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IMPACT ASSESSMENT REPORT

Accompanying the documents

COMMISSION REGULATION (EU) .../... on the application of Article 101(3) of the Treaty on the Functionning of the European Union to categories of vertical agreements and concerted practices

COMMUNICATION FROM THE COMMISSION
Approval of the content of a draft for a Communication from the Commission
Guidelines on vertical restraints

{C(2022) 3015 final} - {SEC(2022) 198 final} - {SWD(2022) 140 final}

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Glossary

Term or acronym	***Meaning or definition***
CJEU	European Court of Justice
DMA	Digital Markets Act
EU	European Union
HBERs	Horizontal block exemption regulations
IIA	Inception Impact Assessment
ISSG	Inter-service steering group
MVBER	Motor vehicle block exemption regulation
NCAs	National competition authorities
RPM	Resale Price Maintenance
SMEs	Small and medium-sized enterprises
SWD	Staff Working Document
VBER	Vertical block exemption regulation
VGL	Guidelines on Vertical Restraints / Vertical Guidelines

1. INTRODUCTION: POLITICAL AND LEGAL CONTEXT

EU competition law aims to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers. Article 101(1) of the Treaty on the Functioning of the European Union ("the Treaty") thus prohibits agreements that restrict competition.

As an exception to this rule, Article 101(3) of the Treaty sets out that the prohibition contained in Article 101(1) of the Treaty may be declared inapplicable to agreements that are on balance efficiency-enhancing, provided that such agreements fulfil four cumulative conditions. They have to (i) contribute to improving the production or distribution of goods or to promoting technical or economic progress, (ii) while allowing consumers a fair share of the resulting benefits. Moreover, they (iii) should not impose restrictions that are not indispensable to the attainment of the aforementioned objectives, and (iv) should not afford the undertakings the possibility of eliminating competition in respect of a substantial part of the products concerned[1].

Council Regulation 1/2003 created a system of parallel competences in which the Commission applies Article 101 of the Treaty in parallel with the national competition authorities ("NCAs") and national courts[2].

Vertical agreements are agreements that relate to the supply and distribution of goods and services. They are ubiquitous across the EU economy. Retail is the biggest sector in the EU non-financial business economy, in terms of number of enterprises and persons employed. Nearly 5.5 million companies (23% of all non-financial business economy) are active in the EU retail and wholesale sectors (3.6 million in retail and 1.8 million in wholesale, 2015). The value of goods and services purchased for resale in the same condition in the retail sector was 1.98 trillion EUR (in 2015, EU28)[3]. Retail also plays an important role for consumers. Expenditure on goods that are normally purchased from retailers accounts for approximately 30% of household budgets[4].

Retailers and wholesalers vary in size, but a majority are SMEs. Most EU retailers (63%) now have their own website and 26% of retailers pay to advertise on the internet. In the EU-27, the percentage of companies that had e-sales increased from 15% in 2010 to 21% in 2019[5]. Overall, a significant share of online sales is carried out by retailers that operate

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[1] Communication from the Commission, Notice - Guidelines on the application of Article 81(3) of the Treaty ("Article 81(3) Guidelines"), OJ C 101, 27.4.2004, p. 97, paragraph 9.

[2] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ("Council Regulation 1/2003"), OJ L 1, 4.1.2003, p. 1–25. When assessing the compatibility of vertical agreements that may affect trade between Member States within the meaning of Article 101 of the Treaty, NCAs and national courts are bound by the directly applicable provisions of the VBER. The Vertical Guidelines, which are binding on the Commission, do not bind NCAs or national courts, but they are typically taken into account when assessing the compatibility of vertical agreements with Article 101 of the Treaty.

[3] Commission staff working document, A European retail sector fit for the 21st century, Brussels, 19 April 2018, SWD(2018) 236 final, section 2.1.

[4] Euromonitor data, 2016.

[5] 2020 survey on 'ICT usage and e-commerce in enterprises' (Eurostat). The E-commerce Sector Inquiry also confirmed this trend, showing that the majority (59%) of the retailers that responded to the relevant

brick-and-mortar shops, but these retailers are not the only ones operating across sales channels. Sales through online-only retailers account for over half of all online sales and online-only retailers are increasingly opening physical shops to cater to consumers that wish to handle products or ask for advice before buying, or to obtain their product immediately[6]. Lastly, in 2019, 86 % of EU enterprises with web sales used their own websites or apps, while 44 % used an e-commerce marketplace[7]. A significant share of SMEs sell through online marketplaces[8].

Like other types of agreements between undertakings, vertical agreements may fall within the prohibition of Article 101(1) of the Treaty. Under the current legal framework, businesses have to self-assess whether their vertical agreements comply with Article 101 of the Treaty. The assessment under Article 101 consists of two steps. The first step, under Article 101(1), is to assess whether an agreement between undertakings, which is capable of affecting trade between Member States, restricts competition. The second step, under Article 101(3), is to assess any pro-competitive benefits produced by the agreement and determine whether these pro-competitive effects outweigh the anti-competitive effects resulting from the agreement[9].

Under Regulation 19/65/EEC[10] ("Empowerment Regulation"), the Commission is empowered by the Council to adopt block exemption regulations. On this basis, the Commission has adopted several block exemptions, including 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")[11].

As is the case for other block exemption regulations relating to the application of Article 101 of the Treaty, the purpose of the VBER is to define those categories of agreements for which it can be assumed with sufficient certainty that they fulfil the conditions of Article 101(3) of the Treaty and to exempt those agreements from the prohibition contained in Article 101(1) of the Treaty. The VBER therefore creates a safe harbour for those agreements, which facilitates the self-assessment described above.

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question in the sector inquiry sold goods both offline and online. See Commission Staff Working Document Accompanying the document Report from the Commission to the Council and the European Parliament Final report on the E-commerce Sector Inquiry ("E-commerce Sector Inquiry"), SWD (2017) 154 final, p. 64).

[6] The E-commerce Sector Inquiry (p.64) revealed that approximately 40% of the retailers that responded to the relevant question in the sector inquiry sell only online without operating any brick and mortar shops. Moreover, out of those respondents that were selling only online, 8% reported that they planned to open a brick and mortar shop within the following two years.

[7] 2020 survey on 'ICT usage and e-commerce in enterprises' (Eurostat).

[8] Commission staff working document, A European retail sector fit for the 21st century, Brussels, 19 April 2018, SWD(2018) 236 final, section 2.2.1.

[9] Article 81(3) Guidelines, paragraph 11.

[10] Regulation No 19/65/EEC of 2 March of the Council on application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices, OJ 36, 6.3.1965, p. 35, as amended by Council Regulation (EC) No 1215/1999 of 10 June 1999, OJ L 148, 15.6.1999, p. 1.

[11] 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.

Together with the VBER, which sets out the conditions for the safe harbour to apply, the Commission also adopted Guidelines ("Vertical Guidelines") in 2010. The Vertical Guidelines complement the VBER, by setting out the rationale for the conditions of the VBER, providing guidance on how to interpret those conditions and apply them to particular situations, as well as practical examples, to facilitate the work of businesses when they assess whether their agreements fall within the safe harbour. The Vertical Guidelines also provide guidance on how to apply Article 101 of the Treaty to vertical agreements that fall outside the scope of the VBER[12].

The VBER entered into force on 1 June 2010 and it will expire on 31 May 2022. In view of this, the Commission carried out an evaluation to gather evidence on the functioning of the VBER, together with the Vertical Guidelines[13]. The results of the evaluation, published on 8 September 2020[14], confirmed that the VBER and the Vertical Guidelines are still relevant, as they are useful tools that greatly facilitate the self-assessment of vertical agreements. However, the evaluation also identified certain areas where the rules do not function well or as well as they could. Therefore, it was deemed relevant to revise the VBER and Vertical Guidelines following an impact assessment of the proposed changes. The revision of the VBER and Vertical Guidelines contributes to the policy objective of achieving a Europe Fit for the Digital Age[15] and supports the digital transition, as outlined in the Commission Communication on Competition Policy[16].

In parallel with the evaluation of the VBER and Vertical Guidelines, the Commission has also carried out an evaluation of the Motor Vehicle Block Exemption Regulation ("MVBER")[17] and the Horizontal Block Exemption Regulations ("HBERs")[18].

The MVBER contains a transition clause[19], according to which, as from 1 June 2013, the distribution of new motor vehicles has been subject to the VBER. Motor vehicle aftermarkets, namely the purchase, sale and resale of spare parts and the provision of repair and maintenance services for motor vehicles, have remained covered by the MVBER[20]. The impact assessment of the VBER and Vertical Guidelines has taken into account the outcome of the evaluation of the MVBER (which concluded on 28 May

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[12] For example, because the market share thresholds are not met.

[13] Insofar as the Vertical Guidelines refer to the provisions of the VBER and inform their application and interpretation, the assessment of the VBER would not be complete if it did not include them.

[14] Commission staff working document, Evaluation of the Vertical Block Exemption Regulation ("VBER Evaluation SWD"), Brussels, 8 September 2020, SWD(2020) 172 final.

[15] Adjusted Commission Work Programme 2020, Brussels, 27 May 2020, COM(2020) 440 final, Annex 1.

[16] Communication *A competition policy fit for new challenges*, 18 November 2021, COM(2021) 713 final.

[17] Commission Regulation (EU) No 461/2010 of 27 May 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 in the motor vehicle sector, OJ L 129, 28.5.2010, p. 52.

[18] Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty to categories of research and development agreements, OJ L 335, 18.12.2010, p. 36 and Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty to categories of specialisation agreements, OJ L 335, 18.12.2010, p. 43.

[19] MVBER, Article 2.

[20] MVBER, Article 4.

2021), in particular the conclusion that there are no indications of market failure or actual or potential consumer harm that would justify distinguishing the distribution of motor vehicles from the distribution of other durable goods and that, therefore, the VBER provides appropriate rules for motor vehicle distribution[21].

The outcome of the evaluation of the HBERs, together with the Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements ("Horizontal Guidelines")[22], which concluded on 6 May 2021, is also taken into account, where relevant, in the impact assessment of the VBER and Vertical Guidelines, in order to ensure coherence between the two sets of rules.

The impact assessment of the VBER and Vertical Guidelines also takes into account new and existing legislation with potential relevance for vertical supply and distribution agreements, in particular legislation that also applies to online platforms, such as the Platform-to-Business Regulation[23] and the Digital Markets Act[24], in order to ensure coherence between the rules.

2. PROBLEM DEFINITION

2.1. What are the problems?

The problems identified in the evaluation of the VBER and the Vertical Guidelines and the underlying problem drivers are better understood in the context of the market developments that have taken place since the adoption of the 2010 VBER and Vertical Guidelines, which were examined in the evaluation[25].

The evaluation has shown that market conditions have changed considerably since the adoption of the VBER and the Vertical Guidelines in 2010. In particular, the growth of online sales and of new market players such as online platforms have had a significant impact on distribution models. A study carried out during the evaluation concluded that online purchasing is increasingly popular among consumers for a wide range of products[26]. Overall, as depicted in Figure 1, the share of individuals purchasing online has increased by 100% since 2008. This is supported by recent Eurostat data showing

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[21] Commission Evaluation Report on the operation of the Motor Vehicle Block Exemption Regulation (EU) No 461/2010, Brussels, 28 May 2021, COM(2021) 264 final, Section 4. The report also concluded that it remains appropriate for the motor vehicle aftermarkets to continue to be covered by the MVBER.

[22] Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements Text with EEA relevance, OJ C 11, 14.1.2011, p. 1.

[23] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services ("Platform-to-Business Regulation"), OJ L 186, 11.7.2019, p. 57.

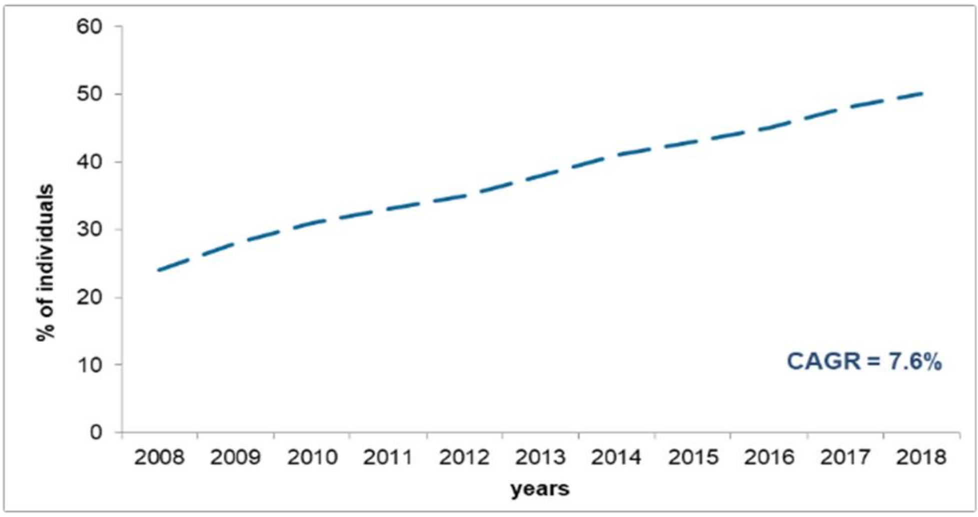
[24] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), {SEC(2020) 437 final} - {SWD(2020) 363 final} - SWD(2020) 364 final}. The DMA is a regulatory solution that complements (EU and national) competition law.

