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COSMETICS EUROPE'S CONTRIBUTION FOLLOWING THE PUBLICATION OF THE DRAFT VERTICAL BLOCK EXEMPTION REGULATION AND VERTICAL GUIDELINES

EXECUTIVE SUMMARY

Overall, Cosmetics Europe is satisfied with the orientations taken by the Commission in the draft Regulation and draft Guidelines. It welcomes the fact that the Commission really took into account the growth of e-commerce over the past ten years by offering more flexibility to market players in certain aspects of their vertical relationships.

Cosmetics Europe welcomes in particular the following changes: the removal of dual pricing from the list of hardcore restrictions, the deletion of the so-called "equivalence principle" from the VGL, as well as the codification of the outcome of the key *Coty* judgment of the ECJ.

Nevertheless, Cosmetics Europe considers that there is still room for clarification regarding the way new forms of doing business online are addressed. In this regard, this contribution mainly focuses on two structuring issues, namely the status of undertakings providing online intermediation services and the limitation of the dual distribution exemption which may significantly affect the level of legal certainty at EU level.

First, with regard to the status of online intermediation services which are now qualified as "suppliers" under the draft VBER, Cosmetics Europe strongly disagrees with such an approach, which does not make sense from a business standpoint and complexifies the legal framework instead of simplifying it.

The qualification attached to undertakings providing online intermediation services should stick to business reality. They should be qualified as "suppliers" only when they produce and sell their own products, and as "buyers" when they purchase products from a supplier in order to resell it. When solely providing pure intermediation services, these undertakings should be considered as mere agents, on a case-by-case basis.

Second, with regard to the new threshold introduced for the exemption of dual distribution relationships, Cosmetics Europe does not share the position on the alleged potential harm to competition identified by the Commission and the solutions it came up with.

Cosmetics Europe reiterates that it does not identify any new specific issue with the collection of information by a supplier from its buyers, which is inherent to any vertical relationship, regardless of the supplier's activity at the retail level, that would justify such a major change in the safe harbor.

Lastly, Cosmetics Europe identifies other topics which also call for some level of clarification and/or improvements. This mainly concerns: the way online advertising restrictions are dealt with, the necessity to protect selective distribution systems from parallel trade and resale price maintenance.

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On 9 July 2021, the Commission published drafts of the revised Vertical Block Exemption Regulation ("VBER") and Vertical Guidelines ("VGL") following the impact assessment phase initiated in October 2020.

This publication triggered the opening of the last phase of the public consultation, which aims at gathering stakeholders' feedback on the new legal framework proposed by the Commission.

Cosmetics Europe is very grateful for this opportunity to provide comments on the Commission's draft VBER and VGL and presents herewith its understanding of the clarifications, new provisions and rules addressed in the drafts as well as its position and recommendations on some of the main topics addressed in the drafts.

On the one hand, Cosmetics Europe is overall pleased with the draft VBER and VGL. It notes with satisfaction that the Commission took into account recent market developments, especially regarding e-commerce, and acknowledged the fact that it was not necessary to overly focus on potential restrictions related to online sales, taking into consideration the increase of digital business over the last decade. Cosmetics Europe thus welcomes the flexibility offered to brand owners in many aspects of their distribution strategy at EU level (**1.**).

On the other hand, although Cosmetics Europe shares the Commission's intention to address the potential imbalance generated by the role played and the power exercised by certain providers of online intermediation services, it notes that, as the drafts currently stand, some of the guidelines adopted could have the undesired effect of reducing the legal certainty/safe harbor provided to brand owners and resellers. This is all the more problematic given that, as a result of the growth of e-commerce, brand owners are more and more likely to enter into relationships with such platforms, especially when these play a hybrid role (**2.**).

Finally, our association has identified several topics on which some clarifications and/or improvement remain necessary. (**3.**).

1. THE IMPROVEMENTS BROUGHT BY THE DRAFT VBER AND VGL

1. Cosmetics Europe notes with satisfaction that the new regulation takes into consideration the move towards digitalization followed by brand owners over the last decade. Cosmetics Europe welcomes the flexibility offered to brand owners in the definition of their qualitative/quantitative criteria and commercial conditions, as well as the clarifications brought on potential limitations to online business.

1.1 The new VBER/VGL bring further flexibility for brand owners

2. First, Cosmetics Europe is satisfied with the clarification brought by the draft with regard to the definition and scope of selective distribution.

Cosmetics Europe particularly welcomes the clarification provided in paragraphs 134 and 136 of the VGL, which confirms that selective distribution can be appropriate for any types of products as long as the nature of the goods or services in question must necessitate it and that a selective distribution system can be block-exempted even if the *Metro* criteria are not fulfilled (*e.g.*, non-discrimination)[1].

These clarifications will provide brand owners and resellers more flexibility to design, in the most suitable way, their distribution strategy at EU level, where the parties' market shares are below 30% and where such distribution model does not contain any hardcore restriction.

Incidentally, Cosmetics Europe believes that classifying hardcore restrictions according to the type of distribution scheme used (exclusive distribution, selective distribution and "free" distribution) provides greater clarity[2].

