EUROPEAN COMMISSION REVIEW OF THE VERTICAL BLOCK EXEMPTION REGULATION

RESPONSE TO PUBLIC CONSULTATION

BRANDS FOR EUROPE

This response is submitted by Brands for Europe, a group of leading brands across numerous industry sectors. The member companies of Brands for Europe are Adidas, Apple, Bose, Canon, Colgate Palmolive, HP, the LEGO Group, Levi Strauss & Co., L'Oréal, Nestlé, Nike, McDonald's, Panasonic, Philips, Pioneer, P&G, Puig, Swatch Group, Unilever, Whirlpool and Yum! (KFC, Pizza Hut, Taco Bell). The group is represented by Baker McKenzie.

This response provides a cross-sectoral brand owner view on the drafts of the revised Vertical Block Exemption Regulation and Vertical Guidelines published by the European Commission on 9 July 2021, as part of its consultation on the of Commission Regulation (EU) No 330/2010 of 20 April 2010[1], and accompanying Guidelines on Vertical Restraints[2].

This response follows our previous submissions in response to the consultations launched on 4 February 2019 and 18 December 2020, respectively.

[1] 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 categories of vertical agreements and concerted practices (Text with EEA relevance) OJ L 102, 23.4.2010, p. 1–7.

[2] Guidelines on Vertical Restraints. OJ C 130, 19.5.2010, p. 1–46.

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1. Introduction

1.1 Brands for Europe welcomes the opportunity to provide its views on the drafts of the revised Vertical Block Exemption Regulation (**draft VBER**) and Vertical Guidelines (**draft Vertical Guidelines**) published by the European Commission (**Commission**) on 9 July 2021. This paper is submitted in response to the Commission's consultation launched on 9 July 2020 (**Consultation**) as part of its review of Regulation (EU) No 330/2010 of 20 April 2010[3] (**VBER**), and accompanying Guidelines on Vertical Restraints[4] (**VGL**), (**Response**). This Response follows our previous submissions in response to the consultations launched on 4 February 2019 (**2019 Submission**), and 18 December 2020 (**2021 Submission**).

1.2 Brands for Europe fully supports the Commission's initiative to update the VBER and the VGL to reflect the need for more flexibility in the design of distribution systems to allow businesses to continue to adapt to future changes and challenges and to respond to evolving customer needs. We also welcome the Commission's initiative of clarifying and simplifying the rules, and providing businesses with up-to-date guidance that reflects the commercial environment reshaped by the growth of e-commerce.

1.3 However, we urge the Commission to reconsider its proposal regarding dual distribution (**section 2**).

(a) First, the additional market share threshold does not address any underlying competition concerns. Intra-brand competition at the downstream buyer's level only exists because of the underlying vertical agreement and it would be inappropriate to treat this as inter-brand competition. Suppliers enter into vertical agreements in order to extend the reach of their products, which leads to increased consumer choice. The additional market share threshold will result in significant practical difficulties and unnecessary additional costs for businesses, and should be removed.

(b) Secondly, Brands for Europe strongly opposes the proposal to assess the information exchange in a dual distribution context as a horizontal arrangement. Information exchange is key for the proper functioning of all distribution agreements including dual distribution. It cannot be divorced from the rest of the relationship. All information exchange between the parties in a dual distribution relationship should remain covered by the VBER, except for the information exchange related to the supplier's sales to end customers.

(c) Thirdly, while we acknowledge that the retail activities of hybrid online intermediation services (**OIS**) providers can raise horizontal concerns in particular circumstances, we consider that the potential horizontal issues are already excluded from the scope of the VBER. There is therefore no need to introduce Article 2(7) in the VBER to address these horizontal concerns.

1.4 In addition to our comments regarding dual distribution, Brands for Europe also provides specific comments and proposed amendments to the draft VBER and draft Vertical Guidelines in relation to:

(a) Agency, exclusive distribution, selective distribution systems and the guidance on active and passive resale restrictions (**section 3**);

[3] 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 categories of vertical agreements and concerted practices (Text with EEA relevance) OJ L 102, 23.4.2010, p. 1–7;

[4] Guidelines on Vertical Restraints. OJ C 130, 19.5.2010, p. 1–46.

(b) Online sales and online advertising, dual pricing and the equivalence requirement (**section 4**);

(c) Resale price maintenance (**section 5**); and

(d) Excluded restrictions (**section 6**).

2. Dual distribution

An additional market share threshold at retail level is not needed

2.1 **The relationship between a dual distributing supplier and its resellers is complementary, not horizontal**. We do not think that any aspect of a dual distribution agreement should be treated as a horizontal arrangement. Dual distribution should not be equated with a horizontal competitive relationship between manufacturers/suppliers of competing products (or indeed with a horizontal competitive relationship between two independent retailers selling the same products). The dual distributing manufacturer creates competition with itself by supplying a distributor and does therefore not seek to eliminate its reseller and monopolise the sale of its products.

2.2 Instead, the economic and commercial reality is that suppliers consider distributors/retailers as a vital complement to their brand building strategy, e.g., in relation to pre- and post-sales service, the speed of product delivery (in the event that stock is not readily available or the manufacturer does not have the logistics to ensure rapid delivery) and in authenticating a brand (including because they provide a multi-brand setting). Production differentiation also plays a role, e.g., the supplier's own store may differ from those of independent resellers by offering niche products, or the ability to customise products or the supplier's distribution network may be focussed on different retail customers than complementary wholesalers/distributors. These are products/services which it might not be possible or profitable for resellers to stock/offer. Moreover, it may be the customers who drive demand and who decide in any given case how and where to purchase depending on their own capabilities, credit situation, required level of service and supplier proximity, etc., often purchasing both directly and indirectly from a supplier and its channel partners in a complementary manner according to their needs.

2.3 It is therefore inappropriate to treat a dual distributing supplier and its reseller as competitors and to condition the availability of the VBER on their combined market shares at the retail level.

2.4 **The Commission has not described any horizontal concerns arising from dual distribution.** The Explanatory Note explains that "*the current exception for dual distribution is likely to exempt vertical agreements where possible horizontal concerns are no longer negligible*" and that "*[t]he proposal provided in Article 2(4) to (7) of the draft revised VBER excludes from the existing safe harbour scenarios of dual distribution that may give rise to horizontal concerns*."[5]

2.5 Paragraph 94 of the draft Vertical Guidelines states that "*the effects that dual distribution agreements have on the market and the possible competition concerns can be similar to horizontal agreements*".

2.6 However, the Commission does not provide any details on these "horizontal concerns" or why they arise in certain circumstances but not others. There is no detail whatsoever on these stated "effects" or suggested false positives on the market. We understand that some NCAs may have expressed concerns but these have not been explained and we are not aware of any past or pending cases which would shed light on the nature of those concerns.

2.7 In our view, it is inappropriate to introduce a blanket additional market share threshold which is not grounded in any specific theory of harm, and which would not address specified competition concerns. Especially as the norm for the VBER is to define "*a category of vertical*

[5] See Background note accompanying the public consultation of the draft revised VBER and Vertical Guidelines [all language versions]: https://ec.europa.eu/competition-policy/document/download/e0eacfbb-9dbe-4dc5-8fdf-b0e9c74a7f15_en

agreements which the Commission [regards] as normally satisfying the conditions laid down in Article 101(3) […]".[6]

2.8 This would be at odds with the very aim and spirit of the VBER which is to block exempt arrangements which, in the absence of certain defined restrictions, are clearly pro-competitive. It would also risk being arbitrary: the size of suppliers/buyers should not determine whether a relationship is classified as vertical or horizontal.

2.9 **DG COMP's rationale for exempting dual distribution under the VBER remains valid.** The rationale behind the exemption of dual distribution by Article 2(4) VBER is set out in an article on DG COMP's website, which explains (using an example from the beer sector) that "*the main competition concern, if any, is not the possible loss of competition between the brewers' pubs and the independent pubs supplied by the brewer, but is the possible foreclosure effects at the brewers' level or pubs' level and resulting loss of competition on those markets*"[7].

2.10 That rationale remains entirely valid and relevant today, and it applies equally to situations of offline and online dual distribution.

2.11 However, the Commission explains that "…*the evidence gathered so far during the review of the VBER indicates that the originally rather limited scenarios of dual distribution have become prevalent since the adoption of the currently applicable VBER and Vertical Guidelines*…" [8] and that the dual distribution exception contemplates scenarios where the supplier is "…*mainly active on the upstream market and has limited ancillary activities in the retail market*"[9].

2.12 Whatever the form of dual distribution used by a supplier, dual distribution as such is certainly not a new phenomenon, nor ancillary. It has always been common and well established, in many different sectors[10]. Rather, the use of dual distribution has always existed and has evolved in line with market developments, and in particular the rise of e-commerce, which has caused suppliers to continue to recalibrate the balance between independent and own retail sales (not only across offline channels, but also across online channels), in response to evolving market conditions.

2.13 However, the fact that dual distribution, which has always been widespread at the wholesale level of distribution, is now also becoming more common at the retail level does not change the nature or centre of gravity of the individual relationship and the efficiencies achieved that form the basis for the inclusion into the VBER. It remains a vertical relationship. This should not therefore affect how dual distribution is treated under the VBER, nor cause it to suddenly be connected with concerns of false positives.

2.14 Indeed, the key for suppliers (and their customers) remains the flexibility to use the distribution channel that best meets consumer demand in a particular situation, and not be required to follow a rigid structure simply because that is the way it has always been done in the past. Consumer behaviour and consumer expectations change constantly, and suppliers need to be able to respond and adjust accordingly. Suppliers look to optimally serve consumers with the products

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[6] Recital 2, draft VBER

[7] https://ec.europa.eu/competition/speeches/text/sp2011_10_en.pdf

[8] See Background note accompanying the public consultation of the draft revised VBER and Vertical Guidelines [all language versions]: https://ec.europa.eu/competition-policy/document/download/e0eacfbb-9dbe-4dc5-8fdf-b0e9c74a7f15_en

[9] See paragraph 86, Draft VBER.

[10] For example, suppliers have sold both direct to retailers as well as selling to wholesalers/distributors depending on respective strengths of each. In the beer sector, brewers have traditionally operated own pubs and also supplied their beer to independent pubs. In franchise systems, the franchisor will often operate a significant amount of wholly owned stores and also work with independent franchisees. Insurance companies work with brokers and sell direct to customers. Supermarkets have own stores and franchise stores. Airlines sell direct and through travel agents. Hotels sell directly and through travel agents.

and services they desire, making them available however (online and offline), wherever (through own retail and independent retail and through own or independent distributors) and whenever consumers want them (at speed).

2.15 In any event, for most suppliers nowadays the line is blurred, as suppliers seek to produce a seamless omni-channel and online-to-offline and offline-to-online (**O2O**) brand and shopping experience, across offline and online channels in own and independent retail, in response to consumer demand. Indeed, the COVID-19 crisis has shown just how crucially important dual distribution, and the omni-channel approach, are in practice, for suppliers, retailers and consumers alike.

2.16 If DG COMP has concerns that particular arrangements have a restrictive effect either due to their object or widespread nature, it has the necessary tools at its disposal under the VBER to deal with these concerns. For example, DG COMP may specify a type of information exchange which would be excluded from the scope of the VBER. DG COMP also retains the right to remove the benefit of the VBER in individual cases if needed. The withdrawal procedure set out in Section IV of the VGL remains an adequate and proportionate mechanism for addressing specific issues that may arise particularly as a result of parallel networks of similar vertical agreements.

2.17 **The VBER already excludes agreements entered into by suppliers with market power**. It is well established that distribution arrangements can only impact competition adversely in the presence of market power (at one or both levels of the supply chain) and the VBER already takes this into account given the existence of the market share thresholds set at 30% (which is sufficiently low so as to eliminate any prospect of market power). Therefore, any direct distribution agreements that could impact competition adversely are already excluded from an automatic exemption by the VBER market share thresholds. Introducing a further market share threshold based on the combined retail share of supplier and reseller would have the perverse effect of removing the benefit of the VBER from distribution networks established by even the smallest players and new entrants who sell to major retailers or platforms as well as making some direct sales.

2.18 Brands for Europe understands that, within DG COMP, a concern has arisen that dual distribution may restrict inter-brand competition when retailers, who also resell other brands, provide information to the supplier extending to those other brands. This is not a valid concern in the context of the VBER because any arrangement between a supplier and retailer relating to such other brands would not fall within the scope of the VBER[11]. Any such arrangement, if significantly restrictive of competition and not merely ancillary to the supply of supplier's goods, would already be (and would continue to be) subject to individual assessment.

2.19 **The introduction of an additional market share threshold will result in practical difficulties as well as significant and unnecessary additional costs.** If an additional market share threshold were introduced (or operated so as to carve out information exchange from vertical block exemption), this would lead to a plethora of wholly unnecessary complications, including the following[12]:

(a) Suppliers would be required to obtain retail market share information (which are often based on national markets) for each retailer (and their own operations) in each Member State and on a continuous basis.

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[11] This follows from the scope of the VBER: Article 2(1) exempts "vertical agreements" which are defined in Article 1(a) as those agreements between undertakings which operate "for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services".

[12] See also paragraphs 44 and 45 of our submission in response to the EC Consultation of 18 December 2020.

(b) It would be extremely complicated to manage a coherent distribution system where different retailers with different market shares for distribution of the same product, and / or the same retailer with different market shares for different product ranges of the same supplier, would need to be treated differently - simply due to the fact that the supplier has decided, for entirely legitimate commercial reasons, to engage in direct sales to customers.

(c) It would have the perverse effect of removing the benefit of the VBER from distribution networks established by even the smallest players and new entrants who sell to major retailers or platforms as well as making some sales direct.

(d) It would jeopardize the EU Single Market imperative. Brands approach distribution in the EEA in a uniform and consistent manner through the roll out of a consistent pan-EEA wide distribution network. Making the availability of the VBER for dual distribution relationships dependent on a combined retail market share threshold (where retail markets are often national in scope) may inevitably lead suppliers to re-assess, regress and redeploy their distribution networks on a national basis.

2.20 Brands for Europe notes and welcomes the UK CMA's explicit recommendation against adding a lower market share threshold for dual distribution. Having considered the evidence gathered during the UK CMA roundtables and the Commission's Evaluation, the UK CMA warned that "[*t]he insertion of an additional market share threshold is likely to add complexity and uncertainty for businesses and the benefits of doing so are unclear at this stage. Further, it is not clear what alternative market share threshold would be appropriate in limiting the application of the dual distribution exception*."[13] The UK CMA's observations on this point are entirely correct, and Brands for Europe strongly urges DG COMP to follow a similar approach. Brands for Europe is concerned that changing the dual distribution rules engenders legal uncertainty with little benefit especially given the lack of clarity regarding the concern.

2.21 **Regulation 19/65/EEC empowers the Commission to exempt dual distribution and that has been the case for the past 21 years[14].** Brands for Europe strongly believes that the wording of Regulation 19/65/EEC empowers the Commission to (continue to) exempt dual distribution under the VBER.

2.22 Regulation 19/65/EEC does not exclude dual distribution relationships from the scope of the VBER. The dual distribution relationship falls within the definition of a "vertical agreement" under Regulation 19/65/EEC and subsequent vertical block exemption regulations, which define a vertical agreement as "*an agreement between two or more undertakings each of which operates, **for the purposes of the agreement**, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services"* [Emphasis added]. In other words, this definition focuses on the function of the agreement, i.e., the distribution of goods/services, and makes no distinction between competitors or non-competitors. This definition clearly does not exclude dual distribution relationships.

