Ref. Ares(2019)4353524 - 08/07/2019

PUBLIC QUESTIONNAIRE FOR THE 2018 EVALUATION OF THE VERTICAL BLOCK EXEMPTION REGULATION

ADDITIONAL COMMENTS

27 MAY 2019

ALLEN & OVERY

1. We welcome this opportunity to comment on the Commission's Public Questionnaire for the 2018 Evaluation of the Vertical Block Exemption Regulation.

2. Overall, our experience as an international law firm has been positive both with Commission Regulation 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union (**VBER**) and the Commission's 2010 Guidelines on Vertical Restraints (**VGL**). Generally, in our firm's experience, both the VBER and the VGL work well by facilitating self-assessments, and they contribute to an increased level of legal certainty in relation to vertical restraints. In addition, the VGL has become hugely influential at Member State level: our firm has seen large numbers of national competition authorities (**NCAs**) and national courts relying on these guidelines not only when applying Article 101 TFEU, but also in relation to national competition laws.

3. Precisely because of such wide-ranging influence of the VBER and the VGL on the application of competition law both at EU and Member State level, we welcome this wide-ranging consultation by the Commission. While the VBER and the VGL have generally worked well over the past 10 years, they would benefit from being updated on a number of points, to reflect recent market developments, experience from enforcement at EU and national level, and judgments of the EU Courts.

4. We set out below our additional comments in relation to specific questions in the questionnaire.

1. QUESTION 1.6

1.6 If you have rated one or several issues as "very low" or "slightly low", please explain the reasons for your rating. Please also explain whether the lack of legal certainty stems from (i) the definition of the particular area in the VBER or the related description in the VGL, (ii) their application in practice or (iii) the overall structure of the VBER and/or VGL.

1.1 Guidance in the VGL on distinguishing field-of-use restrictions from customer restrictions

5. The VGL could usefully provide guidance on field-of-use restrictions in vertical agreements that are not covered by the Technology Transfer Block Exemption Regulation[1] (**TTBER**) and the related Commission Guidelines[2] (the **TTGL**).

6. Under a field-of-use restriction, an intellectual property rights licence *"is either limited to one or more technical fields of application or one or more product markets or industrial sectors."*[3] The block exemption of the TTBER covers such restrictions, as long as they do not go beyond the scope of the licensed technologies.[4] The TTGL also notes that it is important to distinguish hardcore customer restrictions from non-hardcore field-of-use restrictions.[5] This is relevant both to determine whether the block exemption can apply to a certain restriction, but also for any analysis outside of the scope of the block exemption. For example, the TTGL clarifies that *"[t]he fact that a technical field–of-use restriction may correspond to certain groups of customers within a product market does not imply that the restraint is to be classified as a customer restriction."*[6]

[1] Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements, OJ L 93, 28.3.2014, p. 17–23

[2] Communication from the Commission — Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, OJ C 89, 28.3.2014

[3] See paragraph 208 of the TTGL

[4] See paragraph 113 of the TTGL

[5] See paragraph 209 of the TTGL

[6] See paragraph 209 of the TTGL

7. Similar guidance would be valuable in the VGL in relation to field-of-use restrictions that are included in vertical agreements whose primary objective is not IPR licensing, and which are therefore subject to the VBER.[7] For example, certain distribution agreements may include field-of-use restrictions in relation to non-software copyright or trade mark licences provided to the downstream party (e.g., retailer or distributor), thereby effectively preventing the downstream party from reselling or distributing the (trade mark or copyright-protected) product outside the authorised field of use. Currently, as such agreements are not covered by the TTBER and the TTGL, there is a degree of uncertainty about the assessment of any field–of-use restrictions they may contain. The VGL could provide guidance on how such restrictions can be distinguished from hardcore customer restrictions. Such guidance could be included, e.g. in paragraphs 50 to 54 and / or in relation to exclusive customer allocation (Section V.2.3).