3. Second, Cosmetics Europe notes with satisfaction that the draft VGL[3] acknowledges the differences between online and offline channels and enables brand owners to apply different selection criteria online and offline, without any reference to a so-called "equivalence principle" that would lead unauthorized resellers to systematically challenge the brand owners' qualitative criteria for online sales.

   By doing so, the Commission recognizes that the implementation of restrictive qualitative criteria for online sales is not perceived in a negative manner, as a way for brand owners to limit the development of online sales, but rather as a way to offer an appropriate sales environment and the best level of services possible to both online and offline channels, to the benefit of consumers.

   In this regard, Cosmetics Europe respectfully submits that an additional clarification could be provided regarding whether this flexibility applies to both quantitative and qualitative criteria. In particular, it should be confirmed whether different quantitative criteria can be applied online and offline. It should be confirmed that both different qualitative and quantitative criteria can be applied online and offline, even though nothing in the VBER or the VGL appears to prevent doing so.

4. Incidentally, the draft VGL confirms that the case law does require disclosing qualitative criteria to all potential resellers. However, the Commission seems to link the disclosure of the criteria to the likelihood of fulfilling the *Metro* criteria, which may lead to confusion. As such, Cosmetics Europe does not see how a brand owner's refusal to disclose its qualitative criteria (on the basis of their confidential nature) could have an impact on the validity of its selective distribution network nor how the brand owner's legitimate refusal to disclose its selective criteria may harm competition.

   Cosmetics Europe considers that the issue of the disclosure of qualitative criteria does not fall within the scope of EU competition law and would rather be related to unfair commercial practices and business secret considerations. Cosmetics Europe therefore suggests to confirm that there is no requirement to disclose qualitative criteria to all potential resellers.

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1 Provided the 30% market share threshold is not attained and the agreement does not contain any hardcore restriction

2 Draft VBER, Article 4

3 Draft VGL, para. 221

Third, Cosmetics Europe welcomes the newly introduced possibility for suppliers to impose different wholesale prices to their distributors depending on whether the distributor sells the products online or offline (so-called "dual pricing")[4]. By removing dual pricing from the list of hardcore restrictions, the draft VGL gives brand owners the possibility to reward the investments made by their distributors in order to improve the quality of the sales environment and services, to the benefit of consumer experience.

5. Finally, Cosmetics Europe shares the Commission's view according to which the so-called "brick & mortar" criteria remains legitimate regardless of the distribution system chosen and the confirmation that brand owners can require more than one brick & mortar store to enter into its distribution network. By doing so, the new rules ensure flexibility for brand owners in the way they design their distribution model and protect their distribution network against free riding while maintaining the socio-economic tissue and the attractiveness of city-centres.

1.2 Marketplace ban and online advertising restrictions

6. Cosmetics Europe welcomes the codification of the *Coty* decision into the draft VBER, which acknowledges the possibility for suppliers – regardless of the type of distribution system operated – to restrict their buyers from selling on third-party platforms.

   Cosmetics Europe takes good note that a marketplace ban shall be block exempted if it meets certain criteria (e.g., the market shares of each of the supplier and the buyer do not exceed 30%, other online channels remain are available etc.).

   However, several points specifically addressed in the VGL are to be clarified.

7. Paragraph 135 of the draft VGL provides that "*(…) 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*."

   Such paragraph appears to erroneously condition the legality of a platform ban to the condition that the concerned products are luxury goods, while it is clear under paragraph 194 that a marketplace ban may be exempted regardless of the type of distribution system.

   Cosmetic Europe considers that the Commission should make clear that a marketplace ban can be exempted regardless of the nature of the product concerned as long as the 30% market share threshold is satisfied and no hardcore restriction are identified.

8. Paragraph 135 also appears to make such marketplace ban conditional upon the fact that resellers must be authorised to advertise via such platforms and to use online search engines.

[4] Draft VGL, para. 195

In that regard, although it may be legitimate to enable resellers to have some degree of visibility on the internet, Cosmetics Europe would like to underline that such interpretation deviates from the *Coty* judgment which provides that "*it is also apparent from the documents before the Court that the selective distribution contract at issue in the main proceedings allows, under certain conditions, authorised distributors to advertise via the internet on third-party platforms and to use online search engines, with the result that, as noted by the Advocate-General in point 147 of his Opinion, customers are usually able to find the online offer of authorised distributors by using such engines*".

Beyond the fact that the ECJ did not state that a brand owner could not combine restrictions on the use of marketplaces and restrictions on the use of advertising platforms, Cosmetics Europe submits that the Commission should at least make clear that a brand which prevents its resellers from using marketplaces may also impose some conditions and qualitative criteria to the use of advertising platforms and online search engines in order to preserve its reputation.

9. Finally, the examples provided by the Commission on individual exemption vis a vis online marketplace bans[5], while useful to a certain extent, shall not be exhaustive nor peremptory. Such examples shall indeed not prevent an individual qualitative assessment of the online marketplace ban to be undergone on a case-by-case basis as the Commission indeed needs to keep in mind that the protection of the aura of a luxury brand is a constant challenge in the permanently evolving digital landscape.

