Linklaters

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Linklaters LLP – Response

European Commission's Consultation on the draft VBER and Vertical Guidelines

1 Introduction

(1) Linklaters LLP ("**Linklaters**") welcomes the opportunity to comment on the draft Vertical Block Exemption Regulation ("**DVBER**") and the accompanying draft vertical guidelines ("**DVGL**").

(2) As a preliminary remark, we would like to commend the European Commission (the "**Commission**") for the open and constructive discussions in the framework of the evaluation phase and the overall consultation process. We appreciate that all stakeholders had the opportunity to put forward their comments with respect to the current Vertical Block Exemption Regulation ("**VBER**") and the current Vertical Guidelines ("**VGL**"). In particular, it has been encouraging to see the Commission being open to calls for changes in approach towards certain restrictions as well as for more clarity and guidance on existing concepts.

(3) As far as the DVBER and DVGL are concerned, we welcome the efforts taken to streamline various sections of the current text and to clarify a number of concepts that have raised some uncertainty in practice. We note the efforts also made to update the guidance in line with the developments in the last decade, in particular in the e-commerce space.

(4) We also welcome the greater flexibility introduced by the Commission notably on the following topics: agency contracts where the agent can temporarily take title to the supplier's products (DVGL, para. 31), the concept of fulfilment contracts (DVGL, para. 178), exceptions relating to active and passive sales restrictions (DVBER, Article 4 and DVGL, paras. 187 and seq.), greater protection for selective distribution (DVBER, Article 4 and DVGL paras. 2013 and seq.) and automatic renewals for non-compete clauses (DVGL, para. 234).

(5) In relation to a few other topics, we are of the view that the Commission could have gone a step further, for example in adopting the policy option that allowed the combination of exclusive and selective distribution at different levels of trade or adopting a more lenient approach to resale price maintenance ("**RPM**").

(6) We have provided our views on the various policy options in response to the Commission's previous consultations so will not seek to repeat these in this document. In this contribution, we provide two types of comments on the DVBER and DVGL. The first type will deal with concepts or formulations that, in our view, require clarifications, including for example on the definition of platforms, "active or passive" sales restrictions, fulfilment contracts, shared exclusivities or the pass-on concept. The second type of comments raise questions around the Commission's policy choices in relation to certain restrictions which were previously exempted and must now fulfil certain conditions to benefit from the safe harbour (e.g. dual distribution or parity clauses) or new positions the Commission has outlined on substantive issues (dual agency and distribution roles).

(7) In this response, we will address the following topics: general comments (**section 2**), dual distribution (**section 3**), distribution systems (**section 4**), active sales restrictions (**section 5**), online restrictions (**section 6**), parity clauses (**section 7**), agency agreements (**section 8**) and RPM (**section 9**). This response is complemented by an **Annex** in which we have provided a non-exhaustive overview of instances where the Commission may consider further clarifying the language or adjusting the terminology used for consistency reasons.

2 General comments

2.1 The transition period needs to be extended

(8) We have taken note of the one-year transitional period foreseen under Article 9 of the DVBER as from the date of the adoption of the revised DVGL on 1 June 2022. While we welcome the fact that the DVBER provides for a transitional period, in light of the extensive proposed changes, in particular with respect to dual distribution, parity clauses or the overall approach concerning platforms, we are of the view that:

(i) Any transitional period should take into account the dates when all of the Commission's revised guidelines relevant to the assessment of vertical agreements will be in force. Indeed, the DVBER and DVGL refer to the upcoming rules on horizontal agreements and to the market definition notice which are currently being revised and which will be relevant, in particular, to the assessment of dual distribution arrangements. Given that the DVBER and DVGL have undergone significant changes with substantial impact on the existing distribution arrangements, companies will need to have full visibility on how their market shares should be calculated, how information exchanges should be assessed, and more generally how their arrangements should be reviewed before potentially amending their agreements.

(ii) A one-year transitional period will in any event not be sufficient for companies to digest the new rules, carry out the self-assessment and identify and implement adjustments to existing agreements and business practices that may be necessary to ensure compliance (and which sometimes will require review across numerous products, commercial partners, and Member States). Therefore, subject to para. (8)(i) above, we would recommend that the Commission extends the transitional period to 18-24 months.

2.2 By object vs hardcore restrictions distinction is unclear

(9) We welcome the Commission's intent to clarify the relationship between by object restrictions and hardcore restrictions in the DVBER. However, the interplay is still not entirely clear and the terminology used does not solve the uncertainty.

(10) In para. 163 DVGL, it is stated that hardcore restrictions are generally restrictions by object within the meaning of Article 101(1) TFEU and generally result in agreements that cannot be block exempted pursuant to Article 2(1) VBER. It is widely accepted that it is difficult to justify a by object restriction under Article 101(3) TFEU. However, the DVGL provides a number of examples where hardcore restrictions fulfil the conditions of Article 101(3) TFEU on an individual basis, including in relation to RPM (para. 182). Moreover, the DVGL identifies a number of hardcore restrictions that may even fall outside of Article 101(1) TFEU, for example at paras. 167-169 in relation to: (i) active and passive sales restrictions for purposes of genuine entry; (ii) active sales restrictions between authorised wholesalers in a selective distribution system; and (iii) active sales restrictions for purposes of genuine testing of a new product.

(11) It appears therefore that hardcore restrictions in the context of vertical agreements are uniquely placed under the DVBER in that it is acknowledged that they can be objectively justified in certain circumstances, even to the extent that they would not even fall within Article 101(1) TFEU. Therefore, the statement that hardcore restrictions are equivalent to by object restrictions, which are, according to the latest ECJ case law, meant to be the type of

practices that on their face are patently anti-competitive, does not appear to be a correct characterisation. Additionally, such parallel is unhelpful as it is likely to discourage the use of the various individual exemptions under the DVGL for fear that the conduct will be treated as a by object restriction.

3 Dual distribution

3.1 Need to clarify the concept of "*object to restrict competition*" in Article 2(6) DVBER

(12) Article 2(6) DVBER states that the dual distribution exceptions shall not apply to agreements that have as their "*object to restrict competition between the competing supplier and buy*er". Notably, exclusive and selective distribution systems have as their object the supply of customers or territories by a limited number of distributors, i.e. the allocation of customers or territories is an object of these distribution systems. Taking Article 2(6) DVBER literally could therefore suggest that such distribution systems are excluded from the safe harbour of the DVBER if they are applied in a dual distribution context. This could not have been the intention of the provision.

