ANTITRUST COMMITTEE OF THE INTERNATIONAL BAR ASSOCIATION UNILATERAL CONDUCT AND BEHAVIOURAL ISSUES WORKING GROUP SUBMISSION IN RESPONSE TO THE PUBLIC QUESTIONNAIRE FOR THE EVALUATION OF THE VERTICAL BLOCK EXEMPTION REGULATION

1 Introduction and Purpose of Submission

1.1 Introduction

The International Bar Association's Unilateral Conduct And Behavioural Issues Working Group (the "Working Group") sets out below its submission on the Evaluation of Commission Regulation (EU) No 330/2010 (Vertical Block Exemption Regulation, "VBER"), together with the Commission Guidelines on Vertical Restraints ("VGL").

The IBA is the world's leading organization of international legal practitioners, bar associations and law societies. The IBA takes an interest in the development of international law reform and helps to shape the future of the legal profession throughout the world.

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1.2 Purpose of Submission

The Working Group welcomes the opportunity to respond to the most relevant issues raised by the Questionnaire and is supportive of the European Commission's initiative to evaluate the important topic of whether the VBER, together with the VGL, is still effective, efficient, relevant, in line with other EU legislation and adds value.

The Working Group's central focus is to provide an international forum for thought leadership with respect to competition / antitrust law developments. The Working Group is neither an undertaking that can provide its own

experience nor an association that has consolidated such experiences. Nevertheless, the Working Group comprises lawyers with significant experience in a number of jurisdictions and brings together experience from advising a large number of clients in matters related to the VBER and VGL. As such, and to assist in the further consideration of the potential alternatives, the Working Group has sought to share its perspective on certain points raised in the Questionnaire.

2 Issues raised by the Questionnaire

2.1 Do you perceive that the VBER and the VGL have contributed to promote good market performance in the EU?

Yes, overall the Working Group believes that the VBER and the VGL have enhanced legal certainty and have facilitated the self-assessment of companies in the context of Article 101 of the Treaty and corresponding national rules.

They also provide useful guidance and insight in terms of applying the effects-based approach in competition law cases, thus complementing other instruments in the context of Arts. 101 and 102 TFEU.

Moreover, both the VBER and VGL have helped provide for a more consistent and clear application of competition rules throughout the common market by all Member States.

2.2 Do you consider that the VBER and the related guidance in the VGL provide a sufficient level of legal certainty for the purpose of assessing whether vertical agreements and/or specific clauses are exempted from the application of Article 101 of the Treaty and thus compliant with this provision (i.e. are the rules clear and comprehensible, and do they allow you to understand and predict the legal consequences)?

In general, the Working Group considers that the VBER and the VGL provide a sufficient level of legal certainty. However, there are certain areas where more clarity or additional guidance would be preferable, including, among others:

- the strict application of the RPM hardcore restriction in the context of certain type of vertical agreements exhibiting an "intense" degree of cooperation (such as franchising agreements);

- the combination of distribution modes, such as selective and exclusive distribution;
- the application of selective distribution schemes; and
- on-line restrictions, particularly in the light of the *Coty* and *Guess* cases, with a view to minimizing the risk of divergent positions by authorities and courts at national level.

Each of these aspects is further discussed below.

2.3 Are there other areas for which you consider that the VBER and/or the VGL provide insufficient legal certainty?

Yes, the Working Group believes that developments would be welcome in relation to "dual distribution" and the definition of "competing undertakings".

Dual distribution

The Working Group believes that the VBER and VGL should specifically address dual distribution systems, given their prominence in the on-line world. While dual distribution is covered under article 2(4) VBER, the VGL's treatment is essentially limited to an indication that "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" (paragraph 28).

Further guidance in the VGL would be helpful in relation to competition issues that usually arise in the framework of dual distribution. Specifically, it would be useful to clarify to what extent, or under which conditions (i) information exchanges in dual distribution agreements are admissible or problematic, in light of their essentially vertical nature (if, for instance, a rationale different from pure horizontal exchanges of information could be considered), or (ii) if dual distribution raises concerns even when interbrand competition is not negatively affected.

Potential competitors

The Commission should also consider either revising or further specifying the definition of "potential competitors" as part of the definition of "competing undertakings" (as used in Article 1(1) (c) of the VBER) or devoting a more in-

depth explanation to the notion of "potential competitors" in the VGL (currently: Section 2.2. of the VGL).

