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GTDC'S REPLY TO THE PUBLIC CONSULTATION ON THE DRAFT REVISED REGULATION ON VERTICAL AGREEMENTS AND VERTICAL GUIDELINES

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I INTRODUCTION

1. The Global Technology Distribution Council (**GTDC**) is the industry consortium representing the world's leading technology distributors. GTDC members drive an estimated **$150 billion** in annual worldwide sales of products (**$** 60 billion in EEA sales), services and solutions through diverse business channels, sourced from manufacturers such as Cisco, IBM, HP, Apple, Microsoft, Samsung, among others. GTDC conferences support the development and expansion of strategic supply-chain partnerships that continually address the fast-changing marketplace needs of vendors, end customers and distributors. GTDC members include AB S.A, Almo Corporation, Arrow Electronics, CMS Distribution, Computer Gross Italia, D&H Distributing, ELKO, Exclusive Networks, Esprinet, Exertis, Infinigate, Ingram Micro, Intcomex, Logicom, Siewert & Kau, SiS Technologies, Tarsus, TD SYNNEX, TESSCO Technologies, Inc., TIM AG and Westcon-Comstor.

2. Technology wholesale distributors are specifically vulnerably positioned between the major technology manufacturers and the largest consumer retail channels, delivering products at relatively low margins based on an ultraefficient logistics and supply organisation model. As part of this supply chain, the technology wholesale distributors provide billions of Euro in credit to thousands of resellers throughout the EEA. By doing so, technology wholesale distributors assure availability of IT goods to consumers in the EEA in a cost- and price-effective way. For further background to the technology distribution market, GTDC refers to the brief description of the technology distribution market and the role of technology distributors that is enclosed to this contribution as **Annex I**.

3. GTDC welcomes the opportunity to participate in the public consultation on the draft revised Vertical Block Exemption Regulation (**VBER**) and Vertical Guidelines (**Guidelines**). Furthermore, GTDC commends the work of the European Commission (the **Commission**) on the draft VBER and Guidelines, which provide much needed clarification on a number of important matters.

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4. However, GTDC takes the position that on certain points the draft VBER and Guidelines do not reflect the economic reality of the technology distribution market and the position of wholesale distributors in particular. This could cause legal uncertainty and may prevent technology distributors to use their full potential to serve the needs of the market.

5. Therefore, GTDC respectfully encourages the Commission to take its comments into account when preparing the final VBER and Guidelines.

In this submission, GTDC requests the Commission to:

1. **Extend the exemption under Article 2(1) of the draft VBER to dual distribution agreements entered into between suppliers and distributors at the wholesale level by revising the wording in Article 2(4) of the draft VBER;**
2. **Clarify that the exchange of information between a wholesale distributor and a supplier is excluded from the scope of Article 2(5) of the draft VBER, and thus falls within the exemption under Article 2(1) of the draft VBER;**
3. **Adjust Article 2(7) of the draft VBER and limit its scope to the large platforms operating at consumer retail level;**
4. **Clarify that the exception for fulfilment agreements in para. 178 of the draft Vertical Guidelines also applies at the wholesale level of trade and explain where and in which manner the "end user" and/or retailer/reseller must waive its right as regards the undertaking performing the agreement.**

II COMMENTS ON DRAFT VBER AND GUIDELINES

II.1 Dual distribution

II.1.1 *Dual distribution at wholesale level should be included in the block exemption under Article 2(1) of the draft VBER*

6. In the technology distribution industry, wholesale distributors purchase products from manufacturers/suppliers (commonly referred to as "vendors") and resell those products to their customers. Important to note is that these customers of the wholesale distributor are resellers only and that wholesale distributors typically choose not to sell to end users. Wholesale distributors purchase these products from the manufacturers based on a distribution agreement for the sale and purchase of the respective products. In addition, manufacturers may also have their own direct distribution channel whereby they sell the products, which are also subject to the distribution agreement with the wholesale distributors, directly to the same resellers.