1.3 Territorial organisation of exclusive and selective distribution networks

10. In its previous contribution, Cosmetics Europe insisted on the necessity to clarify that exclusive distribution (at the wholesale level) and selective distribution (at the retail level) can be combined within the same territory. Cosmetics Europe notes that such clarification has not been explicitly included in the draft VGL and that such system could be exempted as long as the market shares of the parties are below 30% and the distribution agreement does not contain hardcore restrictions.

Paragraph 223 of the draft VGL merely provides that "*(…) [t]his 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. 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* (...) *it also means that within a selective distribution network, no restrictions can be imposed on authorized wholesalers as regards their sales to authorized distributors*".

Such wording is particularly confusing, notably as to whether, within a selective distribution network, the term "*authorized distributors*" refers to authorized retailers and exclusive wholesalers (which are by nature limited in their capacity to carry out active sales outside their allocated territories) or to authorized retailers only.

[5] Eg Draft VGL, para. 322

As already stressed out by Cosmetics Europe, such a combination of exclusive and selective distribution (in the same territory but at different levels of trade) does not raise any competition concern, as long as exclusive wholesalers focus on their role of wholesalers and network heads while authorized retailers remain free to resell the products in other territories covered by selective distribution. In addition, it is essential for brand owners to make sure that wholesalers are allowed to invest sufficient means to develop "their" local markets by being protected from other distributors' potential free riding.

11. Notwithstanding the above, Cosmetics Europe welcomes the improvement brought to the definition of active and passive sales which is now adapted to digital business and to the intensification of online cross-borders sales.

Cosmetics Europe is therefore in line with the clarification that some forms of online sales shall be considered as active sales when specifically targeting consumers or territories[6]. This will exclude any misinterpretation under which any online sale is presumed to be a passive sale.

Indeed, as indicated in our previous contribution, most of online sales can no longer be achieved without an active behaviour of the seller such as targeted and/or local advertising.

12. While Cosmetics Europe is overall satisfied with the proposals made by the Commission, it presents hereunder several matters for which it considers that improvements could be made in the final version of the regulation.

2. NEW CONCERNS LIKELY TO AFFECT LEGAL CERTAINTY

13. Amongst the new topics addressed in the VBER/VGL drafts, there are two main issues for which the proposal may impair the legal certainty offered to stakeholders for the next ten years. This notably concerns the qualification of undertakings providing online intermediation services as "suppliers" and the way exchanges of information in the context of dual distribution are dealt with.

14. More generally, Cosmetics Europe regrets that these two topics, albeit structuring, have not been subject to more discussions and to a real impact-study during the first phases of the evaluation process.

The Commission's approach on these two subjects in fact raises implementation difficulties that could have the effect of preventing stakeholders from relying on the proposed new framework to define their distribution strategy, as they would have to systematically self-assess their agreements on the basis of Article 101(3) of the TFEU, which we know does not provide sufficient legal certainty.

[6] Draft VBER, Art. 1(l) and 1(m)

2.1 The VBER/VGL approach regarding online intermediation services

2.1.1 The status of undertakings providing online intermediation services

15. First, the distinction between the definitions (i) of online intermediation services providers, notably in Article 2(7) and (ii) online marketplaces (in paragraph 313 of the VGL) is unclear and is likely to create a great deal of confusion for stakeholders.

16. Besides, Article 1(d) of the draft VBER provides that the notion of "supplier" – as opposed to "buyer" – includes undertakings which provide online intermediation services[7] irrespective of whether these undertakings are a party to the transaction they facilitate. As a consequence, all undertakings providing online intermediation services (including marketplaces) would now be considered as "suppliers" under the VBER.

    Such an approach raises several issues which are described hereunder.

17. First, Cosmetics Europe considers that this new definition lacks clarity and is rather difficult to grasp from a business standpoint, since undertakings providing online intermediation services cannot necessarily be classified within the traditional vertical dichotomy between "suppliers" and "buyers".

18. The dichotomy between "suppliers" and "buyers" provided in the current version of the VBER is coherent and adapted to the functioning of vertical relationships between "suppliers" (upstream) and "buyers" (downstream).

    Systematically qualifying providers of online intermediation services as "suppliers" under this definition is questionable since these undertakings bear no resemblance to traditional suppliers, which usually enter into vertical agreements with so-called buyers. Most online intermediation services do not manufacture nor produce any products in the traditional sense, and therefore do not compete with conventional suppliers which sell products through these intermediation services. On the contrary, they most often "supply" online intermediation services to "suppliers" themselves.

19. The Commission itself acknowledges that these new ways of doing business, such as online intermediation services, were "*not easy to categorise under the concepts traditionally associated with vertical relationships between suppliers and distributors in the brick and mortar environment*".[8]

    For this very reason, Cosmetics Europe considers that the draft regulation should refrain from artificially "forcing" providers of online intermediation services into this traditional dichotomy.

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[7] Services that allow undertakings to offer goods or services to other undertakings or to end users with a view to facilitating direct transactions between such undertakings or between such undertakings and end users, irrespective of whether and where those transactions are ultimately concluded, and that constitute information society services within the meaning of point (b) of Article 1(1) of Directive (EU) 2015/1535 of the European Parliament and of the Council

[8] Draft VGL, para. 60

20. In addition, a great number of undertakings providing online intermediation services have a hybrid role and also act as “buyers”, thus excluding their qualification of “suppliers”. This is the case where hybrid platforms enter into a traditional distribution agreement with a supplier (under which the platform undertakes to buy and sell the supplier’s products). In this case, such hybrid undertaking should not qualify as a supplier, but rather as a buyer. This should in any case be clarified within the final version of the VBER.

