Summary of the comments received in response to the public consultation on the draft revised rules for the review of the Vertical Block Exemption Regulation (EU) No 330/2010

On 9 July 2020, The European Commission ("Commission") launched a public consultation on draft revised rules in the context of the impact assessment for the review of Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty to categories of vertical agreements and concerted practices ("Vertical Block Exemption Regulation" or "VBER"),[1] together with the Guidelines on Vertical Restraints ("Vertical Guidelines") [2].

Stakeholders were invited to submit comments on the draft revised rules that reflected the Commission's proposed changes to the VBER ("draft revised VBER"), together with the draft guidance that reflected the Commission's proposed changes to the Vertical Guidelines ("draft revised Vertical Guidelines"). The draft revised VBER and draft revised Vertical Guidelines were published for comments in all official EU languages (except Irish).

Through the consultation, the Commission aimed to gather stakeholder feedback on the changes it proposed to address the issues identified in the evaluation of the current rules. The evaluation showed that the VBER and the Vertical Guidelines are useful tools that facilitate the assessment of vertical agreements and help reduce compliance costs for businesses. It also showed room for improvement, notably the need to adapt both texts to new market developments. Since the launch of the impact assessment in October 2020, the Commission gathered further evidence on possible changes to the current rules, which was taken into account when preparing the draft revised VBER and draft revised Vertical Guidelines.

The Commission received 152 submissions[3] from stakeholders with comments on the draft revised VBER and draft revised Vertical Guidelines.

In addition, six national competition authorities ("NCAs") submitted comments on the draft revised rules. NCAs had for the most part already made their views known during the regular exchanges with the Commission in the context of the ECN Verticals Working Group.

Neither the views of the stakeholders reflected in the comments received nor the views reflected in this summary can be regarded as the official position of the Commission, or its services, and thus do not bind the Commission in any way. This summary of the contributions is preliminary and does not prejudge the outcome of the impact assessment, including the impact assessment report.

[1] Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102, 23.4.2010, p. 1.

[2] Guidelines on Vertical Restraints, OJ C 130, 19.5.2010, p. 1.

[3] Some of the submissions contained confidential information and have therefore not been published with this summary.

I. Profile of stakeholders that commented

Of the 152 submissions received, 103 emanate from business associations (including 11 associations of legal professionals and one consumer association), and 44 emanate from companies (including 18 law firms). The Commission also received 2 submissions from EU citizens, 2 from public authorities, and 1 from a trade union. The majority of the contributions were submitted in English, German or French.

As far as business associations are concerned, 21 represent both sides of the supply chain, 41 primarily the distribution/retail side, 23 primarily the supplier side and 7 represent other interests.

As far as companies are concerned, 13 are active on the supplier side of the supply chain, while 1 is active on the distribution/retail side.

The companies and business associations that submitted comments cover several sectors of the European economy. The more represented sectors include the automotive sector, the consumer goods sector (including luxury products), and the hospitality (Hotels/Restaurants/Cafés, "Horeca") sector.

II. Comments

Stakeholders commented on the four areas for which the Commission identified policy options, as reflected in the Inception Impact Assessment and the draft revised VBER and the draft revised Vertical Guidelines, namely (i) dual distribution, (ii) parity obligations, (iii) active sales restrictions, and (iv) indirect measures restricting online sales.

In addition, stakeholders commented on other areas of the rules for which the Commission has proposed updates or clarifications.

a. Feedback on the areas for which the Commission identified policy options

i. Dual distribution

Dual distribution concerns situations where a supplier not only sells its goods or services through independent distributors but also sells directly to end customers, thereby competing with its distributors at retail level.

The stakeholders that commented on this area were generally sceptical as regards the proposals put forward in the draft revised VBER. Many stakeholders argued that the proposals do not sufficiently take into account that dual distribution has positive effects on (inter-brand and intra-brand) competition and ensures the efficient distribution of goods and services.

All categories of stakeholders were critical of the **threshold introduced in Article 2(4) of the draft revised VBER**, which limits the current safe harbour for dual distribution to instances where the parties' aggregated market share in the retail market does not exceed 10%. Some stakeholders argued that this threshold should, as a minimum, be replaced by a higher market share threshold (20%) or by an alternative threshold (relating to the share of direct sales of the manufacturer in relation to its entire sales). In addition, many stakeholders indicated that it is difficult and costly (especially for SMEs) to calculate market shares at retail level, notably where local markets and/or different products are concerned. They also pointed to inconsistencies with Article 3 of the VBER, where the relevant market share threshold for the buyer concerns the purchasing market and not the retail market.

Conversely, all categories of stakeholders supported the **extension of the dual distribution exception to cover wholesalers and importers**. Some stakeholders asked for a definition of 'wholesaler' and 'importer', as well as confirmation that the exception would apply not only where a manufacturer, importer, or wholesaler competes with retailers at the retail level, but also, as currently, where a manufacturer competes with wholesalers at the wholesale level.

Some stakeholders nonetheless considered that the **exchange of sensitive information in a dual distribution context** may raise competition concerns. These stakeholders were mostly distributors active in the motor vehicle industry, where, according to them, manufacturers increasingly ask their distributors to provide various types of data, including on sales, and where access to data was presented as a barrier to entry.