1.2 Non-compete obligations in franchising agreements

8. We believe that there is inconsistency in the VGL regarding non-compete obligations in the context of franchising agreements. While paragraph 148 seems to suggest that non-compete obligations are generally justified in case of franchising agreements, paragraph 190(b) appears to suggest that a non-compete obligation in the context of franchising is only appropriate if certain conditions are met. These points of the VGL should be revised to clarify that generally single branding obligations can be justified for the whole duration of a franchising agreement.

9. Article 1(1)(g) of the VBER provides that *"know how means a package of non-patented technical information, resulting from experience and testing by the supplier, which is secret, substantial, and identified"*. Thus, know-how will only fall within the scope of the VBER if it is substantial.

10. Paragraph 189 of the VGL explains that franchising agreements *"contain licences of intellectual property rights relating in particular to trade marks or signs and know-how for the use and distribution of goods or services"* [emphasis added].

11. Under paragraph 148 of the VGL, the transfer of substantial know-how usually justifies a non-compete obligation for the whole duration of the supply agreement. As an example, paragraph 148 of the VGL expressly mentions that this is the case in the context of franchising. This is, therefore, fully consistent with paragraph 189 of the VGL and Article 1(1)(g) of the VBER, under which an arrangement only qualifies as franchising if it involves a licence for substantial non-patented technical information (i.e., know-how).

12. However, paragraph 190(b) of the VGL appears to suggest that non-compete obligations in franchising agreements fall outside the scope of Article 101(1) TFEU only where *"the obligation is necessary to maintain the common identity and reputation of the franchised network"*. Thus, contrary to paragraph 148 of the VGL, paragraph 190(b) of the VGL seems to suggest that non-compete obligations in franchising are not always justified, despite the know-how licensed as part of franchising.

13. A key feature of franchise networks is the provision of a complete and uniform business method by the franchisor to its franchisees and the transfer of know-how. Such an arrangement only qualifies as franchising under paragraph 189 of the VGL, if it involves the transfer of know-how meeting the definition of Article 1(1)g) of the VBER – i.e., it must be substantial. Therefore, we would encourage the Commission to expressly state that in franchise agreements within the meaning of paragraph 189 of the VGL, non-compete obligations are justified for the whole duration of the agreement, and therefore fall outside the scope of Article 101(1). If the Commission is of the view that there could be any situations in which such non-compete clause would not be justified in

7 See Article 2(3) of the VBER

franchise agreements, for the sake of legal certainty it would be helpful if the Commission provided examples of such situations.

2. QUESTIONS 1.14, 1.16

1.14, 1.16 Are there any types of vertical restrictions that the VBER considers as hardcore (Article 4 VBER), but for which it can be assumed with sufficient certainty that they generate efficiencies in line with Article 101(3) of the Treaty?

Please explain your selection by providing examples and explain how prevalent these restrictions are in your industry:

2.1 RPM in franchise agreements

14. In our view, Article 4(a) of the VBER should be revised, so that the VBER's exemption should apply to fixed resale prices in franchise agreements. We believe this is justified in light of the goal of maintaining a common identity and reputation of franchise networks and the fact that under franchise agreements the franchisor shares with its franchisees a complete business concept. Prices, besides the assortment of products/services that customers can purchase from franchisees and the quality of products/services, can be one of the key elements by which customers identify franchise networks and distinguish from brands of other entities.

15. In any case, fixed resale prices in franchise agreements do not by their very nature produce a sufficiently high degree of consumer harm. *First*, franchising agreements are often present in very competitive markets. *Second*, consumers' transaction costs are reduced if consumers shopping in franchise retail stores can expect that the prices in all stores will be the same, regardless of the location of the store. *Third*, in many cases franchisees do not compete with each other as they often operate in local markets, competing with other third party undertakings offering similar goods and services. Therefore, RPM in such a case would not restrict intra-brand price competition. *Fourth*, as franchisees generally do not distribute products other than those covered by the franchise agreement, setting prices for products in a franchise agreement would not result in a softening of competition between different suppliers using the same distributors.

