Reflections on the Draft Revised Vertical Block Exemption Regulation and Vertical Guidelines

1. By way of follow-up to the webinar held by Van Bael & Bellis on 15 September 2021 concerning the draft revised Vertical Block Exemption Regulation ("Draft VBER") and draft revised Guidelines on Vertical Restraints ("Draft VGL"), this paper identifies a number of issues which we would request the Commission to consider in finalising the revised texts, taking into account their stated goals.[1]

2. We appreciate the thoroughness and transparency of the review process conducted thus far, which has resulted in numerous positive proposed modifications to the current rules.[2] Nonetheless, there are a number of areas where we consider that either further reflection, or further clarification, is warranted.

3. We start by identifying two overarching issues which are relevant to various aspects of the proposals, before making specific comments in respect of four particular topics: dual distribution, online sales restrictions, RPM and agency.

1. INTRODUCTORY COMMENTS

4. There are two overarching issues which would merit further consideration in relation to the proposed rules: (i) the approach to inter-brand hardcore restrictions, and (ii) the need to achieve legal certainty.

5. **Intra-brand hardcore restrictions.** The restrictions designated as hardcore in Article 4 of the Draft VBER only directly affect intra-brand competition and not inter-brand competition, which significantly limits their ability to cause competitive harm: as the Draft VGL acknowledge, "*the loss of intra-brand competition can only be problematic if inter-brand competition is limited*" (para. 138). As a result of the modest market share ceiling of 30%, the block exemption may only apply in situations where there is no obvious indication that inter-brand competition is limited. Consequently, one would expect the Commission to apply a light touch in defining intra-brand hardcore restrictions under the Draft VBER.

6. Furthermore, the Commission and the national competition authorities ("NCAs") have the power to withdraw the benefit of the benefit of the block exemption in cases where, on an individual assessment, an agreement is found to appreciably restrict competition and not to meet the conditions of Article 101(3) of the Treaty on the Functioning of the European Union ("TFEU"), despite the relevant market shares not exceeding this modest ceiling. Thus, competition authorities have effective powers in any case where the general presumptions described above prove to be

---

[1] The views expressed in this document are exclusively those of Van Bael & Bellis developed independently of the webinar and should not be attributed to any participant in the webinar.

[2] Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to vertical agreements and concerted practices ("Current VBER") and the Commission's Guidelines on Vertical Restraints ("Current VGL").

incorrect based on specific facts, and a restriction of intra-brand competition can be shown to cause significant harm to competition.

7. Admittedly, the Commission is bound to follow the case law of the European Courts, which supports treating passive sales restrictions, retail price maintenance and outright internet sales bans as hardcore restrictions. However, beyond this, the Commission faces no such judicially imposed constraints, and yet it has chosen to apply a conservative approach, apparently declining to limit the scope of certain hardcore restrictions, particularly in the online sphere as further discussed in section 3. below, seemingly on the grounds that these hardcore restrictions might, in some instances, restrict intra-brand competition (despite what would necessarily be the no-more-than modest market shares of the parties). It is submitted that this approach is not only disproportionate to the extent of the risk to competition but may itself limit inter-brand competition. This is because suppliers use vertical restraints to optimize the distribution of their products and thereby compete more effectively with other brands. We would ask the Commission to take this into consideration in considering the more specific requests made in section 3. below. [3]

8. **Legal certainty.** The general purpose of a block exemption is to provide legal certainty to companies by enabling them to determine whether they benefit from the legal safe harbour of the block exemption without having to carry out complex and costly economic and legal analyses. However, this purpose can only be achieved if the block exemption clearly identifies and delimits the scope of the hardcore restrictions that prevent its application.

9. To a greater extent than under the current rules, the Commission now qualifies statements that specific restrictions, particularly in the online sphere, do not constitute hardcore restrictions by reference to vague concepts, most frequently the proviso that the restrictions in question must not have "*as their object to prevent the buyers or their customers from effectively using the internet for the purpose of selling their goods or services*". Clearly, what restricts *effective* use will give rise to interminable debates and will fuel litigation, and is liable to divergent interpretation by the NCAs. We consider that the proposed "test" to determine in practice whether the effective use of the internet has been prevented would not be workable and would not provide any greater clarity or predictability (as discussed further in section 3. below). The resulting uncertainty would undermine one of the key tenets of a block exemption, i.e., providing clear and predictable rules to market participants.