(13) We understand from paras. 87(d) and 90(e) DVGL that the objective of Article 2(6) DVBER is to exclude vertical agreements that contain "*horizontal restrictions of competition by object*", which, pursuant to the EU case law, constitute an appreciable horizontal restriction of competition even if the parties' combined market share is below 10%. There is a difference between a vertical agreement having an object to restrict competition or containing clauses with horizontal restrictions. Since our understanding is that Article 2(6) DVBER is meant to capture the latter, the wording in Article 2(6) DVBER should be aligned with paras. 87(d) and 90(e) DVGL, to clarify that Article 2(6) DVBER only refers to horizontal by object restrictions.

(14) In addition, it would be helpful if the Commission could include examples of "*horizontal restrictions of competition by object*" in the DVGL where these are mentioned, including in paras. 87(d) and 90(e).

3.2 Need to reconsider the information exchange carve out

(15) We are of the view that Articles 2(4) and 2(5) DVBER and, more generally, the new approach of the Commission to dual distribution fails to take into account the many pro-competitive reasons companies have to communicate with resellers in a dual distribution context. This includes assistance with product launches and promotions (including supplier-financed promotions), setting sales objectives, sharing consumer or market studies, sharing recommended prices, etc.

(16) In fact, information exchange in the vertical context generally serves a legitimate purpose and therefore should not be carved out of the VBER safe harbour. Instead, we would propose that the Commission adopts an effect-based approach for which further guidance is provided in the VGL regarding (i) the situations in which the Commission considers information exchange raise concerns in dual distribution systems; and (ii) how to assess information exchanges in a dual distribution scenario. We would consider guidance on the general principles more helpful than granular descriptions of potential safeguarding measures so that companies, of different sizes and internal resources, have the flexibility to adapt their arrangements in line with the rules on information exchange. This observation is equally relevant to any guidance on information exchange for dual distribution, whether contained in the VGL or the upcoming horizontal guidelines.

(17) If the Commission nonetheless decides to carve out information exchange from the VBER dual distribution safe harbour, we would discourage the use of the 10% threshold. Indeed, the 10% market share threshold is artificial and will likely lead to exclusion of dual distribution arrangements for many scenarios even where they do not objectively lead to competition concerns. More generally, we note that the 10% threshold will result in higher complexity for the assessment of the applicability of the VBER in the future. While a company may be able, in most cases, to ultimately feel relatively comfortable that its market shares are below the 30% threshold provided for under Article 3 DVBER, it will be much more difficult to be comfortable that market shares definitely fall below the much lower market share threshold of 10%, in particular in a context where the Commission and the NCA tend to define markets very narrowly. Further complexity is added by imposing an *aggregate* market share threshold, i.e., whereby the market share of the counterparty also needs to be taken into account. In practice, suppliers manufacturing several products and selling in several EU countries via own sales channels and distributors in parallel would have to assess market shares for each product and geographic market.

(18) Therefore, we consider that the particularities of dual distribution systems justify a safe harbour that exceeds a 10% market share.

3.3 Need to revisit the terminology used in Article 2(4)(a) and (b) and Article 2(5) DVBER

(19) We understand that the objective of the 10% market share threshold in the dual distribution carve out is to ensure that dual distribution arrangements are only fully exempted if an appreciable horizontal restriction of competition can be excluded on the distribution market where the overlap arises. We do not see any reason why the rules should differ depending on whether such horizontal overlap arises at retail level or at another downstream market level. We therefore assume that the use of the term "*retail level*" in Article 2(4)(a) and (b) DVBER may have been prompted by the extension of the dual distribution exception to wholesalers and importers, but that it was not the Commission's intention to narrow down the scope of that provision to dual distribution systems involving retailers.

(20) We would therefore suggest amending this reference. Rather than referring to the 10% market share at "*retail level*" we would propose to refer to "*downstream distribution level*" and to add a paragraph under section 5.2 DVGL which discusses the calculation of market shares for the purpose of the 10% threshold, should that threshold to be maintained.

3.4 Need to clarify the market share calculation in Article 2(5) DVBER

(21) Additionally, it is not clear in Article 2(5) DVBER what method of calculating market shares is required for assessing whether parties in a dual distribution arrangement can still benefit from the exemption in Article 2(1) DVBER where their combined market shares exceed 10%. In particular, while Article 2(5) DVBER refers to their market shares not exceeding the threshold in Article 3 DVBER, this provision refers to 30% market shares in the markets for the sale and purchase of goods or services for the supplier and buyer respectively. The DVBER and DVGL refer to different thresholds and methods, and are not aligned with the combined market share at the "retail level" (or "downstream distribution level") requirement in Article 2(4) DVBER. Different methods for calculating market shares for Article 2(4) DVBER and Article 2(5) DVBER does not seem to make sense in this context and therefore the methodology should be clarified.

3.5 Need to clarify the applicability of DVBER to online intermediation services

(22) The formulation of the exclusion of hybrid online intermediation services from the VBER in Article 2(7) DVBER is unclear and creates uncertainty as to its application. In particular, Article 2(7) DVBER excludes hybrid online intermediation services from the dual distribution exception "*where a provider of online intermediation services that also sells goods or services in competition with undertakings to which it provides online intermediation services*".

(23) If Article 2(7) DVBER is interpreted narrowly, the dual distribution exception could still apply to vertical agreements where a hybrid platform does not compete with a commercial user of its platform (e.g. because it does not sell substitutable products or operate in the same product / geographic market). However, Recital 12 DVBER seems to indicate that the Commission intends to exclude hybrid platforms more generally from the safe harbour, even in relation to vertical agreements where the platform does not compete with its customer. It would be helpful if the Commission could address that point in the DVBER and DVGL more clearly.

