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Public consultation on the draft revised Block Exemption Regulation on Vertical Agreements ("VBER") and the draft Vertical Guidelines

Ladies and gentlemen,

This submission is made on behalf of the Bosch Group. The Bosch Group is a globally active supplier of technology and services for the automotive industry, industrial technology, consumer goods and energy and building technology industries. Its business activities are primarily separated into the following four business sectors: (i) Mobility Solutions: automotive electronics, car multimedia, chassis systems control, gasoline and diesel systems, electrical drives, starter motors and generators, automotive steering and various products for the automotive aftermarket; (ii) Industrial Technology: drive and control technology; (iii) Consumer Goods: power tools and household appliances; (iv) Energy and Building Technology: security systems and thermotechnology. The VBER and the Vertical Guidelines are most relevant for the consumer goods sector, but they also play a role in the other sectors, both "upstream" (e.g., when purchasing raw materials and components) and "downstream".

We welcome the opportunity to comment on the draft VBER and the draft Guidelines and appreciate the European Commission's openness and efforts to engage in broad and comprehensive stakeholder consultations. In this respect, we note that the draft VBER and the draft Guidelines already reflect many of the issues that have been raised throughout the prior steps of the public consultation.

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In particular, we believe that, considering how online trade has developed during the last years, the more lenient approach towards online restrictions is certainly a step in the right direction. We also find it helpful that there is more guidance for "dual role" commercial agents, and we recognize the European Commission's willingness to grant more freedom to manufacturers to design distribution systems that take into account different competitive conditions, consumer expectations and market environments across the EU.

Our submission consists of two parts. In the first part, we make some general comments on certain particularly pertinent subjects (dual distribution, online restrictions, and selective distribution; sections A to C). In the second part (Section D), we comment specifically on the wording or implications of certain sections of the Draft Vertical Guidelines.

A. Dual distribution

The Commission takes the view that the increased activity of suppliers at the retail level during the last few years warrants certain amendments to the existing rules on dual distribution. We would like to comment on some of the proposed changes.

Complexity and inconsistencies. First, we would like to point out that the wording, the structure of the relevant rules and the corresponding explanations in the Draft Vertical Guidelines may warrant further alignment. In the table below, we have summarized how we understand Articles 2 (4), (5) and (6) of the Draft VBER, together with some examples and comments.

Type of agreement / restriction	**Example(s)**	**What applies according to the Draft Vertical Guidelines**
Restraint of a vertical nature imposed by the supplier on the buyer	Supplier engaged in dual distribution prohibits a retailer from using marketplaces (but allows the retailer to have its own web shop and to do online advertising).	Exempted according to Art. 2 (4) if the joint market share at the retail level does not exceed 10%. Exempted according to Art. 2 (5) if the joint market share at the retail level exceeds 10%.

Horizontal restriction by object	Supplier engaged in dual distribution **agrees with a retailer on retail prices** (see case GB Eye/Trod, UK Consumer and Markets Authority, 30 September 2016). Most cases of **reciprocal exchange of sensitive information** would likely qualify as horizontal restrictions by object as well. For example, where a supplier engaged in dual distribution and its retailers regularly exchange information about their customers, this is likely to amount to a prohibited allocation of customers. Furthermore, the **unilateral disclosure by a supplier** engaged in dual distribution of sensitive information regarding his market behavior as a retailer to a competing retailer has also been held to constitute a restriction by object (see Hugo Boss; Danish Competition Appeals Tribunal, 23 June 2021).	Not exempted, Art. 2 (6) With regard to the wording of Art. 2 (6),[1] one may argue that a vertical agreement – which is by definition (Art. 1 (1) (a) of the Draft VBER) entered into between undertakings which are, for the **purpose of the agreement**, active at **different levels** of the distribution chain – actually cannot have the object to restrict competition "between the competing supplier and buyer". If the agreement has the object to restrict competition **"between the competing supplier and buyer"**, then one would think that it cannot, at the same time, be a vertical agreement in the sense of Art. 1 (1) (a) of the Draft VBER, because the parties are necessarily entering into this agreement in a function where they belong to the **same level** of the distribution chain. In any event, one could also argue that Art. 2 (6) is not necessary because agreements between competitors that have the object to restrict competition between them cannot be block-exempted under any circumstances.[2]

[1] "… shall not apply to **vertical agreements** which … have as their **object to restrict competition between** the competing supplier and buyer".