    The qualification attached to undertakings providing online intermediation services should thus stick to business reality. They should be qualified as “suppliers” only when they produce and sell their own products, and as “buyers” when they purchase products from a supplier in order to resell it. When solely providing pure intermediation services, these undertakings should be considered as mere agents, on a case-by-case basis.

2.1.2 Exclusion of the safe harbour for hybrid platforms

21. Cosmetics Europe understands that the relationships between hybrid platforms and their users are to be excluded from the benefit of the exemption.

    In this regard, the first question that needs to be clarified by the Commission is whether hybrid platforms are to be excluded only when they sell their own competing products.

    While Cosmetics Europe gets the need to regulate the relationships between platforms and their users, it would like to draw the Commission's attention to the fact that a large number of platforms have adopted or will be adopting a hybrid format. The positions taken today by the Commission could impact a large part of the sales made online in the future.

    In addition, there is a contradiction between, one the one hand, preventing brands from restraining the use of marketplaces (by encouraging qualitative criteria instead of straightforward bans) while on the other hand removing the exemption for agreements entered into with said marketplaces.

    In this context, the new framework provided in the draft VBER may appear contradictory: on the one hand, the Commission wants to promote digital business, while on the other hand, it seems to limit a large part of such business by removing the safe harbor.

22. Therefore, it is essential to clarify in which exact circumstances the relationships between brands and hybrid platforms would not benefit from the exemption.

    Cosmetics Europe thus asks to Commission to confirm that this limitation of the exemption only targets the situation where a hybrid platform sells competing products that it has manufactured, but not when it acts as a mere reseller of competing products manufactured by other suppliers.

23. The confusion resulting from the qualification of platforms as suppliers will for sure give rise to divergent interpretation not only from stakeholders but also and in particular from NCAs, far from the objective of the VBER/VGL, which is to bring consistency at the EU level.

2.2 The exclusion from the status of agent

24. Another immediate consequence of qualifying platforms as supplier is that providers of online intermediation services can no longer qualify as "agents" for the purpose of applying Article 101(1) of the TFEU[9].

Members of Cosmetics Europe are quite surprised and disappointed by this consequence. In practical terms, this means that platforms offering intermediation services, which are intermediaries by nature, will no longer be considered as "agents".

This is not in line with the actual functioning of these relationships: where brand owners sell their products through a marketplace, such marketplace only serves as an intermediary agent for selling they products. This is the case because:

- The online intermediary does not purchase the products nor does it resell it (contrary to resellers). Therefore, it does not acquire ownership of the products, or only for a very brief period, while selling them on behalf of the brand owner/principal.

- The intermediary does not always provide a fulfilment service and, when it does, only acts the same way a logistician would.

- The intermediary does not bear any risk associated with the products. All liabilities related to the products (including product safety compliance, defective products, etc.) as well as liabilities related to the stocks of products are generally borne by the brand or the supplier and not by the platforms (contrary to traditional resellers).

- According to the draft VGL, the exclusion of the notion of "agent" is only based on the fact that platforms generally have significant advertising budget. However, Cosmetics Europe does not share this view, which is untrue for the vast majority of platforms. Brand owners and resellers only use platforms to gain visibility on the Internet, which is why they are willing to pay significant commissions to platforms. It is only because of the huge number of users and the sum of the related commission collected by the platforms that they are able to engage significant advertising budgets on behalf of their users.

- Contrary to what is provided in the draft VGL, the intermediary does not determine the conditions of sale or the commercial strategy associated with the products. Users (brand owners, importers or resellers) are always setting the retail price. This is confirmed by the new paragraph 179 of the VGL, which provides that "*Article 4(a) VBER prohibits the online intermediation services provider from imposing a fixed or minimum sales price for the transaction that it facilitates*".

[9] Draft VGL, para. 44

- Contrary to what is stated by the Commission, all the main intermediary platforms are considered to be acting in a passive manner as pure hosting services. They all ask to benefit from the derogation of liability provided by the e-commerce directive[10]. It is unlikely that the DSA would change such assessment.

The draft VGL considers that providers of online intermediation services allegedly benefit from "strong network effects" and strong bargaining power and that, consequently, they determine the conditions of sales and strategy.

Here again, Cosmetics Europe fully understands the Commission's willingness to provide a framework to regulate the behaviours of platforms. However, the VBER and VGL do not appear to be the most appropriate vehicle, unlike the DMA, which allows the Commission to closely monitor so-called "gatekeepers".

25. The definition of providers of online intermediation services is at the same time (i) confusing (notably in light of the definition of online marketplaces in paragraph 313 of the VGL mentioned above) and (ii) very broad. This leads to the adoption, by the Commission of an extremely general approach, by which the Commission seems to assimilate all types of platforms to "gatekeepers", assuming that all platforms benefit from strong network effects and a high bargaining power. By doing so, it eludes all other smaller platforms, which situation is obviously drastically different, since they do not benefit from similar network effects and do not have the same bargaining power.