4 Distribution systems

4.1 General comments

(24) We commend the Commission's statement that a supplier is free to set up its distribution system as it sees fit (DVGL para. 98). This is a key principle which had not been articulated in the current VBER and VGL. The Commission rightly states that suppliers should be able to choose how to commercialise their products or services and to determine the most appropriate distribution set up.

(25) We also welcome the greater flexibility offered by the DVBER (under Article 4) and DVGL (at paras. 202 to 231) allowing suppliers to better protect their resellers' investments and their distribution networks. In particular, the following points are useful:

(i) Clarification that you can combine, within the EEA, different distribution models.

(ii) Protection of both exclusive distribution and selective distribution from sales in a free distribution network.

(iii) Clarification that the supplier can accept a restriction of its passive and active sales.

(26) Our main observation relates to the **pass on concept**, which we welcome and see as important in preserving the suppliers' ability to incentivise their distributors' investments in the distribution networks. The Commission has introduced this new concept of "*pass on*" under Article 4 (b) DVBER but its formulation raises some questions.

(27) Firstly, in relation to the pass on of exclusive distributor protections, it would be helpful to clarify, ideally with the help of examples, the scenarios envisaged at para. 206 DVGL. In particular, it would be helpful to clarify what "other distributors" refers to and, the definition of customers that have entered into a distribution agreement (i) "*with the supplier"* and (ii) *"with a party that was given distribution rights by the supplier*" as per the below:

> "*To protect the investment incentives of exclusively appointed distributors, the supplier may require that such* ***other distributors****, and* ***their customers that have entered into a distribution agreement with the supplier*** *or* ***with a party that was given distribution rights by the supplier****, are restricted from engaging in active sales into the exclusively allocated territory or to the exclusively allocated customer group (i.e. to pass on the active sales restriction to the buyer's customers)".* [Emphasis Added]

(28) Finally, we note that there is a difference in the pass on formulation for exclusive and selective distribution, which would be helpful to clarify. Specifically, when dealing with restrictions of active sales into an exclusively allocated territories/customer groups, the pass on relates to distributors and "*their customers that have entered into a distribution agreement with the supplier or with a party that was given distribution rights by the supplier*"[1]. When dealing with restrictions of active or passive sales into a selective distribution network, the pass on refers to exclusive distributors "*and their customers*" without the reference to entering into distribution agreements or distribution rights.[2] The different treatment is unclear and could benefit from an explanation.

4.2 Exclusive distribution

(29) Then in relation to exclusive distribution, we have an observation relating to the newly introduced concept of **shared exclusivity**, which under the DVBER and DVGL allows suppliers to appoint more than one exclusive distributor for a particular territory, provided that this is proportionate.

(30) We welcome the additional flexibility given to suppliers to organise their exclusive network. That said, we would like to understand better the functioning of this concept in practice. It would be helpful to clarify in the VGL, ideally with reference to examples, whether shared exclusivity:

(i) allows two distributors to operate in the same territory without having to allocate a precise share of this territory to each of them (e.g., two exclusive distributors can now operate in Paris without the need to allocate North Paris to the first one and South Paris to the second one);

(ii) merely clarifies that, under Article 4, for two exclusive distributors to operate in the same territory (e.g. Paris) each of them should be appointed for a specific portion of it in proportion to their required investment (e.g. North Paris and South Paris respectively).

(31) Reading the Expert report on active sales p. 36[3], we assume that the former scenario is the one envisaged by the Commission (i.e., more than one distributor can operate in one and the same territory, without the need to allocate a specific portion between them) but we would welcome confirmation on this point, illustrated with a practical example.

4.3 Selective distribution

(32) We welcome the Commission's proposed amendments to enhance the protections for selective distribution systems. In particular, the following proposals are useful: (i) to allow suppliers to protect their selective distribution network from sales to unauthorised distributors from outside the network; and (ii) to no longer treat non-equivalent criteria for online and offline sales as a hardcore restriction, acknowledging that these channels are inherently different.

(33) Below, we make a few observations regarding: (i) the new formulation around the non-equivalence principle; and (ii) the fact that, contrary to what was envisaged in its Impact Assessment, the Commission did not allow exclusivity at the wholesale level in a selective distribution context.

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1 See DVBER Article 4(b)(i) and 4(c)(i), bullet 1.

2 See DVBER Article 4(b)(ii) and 4(c)(i), bullet 2.

3 See VBER, para. 56.

4.3.1 Need to clarify the non-equivalence principle

(34) In respect of the non-equivalent criteria for online and offline channels, the current VBER considers as hardcore a criteria outline sales which is "*not overall equivalent*" to those imposed for offline sales. The Commission nonetheless explains that the criteria need not be "*identical*" but must pursue the "*same objectives and achieve comparable results*" where the difference is justified by the different nature of the channels.[4] The DVBER proposes to allow criteria which is not "*identical*" as long as it does not have the object "*to prevent the buyers or their customers from effectively using the internet for the purposes of selling their goods or services online*".

(35) In this respect, the VBER never required that criteria for online and offline channels be identical, but rather "*overall equivalent*". Thus the new drafting raises a few questions. It is helpful that the non-equivalent criteria is no longer expressly identified as a hardcore restriction in the DVGL. However, the present formulation relating to criteria not needing to be "*identical*" introduces some ambiguity. Indeed, based on the proposed wording, it is not clear whether the criteria should still be overall equivalent. The examples used in the DVGL, relating to "*online after-sales helpdesk*" and "*secure payment systems*", are already used in the current VGL to illustrate non-identical but overall equivalent online requirements. This gives the impression that the Commission has not really changed its approach.

(36) To the extent that it is acknowledged that the channels are different, it would be helpful to clarify that the criteria for online and offline channels can be "*different*", not just "*not identical*", provided that the aim is not to prevent internet sales.

4.3.2 Need to reconsider the prohibition of combined exclusivity and SDS

(37) We regret to see that the DVBER and DVGL had not adopted the proposal to allow exclusivity at the wholesale level in a selective distribution network. This is a missed opportunity to provide protection to wholesalers who are tasked with developing the supplier's network in a particular territory. The investments that they are often asked to make are not limited to promotional activities and can be extensive. These investments are generally recognised in the VBER/VGL and form the basis for the general exception relating to exclusive distribution. It is unclear why wholesalers in a selective distribution context should be treated differently and, in particular, less favourably.