[25] VBER Evaluation SWD, Section 5.1.

[26] VBER Evaluation SWD, Section 5.1.2. and Section 4.3.1 of the external evaluation support study ("evaluation study").

that in 2020/2021, 90% of people aged 16 to 74 in the EU had used the internet, 74% of whom had bought or ordered goods or services for private use[27].

FIGURE 1 : SHARE OF INDIVIDUALS PURCHASING ONLINE IN THE LAST 3 MONTHS – EU 28.



SOURCE : EVALUATION STUDY ANNEX IX

As regards online platforms, the findings of the evaluation study show that platform business models appear to be evolving over time. Today, many platforms perform a dual role, acting as both an intermediary service provider and a retailer[28].

The growth of online sales and new market players has resulted notably in more vertical integration on the supplier side, an increased use of selective distribution[29], which appears to allow suppliers to exert more control over resale conditions, a decreased use of exclusive distribution, and the emergence or increased use of new types of vertical restrictions (e.g. online sales restrictions, retail parity obligations, etc.).

In addition, there have also been changes in the purchasing behaviour of consumers, who nowadays expect a continuous omni-channel experience across a variety of different offline and online channels (such as offline and online shops, marketplaces and other online platforms), between which they tend to switch frequently during their purchasing journey. The evaluation study, which included a study of consumer purchasing behaviour in Europe[30], showed that online channels play a major role in the purchasing journey, regardless of the product category. The study also showed that consumers integrate

[27] Eurostat, Survey on 'ICT usage and e-commerce in enterprises'. The data is based on the annual survey on use of ICT in households and by individuals and covers the 12 months prior to the 2021 survey.

[28] For instance, Amazon and Zalando not only grant third-party sellers access to their platforms by offering intermediation services in exchange for a commission, but also act as retailers, selling on the same platform products that they source from suppliers, manufacturers or brands at wholesale level in competition with the third-party sellers that use their platform. See Section VIII of the evaluation study.

[29] This was confirmed not only by the evaluation study (see Section 3.1), but also in the E-commerce Sector Inquiry (p. 63).

[30] This study traced customer journeys for four product categories, in an online survey covering six EU Member States (i.e. France, Germany, Hungary, Italy, Poland, and Sweden).

online marketplaces, price comparison tools and search engines strongly into the purchasing process. The share of individuals using these services has increased steadily over the years[31].

At the same time, the Commission and the NCAs have continued their enforcement actions as regards vertical agreements, which has resulted in an evolution of the enforcement practice, especially as regards new types of vertical restrictions. For example, regarding online selling, online advertising and retail parity obligations[32]. In parallel, the Union courts have created new case law on vertical restrictions in recent years, for example, regarding restrictions on online selling and selling through marketplaces. This reflects the growing relevance of these sales channels.

In this context, **the general problem identified in the evaluation is that certain areas of the rules are perceived to not function well or as well as they could**. This is because they appear not well adapted to the new market environment; are not sufficiently clear; do not address certain issues; or do not refer to recent case law.

The general problem can be subdivided into two main categories. A distinction can be made between (i) issues of a technical nature relating to the clarity, completeness and complexity of the rules, and (ii) more substantive issues relating to the scope of the rules.

As explained in more detail in Section 2.1.2 below, this impact assessment focuses on the scope of the rules, i.e. the conditions that vertical agreements need to meet in order to benefit from the safe harbour provided by the block exemption, and in particular on those conditions that the evaluation identified as possibly needing adjustment. While the results of the evaluation were the starting point for identifying the problems to be addressed, for the purpose of identifying the specific problems and policy choices that are subject to the impact assessment, the Commission was bound by the competition rules set out in the Treaty and the requirements of the Empowerment Regulation of 1965, as well as by the case law of the Union courts, which interprets the competition rules and is binding on the Commission. In this context, the issues and policy choices that are subject to the impact assessment are those for which the Commission has a margin to make changes.

2.1.1. Clarity, completeness and complexity of the rules

The evaluation has identified some areas of the rules that do not require a change in substance (or areas in which the existing case law or available evidence does not leave much margin for changes) but that could be clarified, simplified or updated. In particular, the evaluation identified certain provisions that, according to stakeholders (primarily businesses, business associations and lawyers), lack clarity, are difficult to apply or are no longer adapted to recent market developments. For example, stakeholders pointed to practical difficulties in applying certain areas of the rules, either because the rules are outdated (for example, they do not expressly cover online platforms) or because they do not provide detailed examples for some complex areas. The evaluation also identified perceived gaps in the rules, especially as regards guidance on certain restrictions of

[31] See Section 3.3.9 of the Study on consumer purchasing behaviour in Europe.

[32] VBER Evaluation SWD, Sections 5.1.3 and 5.1.4.

online sales, and areas of the rules that do not refer to case law issued since the adoption of the rules (notably the CJEU's judgments in the Pierre Fabre and Coty cases)[33]. Addressing these issues would increase legal certainty for businesses, reduce the compliance costs of businesses that use the rules to self-assess their vertical agreements and enhance the ability of the rules to provide a common framework of assessment for national competition authorities and national courts.

These issues are mainly issues of a technical nature, or pertain to areas of the rules where there is little scope to make substantive changes, due to the limits imposed by the case law or the lack of sufficient evidence to justify a change. The issues of a technical nature can in many cases be addressed by making drafting changes to the existing rules that improve clarity without altering their substance, or by adding more examples or detail to the existing guidance. As regards the perceived gaps in the rules, these can be addressed by reflecting in the rules the case law of the Union courts, as well as the recent decisional practice of the Commission and NCAs, and by including more examples showing how the rules should be applied to more recent business models (e.g. to online platforms or certain agency relationships). Finally, the issue of complexity can be addressed by making changes to the structure of the rules, and by drafting changes that aim to make the rules more understandable for non-legal experts.

Since these issues can generally be addressed without altering the substance of the rules, they are not subject to the impact assessment. Nevertheless, these issues and the way they are addressed in the revised VBER and Vertical Guidelines are described in more detail in Annex 4 to this report.

2.1.2. Scope of the VBER

The evaluation also pointed to issues of a more substantive nature regarding the scope of the VBER, i.e. to instances where potentially anti-competitive agreements benefit from its safe harbour and instances where the safe harbour does not cover agreements that generate efficiencies. In particular, the evaluation has shown that, in certain areas, the scope of the VBER is no longer well adapted to the current business environment, which has been significantly reshaped by the growth of e-commerce and of new market players, such as online platforms. These changes have led to an increase in the use of dual distribution and of retail parity obligations, both of which may raise competition concerns in specific instances, but which currently benefit from the VBER safe harbour. In this respect, it appears that the scope of the safe harbour may no longer provide sufficient protection against harm to competition, such as can result from the exchange of commercially sensitive information in dual distribution or from the use of across-platform retail parity obligations. For this reason, the VBER may also no longer be in line with the Treaty. At the same time, the growth of e-commerce has re-shaped the balance between online sales and physical stores. It is no longer warranted to treat online sales as predominantly used for cross-border selling and thus necessitating special

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[33] Judgment of 11 October 2011 in Case C-439/09, EU:C:2011:649, *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie* and judgment of 6 December 2017 in Case C-230/16, EU:C:2017:941, *Coty Germany GmbH v Parfümerie Akzente GmbH*.

protection. On the contrary, it is now rather the brick-and-mortar channel, which often incurs higher costs, which may need to be supported, to ensure competitiveness, service quality and long-term viability, which is important to ensure that consumers continue to have a choice of sales channels. Against this background, the current rules appear not to allow sufficient flexibility for suppliers to incentivise investments by distributors that can be beneficial for consumers, while in some cases the concerns that the rules sought to address appear to have diminished or disappeared.

This impact assessment focuses on the scope of the VBER. However, since the scope of the safe harbour provided by the VBER is affected by the interpretative guidance provided in the Vertical Guidelines[34], changes to the Vertical Guidelines are also considered in this impact assessment.

Ensuring that the scope of the safe harbour provided by the VBER is not too generous is of particular importance. To ensure that the VBER complies with the Treaty and the limits set by the Empowerment Regulation, the Commission must pay particular attention to avoiding false positives[35]. At the same time, although it is less important, avoiding false negatives[36], i.e. a safe harbour that is too narrow, reduces the compliance burden for businesses, as the VBER provides a simpler set of rules for the assessment of agreements that fall within its safe harbour. The scope of the VBER therefore has important practical consequences for businesses and is thus highly relevant for them.

The evidence gathered in the evaluation pointed in particular to four areas where the scope of the block exemption might need to be adjusted. Two of these areas concern possible false positives (a scope which is too generous), i.e. (a) dual distribution and (b) retail parity obligations, whereas the other two areas concern possible false negatives (a scope which is too narrow), i.e. (c) active sales restrictions and (d) restrictions of online sales.

Dual distribution

Dual distribution refers to the situation in which a supplier sells its goods or services not only through independent distributors but also directly to end customers, therefore competing with its distributors at retail level. For example, a manufacturer of mobile phones may sell its products directly to consumers (e.g. through its own brand website and physical stores) as well as marketing its products in the (physical or online) stores of electronic equipment retailers, which may sell the mobile phones alongside products from other manufacturers. Under the 2010 VBER, dual distribution is generally block

[34] For example, the VBER provides that restrictions of passive sales are hardcore restrictions (i.e. a type of restriction that removes the benefit of the safe harbour for the entire agreement) in almost all scenarios. However, the VBER does not contain a detailed explanation of what qualifies as a passive sales restriction. This detail is contained in the Vertical Guidelines. Therefore, when the Vertical Guidelines clarify that a particular type of restriction is to be categorised as a restriction of passive sales, this affects whether such restrictions are treated as hardcore restrictions and whether agreements that contain such restrictions can benefit from the safe harbour provided by the VBER.

[35] False positives occur where the rules exempt an agreement for which it cannot be assumed with sufficient certainty that it satisfies the conditions of Article 101(3) of the Treaty.

[36] False negatives occur where the rules do not exempt an agreement for which it can be assumed with sufficient certainty that it satisfies the conditions of Article 101(3) of the Treaty.

exempted. This constitutes an exception to the general rule[37] that vertical agreements between competitors are not subject to the VBER, but must be assessed under the horizontal rules (which generally deal with agreements between competitors).

The evidence gathered in the evaluation[38] suggests that, in view of the increase in the use of dual distribution, this exception may exempt vertical agreements where horizontal concerns are no longer negligible and the conditions of Article 101(3) of the Treaty may not be satisfied (a possible false positive). In the evaluation, the main issue raised by stakeholders representing both the supply side and the distribution side of the market, as well as a variety of sectors, was the issue of information exchanges between the supplier and the buyer in dual distribution scenarios. Some stakeholders argued that information exchanges in the context of dual distribution (including commercially sensitive data) can have pro-competitive effects, such as allowing suppliers to distribute their products more effectively and thus enhancing inter-brand competition. For example, exchanging information relating to production, inventory, stocks, sales volumes and returns can lead to improvements in the distribution of the goods or services. Other stakeholders, however, expressed concerns that exempting information exchange in a dual distribution scenario may, for example, raise concerns regarding collusion at retail level, or allow a supplier to use customer data to restrict the distributors' ability to compete effectively at retail level, which would reduce intra-brand competition. This would concern, for example, the exchange of information relating to the future prices at which the supplier or buyer will sell the contract goods or services downstream. Such concerns have already been the focus of enforcement actions by NCAs[39]. This was confirmed by the Expert Report on information exchange in dual distribution, which set out considerations for defining which types of information in dual distribution should benefit from the block exemption[40].

During the evaluation and based on their experience, NCAs also raised concerns about whether hybrid platforms (which act both as suppliers of online intermediation services and as retailers) should be covered by the dual distribution exception. NCAs questioned whether the hybrid nature of these platforms and the fact that they are not the manufacturer or original provider of the goods or services that are sold at retail level would be in line with the *rationale* of the dual distribution exemption.

In addition, the evaluation identified a possible gap in the rules, namely that the dual distribution exception does not currently cover wholesalers and importers, even though

[37] See Article 2(4) of the VBER.

[38] VBER Evaluation SWD, Section 4.2.4 of Annex 4. This evidence includes data from the E-commerce Sector Inquiry on the increase of dual distribution (see E-commerce Sector Inquiry, p. 61.), as well as stakeholder feedback. The problem definition is also supported by the enforcement experience of NCAs.

[39] For example, in the Hugo Boss-Kaufmann case, the Danish NCA found a restriction of competition in the form of a concerted practice by which the manufacturer provided information to its distributors on the future prices that it would charge in its own outlets, i.e. in a scenario where the manufacturer was competing with its distributors at retail level. The German NCA had similar concerns relating to the exchange of information between producers and their business customers in the metal industry. See Section 6.1.1 below for further detail.

[40] Expert Report on information exchange, pages 49-52.

they are perceived to be in a comparable situation to manufacturers or service providers when they operate at two levels in the supply chain (a possible false negative).