7. Under the draft VBER and Guidelines, dual distribution agreements can (rightly) still benefit from the block exemption. However, the Commission has introduced a number of limitations and unclear requirements that would likely have serious consequences for the technology distribution market.

8. Firstly, from the wording of the draft VBER[1] and Guidelines[2] it seems to follow that only dual distribution agreements concerning the sale and distribution of goods and services between competitors on the *retail* market are block exempted. More specifically, article 2(4)(a) and (b) of the VBER provides that:

> *"[…] 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 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]%* (emphasis added)
>
> *(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]%."* (emphasis added)

9. The draft Guidelines further provide that:

> *"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 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."* (emphasis added)

10. Thus, the proposed wording only exempts one scenario that involves wholesale distributors: the wholesaler also sells to end users and therefore competes with its buyers on the retail level. However, as stated above, wholesale distributors typically do not sell directly to end users in the technology distribution industry. Indeed, there is another scenario of practical significance for wholesale distributors that is currently not covered by Article 2(4)(a) and (b): the manufacturer is also active on the wholesale level (i.e. by selling directly to distributors on the retail level) and therefore competes with its wholesale distributors. In other words, the current draft wording only recognises a scenario in which the wholesaler takes the manufacturer's place, but ignores a

[1] Draft VBER, Article 2(4)(a) and (b).
[2] Draft Guidelines, paras. 86 and 87.

scenario that involves a dual distribution agreement between a manufacturer and a wholesale distributor.

11. It is unclear to GTDC why the draft VBER and Guidelines exclude dual distribution agreements between suppliers and *wholesale distributors* (*i.e.*, manufacturers selling to resellers at wholesale level) from the scope of the block exemption. The introduction of this new limitation to the scope of the VBER block exemption – if this is indeed what the Commission aims to do – would cause a great amount of legal uncertainty for suppliers and distributors at the wholesale level of trade, increase costs and possibly prohibit suppliers and distributors from entering into agreements. GTDC identifies *inter alia* the following (potential) negative effects for the technology distribution market:

a) Negative impact on inter-brand competition: losing flexibility of suppliers and wholesale distributors to choose between various routes to market will increase costs for and limit competition between suppliers;

b) Negative effect on intra-brand competition: suppliers may decide not to rely on multiple sales channels, such as the wholesale distribution chain, which will reduce competition between these sales channels. In particular, excluding dual distribution agreements between suppliers and wholesale distributors from the scope of the VBER will make it more difficult for manufacturers to create a multichannel environment for consumers, the importance of which was highlighted by the European Commission in its evaluation report;

c) Increased legal costs and legal uncertainty for suppliers and wholesale distributors due to the requirement to self-assess the legality of dual distribution agreements, which will mainly harm small to mid-sized distributors;

d) Diverging and inconsistent approaches by national competition authorities. This will almost inevitably result in a fragmented regulatory landscape, causing increased costs and a lack of legal certainty for companies, which in turn will harm cross- border trade;

e) Decreased efficiency of distribution chains. Many practices/interactions that are widely accepted to increase efficiencies in a vertical supply chain must be assessed under the horizontal framework and could be considered problematic if dual distribution agreements at the wholesale level are no longer block exempted. For example, while the sharing of certain type of information (e.g. inventory data and sales quantities) in a vertical supply chain is widely accepted as a source of efficiencies (e.g. to avoid the so-called "bullwhip effect" which shows that due to a lack of information flows between the different levels, a small mistake in demand forecast on the retail level can lead to significant errors in demand forecast at the manufacturer level, which

ultimately results in significant inefficiencies), it could raise concerns if it were to be assessed as horizontal information exchange between competitors.

12. In GTDC's view there are no valid legal or economic grounds for such limitation. The draft Guidelines do not explain whether and why in this respect a distinction should be made between the wholesale and retail levels of trade.

13. Moreover, the draft VBER explicitly allows for decreasing the competitive pressure exerted by wholesale distributors in other scenarios. Most notably, bans (or restrictions) on sales to end users by wholesale distributors are excluded from the list of hardcore restrictions in Article 4(b) to (d) of the draft VBER. Since the draft VBER allows for such restrictions on competitive pressure exerted by wholesale distributors in certain cases, it is unclear to GTDC why dual distribution agreements at the wholesale level generally do not benefit from the safe harbour of the VBER.