All categories of stakeholders asked for more guidance on the type of information that can be exchanged between the parties in a dual distribution relationship and on the measures that undertakings can take to address possible competition concerns, including the use of Chinese Walls, aggregation of data, etc. Many considered that the reference in Article 2(5) of the draft revised VBER to an assessment under the Horizontal Guidelines was not appropriate or at least not sufficient. In this context, they asked the Commission to recognise that the exchange of information is necessary to generate efficiencies under the vertical supply agreement that underlies the dual distribution relationship. According to stakeholders, such information typically concerns stock levels, sales volumes and targets, marketing strategies and budgets, recommended resale prices, maximum prices, future product launches and promotions, the identification of exclusive territories or customer groups, and customer lists. Stakeholders active in franchising argued that information exchange is particularly vital in their business model, which is based on uniformity and the sharing of substantial know-how.

Many stakeholders stated that the **reference to "by object restrictions"** in Article 2(6) of the draft revised VBER creates considerable legal uncertainty, in particular since certain vertical restrictions that are block-exempted by the VBER, including exclusive territories and customer groups, would be by object restrictions if agreed between competitors.

As regards Article 2(7) of the draft revised VBER, many stakeholders considered that it is not appropriate to exclude from the VBER the agreements of all **hybrid platforms** *per se*. In particular, stakeholders raised questions about the negative impact of this provision on the incentives of smaller platforms to enter new markets and the legal uncertainty for undertakings that enter into agreements with hybrid platforms. In the same vein, some stakeholders mentioned that it is not clear whether a manufacturer that allows its distributors to use its website would qualify as a hybrid platform and therefore fall outside the safe harbour. According to these stakeholders, if this were the case, it would reduce the incentives of manufacturers to make such offers.

The NCAs that commented on the draft revised rules generally supported the introduction of a threshold to limit the current scope of the dual distribution exception. However, some of these NCAs suggested alternatives to the new market share threshold of 10% at retail level proposed for Article 2(4) of the draft revised VBER. These included referring instead to the share of the manufacturer's direct sales in relation to its overall sales, or taking into account the combined sales of the manufacturer and all the distributors of the manufacturer's product, for the purpose of calculating the market shares under Article 2(4) of the draft revised VBER. The NCA comments also included the suggestion that the horizontal aspects of the dual distribution relationship should always be assessed first under the Horizontal Guidelines; that more guidance should be provided on which information shared in the context of dual distribution is vertical and which is horizontal, and

not to extend the safe harbour to cover wholesalers and importers, as they are arguably in a different situation from manufacturers when it comes to actually investing and developing goods and services with a view to bringing them to market. As regards hybrid platforms, the NCAs generally supported the exclusion of their agreements from the scope of the VBER, as proposed in Article 2(7) of the draft revised VBER.

ii. Parity obligations

Parity obligations require a company to offer the same or better conditions to its contracting party as those offered on certain other sales channels, for example on intermediary sales channels or on the company's direct sales channels.

The feedback on the proposals of the draft revised rules relating to parity obligations was mixed. Stakeholders from almost all stakeholder categories welcomed the proposal to exclude **across-platform retail parity obligations** (often referred to as "wide retail parity obligations") from the VBER. In particular, among the stakeholders that submitted comments, this proposal was supported by all the distributors and their associations, by half of the stakeholders from the e-commerce sector, as well as by a significant share of business associations that represent both suppliers and distributors and by law firms and their associations. Some of these stakeholders characterised the proposed approach as 'middle-of-the-road' or contrasted it favourably to the UK competition authority's proposal to treat across-platform retail parity obligations as hardcore.

A second group of stakeholders opposed the proposal on the basis that there was no need to change the current policy of block-exempting all forms of parity obligation. This included the other half of the stakeholders from the e-commerce sector, as well as a significant share of law firms and their associations. These stakeholders argued that the proposal would increase legal uncertainty and increase the scope for divergent enforcement at national level. They also considered that across-platform parity obligations are capable of creating efficiencies, in particular by addressing the risk of free-riding by other platforms.

A third group of stakeholders considered that the proposal did not go far enough and favoured extending the exclusion to **narrow retail parity obligations** or indeed to all forms of parity obligation. This included a majority of the suppliers and their associations, predominantly from the hotel sector, a minority of law firms and their associations, the consumer association that commented and the two public authorities. This group of stakeholders argued that narrow parity obligations can produce similar effects to across-platform obligations; that they are not used to address a real free-riding concern, and/or that they have not been shown to be indispensable. In many cases, these arguments referred to decisions and judgments relating to the hotel sector, a sector characterised by the cumulative use of parity clauses, including by online intermediaries with market shares that exceed the VBER 30% threshold.

Amongst those stakeholders that supported the proposal, as well as those that favoured preserving the status quo, several requested more practical guidance in the Vertical Guidelines to assist companies with their self-assessment, including more guidance on the assessment of upstream parity obligations and on market definition and market share calculation for online intermediation services.

The feedback from NCAs was similarly mixed. Some NCAs supported the proposal, while making suggestions for improving the clarity of the new guidance on parity obligations in the draft revised Vertical Guidelines. The comments of these NCAs included the argument that, below the 30% market share threshold, there is a low risk that narrow retail parity obligations will harm

competition, and they may enhance efficiency and consumer welfare by addressing a risk of free riding on commission-based online intermediation services. On the other hand, some other NCAs and one public authority favoured the exclusion of all types of parity obligation from the VBER. The comments made by these NCAs included the criticism that the proposal preserves the current block exemption for parity obligations relating to offline sales channels (contrary to the remedies imposed by competition authorities on hotel booking platforms). Reference was also made to the recent judgment by the German Supreme Court in the Booking.com case, which was considered to contain principles that are applicable also to other sectors and supply structures.

iii. Active sales restrictions

Under the VBER, restrictions of the territory into which, or the customers to whom, the buyer can sell are generally considered hardcore. The buyer should generally be allowed to actively approach individual customers (active sales) and respond to unsolicited requests from individual customers (passive sales). Therefore, the current rules only allow restrictions on active or passive sales in a limited number of scenarios.

