

Position Paper

2019 Evaluation of Commission Regulation (EU) No 330/2010 of 20 April 2010 and Guidelines (2010)2365

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Table of Contents

1.	2010 VBER and VGL revision: Setting scene for a future facing revision	3
2.	The Brand ecosystem and the market realities.....	3
3.	Overall experience with the VBER and the VGL.....	6
4.	A VBER and VGL fit for the Consumer Ecosystem Era.....	7
4.1.	Market share thresholds	7
4.2.	Pricing issues.....	8
4.2.1.	Resale Price Maintenance.....	8
4.2.2.	Maximum Resale Prices, RRP's and discussions on prices.....	9
4.2.3.	Dual Pricing.....	9
4.3.	Agency and fulfilment model.....	11
4.4.	Dual role of Retailers.....	11
4.5.	Selective distribution.....	13
4.6.	Dual Distribution.....	14

1. 2010 VBER and VGL revision: Setting the scene for a future-facing revision

- 1.1. Consumers are engaged today in a vastly different Brand ecosystem experience compared to the one available when the current VBER was adopted ten years ago “to take into account the development of the internet as a force for online sales and for cross-border commerce with the aim of increasing consumer choice and price competition¹”. The market paradigm has profoundly changed.
- 1.2. The ways in which products and services reach consumers are increasingly diverse and rapidly evolving, adapting to how the product’s features and experience are best delivered. Different channels are progressively complementary and Brands strive to deliver in one seamless environment the necessary elements to meet, and indeed, exceed consumer expectations, needs, desires and values.
- 1.3. This transformation has had a positive impact for consumers, as well as for Brands and distributors in terms of new, smart, personalized means to serve consumers, while consistently increasing the quality of the experience offered to them. It has also changed the overall retail landscape in Europe. The retail network is the route to the consumer, whether through ‘brick & mortar’ physical stores, supermarkets, pharmacies, retail outlets, platforms, online marketplaces, apps or connected devices, regardless of whether he/she engages with our Brands online, offline, or both. This omni-channel world is the reality for consumers today, who have access to endless ‘digital’ shelves through sale channels that open up markets in a very different way, but who also engage in the retail experience in diverse ways. The offline retail world has experienced dramatic changes, as physical retailers adapt to this new reality.
- 1.4. As Brands, our primary goal remains to connect to consumers through these transforming ecosystems, and in an omni-channel world ensure that Brands are able to effectively convey their identity and the quality of their products, while remaining competitive². The intrinsic dedication of Brands to innovation and value creation is core to this identity as they constantly strive to create, craft and develop differentiated products to engage consumers, reflecting their aspirations and addressing their needs with the most effective combination of elements, including design, innovation, trends, beliefs, traditions, functionality, durability, precision, craftsmanship and competitiveness.

2. The Brand ecosystem and current market realities

- 2.1. Thinking ecosystems: just as technology providers have developed complex ecosystems in this new market paradigm, Brands have responded to consumer expectations and are developing their own seamless cross-channel ecosystem, where the line between online and offline becomes increasingly blurred, to the benefit of consumers who can engage with our Brands at any time, anywhere. With the goal of meeting and exceeding consumer expectations, Brands match the best-in-class practices across the board – from the use of data, new experiential technologies such as Artificial Intelligence and Augmented Reality, to speed of delivery and quality of the sale experience. This is a continuous and conscious effort to help maximize the Brand experience for consumers and overall the Brand value.
- 2.2. As noted by the recent Expert Panel Report on the Future of Competition Policy and Digital³, digital developments bring new challenges with regard to the impact of different aspects, including voice assistants/conversational commerce. Some of these aspects include or are linked to the network effects of marketplaces or some of the incentives for anticompetitive behaviours. In that context, market share could become a less relevant element in light of others such as access to data, the number of users or other network effects.