(38) The same comment applies to franchises where master franchisees may be operating a selective type franchise model which would prevent the granting of territorial exclusivity to protect their investment in developing the franchise in the particular territory.[5]

(39) The narrow individual exception in para. 168 DVGL, covering limited scenarios of investment in promotional activities in certain territories, does not adequately address this scenario. In this respect, we agree with the observations in the Expert Report on active sales restrictions[6] that the formulation of the exception around investments in promotional activities has limited practical application. As noted above, wholesalers are often required to make investments that are not limited to promotional activities and it is unclear why this particular type of investment is singled out in the DVGL. Additionally, the requirement in the exception that it must not be "*practical to specify in a contract the required promotional activities*" is

[4] See VBER, para 56.

[5] See DVGL, para 151 which states that a "*franchise agreement that gives rise to a closed network since members are forbidden from selling to non-members shall be assessed under the rules applicable to selective distribution*".

[6] See Final Report, Expert report on the review of the Vertical Block Exemption Regulation, *Active sales restrictions in different distribution models and combinations of distribution models* (the "**Expert Report**"), page 43.

ambiguous and it is often impossible for a supplier to conclude whether they fulfil this requirement. As a result, the exception is seldom relied on.

(40) We therefore would welcome the Commission reconsidering its position on allowing exclusivity at the wholesale level in a selective distribution context. If this narrow exception to the general rule on cross-sales within an SDS is not allowed, it would be crucial to expand the existing individual exemption to capture scenarios where wholesalers are required to make "*financial and non-financial investments*", not just in promotional activities, so as to develop the supplier's brand in the particular territory. This would be more in line with the requirements in para. 101 DVGL dealing with exclusive distribution. Additionally, the reference to the practicalities of specifying these investments in a contract should be removed, as it is unclear what purpose this requirement serves and stakeholder feedback indicates that this provision creates uncertainty which makes the exception difficult, if not impossible, to rely on.

(41) Finally, we welcome the clarification in para. 166 DVGL that the exclusive wholesale individual exemption is an example of a hardcore restriction that falls outside of Article 101(1) TFEU. However, para. 168, which contains the actual example, still characterises the example as fulfilling the conditions of Article 101(3), per the current formulation in VBER[7] rather than "falling outside Article 101 (1) TFEU". The distinction between the two characterisations is key because, as per the Expert Report,[8] if the individual exemption does not fall outside 101(1), as a hardcore restriction, it would result in the overall vertical agreement losing the benefit of the block exemption. As such, we think the reference to exemption under Article 101(3) in para. 168 should be changed to following outside Article 101(1) TFEU. Additionally, it would be helpful to confirm in para. 166 DVGL that by virtue of the hardcore restriction falling outside of Article 101(1) TFEU, this would mean that the distribution agreement as a whole would not forfeit the benefit of the block exemption.

5 Active sales restrictions

5.1 General comment on definitions under Article 1 of the DVBER

(42) As a general comment, Article 1 DVBER introduces three new definitions relevant to the application of Article 4 prohibiting territorial and client restrictions. These are "*active sales*", "*passive sales*" and "*active or passive sales restrictions*". While we do not have specific comments with respect to the first two definitions (i.e., active sales and passive sales, which were previously covered by the VGL and are now also in the DVBER), we are less clear about the purpose of having a third definition covering "*active **or** passive sales restrictions*".

(43) We understand that this definition combining active and passive sales mainly concerns online sales restrictions which can qualify as passive **or** active sales restrictions. However, neither Article 1.1(n) DVBER nor the DVGL give a clear indication as to why the Commission has decided to introduce this specific reference for online sales. Reading the Expert Report[9] on the review of the VBER concerning active sales restrictions in different distribution models, in particular, on the concept of active and passive sales, we note that stakeholders have raised difficulties in drawing a line between active and passives sales in the online space. As a result, all online sales restrictions were quasi-systematically considered as

[7] See VBER, para 63.

[8] See the Expert Report, page 43.

[9] See the Expert Report, page 22.

passive sales so as to avoid the risk of an incorrect application and triggering of a hardcore restriction under the VBER.

(44) If the purpose of Article 1.1(n) DVBER is to address this difficulty and to reiterate that certain forms of online sales are "active" sales and therefore restrictions of such sales are permissible (depending on the distribution system in operation), then we believe that it is important that the Commission makes this point more clearly.

5.2 General principles under the DVGL

(45) We understand that paras. 187 to 196 DVGL are intended to outline the general principles underpinning the hardcore restrictions and exceptions in Article 4(b) to (d) DVBER.

(46) At para. 188, the DVGL indicates that Article 4(b) to (d) DVBER apply irrespective of the sales channel. However, this entire section then focuses on the online space regarding: (i) restriction on the effective use of Internet and (ii) restrictions on the effective use of online advertising channels. The sole paragraph with general principles is at para. 189 which provides guidelines on what constitutes hardcore territorial or client restrictions.

(47) For clarification purposes, we would suggest starting this section with the general considerations currently at para. 189 DVGL and then dedicating a specific sub-section to online restrictions where all considerations applicable to restrictions to the effective use of the internet or online advertising channels are handled together. This "online" sub-section could cover para. 188 DVGL (save for the first sentence) and paras. 192, 194, 195 and 196 DVGL.

(48) We have the same comment with respect to the section dedicated to the distinction between active and passive sales at paras. 197 to 201. Three of the four paragraphs are dedicated to online sales and might therefore be better placed under a dedicated online section so that companies have all developments which are relevant to online sales restrictions in one section.

6 Online restrictions

(49) We welcome the Commission's objective to provide more flexibility as regards online sales (e.g., via online platforms). This being said, the proposed wording of the DVBER and DVGL often leave room for interpretation, to the detriment of legal certainty.

6.1 Definitions

(50) As a first and general comment, we would welcome some clarifications in the DVBER and DVGL concerning the definition of online intermediation services.

(51) While we have noted that the Commission refers to Regulation 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services ("**Regulation 2019/1150**"), we are of the view that the definition provided under Article 1(d) is not entirely consistent with the definition of "*online intermediation services*" provided for in the Commission's proposed Digital Market Act. This refers to Regulation 2019/1150 but leaves out the requirement of Article 2(2) (c) for a contractual relationship between the provider and the business user. This raises the question whether this has been left out intentionally.