10. This tendency is taken to its extreme in the case of dual distribution, in the context of which the block exemption does not apply to agreements which have "*as their object to restrict competition*". It is submitted that this sweeping exclusion is inconsistent with the purpose of a block exemption, which is to identify the specific restrictions which are considered to have such an object.

---

[3] We would contrast here the approach advocated in the Draft VGL to active sales restrictions and online sales restrictions respectively. Simply put, with respect to the former, the Draft VGL suggest that the block exemption may be withdrawn if otherwise exempted active sales restrictions are considered to have restrictive effects (in situations where exclusivity is shared between too many distributors in a territory or because only some distributors appointed elsewhere are restricted from actively selling into an exclusive territory – see paragraphs 107 & 205), whereas with respect to dual pricing, online advertising and (apparently) platform restrictions, the Draft VGL indicate that these may become hardcore restrictions if they should be considered to have restrictive effects. Taking into account (i) the low potential for these types of intra-brand online restrictions to cause real harm to competition online selling (ii) and the need for legal certainty (discussed below), we consider the former is the more appropriate approach.

Consequently, we would urge the Commission to increase legal certainty by clearly defining hardcore restrictions and avoiding abstract qualifications.

2. DUAL DISTRIBUTION SYSTEMS

11. The Current VBER covers (non-reciprocal) vertical agreements concluded within dual distribution systems without any specific limitations,[4] provided that the parties' market shares satisfy the conditions of Article 3(1) VBER. We consider this to be an appropriate rule, which is also fully consistent with enforcement experience.

12. In contrast, the Draft VBER proposed rules would apply a much more restrictive approach by:

- Exempting (non-reciprocal) vertical agreements in dual distribution systems in their entirety, including information exchange between the parties, only if the parties' combined market share at retail level does not exceed 10% (Draft VBER, Article 2(4))[5];
- Providing for a more limited exemption where the parties' aggregate market share at retail level exceeds 10% but their individual shares do not exceed 30% (apparently in the relevant sale and purchase markets[6]), in which case the block exemption would apply to (non-reciprocal) vertical agreements, but not to exchanges of information between the parties, which would have to be separately self-assessed under Article 101 TFEU (Draft VBER, Article 2(5)); and
- As noted above, precluding the availability of the safe harbour for vertical agreements in dual distribution systems (regardless of the parties' market share at retail level) if the agreement, including the information exchange between the parties, is considered to restrict competition by object (Draft VBER, Article 2(6)).

13. To justify these much stricter proposed rules, the Commission points to "*the growth of online sales, which has facilitated direct sales by suppliers, either through their own web-shops or via online marketplaces*" and the resulting apprehension that "*the current exception for dual distribution is likely to exempt vertical agreements where possible horizontal concerns are no longer negligible*" (Revision of the Block Exemption Regulation – Explanatory Note, p. 2).

14. However, the Commission does not provide any explanation of the nature and scope of these alleged horizontal competition law concerns and does not point to any empirical evidence of increased horizontal coordination. Moreover, the above statements cannot explain why the much more prescriptive approach to information exchange would be necessary or justified to address horizontal competition law concerns.

---

4 Other than the conditions of Article 2(4) of the Current VBER.

5 It is not clear to us why there is a difference in treatment between situations where a supplier and its reseller both operate at the retail level (which may be covered by the block exemption subject to the limitations set out above) and situations where a supplier and its reseller both operate at the wholesale level (which would be excluded altogether from the benefit of the block exemption).

6 We recommend that it should be clarified in the final version of the VBER or the VGL whether this interpretation is correct.

15. The proposed prescriptive rules on information sharing are not justified because they would deny the benefit of the block exemption to information exchanges that are unambiguously pro-competitive.