Parity obligations

Parity obligations (sometimes referred to as most-favoured nation clauses or best price clauses) require a company to offer its goods or services to its contracting party under conditions that are the same or better than the conditions under which the goods or services are offered to third parties. For example, a booking platform might require a hotel to offer its rooms at prices that are no higher than the prices at which the rooms are offered on other sales channels. The parity obligation may relate to price and/or to other conditions, such as levels of inventory or availability. The obligation may cover direct sales channels (for example, the hotel's website), indirect sales channels (for example, other booking platforms), or all sales channels. Lastly, parity obligations may concern the price and conditions under which goods or services are sold as inputs (for example, to manufacturers or wholesalers) or the conditions under which goods or services are sold to end users, including final consumers (retail parity obligations).

Neither the 2010 VBER nor the 2010 Vertical Guidelines explicitly address parity obligations. As such, all types of parity obligations are currently block-exempted[41]. The evidence gathered in the evaluation[42], however, has shown that the use of retail parity obligations has increased over the last ten years, especially in the e-commerce environment. There is, therefore, a gap in the rules as regards parity obligations in general. Moreover, the evidence gathered in the evaluation, including from NCAs, suggests that obligations imposed by online intermediaries (platforms) relating to retail prices and conditions offered on competing online intermediaries (i.e. across-platform retail parity obligations) cannot be presumed to satisfy the conditions of Article 101(3) of the Treaty in all cases (a possible false positive). In particular, these obligations may restrict competition between established online intermediaries on the price and quality of their services, and foreclose market entry or expansion by new or smaller online intermediaries, without in all cases generating efficiencies that outweigh these effects[43].

[41] It should be noted that four EU Member States have adopted laws prohibiting the use of retail parity obligations by hotel booking platforms.

[42] VBER Evaluation SWD, Section 4.6.3 of Annex 4. This evidence includes data from the evaluation study and stakeholder feedback, notably lawyers, indicating an increased use of retail parity obligations. The evaluation also included evidence collected by means of two econometric studies, a survey and the review of existing literature, which pointed to mixed evidence as regards the effects of retail parity obligations, depending on the nature of the obligation in question and the market circumstances. The problem definition is further supported by the enforcement experience of NCAs involving these obligations, notably in contracts between online travel agencies and hotels, which points to anti-competitive issues (see Section 6.2.1 below for further detail).

[43] Whereas the NCAs generally agreed that across-platform retail parity obligations should be excluded from the block exemption for these reasons, the NCAs' views differed regarding the appropriate treatment for narrow retail parity obligations. Some NCAs considered that such narrow parity obligations were less likely to appreciably restrict competition and more likely to create efficiencies, relative to across-platform retail parity obligations, whereas other NCAs considered that, in many instances, narrow retail parity obligations produce equivalent harmful effects.

Active sales restrictions

Active sales restrictions concern limitations of a distributor's ability to actively approach customers. The VBER differentiates between active sales (where a seller actively targets particular customer groups or territories) and passive sales (where a seller responds to unsolicited requests from individual customers). The current rules generally do not allow suppliers to restrict buyers' ability to make passive sales, with the notable exception of restrictions of passive sales to unauthorised distributors where a supplier operates a selective distribution system[44]. As regards active sales, the general rule is that a supplier may not restrict the territory into which or the customers to whom the buyer can sell[45]. This is intended to preserve intra-brand competition as well as limit the risk of market partitioning. As an exception to this general rule, active sales restrictions are allowed notably to protect investments by exclusive distributors[46] and to prevent sales to unauthorised distributors located in a territory where a supplier operates a selective distribution system.

The evidence gathered in the evaluation[47] has shown that there may be scope for block-exempting active sales restrictions in additional cases, where they also meet the conditions of Article 101(3) of the Treaty. In the evaluation[48], some stakeholders (mainly lawyers) argued that the rules on active sales restrictions in the context of exclusive distribution are not sufficiently flexible, as they do not allow suppliers to appoint and protect the investments of two or more distributors in a given exclusive territory, but only one distributor per territory/customer group. The Expert Report on active sales restrictions, commissioned during the impact assessment[49], confirmed that the lack of flexibility of the current rules may lead to undesired results[50].

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[44] In a selective distribution system, the supplier can choose its distributors on the basis of qualitative and/or quantitative criteria and prohibit authorised distributors at wholesale and retail level from selling to unauthorised resellers. However, the supplier cannot restrict authorised distributors from making active or passive sales to end users or from making cross-supplies to other authorised distributors at the wholesale or the retail level.

[45] Such restrictions are treated as hardcore by Article 4(b) of the VBER and thus remove the benefit of the VBER for the whole agreement.

[46] Exclusive distribution enables a supplier to reserve a particular territory to itself or to allocate it to a single distributor and to protect that distributor by preventing other distributors located in other territories from actively approaching customers in the exclusive territory. This protection gives the exclusive distributor more incentives to invest in distributing and promoting the supplier's products or services in that territory, as the exclusive distributor will be protected to a certain extent against the risk of free-riding by other distributors on its investments. However, the supplier is not allowed to prohibit other distributors from responding to unsolicited requests from individual customers located in the exclusive territory (passive sales).

[47] This evidence consists of feedback from stakeholders provided in different consultation activities.

[48] VBER Evaluation SWD, Section 4.6.5 of Annex 4.

[49] Expert Report on the review of the Vertical Block Exemption Regulation on active sales restrictions in different distribution models and combinations of distribution models ("Expert Report on active sales restrictions"), available here: https://ec.europa.eu/competition-policy/system/files/2021-06/kd0821131enn_VBER_active_sales.pdf. This study relied on the business experience of the authors with the application of the VBER and the Vertical Guidelines, including case studies from the authors' practice as well as provided by specialized practitioners active in various Member States.

[50] Expert Report on active sales restrictions, pages 35-37.

Other stakeholders (mainly lawyers and suppliers) considered that there was also a lack of flexibility as regards the fact that the rules allow the restriction of active sales by a buyer, but only where the restriction does not limit sales by the customers of the buyer. For example, where a supplier uses an independent importer (buyer), which in turn appoints distributors at the retail level (customers of the buyer), the supplier may only restrict the importer from selling actively into territories that have been exclusively allocated to other distributors; the supplier may not prevent the distributors appointed by the importer from making active sales into other exclusive territories. Since active selling by the buyer's customers can have the same free riding effect as active selling by the buyer itself, these stakeholders argued that there could be legitimate reasons for suppliers to also impose restrictions on active sales by the customers of the buyer. The Expert Report on active sales restrictions also highlighted that the current rule on active sales restrictions means that the level of protection that can be offered by the supplier depends arbitrarily on the extent to which the supplier is vertically integrated[51].

As regards selective distribution, some stakeholders argued[52] that the current rules do not allow for a sufficient protection of selective distribution systems against the sales from unauthorised resellers, since the supplier cannot limit sales from outside the territory reserved for selective distribution. For example, if a supplier operates a selective distribution system in only part of the EU, but exclusive or free distribution in another part, the current rules do not allow it to prevent the other exclusive distributors or free distributors from selling to unauthorised resellers in the territory reserved for selective distribution. This was confirmed by the Expert Report on active sales restrictions, which pointed out that, in practice, suppliers may be forced to adopt more restrictive models of distribution (for example, selective distribution across the entire EEA, as opposed to selectivity in only some territories and a free distribution system in others) due to the current lack of flexibility of the rules[53].

Finally, the evidence gathered in the evaluation also raised the question of whether suppliers may combine exclusive and selective distribution in the same territory, but at different levels of the supply chain (i.e. exclusive distribution at the wholesale level and selective distribution at the retail level), and whether, in such a scenario, the exclusive distributors at wholesale level may be restricted from selling to retailers that are not authorised under the selective distribution network at retail level. This issue was also raised by NCAs and in the Expert Report on active sales restrictions[54].

The evidence gathered in the evaluation was overall confirmed by the Expert Report on active sales restrictions. The report also pointed out that a more generous exemption of active sales restrictions would generally limit intra-brand competition. However, the potentially negative impact of active sales restrictions on intra-brand competition (and

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[51] Expert Report on active sales restrictions, pages 39-41.

[52] VBER Evaluation SWD, Section 4.6.6.1 of Annex 4.

[53] Expert Report on active sales restrictions, pages 41-43.

[54] Expert Report on active sales restrictions, pages 43-44.

also on inter-brand competition and the risk of market partitioning) would likely be limited and outweighed by the positive impacts of more flexible distribution systems[55].

Online sales restrictions

Under the current rules, prohibiting online sales is considered a hardcore restriction that removes the benefit of the VBER, since online sales are generally treated as a form of passive sales and the current rules generally do not allow restrictions of passive sales, to prevent the risk of market partitioning. The same approach applies to certain indirect measures that may make online sales more difficult, such as charging the same distributor a higher wholesale price for products intended to be sold online than for products sold offline ("dual pricing") or imposing criteria for online sales that are not overall equivalent to the criteria imposed for sales in brick-and-mortar shops ("equivalence principle") in the context of selective distribution.

The evaluation has shown that the treatment of these online restrictions is one of the areas in which the VBER and the Vertical Guidelines are not up to date in the light of market developments in recent years[56]. As regards dual pricing, stakeholders (mainly suppliers and lawyers) indicated during the evaluation[57] that the current approach is not well adapted to the current market environment. In particular, e-commerce has become widespread and it is no longer justified to treat it as predominantly a means for cross-border selling and thus necessitating special protection for that reason. On the contrary, it is now rather the brick-and-mortar channel, which often incurs higher costs, which may need to be supported to ensure service quality.

In view of these changes, some stakeholders (mainly suppliers) argued that the current rules deprive brand owners of the flexibility they need in order to incentivise and reward their hybrid distributors for their investments and efforts to provide consumers with a physical product experience, as well as advice and service from well-trained staff in brick-and-mortar stores. Other stakeholders also stressed that the rules on dual pricing may lead to discrimination between different types of retailers[58]. NCAs expressed diverging views on this issue. While some recognised that brick-and-mortar stores have difficulties competing with online stores and that allowing suppliers to differentiate wholesale prices between offline and online sales in such situations could be justified, others were concerned that suppliers could use dual pricing to disincentivise online sales by hybrid retailers to such an extent that in practice it would equate to excluding online sales, leading to a risk of market partitioning.

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55 Expert Report on active sales restrictions, pages 12-15.

56 The evidence gathered during the evaluation includes the findings of the E-commerce Sector Inquiry regarding the growth of online sales; stakeholder feedback; and the findings of the evaluation study (in particular, the findings of the study of the consumer purchasing behaviour, which pointed to consumers' expectation of an omni-channel environment).

57 VBER Evaluation SWD, Section 4.6.7.2 of Annex 4.

58 Hybrid retailers consider that they are being discriminated against, as compared to retailers that only sell offline, for instance to the extent that the latter may be rewarded for their efforts and investments in high-quality in-store services.

The evidence gathered during the evaluation[59] also raised concerns as regards the functioning of the equivalence principle. Several stakeholders (mainly suppliers) argued that the equivalence principle is based on a wrong premise, because online and offline distribution are inherently different sales environments and thus require different sets of criteria. By contrast, for other stakeholders, the equivalence principle may benefit consumers by leading to more competition and choice, as well as better access to a variety of distribution channels, while protecting product quality and integrity. The evaluation study pointed to the need to reassess the <u>effectiveness of the equivalence principle against the new retail landscape and in particular, consumers' expectations of an omni-channel purchasing experience.</u>

The evaluation has thus shown that the current rules on dual pricing and the equivalence principle need to be reassessed, in order to avoid a false negative.

2.2. What are the consequences of the problems and who is affected?

The problems described above affect different types of stakeholders across the EU. The problems primarily affect businesses, which use the rules in their daily operations to self-assess the compatibility of their vertical agreements with the EU competition rules. NCAs and national courts are also indirectly affected by the problems, as the VBER is binding on them and they typically take into account the Vertical Guidelines in their enforcement practice. To the extent that, in the areas identified above, the rules do not function well or as well as they could, they do not fully meet their objectives[60], thereby leading to a lack of effectiveness and efficiency[61]. Indirectly, the problems also affect consumers, since healthy competition in the supply and distribution chain will generally lead to lower prices, increased quality and variety of products and services, as well as increased incentives to innovate.

Overall, the identified problems increase the (self-assessment) compliance costs for businesses. During the evaluation and impact assessment[62], stakeholders stated repeatedly that legal certainty is the main factor that leads to lower compliance costs. Stakeholders indicated that the costs linked to ensuring compliance of vertical agreements with Article 101 of the Treaty, notably fees for lawyers and economists, would increase in the absence of a VBER, as the legal certainty it provides for the self-assessment that businesses have to conduct would decrease or even disappear. They also indicated that the low level of legal certainty in the areas where the rules were identified

[59] VBER Evaluation SWD, Section 4.6.6.2 of Annex 4.

[60] In particular, the objective of providing legal certainty, thereby making it easier for stakeholders to perform the self-assessment required by the wider legal framework, and of providing a common framework of assessment for NCAs and national courts, in order to ensure consistency in the application of Article 101 of the Treaty. The objectives of the VBER, together with the Vertical Guidelines, are explained in more detail in Section 2.3 of the VBER Evaluation SWD and in Section 4 below.