(52) We would recommend that the Commission either align the definition with that used in other recent legislation or proposal or more clearly delineate what online intermediation services means in the context of the DVBER and DVGL.

6.2 Need to clarify "object of preventing the effective use of the Internet"

(53) Substantial uncertainty remains with respect to the principle set out at Recital 13 DVBER according to which "*online sales restrictions benefit from the block exemption […] provided that they do not have as their object to, directly or indirectly, prevent the effective use of the internet by the buyers or their customers for the purposes of selling their goods or services online*."

(54) It is to be expected that some national competition authorities ("**NCAs**") will make more extensive use of this qualification than others to narrow the scope of the exemptions. To ensure a more harmonised application of the vertical rules, additional guidance by the Commission would be very much appreciated on the concept of "*the object of preventing the effective use of the Internet*". While we understand that, according to the Commission, the qualification of an online sales restriction as a hardcore restriction depends on whether it has the object to prevent the use of the internet and not on its actual effect, it is unclear in which circumstances an eligible online sales restriction, such as an online platform ban, could qualify as an indirect objective restriction (para. 194 DVGL). This is also given that, according to para. 188 DVGL, the assessment of whether a restriction is hardcore cannot depend on market-specific circumstances or the individual circumstances.

(55) In order to avoid substantial uncertainty in relation to the exemption and divergent interpretations by NCAs at the EU level, it would be very helpful if the Commission could include guiding principles and examples when certain online restrictions can have as their indirect object the prevention of online sales.

6.3 Online platform bans

(56) Following the *Coty* judgment by the ECJ, the clarification that online platform bans are not hardcore restrictions is very much welcomed. However, confirmation that this principle also applies if the selective good are not luxury product would be useful. The DVGL correctly reflects that Article 101 (1) is not applicable if the platform ban meets the *Metro* criteria within a qualitative selective distribution system. However, we consider it unhelpful to discuss in the context of online platform bans, albeit as an example, the applicability of the *Metro* criteria to luxury goods (para. 135 DVGL) without also referring to high-technology or branded products which are also eligible to selective distribution.

(57) In case the supplier does not operate a selective distribution system that meets the *Metro* criteria, paras. 194 and 317 of the DVGL clarify that platform bans are block exempted for all goods (i.e. not only luxury goods) unless they have the indirect object of preventing the effective use of the internet for the purposes of selling online. We welcome this clarification, which is in line with the *Coty* judgement, and, in particular, the clear statement against the view that platform bans could constitute a restriction of sales to a certain customer group.

(58) In addition, we would welcome if the Commission includes in paras. 318 et seq. DVGL a reference that outside the applicability of the VBER (e.g. where market share thresholds are exceeded) the potential to obtain an individual exemption according to Article 101(3) TFEU is not limited to luxury goods only and selective distribution schemes.

6.4 Dual pricing

(59) The introduction of more flexibility on dual pricing had been requested by both suppliers and retailers[10] and we welcome proposed change that offer this flexibility.

(60) Contrary to the current framework, the DVGL now indicates that dual pricing (i.e., where a distributor charges different prices to the same reseller for products intended to be resold online or offline) can benefit from the safe harbour if it is intended to incentivise or reward the appropriate level of investment respectively made online or offline (para. 195).

(61) We have two main comments concerning the revised approach to dual pricing in the DVGL:

(i) Para. 195 should make it clearer that the principle is that it is possible for a supplier to offer different prices to a hybrid distributor depending on whether the goods are sold online or offline. As currently drafted, para. 195 gives the impression that dual pricing only falls in the scope of the DVBER under fairly strict conditions and it appears, therefore, rather to be an exception than a general principle that dual pricing falls in the safe harbour.

(ii) The general principle of dual pricing has a number of qualifications in para. 195 which suggests that companies should undertake a fairly complex assessment to determine whether their differential pricing policy would fall within the safe harbour. In particular, para.195 suggests that the supplier must undertake an assessment of the price-cost relationship between the two channels. This seems *prima facie* difficult to assess given the diversity of business models especially regarding online sales and difficulties in cost assessments, leaving substantial room for discretion by the Commission or NCA to withdraw the safe harbour. The caveat that in order to be exempted such dual pricing must have the object to incentivise or reward the appropriate level of investments also creates uncertainty, by including an additional vague element for a self-assessment. Therefore, we would welcome confirmation that there is no need to conduct a proportionality test and/or a thorough cost-price analysis and that the supplier merely needs to ensure that the price difference is broadly justified by a difference of costs (on the basis of the investment required by the supplier for each channel).

7 Parity clauses

(62) We welcome that the Commission has clarified that the DVBER generally covers parity clauses ("**MFNs**"). In particular, there has not been sufficient evidence of anticompetitive effects by narrow MFNs in cases of market shares below 30% to exclude them from the safe harbour provided by the VBER. Further, the Commission is right to not consider cross-platform MFNs as hardcore restrictions, given that hardcore restrictions must be limited to those terms that have clear and predictable anticompetitive effects. This leaves room to also justify cross-platform MFNs on a case-by-case basis as the competitive effects of such provisions have not yet been fully investigated.

(63) That said, we would suggest harmonising the wording in the section on MFNs in the DVGL. Per Recital 10 DVBER, online intermediation service providers are categorised as suppliers (i.e., providers of services). In recital 333 et seq. DVGL, however, the commercial users (entities selling via the online intermediation service) are also referred as suppliers. The commercial users of the platform services are, however, not suppliers to the platform, but buyers of the platform services. This is correctly referred to in para. 337. To clarify the vertical

[10] The Commission's Inception Impact Assessment, 23 October 2020, page 2.

relationship it would be helpful to use different terminologies for the online intermediation service provider, the commercial user (reseller or manufacturer) and the end user, e.g., by including upstream market and downstream market references. In addition, we would recommend harmonising the references "*online platform*", "*online intermediation service"* and "*online marketplaces*".

(64) Finally, we welcome the statement at para. 239 that all other types of parity obligations are covered by the safe harbour. In this respect, we note that in the examples the Commission refers to retail parity clauses. We would suggest that the Commission also confirms that upstream parity clauses are block exempted.