16. As the Commission suggests, dual distribution systems have, in recent years, grown in scale with the rapid development of direct-to-consumer online sales. However, they are in no way a recent phenomenon: in fact, for many years numerous brands have distributed their products through both directly owned stores and third-party distributors and retailers. This is because dual distribution allows suppliers of (in particular) branded products to promote their products in complementary environments which reflect the heterogenous preferences of their consumers: through an own-retail environment which is directly and exclusively associated with the supplier's brand and products, and through third-party retail channels which are typically multi-brand environments. Dual distribution therefore clearly constitutes a legitimate practice that expands consumer choice.

17. In practice, any successful and effective – vertical – relationship between a supplier and its retailers requires the sharing of information about sales, products, marketing campaigns, market trends, and consumer preferences on a continuous basis, including in a dual distribution context. Without this information from its retailers, a supplier simply cannot provide the products that meet the needs of diverse consumers in an efficient manner. Thus, these – vertical – information exchanges are necessary to create the efficiencies in the vertical supplier/retailer relationship that the Commission, by exempting vertical agreements in the context of dual distribution, acknowledges.

18. Yet, as soon as the parties' market share at retail level exceeds 10%, under the Draft VBER all sharing of information would no longer benefit from the block exemption. Instead, any exchange of information would have to be separately self-assessed under Article 101 TFEU. The Commission has not provided any reasons – nor can we think of any – that would justify such an approach with respect to the clearly identifiable vertical information exchanges between a supplier and a retailer.

19. The proposed rules are also not necessary. This is so because the Current VBER does not apply to any (horizontal) collusive activity between a supplier and its distributors that might take place on the retail market. As the Current VBER only applies to vertical agreements and only exempts vertical restraints, only the vertical aspects of supplier/distributor agreements, and only vertical information exchanges (in particular, information related to the sales of the supplier's own products provided by the distributor) benefit from the Current VBER. By contrast, information provided by the supplier about its own future retail strategies is not exempt as it is not part of the vertical relationship as it does not aim at facilitating or improving the distribution of the supplier's product. As a result, NCAs have not been prevented by the current rules from investigating what appear to be the rare examples of (horizontal) collusive activity between a supplier and its distributors on the retail market and from finding an infringement of Article 101 TFEU.[7] There is, therefore, no need to

[7] *See Hugo Boss/Kaufmann & Hugo Boss/Ginsborg*, Decisions of the Danish Competition Authority of 24 June 2020; confirmed, Competition Appeal Tribunal, Case No. KL-1-2020, Axel Kaufmann v. Konkurrencerådet, & Case No. KL-3-2020, Hugo Boss Nordic, v. Konkurrencerådet, Juni 23, 2021. Similarly, when the UK was still part of the EU, the CMA found an infringement of the UK equivalent of Article 101 TFEU where the supplier of posters and frames, which was also engaged in retail sales of its own products, and one of its retailers colluded on the sale of posters and frames on Amazon and other websites. CMA, Case 50223, Online sales of posters and frames, August 12, 2016.

change the current rules to empower enforcement against conduct that has until now been exempt.[8]

20. Additionally, regardless of the parties' market share at retail level, if the exchange of information is considered to result in a restriction of competition by object, the entire agreement would lose the benefit of the block exemption. As noted above, the huge uncertainty that comes with self-assessing whether an agreement could be considered to include an undefined object restriction is not appropriate in the context of a block exemption whose aim is to provide certainty.

21. We also have the impression that the Commission may not appreciate the enormous burden that the envisaged self-assessment approach would create. What is at issue is not a specific contractual provision that the supplier would normally be able to analyse before including in a contract. Vertical information exchanges are a continuing and – for many suppliers – daily practice. Many different retailers are involved, which may share different types of information. As new products and services are developed, the nature of information to be shared may change quickly. Many suppliers will regularly experiment with new distribution strategies, thus adapting information sharing with retailers. Some retailers might agree with the supplier's competition law (self) assessment, while others might not, for a variety of reasons that may not be related to genuine competition law concerns. Self-assessment in this context is impractical. Internal, formalized rules will inevitably constrain legitimate conduct, and an ongoing review is not feasible. Inevitably, self-assessment would prove very burdensome and uncertain, increasing costs and hindering the supplier's efforts to better understand, and react to, consumer demand. Dual distribution would become a disadvantage for suppliers, despite its obvious pro-competitive benefits.