¹ EU Commission Press Release IP/10/445

² The age of digital Darwinism, McKinsey January 2018

³ Expert Panel Report on Competition Policy & Digitalization, February 2019

- 2.3.** In light of the above, and in the interest of safeguarding competition and value creation, the VBER framework should be upheld and reinforced to allow Brands to continue to innovate and develop further their ecosystems, while making best use of innovative technologies to the benefit of consumers.
- 2.4.** This could be achieved through a channel neutral approach. The future VBER framework should provide the market with a balanced framework that enables Brands to preserve their value and furthermore, to anticipate some of the already visible challenges in terms of concentration in the retail sector overall, especially in the marketplace economy. Brands need flexibility to organize their omni-channel networks in the way that they consider necessary to remain aligned with the Brand image they want to convey. Brands may choose to invest in some channels over others at different times, for example, to develop an app or a new offline experience. The key is flexibility and the ability to ensure all members of their authorized networks contribute fairly overall.
- 2.5.** One other essential change in the past 10 years in the FMCG sector has been the change in channel economics between the various players in the market, to the benefit of big retailers, whether online or offline, and of digital platforms. As an example, an individual retailer may represent 20% or more of the turnover for a manufacturer, while the products of the same manufacturer may represent at most 1%-2% of the turnover of the retailer. While this may at first sight appear to be a simple shift of contractual power affecting manufacturers of FMCG products, it is in fact a change that has also resulted in detrimental results for consumers through reduced access to innovative products⁴ and ultimately less choice. Strong retailers and online platforms now act as gatekeepers of what products consumers are allowed to see and purchase, with Brands dependent on them to be visible across the channels. Retailers and marketplaces compete with their affiliated Brands (i.e. private label) with suppliers of unaffiliated Brands. Only those suppliers willing and capable of meeting excessive back-margin requests from retailers will see their products appearing on shelf. This reduces the choices available to consumers and, consequently, the interest and ability to invest in additional innovation by manufacturers, given the low chances of seeing innovative products making it through the “gates” set-up by retailers.
- 2.6.** This also has a clear impact on potential Resale Price Maintenance, for which historically manufacturers have been viewed as solely responsible, even in situations in which they may have been caused by requests of some powerful retailers against threat of de-listings and other retaliatory measures. The current framework assumes suppliers hold certain control over markets, which is not connected to how the markets operate today.
- 2.7.** In evaluating the VBER, and how to ensure it is ‘fit for purpose’ with this current market paradigm, Brands would recommend addressing restraints in some specific areas to reflect this evolution for the benefit of consumers.

⁴ DG Competition: The Economic Impact of modern retail on choice and innovation, November 2014

3. Overall experience with the VBER and the VGL - the VBER and VGL should be renewed in order to safeguard legal certainty and competition

- 3.1.** The VBER and the VGL have provided a good level of legal certainty and have empowered manufacturers and Brands to effectively assess their practices and agreements, with both contributing to good market practice and enhanced legal certainty. The VBER and VGL should be renewed and in our view, the only necessary adjustments would be in the form of targeted amendments, unless the issues can be addressed via further clarifications in the VGL.
- 3.2.** Possible improvements could be necessary in order to reflect current market dynamics, the omni-channel space, the diverse roles that players take (retailers and suppliers), consumer expectations for quality and choice, and the challenges to maintain competition in an increasingly concentrated market. However, one area of concern stems from the experience of AIM members over the past nine years of the VBER with regard to the differences in application and enforcement of the VBER at national level. The non-uniform, fragmented approach is an issue for businesses who need to operate in an environment with legal certainty.
- 3.3.** The lack of uniform interpretation of the VBER and VGL is particularly relevant in the digital space, as Member States have applied the rules in very different ways, or sometimes even seem to have ignored those rules to create new ones that seem to be at odds with the spirit of the VBER and VGL⁵. In a fast-moving digital environment, this has led our Brands to remain cautious, hence less innovative in the way they present their products to customers⁶.
- 3.4.** AIM therefore recommends that the European Commission (EC) makes more pro-active use of its role as overseer and coordinator of competition law enforcement within the European Competition Network (ECN). More specifically, the EC should continue to strengthen its efforts to ensure a consistent application of the EU competition rules on vertical restraints through dialogue with the national competition authorities (NCA) within the ECN. In addition, where the correct and uniform interpretation and application of the Block Exemption and Guidelines is at stake in specific cases, it should not hesitate to make more frequent use of its existing powers under Regulation 1/2003 (e.g. submitting amicus curiae briefs before national courts under Article 15(3); carefully reviewing NCA decisions under Article 11(4) or removing the competence of NCAs to apply Article 101 TFEU in a specific case under Article 11(6)). This would further ensure that the VBER and VGL are interpreted uniformly across the Single Market and provide a consistent approach (both on restrictions and on practices that are not considered as harmful) at EU and national level which would enhance legal certainty.