[61] Sections 5.2.1 and 5.2.2 of the VBER Evaluation SWD further explain how the fact that the rules do not function well or as well as they could affects the effectiveness and efficiency of the rules.

[62] See, for example, pages 62-67 of the VBER Evaluation SWD.

as not functioning well is primarily due to the lack of clarity of certain provisions, and the fact that the rules are not fully adapted to market developments.

Moreover, the fact that there are perceived gaps in the rules, e.g. as regards parity obligations and dual distribution by wholesalers and importers, also leads to a reduction in legal certainty, as well as diverging interpretations of some provisions of the VBER and the Vertical Guidelines by NCAs and national courts. These issues generate an additional burden and costs for businesses. This is because applying the rules as they currently stand requires an increased need for legal advice and can force suppliers and distributors to assess compliance risks for each Member State in which they operate and to adjust their business practices according to the approach taken by the respective NCA and national courts. It may also lead to suppliers and distributors adopting the approach of the NCA or national court that has the strictest interpretation, which may lead to a chilling effect on pro-competitive conduct.

Finally, several stakeholders stressed that SMEs would be especially affected by the cost increases mentioned above, since they do not have the human and financial resources needed to perform what is, from their perspective, a complex self-assessment under Article 101 of the Treaty. They also confirmed that increased legal certainty is particularly relevant for SMEs, whose market shares generally do not exceed the applicable market share thresholds, enabling them to benefit more often than other businesses from the VBER.

In addition to the impact on costs for businesses, the problems identified also create an issue of compliance with the Treaty. More specifically, defining the scope of the safe harbour too widely (<u>false positives</u>) is a problem because the Commission is only empowered to block-exempt those agreements for which it can be assumed with sufficient certainty that they meet the conditions of Article 101(3) of the Treaty. False positives thus indicate a mismatch between the scope of the VBER and the limits set by the Empowerment Regulation and the Treaty. They should therefore be eliminated. Exempting restrictions that do not meet the conditions of Article 101(3) of the Treaty could lead to distortions of competition and anti-competitive effects that would affect businesses and consumers alike.

For example, exempting all forms of information exchange in the context of **dual distribution** creates incentives for manufacturers to engage in dual distribution and to continue exchanging information in this context, even if this may lead to anticompetitive collusion between the manufacturer and the retailers with whom it competes at retail level, or a restriction of the retailers' ability to compete effectively. Similarly, exempting dual distribution by hybrid platforms would create a risk of anti-competitive spill over effects in multiple markets, stemming from the fact that the platform provides online intermediation services to sellers with whom it directly competes on the platform for the sale of goods and services. In view of the ability of hybrid platforms to influence the outcome of competition on their platform(s), including through the terms of access to the platform, their agreements should be differentiated, for the purposes of a general exemption, from other dual distribution scenarios where the risk of anti-competitive outcome is typically lower. This issue would not be covered by the proposal for a Digital Markets Act, notably because the scope of application the Digital Markets Act is different, covering providers of online intermediation that have significant scale, while the vertical rules are applicable to all providers of such services.

Exempting across-platform retail **parity obligations** incentivises online intermediaries to continue using these obligations in situations where they do not create efficiencies that outweigh their anti-competitive effects. The evidence gathered during the evaluation, including in relation to recent enforcement actions, indicates that these effects include reduced competition between established online intermediaries on the price and quality of their services and reduced scope for new and smaller online intermediaries to enter or expand in the market.

Defining the scope of the safe harbour too narrowly (false negatives), on the other hand, results in a situation where a particular type of vertical agreement or restriction is not block-exempted, even though it can be assumed with sufficient certainty that it satisfies the conditions of Article 101(3) of the Treaty. Although false negatives are less important than false positives, the Commission also seeks to avoid them. This is because a false negative increases the compliance burden for businesses, as they then have to conduct an individual assessment of the compliance of their agreements with Article 101 of the Treaty, instead of applying a simpler set of rules (i.e. the VBER and Vertical Guidelines).

For example, imposing excessively strict rules on the use of **active sales restrictions**, could, according to stakeholders, prevent suppliers from designing their distribution systems according to their business needs. This could disincentivise investments by distributors, impairing their ability to win new customers (i.e. reduce intra-brand competition) and thereby reducing competition between rival brands (i.e. inter-brand competition), to the detriment of consumers.

Similarly, as regards **online restrictions**, imposing excessively strict rules on the use of dual pricing could prevent suppliers from incentivising investments by hybrid distributors in physical stores, thus limiting the ability of brick-and-mortar shops to stay competitive and provide high quality retail services, which could ultimately jeopardise their viability. As regards the equivalence principle, this can force suppliers to impose criteria on online and physical stores that are not appropriate for the particular sales channel and thus may artificially restrict the supplier's business model. For instance, a supplier may not be able to require its distributors to reimburse the return costs of products purchased online unless it imposes an equivalent requirement on physical shops. This risks limiting online and physical stores' ability to compete effectively, also to the detriment of consumers.

NCAs and national courts are also affected by the problems identified above since the rules as they currently stand do not fully meet the objective of facilitating their enforcement work. As regards false positives, enforcement authorities wishing to pursue cases against restrictions that do not satisfy the conditions of Article 101(3) of the Treaty but which are currently block-exempted would need to withdraw the benefit of the VBER, which is burdensome. Therefore, false positives cause increased enforcement costs for authorities. On the other hand, false negatives can also increase costs for enforcement authorities. This is because, in order to enforce Article 101 of the Treaty against vertical restraints that are not covered by the block exemption (even though the conditions for an exemption are met) enforcement authorities have to conduct a more detailed assessment, rather than relying on the VBER. Moreover, qualifying restrictions that could be exempted as hardcore could lead to enforcement actions in instances where no competition concerns arise, which would imply unnecessary enforcement costs. The lack of legal certainty may also contribute to the costs of enforcement, as NCAs would have to undertake more complex analyses instead of directly enforcing existing rules, and may face increased litigation costs.

2.3. What are the problem drivers?

The problems identified above are mainly due to market developments that have occurred since the adoption of the VBER and Vertical Guidelines in 2010.

As regards the possible false positives, the main reason why the rules on **dual distribution** currently raise issues is that the prevalence of dual distribution has increased significantly in recent years, in particular due to the growth of online sales, which makes it easier for suppliers to reach end customers directly[63]. At the time of the adoption of the VBER in 2010, the scale of dual distribution was perceived to be relatively limited and therefore it was considered that any impact of the vertical agreement on the competitive relationship between the parties at retail level (where they act as competitors) was less important than the agreement's potential impact on general competition at the supply level or the retail level[64]. However, now that dual distribution appears to be more prevalent, concerns arising from the impact of the vertical agreement on the horizontal relationship between the parties, such as those linked to information exchange, may no longer be negligible. Similarly, hybrid platforms are now much more prevalent and in some cases, widely used, so that concerns regarding their inclusion in the scope of the dual distribution exception have also increased.

As for **parity obligations**, the evaluation showed that there has been an increase in the use of retail parity obligations, notably by online intermediaries[65]. This type of parity obligation has also been the subject of a number of enforcement actions by NCAs in recent years[66]. In particular, NCAs and courts have identified anti-competitive effects

[63] One of the findings of the E-commerce Sector Inquiry (p.61) was that in response to the growth of e-commerce, a common reaction by manufacturers was to open their own online shop (64% of respondent manufacturers launched their own websites within the 10 years preceding the sector inquiry) and that manufacturers also increasingly rely on marketplaces for their direct sales to customers. Many manufacturers acknowledged that the decision to engage in direct selling at retail level was largely due to the fact that, with relatively small investments, they can benefit from the advantages of online sales, including better knowledge and control over distribution, both in terms of quality and price.

[64] See examples provided in Brenning-Louko/Gurin/Peeperkorn/Viertiö, *Vertical Agreements: New Competition Rules for the Next Decade*, Competition Policy International, Number 2 - 2010, p. 14-19 (see section dealing with vertical agreements between competitors).

[65] This was supported not only by stakeholder feedback but also by the findings of the evaluation study.

[66] For example, prohibition decision of the German competition authority of 20 December 2013 addressed to HRS, upheld on appeal by the judgment of the Higher Regional Court of Düsseldorf of 9 January 2015; commitments decisions of the French, Italian and Swedish competition authorities of 21 April 2015 addressed to Booking.com; commitments decision of the Irish competition authority of 6 October 2015 addressed to Booking.com; prohibition decision of the German competition authority of 22 December 2015 addressed to Booking.com, upheld on appeal by the judgment of the German Supreme Court on 18 May 2021; commitments decision of the Hungarian competition authority of 27 April 2018

arising from the use of retail parity obligations relating to the prices and conditions offered on the platforms of other online intermediaries ("across-platform retail parity obligations"). This recent enforcement experience, the evidence gathered during the evaluation as regards the possible effects of these parity obligations[67] and the increased prevalence of retail parity obligations in general, are all elements that lead to an increased risk that continuing to block-exempt this type of restriction could lead to anti-competitive effects, as described in Section 2.2 above.

The possible existence of false negatives is also related to recent market developments. As regards **active sales restrictions**, the evidence gathered in the evaluation showed that distribution models that rely on territorial sales restrictions are becoming less viable[68]. Whereas previously it was relatively simple to apply territorial exclusivity, nowadays e-commerce makes it easier for buyers to reach sellers outside their territory (and vice-versa). Suppliers thus seem to be moving away from exclusive distribution models, at least at retail level, since the rules do not enable them to offer sufficient protection to the investments of exclusive distributors. This may lead suppliers to choose alternative, more restrictive models[69]. The rules thus prevent suppliers from designing their distribution systems according to their business needs. Similarly, the current rules on active sales restrictions in selective distribution seem to undermine the ability of businesses to set up efficient distribution systems, thus forcing them to choose between an ineffective "permeable" selective distribution system for a limited territory and a selective distribution system at pan-European level to avoid that distributors located outside the reserved territory can sell to unauthorised distributors in the reserved territory. In view of this, it appears that in a business environment reshaped by the growth of e-commerce, the current rules on active sales restrictions are no longer flexible enough to allow businesses to design their distribution systems to meet their needs.

As regards **restrictions on online sales**, the evaluation has shown that online sales have developed into a well-functioning sales channel over the last decade and it is no longer warranted to treat them as predominantly used for cross-border selling and thus necessitating special protection for that reason. On the contrary, physical stores, which often incur higher operating costs, face increasing pressure and may need to be supported to preserve their service quality and their ability to compete in the longer term. This development calls into question the current treatment of dual pricing and the equivalence principle as hardcore restrictions, as a means to ensure cross-border trade. The evaluation has shown that today's consumer journey is a fluid omni-channel process, whereby consumers can switch easily across and within the online and offline channels. In order to meet consumer expectations, businesses now aim to create seamless omni-channel sales

addressed to Netpincer; prohibition decision of the Czech competition authority of 12 December 2018 addressed to Booking.com.

67 In particular, the evidence gathered by means of two econometric studies, a survey and the review of existing literature.

68 See Section 3.2.2 of the evaluation study.

69 For example, suppliers may prefer to use a quantitative selective distribution model with very few distributors. While for exclusive distribution, only active sales can be restricted, in the case of selective distribution, the supplier can impose restrictions on active and passive sales to non-authorised distributors, leaving only authorised distributors and final customers as possible buyers.

environments. Hence, differently from the past when suppliers often sought to exclude online players and notably online platforms from accessing their products, suppliers nowadays need to be active both online and offline in order to be competitive and meet consumer demand across markets and they focus their strategy on protecting the value of their products both online and offline.

Against that background, suppliers and hybrid retailers consider that treating dual pricing as a hardcore restriction prevents them from taking into account the differing costs of online and offline sales channels and from incentivising associated investments, notably in physical stores, which often seek to compete on service quality. Similar concerns were raised about the effects of the equivalence principle. Treating any lack of equivalence between the criteria applied by a supplier for its distributors' online and offline sales as a hardcore restriction has led suppliers to impose, to the extent possible, standards that can be applied to all types of distribution channels, be it online or offline[70]. In this context, suppliers explain that the equivalence principle deters them from imposing on their distributors certain pro-competitive criteria for the use of the online or offline sales channel because inherent differences between these sales channels make it difficult to judge whether the criteria are in fact equivalent. Therefore, it appears that a relaxation of the rules in this regard is needed in order to reduce businesses' compliance costs and allow them to adapt their distribution models to a business environment reshaped by the growth of e-commerce.

2.4. How will the problem evolve?

The market developments that have taken place in the last decade are unlikely to be reversed in the near future. On the contrary, online sales and online platforms are likely to continue growing. Among other factors, the COVID-19 crisis has increased the scale of e-commerce and the role of digital platforms in the EU economy[71]. In addition, the Commission and NCAs continue their enforcement activity as regards vertical agreements. As more cases reach the national and Union courts, including cases relating to novel types of restrictions, it can also be expected that the case law will continue to evolve.

In the near future, other developments such as big data and artificial intelligence may also impact supply and distribution. As highlighted in the Commission´s Strategic Foresight Report for 2021: "Given its profound and diverse impacts across sectors, territories and society, technological progress needs to be backed by a strong social market economy and competitive single market"[72].