[2] Interestingly, though, one particular agreement with a clear horizontal dimension between a supplier and its buyers is in fact explicitly exempted: According to Art. 4 (b) (i) of the Draft VBER, the supplier can reserve a territory for himself (which necessarily implies that he is engaged in dual distribution), and prevent his exclusive distribution partners from making active sales into his territory. In such a case, the supplier agrees with his exclusive retailers that he will not make any active sales into their territories, and they will agree that they will not make active sales into the supplier's territory in turn. This kind of reciprocal allocation of territories would seem to amount to a hardcore cartel if it happened between competing retailers, without the involvement of a supplier engaged in dual distribution.

Horizontal restriction purely by effect	Benchmarking exercise between the supplier engaged in dual distribution (in his role as a retailer) and his retailers, e.g. on best practices regarding customer reviews, delivery options and payment methods in online shops.	We understand that this kind of agreement would be exempted if the joint market share is not higher than 10% (Art. 2 (4) – "*all aspects of a non-reciprocal vertical agreement between competing undertakings*"). However, it is not clear whether this kind of agreement would qualify as a "vertical agreement" in the sense of Art. 1 (1) (a) at all (see above). Where the share is higher, it would be judged by its effects, where applicable with reference to the Horizontal Guidelines.

Special case of a horizontal restriction by effect: "*exchange of information between the parties*". Given that the reciprocal exchange of sensitive information and the unilateral disclosure of such information by the supplier to its trade partners are restrictions by object (see above) and therefore cannot be exempted in any case, we assume that this "exchange of information" relates to the **unilateral disclosure of information by the retailer to the supplier**. Unlike the other variants of "information exchange", this is a practice that is likely to happen in the vertical dimension of the relationship between the retailer and the supplier engaged in dual distribution, i.e., it is (part of) a vertical agreement in the sense of Art. 1 (1) (a).	The supplier and the retailer agree that the retailer will provide regular and detailed information about his sell-out figures, sales prices and promotions to his supplier (who is engaged in dual distribution). We understand that this is the key scenario that the Commission has in mind when the Vertical Guidelines mention "information exchange" and where the Horizontal Guidelines are to provide more guidance.	Exempted if the joint market share is not higher than 10% (Art. 2 (4) – "*all aspects of a non-reciprocal vertical agreement between competing undertakings*"). Where the share is higher, it would be judged according to the Horizontal Guidelines (Art. 2 (5)).

“Information exchange” in dual distribution scenarios. As set out in our earlier submissions, it is in our view not necessary to introduce an additional market share threshold for cases where the buyer provides certain information that is relevant for the distribution relationship to his supplier. This form of “disclosure of information” (i.e., the sharing of certain information by a retailer with his supplier in the context of the distribution relationship) should be block-exempted in all cases of dual distribution irrespective of the parties’ market share threshold at the retail level.

However, if such a threshold becomes law, with the result that certain aspects of the sales and distribution relationship with certain trade partners must be assessed under the Horizontal Guidelines, we would welcome a very clear statement in the Horizontal Guidelines that suppliers that are engaged in dual distribution can essentially work with their trade partners in the usual way without having to fear claims of unlawful information “exchange” – even if the supplier will inevitably obtain information that could technically be viewed as sensitive from a purely horizontal perspective.

