SUPPORTING DOCUMENT TO THE CLIFFORD CHANCE RESPONSE TO THE CONSULTATION ON THE 2018 EVALUATION OF THE VERTICAL BLOCK EXEMPTION REGULATION

This supporting document contains responses to two questions.

First question

In response is to the following question:

" Please estimate the level of legal certainty provided by the VBER and the VGL for each of the following areas by providing a qualitative estimate using the following number coding: 1 (very low), 2 (slightly low), 3 (appropriate), or selecting "DN" if you do not know or "NA" if not applicable to your organisation

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"

Our response:

- Meaning of agreement: Recital 25(a) of the VGL states "[i]f after a supplier's announcement of a unilateral reduction of supplies in order to prevent parallel trade, distributors reduce immediately their orders and stop engaging in parallel trade, then those distributors tacitly acquiesce to the supplier's unilateral policy". This statement misrepresents the case law on the circumstances in which an agreement can arise through tacit acquiescence. The key factor in Case T-41/96 Bayer v Commission was not (as implied by this paragraph) whether distributors de facto complied or continued to engage in parallel trading. As persuasively explained by Eric Gippini-Fournier of the Commission's Legal Service in his article "The Notion of Agreement in a Vertical Context: Pieces of a Sliding Puzzle" (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1892742), the determining factor was instead the fact that the supplier's expressed policy did not require any acquiescence at all to be implemented. Given that a reduction of supplies does not "require explicitly or implicitly the cooperation of the other party" (it will occur regardless of whether distributors reduce their orders) it is only in respect of the desired cessation of parallel trade that tacit acquiescence might arise. However, if supplies are reduced, it will often be the commercially rational (and entirely unilateral) response for distributors to focus their sales of the available products on their home market. Consequently, a simple cessation of parallel trading cannot be assumed to be the expression of a tacit agreement between the parties and there is no support in the case law for such an assertion.

- De minimis agreements: Recital 10 states that "As regards hardcore restrictions referred to in the de minimis notice, Article 101(1) may apply below the 15 % threshold, provided that there is an appreciable effect on trade between Member States and on competition." This should be updated to reflect the judgment of the CJEU in Case C-226/11 Expedia.

- Agency: The VGL recitals relating to agency (12-21) need updating to reflect the reality of online trading platforms, many of which sell products and services on an agency basis. In particular, it should be clarified (in line with what appears to be the Commission's enforcement policy in this area) that the requirement that agents do not make "market specific investments" does not extend to investments in the creation, operation and enhancement of the (market specific) platform itself. It should also be clarified who the Commission considers to be the "buyer" for different types of online platforms (see further our response regarding major trends during the last five years).

- Agency: The VGL recitals relating to agency also need to clarify various other issues:

    - It is not clear what is meant by "insignificant risks" (para 15).

    - Manufacturers will often appoint a third party with specific responsibility to supply products to its retailers at prices that have been negotiated between the manufacturer and the retailers. These third parties are often referred to as "wholesalers" and analysed as such under the VBER and VGL, which poses various obstacles to such arrangements, notwithstanding that their role is more akin to that of an agent or provider of logistics services. To reflect commercial realities the VGL should recognise that such providers can be considered to be agents, even if they acquire title to the property or goods. The question whether the property of the goods bought or sold vests in the agent or not is in our view not an efficient criterion for determining whether a genuine agent bears risks.

    - The limitation of a non-compete clause for an agent limited to five years may not be justified in all cases. It should rather reflect the duration of the agency agreement.

    - Where a non-genuine agency agreement is concerned, a certain price maintenance element is inherent as well. Therefore, at least some restrictions should be allowed in this context as well. It would be helpful to have clear definitions of what may be allowed in this case.

- Non-reciprocal vertical agreements between competitors: Our experience is that suppliers engaging in dual distribution are cautious about gathering information from their third party distributors relating to the selling and marketing of the suppliers'

products, as it is unclear whether such information disclosures fall to be considered as part of the vertical dual distribution arrangement that is covered by the VBER or, alternatively, risk being treated as information exchanges between competitors. Gathering such information from distributors allows suppliers to develop more effective and efficient sales and marketing strategies, so we consider that it should be expressly stated in the VGL as being covered by the VBER.

- Vertical agreements containing provisions on IPR: The application of the VBER and VGL to agreements containing IPR is one of the areas in which we have encountered the least clarity and legal certainty. In particular, there are various types of IPR arrangements that are not covered by the VBER, nor any other block exemption, and for which there is no relevant guidance. For some such agreements (franchise agreements that primarily concern licensing of IPRs) the VGL states that "the Commission will, as a general rule, apply the principles set out in the Block Exemption Regulation and these Guidelines to such an agreement". This raises the question of why those agreements are not simply covered by the VBER and VGL (as opposed to the principles set out therein)? For other agreements (such as those listed in recital 33), practitioners have tended to advise on them either by applying the principles set out in the Technology Transfer Block Exemption and associated guidelines (for copyright, following recital 48 of the technology transfer guidelines) or the VBER/VGL (e.g. for trademark/brand licensing). Given the prevalence of these types of agreement, it seems to us that a clearer assessment regime would materially contribute to good market performance.