In view of this, it can be expected that, absent an intervention that addresses the problems identified, the VBER and Vertical Guidelines will continue to not fully deliver on their objectives. In particular, the risk of false positives will likely evolve negatively.

[70] See Section 4.3.1 of the evaluation study.

[71] https://platformobservatory.eu/news/covid-19-and-online-platform-economy

[72] 2021 Strategic Foresight Report, https://ec.europa.eu/info/sites/default/files/strategic_foresight_report_2021_en.pdf

As regards **dual distribution**, it can be expected that this model will remain widely used (or continue to grow) as suppliers will likely continue to make use of online sales channels to sell their goods or services directly to end customers (in addition to using independent distributors). In such a scenario, maintaining the block exemption for dual distribution could lead to an increased risk of anti-competitive effects, as described in Section 2.2 (which would likely continue to not be outweighed by the pro-competitive effects of this distribution model). Effective enforcement against such anti-competitive effects would remain difficult. This is because under the current rules NCAs would only be able to pursue such cases by withdrawing the benefit of the VBER, which the NCAs view as challenging, because they consider it difficult to meet the conditions of Article 29(2) of Regulation 1/2003 in practice.

As regards across-platform retail **parity obligations**, the evidence collected during the evaluation on the growth of online platforms and the fact that consumers increasingly use such tools in their purchasing process[73] suggests this trend is unlikely to be reversed. In view of this, if across-platform retail parity obligations remain block-exempted, it is likely that their use will remain at current levels or even potentially increase. Taking also into account the fact that, as is the case for dual distribution, effective enforcement would require NCAs to first withdraw the benefit of the block exemption, this scenario would lead to an increased risk of anti-competitive effects stemming from these obligations, as described in Section 2.2.

Absent an intervention, it can also be expected that the risk of false negatives will remain. As regards **active sales restrictions**, it can be expected that businesses will continue to feel restricted by the current rules from designing their distribution systems according to their needs. The current rules discourage suppliers from using active sales restrictions, thereby limiting their ability to protect distributor investments and forcing suppliers and distributors to adopt distribution models that may be less suited to their needs and potentially more restrictive than necessary[74].

Similarly, as regards **online sales restrictions**, in view of the growth of e-commerce and customers' demand for omni-channel purchasing, it can be expected that suppliers will continue to face reduced incentives to use dual pricing and impose additional requirements in order to restrict online sales, as this would impact their ability to compete. Against that background, the current rules appear to address a risk that is likely to diminish even further or disappear. On the other hand, the need to support the brick-and-mortar stores to ensure service quality and consumer choice between different sales channels will likely remain relevant. Maintaining the current rules, which treat dual pricing and a breach of the equivalence principle as hardcore restrictions, would thus continue to qualify as a false negative.

[73] See Section 3.3.9 of the Study on consumer purchasing behaviour in Europe

[74] Expert Report on active sales restrictions, pages 46-48.

3. WHY SHOULD THE EU ACT?

3.1. Legal basis

Under the Empowerment Regulation, the Commission is empowered by the Council to adopt block exemption regulations, which define certain categories of agreements that generally fulfil the conditions of exemption under Article 101(3) of the Treaty.

3.2. Subsidiarity: Added value of EU action

Competition law is an area where the EU has exclusive competence, as defined by Article 3 of the Treaty. Moreover, the Empowerment Regulation grants only the Commission, and not the Member States, the power to adopt block exemption regulations for certain categories of vertical agreements. In view of this, the subsidiarity principle does not apply.

In any event, there is an added value of EU action. The provisions of the VBER are binding also on NCAs and national courts. Since it provides a safe harbour from EU competition law, which can only be granted at EU level, the VBER offers increased legal certainty and guidance to businesses as compared to existing, more general and nationally fragmented guidance on the application of Article 101 of the Treaty.

Moreover, the VBER, together with the Vertical Guidelines[75], provides a harmonised approach for the assessment of vertical agreements throughout the EU, thus reducing the potential for diverging interpretations by national competition authorities and national courts, as well as reducing compliance costs and the administrative burden for businesses operating in more than one Member State.

4. OBJECTIVES: WHAT IS TO BE ACHIEVED?

4.1. General objective

The initiative consists of a revised VBER together with revised Vertical Guidelines. The general objective of the initiative is to provide businesses with simpler, clearer and up-to-date rules and guidance that can help them to self-assess the compliance of their vertical agreements with Article 101 of the Treaty in a business environment reshaped by the growth of online sales and by new market players such as online platforms. In parallel, the initiative also aims to facilitate the enforcement work of the Commission, NCAs and national courts.

4.2. Specific objectives

The specific objectives of the initiative are primarily to readjust the safe harbour in order to (i) eliminate the false positives as regards dual distribution[76] and parity obligations and

[75] The Vertical Guidelines do not bind NCAs or national courts, but they are typically taken into account when assessing the compatibility of vertical agreements with Article 101 of the Treaty.

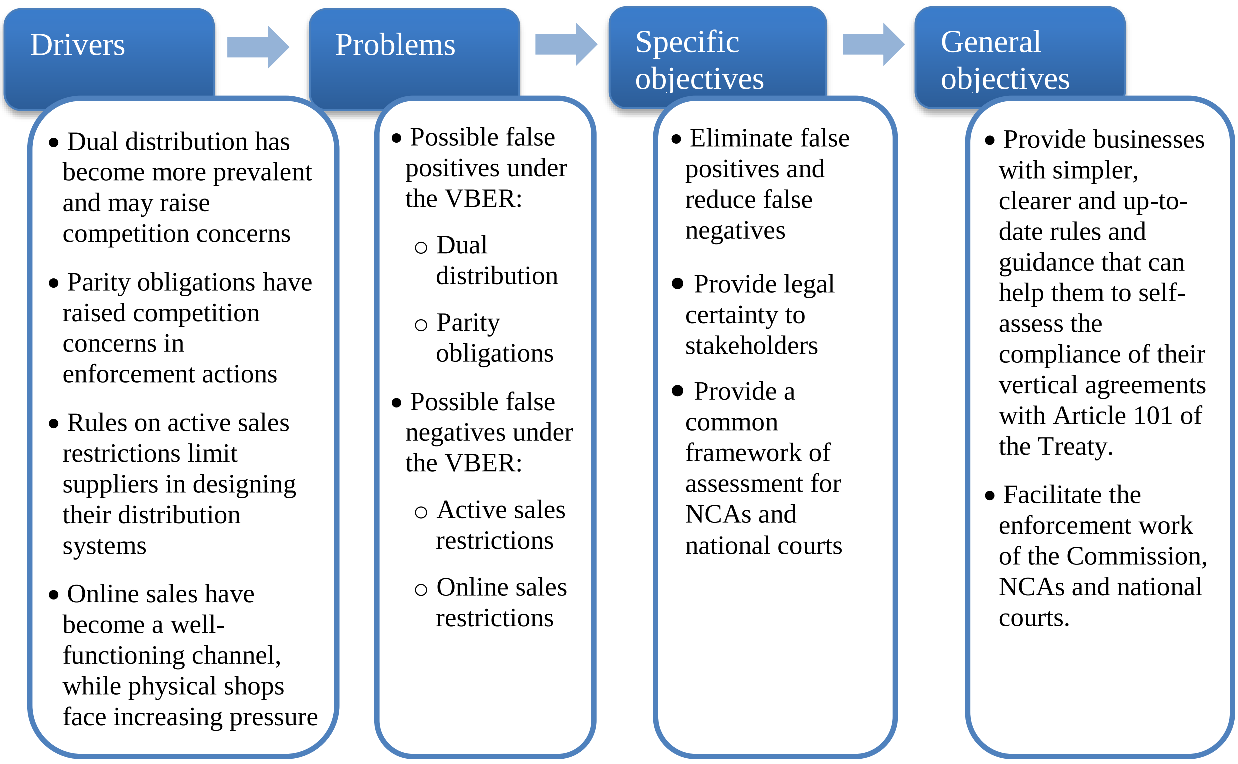
[76] While the dual distribution exemption is generally described in this report as a false positive, it should be recalled that, as explained in Section 2.1.2 above, the fact that the current dual distribution exception excludes wholesalers and importers is actually a false negative.

to (ii) reduce the false negatives as regards active sales restrictions and restrictions of online sales.

In addition, the initiative (i.e. the revised VBER and revised Vertical Guidelines) also aims to enhance the level of legal certainty that the rules provide to stakeholders, thereby making it easier for them to perform the self-assessment required by the wider legal framework, and to provide a common framework of assessment for NCAs and national courts, in order to ensure consistency in the application of Article 101 of the Treaty.

The objectives of providing legal certainty and a common framework of assessment concern not only the issues relating to the scope of the rules (namely, the four areas mentioned above as false positives and false negatives) but also the issues of a technical nature relating to the clarity, completeness and complexity of the rules, which are further developed in Annex 4 to this report.

The table below illustrates the logical chain between the drivers, problems and objectives.



5. WHAT ARE THE AVAILABLE POLICY OPTIONS?

5.1. What is the baseline from which policy options are assessed?

Currently, the assessment of vertical agreements under EU competition law is subject to the version of the VBER and the Vertical Guidelines adopted in 2010. For the reasons set out below, these rules are the relevant baseline for assessing the policy options identified to address the four areas identified above in which the rules are not functioning well or as well as they could.

First, the evaluation has shown that the VBER, together with the Vertical Guidelines, overall constitutes a useful instrument that facilitates the assessment of vertical agreements and increases legal certainty as compared to a situation without a VBER and Vertical Guidelines.

Second, the 2010 version of the VBER, together with the Vertical Guidelines, constitutes the relevant baseline rather than any earlier version of the VBER or Vertical Guidelines because the changes introduced in 2010, which mainly concerned the introduction of a market threshold on the buyer side and the clarification of how to treat sales through a particular distribution channel in the context of different distribution models, have proven to be still relevant (according to the results of the evaluation).

As explained in more detail in Section 2.4, under the baseline scenario, which is maintaining the current rules, the identified problems are likely to evolve negatively. The problems identified are mainly due to a mismatch between the rules and the current business environment that has been significantly reshaped by the growth of e-commerce and of new market players. Given that these market developments are unlikely to be reversed in the near future, under the baseline scenario, the rules would continue to not meet their objectives.

5.2. Description of the policy options

As explained in more detail in Section 2.1 above, the impact assessment has focused on the issues of a more substantive nature relating to the scope of the rules. The Inception Impact Assessment ("IIA") therefore identified policy options only for the four areas of the rules that were identified as possible false positives or false negatives. Those initial policy options were based on the evidence gathered in the evaluation, which is summarily recalled in Section 2.1.2 above. The policy options were further developed throughout the impact assessment, based on the evidence gathered and in particular, the feedback from stakeholders and the NCAs, as described in more detail below.

5.2.1. Policy options concerning dual distribution

The baseline scenario for this area entails that dual distribution would continue to be block-exempted, provided the buyer does not compete with the supplier at the upstream level and the market shares of each the supplier and the buyer do not exceed 30% on the relevant market. Three policy options have been identified for this area.

Under **Option 1**, dual distribution would continue to be block-exempted, but the scope of the exemption would be limited to scenarios that are unlikely to raise horizontal concerns. As explained in more detail in Section 2.1.2 above, the evaluation pointed to various elements that may raise horizontal concerns. The following **sub-options** for limiting the scope of the exemption aim to address those elements:

(a) Limiting the exemption of dual distribution by using a market share threshold that reflects situations where the horizontal concerns would be truly negligible – in particular limiting the exemption to instances where the parties' aggregate market share in the retail market does not exceed 10%[77] – provided the vertical agreement does not include any by object restrictions under Article 101(1) of the Treaty[78];

(b) Block-exempting all aspects of the vertical agreement in situations of dual distribution below the general 30% market share threshold, with the exception of information exchange, in particular those types of information exchange that raise horizontal concerns[79]; and

(c) Excluding from the block exemption the agreements of providers of online intermediation services that have a hybrid function, namely where they sell goods or services in competition with undertakings to which they provide online intermediation services.

Under Option 1, sub-options (a), (b), and (c) are not mutually exclusive and could thus be introduced cumulatively.

Option 2 would entirely remove the block exemption for dual distribution. This would mean that dual distribution would require an individual assessment under Article 101 of the Treaty.

Option 3 would extend the scope of the block exemption to cover scenarios where dual distribution is applied by wholesalers and importers (and not just by manufacturers, as in the current rules).

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[77] Other market share thresholds were considered at earlier stages of the impact assessment. For example, a 20% market share threshold, in line with the Specialisation block-exemption regulation (Commission Regulation (EU) No 1218/2010, OJ L 335, 18.12.2010, p. 43–47), as one could argue that dual distribution scenarios are akin to specialisation scenarios, or a threshold based on the manufacturer's share of direct sales to consumers. However, the initial feedback on these thresholds was not positive, so they were not considered further. The present impact assessment thus focuses only on the option to include a 10% market share threshold, as this was the option proposed in the draft revised rules published for stakeholder consultation.

[78] This limitation would mirror the De Minimis Notice (Communication from the Commission - Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union ("De Minimis Notice"), OJ C 368 22.12.2001, p. 13. A new version of the notice entered into force in 2014, OJ C 291 30.8.2014, p. 1). In point 8 of the De Minimis Notice, the Commission has expressed its view that agreements between competitors generally do not appreciably restrict competition if the aggregate market share held by the parties to the agreement does not exceed 10 % on any of the relevant markets affected by the agreement. In point 13, the Commission clarifies that the Notice does not cover agreements that include by object restrictions.