Examples of such cases include

- promotions, whether initiated by the retailer or specifically suggested and / or supported by the supplier, where the supplier and the retailer would talk about topics such as campaign dates, products, expected volumes, and the type of campaign (flyer, TV spot, social media) etc.,
- the collection and analysis of retailer and / or shop-specific sell-out figures, for example by product category and / or value class and by channel, which allows the supplier, for example, to make more targeted product offers and to invest in the most promising promotional activities with each individual retailer, or
- any information provided by retailers about their sales strategy, such as the retailer’s “multi-channel” approach or the planned expansion of their activities into new areas or markets, which also allows the supplier to better tailor its product range and promotional activities to the particular retailer and to support the retailer’s plans.

The 10% threshold combined with strict rules in the Horizontal Guidelines could, in a worst-case scenario, mean that a supplier engaged in (even very limited) dual distribution activities (for example, relating just to a very narrow section of its overall product offer) would no longer be in a position to work efficiently on the commercialization of his products with his biggest retailers.

Besides the specific examples mentioned above, there is a more general concern regarding information “exchange” in the context of dual distribution: It seems almost inevitable – unless the direct-to-consumer business were to be kept completely separate in terms of organisation and information flow from the rest of the supplier’s business – that information gained in a legitimate way in the context of vertical relations with trade partners will, directly or indirectly, inform, influence or guide unilateral decisions relating to a supplier’s direct-to-consumer business.

For example, a supplier of consumer goods will, based on a large number of previous joint campaigns with retailers, have gained a good understanding of which kind of promotions works best for which products and target groups. This is not publicly available information; it is uniquely available to the supplier because of his role as a supplier. For the supplier, this information is very important to prevail in inter-brand competition with competing suppliers. To us it seems not problematic – rather pro-competitive – to allow the supplier to use this knowledge also in the supplier's direct-to-consumer business.

Against this background, we would welcome if the Horizontal Guidelines (or the Vertical Guidelines) could state clearly that – unless in very unusual situations of market power where the use of such information could be deemed abusive – such scenarios (legitimate collection of information in a vertical context by the supplier followed by a unilateral decision of the supplier concerning his direct business based on this information) do not qualify as a concerted practice or a prohibited "exchange" of sensitive information.

Legitimate interest to steer both sales channels in dual distribution scenarios. In a dual distribution scenario, the supplier has a legitimate interest to steer both sales channels (direct-to-consumer business and retail business) in order to have a coherent distribution ecosystem. While it is clear that any coordination between the supplier and its retailers (like in the GB Eye case) and any disclosure of sensitive information about the supplier's retail activities vis-à-vis retailers (like in the Hugo Boss case) is not acceptable, it must remain allowed for the supplier to unilaterally determine a direct-to-consumer strategy that avoids conflicts with trade partners.

For example, it should be allowed for the supplier to take into account a distributors' campaign strategy (information obtained lawfully in the context of the vertical relationship) when fixing dates and deciding on the content of the campaigns in its direct-to-consumer channel. Further, in such a case, the supplier must be able to refrain from independent campaigning in order to avoid a direct conflict with campaigns of his distributors/competitors.

B. Selective distribution

We would like to address three specific issues: The implications of a distribution strategy that combines selective and "free" distribution, the importance of brand image, and the use of wholesalers in selective distribution.

Combination of selective and "free" distribution. There is a scenario that we believe may not be uncommon among suppliers of branded consumer goods and that is, in our view, not sufficiently addressed in the draft Vertical Guidelines: Suppliers may use selective distribution only for a relatively small and/or very clearly defined sub-set of their product offer (such as premium products and/or luxury brands), while selling the largest share of all their products to a large variety of retailers, without any restrictions, under a system that the Draft Vertical Guidelines call "free distribution". All products would belong to the same relevant upstream market(s).

In such cases, it seems that the overall market share threshold for suppliers is not an appropriate indicator of the potential effects on competition that such a selective distribution system may have. If a supplier has a market share of 40% but uses selective distribution only for a small range of his products that account for an estimated 5% of the total downstream retail market, we believe that a selective distribution system should still qualify for an exemption, just like e.g. in a situation where a supplier with a 25% upstream market share sells all of its products under selective distribution.