14. In view of the above, it seems to GTDC that the wholesale level of distribution was not taken into account by the Commission.

15. GTDC therefore respectfully urges the Commission to clarify in the draft VBER and Guidelines that dual distribution agreements between suppliers and distributors at the wholesale level fall within the scope of the block exemption. To that end, the following simple adjustments could be made to Article 2 (4) (a) and (b) of the draft VBER:

> (a) *"the supplier is a manufacturer, wholesaler, or importer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the relevant upstream level, and their aggregate market share in the relevant market at the downstream level does not exceed [10]%;*
>
> (b) *the supplier is a provider of services at several levels of trade, while the buyer provides its services at the relevant downstream 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 the downstream level does not exceed [10]%."*

16. Secondly, from the new Article 2(5) it follows that the exchange of information between the supplier and the distributor must be assessed as horizontal information exchange, where the 10% market share at retail level of Article 2(4) is exceeded but the combined market share of the parties still falls below the general threshold of 30%. In GTDC's view, this change to the Commission's policy will likely spark serious discussion, since it lacks the legal certainty that companies seek. It is unclear what "information exchange" entails in practice. In general, the regular exchange of certain product sales information between manufacturers and wholesale distributors (e.g. inventory data and sales quantities) is vital for the realisation of the efficiencies in the wholesale distribution chain model. GTDC is of the position that at the wholesale distribution level

there should be no restrictions in relation to information exchange and that particular market share thresholds, *if any*, should be significantly higher than 10%.

17. GTDC therefore respectfully urges the Commission to clarify that "exchange of information" between wholesale distributor and a supplier are exempted from the scope of Article 2(5) of the draft VBER, and thus fall within the exemption under Article 2(1) of the draft VBER.

II.1.2 *The scope of the hybrid platform limitation is too broad*

18. Pursuant to the new Article 2(7) of the draft VBER, dual distribution agreements entered into with providers of hybrid platforms cannot benefit from the block exemption. In this respect, the draft Guidelines explain that the *retail activities* of such hybrid platforms typically raise significant horizontal concerns.

19. GTDC assumes that the Commission has introduced this limitation in response to the growing market power of certain large platforms that operate marketplaces for distributors selling to consumers, while these platforms also sell directly to consumers themselves.

20. In the technology distribution industry, several wholesale distributors offer platform intermediation services to vendors (i.e., suppliers) by which vendors sell directly to retailers and/or professional/business end users, in addition to their regular wholesale distribution arrangements with those wholesale distributors. For example, wholesale distributors may operate platforms that enable vendors to sell directly to resellers and facilitate the billing and invoicing processes via the platform. At the same time, these wholesale distributors may also act as resellers of these vendors' products and services to their customers. In GTDC's view, the hybrid function of these distributors does not raise the same horizontal concerns as those identified by the Commission in relation to the retail activities of the large platforms mentioned above. However, Article 2(7) of the draft VBER does not make a distinction between different hybrid players, for example based on the level of trade on which they operate. Therefore, under the current wording of the draft VBER and Guidelines, distribution agreements between wholesale distributors offering online intermediation services and suppliers could no longer benefit from the VBER block exemption.

21. As indicated above, in GTDC's view the hybrid function of certain wholesale technology distributors does not raise competition concerns similar to those identified in relation to the retail activities of large consumer goods platforms. If the Commission takes the position that such concerns do exist in relation to platforms that operate exclusively at the wholesale level of trade, it is requested to address and explain these concerns.