8 Agency

(65) With respect to agency agreements, we believe that the Commission could streamline and clarify the position more. In our view, some aspects of the guidance are overly-restrictive and could undermine sound economic distribution set-ups, while others require further clarity to be implemented effectively. While we welcome the additional flexibility provided for by the Commission regarding temporary transfer of title, we consider that the overall approach to agency agreements is difficult to navigate.

8.1 Temporary transfer of title

(66) The Commission's clarification that a temporary transfer of title does not deprive a company from being classified as an agent is useful. Para. 31(a) DVGL states that: "*The fact that the agent may temporarily, for a very brief period of time, acquire the property of the contract goods while selling them on behalf of the principal does not preclude an agency agreement, provided the agent does not incur any costs or risks related to that transfer of property".*

(67) We commend the Commission's recognition that a temporary transfer of title should not prevent a company from being designated as an agent. We would encourage the Commission to provide an example of a model that involves a title transfer that would not preclude an agency agreement, including so that it can be better understood how the Commission would assess "*a very brief period of time*" (given the length and complexity of routes to market can vary significantly).

8.2 Dual agency and distribution role

(68) The Commission's position on dual agency and distribution role is overly restrictive and, in any event, requires important clarifications. The Commission has incorporated the position taken in its "*Working Paper: Distributors that also act as agents for certain profits for the same supplier*" ("**Working Paper**") into the DVGL. We welcome the Commission's clarification that the same company can act as an agent and a distributor for a supplier within the same product market. However, we have significant concerns with both the Commission's substantive position on this issue as a whole, and the clarity with which its position has been outlined. We would respectfully ask that the Commission consider both aspects in more detail in its revised guidelines.

8.2.1 The Commission's position is overly restrictive

(69) The Commission identified two key issues relating to such set-ups, namely: (i) the "influence" risk (i.e. that conditions imposed in the agency channel will influence incentives in the

independent channel); and (ii) the "cost allocation" risk (i.e. that distinguishing costs relating to the agency function will be more difficult).[11]

(70) Firstly, in relation to the "influence" risk, the DVGL states that particular concerns will arise where the agent undertakes activities as an independent distributor within the same product market, and the risks may be significant where the products do not present objectively distinct characteristics.[12] We are concerned that this could result in an overly restrictive approach. For example, there may be other scenarios where dual roles do not raise competition issues despite the relevant products falling the same potential product market, and the Commission should therefore provide guidance on dual roles in a wider set of scenarios.

(71) Second, in relation of the "cost allocation" risk, the DVGL requires the principal to cover not only the costs related to the agency arrangements, but also common costs. The DVGL makes no account for relative scale of sales made via the agent and distribution channels, meaning that the vast majority of costs a supplier is required to cover may have no relationship to the agency function.

(72) As detailed to the Commission previously,[13] we have significant concerns that this approach will discourage the development of new and innovative distribution models, and will risk distorting competition and creating allocative inefficiency. In our view, a good and appropriate solution would be to adopt a pro-rata approach to cost allocation in dual systems. This would be more reflective of the service the agent in fact provides, while still ensuring that they do not bear the financial or commercial risks associated with their agency activities.

8.2.2 The Commission's position requires clarity

(73) Without prejudice to the above submissions, if the Commission's substantive position remains unaltered, we respectfully submit that further clarity is required.

(i) Clarity on the impact of spill-over effects

(74) We invite the Commission to specify what the legal consequences would be if there is a risk that the agent is influenced by the terms of the agency agreement, notably regarding price setting, for the products that it distributes independently. We understand that this would not call into question the qualification of the agent as "genuine agent" but that it could potentially affect the legality of the distribution activities that the agent undertakes at his own risk.

(ii) Clarity on the allocation of costs

(75) With respect to the definition of the costs that must be covered by a supplier in a dual agency / distribution relationship, the position outlined by the DVGL is uncertain. By way of example:

(i) DVGL para. 37 suggests that all market-specific investments that are relevant to the type of activity carried out by the agent shall be borne entirely by the principal with the sole exception of market-specific investments that relate exclusively to differentiated products in the same market.

(ii) DVGL para. 38 then provides an example where a supplier wants to use its distributor of Product A to sell Product B as an agent (where Products A and B are within the same product market). In the DVGL example, costs to furnish a shop, train

[11] See DVGL, para. 35.

[12] See DVGL, para. 36.

[13] See Linklaters Position Paper on VBER, paras. 77 to 80.

employees, and specific storage equipment are identified as likely to be relevant to Products A and B, and therefore the Commission states that they must be covered by the principal in full. By contrast, advertising for the agent's shop would benefit both the shop as well as products A and B, and "*would therefore be partly relevant for the assessment of the agency agreement, to the extent they relate to the sale of product A which is sold under the agency agreement, while they are also relevant to the general activity of selling products A and B*."

(76) Two items become immediately unclear: (i) how do companies know which shared investments need to be covered in full (i.e. what is the distinction between furnishing, training and storage on one hand, and advertising on the other); and (ii) where items do not need to be covered in full, on what basis must costs be allocated (i.e. would the Commission expect a pro-rata allocation of advertising costs in the para. 38 DVGL example)?

(77) These issues create real practical difficulties in understanding and interpreting these rules. This is concerning, particularly as the Commission's example does not cover some of the key costs that distributors / agents would be expected to incur in fulfilling their roles, including transport costs. The Commission should provide clear examples of how it would expect such costs to be split given this uncertainty.

(78) Take, for example, a distributor that sells 1/3 of its goods as an agent and 2/3 as an independent distributor of products within the same product market. The distributor has twelve vehicles for these goods. All vehicles are used to transport both the independently distributed and agency products (and it would be inefficient and costly to allocate the trucks to one or other channel). However, a hypothetical distributor that is not yet active on the market would only require four trucks if it was only to sell the agency products. The Commission should clarify which costs the principal would need to cover in this scenario and why.