In para. 140, the Draft Vertical Guidelines already use this approach when they address cumulative effects: They make a distinction between the "*share of the market covered by selective distribution*" (which would be the share of the relevant downstream retail market subject to selective distribution) and the "*aggregate market share of the five largest suppliers*" (which would be the overall market share of the suppliers in the upstream, supply market). It may be worth considering the introduction of a separate market share threshold for selective distribution agreements, related not to the supplier's share on the upstream market, but to the share of the downstream retail market covered by a supplier's selective distribution system.

We also propose that the fact that suppliers may often decide to use selective distribution only for a (small) part of their entire product range would warrant stronger emphasis in the context of the assessment of cumulative effects. Even if there is a large number of selective distributions systems in the market (para. 139), and even if a majority of leading suppliers apply selective distribution, we believe that this does not necessarily imply a "*foreclosure of certain types of distributors (i.e. price discounters)*" (para 139). It may well be that each of these suppliers offers a wide range of products belonging to the same upstream product market(s) to all kinds of distributors, and that they all also work with price discounters – except that they do not sell a certain brand or the most premium variants of their products to these price discounters, because this narrow range is subject to selective distribution. In such a scenario, consumers will still be able to "*take advantage of the specific benefits offered by these distribution formats such as lower prices, more transparency and wider access to the product*" (para. 139). Similarly, even if "*all five largest suppliers apply selective distribution*" (para. 140), we believe that this does not necessarily imply that "*other distributors will be foreclosed*": If each of these suppliers has a distribution strategy that combines selective distribution (only) in the premium or luxury segment with free distribution in the (much larger) value and value-added segments (including sales to "*price discounters or pure online distributors which offer lower prices to consumers*"), foreclosure concerns seem unlikely.

Selective distribution as a means to protect brand image. In our view, the section about selective distribution outside the Metro criteria and outside the VBER (paras. 137 et seq) reveals a too skeptical view of selective distribution. We believe that more emphasis could be given to the legitimate objectives and the positive effects of selective distribution, in particular with regard to the protection of the brand image.

The relevant section in the Draft Vertical Guidelines is permeated by concerns of higher prices ("*well suited to avoid pressure ... on the margins of the manufacturer, as well as on the margins of the authorised distributors*", para. 139). However, the Court of Justice has implied that it is a legitimate concern to ensure a certain price level (subject, of course, to the rules on resale price maintenance): "[*f*]*or specialist wholesalers and retailers the desire to maintain a certain price level, which corresponds to the desire to preserve, in the interests of consumers, the possibility of the continued existence of this channel of distribution in conjunction with new methods of distribution based on a different type of competition policy, forms one of the objectives which may be pursued without necessarily falling under the prohibition contained in article [101(1)], and, if it does fall thereunder, either wholly or in part, coming within the framework of article [101(3)]. This argument is strengthened if, in addition, such conditions promote improved competition inasmuch as it relates to factors other than prices*." (Case 26/76 Metro v Commission [1977] ECR p. 1875, at para. 21).

The case study in para. 147 suggests that there must always be "*low service/low price*" retailers that sell brands of suppliers who "*maintain a strong quality image*". We believe that this is somewhat contradictory because the strong quality image risks precisely being lost where these products are sold by such "*low service/low price*" retailers. In the case study, the assessment of brand manufacturer A's contract – which provides for a maximum number of retailers per territory and therefore fails the Metro criteria – depends on the fact that manufacturers B and C, for one reason or another, have chosen not to use selective distribution, even if their brands are just as worthy of protection. Also, the case seems to be designed in a way that it is only the quantitative element that brings the selective distribution system outside the Metro criteria. However, the removal of the quantitative element would not result in a situation where brand manufacturer A's products would become available at "*low service/low price*" retailers because A would in all likelihood be allowed to use strict quality criteria that would exclude such retailers.