2.23 Regulation 19/65/EEC does not make a legal distinction between vertical agreements between competitors and non-competitors. The Court of Justice of the European Union stated in respect of Regulation 19/65/EEC that *"[n]either the wording of [Article 101] nor that of [Article 102] justifies interpreting either of these Articles with reference to the level in the economy at which the undertakings carry on business. Neither* of *these provisions makes a distinction between businesses operating in competition with each other at the same level or between businesses not competing with each other and operating at different levels. It is not possible to make a*

[13] Paragraph 3.16(b) of the CMA Consultation paper available here.

[14] See Article 4 (b) and (c) of Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices

distinction where the Treaty does not make one"[15]. Based on the judgment of the Court of Justice it is therefore clear that, as a matter of law, Regulation 19/65 can cover distribution agreements both between non-competitors as well as between competitors.

2.24 DG COMP's decisional practice, and the UK CMA's recommendations, recognise the benefits of dual distribution. DG COMP has looked at dual distribution relationships in several cases in the past, going as far back as the *Charles Jourdan*[16] case. In this case, DG COMP endorsed the benefits of dual distribution - including in relation to the complementary nature of a supplier's stores and retailers, the ability of the supplier to offer consumers a distribution network uniform in terms of range of products. DG COMP noted that the supplier can be rapidly informed by retailers of any changes in consumers' habits and thus be able to take account of this in its forward plans on sales and production. DG COMP concluded that the restriction of competition between the supplier's direct sales and franchisees was indispensable to the benefits identified. These significant benefits to direct sellers, retailers and consumers still exist in today's dual distribution relationships, as illustrated by the submissions made by Brands for Europe in the context of the Consultations. The only difference digitalisation has brought is speed with accelerated growth of e-commerce in recent years having made retail markets more competitive and more dynamic. Consumers now enjoy an unprecedented degree of choice: information about products and sales terms from multiple suppliers is widely available to an extent that was previously inconceivable when the choice of consumers was constrained to what was available in the local brick and mortar outlets they could visit. The use of dual distribution under conditions of increased competition can only be considered as a strong indication that dual distribution is also a tool of more effective inter-brand and intra-brand competition.

2.25 These benefits are also the key reason for the UK CMA's recommendation against removing or limiting the scope of the dual distribution exemption in the VBER (in the context of its proposals to develop a UK vertical block exemption based on the VBER). The UK CMA acknowledges that "[*b]usinesses of all sizes and in all sectors commonly operate a dual distribution model (particularly given the growth in online sales) with significant benefits to direct sellers, retailers and consumers (e.g. increased market penetration for direct sellers and retailers, increased choice for consumers, better adaptation to the market's needs, and innovation in distribution models)"*[17].

2.26 The current VBER already allows DG COMP to adequately address any underlying competition concerns associated with dual distribution**.** In recent cases, such as the decision against *Guess*[18], DG COMP has examined the competition issues caused by the dual distribution aspects of the distribution system between Guess and its resellers in respect of product sales and AdWords bidding[19]. A number of restrictions on the resellers were identified, namely on AdWords bidding, online sales, cross-selling between SDS members, cross-border sales to end users, and resale price maintenance. Each and every one of these restrictions separately was analysed and held to take the Guess agreements outside the VBER.

2.27 This illustrates that while the current VBER exempts dual distribution arrangements, it does not extend its safe harbour to restrictions of concern to DG COMP. The decision in this case ordered termination of the infringements without needing to withdraw the benefit of the block exemption for the dual distribution arrangement as such in order to protect competition.

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15 Case 32/65 Italy v Council challenging Regulation 19/65/EEC

16 IV.31.697 Charles Jourdan of 2 December 1988

17 See paragraph 3.16(a) of the UK Consultation paper, available here.

18 Brands for Europe does not imply that it agrees with all aspects of DG COMP's analysis in this case, which is cited to demonstrate that the current VBER in no way impedes DG COMP imposing its preferred analysis.

19 Guess - AT.40428 of 17 December 2018, paragraph 36, 44-50 and 118-121

2.28 **In conclusion, Brands for Europe rejects as ill-founded the need for an additional market share threshold at retail level**.

2.29 We therefore suggest the following amendments:

Article 2(4) draft VBER

4. The exemption provided for in paragraph 1 shall not apply to vertical agreements entered into between competing undertakings. However, the exemption provided for in paragraph 1 shall apply to all aspects of a non-reciprocal vertical agreement between competing undertakings where:

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

(b) the supplier is a provider of services at several levels of trade, while the buyer provides its services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services~~, and their aggregate market share in the relevant market at retail level does not exceed [10]%.~~

Article 2(5) draft VBER

5.~~ If the competing supplier and buyer referred to in Article 2(4)(a) or (b) have an aggregate market share that exceeds [10]% in the relevant market at retail level but that does not exceed the market share thresholds of Article 3.~~ The exemption provided for in paragraph 1 shall apply ~~except for~~ to any exchange of information between the parties, except for the exchange of any information related to the supplier's sales to end customers, which has to be assessed under the rules applicable to horizontal agreements.

Paragraph 86 draft Vertical Guidelines

(86) The second sentence in Article 2(4) VBER contains two exceptions to the general rule that vertical agreements between competitors are excluded from the safe harbour provided by the VBER. Both exceptions, namely Article 2(4)(a) and (b) VBER, concern dual distribution agreements between a supplier of goods or services also active on the ~~retail~~ downstream market and its distributors.~~ These are typically scenarios where the supplier is mainly active on the upstream market and has limited ancillary activities in the retail market. In cases where the aggregate market share of the supplier and the buyer in the relevant market at retail level does not exceed [10]%, horizontal concerns are unlikely to arise and any potential impact on horizontal competition between the parties at the retail level is considered of lesser importance than the potential impact of the parties' vertical agreement on general competition at the supply or distribution level.~~

Paragraph 94 draft Vertical Guidelines

(94) However, Article 2(8) VBER states that the VBER does "not apply to vertical agreements the subject matter of which falls within the scope of any other block exemption regulation, unless otherwise provided for in such a regulation". It is therefore important to verify from the outset if a vertical agreement falls within the scope of application of any other block exemption regulation.~~ For example, as set out in Article 2(4) VBER, vertical agreements concluded between competing undertakings are in principle excluded from the scope of the VBER and have to be assessed under the rules applicable to horizontal agreements. Article 2(4)(a) and (b) VBER provide exceptions to this principle, which must be read in conjunction with Article 2(5) VBER in case the market share threshold of Article 2(4)(a) and (b) VBER is exceeded but the

~~*market share threshold of Article 3 VBER is not exceeded. These provisions take into account that the effects that dual distribution agreements have on the market and the possible competition concerns can be similar to horizontal agreements.*~~

Dual distribution at the wholesale level

2.30 Brands for Europe welcomes the clarification that the dual distribution exception applies to wholesalers and importers. However, the proposed text is unclear on how it treats the prevalent and extremely well-established forms of dual distribution which can take place at multiple levels of the supply chain, and in different combinations, but which are upstream from the retail market level.

2.31 As explained above, the supplier may be a manufacturer, wholesaler, or importer and a distributor of goods (including components), while the buyer is a distributor, wholesaler, importer, system integrator, installer etc. The relationships between the manufacturer and distributors of the manufacturer's products at all downstream distribution levels should remain covered by the VBER. The key factor to determine the applicability of the VBER to the relationship should be that that the manufacturer's distribution partners are not competing undertakings at the manufacturing level.

2.32 Although our submission focuses on dual distribution at the retail level and why certain information exchanges are needed in order to generate consumer benefits, precisely the same reasoning applies at the upstream level. This point is illustrated in **Confidential Annex 1.**

2.33 Brands for Europe considers that the current VBER (and the exception for dual distribution) already covers this situation. While paragraph 28 VGL appears to focus on the retail level ("*potential impact on the competitive relationship between the manufacturer and retailer at the retail level*"), it is clear that the VBER itself is worded more broadly, and logically also covers dual distribution where the supplier/manufacturer competes with its distributors at the wholesale level.

2.34 However, the text of the draft VBER and VGL is unclear. We suggest the change to Article 2(4)(a) shown above. As regards the VGL, we suggest the following change:

Paragraph (88) draft Vertical Guidelines:

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*~~ *manufacturing level.*

Information exchange which is inherent to dual distribution should continue to be covered by the VBER

2.35 Information exchange is essential for the proper functioning of any distribution relationship, including dual distribution. It does not make sense to disassociate this important element from 'the rest of the relationship'.

2.36 Vertical information exchanges between a supplier and a retailer are a normal, integral, and necessary part to make the vertical relation work. They have, unambiguously, both a pro-competitive purpose and pro-competitive effects, help to align supplier and retailer incentives, intensify inter-brand competition, and benefit all stakeholders.

2.37 The vertical sharing of information also directly benefits retailers. With improved knowledge of the preferences of customer groups frequenting a particular retailer, the supplier supports the retailer's sales strategies by offering the right product assortment and making appropriate volumes available to meet the needs of the retailer's target consumer groups. Information about

planned brand promotions help the retailer to more effectively develop its own sales strategies. And information sharing benefits retailers willing to promote a brand by reducing scope for opportunistic behaviour by retailers preferring to free ride on the investment by the supplier and other retailers.

2.38 Requiring the exchange of information in the context of a dual distribution relationship to be assessed under the Horizontal Guidelines would remove the efficiencies and legal certainty conferred by the availability of the block exemption; generate significant additional compliance and business costs for suppliers; and reduce intra-brand competition and consumer choice. Failure to have this information would further strengthen the position of digital platforms who would have this information (and would therefore be placed at a competitive advantage compared to suppliers).

2.39 We believe it would be disproportionate to classify all information exchange in a (essentially vertical) relationship as horizontal to address an unarticulated horizontal concern of 'false positives'.

2.40 We explain below:

(a) what kind of information flows are legitimate and procompetitive in the dual distribution context

(b) why requiring the exchange of information in the context of a dual distribution relationship to be assessed under the Horizontal Guidelines will reduce consumer benefits

(c) why firewalls would be problematic and reduce consumer benefit even if they were plausible

(d) why guidance on information exchange in the dual distribution context should be provided in the VGL (and not in the HGL)

2.41 **Legitimate and procompetitive information exchange.** A supplier will often want to contact resellers to discuss levels of inventory and sell-through which enables the manufacturer to be more efficient in its supply chain and forecast future needs. In addition, a supplier may want to contact resellers with details of the promotions which the supplier intends to run across a particular market in the future, and which it would like all resellers in that market to join. This may include a discussion about RRPs and/or the type of funding which the supplier would be prepared to offer. Suppliers may also want to inform resellers about future promotions which they plan to run in their own direct to consumer business - which resellers may or may not want to replicate on an independent basis (with or without support from the supplier).

2.42 Similarly, resellers need to be able to approach suppliers at any point to seek funding for a promotion which they plan to run in the future in relation to supplier's brands. They will also need to give advance notice of the stock they will need, etc.

2.43 In some sectors, such as fashion and sporting goods, the collections and level of demand will change from season to season and yet consumers expect immediate delivery of their purchases. Suppliers will therefore need to have discussions with distributors about their likely future needs at a local level (by reference to current and future collections) so that the suppliers are able to decide on the correct volume to produce and product styles.

2.44 The exchange of certain information is fundamental to a successful franchise system. Without it, franchisees would not be able to receive the support they need to operate their 'business in a box', nor would the franchisor have sufficient control (to safeguard its trade-marks). Consequently, franchisors will share information with franchises on 'development' (opening new stores) which might include site identification/selection, demographic analysis, and sales

predictions. Many franchisees would not have the in-house capability to select and conclude new sites. If the franchisor did not provide this service then the franchisor and its franchises would not be able to expand and meet consumer demand. Franchisors may also share a variety of information in order to guarantee product excellence, for example product information as well as manuals and details of products that are in the pipeline. Indeed, franchisees may not have the know-how to produce the products and serve them safely to consumers without training from the franchisor (train the trainer) and various manuals and guidance. All this is typically provided by the franchisor to the franchisees. It is critical for product consistency but also for health and safety of team members and consumers too.

2.45 Suppliers may wish to collect information (SKU, volume, sell-out price relating to the supplier's own products) from their resellers for a number of legitimate reasons:

(a) To understand consumer profiles and trends: Suppliers need to ensure that consumers can find the products they desire at the prices they expect. Distributors/retailers are differentiated as regards the consumer segments they target (and where they are located). Hence, many suppliers require information from distributors/retailers to get a more complete view of the market or else their view is limited to only those consumers that purchase products from their own downstream operations. Without detailed information on sales made by distributors/retailers, the supplier loses out on potential sales through those same retailers/distributors. This is because they cannot make well-informed decisions on the basis of actual consumer demand, satisfaction and needs for example, regarding overall production trends, styles and colours, assortments and prioritisation of delivery and inventory at different distributors/retailers. Collecting this data on consumer behaviour in relation to the supplier's brand promotes stronger inter-brand competition by, among other things, allowing the manufacturer to better meet consumers' needs and better position its brand in the market, including to the benefit of resellers of course.

(b) To assess whether a promotion/investment decision was successful: Suppliers may collect sell-out information relating to their products in order to be able to assess the success or otherwise of promotions organised (and often financially supported) by those suppliers or to verify that supplier financial support has been passed on to consumers. This enables suppliers to know which products to invest in, and therefore how to allocate budget. The data may show whether a consumer is most interested in price or some other factor. This information may be needed quickly in order to enable the supplier to react to evolving consumer demand/tastes and market conditions.

(c) To manage inventory efficiently: Collecting information is also necessary for many suppliers to efficiently plan their production processes to meet consumer demand as well as for purchasing, planning, and inventory management purposes. This is particularly important for suppliers of products such as fashion and sporting goods, (with seasonal collections and demand where consumers expect immediate delivery). It is crucial that suppliers have up-to-date information about the demand for particular products because consumer preferences for those products can change very quickly with differences between countries or even regions in Europe. This information allows suppliers to quickly shift stock from retailers where demand is low to retailers where demand is high. Importantly, it also allows for more efficient supply chain management and assortment planning with retailers because production lead times can be between 12 and 18 months and products are ordered by retailers up to 12 months in advance. Therefore, it is crucial to understand consumer preferences because if consumer preferences change, suppliers can quickly adjust their production planning and assortment planning and avoid the risk of holding substantially high levels of unwanted inventory. In some sectors, e.g. electronic goods, this kind of information about

inventory is critical due to scarcity of certain components (e.g. chips). Having access to reliable inventory information enables the manufacturers to provide accurate representations to regulators, investors and other stakeholders about forecasts, financial results etc.

Additionally, exchange of information in this context is critical when it relates to food products. Without such exchange of information, there would be an increase of costs and a greater likelihood of products expiring and food wastage, with an inevitable negative impact on customers. Specifically, access to information on daily sales helps ensure not only the right amount of products and raw materials in franchisee outlets but also that customers will consistently be offered the products they want, matching supply to demand whilst guaranteeing product safety and quality. All these factors directly benefit consumers, allowing them to choose between a wide range of products at a sustainable price with minimum wastage.