22. Furthermore, the Draft VGL do not provide any guidance on information exchange for the purpose of self-assessment. The Commission suggests that the Horizontal Guidelines "*could in the future provide further guidance on horizontal and vertical information exchanges in situations of dual distribution to further increase legal certainty for businesses*" (Revision of the Vertical Block Exemption Regulation – Explanatory Note, p. 3). We do not consider this to be an appropriate choice. The Horizontal Guidelines, which are also being reviewed, currently do not address information exchanges in dual distribution systems for a very good reason: the relationship between a supplier and a retailer remains fundamentally vertical, even in a dual distribution context, and this typically also applies when they exchange information.

23. In light of the above, we urge the Commission to reconsider the rules contained in its proposed Draft VBER with respect to dual distribution. In particular, we consider that the only sound policy choice is to maintain the current rules, to the extent that they exempt non-reciprocal vertical agreements between competing undertakings without any specific limitation.[9] Additionally, we would welcome the inclusion, in revised VGL, of clear guidance on information sharing in the

---

[8] It may in any event be questioned whether it is appropriate to exclude such conduct from the benefit of a block exemption given that (i) it concerns intra – and not inter – brand relationships between sales channels that are in any event complementary, and (ii) the market share threshold further limits the scope for any potential harm to competition as the brand would not have market power.

[9] We would welcome the currently proposed extension of the exemption to cover agreements where neither party is a manufacturer but one party operates at the importer or wholesaler level.

context of dual distribution which recognises the essential and pro-competitive nature of most such exchanges whilst identifying what constitutes a horizontal exchange.[10]

3. ONLINE SALES RESTRICTIONS

3.1 Dual pricing

24. We welcome the more flexible approach taken by the Commission in the Draft VGL on dual pricing. It is a sound approach, consistent with market developments, and would exempt practices that are likely to enhance, rather than restrict, competition. However, the test to be applied in order to assess the legitimacy of dual pricing is a cause for concern.

25. Paragraph 195 of the Draft VGL states that a difference in price between products intended for on and off-line resale "*should be related to the differences in the costs incurred in each channel by the distributors at retail level*", taking into account the "*different investments and costs incurred by a hybrid distributor*".

26. A distinction between what is permissible and what is not based on criteria related to the costs incurred by individual customers is not feasible. Contrary to what the Commission appears to assume, suppliers typically do not have access to this type of information from their customers. If requested, customers would likely decline to provide such information, as it may strengthen the bargaining power of suppliers by revealing their customers' profit margins in respect of the supplier's products. Thus, the supplier would have to make "best estimates", but with the serious risk of committing a hardcore infringement if it gets its estimates wrong.

27. In addition, this approach is inconsistent with the general standard advocated by the Commission in making this type of determination because it is customer-specific: reflecting the importance of legal certainty, the Commission appropriately states that "[t]*he assessment of whether a restriction is hardcore cannot depend on market-specific circumstances or the individual circumstances of one or specific customers*" (paragraph 188 of the Draft VGL, emphasis added).

28. Furthermore, even were cost information to be available and the above inconsistency of approach ignored, the dividing line between what would be likely to be considered an appropriate dual price and what would instead be considered a hardcore restriction would be highly uncertain in practice as it would apparently be a question of (unspecified) degree. The only guidance provided (in paragraph 105) is that "*where the wholesale price difference is entirely unrelated to the difference in costs incurred in each channel, such price difference is unlikely to bring about efficiency-enhancing effects*" and price differences that have as their object to "*prevent the effective use of the internet for the purposes of selling online*" constitute hardcore restrictions. What in practice would be considered to avoid these two points of reference is unknowable based on the Draft VGL.