[79] To gather additional information on the types of information exchange that should not benefit from the safe harbour, the Commission organized a stakeholder workshop ("Workshop on information exchange in dual distribution", held on Friday 15 October 2021. See Section 2.5 of Annex 2 to this report for more information) and commissioned an expert report on information exchange in dual distribution ("Expert Report on information exchange"). On the basis of this evidence, the Commission drafted new guidance to be included in the Vertical Guidelines, which was subject to an additional open public consultation (see Section 2.6 of Annex 2 to this report for more information). This guidance sets out that the exemption for dual distribution does not cover information exchange that is that is either not directly related to the implementation of the vertical agreement or is not necessary to improve the production or distribution of the contract goods or services, or which meets neither of those conditions. The Vertical Guidelines also provide examples of information exchanges falling inside or outside the scope of the VBER.

While Options 1 and 2 are mutually exclusive and provide different levels of exemption for dual distribution, option 3 could be introduced cumulatively with one of the other options.

5.2.2. Policy options concerning parity obligations

The baseline scenario for this area entails that all types of parity obligations would continue to benefit from the block exemption, provided the market shares of the supplier and the buyer do not exceed 30%. Two policy options have been identified for this area.

Under **Option 1**, across-platform retail parity obligations would be excluded from the VBER, by including them in the list of excluded restrictions in Article 5 of the VBER[80]. This would mean that this type of parity obligation would no longer be block-exempted and would require an individual assessment under Article 101 of the Treaty. All other types of parity obligations would continue to benefit from the block exemption.

Option 2 would exclude all types of parity obligations from the VBER, without distinguishing between retail and wholesale parity obligations or between parity obligations relating to direct and indirect sales channels. This would mean that all types of parity obligations would require an individual assessment under Article 101 of the Treaty.

5.2.3. Policy options concerning restrictions of active sales

The baseline scenario for this area entails maintaining the current rules, which contain only narrow exceptions in which restrictions of active sales are block-exempted. Two policy options have been identified for this area.

Option 1 would expand the exceptions under which certain restrictions of active sales are block-exempted, to give suppliers more flexibility to design their distribution systems. As explained in more detail in Section 2.1.2 above, the evaluation identified specific instances where stakeholders perceived a lack of flexibility in the rules. Based on this evidence, as well as on the Expert Report on active sales restrictions[81], the following **sub-options** have been identified:

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[80] In the IIA, Option 2 was initially less concrete. It proposed to include in the list of excluded restrictions obligations that require parity relative to specific types of sales channels, citing as an example indirect sales and marketing channels, including platforms and other intermediaries, whereas parity obligations relating to other types of sales channels would continue to benefit from the block exemption, on the basis that they are more likely to create efficiencies that satisfy the conditions of Article 101(3) of the Treaty. The types of parity obligation that would be covered by the exclusion therefore remained to be defined. Based on the stakeholder feedback, and in particular the feedback from NCAs, who have more enforcement experience regarding parity obligations, it was concluded that across-platform retail parity obligations were more likely not to satisfy the conditions of Article 101(3) of the Treaty. Option 2 was therefore limited to removing the benefit of the VBER for those types of obligations.

[81] The Expert Report on active sales restrictions was commissioned in part to better understand the issues raised by the current rules on active sales restrictions. The report also aimed at gathering more information on the impacts of possible changes to the rules.

(a) Allowing the supplier to combine different distribution systems in the same territory. This would allow the combination of exclusive distribution at wholesale level with selective distribution at retail level.

(b) Introducing the possibility of shared exclusivity, which would allow a supplier to appoint more than one exclusive distributor in a particular territory or for a particular customer group. This would allow a supplier to restrict active sales in more instances (currently, it can only restrict active sales in cases of single exclusivity). Since the possibility to restrict active sales should nevertheless remain limited to avoid fragmentation of the internal market and to ensure that the investment incentives remain, the option to introduce shared exclusivity should only allow a limited number of exclusive distributors[82].

(c) Allowing a supplier to restrict active sales not only by its buyers and customers of the buyer that are parties to a tripartite agreement with the supplier and the buyer (the current rule), but also to restrict active sales by other customers of its buyers. Since the possibility to restrict active sales should nevertheless remain somewhat limited to avoid fragmentation of the internal market, the possibility to restrict active sales by customers of the buyers should not apply to the entire distribution chain. The present report thus assesses the possibility of limiting the exemption to the first level of the distribution chain (i.e. the direct customers of the buyer that purchased from the supplier)[83].

The three sub-options under Option 1 are not mutually exclusive and could thus be introduced together.

Option 2 would also address another specific instance of lack of flexibility of the rules identified in the evaluation. It would allow a supplier to restrict active and passive sales from outside the territory in which a selective distribution system is operated to unauthorised distributors located inside that territory.

Options 1 and 2 are not mutually exclusive and could thus be introduced cumulatively.

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[82] Throughout the impact assessment, two options were considered for limiting the number of exclusive distributors in shared exclusivity. The draft revised rules published for consultation proposed that the number of distributors should be determined in proportion to the size of the exclusive territory or customer group in such a way as to secure a certain volume of business that preserves the distributors' investment efforts. Due to the negative feedback from stakeholders as regards the lack of clarity of this limit and taking into account its legal consequence (i.e. restrictions can be considered as hardcore if a disproportionate number of distributors was appointed), the impact assessment also assesses the option of limiting the number of exclusive distributors by setting a (maximum) limited number of distributors per exclusive territory or customer group.

[83] In practice, this would mean that a supplier using independent distributors (buyers), which in turn resell to other distributors (customers of the buyer) would be able to prevent the latter distributors from engaging in active sales in other exclusive territories. However, should the customers of the buyer sell to other retailers, the supplier would not be able to prevent these other retailers from engaging in active sales in other exclusive territories.

5.2.4. *Policy options concerning indirect restrictions of online sales*

The baseline scenario for this area entails maintaining dual pricing and a breach of the equivalence principle in the list of hardcore restrictions. Two policy options have been identified for this area, which could be pursued cumulatively.

Option 1 would remove dual pricing from the list of hardcore restrictions, thus block-exempting agreements where suppliers differentiate the wholesale prices for online and offline sales by the same distributor to better reflect the costs incurred and incentivise investments in brick-and-mortar stores.

Option 2 would remove the equivalence principle, by no longer treating as a hardcore restriction the imposition of criteria for online sales that are not overall equivalent to the criteria imposed in brick-and-mortar shops in the context of selective distribution. This would block-exempt agreements that include a dissimilar treatment of offline and online sales in a selective distribution system.

In both options 1 and 2, it is important to ensure that any change does not deprive retailers of the benefits of e-commerce. In order to achieve that, appropriate safeguards would be included in the rules to ensure that the block exemption would not cover restrictions that do not meet the requirements of Article 101(3) of the Treaty. This would have to reflect the existing case law.

6. WHAT ARE THE IMPACTS OF THE POLICY OPTIONS?

This section presents the main impacts of the policy options described in Section 5.2 compared to the baseline scenario, which is no change. These policy options would primarily affect businesses, which use the rules in their daily operations to self-assess the compatibility of their vertical agreements with the EU competition rules. Indirectly, the policy options would also affect consumers, which may benefit from lower prices, increased quality and variety of products and services, as well as the results of increased incentives to innovate delivered by competition in the supply and distribution chain. Finally, also NCAs and national courts would be indirectly affected, as the VBER is binding on them and they typically take into account the Vertical Guidelines in their enforcement practice.

The following sub-sections cover the assessment of impacts on: competition; the internal market; businesses (including SMEs) and distribution systems; consumers; and enforcement authorities (i.e. the Commission, NCAs and national courts). The evidence gathered during the impact assessment, notably the feedback from the stakeholders and NCAs, shows that the policy options would have limited or no impact on social issues, environmental issues[84] and fundamental rights. These areas are therefore not further assessed.

[84] During the impact assessment, some stakeholders requested the inclusion in the Vertical Guidelines of guidance relating to sustainability objectives, e.g. on the assessment of sustainability objectives in vertical agreements under Article 101(3) of the Treaty. However, this request does not relate to the scope of the rules or to the four specific areas for which policy options were identified. This request for

The assessment of the impacts of the policy options is subject to limitations, which are similar to the limitations faced during the evaluation of the current rules.

In particular, it proved difficult to collect quantitative evidence on the costs and benefits of the policy options identified. The difficulty in quantifying the costs and benefits of the VBER, together with the Vertical Guidelines, had already become apparent during the VBER evaluation, which showed that businesses seem to assess the costs they incur to ensure compliance of their business operations with competition law at a general level, notably without distinguishing between the type of agreement concerned or the instrument relied on for the purposes of their self-assessment. To try to overcome this limitation for the purpose of the impact assessment, the questionnaire for the open public consultation of December 2020 gave respondents the opportunity to assess the impacts of the proposed policy options on various parameters of competition on a scale ranging from very negative, negative, neutral, positive, to very positive. At the same time respondents could add free answers to such questions and were invited to provide further information. However, none of them provided quantitative evidence.

The present impact assessment thus relies almost exclusively on qualitative evidence and especially on the feedback of stakeholders and NCAs. In addition, the impact assessment relies on the enforcement experience of the Commission and NCAs, as well as on the results of the expert reports commissioned during the impact assessment.

The feedback of stakeholders and NCAs is of particular importance, since companies that use the rules to self-assess the compliance of their vertical agreements with Article 101 of the Treaty and enforcement authorities are the primary users of the VBER and Vertical Guidelines. They are thus the ones with relevant practical experience on the impacts of the rules. In general, particular weight was given to the views of the NCAs, especially where those views were supported by practical enforcement experience. This is in line with the requirement to only block-exempt restrictions for which it can be assumed with sufficient certainty that they fulfil the conditions of Article 101(3) of the Treaty. Through their enforcement of Article 101(3) of the Treaty, the NCAs have developed informed views on this[85].

In the assessment of the stakeholder feedback, due account was also taken of the fact that this feedback was not necessarily representative[86]. In particular, the report takes due account of the fact that the views and interests of companies operating at different levels of the supply chain (for example, supply, wholesale or retail level) or in different sales channels (for example, brick-and-mortar or online) may differ with regard to certain

guidance is therefore addressed in Annex 4 to this report, together with other proposed technical updates and clarifications of the rules.

[85] However, this does not mean that the views of the NCAs were always given more weight than the views of other stakeholders. This was especially not the case where all other categories of stakeholders shared an opposing view.

[86] The impact assessment included an open public consultation and a public consultation on the basis of draft revised rules. The participation in these consultations was voluntary and therefore, by definition, did not necessarily lead to representative results, even though the Commission reached out to the types of stakeholders that are normally underrepresented, such as micro and small stakeholders, representatives of SMEs, and consumer associations.

aspects of the rules. In accordance with the approach adopted in the VBER evaluation, and the experience gained therein, the impact assessment tried to identify whether a particular view was held by all or by only specific categories of stakeholders, and whether a particular concern was primarily related to one sector. The present report also attempts to highlight the views of underrepresented categories of stakeholders, such as consumers[87]. Overall, but especially where there were diverging opinions, the assessment paid particular attention to the arguments raised and whether these were, for example, sector-specific. As the VBER is a horizontal instrument applying across all sectors, more weight was given to arguments that are relevant to all sectors, rather than those which were sector-specific. As explained in more detail below, for each area of the rules, the assessment gave particular weight to the stakeholder views that were consistent with other evidence (the evaluation, case law, expert reports). In addition, the assessment considers the impacts of certain adjustments to the policy options to take into account and address certain diverging views (for instance the introduction of limiting principles, in particular in areas where the proposal is to widen the scope of the block exemption).

6.1. Dual distribution

6.1.1. Impact on competition in the market

By block-exempting dual distribution, the VBER creates incentives for manufacturers to enter downstream markets by engaging in dual distribution. Therefore, the block exemption encourages dual distribution and its pro-competitive effects. Stakeholders across all categories highlighted the pro-competitive effects of dual distribution, in particular that it increases inter-brand and intra-brand competition. This was also confirmed by the Expert Report on information exchange in dual distribution[88]. However, the evidence also pointed to the need to address horizontal concerns raised by dual distribution. In view of the evidence gathered during the impact assessment, it can be concluded that limiting the scope of the dual distribution exemption (**Option 1**) would have a positive impact on competition on the market, insofar as it would address the negative impact of the horizontal concerns identified during the evaluation, while not entirely discouraging the use of this distribution model and thus still allowing dual distribution to deliver pro-competitive effects.

Option 1a (limiting the dual distribution exemption to instances where the parties' aggregate market share in the retail market does not exceed 10%, provided the vertical agreement does not include any by object restrictions under Article 101(1) of the Treaty) would, on balance, have a negative impact on competition. The additional threshold and the reference to by object restrictions would not only reduce legal certainty but would

[87] Consumers and consumer associations only made limited contributions, as was also the case during the evaluation, in spite of the Commission having reached out to many of them to solicit their participation. This is likely to be due to the same reasons that were set out in the VBER evaluation SWD, i.e. that the VBER and Vertical Guidelines are a technical piece of legislation aimed at businesses and their legal advisers. Furthermore, they concern vertical agreements, to which consumers are not party and their contents are therefore outside consumers' knowledge.