2.46 **Requiring the exchange of information in the context of a dual distribution relationship to be assessed under the Horizontal Guidelines will reduce consumer benefits**. In a dual distribution relationship, the distributor/retailer is, and remains, a customer. A horizontals classification would reclassify conversations with a customer to conversations with a direct competitor.

2.47 As a result, suppliers may be forced to take a very cautious approach in their dealings with wholesalers and retailers. Suppliers would be reluctant to collect a lot of the information described above – i.e. information that is inherently part of an efficient and pro-competitive vertical relationship, and absolutely essential for that relationship to function.

2.48 In particular, a 'horizontals' classification may lead suppliers to:

(a) Avoid price recommendations or discussions with resellers about future buy-in needs, or future planned promotions and the availability of funding for resellers. Many suppliers would stop these every day and pro-consumer practices out of fear this would be seen as pricing discussions between direct competitors.

(b) Avoid seeking information from distributors that is needed for wholly legitimate and proconsumer purposes (such as sell-out information in relation to the supplier's products which enables the supplier to better match consumer needs and expectations and to manage its supply chain more efficiently).

(c) Become uncertain about whether they can allocate customer groups and territories - which are normal aspects of many vertical agreements and obviously key for an efficient supply chain.

2.49 Suppliers may also decide against establishing a direct to customer business simply because they are already selling to resellers with a retail market share over 10%. That is because, on making one direct sale to a customer, there is a real risk that a supplier would no longer be able to receive the type of information listed above from the larger resellers (without first detailed and complicated analysis under the Horizontals Guidelines which do not in fact provide legal certainty). This would immediately place the supplier at a competitive disadvantage compared to rivals that do not sell direct to consumers and which can continue to receive this important information from key resellers. The supplier is therefore likely to decide against starting a direct to consumer business over the next 10 years. Similarly, suppliers that are growing their direct to consumer business (but still beneath the combined 10 per cent threshold) may decide to withdraw/not to invest further because of the obvious downsides of losing access to information. Suppliers could also decide against establishing or maintaining a multi-brand retail business.

2.50 If reforms were to push suppliers towards a third party /indirect sales only model, this would mean a loss of features/aspects valued and driven by consumers (and the end of the rise of the seamless omni-channel brand and consumer experience).

2.51 If the reforms were to push suppliers towards more and more direct sales, then there would inevitably be some customers (e.g., smaller customers or those located in less populated regions) that the supplier could not realistically service themselves. The independent retailer suffers. Consumers suffer.

2.52 Worse still is the fact that, for some suppliers, the market share threshold may remain a moot point as suppliers may not want to rely on it, due to lack of data or resources to verify market shares or due to concerns about frequent variation in market shares etc.

2.53 **Erecting a firewall to address perceived horizontal concerns would be highly problematic and reduce consumer benefit.** Smaller companies and business divisions would find it impossible in practice to set up firewalls in their organisations. They would be forced to employ more team members, which will often be cost prohibitive, and may cause them to end dual distribution entirely.

2.54 Even if companies could achieve the firewall separation, it would still be costly, complex and cumbersome, and it would eliminate many of the efficiencies that allow the supplier to make informed decisions about innovation, product development and sales strategies and to manage their sales and operations effectively. For example, suppliers would no longer be able to undertake production/demand planning with the same degree of accuracy. This process involves matching supply and demand and, logically, is most accurate when the supplier is able to look holistically at the two channels (direct and third party reseller) and then decide what quantity to produce looking at the forecasted demand of the channels together. Pricing information may be important for many suppliers since it will show how successful a particular item has been with consumers. The mix of discounts given, combined with knowledge of volumes sold, contextualizes the sales information and informs the production/inventory decisions going forward.

2.55 Firewalls would also hamper the ability of suppliers to manage the business holistically – e.g., it would no longer be possible to coordinate launches or promotions/related advertising seamlessly across all channels. Suppliers also fear that customers would become frustrated at the artificiality and inefficiency of having to deal with separate touch points within the company. It would be particularly damaging for companies that do not treat direct to consumer and wholesale as binary options since their customers may seek to combine elements of a product or service offering that would become be divided by a firewall. For example, there are situations where a supplier sells directly to customers in some geographies but relies on partners to fulfil the deal in territories where it does not have sufficient capabilities or direct presence. Alternatively, a supplier may sell a solution but rely on partners to supply certain hardware or service elements. The same could be true on a partner led deal. In the evolving omni-channel and increasingly global landscape, businesses increasingly recognize the importance of addressing customers however they choose to buy across multiple routes to market and often need to offer blended solutions to meet optimal customer needs.

2.56 Rather than develop a firewall, some suppliers may opt to launch certain brands or segments in one channel only. That would not be the supplier's preferred commercial strategy but would be a distortion caused by the complications caused by firewall obligations. Ultimately, this would reduce competition and consumer satisfaction at the retail level.

2.57 **The supplier's use of retail sales information for its own downstream operations does not restrict competition.** A potential concern is that the supplier would be able to take reseller information into account when determining the sales policy of its own downstream operations.

2.58 However, the unilateral use of reseller sale information by the supplier does not raise competition law concerns because it does not facilitate the coordination of, for example, retail activities between the supplier and the retailer. The Commission has not advanced any theory of harm explaining how such a practice could, realistically, harm consumers, nor is there any decisional practice under EU competition law showing how such harm could exist.

2.59 This can be explained by several reasons. First, the unilateral use of reseller sales information by the supplier does not change the incentives of the independent resellers to maximize their sales. Second, the principal incentive for the supplier is to compete successfully against rival suppliers by maximizing its sales through all available channels. Thus, the supplier will always seek to ensure that its entire distribution "ecosystem" can best meet the demands of customers interested in the brand. Moreover, the supplier's downstream operations and those of independent resellers are typically complements that can serve different customer preferences and operate under inherently different competitive conditions. If the supplier were to try to limit the ability of its resellers to effectively compete, it would run a serious risk that it would lose sales to rival brands at the level of independent resellers, thus undermining its goal to maximize sales overall.

2.60 Resellers might express concerns about the supplier's use of their sales data to benefit its own downstream operations. But these are commercial concerns that a supplier needs to address to maintain a productive relationship with its retailers. These are not concerns relevant from the competition law perspective, as they are not related to possible output reductions or price increases that could harm consumers.

2.61 In any event, while the supplier has legitimate, and pro-competitive, reasons to use all available information to develop its distribution system, which includes its own downstream operations, it also has every incentive to ensure that independent resellers remain committed to the brand and invest in promoting the brand and its products. Creating an adversarial relationship with resellers would be against the supplier's own best interests, as it would undermine its ability to compete against rival brands.

2.62 **Problematic information exchange can be excluded from the scope of the VBER**: in conclusion, Brands for Europe considers that the VBER and VGL should make it clear that all information exchange between the parties should be covered by the VBER, except for the exchange of any information related to the supplier's sales to end customers, which needs to be assessed under the rules applicable to horizontal agreements.

2.63 This can be achieved by amending Article 2(5) draft VBER as follows:

> Article 2(5) draft VBER
>
> ~~*If the competing supplier and buyer referred to in Article 2(4)(a) or (b) have an aggregate market share that exceeds [10]% in the relevant market at retail level but that does not exceed the market share thresholds of Article 3, T*~~*the exemption provided for in paragraph 1 shall apply~~~~, except for~~* *to any exchange of information between the parties, except for the exchange of any information related to the supplier's sales to end customers, which has to be assessed under the rules applicable to horizontal agreements.*

'By object' restrictions and dual distribution

2.64 According to Article 2(6) of the draft VBER, vertical agreements in dual distribution systems that include provisions that are considered to restrict competition by object preclude the application of the VBER to the entire agreement. Consequently, by object restrictions would have the same legal effect as the hardcore restrictions listed in Article 4 of the draft VBER.

2.65 However, unlike Article 4 hardcore restraints, such by object restrictions are not specified. This is concerning because, as demonstrated by the case law of the Court of Justice and the unpredictable outcome of individual cases, the precise determination of what in practice constitutes a restriction by object is a complex exercise that is inevitably fraught with a high degree of legal uncertainty and unpredictability. Making the availability of the exemption conditional on the absence of such by object restrictions is entirely at odds with the stated goal of the VBER, which is to define the specific restrictions or practices that prevent the application of the block exemption in order to simplify the process of compliance for market participants.

2.66 Article 2(6) does not assist as there is no further reference to what information exchanges between a supplier and retailer would be considered "object restrictions." The Draft VGL are silent on this issue. The Commission apparently envisages including guidance on this issue in the revised Horizontal Guidelines. But this does not resolve the concerns. Commission guidelines are not binding on national competition authorities or courts (which frequently deal with competition issues related to distribution agreements), thus materially undermining the goal of the VBER to provide legal certainty. Moreover, the revised VBER looks set to enter into force before the revised Horizontal Guidelines will be adopted and therefore there would be a transition period during which market participants would be expected to adjust their distribution agreements and practices to the new VBER without clear guidance from the Commission or case law.

2.67 Nor would the vague approach envisaged in the draft VBER be necessary to enhance competition law enforcement. Rather than include a vague reference to "object restrictions", we consider that the VBER should simply exclude from its scope information exchanges which may be considered to be problematic – as explained in paragraph 2.62 above.

2.68 We therefore suggest that the following amendments:

Article 2(6) of the draft VBER is deleted.

Paragraph (83) draft Vertical Guidelines

Whereas pursuant to Article 2(8) VBER, on which guidance is provided in section 4.5 of these Guidelines, the VBER does not apply to vertical agreements if their subject matter falls within the scope of any other block exemption regulation, unless otherwise provided for in such a regulation, the first sentence of Article 2(4) VBER also explicitly excludes vertical agreements entered into between competing undertakings from the scope of application of the VBER, unless the vertical agreements fall within the scope of the exceptions in Article 2(4)(a) and 2(4)(b) VBER. Thus, vertical agreements between competitors that are excluded from the scope of the VBER have to be assessed by reference to the Horizontal Guidelines, including the guidance on the exchange of information in the context of vertical agreements between competing undertakings. Where a vertical agreement falls within the scope of an exception in Article 2(4)(a) or (b) VBER ~~and does not include a horizontal restriction of competition by object,~~ this agreement has to be assessed only by reference to these Guidelines.

Paragraph 87 draft Vertical Guidelines

(87) ~~Therefore, A~~a vertical agreement between competitors falling under Article 2(4)(a) and (b) VBER is block exempted pursuant to Article 2(1) VBER if the following conditions are fulfilled:

(a) the subject matter of the agreement does not fall within the scope of another block exemption regulation, as set out in Article 2(8) VBER;
~~the supplier's and the buyer's aggregate market share in the relevant market at~~

~~*retail level does not exceed [10]%, thus not appreciably restricting competition within the meaning of Article 101(1),46 and*~~

(b) the agreement does not contain hardcore restrictions pursuant to Article 4 VBER; and
(c) the conditions of Article 2(4)(a) or (b) VBER are fulfilled~~*; and*~~
~~*the agreement does not include horizontal restrictions of competition by object, as set out in Article 2(6) VBER.*~~ *This exemption relates to all aspects of the non-reciprocal vertical agreement and* ~~*any*~~*to all* ~~*horizontal restrictions by effect, including those resulting from the exchange of*~~ *information exchanges between the competing undertakings except for the exchange of any information related to the supplier's sales to end customers, which has to be assessed under the rules applicable to horizontal agreements.* ~~*Horizontal restrictions of competition by object are not covered by the exceptions of Article 2(4)(a) or (b).47 Whether an agreement can be considered a dual distribution agreement for the purpose of applying Article 2(4)(a) or (b) VBER should be interpreted narrowly due to the exceptional nature of this provision.*~~

The Article 2(7) exclusion is not required to address horizontal issues

2.69 Under Article 2(7) of the draft VBER, the Commission proposes to exclude from the scope of the VBER non-reciprocal vertical agreements entered into between "*a provider of online intermediation services that also sells goods or services in competition with undertakings to which it provides online intermediation services*" and such a competing undertaking.

2.70 The Commission justifies this exclusion of hybrid OIS providers from the benefit of the VBER's provisions on dual distribution on the ground that "*the retail activities of [OIS providers] that have a hybrid function typically raise non-negligible horizontal concerns*".[20]

2.71 We acknowledge that the retail activities of OIS providers can raise horizontal concerns, in particular with regard to the potential misuse of information obtained by the OIS provider through its platform activities in informing its retail strategy (in addition to the potential abuse of market power by large OIS providers).

2.72 However, we consider that the potential horizontal issues arising from this kind of conduct are already excluded from the scope of the VBER. There is therefore no need to introduce Article 2(7) in the VBER to address these horizontal concerns.

2.73 In addition, the introduction of Article 2(7) would have a significant impact on the vertical relationships between suppliers and hybrid OIS providers/retailers, because it would remove the VBER safe harbour for both the hybrid operator and its supplier.

2.74 We also consider that the wording of Article 2(7) is very complex and difficult to understand, and is therefore likely to cause confusion and lead to inconsistent interpretations and enforcement, particularly at national court and national competition authority level.

Based on all these arguments, we consider that it is not necessary or justified to introduce Article 2(7) in the VBER and would recommend that it is deleted entirely.

2.75 If the Commission feels that the deletion of Article 2(7) would not allow it to adequately address the competition concerns associated with the hybrid role of OIS providers, we would suggest an alternative approach which would be to amend Article 2(7) so that it specifies and explicitly carves out from the VBER the area of the Commission's concern – which we understand to be the OIS provider's access to information relating to the sales activities of the supplier that is using the provider's online intermediation services. This approach would address these concerns,

[20] Draft VGL, para. 91

whilst maintaining the VBER safe harbour protection for the vertical relationship between the supplier and the OIS provider.

Proposed new Article 2(7):

"The exceptions of Article 2(4)(a) and (b) shall ~~not~~ apply where a provider of online intermediation services that also sells goods or services in competition with the undertaking~~s~~ to which it provides online intermediation services enters into a non-reciprocal vertical agreement with ~~such a competing~~ that undertaking, except in relation to the access by the provider of online intermediation services to information related to the sales activities of the undertaking that uses the online intermediation services, which has to be assessed under the rules applicable to horizontal agreements.

3. Flexibility in designing distribution systems

3.1 Brands for Europe welcomes the Commission's initiative to update the VBER to reflect the changes to the retail environment, to offer the necessary flexibility to allow brand owners and retailers to continue to adapt to future changes and challenges, and to provide consumers with the seamless omni-channel experience which they expect. Allowing businesses the freedom to respond with agility to changes in the market and consumer behaviour is essential. The draft VBER and draft Vertical Guidelines include revisions to the VBER and VGL which reflect this, and we welcome those revisions. However, in some instances, both the draft VBER and the draft Vertical Guidelines include language which in our view is insufficiently clear and raises the risk of inconsistent interpretation and enforcement, especially by national authorities and national courts, thus endangering the Commission's intentions to provide more flexibility across all relevant distribution methods and to achieve an integrated internal market. Accordingly, in respect of each distribution model, we provide in this section our comments on the Commission's draft VBER and draft Vertical Guidelines with a view to clarifying the texts and to reduce the risk of divergent interpretations across the EU.