⁵ Case C-230/16, *Coty Germany GmbH v Parfümerie Akzente GmbH* and Case C-158/11 *Auto 24 v Jaguar Land Rover France*

⁶ EU Commission, *The economic impact of modern retail on choice and innovation in the EU food sector*, 2014

4. A VBER and VGL fit for the Consumer Ecosystem Era

Overall, the VBER and VGL have provided a very good base for legal certainty. However, as the purpose of this consultation is to highlight areas that are in need of some form of clarification, we outline in this section the main aspects reported by the AIM members in relation to the VBER and Guidelines.

4.1. Market share thresholds

- 4.1.1. The VBER relies on a safe-harbour mechanism, according to which agreements concluded by companies with market shares below the 30% market share threshold benefit from the applicability of the block exemption (in the absence of hardcore restrictions). This framework creates a good level of legal certainty for the assessment of vertical agreements.
- 4.1.2. AIM supports the presumption of legality provided by the VBER and is in favour of maintaining the *status quo* in so far as the market share thresholds are concerned.
- 4.1.3. In AIM's view, there are even situations in which supplier market shares in excess of 30% should not deprive these suppliers from the benefit of the VBER. It is true that companies are expected to conduct self-assessment of their vertical agreements if these do not automatically benefit from the application of the VBER. However, such self-assessment remains challenging and is subject to such high evidentiary standards that are virtually impossible to meet or take the risk. In addition to advocating at the very least the *status quo* regarding the current market share thresholds, AIM recommends that the EC consider options to increase legal certainty for the assessment of such agreements. In particular, more comfort could be provided to vertical agreements that do not contain hardcore restrictions and are entered into by companies whose market shares range between 30% and 40%. It is unclear why such agreements, in the absence of hardcore restrictions, should not benefit from an automatic exemption as well. The VGL could, for instance, specify that it is unlikely that anticompetitive effects would arise from such agreements.

4.2. Pricing issues

4.2.1. Resale Price Maintenance

- 4.2.1.1.** The VGL⁷ acknowledge that RPM may lead to efficiencies and consumer benefits, in particular by preventing free riding at the distribution level, protecting a retailers' high investments on products' display, advertising, qualitative and tailored advice and client experience while others are practising low prices aimed only at attracting consumers. Unfortunately, this acknowledgement has shown limited practical value in current enforcement. Both the VBER and the VGL should better clarify the criteria for the exemption of RPM under Article 101 (3) TFEU. More specifically, AIM takes the view that the current blacklisting of minimum RPM clauses as hardcore restrictions is overbroad and that the EC should seriously consider listing a few "carve outs" in Article 4 VBER. Here are some examples.
- 4.2.1.2.** RPM during pricing promotions for a period of up to 6 weeks (cf. paragraph 225 of the VGL) is a first example. An exception in Article 4 VBER could be combined with a clarification in the VGL that there may be instances where RPM even makes sense during promotional campaigns of a somewhat longer duration. A more suitable, and longer, time frame for promotions should be identified, to enable manufacturers to adequately prepare and implement promotional activities.
- 4.2.1.3.** Second, the EC could consider extending the automatic exemption to an RPM scheme that prohibits the dealers from reselling below cost (i.e. below their net invoice purchase price plus a reasonable profit margin). Apart from the fact that below-cost pricing might constitute an unfair trading practice under national law⁸, *below-cost* pricing might be part of a loss-leader policy whereby a retailer seeks to attract customers to its outlets by using certain products as baits outside the promotion campaigns that it may have negotiated with that manufacturer for these products. Retailers who sell tens of thousands of products are not concerned about the Brand image of a particular product that they use as a loss leader. Once a product's image has been eroded, the retailer can simply "move" to another product and use it as another bait. We believe it is justified for a manufacturer to attempt to prevent his products being used for that purpose.
- 4.2.1.4.** Third, RPM can serve as a useful tool to price-position new products in existing markets or existing products in new geographic markets. In such situations, there does not seem to be any basis for the proposition that RPM will lead to a supra-competitive price for the product at stake. In this respect, and also considering the consumer benefits deriving from innovation, it should be further clarified that fixed resale prices for new product launches are likely to meet the conditions for an exemption and can be implemented for an adequate duration (up to six months).
- 4.2.1.5.** Fourth, RPM should be allowed where intra-Brand competition does not represent a concern (for instance where a distributor is an exclusive distributor in a country, or when a reseller is more akin to a logistics provider who, for practical reasons, receives title and resells products in its name) and where it may be desirable for the distributor to rely on the skills of the manufacturer to set a competitive price for the products.