A few stakeholders made **general comments on the proposed new structure for Article 4 of the VBER**, which now presents the rules for each of the three the most common types of distribution system in separate paragraphs (exclusive distribution, selective distribution and free distribution). These stakeholders, from all stakeholder groups, considered the new structure to be an improvement and that the reference to concrete situations for each type of distribution system makes the rules less abstract. Similarly, some retailer associations considered that the draft revised Article 4 provides clear boundaries between what is block-exempted and what constitutes a hardcore restriction, for each type of distribution system. However, a few other stakeholders (essentially lawyers and lawyer associations) considered that the proposed new structure is unnecessarily complex and that the only real distinction is between selective and non-selective distribution systems, as shown by the fact that Article 4(b) of the draft revised VBER is essentially identical to Article 4(d). They therefore proposed a simplification consisting in deleting Article 4(d), which covers free distribution, and specifying in Article 4(b), which currently covers exclusive distribution, that it applies to all agreements that do not satisfy the definition of selective distribution provided in Article 1(1)(f) VBER.

Some stakeholders also commented on **the changes proposed in the draft revised rules to extend the block exemption to certain active sales restrictions** which are not currently block-exempted.

The first proposal concerns **shared exclusivity**. It would allow suppliers to appoint more than one exclusive distributor for a particular territory or customer group and to restrict active sales by other distributors into the exclusive territory or customer group. However, this would be subject to the proviso that the number of exclusive distributors is determined in proportion to the allocated territory or customer group in such a way as to secure a certain volume of business that preserves the distributors' investment efforts.

Some stakeholders (mainly suppliers, supplier associations as well as lawyers and lawyer associations) supported the proposal to allow shared exclusivity, on the grounds that it provides more flexibility for suppliers to structure their distribution system according to their needs. Some of the lawyer associations considered that the current limitation to one exclusive distributor leads to inefficiencies, as customers can expect to be better served by a few distributors that are able to focus on one territory without facing uncontrolled intra-brand competition. For some of these stakeholders, the need to secure a certain volume of business that preserves the distributors'

investment efforts also justifies the requirement that the number of distributors in a shared exclusivity system should be limited.

Conversely, other stakeholders (essentially retailer associations, a consumer association and stakeholders from the e-commerce sector) considered that the proposal provides too much flexibility for suppliers, without imposing clear limits to prevent shared exclusivity from being misused by suppliers to shield a large number of distributors from active sales coming from other territories. Some of these stakeholders questioned the benefits of allowing shared exclusivity. They argued that it will not incentivise distributors to make investments, as other buyers in the shared exclusivity system will be able to free-ride on their efforts. Other stakeholders expressed concern that shared exclusivity could be used as an alternative to a selective distribution system but without the need for the supplier to set selection criteria, thereby leading to the arbitrary exclusion of distributors from the distribution system. Other stakeholders, notably a consumer association and retailer associations, considered that allowing shared exclusivity could contribute to the partitioning of the internal market.

The limiting principle based on the requirement that the number of exclusive distributors should be proportionate to the size of the exclusive territory or customer group also raised comments. Some stakeholders across stakeholder groups indicated that the draft revised rules do not clearly state the legal consequences of appointing a disproportionate number of distributors. In this regard, some stakeholders (notably a lawyer association and stakeholders from the e-commerce sector) commented that, since this principle is used to delimit a hardcore restriction, it should be precise and should not leave room for interpretation, or require an extensive fact-specific analysis.

To avoid legal uncertainty, some stakeholders suggested that more guidance or examples could be provided in the Vertical Guidelines to explain how this principle is to be applied. Alternatively, for other stakeholders (mainly lawyer associations), more certainty could be achieved by basing the proportionality test not on the volume of business that would be necessary to preserve the distributors' investment efforts, but on other parameters, such as turnover, square meters/kilometres, number of inhabitants. Another suggestion made by some stakeholders consists in turning the limiting principle into a guiding principle, by indicating that the number of distributors should be "broadly" determined in proportion to the allocated territory, in such a way as to secure a certain volume of business. Finally, for other stakeholders, shared exclusivity should be block-exempted in all instances. It should be for the parties to decide the number of shared exclusive distributors, while competition authorities would retain the possibility to withdraw the benefit of the block exemption in individual cases where the number of distributors appointed is disproportionate.

The second proposal allows a supplier to require its buyers to **pass on further down the distribution chain restrictions on active sales into an exclusive territory or an exclusive customer group**, when the customers of the buyer have entered into a distribution agreement with the supplier or with a party that has been given distribution rights by the supplier. In addition, the draft revised rules allow a supplier to restrict active or passive sales by its buyers (be they exclusive distributors, members of a selective distribution system or free distributors) or the customers of those buyers to unauthorised distributors located in a territory where the supplier operates a selective distribution system.

Some of the stakeholders across all stakeholder groups considered that allowing suppliers to pass on active sales restrictions is an improvement. For some of these stakeholders, it can enhance the effectiveness and attractiveness of exclusive distribution systems. By preventing some distributors from using third parties to circumvent restrictions on active sales into territories or to customer

groups exclusively allocated to other distributors, the pass-on increases the possibility for distributors to recoup their investments. Some stakeholders also considered that the pass-on proposals provide additional protection for selective distributors, because currently suppliers can restrict sales to unauthorised distributors only where the restrictions are imposed on the members of the selective distribution system and concern sales to unauthorised distributors within the selective distribution system territory. By contrast, under the pass-on proposals, suppliers would be allowed to impose such restrictions on all types of distributors (selective distributors, exclusive distributors and free distributors) and their customers, provided the restriction relates to sales to unauthorized dealers located inside the territory where the supplier operates a selective distribution system.