The approach of considering all platforms as "gatekeepers" mainly focuses on mass-market platforms, thus excluding all specialized platforms from the competitive assessment. However, and this is all the more true in the case of selective brands, smaller specialized platforms are usually more appropriate to take into consideration, since they offer a sales environment adapted to their qualitative standards.

Therefore, while Cosmetics Europe understands and welcomes the Commission's willingness to target gatekeeper platforms in order to fight potentially abusive practices, it believes treating all platforms the same way is not the right answer and shows significant limits in practice[11].

Such approach, if it is maintained, would simply deprive suppliers and distributors in the European Union from concluding partnerships with online players other than on a purchase-resale relationship basis. This would not only create additional risks of free riding on "traditional" retailers but this would also deprive consumers from innovative/additional customer experiences online.

[10] See Article 14 of the e-commerce directive and the following case law concerning some of the most well-known platform: (Paris Court of Appeal, 25 January 2019, no. 17/22056, *Alibaba*; Paris Tribunal de Grande Instance, 28 June 2019, no. 17/17613, *Cdiscount*; ECJ, 2 April 2020, Case C-567/18, *Coty Germany GmbH v Amazon*.

[11] On this issue, in the Amazon / Coty case, the ECJ refrained from applying a general rule to all platforms (here concerning the fulfillment services offered by Amazon) and referred to national judges to rule on the basis on an *in concreto* approach (C-567/18 Coty Germany GmbH v Amazon)

26. **In view of these considerations, Cosmetics Europe considers that (i) the definition of providers of online intermediation services shall be urgently clarified and narrowed down and (ii) that such providers of online intermediation services shall not be associated to "suppliers" in the VBER and should be qualified as agents when providing intermediation services, and the final version of the regulation should be amended in this respect.**

2.3 The exemption applicable to dual distribution

27. Considering that instances of dual distribution are becoming increasingly prevalent, allegedly increasing the possibility of non-negligible "false negatives", the draft VBER introduces new thresholds specific to the exemption of so-called dual distribution[12].

Cosmetics Europe disagrees with the introduction of these new thresholds which *de facto* lead to a removal of the exemption, for the reasons described below.

2.3.1 The new market share thresholds will complicate future assessments and increase costs for businesses

28. The new threshold combines an aggregated market share (10%) and a non-aggregated market share (30%). This lack of uniformity will, without any doubt, make the assessment required from suppliers and buyers all the more complex.

29. In addition, Competition authorities usually consider that the geographical dimension of the market for the retail of cosmetics products is local or limited to a catchment area surrounding a point of sale. Cosmetics Europe does not see how, for the purpose of assessing the likelihood for vertical agreements to be exempted, market shares at the retail level could be calculated at a local level for distribution agreements concluded at national or at EU level. This needs to be clarified.

30. Furthermore, with regards to the cosmetics sector (but this is also true for other sectors), Cosmetics Europe observes that while the supply level is rather atomized, the retail level is more concentrated, and most national markets are structured in such a way that the main retailers usually hold a market share above the 10% threshold.

Accordingly, the market share threshold provided in Article 4(2)(a) will systematically be exceeded simply because of the retailers' market shares, leading to a *de facto* removal of the block exemption.

This is all the more problematic that the Commission's issue with dual distribution targets the activity of the supplier at the retail level. Thus, it may be more reasonable to focus solely on the supplier's market share rather than on the supplier and the buyer's aggregate market share.

31. Cosmetics Europe would also like to re-insist on the fact that such complexification of the rules will drastically increase costs for companies, which will have to assess, on a case-by-case basis, whether their vertical relationships may be fully exempted or not.

[12] Draft VBER, Articles 2(4) to 2(7)

This creates an overly complicated framework for brands and consequently deprives them of the necessary level of legal certainty, while - rom a pure competition standpoint - there is no new development regarding dual distribution that requires removing the existing safe harbour in this respect.

By contrast, it may have the effect of discouraging brand owners from using dual distribution, and on the contrary, encouraging them to focus on direct distribution (D2C) exclusively or to decide not to launch their D2C operations at all, thus strongly decreasing intra-brand competition altogether, to the detriment of consumer welfare.

32. Finally, it is not clear whether the narrowing down of the exemption also applies in the case of dual distribution at the wholesale level (i.e. when the supplier sells directly to retailers while also resorting to a wholesaler). In other words, would exchange of information between the supplier and the wholesaler in this case be removed from the exemption? If so, the Commission should clarify what are the market shares of the supplier and the wholesaler to be taken into account.

2.3.2 Cosmetics Europe disagrees with the Commission's focus on exchanges of information

33. The Commission focuses specifically on exchanges of information between suppliers and buyers because it considers that the increase of occurrences of dual distribution will result in an increase of potentially anticompetitive exchanges of information. Accordingly, it considers that maintaining the exemption could result in anticompetitive situations being erroneously exempted (*i.e.*, "false positives").

Cosmetics Europe strongly disagrees with such assumption. It must be borne in mind that, in dual distribution schemes, suppliers and buyers belong to one single distribution network and share the same interest in promoting and selling the same products and the same brand in a way that satisfies customer expectations.