---

[10] It may be legitimate for the Commission to express concerns in such guidance concerning (i) the communication by the supplier of information about its own future retail strategies and (ii) the communication by distributors of information concerning their future retail prices and future sales volumes.

29. Taking into account the above, we would submit that dual pricing should no longer be considered as a hardcore restriction, regardless of the level of the price difference. Since the adoption of the Current VBER and VGL, e-commerce has grown exponentially making it a commercial necessity for brands to embrace the online selling of their products. It would be irrational for a supplier to try to prevent its products from being sold online, as the scale of the resulting loss of profit and brand visibility would be highly likely to make such a strategy a commercial failure. In other words, e-commerce is successful because it offers opportunities to both distributors and suppliers. Furthermore, the extreme challenges faced by brick-and-mortar stores, and the obvious need they have for supplier support, together create a strong presumption that dual pricing has a legitimate goal of promoting the supplier's brand in offline retail outlets where consumers physically "meet" the supplier's products. In these circumstances, making it a hardcore restriction is not justified by an obvious concern and determining whether it is such a restriction on the basis of an impractical test will cause unnecessary legal uncertainty. Should dual pricing lead to anti-competitive effects in specific cases, the Commission and the NCAs will have the power to withdraw the benefit of the block exemption.

3.2 Online marketplaces

30. We welcome the extent to which, for the most part, the Draft VGL reflect the ruling handed down by the Court of Justice in *Coty* (C-230/16), in relation both to the application of the Draft VBER and to the principles applicable where self-assessment is required outside the scope of the Draft VBER. Paragraph 316 of the Draft VGL thus make clear that: "[a] *restriction of sales on online marketplaces in a vertical agreement is exempted by the VBER where the market shares of each of the supplier and the buyer do not exceed 30% and the vertical agreement does not include any hardcore restriction under the VBER or any excluded restriction under the VBER that cannot be severed from the rest of the vertical agreement*".

31. However, paragraph 317 of the Draft VGL qualifies this apparently clear rule by stating that a restriction on the use of marketplaces can "*generally*" be block exempted "*to the extent that it does not de facto prevent the effective use of the internet by the buyers or their customers to sell online*". A similar qualification is to be found in paragraph 194. No indication is provided of any hypothetical circumstances in which the Commission might consider such an effect to be a plausible scenario.

32. In contrast to this apparent equivocation, the *Coty* judgment is very clear: a marketplace ban should be covered by the block exemption without any qualification.[11] Furthermore, as in the case of dual pricing, this approach seems to contradict the Commission's clearly stated (and laudable) position that "[t]*he assessment of whether a restriction is hardcore cannot depend on market-specific circumstances or the individual circumstances of one or specific customers*" (Draft VGL, paragraph 188).

---

[11] In this respect, it is noteworthy that paragraph 65 of the *Coty* judgment, in explaining why a platform ban is not a hardcore restriction, cross-refers to paragraphs 52 and 53 (which state that – under an individual assessment – such a ban does not amount to a ban on internet sales as the retailer can sell through its own webshop), but not to paragraph 54 (which – in that same context – refers to the factual findings of the Preliminary Report on the E-commerce Sector Inquiry to the effect that 90% of retailers do sell through their own online stores). Thus, the fact that a lower proportion of retailers in a given market might sell through their own webshops would not be a reason to consider that the block exemption would not apply to a platform ban.

33. We therefore submit that the Commission should remove all qualifications on this issue in order to make it unequivocally clear that a ban on online marketplaces is block exempted.