(79) The Commission should, further, be clear on whether the quality of infrastructure affects the cost allocation. Take, for example, a distributor that has invested in an advanced system costing €100 million. This system can be used to sell the agency products. However, a less advanced system, costing €20 million, could also have been used to sell the agency products (for example, due to the more limited volume and product range being sold in the agency channel). In this scenario, does the principal need to cover the €100 million of common costs, even though a €20 million system would have been suitable for a hypothetical distributor that is not yet active in the market?

9 Resale Price Maintenance

9.1 Overall approach

(80) The Commission's position on RPM remains overly restrictive and the efficiency exemptions too narrow. We had advocated in our previous contributions that RPM should be removed from the hardcore category, and that much greater focus should be given to the analysis of potential efficiencies of RPM[14].

(81) The DVGL maintains the restrictive approach of the Commission in this area, and does not meaningfully expand its commentary on the potential efficiencies of RPM in the DVGL. We

[14] See Linklaters Position Paper on VBER, paras. 77 to 80

disagree with this approach, for the reasons previously articulated. In addition to our overall position, we inserted below a couple of specific comments on the Commission's positioning.

(i) DVGL para. 181(a) states that the direct effect of RPM is to prevent all or certain distributors from lowering their sales prices resulting in a price increase for the brand. This is not necessarily correct, as RPM could be employed by a supplier to encourage distributors to lower their current pricing in the belief that this will enhance the overall value of sales of the supplier's product. This should be reflected in para. 181(a) by including the following clarification "***potentially*** *preventing all or certain distributors from lowering their sales price*".

(ii) We believe that the Commission should expand the examples of potentially beneficial RPM in para. 182 by relaxing the conditions required to benefit from Article 101(3) TFEU in the event of promotional campaigns. In particular, we would welcome confirmation that it is possible to impose on distributors / retailers a requirement to pass onto consumers the benefits from supplier financed promotions, without this necessarily relating to a short-term campaign or new product launch. Indeed, promotion campaigns are very often financed by suppliers who, in return, legitimately expect that their promotional investments will be passed onto consumers in the form of lower prices. Insofar as this is beneficial to consumers, intervention or requests by a supplier that distributors pass the promotion onto customers / consumers in full (and provide evidence that they have done so) should be permissible / should benefit from the block exemption as it fosters inter-brand competition. Some clarifications in this respect would be welcome to provide suppliers with greater legal certainty.

(iii) We would also welcome confirmation that, in the scenario included at para. 182(a), it is possible for the supplier to fix the price to a distributor for a new product that the supplier introduces in the market, even if the supplier itself does not sell the product directly to the distributor.

(iv) Finally, at para. 182(b), we would suggest that the Commission confirms more clearly that (i) the supplier can fix the products price during the promotion period, (ii) what would be the maximum period for a short-term promotion campaign and (iii) that this exception is not limited to franchise networks (or equivalent) but can also be used by suppliers operating other distribution systems.

(v) We would also appreciate confirmation that it would be possible for a supplier to pass on any RRP and maximum prices to the customers of its buyers as introduced in the context of the territorial / customer restrictions.

9.2 Minimum advertised prices (MAPs) and price monitoring

(82) The DVGL introduces two new concepts with respect to RPM for which we would appreciate receiving more guidance from the Commission: MAPs (para. 174) and price monitoring (para. 176).

(83) **MAPs** – We understand that that the Commission introduced this concept in the DVGL based on experience. We would welcome some references to the relevant case law so as to better understand the practices considered problematic and how to differentiate these practices from, for example, recommended prices. Does the Commission envisage at para. 174 a new hardcore restriction distinct from RPM or is the intention behind the inclusion of this concept that MAPs may be taken into account as part of a body of evidence used to demonstrate an RPM practice?

(84) **Price monitoring** – Similarly, we believe that more guidance with respect to price monitoring would be useful. We welcome the Commission's statement that price monitoring does not in itself constitute RPM (para. 176 DVGL). However, this statement is immediately undercut when the Commission says that it increases price transparency in the market and allows suppliers to track the resale prices and to intervene in case of price decreases. To properly assess possible risks attached to price monitoring, we would suggest that the Commission provides more guidance on situations where this practice does not raise issues and where it does.

9.3 Fulfilment contracts

(85) While we commend the additional flexibility that the DVGL brings with respect to fulfilment contracts, the Commission's position remains uncertain and requires clarifications. The Commission has specified that fixing resale prices in a vertical agreement between a supplier and a buyer that executes a prior agreement between the supplier and a specific end-user (fulfilment contract) does not constitute RPM if the end-user waives their right to choose the company that should execute the agreement. We welcome this development, but invite the Commission to consider the following comments:

(86) First, we would like to confirm that the fulfilment contract construct in para. 178 DVGL is not envisaged in the online platform context only. Indeed, centralised price negotiation between a supplier and, for example, large customers who want to negotiate centrally with a single counterparty, also take place outside the online platform context in many sectors. In these circumstances, competition for the customer takes place in the central negotiation, rather than where the supplier's distributor is merely executing the agreement reached between the supplier and its customer, who is not necessarily an end-user. Therefore, the distribution of the contracted products to the customer (who need not be an end-user) by the supplier's buyer/distributor should also fall into the fulfilment contract exception, even if the distributor were to take title to the products, which is often required for logistical reasons.

(87) Further, the fulfilment exemption only applies where the counterparty has "*waived its right*" to choose the company that should execute the agreement. This waivers' purpose is unclear, and it would be helpful for the Commission to clarify what the requirement seeks to achieve. In particular, we are aware of circumstances where the buyer dictates to the supplier the party it wants to execute the agreement / delivery of the product, and in such a case a waiver by the customer would be superfluous. Given that we understand (and agree) that the key element behind this exemption is that competition for the supply price has occurred as part of the central negotiation, we consider that this exemption should also apply where the counterparty has agreed to a particular company fulfilling the contract. We therefore suggest amending this text as follows:

> "*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 customer (hereinafter "fulfilment contract") does not constitute RPM where either of the customer or the supplier has waived its right to choose the undertaking that should execute the agreement or has agreed or required that it be executed by a specified third party*".