A review of the VBER and the VGL is necessary, in particular, due to the market changes brought about by the online distribution. For example, online distribution made it significantly easier for manufacturers to be a constraining factor on their distributors as they now have a much more realistic possibility to enter the wholesale or even retail market. In the online world establishing a retail presence (i.e., essentially a webshop, which can then cover an entire country or region) requires much less effort and investment than the opening of several brick and mortar shops (with physical presence, lease agreements, warehouses, licenses, etc.). This is especially true where the manufacturer already has a significant database on the final customers (e.g., if they have the option to register with a central (manufacturer-driven) customer service or loyalty program upon the purchase of the manufacturer's products). In fact, several manufacturers/brand owners have done exactly this as they felt they have been forced to do so to protect their brand. This entailed brand owners favouring vertical integration as opposed to using a system of independent distributors, a trend that could be harmful to competition in general and to SMEs in particular.

As a result, the notion of "potential competitor" has now become somewhat blurred and thus the Commission could consider making the individual elements of the definition of "potential competitors" stricter or at least more reflexive of the online environment and its specific characteristics (e.g., by providing examples from the online world as to what situation would be considered as a falling within the scope of the definition and what would fall outside).

2.4 Leaving aside the appropriateness of the scope of the current list of hardcore restrictions (Article 4 VBER) and excluded restrictions (Article 5 VBER), do you consider that the additional conditions defined in the VBER (i.e. Article 2 and 3 VBER) lead to the exemption of types of vertical agreements that do not generate efficiencies in line with Article 101(3) of the Treaty?

No.

2.5 Are there other types of vertical agreements for which it can be assumed with sufficient certainty that they generate efficiencies in line with Article 101(3) of the Treaty but which are not covered by the current scope of the exemption?

The Working Group has not identified any major category of agreement of this kind.

2.6 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?

The Working Group believes that a fundamental rethink of the Commission's rigid approach of treating RPM generally as a hardcore restriction (by object) is warranted. This is because the loss of intrabrand competition can only be problematic if interbrand competition is limited. In the absence of supplier market power and/or evidence of retailer collusion, RPM can have a commercial rationale that is not anticompetitive and may thus generate efficiencies in line with Article 101(3) EC Treaty.

The Commission's untenable approach is particularly pronounced in relation to vertical agreements exhibiting a high degree of cooperation between suppliers and distributors (such as franchising agreements). The end-result – aside from being at odds with established economic theory – is often impracticable and counter-intuitive for businesses.

Moreover, the approach also appears to be wrong from an economic perspective. Provided there is sufficient interbrand competition, it is hard to see why a manufacturer would have any interest in maintaining high prices (with the potential of diminishing sales) unless there are sound commercial reasons for doing so (such as maintaining brand equity, investment in customer services by retailers or other justifications.

2.7 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?

Article 5(1)(b) of the VBER excludes from the exemption post-termination non-compete obligations, unless circumstances in Article 5(3) of the VBER occur.

The requirements of the obligation being (i) limited to the premises and land from which the buyer has operated during the contract period (which must be interpreted strictly, according to the CJEU), and (ii) indispensable to protect know-how transferred to the buyer, render this provision inapplicable in most cases.

The Working Group believes that these requirements should be reviewed and reconsidered in light of the current business and market environment, where on-line commerce is the leading trend and few operators commercialize goods or services from "premises or land" only. In order to provide greater certainty to stakeholders the Commission should evaluate whether such requirements should also apply in circumstances where the buyer operates on-line.

2.8 Are there other types of vertical restrictions for which it cannot be assumed with sufficient certainty that they generate efficiencies in line with Article 101(3) of the Treaty but which are not captured by the current list of hardcore restrictions (Article 4 VBER) or excluded restrictions (Article 5 VBER)?

There has been a discussion amongst some scholars and practitioners whether it would be appropriate to include in the list of hardcore restrictions (Article 4 of the VBER) certain "most favoured nation" (MFN)-type/parity clauses, notably the so-called wide MFN/parity clauses, on the basis that they have been found to produce anti-competitive effects. In the Working Group's view, this is not warranted, particularly as MFN-type/parity clauses very often have pro-competitive effects (e.g. reduction of search and negotiation costs, incentivizing specific investments by the buyer etc).