⁷ 225 VGL

⁸ Le livre VI "Pratiques du marché et protection du consommateur" du Code de droit économique (Livre VI CDE), interdit à toute entreprise de vendre un bien à perte ([art. VI.116 CDE](#)). Toutefois, le Livre VI CDE prévoit une série d'exceptions liées à des circonstances particulières, dans lesquelles il est autorisé de vendre à perte ([art. VI.117 CDE](#)) and for France the Code de commerce – articles [L.442-2](#) – [L.442-3](#) et [L.442-4](#) modified by Ordonnance n°2019-359 du 24 avril 2019 - art. 2 [and Italy](#). La risoluzione n. 11569 del 23 gennaio 2013, precisa come deve essere interpretato il termine *referenza ai fini dell'applicazione del Decreto del Presidente della Repubblica 5 aprile 2001, n. 218, Regolamento recante disciplina delle vendite sottocosto, a norma dell'articolo 15, comma 8, del Decreto legislativo 31 marzo 1998, n. 114.- Quesito vendite sottocosto*

4.2.2. Maximum Resale Prices, RRP's and discussions on prices

- 4.2.2.1.** The VBER and VGL clarify that maximum fixed prices are permissible "provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties"⁹. It should be further clarified that maximum resale prices - even when market power is present – do not amount to RPM, absent such incentives. Such clarifications would also increase legal certainty for specific distribution schemes, currently under-used as a result of possible restrictive interpretations.
- 4.2.2.2.** Manufacturers need to communicate to retailers about their resale price recommendations. Resale data is critical for manufacturers to define their future strategy. Manufacturers need to understand how the market responds to their price recommendations and seek information from resellers on actual resale prices. These communications with retailers should not be considered as an indication of RPM. Monitoring of retail price is part of the normal commercial activity of well-managed companies, it is to be expected from all companies and it should not pose specific concerns, unless retaliation (or threats thereof) have taken place.
- 4.2.2.3.** The VGL suggest that price recommendations may be problematic if they are followed "by most or all of the resellers"¹⁰. However, the fact that recommendations are followed should not give rise to concerns, absent threats or other measures encouraging distributors to comply with the recommendation. The VGL also indicate that a supplier with a strong market position should be careful before proposing "price recommendations" to its customers. As the key criterion to determine whether a supplier is involved in illegal RPM is to look at whether it has come to an agreement with a retailer on a particular minimum or fixed price level, its market position should not be relevant. This approach creates legal uncertainty for manufacturers, especially for those with a market share higher than 30% in relation to certain products.
- 4.2.2.4.** Finally, when considering whether "pressure" is applied in the framework of pricing discussions, the VGL should consider the significant power large retailers and platforms currently have in their relations with manufacturers. Retailers often demand ex-ante guaranteed margins from manufacturers (or unilaterally impose ex-post compensation charges to meet their margin requirements) and often make such demands subject to threats of delisting or other retaliating measures. RPM may arise as a result of such pressures; enforcement actions should take these aspects into account and avoid focusing solely on manufacturers.

4.2.3. Dual Pricing

- 4.2.3.1.** The EC should recognise that Brands should be able to reward fairly the offline or online efforts of their distributors without being constrained by dual pricing rules that were created without full consideration to the omni-channel environment where our members (and retailers) operate. The VGL are out of touch with the current omni-channel commercial reality. Consumers expect a seamless experience throughout their purchase journey, whether offline, online or both. Brands should have the freedom to incentivise retailers to invest in those seamless shopping experiences across all channels, whilst minimising the risk of free-riding. The VGL ought to reflect this. AIM's suggestions concern, more specifically, the EC's current position on dual pricing, as set forth in paragraph 52 (d) of its Guidelines.
- 4.2.3.2.** The EC indeed views as a hardcore restriction the fact that a supplier charges a distributor a higher price for products intended to be resold online than for the product intended to be resold off-line (paragraph 52 (d) VGL) (prohibition of dual pricing).

⁹ 2014 Commission Staff Working Document Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice 3.4, p. 16

¹⁰ VGL 227

4.2.3.3. This prohibition creates a real imbalance in the way Brands are meant to treat on the one hand retailers who are only present online or in brick & mortar (we note here that few retailers are nowadays only present in a physical environment) and on the other hand, retailers who are present both offline and online (referred to as hybrid retailers).