- Territorial/customer restrictions (Article 4(b) VBER): It is unclear what a supplier must do to reserve an exclusive territory or customer group for itself and we have seen businesses receive conflicting advice in this respect. This also gives rise to issues in those cases where a territory / customer group has not been reserved to the supplier or allocated by the supplier to another buyer (“white spots”). Given that suppliers have inherent incentives to ensure that demand for their products in a given territory or customer group is met, our view is that it would be unnecessary and inefficient to require suppliers to do anything more than simply document the reservation in the relevant distribution arrangements, and that there should be no other conditions or criteria for such reservation.

- Territorial/customer restrictions (Article 4(b) VBER): There seems to be a difference in the wording of Art. 4 lit b in some translations for specific Member States. The term "customer" in the English version is translated in the German version with "Kundengruppe", which is equivalent to "customer group" which may have a different meaning. It should be clarified and harmonized in all texts of the VBER.

- Non-compete obligations with indefinite duration or exceeding 5 years: The term "premises" should be extended to business activities, as it is too restrictive to only focus on premises.

- Online sales restrictions: we note that paragraph 54 requires updating in light of the Coty judgment. The Commission should take the opportunity to set out a clear and consistent position on its implications, taking into account potentially conflicting positions adopted by national competition authorities. Finally, our experience is that businesses have not tended to take up the option described in recital 52(b) of minimum offline sales volumes, as they consider that such a system would be inefficient and unwieldy to implement, monitor and enforce.

- Hardcore restrictions falling outside the scope of Article 101(1) of the Treaty or likely to fulfil the conditions of Article 101(3): We submit that the Commission should consider how the examples in recitals 60-64 might be brought into the cover of the VBER, e.g. by devising additional objective criteria (if additional criteria are required) to determine whether such agreements qualify for exemption, in light of the experience of the Commission and NCAs in applying these recitals, since their introduction.

- The framework of analysis (recitals 96-127 VGL): recital 102 should be clearer that an agreement that restricts intra-brand competition will not be considered to infringe Article 101(1) if there is fierce inter-brand competition in the market, i.e. that Article 101(1) prohibits restrictions of competition "in the round", so will not necessarily catch a restriction of a specific type of competition.

- Upfront access payments: Recital 204 states that these may be anticompetitive if they "induce the supplier to channel all its products through only one or a limited number of distributors". It seems to us counterintuitive to refer to a payment by a supplier to a retailer as being an inducement to that same supplier not to supply its products to other retailers.

- Maximum resale pricing: Recitals 227-228 assert that the imposition of maximum resale prices is anticompetitive if those prices become a "focal point" and result in more uniform pricing by distributors. However, it is common and desirable for maximum resale prices to be set below the level at which sellers would choose to adopt when acting on the basis of their individual commercial incentives. That addresses double marginalisation issues, and has the pro-competitive effect of driving demand. Yet it is inevitable in such cases that distributors will uniformly adopt the maximum price as their selling price. The VGL should clarify that the setting of maximum resale prices that are likely (because they fall short of the competitive market price) to be followed by all resellers should not be equated with the setting of a focal price point.

Second question

In response to the following question:

"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"

Our response:

We consider that Resale Price Maintenance (RPM) gives rise to pro-competitive efficiencies in a wider range of circumstances than is recognised by the current VBER and VGL. Our view is that RPM is in practice highly unlikely to give rise to anticompetitive effects where the parties' market shares are low and there is significant inter-brand competition and that, in those circumstances, it will often give rise to pro-competitive incentives for distributors to invest in promoting the relevant brand (as was the case in the RPM arrangements of Tooltechnics that were cleared by the Australian Competition and Consumer Commission – see https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/resale-price-maintenance-notifications-register/tooltechnic-systems-aust-pty-ltd-rpm20181). At minimum, we consider that it should be possible to extend the cover of the VBER to those specific circumstances covered by recital 225 of the VGL (short term low price campaign and introductory period after launch of a new product).

Article 4(b)(iii) VBER requires that members of a selective distribution system (SDS) must be free to sell to unauthorized distributors located outside the territory in which the SDS is operated. The problem here is that those distributors cannot be prevented from reselling to distributors within the SDS territory, so undermining the SDS. As a result, suppliers are forced to choose between implementing a SDS throughout the entire EU (which may not be the optimal distribution model in some territories), or applying an ineffective – and easily circumvented – selective distribution system in part of the EU. We consider that the VBER should cover restrictions on sales to unauthorized distributors within an SDS territory by any distributor (within or outside the SDS territory).