new era of omni-channel retailing, it is impossible for independent retailers' groups operating under one brand name to compete on effective terms online with integrated retail groups in the absence of a recognised possibility to establish a joint internet platform under the brand name with a single price on that specific channel.

Intra-group RPM for the exclusive purpose of establishing and operating a joint internet platform under the group's brand name provides for a level playing field, so spurring competition, aiding efficiency, and benefiting consumers through price assurance (reducing search costs within the group) **and price transparency** (allowing consumers to make more informed choices across groups). Intra-group RPM is fundamentally different in nature to inter-group RPM (e.g. manufacturer to retailer) – see in this sense the Dobson Report "Levelling the Playing-field 2.0" – as, in the context of multichannel retail, it allows to offer consumers low prices and improve the competitive positioning of groups of independent retailers (price-wise) vs competitors, and therefore boost inter-brand competition through increased transparency and price competition. The VBER has so far failed to recognise this critical distinction.

To tackle this issue, a specific provision and/or example needs to be introduced in the VBER and/or VGL, recognising the possibility for a group of cooperative independent retailers operating under one brand to use intra-group RPM for the exclusive purpose of effectively competing online through a joint internet platform, and with clear safeguards to maintain intra-brand competition and deliver strong consumer benefits, and therefore satisfy the conditions under 101(3). Given the horizontal aspects involved, a clear provision would also be needed in the Horizontal Guidelines to ensure coherence and legal certainty.

The Dobson Report "Levelling the Playing-field 2.0" shows that intra-group RPM for online sales through a joint internet platform is not creating any strong issues in terms of competition on the market (by opposition to 'external' RPM) as it simply allows groups of independent retailers operating under one brand to give rise to the same outcomes online as if they were an integrated retail chain, whilst respecting their business model. Such a narrowly defined legal recognition would allow with a high degree of legal certainty to set up an efficient joint online platform for a group of cooperative independent retailers operating under one brand, which is consistent with their (cooperative) business model and enable them to compete online on equal grounds with large integrated chains, pure players,

direct selling manufacturers and the new giants of e-commerce such as Amazon, Alibaba, etc. This would result in increased inter-brand competition online**.**

We therefore invite the European Commission to discuss concretely how such a joint internet platform (using intra-group RPM) could be recognised and given legal certainty, and upon which narrow conditions (e.g. a clear definition of groups of cooperative independent retailers, freedom for member retailers to join or not the platform and to have their own separate online shop with their own prices, absence of competition on the joint platform between the central office of the group and the member retailers - as incompatible with the group business model, prevention of price discussion between the central office of the group and the member retailers on the pricing on the joint internet platform, etc.).

We invite the Commission to discuss with Independent Retail Europe in details the following possibility as part of the review of the VBER/VGL and Horizontal guidelines:

- ➔ **How to allow and recognise in the VBER/VGL and HGL the possibility for a group of (cooperative) independent retailers operating publicly under one brand to effectively compete online with a single price on their joint platform**
- ➔ **Which conditions should apply to preserve inter-brand and intra-brand competition and maximise consumer benefits, and therefor satisfy the conditions of Article 101(3).**

Original version: English – Brussels, 16 September 2021

Established in 1963, ***Independent Retail Europe*** *(formerly UGAL – the Union of groups of independent retailers of Europe) is the European association that acts as an umbrella organisation for groups of independent retailers in the food and non-food sectors.*

Independent Retail Europe represents retail groups characterised by the provision of a support network to independent SME retail entrepreneurs; joint purchasing of goods and services to attain efficiencies and economies of scale, as well as respect for the independent character of the individual retailer.
Our members are groups of independent retailers, associations representing them as well as wider service organizations built to support independent retailers.

Independent Retail Europe represents 24 groups and their 386.602 independent retailers, who manage more than 753.000 sales outlets, with a combined retail turnover of more than 944 billion euros and generating a combined wholesale turnover of 297 billion euros. This represents a total employment of more than 6.603.270 persons.

Find more information on our website, on Twitter, and on LinkedIn.