From a policy perspective, the Commission should instead consider providing additional guidance in the VGL in order to expressly clarify that MFN-type/parity clauses are not considered restrictions by object, with a view to minimizing the risk of divergent positions by authorities and courts at national level (see Response to Question 2.16 below).

2.9 Does the assessment of whether the VBER, together with the VGL, is applicable to certain vertical agreements generate costs for you (or, in the case of a business association, for the members you are representing)?

Yes, the Working Group believes that the assessment does generate (manageable) costs for clients. Nevertheless, overall, the Working Group

considers that it saves costs for external legal advice when compared to the situation in the absence of the VBER and VGL.

2.10 Does the assessment of whether the VBER, together with the VGL, is applicable to certain vertical agreements generate costs proportionate to the benefits they bring for you (or, in the case of a business association, for the members you are representing)?

Yes, the Working Group believes that the assessment of whether the VBER, together with the VGL, is applicable to certain vertical agreements in general generates limited costs proportionate to the benefits they bring.

Nevertheless, the Working Group also points out that for agreements that fall outside the narrow confines of the VBER the assessment can be significantly more costly and that an appropriate extension of the VBER or additional guidance would therefore be welcome.

2.11 Would the costs of ensuring compliance of your vertical agreements (or, in the case of a business association, the vertical agreements of the members you are representing) with Article 101 of the Treaty increase if the VBER were not prolonged?

Yes, the Working Group believes that uncertainty, and costs, may be increased if the VBER and VGL are not prolonged.

A decision not to prolong the VBER may increase uncertainty for for enterprises. The VBER provides a *safe harbour* and therefore legal certainty to a vast number of vertical agreements across the EU, allowing most businesses at relatively low cost to assess whether vertical arrangements are competition-law compliant. While many of the principles established in the VBER are settled, in its absence the possibility of judicial and administrative divergence and, with it, additional cost and uncertainty, cannot be ruled out.

The Working Group also believes that the prolongation of the VBER and the VGL may be beneficial to other jurisdictions developing their own competition rules and looking to the European Union for guidance.

2.12 Have the costs generated by the application of the VBER and the VGL increased as compared to the previous legislative framework (Reg. 2790/1999 and related Guidelines)?

While the Working Group does not have access to data, the impression of the members of the Working Group is that costs do not appear to have increased as compared to the previous legislative framework, or, at least not significantly.

2.13 Would you expect any effect in case the VBER were to be prolonged and the VGL maintained without any change?

The Working Group firmly believes it would be preferable to review and update the VBER and the VGL. The current market and business environment has significantly evolved and changed in the last ten years, leading to a fundamental shift in the parameters of the way business is done, the willingness of manufacturers to invest in products (especially innovation) and brands, and the willingness (and ability) of distributors and retailers to invest in the quality of their operations. All of these factors have a significant effect on consumer benefits, such that a rethink of the approach of the VBER is timely.

2.14 Would you expect any effect in case the VBER were not to be prolonged and the VGL were to be withdrawn?

Yes. The Working Group believes that if the VBER were not prolonged companies would be exposed to greater risk of divergent positions between competition authorities and courts in different member states (as has recently occurred, for example, in relation to platform bans in the context of selective distribution).

2.15 Do you see the need for a revision of the VBER 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)?

Yes. As described above, the Working Group feels that the rules in the VBER and VGL be reviewed to ensure that they encourage a diverse ecosystem of distribution activities rather than distorting incentives towards excessive vertical integration.

2.16 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)?

Yes, the Working Group believes that there is scope of revising the VGL in relation to certain issues, in particular:

Agency

- Definition of agency*:*

Sometimes the parties' clear intention is that there should be an agency relationship in which a third party acts as a "middle man" in fulfilling a contract, but the third party takes on certain risks that have the effect of taking the arrangement outside the definition of agency given in the VGL.

For example, a third party may facilitate "de facto direct sales" between a manufacturer and an end user i.e., in case where a manufacturer negotiates and agrees sales prices directly with an end user, and thereafter the third party is involved as an intermediary to purchase the products from the manufacturer and resell them to the end user, solely for the purpose of facilitating the distribution logistics, customer communication and collection of payment in return for commission.

In this situation, despite the superficial appearance that the third party is "re-selling" the products at a fixed price, the anti-competitive concerns typically raised in relation to RPM do not apply, as the end user negotiates directly with the manufacturer to achieve the lowest possible purchase price, and the third party would not have been able to achieve a better price as an intermediary.