Transmission of information on products, sales and/or consumer data from retailers to brand owners in general are inherent to their relationship, since it is essential for suppliers to define the most suitable commercial strategy and meet consumers expectations. This mainly concerns information on the brand's past sell-out data for each reference of products, aggregated information on consumer profiles and consumer preferences and behaviours. As an illustration, in the context of selective distribution, the exchange of certain past data between suppliers and their retailers may help them identify grey market players such as organized buying rings (entities or individuals) pretending to act as consumers and making repetitive purchases (to the detriment of genuine consumers) from authorized points of sales or websites for the sole purpose of reselling the products outside selective distribution networks.

34. Cosmetics Europe regrets that the Commission did not conduct an impact assessment regarding the potential harm to competition caused by reducing the scope of the exemption.

The transmission of information from a retailer to a brand owner is only related to the tight cooperation that enables both of them to be efficient in the way they market the products to end-users, by enabling suppliers to define the best and most-suited commercial strategy to compete with their own competitors and to increase sales while preserving brand-equity, to the benefit of the upstream and downstream levels as well as of consumers.

Accordingly, the transmission of information and retail data from a buyer to a supplier within a dual distribution scheme (*i.e.*, information on the buyer's own distribution network and own products), lead to efficiencies for the distribution relationship, especially within selective distribution systems for which the cooperation goes far beyond pricing and is more focused on services offered to consumers. Such transmissions of information do not therefore require an "*ex-ante*" evaluation.

In addition, Cosmetics Europe sees no reason why the exemption should be narrowed down. The existing rules are sufficient to cover situations where an anticompetitive exchange of information occurs in a dual distribution scheme.

Once again, the recent *Hugo Boss* decision of the Danish Competition Council[13] shows that the current framework is efficient and does not prevent NCAs from catching *ex post* anticompetitive exchanges of information such as exchange of information on future prices, which would in any case be seen as a restriction by object leading to an automatic removal of the block exemption.

2.3.3 The reference to the horizontal guidelines to assess the exchanges of information is inappropriate

35. Cosmetics Europe does not agree with the proposition aimed at assessing exchanges of information under the horizontal guidelines, which, as their name implies, only concern horizontal relationships between competitors.

In dual distribution schemes, the fact that suppliers may also be active at the retail level does not mean that the relationships between such suppliers and buyers amount to an horizontal relationship. On the contrary, suppliers and buyers only compete at the retail level (and not at the supply level) and for the same brand (and not for competing brands). Therefore, in dual distribution schemes, the principal and most important aspect of the relationship remains vertical rather than the ancillary horizontal aspect at retail level.

36. Finally, providing guidance within the horizontal guidelines, which are also currently under review and which – for the time being – do not address such issue, would once again complicate the assessment of vertical agreements and even more by multiplying the number of applicable texts.

This does not fulfill the objectives of efficiency, simplification and consistency followed by the Commission and significantly affects the level of legal certainty provided to market players where entering into vertical relationships.

37. In addition, since the end of 2018, stakeholders have been given several opportunities to have their say in the revision process of the VBER and VGL. The alleged issue of dual distribution only came up during the final public consultation of the impact assessment phase, where only 22% of respondents advocated for a change in dual distribution rules.

[13] In this case, Hugo Boss and two of its retailers were sanctioned for having exchanged sensitive information (information on future prices, discounts and quantities, which was likely to give the supplier and its retailers the ability to coordinate their future sales) while also competing at the retail level. The DCC considered that this conduct was horizontal rather than vertical so that the VBER was not intended to apply in this specific situation.

38. **Therefore, Cosmetics Europe considers that the concerns identified by the Commission are unjustified and that the exemption should not be narrowed down.**

Here again, there is no reason for the Commission to change its approach without having conducted an impact assessment clearly establishing a theory of harm, i.e. showing that the transmission of information from a reseller to a supplier also active at the retail level may harm intra-brand competition in a way that would justify to reduce the scope of the safe harbour provided by the VBER.

As such, the new provisions regarding dual distribution would, in Cosmetics Europe's view, unnecessarily increase the complexity of the self-assessment required by businesses, thus having a negative impact on the third objective pursued by the Commission in the revision of the VBER, aka "*reducing compliance costs for businesses by simplifying complex areas of the current rules and streamlining the existing guidance*".

3. OTHER ISSUES TO BE CLARIFIED OR ADDRESSED IN THE VBER/VGL

3.1 Indirect restrictions of online sales

39. Cosmetics Europe notes with satisfaction that the draft regulation takes into account the growth of e-commerce and provides stakeholders which a much-needed flexibility, notably by codifying the *Coty* case.

40. The new rules described in the draft VGL however do require some clarification on the possibility for suppliers to impose restrictions on how and where buyers can advertise their products.

Recital 13 of the draft VBER indicates that, in some cases, restrictions on the effective use of certain online advertising channels "*should be excluded as a whole from the benefit of the block exemption*".

The Commission considers that restrictions applying to online advertising could be considered as hardcore restrictions, namely where such restrictions 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.

In other words, Recital 13 may be viewed and interpreted by NCAs and stakeholders as extending the list of hardcore restrictions provided in Article 4 of the VBER to indirect online restrictions, especially those focusing on online advertising.