22. GTDC therefore respectfully encourages the Commission to adjust Article 2(7) of the draft VBER and limit its scope to the large powerful platforms operating at consumer retail level at which this article seems to be aimed. To that end, the following adjustments could be made to Article 2 (7) of the draft VBER:

> *"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 to end users in competition with undertakings to which it provides online intermediation services, enters into a non-reciprocal vertical agreement with such a competing undertaking."*

II.2 RPM: fulfilment agreements

23. The draft VBER and Guidelines mark a more nuanced view towards Resale Price Maintenance practices (**RPM**). Notably, the Guidelines explain that resale price fixing arrangements in fulfilment agreements do not constitute RPM within the meaning of Article 4(a) of the draft VBER where the end user has waived its rights to choose the undertaking that should execute the agreement. Conversely, where the end user has not waived this right, resale price fixing arrangements in fulfilment agreements will likely constitute RPM.

24. Fulfilment agreements are commonly used in technology distribution, especially where it concerns products that are marketed by players other than the distributor (i.e. the vendor or retailers). In practice, distributors often perform the role of a highly efficient logistics engine. In this capacity a wide range of services can be provided to suppliers and retailers, such as receipt of orders from retailers; packaging of goods according to retailer or vendor specifications; providing customized logistics and transport management; providing reverse logistics (i.e. returns management); managing financial flows towards the retailer, and reseller account management.

25. While the wholesale distributor often bears the inventory and credit risks, it is in practice a service provider, rather than a reseller. In this respect it should also be noted that in these scenarios the inventory risks assumed by the wholesale distributor under fulfilment agreements are in practice relatively limited, as the demanded quantity will be specified in the framework conditions between the supplier and the buyer and fulfilment will typically take place very quickly once the agreement is put in place. However, the legal liability for loss/damage during the delivery and logistics is borne by the wholesale distributor who also acquires title on the products. The same is true for credit risks, as the buyer is typically a large corporate entity or the vendor pays credit insurance premium to the benefit of the wholesale distributor.

26. GTDC therefore welcomes the more nuanced approach towards RPM, in particular where it concerns fulfilment agreements. However, the envisaged exception for fulfilment agreements is too narrow and unclear in GTDC's view.

27. First, it seems unnecessary to restrict the scope of this exception to fulfilment agreements involving *end users*. In GTDC's view fulfilment agreements at the wholesale level of trade (i.e. where the purchaser is a retailer/reseller) should be granted similar treatment. There are no clear legal or economic ground for making a distinction between the wholesale and retail levels of trade in this respect. In both cases competition has already taken place at the time of agreement on the commercial terms between the supplier and the buyer. Moreover, fulfilment models at the wholesale and retail levels lead to similar price advantages for the buyer.

28. Second, it is unclear how and in which agreement the 'end user' must waive its right as regards the undertaking performing the agreement. Additional guidance on this would be very welcome. In any event GTDC would assume that there are no formal requirements for such waiver and that the 'end user' concerned could waive its right to choose the undertaking that should execute the agreement by, for example, agreeing on a price with the supplier. Moreover, the current wording risks the unintended consequence that consumers could be worse off. Since in the technology sector the end user is often the consumer, end users are not in a direct contractual relationship with the supplier (i.e., vendor) or wholesale distributor, nor are they a party to the fulfilment agreements described above. The relevant parties for these fulfilment agreements are the vendor, the wholesale distributor and the retailer/reseller. Therefore, it is unclear which agreement the Commission refers to in paragraph 178 of the draft Guidelines. On the one side, unlike large corporate end users, consumers will not be able to negotiate better terms and conditions directly with the vendor, and on the other side, the current narrow wording deprives them of the opportunity to benefit from a framework agreement between a vendor and a large retail distributor that is fulfilled by a wholesale distributor.

29. GTDC therefore encourages the Commission to clarify that the exception for fulfilment agreements also applies at the wholesale level of trade and explain where and in which manner the 'end user' and/or retailer/reseller must waive its right as regards the undertaking performing the agreement.

30. To clarify that the exception for fulfilment agreements also applies at the wholesale level of trade, the following adjustments could be made to paragraph 178 of the draft Guidelines:

> *"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 reseller or end user (hereinafter "fulfilment contract") does not constitute RPM where the*

reseller or end user has waived its right to choose the undertaking that should 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 reseller or end user 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 reseller or end user 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."

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