[88] Expert Report on information exchange, pages 47-49.

also be difficult to apply in practice, as many stakeholders have pointed out. This could therefore excessively discourage the use of dual distribution.

Most NCAs supported the introduction of an additional threshold as a way to limit the dual distribution exemption and argued, for example, that a threshold might prevent restrictions of intra-brand competition and help both the manufacturer and the distributor to implement a more differentiated competitive approach. Some NCAs suggested alternatives to the 10% threshold, for example a threshold relating to the share of the manufacturer's direct sales compared to its overall sales, or taking into account the combined sales of the manufacturer and all its distributors in relation to the manufacturer's product. While these alternative thresholds take into account the increase in the use of dual distribution[89], they do not address the competition concerns resulting from dual distribution. Moreover, such alternative thresholds would still be difficult and burdensome for manufacturers and distributors to apply.

The competitive concerns that NCAs and stakeholders (mostly distributors) have raised focus not on dual distribution as such, but on information exchange in the context of dual distribution. This was also apparent from the stakeholder workshop on information exchange in dual distribution. Similarly, the Expert Report on information exchange concluded that an additional market share threshold in the VBER for information exchange in dual distribution scenarios would not help to distinguish between pro- and anti-competitive practices[90].

In view of the above, **Option 1a** would go too far in limiting the scope of the dual distribution exception. It would disincentivize manufacturers from engaging in dual distribution as a means to compete better with rival manufacturers (inter-brand competition), for example by using their own online or offline outlets to test new products and business formats and to learn more about customer's needs. This disincentive would exist in addition to the disincentive for manufacturers to compete with their distributors (intra-brand competition). On the other hand, it would not adequately address the competition concerns identified. Option 1a would therefore have a negative impact on competition.

It follows partly already from this that allowing for an exemption of dual distribution that covers all aspects of the vertical agreement, with exceptions for information exchange (**Option 1b**), would address competitive concerns arising in the context of dual distribution and their negative impacts. This is especially the case if the exception targets those types of information exchange that raise competition concerns. As mentioned above, both stakeholders and NCAs have confirmed that there are competitive concerns in relation to certain types of information exchange in dual distribution. Some stakeholders mentioned that they exist, for example, in sectors where manufacturers increasingly ask for data and where access to such data can be a barrier to entry[91].

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[89] See Section 2.3 above and the findings of the E-commerce Sector Inquiry.

[90] Expert Report on information exchange, p.46.

[91] See, for example, Commission Staff Working Document of the Motor Vehicle Block Exemption Regulation Accompanying the document, Report from the Commission, Evaluation Report on the

On the basis of their practical experience, NCAs highlighted the anti-competitive risks of information exchange in dual distribution in the form of collusion. For example, in the Hugo Boss-Kaufmann case[92], the Danish NCA found a restriction of competition in the form of a concerted practice by which the manufacturer provided information on future prices in its own outlets to distributors which competed with the manufacturer at retail level. The German NCA had similar concerns relating to the exchange of information between producers and their business customers in the metal industry, when it assessed the launch of an electronic trading platform for steel products (XOM Metals GmbH)[93], and later on the launch of an online agricultural trading platform[94].

It follows *inter alia* from these cases that limiting the safe harbour to exclude those types of information exchange that raise competition concerns would have, on balance, a positive impact on competition, as it would reduce the incentives to engage in anti-competitive information exchange in dual distribution while still encouraging dual distribution and allowing it to deliver pro-competitive effects. Such a targeted limitation would appear preferable to excluding all information exchange from the scope of the exemption. While the latter option would address the competition concerns raised by information exchange, it would go too far in disincentivising the use of dual distribution and would not take into account the fact that some types of information exchange may be pro-competitive, e.g. by allowing suppliers to distribute their products more effectively. For example, in a franchise system, the franchisor collects many types of information from its franchisees (customer feedback, sales patterns, effects of promotional activities, etc.) in order to continuously develop the franchise concept. Franchisees will typically also inform the franchisor about the stock available in the franchisee's outlet, and will give forecasts on products to be purchased from the franchisor. In general, this information exchange aims at improving the efficiency of the franchise system and is considered to be pro-competitive[95]. The Expert Report on information exchange confirmed that specifying limits for the exemption of information exchange in dual distribution would improve legal certainty and hence increase the practical benefits of the rules[96].

Both stakeholders and NCAs confirmed however that further guidance would help companies to identify which types of information exchange would be considered pro-

operation of the Motor Vehicle Block Exemption Regulation (EU) No 461/2010, SWD/2021/112 final, p. 98, 100.

92 See decision of the Danish Competition Council of 24 June 2020 concerning HUGO BOSS NORDIC ApS and Axel Kaufmann ApS and HUGO BOSS, Ginsborg ApS and Ginsborg Frederiksberg Centret ApS, https://www.en.kfst.dk/nyheder/kfst/english/decisions/20200624-the-danish-competition-council-has-adopted-a-decision-finding-the-exchange-of-information-on-prices-discounts-and-quantities-in-relation-to-future-sales-between-retailers-of-clothing-items-illegal/.

93 See case summary of the German NCA, 27 March 2018, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2018/B5-1_18- 001.pdf?__blob=publicationFile&v=2.

94 See press release of the German NCA, 5 February 2020, https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2020/05_02_2020_Unamera.pdf?__blob=publicationFile&v=2 2.

95 Expert Report on information exchange, p.34-35.

96 Expert Report on information exchange, p.54.

competitive in dual distribution and which types would be considered anti-competitive. To gather additional information in view of providing this guidance, the Commission organized the Workshop on information exchange in dual distribution and commissioned the Expert Report on information exchange. On the basis of this evidence, the Commission prepared guidance to be included in the Vertical Guidelines, setting out the limits of the exemption for information exchange in dual distribution, i.e. that it only covers information exchange that is both directly related to the implementation of the vertical agreement and necessary to improve the production or distribution of the contract goods or services. The guidance also provides examples of types of information exchange falling inside or outside the scope of the VBER.

Another option identified for limiting the scope of the dual distribution exemption (**Option 1c**) is to exclude from the benefit of the exemption online intermediaries that have a hybrid function, namely where they sell goods or services in competition with undertakings to which they provide online intermediation services. This option would have both positive and negative effects on competition. This is due to the specific features of hybrid online intermediaries and their vertical agreements, which can have competitive effects on several markets, not solely on markets for online intermediation services.

The enforcement experience of the NCAs illustrates the complex assessment that is required to capture the anti-competitive effects of vertical agreements concluded by hybrid online intermediation services providers and demonstrates the greater concerns as regards reduced inter-brand competition in such scenarios[97], which may go beyond the intra-brand concerns typically found in dual distribution. Excluding from the benefit of the dual distribution exemption the agreements of online intermediaries that have a hybrid function would mean that scenarios raising such concerns would not be block-exempted, which would be positive for competition. This was supported by the NCAs.

However, as confirmed by other stakeholders, the exclusion of hybrid online intermediaries would disincentivise manufacturers of goods and suppliers of services from providing intermediation services to other undertakings, for example to their distributors, as well as disincentivising online intermediation services providers from entering markets for the sale of goods or services. These disincentives could restrict the ability of smaller hybrid online intermediaries to grow and compete against large hybrid online intermediaries, thus having a negative impact on competition.

Option 2, which is to remove the benefit of the VBER in its entirety for dual distribution, would have a negative impact on competition in the market. As explained in more detail above, it would cause legal uncertainty, disincentivise manufacturers from engaging in dual distribution and therefore have a negative impact on both inter-brand and intra-brand competition. All categories of stakeholders confirmed this, raising arguments similar to those made in relation to the introduction of a threshold to limit the dual distribution exception (Option 1a). NCAs also acknowledged the negative impact of

[97] See the investigation of the Italian NCA against Apple and Amazon for banning the sale of Apple- and Beats-branded products to retailers who do not join the official programme, https://www.agcm.it/media/comunicati-stampa/2020/7/I842.

Option 2 on competition, notably by reference to the efficiencies of dual distribution, which would be forgone if it was no longer block-exempted and therefore less used.

The extension of the dual distribution exemption to provide a safe harbour also for wholesalers and importers (**Option 3**) would have a positive impact on competition because it would incentivise wholesalers and importers to compete at retail level, which stakeholders of all categories confirmed. While raising some doubts as to whether the incentives of wholesalers and importers are fully comparable with those of manufacturers that invest directly in developing goods or services, even NCAs do not question that the extension of the dual distribution exception would generally facilitate inter- as well as intra-brand competition.

Under Option 1, sub-options (a), (b), and (c) are not mutually exclusive and could thus be adopted cumulatively. Furthermore, Option 3 could be introduced together with any of the other options. As these options are largely complementary, their combined application is expected to have the same impact on competition as the impact of each option assessed separately.

6.1.2. Impact on the internal market

Limiting the current scope of the exemption of dual distribution, either by introducing a market share threshold (**Option 1a**) or removing the exemption entirely (**Option 2**), would have a negative impact on the internal market. This is because it would reduce the incentives of manufacturers to sell directly to end customers in other Member States. This was confirmed by stakeholders of all categories.

Limiting the dual distribution exemption to cover only information exchange that is both directly related to the implementation of the vertical agreement and necessary to improve the production or distribution of the contract goods or services (**Option 1b**) would have both a positive and negative impact on the internal market. It would still allow businesses to benefit from a safe harbour for dual distribution, as it would only exclude certain types of information exchange. However, this option could lead to increased costs for businesses to ensure that only necessary information is exchanged, which may in turn reduce the incentives to expand and sell across the EU. This was confirmed in the stakeholder workshop and can at least partially be addressed by providing additional guidance in the revised Vertical Guidelines to facilitate the work of businesses when assessing which types of information exchange are covered by the exemption.

Excluding from the benefit of the dual distribution exemption online intermediaries that have a hybrid function (**Option 1c**) would have a negative impact on the internal market as it would disincentivise online intermediaries from growing into pan-European platforms competing more effectively with hybrid intermediaries that are global players and already active in the EU. However, this negative impact can be mitigated by providing clear rules and comforting guidance for businesses and online intermediaries to better self-assess their vertical agreements when they become hybrid online intermediaries.

Conversely, extending the dual distribution exemption to cover wholesalers and importers (**Option 3**) would have a positive impact on the internal market, because it would incentivise wholesalers and importers to invest and sell directly to end customers, including across borders.

As explained above, the combined application of sub-options 1a, 1b, 1c and Option 3 is expected to have the same impact on the internal market as the impact of each option assessed separately.

6.1.3. Impact on businesses (including SMEs) and distribution systems

The introduction of a threshold to limit the scope of the dual distribution exemption (**Option 1a**) or removing the exemption entirely (**Option 2**), would have a negative impact on businesses, as it would reduce legal certainty, thereby increasing compliance costs and disincentivising manufacturers from designing and investing in efficient distribution systems. Manufacturers benefit from the current rules, which creates investment incentives for them. This is not only confirmed by the feedback from stakeholders of all categories but also by the Expert Report on active sales restrictions, which stresses the importance of legal certainty for the design of distribution systems and investments.[98] However, SMEs, which typically do not have substantial market shares on the relevant retail markets, would be less likely to be negatively affected by the introduction of the 10% market share threshold.

Maintaining a dual distribution exemption that covers all aspects of the vertical agreement except for information exchange that is not directly related to the implementation of the vertical agreement or is not necessary to improve the production or distribution of the contract goods or services (**Option 1b**) would have a positive impact on businesses and the efficiency of distribution systems and investments. This was supported by stakeholders across all categories. This option would nevertheless slightly increase compliance costs, as businesses would need to assess whether the types of information that they exchange fall within or outside the scope of the exemption, However, provided the VBER and Vertical Guidelines are sufficiently clear regarding the scope of the exemption, this impact on costs should be minimal.

Many stakeholders argued that information exchange is indispensable to generate the efficiencies of the vertical agreement that underlies a dual distribution relationship, especially in franchising systems where know-how is important and needs to be regularly updated. According to these stakeholders, it can be necessary to exchange information relating to sales targets, marketing strategies and budgets, recommended prices, maximum prices, future promotions, information on exclusive distribution arrangements and customer lists. Exempting dual distribution and the information exchange that is both directly related to the implementation of the vertical agreement and necessary to improve the production or distribution of the contract goods or services would thus allow dual distribution to deliver its efficiency-enhancing effects.

Excluding from the benefit of the dual distribution exemption providers of online intermediation services that have a hybrid function (**Option 1c**) would have both a positive and a negative impact on businesses, including SMEs, and the efficiency of

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98 Expert Report on active sales restrictions, p. 32.

distribution systems. It would have a positive impact insofar as the removal of the safe harbour would deter hybrid online intermediaries from including restrictions in their vertical agreements that would prevent those using the online intermediation services from efficiently distributing their goods and services and making investments in this respect. At the same time, the *per se* exclusion of hybrid online intermediation services providers from the VBER safe harbour may firstly disincentivise undertakings from entering intermediation services markets, which would mean that other undertakings, including SMEs, would not have the opportunity to use such services to efficiently distribute their goods and services. Secondly, it may disincentivise online intermediaries from making investments to enter markets for the sale of good or services. This option would also increase compliance costs for online intermediaries that have a hybrid function, as they would no longer benefit from the exemption and would need to individually assess the compliance of their agreements with Article 101 of the Treaty. These increased compliance costs would however be limited as the revised rules would provide additional guidance to facilitate this self-assessment, notably on the exact scope of the exclusion of hybrid platforms. It would also provide some reassurance to smaller hybrid platforms by mentioning circumstances under which the Commission is unlikely to prioritize an investigation.