Agency

3.2 Brands for Europe welcomes the clarification in paragraph 31 of the draft Vertical Guidelines that an agent may temporarily acquire the property of the contract goods while selling them on behalf of the principal. It reflects the reality that for many reasons (including tax, consumer laws etc.) title does pass to the agent, but the intermediary does not have, is not set up to have and does not want to have an influence on the commercial conditions of the agreement concerned (notably the price or end-customer) and thus is not acting as an independent distributor. In this context, we note that the reference to "very" before "brief period of time" introduces uncertainty to an otherwise clear framework.

3.3 We noted in the 2021 Submission at paragraphs 73-74 our disappointment with the Commission's rigid approach on “dual role” agents, expressed initially by DG Competition in its Working Paper on “dual role” agents[21], and now in the draft Vertical Guidelines. The analysis framework is overly formalistic and fails to recognise the practical complexity surrounding the relevant dual role scenarios. Many brands would agree to use the agency model with their existing distributors in respect of new launches of a specific line of products, where the intermediary is used as a distributor for all other products. Requiring the brand owner in these instances to cover all relevant risks of the intermediary (i.e., both in respect of the new product launch and the existing product lines) is particularly disproportionate as the costs associated with the distribution business are far greater than those incurred for the agency model. Another example is where a distributor may operate different types of businesses, e.g., a mono-brand concept under genuine agency and a multi-brand concept as a distributor.

3.4 We also note that paragraph 34 of the draft Vertical Guidelines states that "*for the agreement to be considered an agency agreement for the purpose of applying Article 101, the independent distributor must be genuinely free to enter into the agency agreement* ***(for example the agency relationship must not be de facto imposed by the principal through a threat to terminate or worsen the terms of the distribution relationship****) (emphasis added)*”. In our view, the phrase expressed in bold is too wide, and fails to recognise that commercially the mere splitting of a distribution strategy from sole distribution to a model consisting of both distribution and agency could potentially already be considered ‘worsen the terms’, as part of the product portfolio may be moved from distribution to the agency model. If the distributor wants to keep the same portfolio (and turnover), it will thus have to accept the agency agreement. The Commission should clarify that a supplier's decision to change its distribution model does not in itself amount

[21] See European Commission's working paper: *Distributors that also act as agents for certain products for the same supplier.*

to a worsening of terms within the meaning of paragraph 34 of the draft Vertical Guidelines. This goes to the heart of the EU verticals framework which allows a supplier to choose its own distribution model.

3.5 In view of our comments on agency, Brands for Europe proposes the following amendments to the draft Vertical Guidelines:

Paragraph 31 draft Vertical Guidelines

In light of the above, for the purpose of applying Article 101(1), the following list provides examples of features generally found in agency agreements. This is the case where the agent:

(a) does not acquire the property of the goods bought or sold under the agency agreement and does not itself supply the contract services. The fact that the agent may temporarily, for a ~~very~~ brief period of time, acquire the property of the contract goods while selling them on behalf of the principal does not preclude an agency agreement, provided the agent does not incur any costs or risks related to that transfer of property;

[…]

Paragraph 34 draft Vertical Guidelines

An independent distributor of some goods or services of a supplier may also act as an agent for other goods or service of that same supplier, provided that the activities and risks covered by the agency agreement can be effectively delineated (for example because they concern goods or services presenting additional functionalities or new features). For the agreement to be considered an agency agreement for the purpose of applying Article 101, the independent distributor must be ~~genuinely~~ free to enter into the agency agreement (in the same way as the supplier remains free at the outset to choose the preferred distribution model) ~~(for example the agency relationship must not be de facto imposed by the principal through a threat to terminate or worsen the terms of the distribution relationship)~~ and, as mentioned in paragraphs (28) to (31) of these Guidelines, all relevant risks linked to the sale of the goods or services covered by the agency agreement, including market-specific investments, must be borne by the principal.

Paragraph 36 draft Vertical Guidelines

The risks described in paragraphs (28) to (31) of these Guidelines are of particular concern if the agent undertakes other activities as an independent distributor for the same principal in the same product market. Conversely, those risks are less likely to arise if the other activities the agent undertakes as an independent distributor concern a different product market. More generally, the less interchangeable the products are, the less likely are those risks to occur. In product markets comprising products ~~not~~ presenting objectively distinct characteristics, such as higher quality, novel, additional or different features ~~or additional functions~~, or in the context of new product launches (including the launch of a different range within the same product market) such delineation appears ~~more difficult~~ easier and there may therefore not be a significant risk of the agent being influenced by the terms of the agency agreement, notably regarding the price setting, for the products it distributes independently.

Exclusive distribution

3.6 Brands for Europe welcomes the introduction of Article 4(b) in the draft VBER dealing with exclusive distribution only. However, while this approach provides more clarity, the draft Vertical Guidelines addresses exclusive distribution in two separate sections (4.6.1 *Exclusive*

distribution systems, and 6.1.2.4 *Where the supplier operates exclusive distribution*) which is unnecessary complex.

We therefore suggest to consolidate the general description in 4.6.1 Exclusive distribution systems under section 6.1.2.4 Where the supplier operates exclusive distribution.

3.7 Brands for Europe also welcomes the possibility of operating shared exclusivity allowing a supplier to appoint more than one exclusive distributor in a particular territory or for a particular customer group. We note that paragraph 102 of the draft Vertical Guidelines notes that the number of distributors must be determined in proportion to the territory/customer group in such a way that it secures a certain volume of business that preserves their investment efforts. Brands for Europe is of the view that consumer demand in a particular territory or group is also a key factor in this context. In addition, we note that paragraph 107 of the draft Vertical Guidelines suggests that if the number of distributors appointed by a supplier is too high such that appreciable anti-competitive effects occur, the appointment of these distributors does not become a hardcore restriction as such, but that the benefit of the VBER is likely to be withdrawn. As set out below, we recommend that this is explicitly mentioned in paragraph 102 of the draft Vertical Guidelines.

3.8 Brands for Europe welcomes the (i) clarification in paragraph 104 of the draft Vertical Guidelines that a "customer group" can be one single customer, and that customers do not need be named individually as long as there is a definition for "customer group"; (ii) the express acknowledgement in paragraph 105 of the draft Vertical Guidelines that the supplier does not need to be commercially active in the reserved territory or towards the reserved customer group; and (iii) the possibility to pass-on obligations are permitted where the customer of the buyer has entered into a distribution agreement with the supplier or with a part which has been given distribution rights by the supplier.

3.9 In view of our comments above, Brands for Europe proposes the following amendments to the draft Vertical Guidelines:

Paragraph 102 draft Vertical Guidelines

In line with this rationale, the number of exclusive distributors should be restricted to one or a limited number (i.e. shared exclusivity) for a particular territory or customer group. Exclusive distribution shall not be used to shield a large number of distributors from competition located outside the exclusive territory, as this would lead to partition of the internal market. To that end, the number of appointed distributors should be determined in proportion to the allocated territory or customer group in such a way as to secure a certain volume of business that preserves their investment efforts. Where appreciable anti-competitive effects occur as a result of the appointment of disproportionally high number of distributors over an extended period of time, the benefit of the VBER is likely to be withdrawn.

Paragraph 107 draft Vertical Guidelines

Exclusive distribution agreements are exempted by the VBER where both the supplier's and the buyer's market share each do not exceed 30% and where they do not contain any hardcore restrictions. An exclusive distribution agreement can still benefit from the safe harbour provided by the VBER if combined with other nonhardcore vertical restraints, such as a non-compete obligation limited to five years, quantity forcing or exclusive purchasing. However, where the number of exclusive distributors is not limited and determined in proportion to the allocated territory or customer group in such a way as to secure a certain volume of business that preserves their investment efforts or meet consumer demand, such a distribution system is unlikely to bring about efficiency-enhancing effects. Where appreciable anti-competitive effects occur, the benefit of the VBER is likely to be withdrawn.

Selective distribution

3.10 Brands for Europe welcomes the introduction of Article 4(b) in the draft VBER dealing with selective distribution only. However, while this approach provides more clarity, the draft Vertical Guidelines addresses selective distribution in two separate sections (4.6.2 *Selective distribution systems*, and 6.1.2.5 *Where the supplier operates a selective distribution system*) which is unnecessary complex.

We therefore suggest to consolidate the general description in 4.6.2 Selective distribution systems under section 6.1.2.5 Where the supplier operates a selective distribution system.

3.11 Brands for Europe is very concerned by the addition in paragraph 134 of the draft Vertical Guidelines of the following qualification: *Although the case law does not require that the qualitative criteria be made known to all potential resellers, such transparency may increase the likelihood of fulfilling the Metro criteria*. This qualification is inconsistent with the *Metro* criteria which merely requires criteria to be applied without discrimination, not to be published. This is likely to be misinterpreted, particularly by national competition authorities and national courts, as an extra condition or test for a selective distribution system to meet the *Metro* criteria, or even to be covered by the VBER. Thus, this qualification brings potentially significant uncertainty, and a high risk of divergent and inconsistent interpretation and enforcement without any legal basis or justification.

3.12 In fact, following the judgement in Auto 24[22], paragraph 259 of the EC's Staff Working Document accompanying the Final Report on the e-commerce sector inquiry (**Final Report**)[23], and in the recent Competition Policy Brief[24], the definition in the VBER and/or in the VGL, should explicitly state that selective distribution criteria (whether qualitative or quantitative in nature) do not need to be published by suppliers and that suppliers are under no obligation to provide the criteria to customers interested in entering the selective distribution system. This would provide additional legal certainty, allowing brand owners to protect their criteria (which in many cases are considered a business secret) from public disclosure.

3.13 In addition, in relation to paragraph 134 of the draft Vertical Guidelines, the Commission summarizes the case law of the European Courts relating to the use of qualitative selective distribution and the application of the *Metro* criteria. While we welcome this restatement of the case law, Brands for Europe asks the Commission to also clarify that (i) the quality of all branded goods (and not only the goods of so-called "luxury brands") may result not only from their material characteristics but also from the attractiveness (or "aura") of a brand in the eyes of consumers and (ii) the attractiveness (or "aura") of all branded goods can be preserved and enhanced by ensuring that they are displayed and sold in an appropriate retail environment, thus necessitating the use of qualitative selective distribution. This position is supported by the opinion of Advocate General Whal in *Coty*[25], in which he states that, with regard to the application of qualitative selective distribution, the same considerations must apply to all brands, not only brands that are traditionally regarded as being so-called "luxury brands". In particular, at paragraph 43 of his opinion, Advocate General Wahl stated: "*Brands, and in particular luxury brands, derive their added value from a stable consumer perception of their high quality and their exclusivity in their presentation and their marketing. However, that stability cannot be guaranteed when it is not the same undertaking that distributes the goods*" (emphasis added). Indeed, it stands to reason that the imposition of qualitative criteria for the presentation and marketing of all branded goods forms an intrinsic part of the quality of the goods in the eyes of consumers. While this may have been explicitly recognised in the past in the case law specifically in relation to so-called "luxury goods", this in no way precludes the

[22] Judgement of CJEU of 14 June 2012 in *Case* C-158/11 *Auto 24 v Jaguar Land Rover France*
[23] See sector_inquiry_swd_en.pdf (europa.eu)
[24] Competition policy brief, April 2018, ISBN 978-92-79-81339-9, ISSN: 2315-3113.
[25] Case C-230/16, *Coty Germany GmbH v Parfümerie Akzente GmbH*, ECLI:EU:C:2017:603 (*Coty*).

application of these principles more broadly to all branded goods. The quality in the eyes of consumers of all branded goods depends on the environment in which such goods are presented and marketed. Similarly, at paragraph 46 of his opinion, Advocate General Wahl explained: "*It should be borne in mind that the compatibility of selective distribution systems with Article 101(1) TFEU ultimately rests on the notion that it may be permissible to focus not on competition 'on price' but rather on other factors of a qualitative nature. Recognition of such compatibility with Article 101(1) TFEU cannot therefore be confined to goods which have particular physical qualities. What matters for the purpose of identifying whether there is a restriction of competition is not so much the intrinsic properties of the goods in question, but rather the fact that it seems necessary in order to preserve the proper functioning of the distribution system which is specifically intended to preserve the brand image or the image of quality of the contract goods*" (emphasis added). Again, this statement applies to all branded goods and not only so-called "luxury brands".

3.14 Moreover, elsewhere in the draft Vertical Guidelines, the Commission itself already explicitly recognises that preserving and enhancing the attractiveness of a brand is an important justification for the use of selective distribution. For example, at paragraph 146 of the draft Vertical Guidelines, the Commission states that selective distribution may generate efficiencies because it helps "*create or maintain a brand image*". In this regard, at paragraph 14(h) of the draft Vertical Guidelines, the Commission reasons that selective distribution "*may help create a brand image by imposing a certain measure of uniformity and quality standardisation [...] thereby increasing the attractiveness of the goods or services concerned for final customers and thereby sales*"[26]. More specifically, at paragraphs 322 and 314 of the draft Vertical Guidelines, the Commission recognises that restrictions on resellers' use of online marketplaces may be justified by the need to ensure brand protection. The reasoning set out in the draft Vertical Guidelines is aligned with the reasoning relied on by Advocate General Wahl in his opinion in *Coty*. Therefore, we consider it important that the Commission clearly states this principle in the revised VGL in order to provide legal certainty that any brand's application of qualitative selective distribution for its products can meet the *Metro* criteria in precisely the same way as so-called "luxury brands".

3.15 In view of our comments above, Brands for Europe proposes the following amendments to the draft Vertical Guidelines:

Paragraph 134 draft Vertical Guidelines

Purely qualitative selective distribution where dealers are selected only on the basis objective criteria required by the nature of the product does not put a direct limit on the number of dealers. Provided that the three conditions laid down by the European Court of Justice in the Metro judgment (so-called "Metro criteria") are fulfilled, purely qualitative selective distribution is ~~generally~~ considered to fall outside Article 101(1), as it can be assumed that the restriction of intra-brand competition associated with selective distribution is offset by an improvement in inter-brand quality competition. First, the nature of the goods or services in question must necessitate a selective distribution system. This means that, having regard to the nature of the product concerned, such a system must constitute a legitimate requirement to preserve its quality and ensure its proper use. For instance, a selective distribution system that falls outside Article 101(1) can be operated for high-quality or high technology products. Operating a selective distribution system may also be necessary for luxury and~~or~~ branded goods. Whether goods are deemed 'luxury' or 'branded' should in practice only be of limited relevance, as the consumer perception of ~~The quality of either~~ such goods may result not just from their material characteristics, but also from the aura of luxury, quality or attractiveness surrounding both the product and the brand experience ~~them~~. Therefore, establishing a selective distribution system which seeks to ensure that the goods are displayed

[26] This is also consistent with paragraph 107(9) of the VGL.

in a manner that contributes to sustaining this aura of luxury, quality or attractiveness may be necessary to preserve their image ~~quality~~ [Commission to insert footnote: See opinion of Advocate General Wahl in C-230/16, Coty Germany GmbH v Parfümerie Akzente GmbH, ECLI:EU:C:2017:603A, paragraphs 43, 46]. Secondly, resellers must be chosen on the basis of objective criteria of a qualitative nature, which are laid down uniformly for all potential resellers and are not applied in a discriminatory manner. ~~Although the c~~Case law does not require that the qualitative criteria be made known to ~~all~~ potential resellers, ~~such transparency may increase the likelihood of fulfilling~~, and this is not a requirement under the Metro criteria. Thirdly, the criteria laid down must not go beyond what is necessary.