2.2 RPM - Broadening the guidance provided for price promotions

16. We consider that applying RPM in short-term low-price campaigns in principle leads to efficiencies in all distribution systems, not only *"in a franchise system or similar distribution system"*, as currently stated in paragraph 225 of the VGL. Consumers can benefit from those campaigns, regardless of the nature of the distribution system. Therefore, we would encourage the Commission to broaden the description of RPM leading to efficiencies in short-term low-price campaigns to all distribution systems. Alternatively, to provide more clarity, the VGL should at least further elaborate on what kind of distribution system is considered sufficiently *"similar"* to a franchise system so that it can justify a temporary RPM for supporting low-price promotions.

3. QUESTIONS 1.17, 1.19

1.17 Does the list of excluded vertical restrictions (Article 5 VBER) exclude types of vertical restrictions for which it can be assumed with sufficient certainty that they generate efficiencies in line with Article 101(3) of the Treaty?

3.1 Single branding obligations exceeding five years

17. When determining a non-compete obligation's forclosure effect and its impact on the customers' ability to switch, its term seems less relevant than the customer's ability to terminate the obligation

upon a reasonable notice period. As a result, Article 5(1)(a) of VBER and paragraph 133 of the VGL are too rigid and arbitrary when they focus on five-year terms.

(a) Comments on the scope of the VBER's block exemption

18. In Article 5(1)(a) of the VBER, we suggest considering block exempting non-compete obligations even if they extend to more than five years (including to an indefinite period of time), provided that the downstream party can terminate the obligation with a reasonable notice period. Such an approach would be more consistent with the theories of harm mentioned by the VGL in relation to single branding than focusing on five-year fixed term non-compete obligations.[8]

19. The first of the competitive concerns mentioned in paragraph 130 of the VGL is that single branding can foreclose the market to competing suppliers. Later, in paragraphs 132 and 133, the VGL explains two situations where such foreclosure can arise. Paragraph 132 of the VGL provides that foreclosure is particularly likely where the supplier requests single branding in relation to a *"must stock"* product. The VGL explains that competitive harm can arise because without the single branding obligation an *"important competitive constraint is exercised by competitors"*. In addition, paragraph 133 of the VGL explains that *"the switching of supplier by customers is rendered difficult due to the duration and market coverage of the single branding obligations."*

20. However, Article 5(1)(a) VBER does not appear to be entirely consistent with this theory of harm:

(i) Below the 30% market share threshold, the VBER block exempts a five-year fixed-term non-compete obligation, even if the retailer cannot terminate it during such five year term. Such an obligation prevents customers from switching, and competing suppliers from effectively competing for the demand of the relevant retailer for the whole of such five-year period.

(ii) However, the VBER does not block exempt a non-compete obligation concluded for an indefinite duration, which the retailer can terminate with a reasonable notice period. This is surprising, as in this case a competing supplier has more access to the demand of the relevant retailer than in case of a five-year non-compete obligation. It can target the retailer with offers on a continuous basis. If the retailer finds that an offer is sufficiently attractive, it can terminate its indefinite non-compete obligation at any time, and start purchasing from the competing supplier.

21. Therefore, if a five-year fixed term non-compete obligation is block-exempted, there seems to be no reason for Article 5(1)(a) of the VBER not to block exempt indefinite non-compete obligations which can be terminated upon a reasonable notice. To address this issue, we suggest considering block exempting non-compete obligations not depending on their duration, but on the customers' ability to terminate them with a reasonable notice period (assuming they meet the relevant market share thresholds).

22. A further point is that the mechanistic way in which the concept of 'non-compete obligation' is defined, by reference to an obligation on a reseller to purchase more than 80% of its requirements from a supplier, can lead to anomalous results. For example, an obligation on a reseller to purchase 80% of its requirements of the contract goods from the supplier is only exempted for five years, but an obligation to purchase 79% can be indefinite. We appreciate that the VBER needs to apply a cut-off point, and we also accept that there is some merit in having a bright-line test, but one should nonetheless be aware of the potential consequences.