This practice does not lead to any of the anti-competitive effects of RPM set out in paragraph 224 of the VGL, and indeed creates efficiencies by ensuring the end user can obtain the lowest possible price. Bringing a facilitator/logistics provider into the distribution chain also helps the manufacturer to balance its commercial risks and break into a new or foreign market. It would therefore be helpful to give companies more assistance in assessing such arrangements, which may not fit neatly into the definition of

agency currently set out in the VGL but which may well be economically efficient and not infringe Article 101.

- Platform sales

The Working Group believes that more and updated guidance is needed on the application of the rules on agency in the context of ecommerce and in particular distribution via platforms, because the existing VGL and case law are difficult to apply in many such situations.

This is in large part because the existing rules developed to deal with situations in which an agent operates as an "auxiliary organ" which forms an integral part of a principal's business, where their relationship is characterized by "economic unity". The current criteria are therefore difficult to apply where, for example, as is now often the case, the agent rather than the principal enjoys greater market power and is in a position to demand significant commission and pricing discretion. Given this new situation there is a significant risk of divergent approaches as between different courts and authorities. Additional guidance, preferably with worked examples, on how the agency exception applies to agency arrangements concluded between platforms and suppliers, and in digital markets, would therefore be welcome.

Resale price maintenance (RPM)

As indicated above (Q. 2.6), the Working Group believes that a fundamental rethink of the Commission's rigid approach of treating RPM generally as a hardcore restriction (by object) is warranted. This is because the loss of intrabrand competition can only be problematic if interbrand competition is limited.[1] In the absence of supplier's market power and/or evidence of retailers' collusion, RPM can be assumed to generate efficiencies in line with Article 101(3) EC Treaty.

As an aside, the Commission could consider introducing a (horizontal) *de minimis* rule in relation to applying RPM in circumstances where the supplier and the distributor cannot be deemed to possess market power in their respective markets. From a policy perspective, as indicated above, there is no compelling argument for seeking to maintain intrabrand competition where the participating parties in the agreement have negligible market shares.

[1] The VGL acknowledge that the loss of intra-brand competition can only be problematic if inter-brand competition is limited (see, indicatively, paragraphs 100, 102, 176, 177 and 178 VGL)

The Commission's untenable approach as regards the rigid application of the RPM hardcore restriction is particularly pronounced in relation to vertical agreements exhibiting a high degree of cooperation between suppliers and distributors (such as franchising agreements or similar distribution system applying a uniform distribution format). The end-result – aside from being at odds with established economic theory – is most often impracticable, counter-intuitive and unrealistic for businesses. Even if the Commission ultimately opts for retaining RPM in the list of hardcore restrictions of Article 4 VBER, we believe that there is scope for adopting a different (and economically more realistic) approach at least in relation to such distribution formats:

- Currently, paragraph 225 of the VGL recognizes that RPM may possibly qualify for an individual exemption pursuant to Article 101(3) TFEU in only a limited number of circumstances, notably for the introduction of a new product for an interim period, as well as for organizing in a franchise system or similar distribution system a coordinated short term low price campaign (2 to 6 weeks in most cases). In all other circumstances, the RPM hardcore restriction is applied with rigidity also in the context of such systems, following the general principle that independent distributors assuming business risk (thus not qualifying as genuine agents within the meaning of the VBER/VGL) should have the freedom to set their own resale prices.

- Nonetheless, given the high degree of cooperation inherent in a franchise system or similar distribution system applying a uniform distribution format, the strict application of the RPM hardcore restriction is no longer tenable. Aside from being unrealistic from the perspective of businesses, it is also undesirable for consumers that normally expect uniformity to extend to cover also retail prices within such systems and that perceive competition to take place between competing systems rather than within them.

- In this vein, the Working Group believes there is scope (at least) for further expanding the scope of paragraph 225 of the VGL to allow RPM in the context of franchise systems or similar distribution systems – on the condition that the 30% threshold is met, thus where there is certainly a sufficient degree of interbrand competition between competing distribution formats in the relevant market.

- The Working Group also submits that the suggestion of competition authorities exercising self-restraint in pursuing RPM cases (prioritization) does not provide an adequate solution to the concern identified above. This is particularly so in the decentralized landscape brought about by Regulation 1/2003. In fact, certain national competition authorities continue to pursue, in a disproportionate manner, RPM cases precisely against franchise systems (presumably in view of the relative ease in substantiating the infringement), despite the fact that the presumed anticompetitive effects are invariably limited (as acknowledged both in theory and practice). In any event, as certain younger jurisdictions tend to look at EU for inspiration, it is necessary to amend substantive policy and provide clear guidance at EU level (instead of relying on procedural filters to avert unwanted outcomes).