3.16 While we welcome the clarifications set out in paragraphs 194 and 316 of the draft Vertical Guidelines, we note that the language in paragraph 136 of the draft Vertical Guidelines which was also included in the previous VGL remains inconsistent with the rest of the draft Vertical Guidelines. This paragraph has been taken out of context by national authorities and courts to challenge whether certain products "deserve" a selective distribution system even where those agreements are covered by the VBER (the sentence included in this paragraph states: "*However, where the characteristics of the product do not require selective distribution or do not require the applied criteria, such as for instance the requirement for distributors to have one or more brick and mortar shops or to provide specific services, such a distribution system does not generally bring about sufficient efficiency enhancing effects to counterbalance a significant reduction in intra-brand competition*"). This sentence should be removed, as well as a similar qualification included in paragraph 135 of the draft Vertical Guidelines. The draft Vertical Guidelines should simply state, in line with the Competition Policy Brief[27], that it is permissible to use a selective distribution system (including qualitative and/or quantitative criteria) regardless of the nature of the product; and that this also covers a restriction on the use of a specific online sales channel, such as an online marketplace, or a requirement that the buyer operates one or more bricks and mortar shops. We propose the following particular amendments:

Paragraph 135 draft Vertical Guidelines

The assessment of selective distribution under Article 101(1) also requires a separate analysis of each potentially restrictive clause of the agreement under the Metro criteria. This implies, in particular, determining whether the restrictive clause is proportionate in the light of the objective pursued by the selective distribution system and whether it goes beyond what is necessary to achieve this objective. Such requirements are unlikely to be met by hardcore restrictions. Conversely, for instance, a ban on the use imposed in a discernible manner third-party online platforms by a supplier of ~~luxury~~ goods on its authorised distributors may be considered appropriate, as long as it allows authorised distributors to advertise via the internet on third-party platforms and to use online search engines, with the result that customers are usually able to find the online offer of authorised distributors by using such engines~~, and not going beyond what is necessary to preserve the luxury image of those goods~~. If this is the case, it falls outside of Article 101(1) and no further analysis is required.

Paragraph 136 draft Vertical Guidelines

Even if they do not meet the Metro criteria, qualitative and/or quantitative selective distribution systems can benefit from the safe harbour, provided the market shares of both the supplier and the buyer each do not exceed 30% and the agreement does not contain any hardcore restriction. The benefit of the exemption is not lost if selective distribution is combined with other non-hardcore vertical restraints, such as a noncompete obligation. The block exemption applies regardless of the nature of the product concerned and the nature of the selection criteria, and does not need require that the

[27] Competition policy brief, April 2018, ISBN 978-92-79-81339-9, ISSN: 2315-3113.

criteria be made known to potential resellers. ~~*However, where the characteristics of the product do not require selective distribution or do not require the applied criteria, such as the requirement for distributors to have one or more brick and mortar shops or to provide specific services, such a distribution system does not generally bring about sufficient efficiency enhancing effects to counterbalance a significant reduction in intra-brand competition. Where appreciable anti-competitive effects occur, the benefit of the VBER is likely to be withdrawn.*~~

3.17 Brands for Europe welcomes the possibility introduced by the Commission in the draft Vertical Guidelines to stop active and passive sales to unauthorised distributors by exclusive distributors or their customers located outside the SDS territory (paragraph 209 of the draft Vertical Guidelines). Having said that, we are concerned that the Commission continues to take an unnecessary strict approach to certain scenarios currently set out in paragraphs 167 (*Example of genuine entry*), 168 (*Example of cross-supplies between authorised distributors*) and 169 (*Example of genuine testing*) of the draft Vertical Guidelines. These examples are currently set out as exceptional circumstances where hardcore restrictions may fall outside the scope of Article 101(1). We urge the Commission to block exempt these examples. In particular:

(a) ***Combining exclusive distribution and selective distribution in the same territory***: A brand owner should be given the flexibility to operate an exclusive distribution network at the wholesale level, and a selective distribution system at the retail level in the same territory. Under the current framework, where a supplier appoints a wholesaler in a territory to manage the supplier's selective distribution system in the same territory (e.g., because the supplier does not have the presence or resource available in that territory to operate a selective distribution systems) brand owners have no power to stop free-riding - for instance, due to the fact that under the current VBER appointed wholesalers cannot be protected from active sale by other distributors. Active sales restrictions in the specific circumstances set out in paragraph 168 VGL (*Example of cross-supplies between authorised distributors*) should be block exempted. Paragraphs 222 and 223 should also be amended to reflect this. The draft VBER and draft Vertical Guidelines already make a distinction between the wholesale and retail levels of the market - for example, brand owners are permitted to restrict sales to end users by a wholesaler. In a similar vein, a brand owner should be permitted to operate an exclusive distribution network at the wholesale level and a selective distribution system at the retail level. In many cases brand owners will not always have the resources, investment and necessary knowledge of the local markets to operate a selective distribution system themselves. Being able to entrust an exclusively appointed wholesaler with the management of that selective distribution system in a particular territory or region helps ensure that the products are widely distributed whilst continuing to offer a seamless consumer experience. The appointed wholesalers in those cases incur significant investment in that territory, and ought to be protected against free-riding by other wholesalers outside the territory. The draft Vertical Guidelines should therefore clarify that in those circumstances exclusively appointed wholesalers can be protected from active selling by other wholesalers. Obviously, the block exemption should extend to a restriction on sales by exclusive wholesalers to any unauthorised retailers, where a selective distribution system is operated at the retail level.

(b) ***Exemption for the launch of new brands and new products (under an existing brand)***: regarding paragraphs 167 (*Example of genuine entry*) and 169 (*Example of genuine testing*) of the draft Vertical Guidelines, which capture protection against active or passive selling where a distributor is the first to sell a new brand or an existing brand on a new market, we urge the Commission to replace these examples with a broader exception which covers the launch of new brands and new products (under an existing brand). The Commission should not only take into account the investments made by the distributor, but also the research and development and other investments made by

the supplier which have allowed the development and launch of this new brand/new product. A protection against active/passive sales, as well as a prohibition against cross-sales between retailers (or at least cross-sales to retailers who are not part of the brand owner's retailer network) should be allowed during the launch period.

3.18 On that basis, we propose the following particular amendments:

Move paragraphs 167-169 of the draft Vertical Guidelines to follow after paragraph 221 of the draft Vertical Guidelines, as set out below (note that in paragraph 4.9 we also recommend to fully remove current paragraph 221 of the draft Vertical Guidelines).

Amend paragraphs 166-169, and 222-223 of the draft Vertical Guidelines as follows:

~~*166 The examples in the following three paragraphs of these Guidelines are meant to illustrate under which exceptional circumstances a hardcore restriction may fall outside the scope of Article 101(1).*~~

~~*167*~~ *221 Example of genuine entry*

A distributor which is the first to sell a new product, a new brand or an existing brand on a new market, thereby ensuring a genuine entry, may have to commit substantial investments if there was previously no demand for the particular type of product in general or for the type of product from the particular producer, in addition to the substantial investments made by the supplier in research and development and other investments to develop and launch this new brand or new product.

In such circumstances, considering that such expenses may often be sunk, the distributor may not enter into the distribution agreement without protection for a certain period of time against active and passive sales into its territory or to its customer group by other distributors. For example, such a situation may occur where a manufacturer established in a particular national market enters another national market and introduces its products with the help of an exclusive distributor, which needs to invest in launching and establishing the brand on this new market.

Where substantial investments by the distributor and/or supplier to start up and/or develop the new market are necessary, restrictions of passive sales by other distributors into such a territory or to such a customer group which are necessary for the distributor to recoup those investments generally fall outside the scope of Article 101(1) during the first two years during which the distributor is selling the contract goods or services in that territory or to that customer group, or a longer period where this is necessary to recoup the relevant investments.

~~*169*~~ *222 Example of genuine testing*

In the case of genuine testing of a new product in a limited territory or with a limited customer group or in the case of a staggered introduction of a new product, the distributors appointed to sell the new product on the test market or to participate in the first round(s) of the staggered introduction may be restricted in their active or passive selling outside the test market or the market(s) where the product is first introduced. Active or passive resale restrictions do not fall within the scope of Article 101(1) during the test period or the period of introduction of the new product. ~~*without falling within the scope of Article 101(1) for the period necessary for the testing or introduction of the product.*~~

~~*222*~~ *223 A selective distribution system can*~~*not*~~ *be combined with an exclusive distribution system, as defined in Article 1(1)(g) VBER, within the same territory, at different levels of the distribution chain.* ~~*168 222 Example of cross-supplies between authorised distributors I*~~ *In particular, while in the case of a selective distribution system, cross-supplies between authorised distributors must normally remain free (see paragraph 187 of these Guidelines),* ~~*However,*~~ *if authorised wholesalers located in different territories are obliged to invest in*

promotional activities in the territory in which they distribute the goods or services concerned in order to support the sales by authorised distributors ~~and it is not practical to specify in a contract the required promotional activities,~~ restrictions on active sales by these wholesalers to authorised distributors in other wholesalers' territories to overcome possible free-riding are block exempted.~~, as this would lead to a hardcore restriction of active or passive sales to end users by the authorised distributors pursuant to Article 4(c)(i) VBER. However~~In addition, the supplier may commit to supplying only one or a limited number of authorised distributors in a specific part of the territory where the selective distribution system is operated. The supplier may also commit not to make any direct sales itself into that territory. In addition, as allowed by the second exception to Article 4(c)(i) VBER, the supplier may impose a location clause on its authorised distributors.

~~223~~ 224 The hardcore restriction set out in Article 4(c)(ii) VBER concerns the restriction of cross-supplies between authorised distributors within a selective distribution system. This means that the supplier cannot prevent active or passive sales between its authorised distributors, which must remain free to purchase the contract products from other authorised distributors within the network, operating either at the same or at a different level of trade. Consequently, selective distribution cannot be combined with vertical restraints aimed at forcing distributors to purchase the contract products exclusively from a given source. It also means that within a selective distribution network, no restrictions can be imposed on authorised wholesalers as regards their sales to authorised distributors, other than as set out in paragraph 223 of these Guidelines.

3.19 We also note that the Commission should clarify in the draft Vertical Guidelines that a supplier may require its authorised retailers and/or any other third party platforms/marketplaces to assist in the legitimate enforcement of the supplier's selective distribution system. We reflect this in our proposal for a new paragraph to be inserted before *6.1.2.6 (Where a supplier operates a free distribution system):*

A supplier operating a selective distribution system may legitimately enforce its selective distribution system, which includes requiring its authorised distributors to assist the supplier in the legitimate enforcement of its selective distribution system. This includes requiring such authorised distributors to report to the supplier any sales by unauthorised distributors they become aware of. Where authorised distributors also operate a third party platform/marketplace, a supplier may require such authorised distributors to block sales by unauthorised distributors of products that are covered by the selective distribution system on that platform/marketplace.

Active / passive resale restrictions

3.20 Brands for Europe welcomes the definitions of active and passive sales in Article 1 of the draft VBER, as well as the clarification in paragraph 198 of the draft Vertical Guidelines that offering language options on a website different than the ones commonly used in the distributor's territory is a form of active selling, and that domain name specific to a territory is also active selling.

3.21 We also welcome the incorporation of the Court of Justice judgement in *Javico*[28] on territorial resale restrictions to / from the EEA (as per paragraph 162 of the draft Vertical Guidelines). Following Brexit we understand this also applies to restrictions on exports to / imports from the United Kingdom of Great Britain and Northern Ireland.

3.22 As regards paragraphs 189 and 191 of the draft Vertical Guidelines, Brands for Europe notes that these paragraphs should include a specific reference to section 4.2.1 and paragraph 52 of the draft Vertical Guidelines, which provide that unilateral conduct falls outside Article 101,

[28] See judgment in Case C-306/96 *Javico* v *Yves Saint Laurent* EU:C:1998:173, paragraph 20.

and the VBER. In addition, Brands for Europe disagrees with certain restrictions included in paragraphs 189 and 191:

(a) Regarding paragraph 189 (a) of the draft Vertical Guidelines, we urge the Commission to clarify that this does not exclude a legitimate request from a supplier to confirm that a sale will be made to end users or to another authorised distributor (in the context of selective distribution), or that the sale is not an active sale (in the context of exclusive distribution).

(b) Regarding paragraph 189 (d) of the draft Vertical Guidelines, an explicit reference should be made to the European Court of Justice judgement in *Bayer/Adalat* where it explicitly noted that *"The mere concomitant existence of an agreement which is in itself neutral and a measure restricting competition that has been imposed unilaterally does not amount to an agreement prohibited by that provision. Thus, the mere fact that a measure adopted by a manufacturer, which has the object or effect of restricting competition, falls within the context of continuous business relations between the manufacturer and its wholesalers is not sufficient for a finding that such an agreement exists*"[29]. Limitations of supplied volumes are legitimate and common in many sectors - e.g., seasonal or temporary products which, by definition, have limited production and volumes which are allocated in limited quantities to distributors.

(c) Regarding paragraph 189 (i) of the draft Vertical Guidelines, a unilateral decision of the supplier to limit languages used on packaging does not constitute a breach of Article 101. This unilateral behaviour was sanctioned by the Commission as a breach of Article 102, but it is inappropriate to include this as an example of an illegal agreement in the context of VBER[30]. There can be many different legitimate reasons for limiting the languages used on packaging - for example, some products have very small packaging making it physically impossible to add multiple languages on a given pack, especially when different legislation or regulations require brands to include certain specific information on the packaging of a product. Therefore, there may be entirely legitimate reasons for refusing a request from a retailer to add a particular language on the packaging of a product.

(d) Regarding paragraph 191 of the draft Vertical Guidelines, we note that the use of differentiated labels, specific language clusters, serial numbers is very common in practice. Unilateral decisions of the supplier to use differentiated labels, specific language clusters, serial numbers should not be included as an example of an illegal agreement in the context of VBER.

3.23 On this basis, we propose the following particular amendments:

4.2.1 Unilateral conduct falls outside the scope of ~~the VBER~~ Article 101 of the Treaty

[...]

189 These hardcore restrictions may be the result of direct obligations, such as the obligation not to sell to certain customers or to customers in certain territories or the obligation to refer orders from these customers to other distributors, it may also result from indirect measures aimed at inducing the distributor not to sell to such customers, such as [Commission to insert footnote: As set out in paragraph 52 of these Guidelines, if there is no explicit agreement expressing the parties' concurrence of wills, the

[29] Bayer AG v Commission of the European Communities (Case T-41/96) [2000] ECR II-3383; BAI and Commission of the European Communities v Bayer AG (Cases C-2/01 and C-3/01) [2004] ECR I-23, para 141

[30] Case 40134 AB InBev Beer Trade Restrictions

Commission has to prove for the purpose of applying Article 101 that the unilateral policy of one party receives the (at least tacit) acquiescence of the other party]:

(a) the requirement to request the supplier's prior approval (this does not apply to a legitimate request from a supplier to confirm that a sale will be made to end users or to another authorised distributor (in the context of selective distribution), or that the sale is not an active sale (in the context of exclusive distribution));

(b) the refusal or reduction of bonuses or discounts, and compensatory payments by the supplier if the distributor stops sales to such customers;

(c) the termination of supply;

(d) the limitation or reduction of supplied volumes, for instance, to the demand within the allocated territory or of the allocated customer group [Commission to insert footnote: See judgement of the European Court of Justice in Bayer/Adalat explicitly noting that "The mere concomitant existence of an agreement which is in itself neutral and a measure restricting competition that has been imposed unilaterally does not amount to an agreement prohibited by that provision. Thus, the mere fact that a measure adopted by a manufacturer, which has the object or effect of restricting competition, falls within the context of continuous business relations between the manufacturer and its wholesalers is not sufficient for a finding that such an agreement exists [31]"];

(e) the threat of contract termination or non-renewal;

(f) the threat or carrying out of audits to verify compliance with the request not to sell to certain customer groups or to customers in certain territories (this does not apply to a legitimate request from a supplier to confirm that a sale will be made to end users or to another authorised distributor (in the context of selective distribution), or that the sale is not an active sale (in the context of exclusive distribution));

(g) requiring a higher price for products to be sold to certain customer groups or to customers in certain territories;

(h) limiting the proportion of sales to certain customer groups or to customers in certain territories;

~~*(i) limiting the languages to be used on the packaging or for the promotion of the products;*~~

(j) the supply of another product in return for stopping such sales;

(k) payments to stop such sales;

(l) the obligation to pass-on to the supplier profits from such sales.