Stakeholders across all stakeholder groups called for clarification of the circumstances in which restrictions of active sales may be passed on. Some stakeholders questioned whether it concerns only the direct customers of the buyer, or whether the restrictions can be passed on further down the distribution chain. In addition, some stakeholders also considered that the Vertical Guidelines should provide some examples of scenarios in which the pass-on can be used.

The third proposal allows a supplier operating any type of distribution system to **restrict buyers and their customers (see the preceding paragraphs for the feedback on the proposal to allow the pass-on of active sales restrictions) from selling actively or passively to unauthorized distributors located in a territory where the supplier operates a selective distribution system**.

Some stakeholders (among which suppliers, supplier associations as well as lawyers and lawyer associations) which support this change indicated that it provides an appropriate level of protection for selective distribution systems. However, these stakeholders also raised issues regarding the implementation of the proposal. In particular, some stakeholders questioned whether and how suppliers can enforce it before national or EU courts, especially in the absence of a harmonised application mechanism. They argued that, without such a mechanism, this proposal would not be used. Some submissions suggested that the Commission should draw inspiration from the rules of civil or commercial law in force in some Member States and replicate one of the enforcement mechanisms in place at national level. Others stakeholders acknowledged that the VBER is not the right vehicle for the implementation of such an enforcement tool, but suggested that the Commission should call for the creation of a dedicated European regulation dealing, for instance, with unfair commercial practices between businesses.

In addition to the comments made on the changes proposed in the draft revised rules, some stakeholders also raised additional points. First, some stakeholders called for clarifications regarding the application of the parallel imposition principle in exclusive distribution systems. According to this principle, a supplier must ensure that any exclusive territory or customer group is protected from active sales by all other buyers of the supplier within the Union. Second, although it is not one of the changes proposed in the draft revised rules, some stakeholders (mainly suppliers and supplier associations as well as lawyers) called for the combination of exclusive distribution at wholesale level and selective distribution at retail level in the same territory to be block-exempted. They argue that this distribution arrangement is a more efficient way to distribute certain products. Some of them also mentioned that any restrictions of active sales would be limited to the wholesale level.

NCAs provided limited feedback on the proposals regarding active sales restrictions. They provided mixed feedback as regards the new structure of Article 4. Some considered it to be an improvement that is likely to make the rules easier to understand for businesses, while others considered the new structure to be repetitive and suggested that it could be replaced by specific hardcore restrictions.

On shared exclusivity, some NCAs noted that it resembles a quantitative selective distribution system, but without selection criteria. Others asked for a clearer limiting principle to ensure that it is not simply used as a means to shield distributors from active sales from outside the territory, which could lead to market partitioning. More technical issues were also raised, one of them relating to the circumstances in which the supplier has to inform all its other buyers about the territories or customer groups that have been exclusively allocated. In particular, the question was whether it was sufficient for a supplier to provide such information on an *ad hoc* basis (e.g. "from time to time") or in response to requests by other buyers wishing to actively sell into the exclusive territory/customer group, or whether the list of exclusive territories/customer groups should be fixed in advance.

iv. Indirect measures restricting online sales

Under the current rules, certain indirect measures that make online sales more difficult are viewed as hardcore restrictions. This is the case where suppliers charge the same distributor a higher wholesale price for products intended to be sold online than for products sold offline ("**dual pricing"**) and where suppliers impose on their selective distributors criteria for online selling that are not overall equivalent to the criteria imposed for sales in physical stores ("**equivalence principle**"). The draft revised rules proposed a policy change consisting in a relaxation of the rules for these two specific forms of indirect restriction of online sales, by no longer treating them as hardcore.

The stakeholders that commented on this proposal generally supported the proposed relaxation, stating that it would increase suppliers' ability to support distributors' investments. In particular, suppliers and supplier associations, business associations representing both suppliers and distributors, law firms and their associations, and a number of distributors were supportive of the changes, while stakeholders from the e-commerce sector and other distributors would prefer to maintain the hardcore restriction. However, many stakeholders flagged that, while going in the right direction, the proposed changes to the rules are not sufficiently clear-cut to allow them to self-assess their compliance. This would prevent businesses from relying on the new rules and could give rise to diverging interpretations across the EU. Therefore, stakeholders called for further clarification of the rules or for additional guidance on how to apply them in practice.

Specifically on the proposal in the draft revised Vertical Guidelines regarding dual pricing, several stakeholders noted a lack of clarity as to the proposed limiting principle, namely when a difference in the wholesale price would amount to a hardcore restriction. In particular, stakeholders explained that it was not clear whether an actual calculation of the difference in costs is needed to assess dual pricing. If yes, they consider that the proposal will not be used in practice, as such calculation would be particularly complex and would dissuade businesses from using dual pricing. Some also noted that to comply with such a requirement, the supplier and its hybrid distributors would need to exchange potentially sensitive information, contrary to the proposed tightening of the rules on information exchange in the context of dual distribution. A number of stakeholders indicated that the rules appear not to take account of hybrid distribution models that combine elements of both online and brick and mortar sales (e.g. click and collect, fulfilment contracts, etc.). Besides more guidance or simplification regarding the reference to the difference in costs, some stakeholders asked for further clarifications on when dual pricing can be considered as having the object of preventing the use of the internet for the purposes of selling online. A few stakeholders, including stakeholders from the e-commerce sector, flagged that dual pricing should not result in higher online prices or prevent distributors from competing online and saw a potential risk for e-commerce, further exacerbated by the lack of clarity as to how dual pricing will be assessed.