The case study in para. 148 raises similar concerns. The five manufacturers of sports articles are the "*leading brands*", and they all have "*strong brand images acquired through advertising and sponsoring*". The Draft Vertical Guidelines advocate that the block exemption should be withdrawn in this case – with the aim that these "*leading brands*" become available in "*low service/low price*" shops. The likely result would be that they would lose their image, created and maintained at considerable cost, in the process.

Wholesalers in selective distribution. A supplier may want to combine a limited form of exclusive distribution at the wholesale level (in the sense that he appoints only one wholesaler in a particular territory, but without any commitment to protect that wholesaler from active sales) with selective distribution at the retail level (in the sense that the supplier chooses retailers based on specified criteria) and then agrees with the wholesaler that he can only sell to such authorized retailers (in any territory where the supplier uses selective distribution).

Choosing just one wholesaler reduces the risk of sales outside the selective distribution network: Generally, since wholesalers have access to products at lower prices and since they typically have a large and varied customer base, it is much more likely that they will engage in sales outside the selective distribution network than retailers. If the supplier can choose just one wholesaler that he trusts to understand the importance of the selective distribution network and to adhere to its rules, this risk is much lower. If the wholesaler has the task to choose and certify retailers on behalf of the supplier, this element of trust becomes even more important.

We understand that this scenario is addressed in para. 222 ("*the supplier may commit to supplying only one or a limited number of authorized distributors in a specific part of the territory where the selective distribution system is operated*"), and that it is therefore exempted. If this is indeed the case, it could be helpful to mention "wholesalers" more specifically in para. 222, and to clarify that the agreement with the wholesaler is exempted even if it neither meets all criteria of "exclusive distribution" (because other trade partners are not explicitly restricted from selling into the relevant territory) nor of "selective distribution" (because the wholesaler is not necessarily "selected on the basis of specified criteria". While a certain quality level is of course required, what is more important is trust. Also, the supplier will not want to work with every wholesaler who meets these criteria, but with just one or a limited number).

C. Online restrictions

Art. 1 (n) of the Draft VBER essentially declares that certain online restrictions qualify as prohibited restrictions of the territory into which or the customers to whom buyers can sell, i.e., as hardcore restrictions under Art. 4 (b) (for exclusive distribution), Art. 4 (c) (for selective distribution) and Art. 4 (d) (for free distribution) (see also para. 188 of the Draft Vertical Guidelines).

At the same time, the Draft Vertical Guidelines offer more flexibility for suppliers to impose certain restrictions on the use of the internet as a sales channel within the scope of application of the VBER. This is, we believe, a very positive and necessary adaptation to the changed circumstances since the current VBER and Guidelines entered into force: the internet is no longer a nascent sales channel that requires absolute protection.

However, we believe that the rules about online restrictions warrant further alignment and streamlining in order to provide adequate legal certainty for undertakings and to ensure the uniform application of EU competition law in all Member States. In our view, it is not clear to what extent the (gravity of) (likely) effects of the restriction and the individual circumstances of each case (markets, context, combination of restrictions) play a role in determining whether an online restriction amounts to a hardcore restriction.

For example, para. 163 seems to imply that for hardcore restrictions – unlike for restrictions by object – it is not necessary to do an individual assessment of the vertical agreement concerned,[3] and para. 188 notes that the assessment of whether a restriction is a hardcore restriction does not depend "*on market-specific circumstances or the individual circumstances of one or specific customers*". By contrast, the definition in Art. 1 (n) appears to leave room for just such an individual assessment ("in isolation or *in combination with other factors*"; "*effectively* using the internet"), and elsewhere, para. 188 refers to online restrictions as restrictions "*capable* of *significantly* diminishing the overall amount of online sales". In para. 192 (f), restrictions on the use of certain online advertising channels are deemed to be prohibited (as hardcore restrictions) in certain cases, but exempted in other cases, depending on the scope of the restriction and its practical effects and implications.

