Federation of the European Sporting Goods Industry

FESI comments on the draft VBER and Guidelines

Brussels, September 2021

The Federation of the European Sporting Goods Industry (FESI) takes note of the publication by the European Commission of the draft new Vertical Block Exemption Regulation (VBER) and its accompanying Guidelines. We appreciate the opportunity offered by the Commission to share our comments on the two documents ahead of their final adoption.

The current VBER has the objective to provide a higher degree of legal certainty than its predecessor to companies by creating a safe harbor when assessing the compatibility of vertical agreements with Article 101(3) TFEU. As such, it represents a key piece of legislation for many sporting goods companies (including SMEs) acting either as suppliers or retailers in the vertical distribution chain.

FESI welcomes the Commission's decision to prolong the VBER for another 12 years. While some of the changes proposed by the Commission will, from our perspective, bring the VBER in line with the realities of today's markets (e.g. changes linked to dual pricing, parity obligations and the equivalence principle), the sporting goods industry remains deeply concerned about the Commission's proposal to further restrict dual distribution.

Please find below the main comments of the sporting goods industry on the draft VBER and its accompanying Guidelines.

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1. Dual Distribution

The European sporting goods industry is deeply concerned about the Commission's proposal to further restrict dual distribution and strongly urges the Commission to reconsider its position.

Suppliers consider dual distribution as a strategy to compete more effectively against other brands in highly competitive retail environments, as they can more effectively reach consumer groups with differentiated demands, promote their brands, and better understand market trends. The current rules applicable to dual distribution systems have worked well, consistent with the VBER's stated policy goal to define a category of vertical agreements which are regarded as normally satisfying the conditions laid down in Article 101(3) TFEU. As such, it has a predictable legal framework within which suppliers can develop, operate, and adapt dual distribution systems. At the same time, no evidence whatsoever has been presented that dual distribution agreements or practices do not normally meet the efficiency criteria of Article 101(3) TFEU. Nor has the current VBER prevented competition law enforcement when information exchange practices in dual distribution systems were found to infringe upon Article 101.

Vertical information exchanges between a supplier and a retailer are a normal, integral and necessary part of the – vertical – "partnership" between a supplier and a retailer. To make this partnership work, suppliers and retailers will regularly exchange information, in particular data related to the supplier's own products; achieved retail sales by the distributor, promotional calendars, and planned retailer promotions. The exchange of this type of information exchange is nothing new as they facilitate the planning and agreement on (future) quantities to be sold. In addition, it is an effective and pro-competitive way to understand changes in consumer demands/behavior. Suppliers require the information to sense changes in consumer demand and optimize demand and supply as best possible throughout their network. Retailers benefit from the guidance obtained from the suppliers' knowledge looking holistically at the market. The exchanges benefit both inter-brand competition as well as intra-brand competition as more relevant products can be served to the distributors which in turn benefits consumers. Another added benefit is that it also leads to less waste. This has been true, continues to be true and is nothing new. The only newness may be that digitalization may *de facto* make the exchange of information easier and faster. Just as consumers have gotten and continue to have easier and faster access to products and services.

Ultimately such regular information exchange is to the benefit of the European consumers, since it e.g. also helps to detect at a very early stage issues relating to products such as product defects, if the suppliers obtain such information from their retail customers, who are at the forefront of the supply chain valuable information. This also represents an essential pillar in the product safety area.

There is no plausible reason or theory of harm that would explain how this vertical sharing of information could have the object or effect of restricting competition. Experience shows, consistently, that these information exchanges enhance, rather than reduce, competition and therefore normally satisfy the conditions of Article 101(3) TFEU.

The nature of an information exchange facilitating coordination at the retail level is fundamentally different from the vertical information exchanges needed to drive competitive supplier-buyer distribution relationships, and such information exchanges can be clearly distinguished in practice.

Removing the benefits of block exemption for dual distribution agreements would create enormous uncertainty, risks and added compliance costs for companies. This goes directly against one of the Commission's own objectives of *reducing costs for businesses by simplifying complex areas of the current rules and streamlining the existing guidance*.

Last but not least, we struggle to understand the reasoning behind the introduction of the 10%-market share at retail threshold. This figure is not based on any sound justification. In addition, the calculation of a dual market share involving independent actors at different levels of the distribution chain is almost impossible to achieve by companies.

The revised draft VBER limits the current safe harbour for dual distribution to instances where the parties' aggregated market share in the retail market does not exceed 10%. In parallel, an *additional but more limited safe harbour for dual distribution* is also created *where the supplier and its distributors have an aggregated market share at retail level above 10% but still do not exceed the 30% market share.* This new mechanism is overly complex and unnecessary. From our perspective, it is inappropriate to introduce a blanket additional market share threshold which is not grounded in any specific theory of harm. Even between 10-30% market share or above 30% market share, a supplier and distributor will still need to exchange the above-mentioned types of information. Appraising such information exchange as if it concerns a horizontal exchange of information between competing undertakings puts the entire vertical relationship under unwarranted uncertainty and pressure, especially as no specified competition concerns are addressed.

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For the above-mentioned reasons, FESI believes the Commission should maintain the status quo of the current rules on dual distribution. Should the Commission decide not to maintain the status quo, FESI would strongly urge the Commission to introduce a specific list of information exchanges that are regarded as hardcore in a dual distribution context. Any horizontal concerns the Commission may have would be addressed by carving out information exchange on the supplier's sales to end-users. Such list could be reflected in the draft VBER as follow:

Article 2(5) draft VBER

The exemption provided for in paragraph 1 shall apply to any exchange of information between the parties, **except for the exchange of any information related to the supplier's sales to end customers**, which has to be assessed under the rules applicable to horizontal agreements.

