ETRMA[1] Response to the consultation in the impact assessment phase of the VBER and the Vertical Guidelines

Brussels , September 17 2021

ETRMA welcomes the opportunity to comment on the proposed future Vertical Block Exemption Regulation ("**Proposed VBER**") and the accompanying Vertical Guidelines ("**Proposed VG**").

During the impact assessment phase of the review of the current VBER and VG, ETRMA pointed out that the exemption of **dual distribution** scenarios by the future VBER is crucial in assessing the extent to which the future VBER may still effectively provide legal certainty to and reduce costs of manufacturers of tyres and general rubber goods (GRG) when entering into agreements in the supply chain and when setting-up distribution networks.

ETRMA therefore in general welcomes the Proposed VBER to the extent that it upholds the exemtion for dual distribution by manufacturers and extends it to dual distribution by wholesalers and importers.

However, ETRMA wishes to make a number of observations regarding the Proposed VBER and Proposed VG and notably the introduction of a second aggregate market share threshold at retail level of 10% for vertical agreements entered into a supplier that engages in dual distribution. The Proposed VBER provides that, if that second market share threshold is exceeded, the exemption does not apply to any information exchanges between the parties to the vertical agreement.

First, the introduction of this second threshold at retail level would significantly increase complexity, costs and legal uncertainty, that may affect tyre and GRG manufacturers more than certain other industries, in view of the multiple customer relationships a tyre or GRG manufacturer typically has.

Defining relevant markets at retail level leads to significant uncertainty : should the tyre and GRG manufacturers follow the logic of the 'local catchment areas' that is typically applied by national competition authorities to assess the impact on competition of concentrations ? If so, this is likely to prevent these manufacturers from efficiently organising their supply chain and distribution arrangements at pan-European and potentially even at national level.

Moreover, how should the market shares then be determined in these local catchment areas ? In the tyre and GRG industry, this would require the supplier to request a substantial amount of data from the buyer or to request the buyer to take on the onus of determining the relevant retail market and its own market share on such market. In the tyre and GRG industry, it is simply not realistic to request this from a buyer active at the retail level.

[1] *The European Tyre & Rubber Manufacturers Association (ETRMA) represents nearly 4.400 companies in the EU, directly employing about 370.000 people. The global sales of ETRMA's tyre corporate members represent 70% of total global sales and 7 out of 10 world leaders in the global tyre sector are ETRMA Members. ETRMA's membership include the following tyre manufacturers: APOLLO VREDESTEIN, BRIDGESTONE EUROPE, BRISA, COOPER TIRES, CONTINENTAL, GOODYEAR, HANKOOK, MARANGONI, MICHELIN, NOKIAN TYRES, PIRELLI, PROMETEON, SUMITOMO RUBBER INDUSTRIES AND TRELLEBORG WHEEL SYSTEMS. Furthermore, members include Associations in the following countries: Belgium, Finland, France, Germany, Hungary, Italy, the Netherlands, Poland, Spain and the UK. ETRMA members have a strong manufacturing, as well as Research & Development presence within the EU and candidate countries, with 93 tyre-producing plants and 17 R&D centres.*

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Clearly, the introduction of a market share at retail level adds a level of complexiy and requires additional fact-finding and number-crunching exercises, to an extent that is not justified by the underlying horizontal concerns that these information exchanges may soften competition in the market or facilitate collusion.

Second, if any additional threshold at retail level is viewed as essential by the Commission, it should be set at a higher level, to ensure that the carve-out of the information exchanges from the exemption only applies to agreements which – although being vertical in nature – might still give rise to horizontal concerns which are not negligible. Indeed, the threshold of 10% does not add any legal certainty on top off the De Minimis Notice. The 10% is even more severe than what is currently considered as a safe harbour for commercialisation agreements between competitors. Indeed, paragraph 240 of the Horizontal Guidelines advances that it is unlikely that commercialisation agreements between competitors would generate restrictive effects and that they would in any event likely fulfil the conditions of Article 101(3) TFEU in case of a combined market share not exceeding 15%. The tyre industry therefore submits that the exemption should only be excluded for information exchanges in dual distribution scenarios in case the parties to the agreement have at least a combined market share at retail level in excess of 30%.

Third, the tyre and GRG industry is in any event of the view that the reference to "*any exchange of information, which has to be assessed under the rules applicable to horizontal agreements*" in the Proposed VBER should be replaced with "*any exchange of information which is incompatible with the principles set forth in the Horizontal Guidelines dealing with the assessment of the exchange of information*", to avoid inconsistencies. Moreover, the tyre industry calls upon the Commission to include additional guidance in the future horizontal guidelines specifically on information exchanges in dual distribution set-ups.

Finally, where the combined market share threshold at retail level is above 10%, paragraph 90(d) of the Proposed VG makes the availability of the VBER for the entire agreement conditional upon the exchange of information being compatible with the rules applicable to horizontal agreements. This should be amended to ensure alignment with the text of Article 2(5) of the Proposed VBER which does not remove the benefit of the exemption for the entire agreement, but just carves out the information exchange from the scope of the exemption.