Combination of distribution formats

In our view, the Commission could also consider providing additional guidance in relation to the combination of certain distribution modes, notably the combination of selective and exclusive distribution. Currently, the VGL (paragraph 152) appear to adopt a rather rigid approach, whereby that particular combination is only exempted by the VBER if active sales in other territories are not restricted. This, however, essentially deprives businesses of the core benefit of the exclusive distribution format. We would therefore argue that the Commission adopt a more economic/pro-consumer approach by accommodating the parallel use of such formats where the participating parties do not have market power in their respective markets (by applying a horizontal *de minimis* rule or otherwise).

MFN-type/parity clauses

The Working Group believes that the Commission should consider providing additional guidance in relation to MFN-type/parity clauses (essentially, most-favoured-customer clauses), particularly with a view to minimizing the risk of divergent positions by authorities and courts at national level.

In the VGL, MFN–type/parity clauses are not analyzed as a stand-alone restriction, but notably as a means of reinforcing the effectiveness of RPM policies by reducing the buyer's incentive to lower the resale price (see,

paragraph 48 VGL). To that extent, MFN-type/parity clauses are deemed to have as their object the restriction of competition and thus qualify as a hard-core restriction within the meaning of Article 4(a) of Regulation No. 330/2010. As an aside, they may form part of a horizontal agreement facilitating collusion. Except in these cases, MFN-type/parity clauses are not considered as being a *prima facie* restriction by object, but instead their (actual or potential) effects must be assessed in the specific factual, economic and legal context on a case-by-case basis (e.g. to determine whether, on the specific circumstances of each case, they raise barriers to entry and may lead to foreclosure of competitors and new entrants). This is also in view of the fact that MFN-type clauses may often have pro-competitive effects (e.g. reduction of search and negotiation costs, incentivizing specific investments by the buyer etc.).

However, in view of divergent approaches by National Competition Authorities in recent cases exhibiting similar characteristics (notably, in the *Hotel Booking* cases – compare e.g. the view taken by the French, Italian and Swedish Competition Authorities against the view taken by the German Competition Authority), there is a risk of incoherent application of EU competition rules.

In the same vein, certain National Competition Authorities have also developed a distinction between wide and narrow MFNs, in a an attempt to reconcile apparent divergences taken in online platform and price comparison cases, while certain Member States (France, Italy) have taken (or have considered taking) legislative action.

In view of these developments, there is scope – as also indicated in response to Q.8 above – for expressly clarifying that MFN-type/parity clauses are not considered restrictions by object (except, possibly, if used as a means to reinforce the effectiveness of RPM[2]), with a view to ensuring a level playing field and mitigating the risk of divergent outcomes.

Dual pricing

The Working Group believes that the Commission should consider whether the prohibition of dual pricing and its characterization as a hardcore

[2] Assuming that RPM continues to be a hardcore restriction within the meaning of Article 4 VBER.

restriction is still justifiable given the development of online distribution and certain suppliers' desire to promote brick and mortar distribution.

Brand positioning is often at the core of business strategy and for many businesses brand value is their core asset. The current restriction on the way suppliers can control their distribution channels leaves suppliers with no choice other than vertical integration, agency agreements (which raise other potential issues) or inefficient arrangements involving higher wholesale prices and rewards for certain distribution channel related activities, thus creating inefficient outcomes.

The Working Group recognizes that the Commission will not compromise its position concerning parallel trade as evidenced by the recent opening of proceedings against editors and distributors of video games. Different price levels across Member States may reflect different consumer preferences, valuations, other price related factors (e.g., taxes) and from that point of view arbitrage business is not desirable.

However, the Working Group is of the view that the Commission should consider a distinction of dual pricing aimed at restricting trade between member states and dual pricing aimed at promoting brick and mortar distribution (i.e. limiting the free riding problem, which often puts brick and mortar distributors at a disadvantage).