4.2.3.4. For the retailers that are only present either online or offline, Brands are free to:

- set differentiated pricing, including potentially to set higher prices for pure e-tailers than for pure brick & mortar retailers
- financially incentivize the offline effort of the pure brick & mortar retailers
- offer rebates, for example assortment or growth rebates, that adequately reward the respective efforts of *both* types of retailers

4.2.3.5. In contrast, when it deals with a hybrid retailer, a brand owner is constrained in the way it can fairly reward its customers. Because a customer is hybrid, the brand owner is not entitled to incentivize that customer's offline effort in the same way that it could reward the offline effort of a pure brick & mortar retailer. If one takes the example of growth rebate, the prohibition on dual pricing suggests that a brand owner needs to have one set of rebates that would apply to its hybrid customer's sales overall, without enabling the brand owner to fairly remunerate the offline growth or online growth (as the case may be) of that customer. The reality is that hybrid retailers compete directly with pure online retailers and pure brick & mortar retailers. Brands should therefore be able to treat them equally.

4.2.3.6. Whilst paragraph 64 of the VGL qualifies the ban on dual pricing for situations where online sales lead to substantial higher costs for the *manufacturer*, this does not address the issue that *hybrid retailers* face considerable higher costs in operating their bricks and mortar stores due to costs related to rental rates, training of staff, investments in store attractiveness, etc.

4.2.3.7. In the current economic reality, e-commerce is ubiquitous and does not need protection. To the contrary, the brick and mortar channel needs Brands' support as otherwise this puts at risk the future of the high street. The current approach can actually dis-incentivise high-service retailers to keep investing in the service offering provided in their brick and mortar stores. Brands should have the flexibility to offer hybrid retailers a specific discount off products that are sold in-store to support these retailers' in-store and logistics efforts.

4.2.3.8. Paragraph 52 (d) of the Guidelines already provides that suppliers are entitled to provide their customers with a fixed fee to support the customer's offline or online sales effort. The EC recognised here that it would be acceptable to support a customer's effort. However, this fixed fee solution is not one that is working in practice.

4.2.3.9. The reason Brands have not, to a significant extent, used the possibility to provide a fixed fee is that it would be extremely expensive and burdensome to put in place. How should a supplier determine the fixed fee remunerating the offline efforts of a particular retailer? Is it dependent on the surface of its stores, the number of personnel in the respective stores that may promote the supplier's products or any other measures? When looking in detail at this question, it becomes quickly apparent that the only fair measure of remuneration is related to the actual sales made by the retailer. Other measures would require a store-by-store analysis, which is administratively difficult and expensive to put in place for suppliers whose products are distributed in thousands of stores. Some manufacturers may be prepared to invest in this analysis but they are most likely to do this only with their largest customers and not with the majority of smaller retailers.

4.2.3.10. In conclusion, in the absence of market power, it is very hard to understand what consumer harm there could be if a supplier put in place dual pricing for its hybrid customers. Dual pricing for hybrid retailers should not be considered a hardcore restriction and should be therefore exempted under Article 101(3) TFEU.

4.3. Agency and fulfilment model

- 4.3.1.** In the current market conditions, some of the AIM members will work with fulfilment partners due to a number of possible reasons described below. We raise the following arguments in support of a request to allow more flexibility concerning the agency model in order to allow the capture of fulfilment partners:
- 4.3.2.** A manufacturer negotiates the conditions of a business transaction directly with an end-customer. In many cases, the negotiation is initiated by the end-customer by way of a formalized private tender procedure or a request for quotation to several manufacturers.
- 4.3.3.** Due to objective economic reasons, an independent third party (distributor) becomes involved, primarily for logistic reasons.
- 4.3.4.** The distributor buys the products from the manufacturer as an independent contractor and resells them to the end-customer in its own name and for its own account.
- 4.3.5.** It should be clarified in the VGL that in such situations of existing preceding competition between manufacturers and an end-customer, the Brand can benefit from enhanced flexibility regarding the agreements that can be established in order to allow the transfer of goods to the distributor.