NCAs gave more mixed feedback. Some NCAs either supported or did not object to the proposed changes, for example welcoming that dual pricing does not have to directly reflect differences in costs and thus does not require complex calculations, but is intended to give suppliers the flexibility to take such costs into account, which makes the rule more operational for businesses and enforcement authorities. At the same time, suggestions were made for simplifying the related guidance in the draft Vertical Guidelines. Other NCAs considered that the proposed limiting principle may be difficult to apply and enforce, and expressed concern that the relaxation will allow suppliers to control resellers' ability to sell online. Notably in view of the removal of the equivalence principle, dual-pricing doesn't seem necessary, and would thus not be proportionate considering the competitive risks at stake.

Stakeholders generally supported the proposal to relax the equivalence principle. Of the few stakeholders that made specific comments on this proposal, some asked for further clarification or examples of the type of criteria that could be imposed and, in particular, whether criteria may be imposed only for one sales channel (e.g. online or offline) in the context of a selective distribution system. Of those that disagreed with the proposal, some referred to a potential risk of reduced intra-brand competition if stricter criteria are imposed for the online channel.

Moreover, a number of stakeholders and NCAs commented specifically on the proposed threshold above which dual pricing and the imposition of non-equivalent criteria in selective distribution would amount to hardcore restrictions and therefore would not be block-exempted. The consumer association that commented, some NCAs and some suppliers and supplier associations supported the approach, notably due to the increased flexibility for setting up distribution systems. A few other stakeholders considered that a different threshold would be more appropriate, e.g. that only absolute bans on the use of the internet should be hardcore and all other online sales restrictions should be block-exempted. Lastly, some stakeholders from the e-commerce sector noted that, overall, the proposed threshold appears to favour brands and suppliers. A significant number of stakeholders, including several law firms, asked for further clarification on how the threshold is to be applied in practice, some stressing that it is not sufficiently clear-cut.

b. Feedback on other issues

i. RPM

Distributors and NCAs mostly welcomed that the Commission had not proposed changes to its policy on resale price maintenance, i.e. that it intends to continue treating RPM as a hardcore restriction. These stakeholders mainly asked for clarifications. Suppliers, on the other hand, mostly continued to argue that the Commission should generally relax its policy on RPM. However, they welcomed the Commission's willingness to consider efficiencies, as expressed in the guidance on the circumstances under which RPM may qualify for an individual exemption under Article 101(3) of the Treaty. Law firms welcomed the clarifications in the guidance on RPM but indicated that the draft revised rules raise further questions that need to be addressed.

All categories of stakeholders asked for clarification of the Commission's position on Minimum Advertised Prices ("**MAPs")**, on which the current VBER and Vertical Guidelines are silent. Suppliers interpreted the relevant paragraph in the draft Vertical Guidelines as allowing MAPs and argued that this should be stated explicitly. They also argued that MAPs cannot be equated with RPM, for example because MAPs may allow brand manufacturers to prevent an externality imposed on them by retailers' efforts to enhance the demand for unrelated goods sold at a high margin ("loss leading"). Distributors and the consumer association argue that MAPs should be prohibited and that

this prohibition should be clarified by stating that MAPs are de facto RPM, notably because they harm consumers and because in online environments it is often impossible to differentiate the advertised price from the actual sale price. The NCA comments contained similar arguments.

All categories of stakeholders welcomed the introduction of guidance on **fulfilment contracts**, which can be defined as a vertical agreement between a supplier and a buyer/distributor, under to which the buyer/distributor executes a prior agreement between the supplier and a specific end customer. Some stakeholders (essentially lawyer associations) supported the proposed approach, which consists of treating **fulfilment contracts** as falling outside the scope of Article 101(1) of the Treaty. Nevertheless, many stakeholders asked for more clarity, notably as regards the condition according to which the end customer must have waived its right to choose the distributor that executes the agreement with the supplier. They also argued that the scope of the guidance is too narrow, i.e. that the Commission should clarify that the same approach will be applied to similar agreements at the wholesale level and where multiple and different intermediaries are involved. The NCA comments included the argument that fulfilment contracts amount to RPM under the current VBER and concluded that the proposed change should not be maintained as such in the new guidelines.

ii. Other online restrictions

As regards online restrictions other than dual pricing and the equivalence principle, stakeholders pointed to certain areas where further clarifications could be considered. Suppliers were largely in favour of relaxing the rules in the areas where the draft revised rules proposed a stricter approach (e.g. online advertising restrictions), whereas stakeholders from the e-commerce sector and distributors largely favoured the approach of the existing rules in areas where the draft revised rules propose relaxation (e.g. online sales restrictions). Several stakeholders welcomed the integration of the Coty jurisprudence. Some NCAs welcomed the proposed limiting principle, on the grounds that it would allow a case-by-case assessment, and made further drafting suggestions, while others asked for further clarification of the limiting principle, which they considered to be insufficiently clear-cut.

As regards restrictions on the use of **online marketplaces**, while suppliers and law firms welcomed the clarifications, certain distributors and stakeholders from the e-commerce sector considered that marketplace bans should be a hardcore restriction, or at least should be assessed individually. Stakeholders also asked for more guidance on the topic, including on whether the block exemption of marketplace bans only applied in the case of luxury products, as well as on the instances in which such restrictions would be considered hardcore on the basis that their object is to prevent the effective use of the internet for the purposes of selling online. The NCA comments included a request for a clarification that marketplace bans would only benefit from the block exemption if they do not have as their object to prevent the effective use of the internet.