Paragraph 192 of the VGL confirms that, in some cases, restrictions on the use of specific online advertising channels (such as price comparison tools or advertising on search engines) can be considered as hardcore restrictions.

This paragraph adds, as an example that "*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*" - and so irrespective of the level of quality offered by these "most widely used advertising services".

This wording may however be contradictory with the principle set by the Commission according to which the restriction should only be considered as "hardcore" where it has the object (and not the effect) "*to prevent the effective use of the internet*".

Cosmetics Europe considers that the types of restrictions which could amount to hardcore restrictions must be clarified in this respect. Once again, suppliers (especially those operating selective distribution networks) should be able to control the way their retailers advertise their products online, with the sole purpose of protecting their image and reputation.

41. The Commission perfectly understands (and accepts) that qualitative criteria can be imposed on the manner retailers advertise contractual products online. For instance, it is perfectly okay for a supplier to impose qualitative criteria relating to the quality / resolution of the image of the website, brand environment, visibility of the product or protection of consumer data.

It is very important to bear in mind that such qualitative requirements - which once again are perfectly legitimate to protect the image and reputation of the brand - can be imposed on the buyers with which suppliers have contractual relationships, but not on third-party advertising platforms. Accordingly, if a platform cannot fulfil these criteria, suppliers should be allowed to prevent their buyers from advertising on these platforms altogether, and so regardless of their importance/market power.

In Cosmetics Europe's view, the question should not be whether or not the restriction applies to a widely used advertising tool, but rather whether such restriction can be justified in order to protect the brand's reputation and image and to reward the investments made by the supplier and its retailers.

42. This is all the more true since brand owners should not "suffer the consequences" of the dominance of the online advertising market by two well-known gatekeepers.

Thus, in order to assess whether a restriction on the use of online advertising tools is lawful, the test should not be based on the importance and power of the advertising tool (as it is provided by the draft regulation) but should be based on the legitimacy and necessity of such restriction.

One efficient way to test such legitimacy would be to verify whether the supplier applies the same restrictions or conditions or qualitative criteria to its own advertisings.

For example, if a brand owner prevents its resellers from advertising products on Facebook (objectively arguing that Facebook's advertising methods do not comply with the image of its brand), but at the same time advertises its own products through Facebook, then the restriction could be seen as a way to prevent its retailer from effectively using the internet, and *vice versa*. The same applies if a brand owner imposes conditions or qualitative criteria to resellers that it does not comply with.

43. Cosmetics Europe also regrets that the Commission's approach to search engines bidding restriction[14] is too conservative, as some NCAs have adopted more flexible approaches regarding the monitoring of brand-related keywords when justified by the objective of ensuring the protection of brand image. In addition, it believes that the *Guess* decision[15] needs to be interpreted in the context of a combination of several forbidden practices, which does not reflect the potential benefits of such restrictions, when objectively justified. In addition, it also ignores the harmful impacts linked to the bidding effect caused by the purchase of keywords by a brand and by the members of its network, as well as the free riding effects resulting from the purchase of brand-related keywords by unauthorized resellers.

44. Finally, regarding indirect restrictions of passive sales in general, and especially paragraph 189 i) of the draft VGL indicating that hardcore restrictions may result from the limitation of the languages to be used on packaging, Cosmetics Europe would like to stress that there can be many legitimate reasons for limiting the languages used on packaging. This includes for example regulatory requirements to ensure consumer safety[16], the practical application of which may be constrained by different factors such as the size of the packaging or the presentation of the product in line with the image of the brand and the desired image that the product should procure. Cosmetics Europe therefore respectfully asks the Commission to remove the reference in paragraph 189 i) in the draft VGL and to adapt the wording of paragraph 191 accordingly.

3.2 The protection of selective distribution networks against unauthorized sales

45. Cosmetics Europe welcomes the initiative of the Commission to acknowledge the necessity to protect selective distribution networks and to provide the possibility for suppliers to prevent their buyers (selective, exclusive and free) as well as their buyers' customers, to sell products to unauthorized retailers in the territory where selective distribution is operated[17]. However, Cosmetics Europe is wondering how brand owners could rely on this provision of the VBER before national and EU courts and would welcome any corresponding guideline in the VGL.

46. Besides, Cosmetics Europe regrets and is extremely concerned that the Commission did not go as far as providing actual tools to fight unauthorized resellers downstream, once they have acquired the selective products and/or actually made sales – similar to the mechanism provided in Article L.442-2 of the French Commercial Code.

Cosmetics Europe has previously insisted on the crucial necessity to fight grey market, which has significantly increased with the rise of e-commerce. Cosmetics Europe has also already explained how difficult it was for brand owners to bring unauthorized retailers before courts in order to protect their brand reputation as well as to ensure the level of services and the product safety related to such brand throughout the whole EEA.

This issue does not only affect the brands' image, leading to their devaluation in the long run, but it also severely impacts consumer welfare, as it discourages brands from investing in their own networks, resulting in a decrease in the number of authorized retailers, intra-brand competition

14 Draft VGL, para. 192(f)

15 Commission, Case AT.40428, 17 December 2018, *Guess*

16 See in particular article 19 of the Cosmetics Products Regulation

17 Draft VBER, Article 4

and consumer choices and in an increase in the occurrences of disappointing consumer experiences (damaged packaging, delivery issues, unregistered and unfindable sellers, less qualitative, or even dangerous, products etc.).