Para. 194 lists certain specific restrictions that are to be block-exempted, notably marketplace bans, brick-and-mortar requirements for selective distribution systems, and a minimum offline turnover requirement. It would be helpful in the interest of legal certainty and the uniform application of competition law across the EU if these cases could be included directly in the VBER as explicit exceptions to the general rule that territorial and customer restrictions are hardcore restrictions and prohibited.

The same is true for dual pricing, which we think could be block-exempted without any further conditions without running the risk of "false positives". The considerations in para. 195 (dual pricing needs to have the object to incentivize the appropriate level of investments, the difference in price must be related to the difference in costs, and online sales must not become unprofitable or financially not sustainable) would then only play a role in a potential withdrawal of the benefits of the VBER.

D. Comments on specific sections of the Draft Vertical Guidelines

Para. 29 and para. 31 (h) and 32 – commercial agency, risk allocation; "dual role" commercial agents	The Draft Vertical Guidelines use very similar language as the current Vertical Guidelines[4] to describe a situation where the agent also performs other activities in the same product market ("dual role" agent):

[3] „A finding of a restriction by object requires an individual assessment of the vertical agreement concerned. **In contrast**, hardcore restrictions …"
[4] Para. 16 (g): „does not undertake other activities within the same product market required by the principal, unless these activities are fully reimbursed by the principal".

	[The agent] "*does not undertake any other activities within the same product market required by the principal under the agency relationship (e.g. the delivery of the goods) unless these activities are fully reimbursed by the principal.*" "*Third, there are the risks related to other activities undertaken on the same product market, to the extent that the principal requires under the agency relationship that the agent undertakes such activities not as an agent on behalf of the principal, but at its own risk.*" "*… the risks related to other activities required under the agency relationship within the same product market may have to be considered.*" Para. 16 (g) of the current Vertical Guidelines has been used as the basis for the claim that a "dual role" agent is not a "genuine" agent because he bears one of the three sets of risks, with the result that agreements with such a "dual role" agent risk being viewed as a form of resale price maintenance. However, the wording used there (both in the current version of the Guidelines and in the new draft) does not seem to describe the "dual role" situation accurately: In a case where a supplier uses an existing retailer as an agent for the commercialization of certain products, the partner's activity as a retailer is neither "*required*" by the supplier, certainly not "*under the agency relationship*", nor is it "*reimbursed by the principal*".
Para. 31 (f) – commercial agency, risk allocation, sales promotions	Just like for transport costs ("*provided that the costs are covered by the principal*") or market-specific investments ("*unless these costs are fully reimbursed by the principal*"), we believe the principal should have the option to require the agent to invest in sales promotion and to reimburse the corresponding cost.
Para. 34 – "dual role" commercial agents; different scenarios	Paras. 34 et seq explain how the requirements for risk allocation should be applied to a situation where the "agency products" and the "retail products" can be clearly delineated.

	We note that this scenario is just one of many possible "dual role" scenarios: For example, a retailer may be appointed as an agent for a certain customer group (such as private consumers), while he acts as retailer for the very same products for another customer group (such as professional users), he could act as an agent for certain types of transactions only (e.g., in a case where the products in question can either be sold individually or as part of a larger package of products and services), or the "agency products" and the "retail products" may differ not so much by their functionalities or features, but primarily by their brand. In this respect, we note that the appropriate definition of the relevant markets where the partner acts as a retailer and as an agent can be very difficult.
Para. 35 – "dual role" commercial agents; activity as a retailer for another supplier	"*Where the agent undertakes other activities for the same **or other suppliers** at its own risk, there is a risk that the conditions imposed on the agent for its agency activity will influence the incentives and limit its decision-making freedom* ..." While this may be a real risk, it is difficult to see how the principal/supplier could be held liable for resale price maintenance for products that **his competitors** have sold to the partner in question. It may be worth considering whether a situation where the agent is a retailer in the same market, but only for other suppliers, should be covered by the special rules for "dual role" agents at all, i.e., whether such agency agreements should not rather be viewed as genuine, provided that the other requirements of risk allocation are met.
Paras. 51 et seq – agreements and concerted practices vs. unilateral conduct; dual pricing vs. different treatment of pure online retailers	The Draft Vertical Guidelines explain that the VBER only applies to vertical agreements and concerted practices and not to unilateral conduct. When it comes specifically to pricing and the question of agreement vs. unilateral conduct, we believe that it is important to distinguish between two scenarios, and we would welcome it if the Vertical Guidelines could unequivocally address this question:

	One scenario is an agreement between a supplier and a retailer providing that the retailer should pay a higher price for products that he resells online (a practice that is today still deemed to be a hardcore restriction of competition). Such "dual pricing" can also be indirect, for example if the supplier uses a price and condition scheme based on quality requirements and it is harder to meet all requirements for online sales than for offline sales. In such cases, there is undoubtedly a distribution agreement between the parties, and this agreement contains a mutual understanding about prices, i.e., the anti-competitive pricing scheme is part of the agreement. This pricing scheme indirectly affects how (or where or to whom, as per Art. 1 (1) n of the Draft VBER, which stipulates that online sales restrictions are restrictions of territory or customer groups) the retailer can resell the products. This case is described in para. 195 as "*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*". The other scenario is a case where a supplier charges different prices to **different (categories of) retailers**. This can – most commonly - be the result of individual negotiations, or it can result from the implementation of a general price and condition scheme that the supplier applies to all retailers. Where this scheme provides, for example, that the best conditions are available only to retailers that present the supplier's goods in a showroom, pure online retailers will pay a higher price. In this scenario, there are agreements between the supplier and his retailers – but they do not contain any anti-competitive element. They do not, in any way, affect how, where and to whom a particular retailer can resell the products. The differentiation is not "by channel", but "by trade partner", and the "discriminatory" element is unilateral in nature. Under EU competition law, discrimination between trade partners can only be prohibited under Art. 102 TFEU.

	We believe that the Vertical Guidelines should make it very clear that, this being said, Art. 101 TFEU does not apply to such scenarios, but only catches cases of discrimination where the supplier **agrees** with one retailer that another retailer is to be discriminated against.
Paras 52, 86, 172, 183, 189, 190 – agreements and concerted practices vs. unilateral conduct; specific examples	We believe that Draft Vertical Guidelines (just like the Guidelines in force today) should draw a clearer demarcation line between unilateral conduct and agreements. While para. 52 states that there must be "*acquiescence of the other party*" and sets out two ways in which acquiescence can be obtained, other sections of the Vertical Guidelines list certain unilateral acts as (elements of?) agreements or concerted practices. For example, threats, delivery delays and contract termination are mentioned as an indirect means to achieve resale price maintenance (para. 172). This disregards the fact that an agreement can only be inferred once the retailer actually reacts to such sanctions and threats. Para. 86 of the draft Vertical Guidelines refers to a "dual distribution agreement" between a supplier and its distributors. It is not clear to us what such an agreement should be. We believe that the mere fact that the supplier also makes direct sales to end consumers would usually not be reflected in any way in the distribution agreements that the supplier enters into with its distributors. The fact that the supplier engages in direct distribution activities as such is, in our view, a unilateral decision. Para. 183 implies that recommended resale prices (RRPs), despite not being an agreement in the sense of Art. 101 (1) TFEU, would need to be exempted under the VBER. We do not see a justification for such need for an exemption where a measure is purely unilateral. From a systematic point of view, we believe that it would be preferable to treat recommended resale prices in a clearly separate section and not in the context of resale price maintenance.