Similarly, as regards **online advertising restrictions** and, in particular, **restrictions on the use of price comparison tools and brand bidding** for advertising on search engines, some stakeholders, notably stakeholders from the e-commerce sector and distributors, welcomed the clarifications, whereas others, notably suppliers, favoured a relaxation of the rules that would allow for the block exemption of online advertising restrictions, even if these concern entire advertising channels. A number of stakeholders, including NCAs, asked for clarifications regarding the treatment of restrictions on the use of price comparison tools and of search engines.

Stakeholders and NCAs also made minor comments on the updated guidance relating to when online restrictions are considered to restrict active sales and when they restrict passive sales, and on the requirement that distributors operate a brick and mortar shop or make an absolute amount of

sales offline. These stakeholders generally did not oppose the proposed approach and welcomed the updated guidance in this regard.

iii. Platforms

The proposals made in relation to the treatment of platforms by reference to a new definition of providers of online intermediation services ('OIS') received mixed feedback. Many stakeholders considered that the definition would be difficult to apply in practice, since many platforms apply mixed business models and intervene to a greater or lesser extent in the transactions that they intermediate. Some stakeholders pointed out that the proposal imports concepts (and possibly case law) from instruments that are unrelated to competition law (such as the Platform to Business Regulation and the Information Society Services Directive).

Only a few stakeholders agreed with the proposal to treat OIS providers as suppliers, but nevertheless requested further clarifications as regards the exact scope of the OIS definition provided in the VBER. In particular, many stakeholders considered the definition of OIS unclear, requesting further clarification on whether OIS providers can only be considered as suppliers of online intermediation services, or whether they can also be considered as suppliers of the products that are intermediated through their platforms. The vast majority of the stakeholders considered that defining OIS is not justified by market reality and likely to lead to unintended, adverse consequences for consumers. More specifically, they argued that treating OIS providers as suppliers will disincentivise suppliers and distributors from concluding agreements with online platforms. It was therefore suggested that OIS providers should be considered as suppliers when they produce and sell a product and as buyers when purchasing products from a supplier in order to resell it. Finally, a stakeholder noted that if OIS providers are treated as suppliers, then restrictions imposed by buyers on these suppliers (for example online sales restrictions) cannot be considered as hardcore, because they are not imposed by a supplier on a buyer.

NCAs provided mixed feedback and raised questions as regards the definition of OIS providers and its application. It was argued that the business model of online intermediaries does not fit within the structure or the application of the VBER and that, notably due to the lack of sufficient enforcement experience in relation to restrictions imposed by online intermediaries and their possible impact on consumer welfare, the VBER should not block-exempt such restrictions.

Furthermore, some stakeholders disagreed with the statement in the draft revised Vertical Guidelines that providers of online intermediation services in principle do not qualify as agents. These stakeholders argued that the characterisation of an OIS provider as agent should remain possible following a case-by-case assessment of risk allocation. Furthermore, stakeholders argued that the designation of OIS providers as suppliers is not sufficient in itself to explain why they cannot qualify as agents, since agents themselves are suppliers of intermediation services. Moreover, according to several stakeholders, treating OIS providers exclusively as suppliers creates a divergence in the rules applicable to online and offline agents, thus resulting in an unjustified discrimination between the two channels. Therefore, a number of stakeholders considered that the Commission's approach seems rather to introduce a third distribution method in addition to the traditional agency and independent distribution.

Additional questions related to the interface between the proposed new rules for OIS providers and the methodology for defining the relevant market(s) for OIS services, and the impact of the proposal on the ability of sellers of goods and services to impose online sales restrictions on intermediary platforms.

iv. Non-compete clauses

A significant number of stakeholders across all categories and sectors expressed broad support for the changes made in order to exempt tacitly renewable non-compete clauses beyond 5 years (while nevertheless proposing minor clarifications, such as additional guidance on what constitutes a reasonable period of time and/or reasonable cost and resolving apparent contradictions with some paragraphs of the Vertical Guidelines).

A few stakeholders, however, disagreed with this change. Stakeholders representing the Horeca sector argued in particular that non-compete clauses exceeding 3 years should be excluded from the VBER. They further argued that the exception set out in Article 5(2) of the VBER, allowing indefinite non-compete clauses where the contract goods or services are sold by the buyer from premises and land owned or leased by the supplier, should be removed, as this would allow hospitality entrepreneurs to better compete with breweries and drink suppliers.

As regards post-term non-compete clauses (set out in Article 5(1)(b) of the VBER), some stakeholders representing the franchising sector and the retail side of the supply chain welcomed the limited circumstances in which such clauses can be exempted, while suggesting some additional clarifications.

Other stakeholders, representing the retail side of the supply chain, however, argued that non-compete clauses in franchise agreements should never exceed the duration of the franchise agreement.

Finally, very few stakeholders commented on the definition of non-compete obligations.

v. Agency

Based on the feedback from stakeholders, agency agreements appear to still be relevant and widely used in the market. Many stakeholders have thus welcomed the Commission's proposals to provide more detailed guidance on the assessment of agency agreements. For example, stakeholders (primarily representing the supply side of the supply chain and legal professionals) have welcomed the clarification that a brief and temporary passing of title will not in itself prevent an agent from being qualified as a genuine agent.

However, some points have been highlighted by stakeholders as presenting issues or requiring further clarifications.

