NOTE

From	Sarah Beeston Nina Korstenbroek
Subject	Contribution to VBER consultation *Dual distribution*
Date	14 september 2021

In this contribution we would like to comment on the dual distribution exception in Article 2(4)(a) of the draft revised VBER.

We understand and support the EC's intention to extend the scope of the exception for dual distribution to wholesalers and importers. However, the draft wording of the revised VBER causes confusion as to whether certain (more upstream) vertical agreements in the distribution chain are covered by the dual distribution exception or whether they now fall outside this exception (contrary to the current VBER situation).

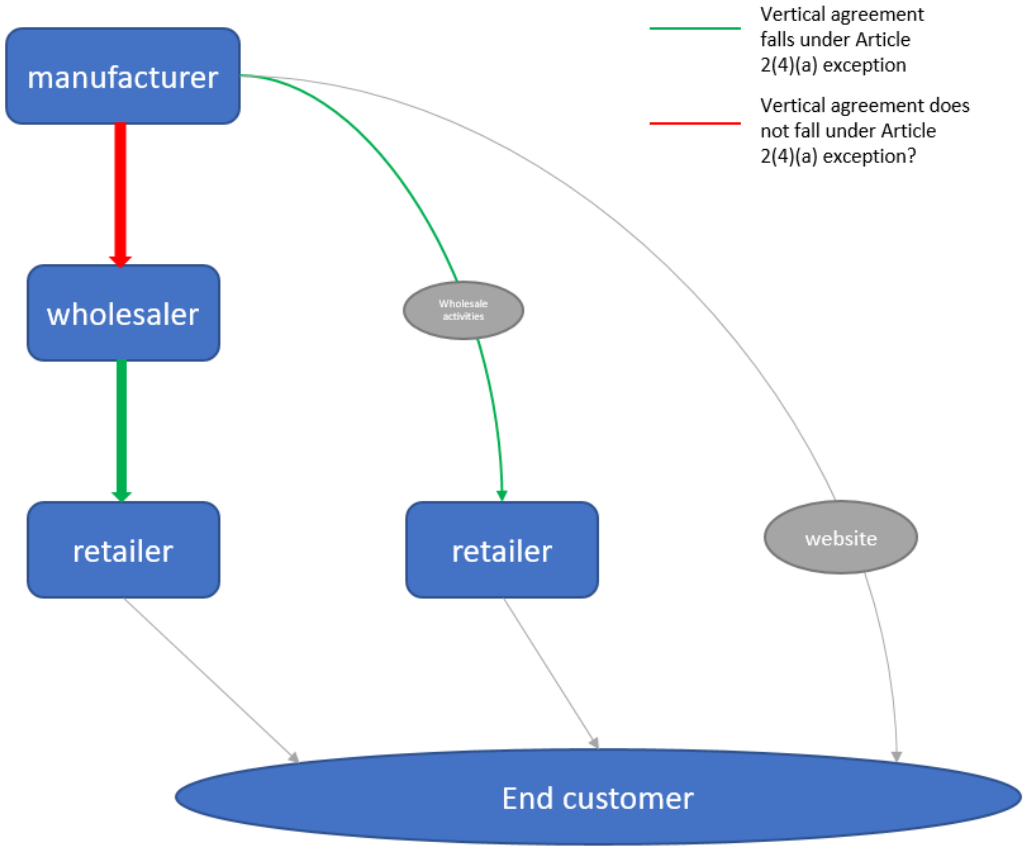
Under both the current and draft revised VBER, a manufacturer which could in principle become active at wholesale level relatively quickly and at low costs qualifies as a potential competitor of an appointed wholesaler. Under the current VBER, the agreement between such (potential) competitors would fall under the exception due to the fact that the wholesaler is not a competitor at manufacturing level.

However, the current wording of Article 2(4)(a) of the draft revised VBER, does not seem to cover the agreement between a manufacturer and an appointed wholesaler:

> *"(…) the supplier is a manufacturer, wholesaler or importer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing, wholesale or import level, and their aggregate market share in the relevant market at retail level does not exceed [10]% (…)"*

If the manufacturer is active (or could relatively easily become active) at wholesale level, it is a (potential) competitor at wholesale level. The vertical wholesale agreement does not seem to be exempted in a situation (i) where both manufacturer and wholesaler are also active on retail level, (ii) where one of the parties is active at retail and even (iii) where none of the parties is active at retail level. If the wholesaler would be left out of the distribution chain, the vertical agreement between the manufacturer and a retailer *would* be covered by the revised VBER (as the retailer is not a competing undertaking at manufacturing or wholesale level).

We provide a graphic overview of this issue on the following page.



It is hard to find the rationale behind excluding the more upstream vertical agreements (where parties are not competing at manufacturing level) from the VBER. Especially since most concerns seem to focus on retail level. That is also where the maximum market share of 10% is now being proposed. Furthermore, the language of paragraph 88 of the draft Guidelines suggests that the intention is not necessarily to exclude agreements between a manufacturer and a wholesaler from the block exemption:

> *"The exception provided by Article 2(4)(a) VBER concerns situations where the supplier is either a manufacturer, wholesaler or importer and is also a distributor of goods, while the buyer is only a distributor that does not compete with the manufacturer at the upstream level."*

We believe that these more upstream vertical agreements should continue to fall under the exception provided for in Article 2(4)(a), and that the wording of this article should be amended (or clarified) accordingly.

If such amendment is not made, would the situation be solved by a commitment from the manufacturer not itself to sell at wholesale level? Such a restriction would however be more likely to limit intrabrand competition than any risk of coordination at wholesale level.