47. Cosmetics Europe fully understands that the purpose of the VBER is to provide guidance on the application of Article 101 of the TFUE, rather than providing guidance on how to enforce selective distribution rules before national courts. On the other hand, it also notes that when required, the Commission can address specific issues of civil law through the VBER and the VGL, as it is the case regarding the relationship between platforms and their users.

48. In any case, Cosmetics Europe strongly maintains that one cannot, on the one hand, acknowledge the legitimacy and necessity of selective distribution while, on the other hand, not provide any tools to protect such distribution system against unauthorized resellers.

49. If the Commission considers that the VBER is not the right vehicle for the implementation of this enforcement tool, it shall at least officially highlight its crucial importance for suppliers and authorized selective distributors. Once again, different policy options could have been explored by the Commission:

- Inserting a general policy principle either in the VBER or in the VGL pursuant to which selective distribution is pro-competitive for consumers and, as a consequence, brand owners operating selective distribution systems must be in capacity to enforce and protect the reputation and integrity of their distribution network at EEA level and in every Member State, against any unauthorized resellers and platforms.

- Reminding, in the VBER or the VGL, the legitimacy of a pre-requisite or a qualitative criteria aiming at tackling free-riding and unfair competition. Such criteria could impose authorized retailers not only to refrain from selling products to unauthorized resellers, but also to cooperate with the brand owner by taking part in the protection of the selective distribution network, as well as to limit any behaviors that may contribute to the increase of unauthorized sales and/or unfair competition.

- Reminding, in the VBER or the VGL, that non-compliance with selective distribution qualitative and/or quantitative criteria may qualify as unfair commercial practices and/or as an act of unfair competition under national laws and/or as a "legitimate reason for the proprietor to oppose further commercialization of the goods".

3.3 Resale price maintenance

50. Regarding the notion of resale price maintenance, Cosmetics Europe notes that it remains in the list of hardcore restrictions.

Cosmetics Europe however welcomes the clarifications provided by the draft VGL on the examples of situations where RPMs can bring efficiencies[18]. This is especially the case regarding

[18] Draft VGL, para.182

the clarification that RPMs can bring about efficiencies in order to prevent free riding of investments in pre-sales services.

In this regard, Cosmetics Europe considers that the final version of the VGL could provide more specific and concrete examples of instances where RPMs could be accepted. Notably, the notion of "new products" could be clarified as to the duration of such "novelty" as well as the possibility of successively launching new products in various Member States, and thus to launch coordinated promotional campaigns specific to these new products.

51. Cosmetics Europe would also welcome the introduction of a specific mention to seasonal products in paragraph 182 of the VGL in order to maximize legal certainty. Indeed, as it is the case for new products, seasonal products require substantial investments that can only be recovered over a limited period. It should therefore be possible to use RPM in order to enable distributors to recover such investments.

Finally, Cosmetics Europe would also welcome additional clarifications as to what the Commission considers to fall under the definition of "experience" and "complex" products.

3.4 Clarifications regarding the dual role of agents

52. The Commission has integrated the clarifications provided in its standalone paper on agents, in the VGL, notably regarding the issue of the "dual role" of dual distributors also acting as agents.

The draft VGL now provides that an independent distributor may also act as an agent for <u>other</u> goods or service of a same supplier, if the activities and risks covered by the agency agreement can be "effectively delineated". The Commission indeed identifies a new risk where the agent undertakes other activities as an independent distributor for the same principal in the same product market by considering that acting as an agent may influence the way it defines its retail prices as an independent distributor[19].

53. Cosmetics Europe regrets this wording, which it considers too broad and imprecise, thus limiting the flexibility offered to stakeholders by adding a new condition to the derogation of agency agreement. Cosmetics Europe does not understand why a dual role as agent and independent retailer for a same principal may raise concerns, as long as the business flows remain strictly delineated.

This does not seem adapted to new ways of doing business in the digital world where traditional retailers may be inclined to adapt their business model in order to be more efficient online and effectively compete with bigger platforms through an agency or a consignment model.

54. The Commission considers that there would be a risk of harm to competition when the independent distributor also acts as an agent for the same supplier "*within the same product market*". As such, it does not make any distinction within a product market, for instance depending on the range of products.

[19] Draft VGL, paras. 34 et seq.

Here again, a supplier may legitimately want to use an agency contract with one of its authorized retailer for certain types of products in order to offer a fully dedicated consumer experience to customers interested by such products. Such model is particularly adapted for very exclusive ranges of products, such as Haute Parfumerie, which are sold at higher prices, produced in limited quantities and for which retailers are not always inclined to bear the risk of stock.

Furthermore, in some cases, brand owners may want to convert their business models from one model to the other, which may result in their independent retailers also acting as agents for some limited period, sometimes on the same product market. This situation cannot be regarded as a way to “misuse” the status of agent, and should be assessed on a case-by-case basis, offering the flexibility necessary for stakeholders to build their own models.

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