3.3 Online advertising channels

34. We would question the position adopted by the Draft VGL that the prohibition of the use of any online advertising channel will necessarily constitute a hardcore restriction. Although *Coty* seems to suggest that online advertising restrictions might qualify as a hardcore restriction when combined with a platform ban (to the extent they prevent retailers from making their online stores known to customers), the ruling does not decide this point as it was not relevant to the facts of the case. Therefore, it is doubtful whether the Court would consider that a prohibition on distributors from bidding on a supplier's trade mark or brand name in online search advertising auctions would alone constitute such a major restriction on the ability to sell online as to constitute a hardcore restriction. Given that, at most, only a limited number of distributors could be expected to be able to have advertisements displayed on a search results page if they were to succeed in such an auction, it is doubtful that such a restriction would meet the Commission's own requirement that, in order to qualify as a hardcore restriction, an online restriction would have to *prevent the effective use of the internet for the purposes of selling online*".

35. As a general matter, the Draft VGL's proposed test to determine whether a particular restraint prevents the effective use of the internet for the purposes of selling online would not be workable in practice and would fail to provide any meaningful degree of legal certainty. In paragraph 188, the Draft VGL explain that a restraint would be found to prevent the effective use of the internet if it is "*capable of significantly diminishing the overall amount of online sales in the market".* But there is no way to apply this test in practice and in particular to anticipate how a competition authority or court would interpret the test at any future point in time.

36. The key shortcoming of the proposed "test" is that there is no reference framework against which "significantly diminished" sales could be determined. In other words, it is unclear what the counterfactual would be against which it would have to be determined whether sales have diminished, or even diminished significantly. Should it be past sales of the same product? This would not be helpful because market conditions may have changed, and there might simply be considerably less demand for an older generation product if more advanced products are available. The past is also not informative for newly introduced products. Alternatively, should the counterfactual be sales that would have occurred under "objectively reasonable" restrictions? Again, it must be apparent that, for market participants, this would not be workable in practice.

37. We therefore urge the Commission to include in revised VGL a standard that is reasonably clear and consistent with the VBER's policy goals. Such a test would simply be whether "the supplier's products are available online". In other words, as long as online sales occur (beyond a mere "sham presence"), restraints on online sales ought to be considered to benefit from the VBER.

4. RESALE PRICE MAINTENANCE

38. In this area, we welcome the clarification in paragraph 178 of the Draft VGL on the issue of fulfilment contracts and confirmation that a supplier may set the resale price where it has contracted directly

with the ultimate customer and such customer has waived its right to choose who will execute the agreement.

39. We would, however, urge the Commission to clarify the intention behind the wording of paragraph 174 of the Draft VGL, which appears to suggest that minimum advertised retail price ("MAP") policies may only in certain circumstances be considered to amount to RPM, in particular where the retailer's freedom to charge a price lower than the MAP, and to communicate that the final price may be lower than the MAP, is restricted.

40. This would signal a significant development in what, as far as we are aware, has generally been thought to be the hostile approach of EU competition law to MAPs. Although we do not believe that the Commission has addressed MAP policies in detail in its enforcement practice, the perception in Europe generally has been that MAP policies would be considered a form of RPM as they would be seen as interfering with the retailer's ability to effectively compete on price (through broadly promoting prices below the MAP). This perception was also reinforced by the CMA's recent (pre-Brexit) enforcement practice, which fined suppliers for the use of online MAP policies. Furthermore, the hostile approach of NCAs towards restrictions on the use of price comparison websites to promote retailers' online prices (now reflected in the Draft VGL) suggested that online MAP policies could well be a concern even outside of the circumstances specified in paragraph 174.

41. We would therefore urge the Commission to clarify the wording of paragraph 174 to make its intention fully clear, in particular to confirm whether MAP policies are not considered to be RPM except in the specific (albeit broadly defined) circumstances referenced there.

5. AGENCY

42. We welcome, despite the highly complex nature of the proposed assessment, the further guidance provided in the Draft VGL on the circumstances in which the selling or purchasing function of an agent is considered to be part of the same economic unit as its principal and, therefore, restrictions on the sale of the principal's products by the agent fall outside the scope of Article 101 TFEU (so-called "genuine agency"). We set out below certain specific issues which we consider merit further consideration.