[8] See para 130 of the VGL

(b) Comments on the VGL

23. For similar reasons, paragraph 133 of the VGL also seems arbitrary, when it focuses rigidly on a five-year period.

24. Paragraph 133 of the VGL provides guidance for the case where a single branding obligation falls outside the scope of the block exemption, e.g., because the parties' market shares exceed 30%. It provides that, even outside the scope of the block exemption, single branding obligations shorter than one year (in the absence of dominance) generally do not even fall within the scope of Article 101(1)[9]. However, paragraph 133 of the VGL also seems to suggest that single branding obligations exceeding five years are not only automatically considered to have anti-competitive effects, but are also unlikely to qualify for an exemption.[10] This rigid approach to single branding obligations exceeding five years is inappropriate, for two reasons.

25. *Firstly,* as explained above, if a single branding obligation can be terminated with a reasonable notice period, it allows competing suppliers to target customers with offers, and also allows customers to switch suppliers. When determining the foreclosure effect and impact on the customer's ability to switch, the term of the non-compete obligation seems less relevant than the duration of notice period. In this context, the VGL's focus on a five year terms seems arbitrary. Instead, the VGL should focus on providing guidance in relation to an appropriate notice period which can be considered sufficient to prevent supplier foreclosure.

26. *Secondly,* the guidance in paragraph 133 seems to apply even below the 30% market share threshold, i.e., if the non-compete obligation falls outside the bock exemption because its duration exceeds five years. In case of such small market shares, it is unclear why the VGL proposes to set up a presumption of anti-competitive effects and declares that exemption will be unlikely.

4. QUESTIONS 3.5 – 3.8

3.7 Do you see the need for a revision of the VGL (including Section VI) in light of major trends and/or changes during the past 5 years (e.g. the increased importance of online sales and the emergence of new market players)?

4.1 Selective distribution of luxury goods and other high quality products

27. We suggest clarifying the section in the VGL on selective distribution (section VI 2.4) to reflect the ECJ's recent judgments in *Coty*[11] and in particular include guidance on the meaning of *luxury goods*. In our view, this is vital in order to prevent divergent approaches across various Member States.

28. In addition, to avoid the risk of diverging interpretations of paragraph 46 of the *Pierre Fabre* judgment[12] we would like to see confirmation in the VGL that high-quality goods (including cosmetic and body hygiene products) are able to meet the criteria necessary to establish a selective distribution network, even if they are not *"luxury goods"*. The Commission's April 2018 Competition policy brief seems to have taken this position already, which could be replicated in the revised VGL: *"[a]gainst this background the differentiation made by the Court of Justice in paragraph 32 of the Coty judgment between luxury goods (at issue in Coty) on the one hand and other products such as the cosmetic and body hygiene goods at issue in Pierre Fabre should in practice only be of limited relevance, as a clear delineation between one and the other will in many*

9 *"single branding obligations shorter than one year entered into by non-dominant companies are generally not considered to give rise to anti-competitive effects."* para 133 of the VGL

10 *„single branding obligations exceeding five years are for most types of investments not considered necessary to achieve the claimed efficiencies or the efficiencies are not sufficient to outweigh their foreclosure effect.",* para 133 of the VGL

11 Judgment of the Court, 6 December 2017, *Coty Germany GmbH* C-230/2016, ECLI:EU:C:2017:941,

12 Judgment of the Court, 13 October 2011, *Pierre Fabre Dermo-Cosmétique* C‑439/09, EU:C:2011:649

cases neither be possible, nor necessary as high-quality and high-technology products similarly qualify for selective distribution compliant with Article 101(1) TFEU as long as the Metro-criteria are fulfilled."[13]

4.2 Marketplace bans in selective distribution systems

29. We suggest clarifying the section on selective distribution in the VGL (VI.2.4) to provide guidance as to how marketplace bans should be assessed both within and outside selective distribution systems. This is currently unclear, after the ECJ's judgment in *Coty* left a number of questions open. This again creates a risk of diverging approaches between various Member States.