4.4. Dual role of Retailers

- 4.4.1.** As noted above, the challenge of the new market economy is to ensure that a healthy, competitive retail environment prevails, in order to offer consumers choice and diversity of products.
- 4.4.2.** The rapid growth of some online platforms has led to the concern, expressed by Commissioner Vestager, that there could be a distortion of competition given the dual role of the online platform, that platform businesses are using the power of their platforms to undermine competition. Concerns have been raised on the practices of platforms using data gathered by hosting a Brand's product to create its own-private label version. This is being addressed in the context of the P2B Regulation¹¹ and some of the on-going investigations at EC and NCA level.
- 4.4.3.** For certain members of AIM, and specifically in the FMCG sector, this is not new in the offline retail world, where large retailers/ buyers have existed in this 'dual role' for years¹². This private label market model for distributors, both online and offline, has grown substantially in the past decade, with some private label distributors capturing 50 percent of market share by volume¹³. As a result, distributors who develop private label/retail Brands **compete with the Brand manufacturer in their retail space - a retail space that is controlled fully by the distributor.**

¹¹ 2018 Regulation on promoting fairness and transparency for business users of online intermediation services

¹² Bundeskartellamt's 2013 EDEKA decision on abuse of economic dependence (upheld by the Supreme Court)

¹³ "WHAT ARE THE ADVANTAGES OF PRIVATE LABEL?" <https://www.plmainternational.com/industry-news/private-label-today>

- 4.4.4.** In the FMCG sector, these distributors have access to commercially sensitive information of innovative Brands, and are in a position to misuse this for their own benefit. The challenge is whether this has a significant impact on consumer welfare, in the form of consumer choice¹⁴. Generally, the relationship between consumer choice and innovation is considered positive, with consumers benefitting from a wider, more diverse and innovative range of products. Consequently, it follows that a negative impact on innovation will lead to a negative impact on consumer choice. This has been demonstrated through the European Commission's own study "The Economic Impact of Modern Retail on Choice and innovation in the EU Food Sector" which found a statistically and economically significant progressive correlation between private label growth and a decline in innovation by Brands. The existence of a risk threshold or tipping point above which private label market shares in a product category will restrict innovation has been confirmed by research in the Spanish market by Kantar World Panel¹⁵. The benchmark analysis of 104 categories in the period 2011-2013 led Kantar to conclude that a private label market share above 35% leads to less innovation and growth in the market.
- 4.4.5.** Another potential negative impact on innovation is the consequences of putting too much focus on promoting intra-Brand competition. The VGL recognises in paragraph 102 that inter-Brand competition is more important than intra-Brand competition from a consumer welfare standpoint. Promoting intra-Brand competition may undermine a Brands' competitiveness (e.g. capacity to innovate) and, therefore, inter-Brand competition. This is particularly so as Brands compete with retailers and marketplaces, which sell their private label Brands in their dual role.
- 4.4.6.** The VGL specifically address two buyer-driven practices (i.e. category management and upfront access fees), but their core assumption is that these practices are led by leading independent Brands in order to exclude smaller independent Brands as opposed to being led by the retailers.
- 4.4.7.** With the market developments in the past 10 years, the revised VBER and VGL should be clarified to reflect this market reality – that the dual role of a distributor (whether online or offline) places it in a unique position from a competition standpoint. Article 2(4) VBER starts by excluding "agreements entered into between competing undertakings" from the application of the VBER, but goes on to include vertical relationships as long as they are non-reciprocal. The VGL should confirm that the last sentence of paragraph 27, read together with paragraph 28, simply clarifies that the VBER is applicable to agreements between a manufacturer and a retailer that sells private label/retailer Brands. This makes sense in pre-dominantly vertical relationships and should stay. That said, AIM urges the EC to bear in mind that manufacturers of Branded goods face fierce inter-Brand competition downstream at the retail level from private label goods in situations where those retailers are in a "judge and party" position. They can determine under which conditions the Branded goods will be sold which results in free-riding issues.

¹⁴ EU Commission, *The economic impact of choice and innovation in the EU food sector*, 2014

¹⁵ Kantar WorldPanel applied the same econometric analysis in the Spanish market and extended the sample of categories to account for the largest part of the market, reaching almost identical results and *Innovating in the post-crisis era – November 2014*