43. **Transfer of title**. We support the modest softening of approach in respect of scenarios where the agent takes title, which no longer necessarily prevents a relationship from qualifying as a genuine agency relationship, but we would urge the Commission to consider broadening the very narrow scope of this exception. Maintaining the general rule that an agent cannot normally qualify as a genuine agent if it acquires the property of the goods bought or sold under an agency agreement (Current VGL, para. 16), the Draft VGL create an exception for so-called flash title transactions. Specifically, the fact that an agent "*temporarily, for a very brief period of time*" acquires the property of the contract goods does not preclude genuine agency, provided that the agent does not incur any costs or risks related to that transfer of property (Draft VGL, para. 31(a)). However, considering the increasingly diverse nature of agency relationships in relation in particular to online sales, we consider there is no need to require title be held for no more than a "*very brief period of time*", itself an imprecise concept, especially as in any event the same paragraph requires that the agent may not bear "*any costs or risks related to the transfer of property.*" Provided the cost and risks of

transfer are borne by the principal, we consider there is no reason to limit the period during which the agent may hold title.

44. **Dual role agency.** We appreciate the detailed guidance provided in the Draft VGL in relation to the difficult issue of "dual role" agency, where an undertaking acts both as an agent and as a risk-taking distributor for the same supplier in the same market. We agree with the basic premise of the guidance that the supplier should not necessarily have to cover all the costs related to the distributor relationship in order for the agency relationship to be considered "genuine", but note that the approach proposed in the Draft VGL is both highly complex and restrictive. As a practical result, suppliers are likely to be reluctant to enter into such relationships given the potentially very serious consequences of misapplying the guidance (which implies a finding of RPM). With this in mind, we would ask the Commission to at least consider the following:

- The specific requirements set out in paragraphs 34-38 of the Draft VGL should only be applicable where the dual relationship exists in the same relevant market rather than, as seems to be currently suggested, in the same product market, i.e., the specific concerns of dual agency do not apply where the agency and the distribution relationships exist in separate geographic markets even if the products sold in the two markets are the same.
- The guidance should more clearly state that the broadly framed risks to competition described in paragraph 35 of the Draft VGL do not exist where the dual role relationship relates to differentiated products (even in the same relevant market), provided that (i) the distributor is not forced to take on the additional agency role, and (ii) the supplier bears all the costs directly or indirectly relevant to the agency relationship in the manner set out in paragraphs 37-38. As currently drafted, the guidance does not exclude the possibility that these risks (which would be very difficult to disprove in practice, given their nature) may exist even if the products are differentiated and the above two conditions are met (paragraph 36 only saying that they are "*less likely*"). This significantly reduces the value of the guidance, especially as, emphasised in paragraph 41, it "*has to be assessed strictly*".
- The suggestion contained in paragraph 35 of the Draft VGL that concerns may arise even where the agent acts a distributor for a different supplier should be removed as (i) that is not reflected in the remainder of the guidance and (ii) the specific risks identified in paragraph 35 would not (even potentially) be applicable where the agent does not have a dual role for the same supplier (e.g., how could "the decision-making freedom" of a distributor be limited by the fact that it acts as an agent for a different supplier?).

45. **Acting for more than one principal.** Finally, we note with some concern the deletion of the express statement contained in paragraph 13 of the Current VBER that "*whether the agent acts for one or several principals*" is not material to the assessment of whether a relationship can qualify as a genuine agency relationship. Furthermore, we note that, in explaining why a supplier of online intermediation services cannot qualify as a genuine agent, one reason given in paragraph 44 of the Draft VGL is that such providers "*often serve a very large number of sellers in parallel, which prevents them from effectively forming a part of any of the sellers' undertakings*".

46. It is unclear whether this is intended to mark a generally applicable departure from the current clear rule, supported by the case law of the Court of Justice cited in footnote 10 to paragraph 13 of the Current VGL, that "*the determining factor in defining an agency agreement for the application of*

Article 101(1) is the financial or commercial risk borne by the agent in relation to the activities *for which he has been appointed as an agent by the principal*". If such a change is intended, this would very substantially limit in practice the relevance of the genuine agency concept which, it is submitted, would be unjustified in light of the most recent case law of the Court of Justice referred to above.

***