30. For example, the Commission's April 2018 Competition policy brief seems to have taken the position that marketplace bans can comply with Article 101(1) TFEU even in case of certain non-luxury products, such as high-quality branded products: *"[s]ome of the Court's considerations in this regard appear to be equally applicable to those other product categories"*.[14] The French competition authority seems to have taken a similar position in its decision regarding *Stihl*.[15]

31. In contrast to the approach of the Commission and the French NCA, the Bundeskartellamt published a paper which seems to indicate a more sceptical view: *"The first unsolved issue concerns the question of where the prohibition of the use of online market-places in selective distribution systems constitutes a restraint of competition according to Article 101 (1) TFEU. The ECJ's statements in this regard are limited to luxury goods. One cannot simply transfer them to other (high-quality) brand products."*[16]

4.3 Combining exclusive and selective distribution in the same territory

32. We consider there is a need for clearer guidance on the circumstances in which exclusive and selective distribution may be combined in the same territory without raising concerns under Article 101(1) TFEU. Paragraph 57 of the VGL states that "*Within the territory where the supplier operates selective distribution, this system may not be combined with exclusive distribution as that would lead to a hardcore restriction of active or passive selling by the dealers under Article 4(c)*." To the extent that exclusive and selective distribution is combined at the same level of the supply chain (e.g. retail), we accept that the guidelines are not controversial: we would agree that there is a potential problem under Article 4(c) if retailers who are members of a selective distribution network cannot make active or passive sales to end-users located in the exclusive territory of another dealer in the same territory. However, we would welcome if the Commission could provide guidance on the circumstances where exclusive distribution at the wholesale level could be combined with selective distribution at the retail level of trade.

---

[13] Competition policy brief, April 2018, page 2, at http://ec.europa.eu/competition/publications/cpb/2018/kdak18001enn.pdf

[14] Id. page 3

[15] See press release at http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=684&id_article=3290&lang=en, regarding Decision 18-D-23 of 24 October 2018 regarding practices implemented in the distribution of outdoor power equipment sector.

[16] See *Competition restraints in online sales after Coty and Asics - what's next?, page 2, at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Schriftenreihe_Digitales_IV.pdf?__blob=publicationFile&v=2*

5. QUESTION 3.10

3.10 Is there any area for which the VBER and/or the VGL currently do not provide any guidance while it would be desirable?

5.1 MFC clauses

33. Currently, we experience a huge disparity across national competition law authorities regarding the treatment of *"most favoured customer"* (**MFC**) clauses. We would welcome guidance from the Commission in this regard.

5.2 Information exchange

34. We would welcome guidance in the VGL about information flows between various levels of the distribution chain, particularly in case of dual distribution. There is detailed guidance on information exchange generally in the Commission's Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (**Horizontal Guidelines**).[17] However, the Horizontal Guidelines exclude from their scope non-reciprocal vertical agreements between competitors.[18]

35. As an example of where guidance may be valuable, we refer to commodity producers, which typically need to collect sales volume forecasts from their distributors. This is needed so that they can plan production capacities, raw material purchases etc. Such producers may also regularly need to inform their distributors in advance about scheduled plant maintenance, to allow distributors and their customers to arrange for alternative sources of supply for the relevant time periods. However, sometimes the same producers also directly sell their products to customers. Thus, such producers and their distributors would be considered as competitors in the downstream market (see Article 1(c) of the VBER).