4.5. Selective distribution

- 4.5.1.** AIM members believe that selective distribution rules in VBER and VGL are effective in practice, provide legal certainty and must be maintained. If an update is to be considered, this should reflect the evolving market dynamics of an omni-channel model as outlined above.
- 4.5.2.** In this omni-channel environment, for Brands, it is key to seek a high level of qualitative standards for both online and offline environments, although these criteria need not necessarily be identical given the peculiarities intrinsic to each channel. This is essential to consistently ensure the excellence of the consumer experience both in shops and online while allowing for more flexibility and a case-by-case approach in the definition and determination of the qualitative criteria appropriate to the different channels.
- 4.5.3.** In this regard, the preservation of the brick and mortar option¹⁶ is crucial for consumers to experience, feel and touch the products, while at the same time it may be an element of compensation of the efforts and investments necessary to safeguard the brand equity.
- 4.5.4.** VBER and VGL should better emphasize that inter-Brand and intra-Brand competition for the selective distribution model does not only focus on price but relies on other factors equally relevant and essential for the enhancement of the consumer's shopping experience including, inter alia, quality, innovation, and consumer service.
- 4.5.5.** In order to ensure legal certainty for market players, and avoid non-uniform interpretation of the VBER and VGL by national authorities, AIM recommends to integrate existing case law at EU level on selective distribution (including but not limited to the Coty¹⁷ and Auto 24¹⁸ cases) Interpretation and enforcement of VBER and VGL should be consistent across the EEA. Brands urge the European Commission to act against national deviations on the interpretation and implementation of VBER and VGL via the European Competition Network and ensure full uniformity as divergences erode legal certainty and act as concrete obstacles for the implementation of consistent selective distribution networks across Europe.
- 4.5.6.** Given the changed market paradigm, and the new forms of digital interactivity with consumers that has subsequently evolved, AIM would recommend the VBER and VGL clarify "active" and "passive" sales as applied to selective distribution systems. VBER should include a definition of "active sales" which should cover any online marketing activity specifically targeting individual consumers, group of consumers or consumers within a specific territory. Several qualifiers can be used to assess when there is an active sale including, for instance, use of local language or advertising campaigns being carried out on social media in specific countries or other similar factors. Due to the changed digital landscape, there should no longer be a presumption that online sales are always to be considered a passive sale. Without a clear distinction between online and offline sales, it is quite difficult for Brands to incentivise a distributor with an exclusive right for a specific group of clients or a territory. The demarcation between active and passive sales should be made in full conformity with both VBER and the Geo-Blocking Regulation¹⁹.
- 4.5.7.** Brands should be empowered with legal tools to protect their selective distribution networks from the illicit behaviours of unauthorized retailers selling products on parallel markets. This legal safeguard is

¹⁶ VGL 54

¹⁷ Case C-230/16, Coty Germany GmbH v Parfümerie Akzente GmbH.

¹⁸ Case C-158/11 Auto 24 v Jaguar Land Rover France.

¹⁹ Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No. 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC.

already a reality in some Member States (e.g. France²⁰) but should be extended at EU level. The EU Commission should be advocating for such legal tools at European level and recognizing the need of a concrete protection of the selective distribution model from free riders.

4.5.8. Moreover, the VGL should also clarify when restrictions on the use of Brand names or trademarks in search engines (e.g. Google AdWords) are likely to be hardcore restrictions of EU competition law. Whilst the EC decision in *Guess* treated a ban on the use of the *Guess* Brand name and trademark in Google AdWords as a “by object” infringement, in the e-commerce Staff Working Paper the EC also stated that such restrictions could help avoid confusion with the manufacturer’s website (see paras. 632 and 997). Further clarity on this point is needed and, in particular, the EC should clarify that restrictions on bidding for a particular positioning in the list of results rendered by search engines when Google AdWords are used for online searches (as opposed to a ban on bidding for Google AdWords) are block exempted. This clarification will be beneficial for all vertical agreements, not only selective distribution agreements.

4.6. Dual Distribution

4.6.1. AIM would like to address two issues regarding dual distribution situations, i.e. situations where a Brand owner not only resells its goods to independent retailers but also operates in parallel its own distribution network.

4.6.2. First, although Article. 2(4) sub a of the VBER block exempts dual distribution, the EC should state more clearly the rationale for this.

4.6.3. Arguments²¹ have been made regarding the rationale in paragraph 28 of the VGL. “...by limiting coverage [of the block exemption] to non-reciprocal dual distribution agreements, it is expected that the possible competition concerns are limited to vertical concerns such as foreclosure and not a possible loss of competition between the parties”. This is a clearer explanation of this rationale in our view, compared to the current statement found in paragraph 28 of the VGL according to which “in case of dual distribution it is considered that in general any potential impact on the competitive relationship between the manufacturer and retailer at the retail level is of lesser importance than the potential impact of the vertical supply agreement on competition in general at the manufacturing or retail level”.