(191) The practices mentioned in paragraphs (187) and (189) of these Guidelines are more likely to be considered a restriction of the buyer's sales when used by the supplier in conjunction with a monitoring system aimed at verifying the destination of the supplied goods~~, such as the use of differentiated labels, specific language clusters or serial numbers~~.

4. Online sales

4.1 Brands for Europe strongly agrees with the EC's conclusions that the VBER and VGL need to be updated in line with the current omni-channel commercial reality. Consumers expect a seamless O2O brand and shopping experience throughout their journey, whether offline, online

[31] Bayer AG v Commission of the European Communities (Case T-41/96) [2000] ECR II-3383; BAI and Commission of the European Communities v Bayer AG (Cases C-2/01 and C-3/01) [2004] ECR I-23, para 141

or both. It is therefore crucial that brand owners should have the freedom to incentivise retailers to invest in those seamless O2O brand and shopping experiences across all channels as they wish in order to meet their brand strategy, maximise sales and support from retailers, whilst minimising the risk of free-riding.

4.2 The draft VBER and Vertical Guidelines go a long way to reflect this new reality. However, as set out further below, Brands for Europe is of the view that the revised texts occasionally introduce legal concepts or tests which are inconsistent with the case law of the European Court of Justice and/or open up a high probably of misinterpretation by national authorities and/or national courts which in turn will hinder harmonisation and cross-border trade.

General comments

4.3 Brands for Europe is extremely concerned by the language used in Recital 13 of the draft VBER and paragraph 188 of the draft Vertical Guidelines, in particular in relation to online sales restrictions which are "**capable of significantly diminishing the overall amount of online sales in the market**". This wording goes far beyond the European Court of Justice judgement in *Pierre Fabre*[32], which held that a ban on online sales or a de facto ban on online sales amounts to a by object infringement of Article 101 (rather than a restriction that is merely "capable of significantly diminishing the overall amount of online sales in the market"). This wording is also not consistent with the European Court of Justice judgement in *Coty*[33], as explained in detail in the expert paper produced by Professor Alison Jones in the context of the EC's impact assessment phase of the consultation[34] (emphasis added):

"Pierre Fabre and Coty establish that although a prohibition (or de facto prohibition) on online selling constitutes a hardcore restraint within the meaning of Articles 4(b) and (c), ***other limitations on online selling are not prohibited unless they operate in practice as an absolute prohibition on online selling****. In line with these cases, the Guidelines should therefore make this position clear and that, consequently, some online restraints, including dual pricing practices, limitations on online selling that are not overall equivalent to the criteria imposed in brick and mortar shops in a SDS, marketplace bans and restrictions on the use of price comparison tools and online advertising, do not in general constitute hardcore restraints. The only exception would be if it could be established that the restriction, as was the case in Pierre Fabre, operates in practice as a prohibition on online selling (for example, where combined with other restraints in the agreement or taking account of remaining avenues of online selling available to the distributor, the restraint operates as a de facto prohibition on online selling).* ***The Guidelines should also clarify that Article 4 applies only to absolute prohibitions on online selling, not provisions which 'substantially' limit online selling. Extending the prohibition to provisions which substantially restrict online selling would detract from a central goal of the VBER to provide legal certainty****."*

4.4 On that basis, we propose the following general amendments:

Recital 13 draft VBER

This Regulation should not exempt vertical agreements containing restrictions which are likely to restrict competition and harm consumers or which are not indispensable to the attainment of the efficiency-enhancing effects. In particular, vertical agreements containing certain types of severe restrictions of competition such as

[32] Judgment of the Court (Third Chamber) of 13 October 2011, *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la Concurrence, Ministre de l'Économie, de l'Industrie et de l'Emploi*, C-439/09, ECLI:EU:C:2011:649.
[33] Judgment of the Court (Fifth Chamber) of 6 December 2017, *Coty Germany GmbH v Parfümerie Akzente GmbH*, C-230/16, ECLI:EU:C:2017:941.
[34] Jones, A., 2021. *Expert report on the review of the Vertical Block Exemption Regulation.* [online] Luxembourg: Publications Office of the European Union. Available at: <https://ec.europa.eu/competition-policy/system/files/2021-06/kd0921156enn_VBER_online_sales.pdf> [Accessed 6 September 2021].

minimum and fixed resale prices, certain types of territorial protection, or the prevention of the ~~effective~~ use of the Internet for the purposes of selling online or of the ~~effective~~ use of certain online advertising channels, should be excluded as a whole from the benefit of the block exemption established by this Regulation irrespective of the market share of the undertakings concerned. Therefore, online sales restrictions benefit from the block exemption established by this Regulation, provided that they do not have as their object to, directly or indirectly, prevent the ~~effective~~ use of the internet by the buyers or their customers for the purposes of selling their goods or services online~~, for instance because it is in~~ practice operating as a prohibition on online selling ~~capable of significantly diminishing the overall amount of online sales in the market~~.

Paragraph 188 Draft Vertical Guidelines

Article 4(b) to (d) VBER applies irrespective of the sales channel used. Vertical agreements which, directly or indirectly, in isolation or combination with other factors, have as their object, to prevent the buyers or their customers from ~~effectively~~ using the internet for the purposes of selling their goods or services online, restrict the territories into which or the customer groups to whom the buyers or their customers may sell the contract goods or services, as they restrict sales to customers located outside the physical trading area of the buyers or their customers. A ban of online sales, as well as restrictions de facto banning ~~or limiting~~ online sales to the extent that these de facto deprive buyers and their customers from ~~effectively~~ using the Internet to sell their goods or services online, have as their object to prevent the buyers or their customers from ~~effectively~~ using the internet to sell their goods or services online. ~~Therefore, a restriction capable of operating in practice as a prohibition on online selling significantly diminishing the overall amount of online sales in the market constitutes a hardcore restriction of active or passive sales within the meaning of Article 4(b) to (d) VBER~~. The assessment of whether a restriction is hardcore cannot depend on market-specific circumstances or the individual circumstances of one or specific customers. Restrictions that prevent the ~~effective~~ use of one or more online advertising channels by the buyers or their customers have as their object to prevent the buyers or their customers from ~~effectively~~ using the internet to sell their goods or services online and thus restrict sales to customers wishing to purchase online and located outside the physical trading area of the buyers or their customers, as they limit the buyers' or their customers' ability to target them, inform them of their offering and to attract them to their online shop or other channels.

Online criteria and online advertising

4.5 Brands for Europe welcomes the Commission's confirmation that qualitative and quantitative criteria are block exempted (including the requirement that a buyer operates a brick and mortar store), regardless of the distribution system used (paragraph 193 of the draft Vertical Guidelines). We also welcome the confirmation that a restriction on the use of a specific online sales channel, such as an online marketplace, is block exempted, irrespective of the distribution system used by the supplier (paragraphs 194 and 316 of the draft Vertical Guidelines).

4.6 While we welcome the examples of online advertising restrictions that benefit from the VBER as provided by the Commission in paragraph 196 of the draft Vertical Guidelines, we note in respect of paragraph 192 of the draft Vertical Guidelines, that:

(a) **Regarding paragraph 192(d)**: it is perfectly legitimate in the context of selective distribution for a supplier to request a distributor to seek prior approval before starting to sell products online to ensure, that the authorised distributor's website meets the relevant qualitative criteria, and

(b) **Regarding the examples set out in paragraph 192(f)**: the Commission decision in *Guess*[35] treated a ban on the use of the Guess brand name and trademark in Google AdWords as a "by object" infringement, but the Commission also noted in the Final Report that such restrictions could help avoid confusion with the manufacturer's website. We ask the Commission to reflect this in the draft Vertical Guidelines. For example, we ask that the Commission clarifies that the following types of restrictions are block exempted: (i) restrictions on bidding for brand names or trademarks that the distributor does not actually sell under the relevant distribution agreement, (ii) restrictions on including the brand name or trademark in the website URL/domain name, or (iii) restrictions on bidding on terms that point in the direction of a brand as a company/corporate (e.g., "brand.com").

4.7 Therefore, we propose the following amendments:

Paragraph 192 draft Vertical Guidelines:

In addition to the direct and indirect obligations laid down in (187) to (190) of these Guidelines, hardcore restrictions specifically related to online sales may similarly be the result of direct or indirect obligations. Besides a direct prohibition to use the internet as a sales channel, the following are further examples of obligations, directly or indirectly, having the object to prevent distributors from ~~effectively~~ using the internet to sell their goods or services online anywhere, in certain territories or to certain customer groups:

[…]

(d) a requirement that the distributor shall seek the supplier's prior authorisation for selling online (this does not apply to a requirement in the context of selective distribution that the authorised distributor shall seek the supplier's prior authorisation for selling online, to allow the supplier to confirm that the authorised distributor's website meets the relevant qualitative criteria);

(f) a direct or indirect prohibition to use a specific online advertising channel, such as price comparison tools or advertising on search engines, or other online advertising restrictions indirectly prohibiting the use of a specific online advertising channel, such as ban on the ~~an obligation on the distributor not to~~ use the suppliers' trademarks or brand names for bidding to be referenced in search engines, or a restriction to provide price related information to price comparison tools. While a prohibition in the use of one specific price comparison tool or search engine would typically not prevent the effective use of the internet for the purposes of selling online, as other price comparison tools or search engines could be used to raise awareness of a buyer's online sales activities, a prohibition in the use of all most widely used advertising services in the respective online advertising channel could amount to such prevention, if the remaining price comparison tools or search engines are de facto not capable to attract customers to the buyer's online shop. Restrictions on (1) the use of the supplier's brand name or trademark in the website URL/domain name of the distributor's website to avoid confusion with the supplier's website, (2) the use of brand names or trademarks of products that are not sold by the distributor or point in the direction of a brand as a company/corporate entity (e.g., "brand.com") (which may mislead the consumer) are block exempted.

Equivalence requirement

4.8 We welcome the EC's objective of removing the equivalence requirement, as set out in its explanatory note: "*criteria imposed in relation to online sales no longer have to be equivalent to the criteria imposed on brick and mortar shops, given that both channels are inherently*

[35] Commission Decision of 17 December 2019, Case AT.40428 Guess

different in nature"[36]. However, we note that the language included in the draft Vertical Guidelines does not fully reflect this approach, and indeed has the potential of creating further confusion and/or misinterpretation (see for example the reference in paragraph 221 of the draft Vertical Guidelines to online criteria "that are not identical" to brick and mortar criteria). Also, the Commission addresses this change in policy only in the section of the draft Vertical Guidelines which deals with selective distribution systems, while this should be applicable to all distribution systems - as is also clear from the rest of the draft guidance (e.g., see reference in paragraph 193 of the draft Vertical Guidelines that quality requirements are block exempted, regardless of the distribution system).

4.9 Therefore, in line with the EC's intentions expressed in its explanatory note, we provide specific suggestions for amendments further below.

Paragraph 193 draft Vertical Guidelines to be amended as follows:

By contrast, under the VBER the suppliers are allowed to give certain instructions to their distributors on how their products are to be sold. It is permissible for a supplier to impose quality requirements on distributors irrespective of the distribution model applied. The modalities of sales that do not have as their object the restriction of the territory into which and the customer groups to whom the product and service may be sold can be agreed upon by the suppliers and its distributors. For instance, vertical agreements that contain quality requirements~~, notably in the context of selective distribution,~~ such as the minimum size of the shop, quality requirements for the setup of the shop (e.g. with respect to fixtures, furnishing, design, lightening and floor coverings), quality requirements for the look and feel of the website, product presentation requirements (e.g. the minimum number of colour options displayed next to each other or of the brand's products exposed, and the minimum space requirement between products, product lines and brands in the shop), are covered by the VBER. In addition, considering that online and offline channels have different characteristics, it is permissible for a supplier to impose online quality requirements that are not equivalent to those imposed for sales in brick and mortar shops, in as far as the criteria imposed for online sales do not, directly or indirectly, in isolation or combination with other factors, have as their object, to prevent the buyers or their customers from using the internet for the purposes of selling their goods or services online. For example, a supplier may establish specific requirements to ensure certain service quality standards for users purchasing online, such as the set-up and operation of an online after-sales help desk, a requirement to cover the costs of customers returning the product or the use of secure payment systems. These restrictions do not affect a group of customers which can be circumscribed within all potential customers nor the buyers' or their customers' ability to operate their own websites and to advertise via the internet on third-party platforms or online search engines, enabling buyers or their customers to raise awareness of their online activities and attract potential customers.

Paragraph 221 draft Vertical Guidelines to be completely removed:

~~*Considering that online and offline channels have different characteristics, a supplier operating a selective distribution system may impose on its authorised distributors criteria for online sales that are not identical to those imposed for sales in brick and mortar shops, in as far as the criteria imposed for online sales do not, directly or indirectly, in isolation or combination with other factors, have as their object, to prevent the buyers or their customers from effectively using the internet for the purposes of selling their goods or services online. For example, a supplier may establish specific requirements to ensure certain service quality standards for users*~~

[36] Available here: https://ec.europa.eu/competition-policy/document/download/e0eacfbb-9dbe-4dc5-8fdf-b0e9c74a7f15_en

~~*purchasing online, such as the set up and operation of an online after-sales help desk, a requirement to cover the costs of customers returning the product or the use of secure payment systems. These restrictions do not affect a group of customers which can be circumscribed within all potential customers nor the buyers' or their customers' ability to operate their own websites and to advertise via the internet on third party platforms or online search engines, enabling buyers or their customers to raise awareness of their online activities and attract potential customers.*~~

Dual pricing

4.10 Brands for Europe welcomes the EC's proposal to clarify in paragraph 195 draft Vertical Guidelines that dual pricing for buyers operating a hybrid model (i.e. the same buyer pays a different purchase price depending on whether the contract goods are resold online or offline) can benefit from the safe harbour provided by the VBER, and thus should no longer be considered as a hard core restriction of competition. For the reasons set out in more detail in paragraphs 117 to 134 and 144 to 148 of the 2021 Submission, the proposed change is really necessary to take into account the market reality that the nature, costs and investments of both sales channels are different and the online sales channel as such does no longer need any specific protection.