36. According to paragraph 73 of the Horizontal Guidelines, *"[e]xchanging information on companies' individualised intentions concerning future conduct regarding prices or quantities (3) is particularly likely to lead to a collusive outcome"*. According to paragraph 86 of the Horizontal Guidelines, *"Generally, information related to prices and quantities is the most strategic, followed by information about costs and demand."* Although this guidance is technically not applicable to vertical agreements[19], it still creates uncertainty as to how a producer engaged in dual distribution can collect sales forecasts from its distributors that are necessary to run its plant, while also ensuring competition law compliance. For example, larger producers with a differentiated sales organisation can sometimes implement information barriers, designed to ensure that any sales forecasts received from distributors are not used by the producer's own sales operations. They can do this by using separate dedicated sales teams to deal with distributors and end-customers. However, this is not always possible in smaller organisations, where only a limited number of sales persons are available to deal with sales. Even where separate sales teams can be used at an operative level, such information barriers are typically impossible to implement at top management level. Board level decision-makers may need access to a wide range of key metrics of the business, including to sales forecasts through all sales channels. At the same time, they are also ultimately responsible for determining the production and pricing policy of the company.

37. We would welcome guidance in the VGL clarifying that this sort of information exchange does not restrict competition where it is objectively necessary for the producer to run its operations. It would

[17] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11, 14.1.2011, p. 1–72

[18] See footnote 3 of paragraph 12 of the Horizontal Guidelines

[19] See footnote 3 of paragraph 12 of the Horizontal Guidelines

be also helpful if the VGL provided non-exhaustive examples of measures that are considered appropriate and sufficient to address these issues.

38. Information exchange is also relevant in relation to collection of information from downstream parties, e.g., retailers. We would be keen to see guidance on the VGL on how far upstream parties (e.g., manufacturers, wholesale distributors) can go when collecting information from retailers on their own products or competing products. In particular, more guidance would be welcome on reporting obligations from "tier 2" distributors up to "tier 1" distributors and then up to the supplier, i.e. where a supplier has more than one layer of distributor. From a commercial perspective, it is often desirable for such information to flow up the distribution chain to check the performance of distributors further down the channel.

5.3 Specific guidance on the ancillary nature of vertical restraints

39. We suggest complementing the guidance provided in chapter VI.1 of VGL on the framework of analysis under Article 101 so that it also refers to ancillary restraints. Whether a restriction is ancillary has been held by the EU courts to be relevant to for the assessment of vertical restraints in one of the very first judgments concerning EU competition law.[20] Subsequently, other cases have confirmed that vertical restraints can fall outside of Article 101(1) because of their ancillary nature.[21] Most recently, the ECJ's judgment in *MasterCard v Commission*,[22] although not specifically a case related to vertical restraints, provided detailed guidance on the framework of analysis to determine whether a restriction is ancillary to a main operation, and therefore falls outside the scope of Article 101.

40. Currently, there is only limited general guidance available on ancillary restraints in the Commission's Guidelines on the application of Article 81(3) of the Treaty (**Article 81(3) Guidelines**).[23] This guidance is not referred to in chapter IV.1 of the VGL, which sets out the Article 101 framework of analysis. At the very least, therefore, we suggest adding a reference in the VGL to the relevant paragraphs of the Article 81(3) Guidelines.

41. However, we are of the view that substantive guidance on ancillary restraints needs to be given in the boy of the VGL. In fact we believe that the VGL risks producing false negatives, if it sets out a framework of analysis without discussing such a fundamental matter as ancillary restraints. We appreciate that ancillary restraints are not only relevant in vertical relationships, and therefore the VGL is probably not the right instrument to provide full general guidance on this matter. However, the Commission has already provided guidance on ancillary restraints specifically in relation to mergers. It would be consistent with this approach to provide guidance in relation to vertical agreements separately, in the VGL.