2. Dual Pricing

FESI strongly supports the Commission's decision to no longer consider dual pricing as a hardcore restriction. Allowing for dual pricing will provide brand owners the possibility to support effectively and efficiently the different sales channels within one retail organization based on the particular needs and costs of each retail channel or format but also according to their actual performance. Brick-and-mortar stores often have to cope with costs that are reduced in the case of online stores due to scale economies (e.g. stock management, employment costs). Protecting offline channels should thus be encouraged.

Dual pricing will also contribute to increased intra-brand competition, where hybrid retailers will have the opportunity to better compete on equal footing with both pure online and brick and mortar shops

3. Selective Distribution

a) Equivalence principle

FESI supports the Commission's opinion that *the criteria imposed by suppliers in relation to online sales no longer have to be overall equivalent to the criteria imposed on brick-and-mortar shops, given that both channels are inherently different in nature*.

This will provide sporting goods companies with much needed flexibility when designing their selective distribution networks. Online and offline distribution channels are in essence complementary. In brick-and-mortar stores staff must be properly trained and must have excellent knowledge of the products on the shelves to provide the best advice to customers. This requirement may be less relevant in the online environment as consumer interactions take place digitally. Recognizing that a set of criteria needs to be suitable for the relevant retail channel does not raise any competition concern. The COVID situation has proven a more flexible and tailor-made approach is indeed needed.

b) Sporting goods industry and selective distribution

FESI strongly disagrees with the conclusions drawn by the Commission in Number 148 of the draft Guidelines referring to sports articles in the context of *selective distribution with cumulative effects.*

Selective distribution fosters innovation and protects investments made by retailers. It is a key element ensuring the best shopping experience to consumers who will have the certainty to access an equally high level of services wherever they buy the product they are looking for, including the provision of professional and competent after sales services. Selective distribution is especially important for sporting goods companies due to the seasonality aspect of this industry while they maintain their aura of attractiveness to consumers through their brand image. With the continuous emergence of new trends and innovative products, the close relationship between suppliers and retailers provided by selective distribution schemes for instance ensures that retailers both at online and offline sales level are properly trained to provide the best advice to customers (brick-and-mortar and online). This holds also true for PPE and other products providing a higher degree of safety to consumer (e.g. pertaining to ski boots / bindings, outdoor and diving equipment and the like).

It should be up to each supplier/brand/distributor to decide how they wish to market their products and the minimum level of services their consumers are entitled to receive when purchasing their products. As stated in the example in the draft Guidelines, consumers can still buy sporting goods articles in low service/low price shops. According to the Commission's example, it is strongly suggested that the reduction of inter-brand competition is not compensated by the fact that sporting goods products can be found in low service/low price shops as the companies selling them often have a lower brand image than the five leading brands. The sporting goods industry does not accept this argument. The reason why the leading brands used in the example benefit from a strong brand image is because they have and continue to invest in it, leading with

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newness and innovation. Companies should not be penalized for aiming at providing consumers with the highest level of services possible and ensuring minimum standards to uphold the aura of attractiveness consumers attach to the sporting goods brands. If suppliers are allowed to make little investments in their brand image and sell their products in low service/low price shops, they should be equally allowed to take the opposite direction if they wish to. For the above-mentioned reasons, FESI would recommend to fully delete Number 148 from the draft Guidelines or at least take out the reference to sports articles.

c) Aura of Luxury

The Commission in the VGL summarizes the case law of the European Courts relating to the use of qualitative selective distribution and the application of the Metro criteria.

While we welcome this restatement of the case law, we would ask the Commission to also clarify that (i) the quality of all branded goods (and not only the goods of so-called "luxury brands") may result not only from their material characteristics but also from the attractiveness (or "aura") of a brand in the eyes of consumers and (ii) the attractiveness (or "aura") of all branded goods can be preserved and enhanced by ensuring that they are displayed and sold in an appropriate retail environment, thus necessitating the use of qualitative selective distribution.

This position is clearly supported by the opinion of AG Wahl (as he then was) in Coty1, in which he states that, with regard to application of qualitative selective distribution, the same considerations must apply to all brands, not only brands that are traditionally regarded as being so-called "luxury brands".

We consider it important that the Commission clearly states in the VGL in order to provide legal certainty that any brand's application of qualitative selective distribution for its products can meet the Metro criteria in precisely the same way as so-called "luxury brands".

[1] Case C-230/16, *Coty Germany GmbH v Parfümerie Akzente GmbH*, ECLI:EU:C:2017:603 (*Coty*).

4. Parity Obligations

FESI welcomes the Commission's decision to remove the benefit of the block exemption for across-platform retail parity obligations imposed by providers of online intermediation services.

There is an inherent unbalanced market power between large retailers and SMEs. In many instances, small sporting goods companies will have no other choices but to accept the inclusion of parity obligations if they wish to enter into a new distribution/marketplace "partner" agreement. This potential imposition of parity obligations is not linked to a specific distribution system but is an expression of the higher market power on the customer side. FESI thus strongly supports the removal of the benefits of the block exemption to this kind of parity clauses.

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About FESI

Founded in 1960 FESI - the Federation of the European Sporting Goods Industry represents the interests of approximately 1.800 sporting goods manufacturers (85% of the European market) through its National Sporting Goods Industry Federations and its directly affiliated member companies. 70-75% of FESI's membership is made up of Small and Medium Sized Enterprises. In total, the European Sporting Goods Industry employs over 700.000 EU citizens and has an annual turnover of some 81 billion euro.