Selective Distribution

The Final Report on the E-commerce Sector Inquiry (the "Final E-commerce Report") has recognized the crucial role played by selective distribution for branded goods suppliers with the emergence of e-commerce. The Final Report concluded that there is no need to change the general approach to qualitative and selective distribution, and the Working Group agrees with that conclusion. However, it would nonetheless be helpful if the VGL would bring some clarity on some key open issues related to e-commerce, where the practice of NCAs is not entirely consistent, and specifically: (i) online marketplace bans; and (ii) brick and mortar requirements.

- Online marketplace bans

On online marketplace bans, the VGL currently acknowledge that a branded goods supplier can require that its selective distributors only use third party

online marketplaces to the extent that they satisfy the selective distribution approval criteria set out by the supplier (see para. 54). In recent years, however, competition authorities have taken a much more stringent approach vis-à-vis online marketplace bans, and have qualified them as "hardcore restrictions".

The Final E-Commerce Report, issued before the *Coty* judgment, acknowledged that online marketplace bans should not be considered as hardcore restrictions under Articles 4(b) and 4(c) of the VBER given that they are not an absolute prohibition to sell through online marketplaces (see para. 42).

Against this background, the Working Group believes it is important that the new VGL should codify the *Coty* judgment,[3] which makes clear that online marketplace bans imposed in the context of selective distribution system are not a hardcore restriction within the meaning of the VBER, given that (i) their scope is much narrower than an absolute ban to sell online (in contrast with *Pierre Fabre,* which involved an absolute ban to sell online), and (ii) such bans can be necessary to preserve the value of the products covered by the selective distribution system. Indeed, treating online marketplace restrictions as hardcore restrictions could adversely affect the brand image, and ultimately the value of the products covered by a selective distribution system.

In addition, given the different views that have been expressed on the scope of the *Coty* judgment, and in particular whether it only applies to luxury goods or whether it also extends to other types of goods covered by selective distribution systems, the Working Group believes the VGL should make clear that the reasoning in *Coty* should apply to all products in similar objective circumstances and not just to luxury goods[4].

The Working Group also believes that the new VGL should also seek to provide clarity on similar restrictions, such as bans on the use of price

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3 *Coty Germany GmbH v Parfümerie Akzente GmbH*, C-230/16, EU:C:2017:941.

4 *See, e.g.,* the *ASICS* case in Germany 12 December 2017 (Case KVZ 41/17) where the Federal Court upheld the BKA Asics decision of 2015, which found that ASICS' ban on the use of price comparison sites and certain other platforms was a hardcore restriction. The Court held that the Coty precedent was not applicable because ASICS was not a luxury brand.

comparison websites or other auction-type sites or marketplaces, given that the unfettered use of such websites also negatively affect the brand value of the products in question, and ultimately affect the integrity of the selective distribution system. Moreover, in a rapidly and fundamentally developing environment, prohibiting such bans may have a significant potential of producing unintended consequences (such as a move to vertical integration).

- Brick-and-mortar requirement

As the Final E-commerce Report has found, a significant number of selective distribution systems contain the so-called "brick and mortar" requirement, whereby the members of the selective distribution network must have one or more brick and mortar shops as a condition for becoming a member of the selective distribution system. The Final E-commerce Report does not suggest that the brick and mortar requirement be taken out from the revised VGL, but does state that the brick and mortar requirement may not be justified where there is no apparent link between such a requirement and the quality of distribution or other potential efficiencies, citing the existing VGL[5]. The report concludes that such cases may warrant further scrutiny[6].

In that connection, it is important that the VGL provide more clarity on the situations in which the brick and mortar requirement can be imposed without running the risk of infringing Article 101 TFEU. The current VGL in para. 176 gives the Commission the possibility of withdrawing the benefit of the VBER where (i) the characteristics of the product do not require selective distribution or (ii) do not require the brick and mortar criterion. Although such withdrawals are very exceptional, the current formulation of para. 176 creates legal uncertainty for manufacturers who wish to set up a selective distribution system, given that as the Commission expressly acknowledges in the same paragraph, the VBER exempts selective distribution regardless of the nature of the product concerned and regardless of the selection criteria.

As a result, the Working Group recommends that the new VGL make more clear that the brick and mortar requirement can be justified not only on the

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5 *See* para. 176 of the VGL, which states that the benefit of the VBER may be withdrawn if such requirement does not bring about sufficient efficiency enhancing effects to counterbalance the significant reduction in intra-brand competition that results from the exclusion of pure online retailers.