5.4 Guidance on single branding of spare parts within an OEM's service network outside the scope of the block exemption

42. As set out in paragraph 59 of the VGL, the VBER block exempts obligations whereby an *"original equipment manufacturer may require its own repair and service network to buy spare parts from it"*. We would welcome similar guidance outside the scope of the block exemption (i.e., above the 30% market share threshold) in relation to obligations imposed on an OEM's service network to use

---

[20] See *„[i]n particular it may be doubted whether there is an interference with competition if the said agreement seems really necessary for the penetration of a new area by an undertaking",* in Judgment of the Court of 30 June 1966 *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.),* Case 56-65, ECLI:EU:C:1966:38, [1966] ECR 225 (English ed.), p. 250, paragraph 1

[21] See e.g., *Pronuptia de Paris*, 161/84, EU:C:1986:41, paragraphs 15 to 17

[22] Judgment of the Court of Justice, 11 September 2014, *MasterCard et al v Commission*, C‑382/12 P, ECLI:EU:C:2014:2201, paras 89-95 and 105-114

[23] See the Commission's Guidelines on the application of Article 81(3) of the Treaty, paras 28-31

original spare parts. Such guidance would be valuable both in relation to warranty and off-warranty repair services, as follows.

43. Warranty repair services are very often carried out by the OEM's service network based on a contract with the OEM. We believe that in such a case, an obligation to use original spare parts should not be considered a restriction under Article 101(1) at all. Such an obligation can be justified by the fact that ultimately OEMs are liable to ensure that warranty repairs are carried out appropriately. The Commission has already recognised this in relation to the automotive sector, in paragraph 39 of the Motor Vehicle Guidelines:[24] *"an obligation on an authorised repairer to use original spare parts supplied by the motor vehicle manufacturer for repairs carried out under warranty, free servicing and motor vehicle recall work would not be considered to be a single-branding obligation, but rather an objectively justified requirement."*. The same principles are applicable in relation to warranty services in relation to any other consumer products. Therefore, we suggest considering including similar guidance in the VGL as provided in paragraph 39 of the Motor Vehicle Guidelines, albeit in relation to a wider range of consumer products.

44. When imposing similar spare parts-related single branding obligations for non-warranty repair services, we would also welcome general guidance in the VGL that recognises the possible efficiencies arising out of an enhanced brand image of the distribution and service network. Currently such guidance is provided only on a sector specific basis in paragraph 30 of the Motor Vehicle Guidelines: *"positive effect of non-compete obligations in the motor vehicle sector relates to the enhancement of the brand image and reputation of the distribution network. Such restraints may help to create and maintain a brand image by imposing a certain measure of uniformity and quality standardisation on distributors, thereby increasing the attractiveness of that brand to the final consumer and increasing its sales."* Although this efficiency is potentially equally relevant in relation to a number of other consumer goods, the VGL does not currently mention it in relation to single branding.[25]

6. QUESTION 6.1

6.1 Is there anything else you would like to add which may be relevant for the evaluation of the VBER and/or the VGL?

6.1 Informal guidance

Although it is technically possible to request informal guidance through the Commission's Guidance Letters notice,[26] in practice this opportunity seems to have remained unused. In 2014, the Commission noted that *"to date only a few approaches have been made to the Commission and none of them fulfilled the conditions for a request for a guidance letter set out in the Notice."* [27] Given the fast-paced nature of digital markets and new ways of doing business that are emerging, it may be useful for the Commission to take a more flexible approach and more readily allow companies to ask for informal guidance on novel vertical issues. The revised VGL could be an opportunity to set out criteria under which the Commission would consider the conditions in its Guidance Letters notice to be met in the case of vertical agreements.

[24] Commission notice — Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles OJ C 138, 28.5.2010, p. 16–27

[25] See in particular paragraph 144 of the VGL, according to which only the free riding problem, the hold-up problem and capital markets imperfections are particularly relevant in relation to the assessment of single branding under Article 101(3) of the Treaty

[26] Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters) OJ C 101, 27.4.2004

[27] See Commission Staff Working Document: Ten Years of Antitrust Enforcement under Regulation 1/2003, COM(2014) 453, paragraph 193