4.6.4. Second, the VGL should clarify that in a dual distribution context, it is perfectly legitimate for a Branded goods manufacturer to collect pricing and other data about its own products from resellers, provided these data are not used to restrict the freedom of the reseller in a manner that would be considered hardcore under the VBER.

4.6.5. There are a number of practical examples of why information collected from retailers is efficiency enhancing above.

- **Geographic spread:** It is necessary to collect this information from retailers because manufacturers typically do not themselves have a material presence in all downstream markets. Therefore, they cannot obtain a comprehensive view of the market from their own downstream operations.
- **Consumer profile:** Another reason for collecting information from retailers is that retailers are differentiated as regards the consumer segments they target. Hence, manufacturers require

²⁰ Article L. 442-2 of the French Commercial Code.

²¹ Page 209 http://ec.europa.eu/competition/speeches/text/sp2011_10_en.pdf

information from retailers to get a more complete view of the market or else their view is limited to only those consumers that purchase products from their own downstream operations. Accordingly, without detailed information on sales made by retailers, the manufacturer loses out on potential sales because they cannot make well-informed decisions on the basis of actual consumer demand, for example, regarding overall production trends, prioritisation of delivery and inventory at different retailers.

- Seasonal products: Customer demand for several categories of products will vary depending on the season or other changing factors. In order to address demand variations Brands need to collect information to plan adequate production and distribution. Some sectors will be more sensitive to these aspects for example the fashion and apparel producers where demand for some products fluctuate and customers need the product within a fixed timeline, often immediately. Having access to information allowing Brands to adjust to quick shifts in consumer needs is crucial in order to avoid having high levels of risk from stock that is not requested by consumers.

4.6.6. Overall, collecting such data on consumer behaviour in relation to the manufacturer's Brand promotes stronger inter-Brand competition by, among other things, allowing the manufacturer to better meet consumers' needs and better position its Brand in the market. Manufacturers typically consider retailers as a complement to their Brand building strategy. Manufacturers and retailers complement each other in many aspects such as pre- and post-sales service and the speed of product delivery (in the event that stock is not readily available), which are very important for Brands to build their reputation.

About AIM

AIM is the European Brands Association representing Brand manufacturers in Europe on key issues which affect their ability to design, distribute and market their Brands.

AIM's membership comprises corporate members and national associations. Altogether, AIM represents directly or indirectly some 2,500 companies ranging from SMEs to multinationals. Members are manufacturers of Branded consumer products that are united in their purpose to build strong, evocative Brands and as such place the consumer at the heart of what they do. AIM's corporate members alone invested €14 billion annually in R&D in Europe in 2014. It places them at fifth in the EU rank for EU R&D investment.

AIM's mission is to create for Brands an environment of fair and vigorous competition, fostering innovation and guaranteeing maximum value to consumers now and for generations to come.

EU consumers spent €653 billion on food, drink, home and personal care Brands alone in 2014 in the retail sector.

Our corporate members include:

AB InBev • Arla Foods • Bacardi Limited • Barilla • Beiersdorf • Bel Group • BIC • Chanel • Coca-Cola • Colgate-Palmolive • Coty • Danone • Diageo • Dr. Oetker • Essity • Estée Lauder • Ferrero • Freudenberg/Vileda • FrieslandCampina • General Mills • GlaxoSmithKline • Heineken • Henkel • JDE • Johnson & Johnson • Kellogg • Kimberly-Clark • LEGO • Lindt & Sprüngli • L'Oréal • LVMH • Mars • McCain Foods • McCormick • Mondelez • Nestlé • Nike • Nomad Foods Europe • Orkla • PepsiCo • Pernod Ricard • Procter & Gamble • Puma • RB • Royal Philips • Sanofi • Savencia Fromage & Dairy • SC Johnson • Signify • Unilever

Our national association members include:

Austria Markenartikelverband • Belgilux BABM • Czech Republic CSZV • Denmark DLF • Finland FFDIF • France ILEC • Germany Markenverband • Greece EllhnikoV SundesmoV Biomhcaniwn Epwnumwn Proiontwn • Hungary Márkás Termékeket Gyártók Magyarországi Egyesülete • Ireland Food & Drink Federation • Italy Centromarca • Netherlands FNLI • Norway DLF • Portugal Centromarca • Russia RusBrand • Spain Promarca • Slovakia SZZV • Sweden DLF • Switzerland Promarca • United Kingdom British Brands Group

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