On the issue of whether an agent can also act as a distributor for other goods or services of the same supplier, most stakeholders agree that such a dual role should be allowed in principle. Some stakeholders representing the supply side of the supply chain and legal professionals have however indicated that the proposed rules on cost and risk coverage are too rigid and not workable in practice. In their view, this would risk preventing the efficient development of such a dual role. In particular, stakeholders have pointed out that it may be efficient for suppliers to use the agency model with their existing distributors in respect of new launches of a specific line of products and that, in such cases, it would be disproportionate for the brand owner to cover all relevant risks of the distributor, both in respect of the new product launch and the existing product lines. Stakeholders have also indicated that a dual role may be necessary, for a limited period of time, when brand owners decide to convert their business models from one model to the other. In such cases, stakeholders argue that this should not be seen as a misuse of the agency model, and should therefore be allowed some flexibility. Another scenario raised as requiring further guidance is that of

the dual role existing in separate geographic markets even if the products sold in the two markets are the same.

Stakeholders representing the retail side of the supply chain also expressed concern about the implementation of the rules in practice, and the possibility for the agency model in a dual role scenario to not be sufficiently risk-free. These stakeholders argued that all specific investments and costs of the agent should be covered by the supplier, including previous investments of the agent/independent distributor; that the cost compensation should be separate from the commission (also outside of a dual role scenario); and that independent distributors should be truly free to accept the agency model as a dual role.

The NCA comments raised similar concerns as regards the freedom to accept the dual role and the implementation of the rules in practice. In addition, they included the argument that the dual role should remain an exception and not be used to circumvent the rules on RPM.

Stakeholders therefore asked for additional clarifications and guidance on these issues.

Another issue that has raised comments regards the section of the guidance which states that providers of online intermediation services in principle do not qualify as agents. While some stakeholders (primarily business associations representing agents and a couple of stakeholders representing the retail side of the supply chain) agree with this approach, other stakeholders (representing the hotel sector, stakeholders from the e-commerce sector, as well as legal professionals) argue that this does not capture business reality. These stakeholders further argue that the reasons advanced by the Commission for adopting this new approach do not apply to all online intermediation platforms. It would therefore be appropriate to assess the situation on a case-by-case basis, focusing on the risks. Other stakeholders primarily representing the supply side of the supply chain argued that where the criteria for genuine agency are met, other characteristics of the genuine agent (e.g., whether the agent is an "online intermediation service") should be irrelevant. Stakeholders overall argued that more clarity and guidance would be useful on the circumstances in which digital providers can lawfully use agency agreements.

Stakeholders representing the retail side of the supply chain and primarily from the motor vehicle sector have more generally expressed concern with the possibility of a supplier switching from a selective distribution model to an agency model, as they argue this would be detrimental to consumers. They further argue that entering into the selective distribution relationship requires large investments in return of which, the distributors should be protected against the risk of sudden termination in the absence of any breach on their part of their contractual obligations.

A couple of stakeholders from the financial/banking/insurance sector have pointed out that the provisions on agency agreements do not properly capture the specific characteristics of the financial sector.

vi. Selective distribution systems

Some stakeholders from all stakeholder groups welcome the description of the principles applied for the assessment of selective distribution system added in the draft revised rules. This includes the explanation on the application of the *Metro* criteria and the clarification regarding the fact that a selective distribution system can be block-exempted even if the *Metro* criteria are not met. However, some stakeholders as well as some NCAs expressed the need for additional clarifications.

Some stakeholders called for more clarity regarding the nature of products that justify the use of a selective distribution system. For some stakeholders (mainly suppliers and supplier associations),

such a system is not only needed for high-quality, high technology products or luxury products, but can be justified for all types of products. Others argue that the quality of certain products (especially branded products) may not only result from their material characteristics but also from the attractiveness (or "aura") of a brand. The preservation of this attractiveness justifies the use of selective distribution. In addition, the NCA comments included a request for additional guidance on the question of determining whether the characteristics of the product justify the use of a selective distribution system.

The Vertical Guidelines provide that the criteria to be appointed as a selective distributor do not have to be made known to all potential resellers, although transparency in relation to such criteria may increase the likelihood of fulfilling the Metro criteria. For some stakeholders (mainly suppliers and supplier associations), there should indeed be no requirement to disclose such criteria to all potential resellers. Conversely, some retailer associations consider that these criteria should be provided to all retailers upon request. This would contribute to the correct and justified application of selective distribution within the framework of the VBER and assist the Commission and the NCAs in the effective enforcement of the future regime.

In line with the EU's Green Deal and proposed new Supply Chain Due Diligence initiatives, some stakeholders (essentially lawyers, lawyer associations and supplier associations) suggested that the Vertical Guidelines should indicate that certain sustainability requirements can be used as qualitative criteria in the context of a selective distribution system.

vii. Franchising

The Commission's proposals to improve the rules as regards franchising agreements did not raise many comments from stakeholders. Some stakeholders representing the franchising sector have indicated that the definition of "know-how" could be further improved.

A few stakeholders (particularly legal professionals) also argued that the principle that franchise agreements should be assessed under the rules applicable to the distribution system that most closely resembles the specific franchise agreement (i.e. exclusive or selective distribution) does not adequately capture the specificities of franchise agreements. In particular, they argued that the principle might not always be easy to apply, as franchise agreements are characterized by features of both exclusive and selective distribution systems. However, this approach is endorsed by a few other stakeholders (representing the supply side of the supply chain in the fashion sector).

Stakeholders from all sides of the supply chain, as well as legal professionals, have also expressed strong concerns as regard the application of the new rules on dual distribution to franchise systems, in view of the special role that information exchange plays in this system. This is addressed in more detail in the section dealing with dual distribution.