6 *See* The Final E-commerce Report at paras. 26-27.

basis of the nature of the product or other efficiencies, but also on the basis of the investments that the supplier requires from its brick and mortar distributors. Otherwise, there is a distinct risk that pure online resellers will simply free-ride on brick and mortar investments of more traditional resellers.

Restrictions on the use of SEOs

For the sake of legal clarity, the Working Group considers that the revised VGL should clarify and explain the circumstances in which restrictions on the use of specific brand names or trademarks could constitute a hardcore restriction of competition. In the *Guess* case[7], the restrictions on the use of keywords in Google's Ad Word platform were found to be part of a broader infringement designed to partition European markets. On the other hand, Guess also had an incentive of not artificially inflating the marketing and online selling costs of its own products, which would have been created by both Guess and the selective distributors bidding for the same keywords.

It would thus be helpful for the Commission to clearly identify the circumstances in which restrictions on the use of keywords could be justified under Article 101 TFEU, given that in some situations there might also be perfectly legitimate reasons for such restrictions, for example when the branded goods supplier wants to centralise its online marketing strategy and/or reduce the costs of implementing such a strategy, without engaging in a strategy of geographic market partitioning, or where separate markets (identified by the value customers attach to a certain product) require separate marketing approaches (in particular where the alternatives are switching to a distributor model or vertical integration).

Dual Distribution

In the on-line world, it is increasingly common that products and services are available for purchase both from the manufacturer/provider and from independent distributors. The VGL barely addresses dual distribution agreements despite their giving rise to complex and relevant competition concerns.

7 *See* Case 40428 Guess.

In this regard, the Working Group believes that dual distribution agreements are eminently vertical (the purpose of the agreement is to ultimately supply products to the end-customer by the manufacturer, either directly or indirectly, but in any case in the most efficient way), and that this feature should prevail over the fact that both the manufacturer/provider and the distributor address -or could eventually address- the same demand, and they are actual or potential competitors. The VGL refers to this, but it is not straightforward or unambiguous, and the assessment of different arrangements –particularly the request from the provider to receive from the buyer information on sales data to customers– can differ significantly depending on the approach taken (see para. 212 VGL and footnote no. 1).

To avoid inconsistency and legal uncertainty, the Working Group believes Commission should clarify its position in relation to the vertical nature of information exchanges in dual distribution agreements and determine the conditions under which such exchanges may raise competition concerns. In this regard, the guidance would not only be useful for undertakings and their counsels but also for national competition authorities.

Non-compete extensions

The VBER exempts non-compete obligations in vertical agreements if the non-compete does not exceed 5 years and is not tacitly renewable. The exclusion from the exemption in cases of tacit renewal has an impact in the design of contractual relationships. Parties to vertical agreements longer than 5 years could include a specific duration for the non-compete compliant with the VBER, but in some instances they refrain from doing so and they tend to set a single term of 5 years for both the distribution agreement and for the non-compete obligation.

On the other hand, the VGL does not provide guidance on the circumstances in which the renewal provisions of a non-compete obligation are considered "express" renewal and therefore compliant with the VBER as opposed to being problematic due to being (a) *de facto* tacitly renewable, (b) merely instrumental or (c) the result of an imposition or unilateral requirement of the stronger party.

This leads to situations where market operators would refrain from setting non-compete obligations longer than five years or engaging in relationships

of more than five years even when such obligations could give rise to efficiencies (at least, for the avoidance of transaction costs), or have no impact in the competitive landscape. This could be the case, more prominently, in cases where parties to the vertical agreement represent a small market share.

In light of the above, the Working Group submits that the Commission should reassess its approach towards the duration of non-compete obligations and analyze the possibilities and the circumstances under which the exemption could also be applicable to non-compete obligations that are longer than 5 years or that are tacitly renewable.

Information exchange/Hub and spoke infringements

The VGL does not expressly discuss or assess so-called "hub-and-spoke" arrangements, i.e. forms of horizontal price-fixing arrangement with important vertical elements (including vertical price maintenance used by retailers and the exchange of sensitive information). In the past decade, these arrangements, however, have gained prominence in enforcement in a number of European countries, with some authorities and courts already taking measures against such arrangements.

Vertical price maintenance is discussed extensively in the VGL, however, the VGL does not expressly discuss situations in which an individual vertical price maintenance between a number of retailers using their suppliers to coordinate prices, in fact, forms part of a larger hub-and-spoke scheme. Neither are information exchanges between market players active on different levels of the supply chain (i.e. within the framework of a vertical agreement).