4.11 Brands for Europe wants to stress that offering the possibility to apply dual wholesale pricing or differentiated levels of discounts/bonuses according to the resale channel through which products are sold, will level the playing field between pure brick and mortars, pure online stores and hybrid retailers and thus be an effective way to incentivise (hybrid) retailers to invest in the necessary pre- and after sales services, store attractiveness and customer experience (both on and offline). This will allow brand owners to better support hybrid retailers to continue to invest in attractive brick and mortar shops (as well as remunerate fairly their online retail business), providing a wider access for all consumers (including those without or limited access to e-commerce) to a broader selection of products as well as to a better level and quality of services. Therefore, dual pricing could contribute to increased intra-brand competition, where hybrid retailers will have the opportunity to better compete on equal footing with both pure online and brick and mortar shops and will not be penalised if investing in attractive customer services. At the same time, such increased intra-brand competition would also result in increased inter-brand competition as hybrid retailers would be rewarded to increase the sales of the brand owner's products. Allowing for dual pricing not only increases competition but equally has the possibility to increase investments both by manufacturers and retailers, as the appropriate incentives for such investments can be more easily designed and implemented.

4.12 At the same time, Brands for Europe, wants to emphasize that as long as the brand owner has no market power and faces competition from other manufacturers, any attempt to use dual pricing to raise prices in a given market or sales channel to supra-competitive levels would result in loss of overall sales by the brand owner as distributors and their customers would switch to other manufacturer's products. For the same reason, brand owners would certainly not have any incentive to use dual pricing as a means to achieve a total ban on online sales. The only result of such an approach would be that such a brand owner would leave the fastest growing sales channel completely to its competitors, likely resulting in a massive loss of sale as well as disgruntled distributors and end-users. In the current omni-channel retail environment, this is not a long term viable solution for any company active in the sale of consumer goods.

4.13 For the reasons set out above, Brands for Europe, while welcoming the proposed recognition that dual wholesale pricing for off- and online sales can benefit from the VBER safe harbour, is of the opinion that to achieve the full potential of dual pricing and the related pro-competitive effects, as set out briefly above in paragraph 4.11 and in more detail in paragraphs 117 to 134 and 144 to 148 of the 2021 Submission, the Commission should amend the conditional language regarding instances in which dual pricing could benefit from the safe harbour. To ensure that

undertakings will really use dual pricing in practice it should be clear that the principle is that dual pricing based on the respective sales channel through which the reseller will resell the contract goods can benefit from the VBER safe harbour. In addition, the Commission should clarify that such dual pricing will only not benefit from the safe harbour if the wholesale price difference has as its clear object to prevent the use of the internet for the purposes of selling online. If such clarifications are not made Brands for Europe believes that most brand owners might continue refraining from implementing dual pricing, in particular because of the inherent difficulties to demonstrate for each specific case that the wholesale price difference bears a close relationship with the difference in costs incurred in the different sales channels.

4.14 This would therefore lead to the same situation as today, where brand owners refrain from making use of the possibility to offer a fixed fee to support the offline sales channel of hybrid resellers.

4.15 Based on the above suggested amendments, Brands for Europe proposes to redraft paragraph 195 draft Vertical Guidelines as follows (changes to the current draft Vertical Guidelines are indicated in red):

> *"A requirement that the same buyer pays a different price for products intended to be resold online than for products intended to be resold offline can benefit from the safe harbour of the VBER. Such difference in price can be an effective means~~, in so far as it has as its object~~ to incentivise or reward the appropriate level of investments respectively made online and offline as it can compensate for the difference in costs, investments or market opportunities for each channel. ~~Such difference in price should be related to the differences in the costs incurred in each channel by the distributors at retail level. To that end, the wholesale price difference should take into account the different investments and costs incurred by a hybrid distributor so as to incentivise or reward that hybrid distributor for the appropriate level of investments respectively made online and offline, as~~ Only where the wholesale price difference is entirely unrelated to the difference in costs, investments and market opportunities incurred in each channel, ~~such price difference is unlikely to bring about efficiency enhancing effects. Therefore, where the wholesale price difference~~ and has as its object to prevent the ~~effective~~ use of the internet for the purposes of selling online it amounts to a hardcore restriction, as set out in paragraph (188) of these Guidelines. This would, in particular, be the case where the price difference makes the ~~effective~~ use of the internet for the purposes of selling online unprofitable or financially not sustainable.*

4.16 Finally, Brands for Europe wants to repeat its request to the Commission to explicitly clarify in the new Vertical Guidelines that differential pricing (i.e., applying different prices for different retailers) is and should remain block exempted. This means that brand owners can charge different prices for retailers only operating pure online stores and retailers that also operate a brick and mortar store. This would help resolve significant confusion and divergence at NCA level on this point (see e.g., the French Competition Authority in *LEGO*[37] and the German Competition Authority in *Gardena*[38] and apparently several NCAs recognise the lack of clarity in the VGL on this point)[39]. In addition, the Commission should explicitly clarify that suppliers may differentiate the commercial conditions, including the purchase price, depending on the type of retail store. A brand owner should therefore be able to differentiate prices for products that are to be sold in a specialised shop with limited product assortment (e.g., consumer electronics store, toys store, pet shop) from a shop with a broad

[37] See press release of the Autorité de la Concurrence on https://www.autoritedelaconcurrence.fr/en/press-release/legomakes-commitments-autorite-de-la-concurrence-amend-its-price-discount-system

[38] See press release of the Bundeskartellamt on https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2013/B05-144-13.pdf?__blob=publicationFile&v=3

[39] See Summary of the contributions of the National Competition Authorities to the evaluation of the Vertical Block Exemption Regulation (EU) No 330/2010, page 9-10.

product assortment (e.g., supermarket), even where one retail group operates different types of retail stores. In that way, brand owners can tailor their commercial conditions to reflect the different costs faced by different types of retailers and valorise the different level of investment made and services offered by those shops to sell the brand owners' products. Such distinctions between commercial conditions are merely a reflection of the outcome of the normal competitive process and should not be considered indicative of a restriction of competition.

4.17 Brands for Europe therefore proposes to include an additional paragraph in the draft Vertical Guidelines after the current paragraph 193

> *Equally, under the VBER suppliers are allowed to apply different commercial conditions, including different purchase prices, for different buyers operating a different sales model (e.g. different purchase prices for a buyer selling offline only compared to a buyer operating a pure online or hybrid resale model), without needing to justify the difference in commercial conditions. Such different commercial conditions are also covered by the VBER in case the different buyers form part of the same undertaking (e.g. differentiate purchase prices for products that are to be sold in a specialised shop with limited product assortment (e.g., consumer electronics store, toys store, pet shop) from a shop with a broad product assortment (e.g., supermarket), even where one retail group operates different types of retail stores.)*

5. Resale price maintenance

Introduction

5.1 Brands for Europe welcomes the additional clarifications and changes proposed by the Commission in the draft Vertical Guidelines with regard to pricing related topics such as Minimum Advertising Pricing Policies (**MAPs**), and fulfilment contracts. The proposed changes are indeed necessary to bring the Vertical Guidelines in line with the current economic and market reality and to allow suppliers to provide the necessary incentives and support to resellers to invest in valuable pre- and after-sales services and ensure consumer choice and quality offering. While welcoming these changes, Brands for Europe thinks that the actual wording of the relevant paragraphs in the draft Vertical Guidelines on MAPs and fulfilment contracts could be enhanced to provide further clarity to businesses and ensure much needed legal certainty on the important topic of promotional and pricing related conduct. Therefore, Brands for Europe provides in this section some suggestions to amend the draft Vertical Guidelines on these points.

5.2 Although, the draft Vertical Guidelines provide some much needed additional flexibility regarding certain pricing related practices, Brands for Europe is disappointed to see that the Commission has not yet made use of the current VBER review process to provide additional clarifications or make further changes on other points such as recommended and maximum resale prices and Article 101 (3) TFEU exemptions to the principle prohibition of resale price maintenance (**RPM**). In particular, Brands for Europe calls upon the Commission to:

a) provide further clarity in paragraph 182 draft Vertical Guidelines on the conditions when an Article 101 (3) TFEU exemption to RPM will be accepted in case of short term promotions, product introduction and free-riding;

b) include in paragraph 182 draft Vertical Guidelines further specific examples where RPM is allowed to overcome free-riding problems, notably in the case of replenishment sales or loss-leader conduct;

c) remove or at least amend the unnecessarily suspicious language on recommended resale prices (**RRPs**) and maximum prices contained in paragraph 184-185 draft Vertical Guidelines.

5.3 Finally, Brands for Europe wants to reiterate its request to the Commission to fully take into account the evolved market reality showing a clear shift of power away from brand owners to retailers. As already explained in more detail in paragraph 168 to 170 of the 2021 Submission, there is a clear shift in power from brand owners/suppliers to big retailers/e-tailers and platforms that often place strong pressure on suppliers to seek price/margin protection against competition from other retailers. This should be reflected in the draft Vertical Guidelines, for instance by including in the list of behaviour indicative of RPM in paragraph 172 some reseller initiated conduct such as threats of de-listing or requests for fixed margin or additional margin protection. This would provide a clear signal to resellers that their behaviour can equally qualify as RPM.

Minimum Advertising Price Policies (MAPs)

5.4 Brands for Europe welcomes the Commission's acknowledgment in paragraph 174 that, except for the specific cases where the supplier accompanies MAPs with further measures limiting the resellers' freedom to determine the final resale price, MAPs, as a unilateral policy, do not constitute RPM as such.

5.5 Brands for Europe wants to stress that for the reasons set out in more detail in paragraphs 179 to 182 of the 2021 Submission, it fully supports the inclusion of this clarification in the draft Vertical Guidelines and asks the Commission to maintain this clarification in the final new Vertical Guidelines. MAPs, as a unilateral policy that only restrict resellers to advertise prices below a certain level, do not prevent resellers from ultimately selling below a certain price and can therefore rightly not be qualified as RPM. In addition, similarly to arguments in favour of allowing for the communication of recommended resale prices, MAP is equally justified for the benefit of retailers and customers in helping retailers to understand how to best position a product for optimal customer experience and incentivizing retailers to provide consumers with important information about the product's features, benefits and performance. Furthermore, allowing a MAP-policy would take away some of the most visible (online) price promotions thus limiting the detrimental impact of (algorithmic) price adjustments and counteract, albeit only partially, the most negative consequences of cases of replenishment sales and loss leader conduct.

5.6 To increase the clarity and legal certainty around the lawful use of MAPs, Brands for Europe would nevertheless propose to include some limited amendments to the precise wording of paragraph 174 draft Vertical Guidelines as follows (changes to the current draft Vertical Guidelines are indicated in red)

> *"Similarly, minimum advertised price policies ("MAPs"), which prohibit ~~retailers~~ resellers from advertising prices below a certain amount set by the supplier, do not constitute RPM as such. If unilaterally set, MAPs may generate efficiencies as they assist in limiting free-riding between buyers (see paragraph (14)(b) of these Guidelines). MAPs may ~~also~~ amount to RPM ~~for instance~~ but only in cases where the supplier sanctions ~~retailers~~ resellers for ultimately selling below the respective MAPs, requires them not to offer discounts or prevents them from communicating that the final price could differ from the respective MAP."*

5.7 Brands for Europe is of the opinion that the first proposed change (replacing retailer by the more generic reseller) is necessary to reflect that MAPs do as such not constitute RPM regardless of the level of the distribution chain where the reseller is active. There is no reason to conclude that MAPs which prohibit wholesalers from advertising prices below a certain

amount set by the supplier, would constitute RPM, in situations where the same MAP would not constitute RPM in case solely directed at retailers.

5.8 The second proposed change is intended to make it more explicit that the Commission acknowledges that MAPs do not constitute RPM as such but can only be considered to constitute RPM in case the supplier takes certain specific follow-up actions that restrict the freedom of the reseller to decide on the actual final resale price it will charge to the customers. Brands for Europe believes that this amendment will provide further legal certainty to businesses and gives a clearer message to NCAs and national courts that MAPs by themselves do not constitute or are indicative of RPM. This will decrease the risk of divergent national decisional practice and increase the likelihood that businesses will feel confident that they can lawfully adopt MAPs amongst others to limit the most detrimental impact of only price wars.

Fulfilment contracts

5.9 Brands for Europe applauds the Commission for including paragraph 178 in the draft Vertical Guidelines which recognises the existence of fulfilment contracts and accepts that in this context the fixing of the resale price between the supplier and the fulfilment agent (i.e. the company that executes a prior agreement between the supplier and a specific customer) does not constitute RPM even in cases where the fulfilment agent acquires title over the contract goods or accepts more than insignificant risks and can therefore not rely on the agency exception as laid down in paragraph 39 draft Vertical Guidelines.

5.10 Brands for Europe believes, for the reasons set out in more detail in paragraphs 69 to 72 of the 2021 Submission, that the exemption from the RPM prohibition in case of fixing the resale price in a fulfilment contract context is indeed warranted and provides for a practical solution for those circumstances where the offer to the buyer, including the price competition, takes place directly between the supplier and the specific customer (end-user or retailer) but the contract is executed by a third party (fulfilment agent).

5.11 Brands for Europe would nevertheless ask the Commission to consider making some amendments to the current proposed paragraph 178 draft Vertical Guidelines to avoid any misunderstanding and to limit the room for divergent interpretation at national level.

5.12 First of all, Brands for Europe suggests to replace "end user" with the more generic concept of customer to make clear that a fulfilment contract can exist regardless of whether the initial agreement concluded by the supplier which will be executed by the fulfilment agent, has been concluded with a retailer or a private or industrial end user. Brands for Europe sees no reason why the fulfilment contract exemption to the RPM prohibition would only be applicable in case the supplier concludes the initial agreement with an end user, and not when the initial agreement is concluded with a specific retailer. The same reasons justifying the exemption in case of an end user, i.e. price competition only takes place at the level of the supplier, is also applicable in case of a specific retailer.

5.13 Secondly, Brands for Europe proposes to clarify that the fulfilment contract exemption to the RPM prohibition not only applies in cases where the specific customer has waived its right to choose the undertaking that will execute the initial agreement with the supplier, but also in cases where the customer has indicated that it does not intend to have any further price negotiations with the undertaking that will execute the initial agreement. This change is necessary to capture those cases where the customer in the initial agreement still wants to have the possibility to choose the undertaking that will execute the initial contract based on other factors than price such as for example, proximity, speed or quality of delivery, or other not price related factors. In similar vein, Brands for Europe, suggests to clarify that the waiver requirement is satisfied also in those cases where the customer has already selected the undertaking that needs to execute the initial agreement and refers to that undertaking in the initial agreement with the

supplier. In that way, all circumstances in which price competition for the customer concerned no longer plays a role, which is the determining factor for the application of the fulfilment contract exemption, will be covered.

5.14 Thirdly, Brands for Europe is of the opinion that the clarity of paragraph 178 draft Vertical Guidelines would improve if the reference to "genuine" agency situations is removed from this paragraph. If we understand the purpose of this reference correctly, the Commission intends to clarify that in situations covered by "genuine" agency as described in paragraphs 40 to 43 of the draft Vertical Guidelines, the fulfilment contract exemption does not apply. However, in these cases the supplier, as principal, would be able to determine the resale price to be applied by the "genuine" agent in accordance with paragraph 39 draft Vertical Guidelines. Therefore, this reference does not bring any added value.