Finally, stakeholders also asked for further clarification on how a few issues apply in the specific context of franchising, such as post-term non-compete clauses; the possibility for franchisors to require franchisees to sell products and services only on an online platform common to the network; other restrictions to online selling; and market definition.

viii. Territorial supply constraints (TSCs)

Stakeholders provided very few comments on the approach proposed by the Commission to improve the rules on TSCs. TSCs are restrictions imposed by suppliers to restrict retailers' ability to source products cross-border, to freely move products within their own distribution network or to offer products to customers that are available in another Member State. Under the current rules,

TSCs are already considered as restrictions of active and passive sales and, therefore, are in principle hardcore restrictions, with very limited exceptions. Additional examples of such practices have been added in the draft revised Vertical Guidelines.

A few stakeholders (mainly lawyers) argued that some of the examples of TSCs mentioned in the Vertical Guidelines should be deleted, as they seem to refer to unilateral conducts. Alternatively, they should be rephrased to clarify that such measure could only be concerned by the application of 101(1) TFEU if it forms part of an agreement between the supplier and its buyers. Other stakeholders called for a definition of TSCs to be added to the draft revised rules. They considered that this should also explicitly state that TSCs are hardcore restrictions which prevent the establishment of a single market for sourcing. The NCA comments contained a similar request.

ix. Sustainability

Some stakeholders suggested that specific guidance should be provided in the Vertical Guidelines in relation to sustainability objectives. They asked, in particular, for reassurance in the Vertical Guidelines about the use of sustainability criteria for the establishment of a selective distribution network. In addition, several stakeholders requested guidance on the assessment of sustainability objectives under Article 101(3) of the Treaty. In that regard, several stakeholders proposed that RPM should be permitted in the context of an initiative to promote a sustainable supply chain, in order to overcome a "first mover disadvantage".

x. Market share threshold and market definition

A few stakeholders argued that the 30% market share threshold is not well suited for companies active in the digital sector, where companies with less than 30% can still have significant market power. Furthermore, for the calculation of market shares, it was proposed to add further criteria applicable specifically to the digital sector, such as traffic volumes or share of online voice (i.e., share in online search results). This argument also featured in the NCA comments. Finally, one stakeholder suggested introducing the concept of relative market power. As regards market definition, one stakeholder considered that private label products should by default be considered as belonging to the same market as the branded products in a product category.

xi. Impact of the COVID-19 pandemic

Very few stakeholders (representing the distribution/retail side of the supply chain and stakeholders from the e-commerce sector) noted that, since the reopening of physical shops, consumers have returned to brick and mortar shops, thus resulting in a decrease in online sales, which had significantly increased during the application of the Covid-19 lockdown measures. Based on that development, they highlighted the importance of an omni-channel distribution strategy. In addition, a business association of lawyers stressed the need for the existence of an effective communication line between businesses and enforcement authorities that will enable them to seek relevant guidance when needed.

xii. Harmonised application

Very few stakeholders commented on the harmonised application of the VBER and Vertical Guidelines. Stakeholders representing primarily the supplier side of the supply chain suggested that the Commission should have a more active role in ensuring the uniform implementation of distribution rules across the EU, by increasing its monitoring role in the context of the ECN. A public authority further argued that the ECN is not well placed for shaping the legal framework and

therefore ministries of the Member States should participate in policy discussions. NCAs commented on the withdrawal of the block exemption, providing mixed feedback.

xiii. Interplay with the Motor Vehicle Block Exemption Regulation

A few stakeholders raised issues related specifically to the automotive sector, for example proposing that some of the specific hardcore restrictions of the MVBER (e.g. article 5(a), 5(b) and 5(c) MVBER) should be included in the VBER, and stressing the need to preserve access to data in the automotive aftermarket and to define an adequate legal framework for the transfer and sharing of customer data, as well as the possible management of such data by a trusted third party. In relation to obligations to buy spare parts from the OEM or members of its selective distribution system, one stakeholder considered that the Vertical Guidelines should provide more guidance on how this restriction is assessed outside the 30% safe harbour.

xiv. Additional remarks

A few stakeholders suggested that the transition period following the entry into force of the new VBER should be extended from one to two years. NCAs also discussed the duration of the VBER and whether it should be significantly shortened in light of the dynamic changes in the world of distribution, or whether the proposed duration is appropriate to observe and evaluate the functioning of the rules.

The NCA comments also included points on Article 2(2) of the draft VBER relating to vertical agreements entered into by associations of retailers and their members or suppliers. In particular, guidance was requested as to when vertical agreements regarding the application of recommended or maximum resale prices within such associations could benefit from Article 2(2) in view of the underlying horizontal aspects of such a co-operation between retailers which are typically actual or potential competitors.

Moreover, a few stakeholders and commented on the definition of vertical agreements, suggesting that a clearer demarcation line between unilateral conduct and agreements is needed, as well as a specific definition applicable to agreements between application providers and developers. Finally, one stakeholder suggested that a new definition of "online advertising channel" should be introduced and that leasing agreements should fall within the scope of VBER. As regards the definition of passive sales, one stakeholder suggested that responding to a call for tenders should be explicitly recognised as a form of passive selling, while another stakeholder identified a possible inconsistency between the VBER block-exempting certain passive sales restrictions and them being void under Article 6(2) of the Geo-Blocking Regulation.

One stakeholder considered that the characterisation of hardcore restrictions as equivalent to by object restrictions is incorrect and unhelpful, as it will discourage the use of these restrictions, even though the Vertical Guidelines recognise various examples of hardcore restrictions that are either exemptible or fall outside Article 101(1) of the Treaty. Finally, another stakeholder suggested that depreciation of investments should also be considered as a guide for the justified duration of territorial exclusivity, as in the case for exclusive customer groups and non-compete obligations, in order to ensure consistency.

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