	According to para. 189 the sale of products with a limited number of languages on the packaging is an agreement that restricts cross-border sales. This is a new example, and we are concerned that this creates a false negative. Given that consumer habits and preferences differ in different EU countries, we believe that suppliers should be free to offer products specifically targeted at a particular country or sub-region. Such products would quite naturally have only a limited number of languages on the packaging, e.g. due to lack of space on the packaging, and for consumer-friendliness. This practice alone is, in our view, a purely unilateral commercial strategy and not indicative in any way of agreements or concerted practices with trade partners with the aim to prevent cross-border sales. The same is true for "*the use of differentiated labels, specific language clusters or serial numbers*", all of which are listed in para. 191 as tools to monitor compliance with territorial sales restrictions. Different variants of products for different geographical areas within the EU are not uncommon, and they will typically have different serial numbers to distinguish them from the standard version and/or from variants for other regions.
Art. 1 (g); para. 100 – exclusive distribution; restriction of active sales into exclusive territories / to exclusive customer groups	The definition in Art. 1 (g) requires that the supplier allocates exclusive territories or customer groups and "*restricts other buyers from actively selling into the exclusive territory or to the exclusive customer group*". Para. 100 specifies that the supplier should restrict "*its other buyers* ***within the Union***" from making such active sales. If a supplier wishes to use exclusive distribution only, for example, in one of the smaller and more remote countries of the EU, para. 100 implies that he would need to impose a contractual restriction of active sales on every single one of his retail partners anywhere else in the EU in order to benefit from the exemption.

	We note that such requirement would be linked with enormous administrative efforts required to include such clauses in thousands of agreements with retailers (many of whom may not even consider to sell into a restricted territory, e.g. because it is too far away, or because there is no existing distribution network etc.).
Para. 140 – selective distribution; minimum turnover requirement	The exemption for selective distribution can be withdrawn in the case of cumulative effects. In this context, the Draft Vertical Guidelines note that the requirement for trade partners to achieve a minimum amount of annual purchases (which is viewed as a quantitative criterion) is unlikely to produce negative effects, but only under certain circumstances. We believe that such minimum turnover requirements are generally justified because they represent a good proxy for a retailer's commitment to the brand and to the selective distribution system. A certain minimum turnover essentially provides proof that the retailer is able to sell the products successfully, i.e., that he is able to convince consumers of their value and benefits. Keeping retailers with continuously low turnover in the system entails costs and is likely to lead to an overall decrease in the quality of commercialization. We would therefore welcome a more positive statement to the effect that such requirements are either not quantitative in nature (and can therefore benefit from the Metro criteria) or else that they pursue legitimate objectives and are generally highly unlikely to result in negative effects (whether in cases of cumulative use of selective distribution or not).
Para. 174 – resale price maintenance; minimum advertised price policies	This section implies that minimum advertised price policies ("MAP") do not constitute resale price maintenance under certain conditions and would therefore be exempted. We welcome this clarification. In order to increase legal certainty, we propose to define the criteria under which MAP is not a form of resale price maintenance more precisely, and include MAP as an exception to the hardcore restriction in Art. 4 (a) directly in the VBER.

	This is particularly important in light of the fact that para. 172 states that "*making the … reimbursement of promotional costs by the supplier subject to the observance of a given price level*" constitutes an indirect means of resale price maintenance (i.e., a hardcore restriction).
Para. 178 – resale price maintenance; fulfilment contracts	We welcome the clarification that such "fulfilment contracts" do not qualify as resale price maintenance. However, we believe that the Vertical Guidelines could go even further: First, we believe that the question of risk allocation between the supplier and the distributor should not play a role at all in such scenarios. The risk allocation is not relevant for the question whether the price pre-agreed between the final buyer and the supplier deserves protection from RPM (which it does not). Second, we believe that the exemption should also apply in cases where the buyer has not explicitly waived its right to choose the distributor. Even in cases where, at the time the price agreement between the supplier and the final buyer takes place, it is not clear yet which distributor will carry out the transaction, the price as a factor of competition has already been "eliminated" – and accordingly, there is no reason to protect the buyer from resale price maintenance. And third, for reasons of legal certainty, we think it would be preferable if fulfilment contracts could be included as an exception to the hardcore restriction in Art. 4 (a) directly in the VBER.

Yours sincerely

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