Although hub-and-spoke arrangements include significant horizontal elements and may, at first sight, appear alien to the world of the VGL, these arrangements also clearly include relevant vertical elements (notably resale price maintenance and exchange of sensitive information). As such, a discussion of them might be a welcome addition to the VGL. In addition, the context of hub-and-spoke arrangements also informs part of a larger debate on distribution (especially, since typically they are supplier driven) and therefore could appropriately be dealt with alongside the other concerns discussed.

In light of these developments, the Working Group believes that the Commission could consider discussing hub-and-spoke arrangements in-depth in the revised VGL either as part of the chapter on resale price maintenance or possibly in the form of a separate chapter. In addition, the Commission could consider the assessment of information exchange mechanisms either as part of the hub-and-spoke discussion or as a standalone issue.

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

As discussed in Section 2.16 above, the VGL barely addresses dual distribution agreements despite giving rise to complex and relevant competition concerns.

On another note, the Commission should further clarify what type of restrictions in the context of online distribution are prohibited / potentially anti-competitive.

The current Spotify investigation, for instance, raises questions around restrictions on online service providers, such as restrictions to promote products or services on a platform if they do not agree to pay a "service fee" if that platform competes with the product or service provider.

Online platforms offering free services to consumers are under contractual obligations by Google and to some extent Facebook to impose wide ranging data collection rights on consumer. One could query whether such wide ranging data collection increases the "price" that consumers "pay" for free services without receiving any enhanced services /products.

2.18 Based on your experience, are the VBER and the VGL coherent with other instruments that provide guidance on the interpretation of Article 101 of the Treaty (e.g., other Block Exemption Regulations, the Horizontal Guidelines and the Article 101(3) Guidelines)?

Yes, the Working Group believes that the VBER and the VGL are coherent with the existing instruments that provide guidance on the interpretation of Article 101 of the Treaty.

2.19 Do the VBER and the VGL add value in the assessment of the compatibility of vertical agreements with Article 101 of the Treaty compared to, in their absence, a self-assessment by undertakings based on other instruments that provide guidance on the interpretation of Article 101 of the Treaty (e.g., the Article 101 (3) Guidelines, the enforcement practice of the Commission and national competition authorities, as well as relevant case-law at EU and national level)?

Yes, the Working Group believes that the other sources are certainly helpful but do not serve as substitutes for the VBER or the VGL.

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

The Working Group notes that some of the difficulties in advising on vertical restraints arise out of diverging approaches as between the Commission and Member States' courts and authorities. As such, the Commission should make every effort to ensure that the revised VGL have as broad support as possible.

In any case, the Working Group highlights the need to review the VBER and the VGL in light of the changing economy and the increase of online sales. In this regard, in addition to the specific issues identified in the responses above, the concrete examples provided in the VGL could also usefully be updated taking into account more up-to-date situations including the on-line world.

In that regard, the Working Group suggests that the Commission leave open the possibility of updating the VGL more frequently than the (understandably longer) expiry of the VBER in order to adapt to changing circumstances (*e.g.*, new ECJ case-law, new market developments).

3 Summary of Key Points

The Working Group is grateful for the opportunity to share its views on the evaluation of the VBER and VGL and is supportive of the European Commission's initiative to evaluate the important topic of whether the VBER, together with the VGL, is still effective, efficient, relevant, in line with other EU legislation and adds value.

In summary, the Working Group makes the following key observations:

- Both the VBER and the VGL have proved to be useful instruments to facilitate the self assessment of companies in the context of Article 101 and should certainly be prolonged.
- However, there are certain areas where more clarity would be preferable, especially given the developments and changes in the economic and legal context. These areas are, among others:
    - the strict application of the RPM hardcore restriction in the context of certain type of vertical agreements;
    - the combination of distribution modes, such as selective and exclusive distribution, as well as distribution;
    - the application of selective distribution schemes;
    - on-line restrictions.
    - the definition of "competing undertakings", as well as market share calculations.
- In general, the Working Group highlights the need to review the VBER and the VGL especially in light of the changing economy and the increase of online sales.
- Indeed, the Working Group would also suggest that the Commission should leave open the possibility of updating the VGL more frequently than the (understandably longer) expiry of the VBER in order to adapt to any changing circumstances (*e.g.*, new ECJ case-law, new market developments).

May 27, 2019