(88) The above amends reflect scenarios where, in downstream situations, the customer assigns fulfilment of the order to a third party who will buy the product from the supplier and then sells it to the customer. Therefore, it is not important whether it is the customer or the supplier who waives their right to choose the company that executes the agreement because the competition process took place during the negotiation of the prior agreement between

supplier and customer. In our view, it is easier to justify RPM when the supplier is the one waiving its right to choose the company to execute the agreement as this fact confirms that the supplier has no market power to fix the resale price to the distributor. In practice, in many instances, the customer chooses more than one distributor/wholesaler/dealer to execute the agreement offering such as using a list of three third-party intermediaries to execute the contract.

(89) If the requirement for waiver is retained as is, it would be necessary to provide guidance as to how the requirement would be practically satisfied, especially in the online context or where it is the customer that imposes the requirement. For example, would knowledge and tacit acceptance of delivery by a party that is not a supplier be sufficient?

Annex: Proposed clarifications

#	VBER Article/ VGL paragraph	Brief explanation of suggested clarification
1.	14(b) DVGL	We invite the Commission to clarify the reference to "*suppliers*" in para. 14(b) DVGL given this paragraph discusses free-rider problems among buyers. The VGL deals with both supplier and buyer free riding problems, so perhaps in a similar fashion the DVGL could delineate between the two concepts.
2.	14(e) DVGL	We invite the Commission to specify the meaning of "incomplete contracting".
3.	135 DVGL	We would welcome a clarification of the following sentence which seems to have missing words: "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*". Additionally, it is unclear why different terminology is used in paras. 135 and 316 for what appears to be the same concept ie. third-party online platform and online marketplaces. To avoid confusion, we would suggest using the same terminology for the same concepts.
4.	1(e) VBER	We recognise that the definition of a non-compete has been part of the VBER for a long time. However, the definition seeks to cover two separate concepts that are not intuitively linked, being (i) a broad construction of a non-compete (i.e. obligation not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services); and (ii) what is essentially an exclusive purchasing / single branding obligation (i.e. obligation to purchase from the supplier or from another company designated by the supplier more than 80% of the buyer's total purchases of the contract goods or services). See definition of non-compete in Article 1(e) DVBER. This leads to confusion as the DVGL offers separate guidance for each limb and has to define in each instance which type of non-compete restriction it refers to. For example, section 6.2.1 of the DVGL defines non-competes in para 233 as "obligations are arrangements that cause the buyer purchasing from the supplier or from another company designated by the supplier more than 80% of the buyer's total purchases of the contract goods and services", which is limb (ii) above. Section 6.2.3 then deals with obligations not to purchase from unauthorised distributors, which is limb (i) above. The single branding section 8.2.1 then again focuses only on limb (ii) of the definition. The rationale for conflating the two limbs into one definition is unclear and it would be helpful to split out the single branding / exclusive purchase obligations as a standalone concept.
5.	182(a) DVGL	For the sake of clarity, we invite the Commission to revisit the second sentence of para. 182(a) DVGL. It is not clear how RPM would create / increase competitive pressure on distributors and why this pressure would induce them to expand demand for the product.
6.	85 DVGL	For the sake of clarity, we invite the Commission to replace the word "supplier" in the second and fourth sentence of para. 78 DVGL by the word "manufacturer".

#	VBER Article/ VGL paragraph	Brief explanation of suggested clarification
7.	87 DVGL	We invite the Commission to amend the second last sentence of para. 87 DVGL ("horizontal restrictions of competition by object are not covered by the exceptions of Article 2(4)(a) or (b)") to make clear that it is vertical agreements that contain an horizontal object restriction that entirely fall outside the scope of the VBER as foreseen in Article 2(6) DVBER.
8.	90(d) DVGL and 2(5) DVBER	We invite the Commission to review para. 90(d) DVGL to ensure it is consistent with Article 2(5) DVBER. Para. 90(d) DVGL seems to suggest, that compliance of horizontal information exchange with the rules applicable to horizontal agreements is a precondition for the applicability of the VBER. This is not in line with the wording of Article 2(5) DVBER according to which the exemption applies if the 30% threshold is not exceeded with the exception of exchange of information which shall be assessed against the horizontal for horizontal agreements. Para. 90(d) DVGL should therefore be dropped for consistency reasons. We also note that, unlike Article 2(5) DVBER, para. 90(d) DVGL only refers to the Horizontal Guidelines rather than to rules applicable to horizontal agreements.
9.	2(5) DVBER.	To make sure that the exception under Article 2(5) DVBER does not only cover vertical restraints but also horizontal by effect restrictions (other than information exchange) we would propose to insert the words "to all aspects of a non-reciprocal vertical agreement" after the word "apply" in Article 2(5) DVBER in line with the language used in Article 2(4) DVBER. We also would invite the Commission to specify that the carve out of information exchanges in Article 2(5) VBER only relates to horizontal information exchanges.
10.	90(c) DVGL	We invite the Commission to clarify in para. 90(c) DVGL that meeting the 10% market share threshold is not a condition for an exemption under Article 2(5) DVBER.
11.	91 DVGL	It is unclear to which situations the Commission is referring by the last two sentences of the para. "*For the same reason, any restriction regarding the extent to which or the conditions under which online intermediation services can be provided to third parties shall not be covered by the VBER. This does not only apply to restrictions that are stipulated in an agreement with a buyer of online intermediation services, but also to agreements regarding the purchase of the goods or services sold by the provider of online intermediation services that has a hybrid function.*" We invite the Commission to clarify these two sentences, ideally with an illustrative example.
12.	179 DVGL	We invite the Commission to revisit the terminology given that the commercial users referred to in the paragraph are technically the "buyers" of the intermediation service and should be named as such.
13.	216 DVGL	We invite the Commission to clarify that when it refers to "active or passive sales" throughout the DVBER and DVGL where the parties can restrict both, it means "active and/or passive sales".

#	VBER Article/ VGL paragraph	Brief explanation of suggested clarification
14.	208 DVGL	We invite the Commission to clarify that the supplier is able to accept restrictions on its sales in the context of Article 4(b) VBER as follows: "*However, Article 4(b) VBER only concerns restrictions of sales by the buyer or its customers, which means that the supplier is not prevented from accepting a total or partial restriction, both online and offline, on both its active and passive sales into the exclusive territory or to (all or some of) the customers constituting an exclusive customer group*" (proposed amendment underlined).