5.15 Based on the above suggested amendments, Brands for Europe proposes to redraft paragraph 178 draft Vertical Guidelines as follows (changes to the current draft Vertical Guidelines are indicated in red):

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

Individual exemptions based on Article 101 (3) TFEU on the RPM prohibition

5.16 Brands for Europe wants to reiterate its position that the Commission should provide in the Vertical Guidelines further clarity on the circumstances in which it will accept a 101 (3) TFEU efficiency argument to allow for the use of RPM, both by clarifying the conditions for product introduction or short term price promotions, as well as including specific examples where RPM is considered appropriate and lawful to overcome free-riding issues.

5.17 First of all, Brands for Europe advocates that, just as the Commission did for dual pricing, the Commission should clarify that agreements on resale prices in the limited situations relating to new product launches and short term promotions can benefit from the VBER safe harbour, and not merely covered by a clarification in the VGL acknowledging that an argument for an individual exemption based on Article 101 (3) TFEU might be available.

5.18 Such a change is warranted given the significant consumer benefits of RPM in expanding demand and promoting a product for a short time period. Particularly in case of the launch of a new product, the current absence of a block exemption for RPM leads to a situation where brand owners refrain from setting a fixed retail price, thereby negatively impacting the willingness of retailers to make investments in the marketing/promotion and customer services needed to make

market entry a success. This, in turn, has a negative effect on the willingness of brand owners to invest in product innovation and launch in the first place. Aside from an inefficiently low level of customer services, this leads to long-term consumer harm by delaying or even preventing the entry of new products on the market thereby slowing product innovation, as well as acting as a disincentive for retailers to make investments for entering a new market (segment) thus hampering wider market penetration. In addition, any of the theories of harm articulated in the draft Vertical Guidelines in respect of RPM are highly unlikely to be realistic in the context of an RPM agreement of limited duration. With market shares not exceeding the current VBER thresholds, an RPM agreement of fixed and limited duration is therefore even more unlikely to give rise to collusive outcomes than an indefinite RPM agreement.

5.19 In the alternative, and at a minimum, the Vertical Guidelines should clarify:

a. **Fixed resale prices for product launches**: given the obvious consumer benefits (introduction of new products on the market), the Commission should clarify that it will accept at least as an "introductory period" of 6 months or any longer period which is necessary (e.g., to recoup investments). The Commission should further clarify that any product which introduces substantial additional features to an existing product of the same manufacturer (renovated existing products/categories) or requires significant investments in terms of research and development or promotion/marketing should be considered as a new product. Furthermore, the Commission should remove wording that this exception is only available where *"it is not practical for a supplier to impose by contract effective promotion requirements"*, because RPM has clear efficiency benefits over contractual requirements, which are extremely difficult to specify for each individual retailer, and very costly to monitor and enforce. It should be made clear that fixed resale prices for product launches are possible in any distribution system, including in case of selective and exclusive distribution networks, as well as for franchising.

b. **Fixed resale prices for short term low price campaigns**: more flexibility is necessary here. There is no reason to limit this exemption to franchising/similar distribution systems only, given the obvious consumer benefits (low prices). In addition, the VGL should not limit the short term promotion period to a maximum of 6 weeks but should allow for more flexibility and longer term promotions, in particular when such campaigns are linked to considerable investments for the preparation and launch of the promotional campaigns.

5.20 Secondly, Brands for Europe calls upon the Commission to include specific examples in which case it will accept a 101(3) TFEU efficiency argument to justify RPM as a lawful solution to overcome free-riding issues. As further explained in paragraphs 179-181 Brands for Europe's response to the public consultation, Brands for Europe is of the opinion that RPM, in cases of replenishment sales or loss-leader conduct, should benefit from the 101 (3) TFEU exemption. The clear negative effects of free-riding in situations of replenishment sales or loss-leader conduct are not limited to experience or complex products, and can only be effectively countered by the implementation of RPM.

5.21 Based on the above, Brands for Europe proposes to redraft paragraph 182 draft Vertical Guidelines as follows (changes to the current draft Vertical Guidelines are indicated in red):

"(...) Three examples of such an efficiency defence are set out below. (a) When a manufacturer introduces a new product, including products which introduce substantial additional features to an existing product of the same manufacturer, or existing products that were renovated following significant investments in research and development and/or promotion/marketing RPM can benefit from the safe harbour of the VBER. In case of a new product introduction RPM, may be an efficient means to induce distributors to better take

into account the manufacturer's interest to promote this product, ~~in particular if it is a completely new product,~~ and to increase sales efforts. If the distributors on the respective market face competitive pressure, this pressure may induce them to expand overall demand for the product and make the launch of the product a success, also for the benefit of consumers. ~~Article 101(3) requires that less restrictive means do not exist. To meet this requirement, suppliers may, for example, demonstrate that it is not feasible in practice to impose on all buyers effective promotion requirements by contract~~. Under such circumstances, the imposition of fixed or minimum retail prices for a limited period of time, (of 6 months in most cases, or longer where this may be justified based on the level of investment in research and development and/or promotion/marketing), in order to facilitate the introduction of a new product may be considered on balance pro-competitive and to meet the conditions of Article 101(3).

(b) Fixed resale prices, and not just maximum resale prices, may be necessary to organise a coordinated short term low price campaign (of 2 to 6 weeks in most cases, or longer where this may be justified based on the level of investment in promotion/marketing), which will also benefit consumers, and can thus benefit from the safe harbour of the VBER. ~~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 and to meet the conditions of Article 101(3).

(c) In some situations, the extra margin provided by RPM may allow retailers to provide (additional) pre-sales services~~, in particular in case of experience or complex products~~. If enough customers take advantage of such services to make their choice but subsequently purchase at a lower price with retailers that do not provide such services (and hence do not incur these costs), high-service retailers may reduce or eliminate these services that enhance the demand for the supplier's product. RPM may help to prevent such free-riding at the distribution level. The supplier will have to convincingly demonstrate that the RPM agreement is necessary in order to overcome free riding between retailers on these services. In this case, the likelihood that RPM is found procompetitive is higher when competition between suppliers is fierce and the supplier has limited market power.
Particular examples where RPM to overcome free-riding at the distribution level is likely to be procompetitive and to meet the conditions of Article 101(3), are situations of replenishment sales and loss-leader conduct.

- *The "replenishment" free riding occurs where a consumer will have seen, experienced and been advised on the product at a full-service bricks and mortar/online retailer but subsequently turns to a no service bricks and mortar/online retailer to buy a "replenishment" (often combined with a "subscribe to save" scheme which further enhances the "locked in" effect on the customer). Such "replenishment" free riding often occurs, but is not limited to customers relying on no service bricks and mortar/online retailers to make subsequent purchases of the same product (e.g. para-pharmaceutical products, dietary food products, cosmetics, etc.), product family (e.g. game extensions, accessories for consumer electronics, etc.), or product replacement (e.g. sports shoes), where the no service bricks and mortar/online retailer free rides on substantial investments made by both supplier and retailer in convincing customers to make that initial sale.*
- *The loss leader free riding occurs where a low service or no service retailer offers a product category champion product at a very low price for a period of time (sometimes at or below the purchase price).*

Recommended and maximum resale prices and price monitoring

5.22 Finally, Brands for Europe welcomes the explicit acknowledgment by the Commission that recommended resale prices, maximum resale prices and price monitoring, as unilateral conduct, does not constitute RPM and therefore is covered by the safe harbour provided by the VBER.

However, Brands for Europe is very disappointed that the Commission has not yet made use of the opportunity presented by the current review of the vertical regime, to remove all the unhelpful language contained in the current VGL that creates legal uncertainty around the lawfulness of RRPs, maximum resale prices and price monitoring.

5.23 The current suspicion in the VGL (and in the current enforcement practice of some NCAs) against RRPs, maximum resale prices, and price monitoring in particular, is unjustified and unnecessarily strict. **Article 4(a) VBER** has a balanced approach in distinguishing between the unlawful agreement to "restrict the buyer's ability to determine its sale price" on the one hand and the lawful unilateral conduct of providing recommended prices on the other. It is important to recognise this and ensure the enforcement is also balanced in that respect.

5.24 It is a brand owner's goal to ensure that its retailers are successful. As such, RRPs are established by the suppliers following extensive cross-market research on the whole product assortment for the benefit of retailers and consumers. It is often essential for brand owners to communicate to retailers about their resale price recommendations, and to explain the underlying reasons for these recommendations. It is also important for brand owners to understand why retailers have not followed the recommendation, particularly if retailers are reacting to market forces of which brand owners are not aware and which in turn would help brand owners to innovate and invest further to adjust to market conditions in a manner that is efficiency enhancing and ultimately benefits consumers. In addition, purchase prices for retailers for products bought from the supplier are in the large majority of cases negotiated or calculated with the RRPs in mind and the (potential) margins that the retailer can earn if it chooses to sell at or around the level of the RRPs. Actual market performance is then obviously part of the discussion for the next sale season or year, without any intention or desire to engage in RPM. Therefore, the Commission should remove the language, suggesting that RRPs can act as a focal point and thus can be used as (indirect) means to arrive at RPM. The VBER and VGL should make clear that RPM is limited to those cases in which there is an agreement or concerted practice between supplier and retailer to fix prices, and that RRPs, price monitoring and price discussions without pressure to stick to a price are in themselves always insufficient to constitute RPM, as they don't restrict the buyer's ability to determine its sale price, but are merely a unilateral conduct of the supplier. In that regard it should be clarified that the mere fact that resellers sell at RRPs or maximum resale prices, or that wholesale purchase prices are periodically negotiated with the RRPs in mind cannot result in a finding of (tacit) acquiescence in the sense of paragraph 52 (b) of the new Vertical Guidelines.

> *(b) Secondly, for tacit acquiescence it is necessary to show, firstly, that one party requires explicitly or implicitly the cooperation of the other party for the implementation of its unilateral policy and, secondly, that the other party has complied with that requirement by implementing that unilateral policy in practice.39 For instance, if after a supplier's announcement of a unilateral reduction of supplies in order to prevent parallel trade, distributors reduce immediately their orders and stop engaging in parallel trade, then those distributors tacitly acquiesce to the supplier's unilateral policy. However, this cannot be concluded if the distributors continue to engage in parallel trade or try to find new ways to engage in parallel trade. Similarly, the mere application by resellers of RRPs or maximum resale prices communicated by a supplier, cannot be considered as indicative of tacit acquiescence of the supplier's unilateral communication.*

5.25 The distinction between RPM, RRPs and maximum resale prices remains relevant even in situations of market power. Brand owners are of the view that RRPs and maximum resale prices, in absence of any pressure exercised to fix the price, would, even in situations of market power, not amount to resale price maintenance and cannot be a breach of Article 101(1) of the Treaty. Therefore, the reference that RRPs and maximum resale prices could, even without any pressure to adopt a fixed price, act as a focal point and thus be considered as fixed resale prices or RPM

should be removed from the draft Vertical Guidelines. At a minimum, the reference to maximum resale prices should be removed in this context, as Brands for Europe fails to see how a unilateral measure which aims at keeping the resale price low, can be considered as a restriction of competition that generates negative effects for consumers.

5.26 Similarly, brand owners should be able to collect data from retailers about their resale prices to remain competitive against competing brands. The VGL have inspired some NCAs to treat resale price monitoring unnecessarily strictly. Resale data helps inform brand owners' future strategy, production, development, marketing strategies etc. Resale price data allows the brand owners to better position their products in the market and can help the brand owners to take a view on the RRP (which they set unilaterally) to compete effectively with other brands. Conversations with retailers about these data points as such should not be treated as interference with the commercial policy of the retailers which is indicative of RPM, as their main purpose is to generate efficiencies in terms of optimal distribution of products across online and offline channels, ensuring availability of products throughout markets and offering the products the consumer wants at a fair and competitive price. All of this makes it extremely important for brand owners to understand how the market responds to these price recommendations, to understand the actual resale prices that are applied for their products in the market, and to seek information from resellers on actual resale prices. These communications with retailers, and the fact that brand owners seek to obtain resale price information from retailers should not be interpreted as an attempt to limit reseller's liberty to define their own commercial policy and price. In fact, they strongly improve inter-brand competition on the merits.

5.27 Based on the above, Brands for Europe suggests the Commission to make a number of changes to the current draft Vertical Guidelines to further enhance legal certainty and reflect market reality:

- To ensure consistent use of language and clarification that maximum resale price and RRPs as such are not as such indicative of RPM, Brands for Europe proposes to amend paragraph 173 draft Vertical Guidelines

> *"However, as set out in Article 4(a) VBER, the imposition of a maximum retail price or the determination of a resale price recommendation by the supplier do not constitute RPM as such ~~does not in itself amount to RPM~~, including where the maximum resale price is set at a level where the reseller only has a very limited, or no distribution margin. ~~However~~Only, if the supplier combines such a maximum price or resale price recommendation with incentives to apply a certain price level or disincentives to lower the sales price, this can amount to RPM. An example of incentives to apply a certain price level would be to make the reimbursement of promotional costs conditional upon reselling at ~~in case of compliance with~~ the maximum resale price or the recommended resale price without allowing the reseller to sell below the maximum resale price or the recommended resale price. An example of disincentives to lower the sales price would be an intervention of the supplier in case the buyer deviates from the maximum or recommended resale price by, for instance, threatening to cut further supplies.*

- To provide further clarification on price monitoring Brands for Europe suggest to amend paragraph 176 draft Vertical Guidelines

> *"Price monitoring is increasingly used in e-commerce where both manufacturers and retailers often use specific price monitoring software. Such price monitoring does not constitute RPM as such and is mostly used to stay price competitive and to decrease resale price for the benefit of consumers. It however increases price transparency in the market, which allows manufacturers to effectively track the resale prices in their distribution network and to intervene swiftly in case of price decreases. It also allows retailers to effectively track the prices of their competitors and report price decreases to the*

manufacturer, together with a request to intervene against such price decreases. However, price monitoring may only amount to RPM where it is accompanied or followed by supplier intervention against retailer price decreases."

- To delete entirely the current paragraphs 184 or 185 draft Vertical Guidelines or at a minimum implement the following changes:

"(184) The possible competition risk of recommended ~~and maximum~~ prices is that they ~~will~~ could work as a focal point for the resellers and might be followed by most or all of them. Moreover, recommended ~~and maximum~~ prices may soften competition or facilitate collusion between suppliers.

(185) An important factor for assessing possible anti-competitive effects of recommended ~~or maximum~~ resale prices is the market position of the supplier. The stronger the market position of the supplier, the higher the risk that a recommended ~~or maximum~~ resale price leads to a more or less uniform application of that price level by the resellers, because they may use it as a focal point. They may find it difficult to deviate from what they perceive to be the preferred resale price proposed by such an important supplier on the market."

6. Excluded restrictions

6.1 Brands for Europe welcomed the EC's approach in paragraph (234) of the draft Guidelines stating that non-compete obligations that are tacitly renewable beyond a period of five years are covered by the block exemption.

6.2 However, we note that the exclusion from the VBER of an obligation prohibiting authorized dealers to sell the brands of specific competitors is artificial. There is no reason why this restriction should not be covered by the block exemption in the absence of supplier market power.

We propose that Article 5 (1) (c) is removed entirely. We also propose that paragraph 238 of the draft Vertical Guidelines is completely removed.