Option 3, which would extend the dual distribution exemption to include scenarios where dual distribution is applied by wholesalers and importers, would have a positive impact on businesses, including SMEs (as wholesalers and importers are often SMEs), as well as on the efficiency of distribution systems. This is because it would allow undertakings that are in a position similar to that of manufacturers to also benefit from the exemption and thus enhance their flexibility when it comes to making investments and designing suitable distribution systems. While NCAs remain sceptical as to whether the position is fully comparable, both stakeholders and NCAs acknowledged the positive impact of the dual distribution exception on the efficiency of distribution systems. This option would reduce compliance costs for wholesalers and importers.

As explained above, the combined application of sub-options 1a, 1b, 1c and Option 3 is expected to have the same impact on businesses as the impact of each option assessed separately.

6.1.4. Impact on consumers

Limiting the scope of the safe harbour for dual distribution to cover only information exchange directly related to the implementation of the vertical agreement and necessary to improve the production or distribution of the contract goods or services (**Option 1b**) would address horizontal competition concerns that could harm consumers while allowing information exchange that enables dual distribution to deliver its benefits to consumers. **Option 1c** would have a negative impact on consumers as this Option could disincentivise distributors from providing online intermediation services (in addition to selling goods or services) as well as online intermediaries from selling goods or other services (in addition to providing online intermediation services) due to increased compliance costs. At the same time, **Option 1c** would address possible horizontal concerns as hybrid online intermediaries have the ability and incentive to influence competition between those using their intermediation services. As it aims to ensure undistorted competition on the platform, **Option 1c** ultimately has also a positive impact on consumers.

The introduction of a 10% market share threshold (**Option 1a**) would clearly decrease the incentives of manufacturers to engage in dual distribution and would remove legal certainty for a significant number of vertical agreements, which would ultimately be to the detriment of consumers, who would notably have less choice if there were less dual distribution. This is confirmed by all categories of stakeholders, including the consumer organisation that provided comments during the impact assessment. The negative impact on consumers would be even more severe if the dual distribution exemption were to be removed entirely (**Option 2**). This is because discouraging the use of this model could ultimately reduce inter- and intra-brand competition and the positive effects it delivers to consumers (e.g. lower prices, higher output, better quality, more choice and innovation).

Conversely, an extension of the dual distribution exception to cover wholesalers and importers (**Option 3**) would have a positive impact on consumers, as this would notably increase consumer choice.

As explained above, the combined application of sub-options 1a, 1b, 1c and Option 3 is expected to have the same impact on businesses as the impact of each option assessed separately.

6.1.5. Impact on enforcement authorities

Under the current rules, in order to enforce Article 101 of the Treaty in situations that are covered by the scope of the block-exemption, competition authorities have to withdraw the benefit of the VBER. The Commission has almost never done this[99]. The NCAs have never withdrawn the benefit of the VBER, notably because of the conditions to be fulfilled under Article 29(2) Regulation 1/2003, which they consider difficult to meet in practice, as pointed out by them during the VBER evaluation[100].

In this context, **Option 2**, which would remove the safe harbour for dual distribution entirely, would have a positive impact on enforcement authorities in that it would allow the Commission and the NCAs to enforce Article 101 TFEU in dual distribution scenarios without first having to withdraw the benefit of the VBER. This would be less burdensome and less costly than having to withdraw the benefit of the VBER before an enforcement action. **Option 1** would also have this positive impact on enforcement authorities, although to a more limited extent. **Option 1a** would limit the current safe harbour to instances where the parties' combined market share at retail level does not exceed 10% and the vertical agreement does not contain any by object restriction, which is a situation that is in any case covered by the De Minimis Notice[101]. **Option 1b**, which would limit the scope of the safe harbour to cover only information exchange directly

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[99] The Commission has withdrawn the benefit of a block exemption in two cases (Commission decision of 25 March 1992 relating to a proceeding under Article 85 of the EEC Treaty in Case IV/34.072 - Mars/Langnese and Schöller and Commission decision of 4 December 1991 relating to a proceeding under Article 85 of the EEC Treaty in Case IV/33.157 - Eco System/Peugeot).

[100] See VBER Evaluation SWD, p. 133.

[101] See footnote 78 above.

related to the implementation of the vertical agreement and necessary to improve the production or distribution of the contract goods or services, would allow the Commission and the NCAs to enforce Article 101 of the Treaty as regards other types of information exchanges without the requirement of a withdrawal. The same logic applies to **Option 1c** and the application of Article 101 of the Treaty to hybrid online intermediaries.

Option 3 would have a negative impact on enforcement authorities if compared only to the baseline because in this scenario the safe harbour would be extended to cover more situations of dual distribution. This extension would also extend the cases in which it would be difficult to apply Article 101 of the Treaty to dual distribution without withdrawing the benefit of the VBER. However, if Option 3 is combined with any of the sub-options of Option 1, this would have a positive impact on enforcement authorities for the same reasons that these sub-options have a positive impact.

6.2. Parity obligations

6.2.1. Impact on competition in the market

Option 1, which is to exclude from the VBER across-platform retail parity obligations, is likely to lead to a reduction in the use of this type of parity obligation. The evidence gathered and considered during the evaluation, including stakeholder feedback and recent enforcement experience[102], indicates that across-platform retail parity obligations may restrict competition between established online intermediaries on the price and quality of their services, and foreclose market entry or expansion by new or smaller online intermediaries. Given that this evidence also indicates that it cannot be assumed that across-platform retail parity obligations generally generate efficiencies that outweigh any restrictive effects on competition[103], reducing the use of such clauses can be expected to have a positive impact on competition in the market. However, it is recalled that this option does not prohibit the use of across-platform retail parity obligations. It simply requires online intermediaries that wish to use this type of parity obligation to assess whether in the particular market context the parity obligations either do not appreciably restrict competition or that they generate efficiencies that meet the conditions of Article 101(3) of the Treaty. This option was supported by some NCAs, as well as by a

[102] For example, prohibition decision of the German competition authority of 20 December 2013 addressed to HRS, upheld on appeal by the judgment of the Higher Regional Court of Düsseldorf of 9 January 2015; commitments decisions of the French, Italian and Swedish competition authorities of 21 April 2015 addressed to Booking.com; commitments decision of the Irish competition authority of 6 October 2015 addressed to Booking.com; prohibition decision of the German competition authority of 22 December 2015 addressed to Booking.com, upheld on appeal by the judgment of the German Supreme Court of 18 May 2021; commitments decision of the Hungarian competition authority of 27 April 2018 addressed to Netpincer; prohibition decision of the Czech competition authority of 12 December 2018 addressed to Booking.com.

[103] In particular, NCAs considered that, based on their experience, across-platform retail parity obligations (sometimes referred to as ‘wide’ parity clauses) are generally less likely to be justified than narrow retail parity obligations (Section 4.6.3 of the VBER Evaluation SWD).

significant share of online intermediaries, distributors, law firms and business associations representing both suppliers and distributors[104].

In order to make this option more effective, the option has been adjusted to also exclude platform exclusivity obligations from the VBER. This adjustment is intended to ensure that online intermediaries do not use exclusivity obligations to achieve similar restrictive effects to across-platform parity obligations. Both types of obligation have the potential to restrict competition between existing online intermediaries and to exclude the entry or expansion of new intermediaries. Again, this adjustment does not prohibit the use of platform exclusivity obligations. It simply requires online intermediaries that wish to impose such obligations to carry out an individual assessment of their compatibility with Article 101 of the Treaty.

Option 2, which consists in excluding all types of parity obligations from the VBER, is likely to deter the use of parity obligations in general and therefore to lead to a reduction in the use of these obligations. In view of the available evidence, however, excluding all types of parity obligations from the VBER would appear to lead to a false negative.

The evaluation and the impact assessment did not produce evidence that upstream parity obligations relating to the conditions under which goods or services are purchased by manufacturers, wholesalers, or retailers create harmful effects[105]. Some retailers stated that they used these obligations to avoid the need for continuous price negotiations with manufacturers[106]. As regards narrow retail parity obligations, the evidence was mixed. However, the enforcement cases in which this type of parity obligation has been found to harm competition are largely limited to the hotel sector and to online intermediaries whose market share exceeds the VBER's 30% threshold[107]. This sector is also characterised by so-called cumulative effects (several online intermediaries applying the same type of parity obligation).

Stakeholders, including a consumer association and a majority of the respondent suppliers, considered that narrow retail parity obligations can produce effects similar to across-platform retail obligations, that they are not used to address a real free-riding concern, and/or that they have not been shown to be indispensable. One NCA pointed out that Option 1 would continue to block-exempt retail parity obligations relating to offline sales channels, whereas these have been eliminated by all the NCAs that have intervened against parity obligations in the hotel sector. This NCA also considered that the

[104] Some stakeholders, including online intermediaries, law firms and business associations representing both suppliers and distributors considered that there is insufficient enforcement experience to change the rules in relation to parity obligations; that excluding parity obligations from the VBER would reduce legal certainty, and that parity obligations can produce pro-competitive effects. However, in view of the evidence, it appears this is not the case for all types of parity obligations. For some stakeholder groups, such as online intermediaries and law firms it was not possible to distinguish clearly whether one option was primarily favoured as compared to the baseline, as these stakeholder groups were more or less evenly split between options.

[105] For example, where goods or services are sold as inputs to be transformed by manufacturers or to be resold by wholesalers or retailers.

[106] Section 4.6.3 of the VBER Evaluation SWD.

[107] The enforcement decisions and judgments relating to retail parity obligations referred to in footnote 56 concern online intermediaries with market shares exceeding the VBER 30% threshold.

competition concerns raised by narrow retail parity obligations in the hotel sector could also apply in other sectors and that only Option 2 would take these concerns into account and reflect the recent judgment of the German Supreme Court relating to the use of narrow retail parity obligations[108]. However, it is noted that this judgment concerns the hotel sector and the parity obligations of an online intermediary whose market share significantly exceeds the VBER 30% threshold.

Other NCAs opposed Option 2. One of them argued that, below the VBER market share threshold, there is a low risk that narrow retail parity obligations will harm competition and that they may create efficiencies, by addressing a risk of free riding. In particular, based on its enforcement experience, one NCA considered that, absent a narrow retail parity obligation, sellers and buyers, after having been matched using the online intermediation service, may have incentives to conclude their transactions using the seller's direct sales channel in order to evade the intermediary's commission fee. This may disincentivise investments by the online intermediary, for example in pre-sales services and promotion.

Since the evaluation and impact assessment did not produce evidence that, absent cumulative effects, the use by undertakings below the VBER 30% market share threshold of upstream parity obligations relating to purchase conditions or narrow retail parity obligations produce harmful effects, excluding all types of parity obligation from the VBER can be expected to have a negative impact on competition in the market.

6.2.2. Impact on the internal market

Parity obligations do not concern the territories or the customers to which goods or services are sold. However, the evidence gathered during the evaluation and referred to in Section 6.2.1 above indicates that across-platform retail parity obligations can raise the price and reduce the quality of online intermediation services, as well as restrict the ability of new or smaller online intermediaries to enter or expand in the market. As such, they can have an indirect negative impact on businesses that use online intermediation services to make sales in other Member States and a direct negative impact on new or smaller online intermediaries seeking to expand across borders[109].

Option 1 (excluding across-platform retail parity obligations from the VBER) is likely to deter some online intermediaries from using this type of parity obligation. However, online intermediaries would remain free to use across-platform retail parity obligations in individual cases where the obligation does not appreciably restrict competition or where the online intermediary can show that it is indispensable to achieve efficiencies within the meaning of Article 101(3) of the Treaty. This option can therefore be expected to have a neutral or positive impact on the internal market.

Option 2 (excluding from the VBER all types of parity obligations) is likely to deter the use of parity obligations in general, including upstream parity obligations for which the

[108] Judgment of the German Supreme Court of 18 May 2021 in case KVR 54/20 relating to the narrow price parity clauses of Booking.com.

[109] It is noted that Austria, Belgium, France and Italy have adopted laws prohibiting the use of all types of retail parity obligation by hotel booking platforms.

evaluation and impact assessment produced no evidence of harmful effects. This option can be expected to negatively impact the business model of companies that use these obligations and therefore to have a negative impact on the internal market.

6.2.3. Impact on businesses (including SMEs) and distribution systems

Option 1 (excluding across-platform retail parity obligations from the VBER) would have a slightly negative impact on the online intermediaries that use these obligations. On the one hand, it would reduce legal certainty and increase compliance costs for these companies, as they would have to carry out an individual assessment of their parity obligations[110]. On the other hand, these companies would remain free to use across-platform retail parity obligations in individual cases where the parity obligation does not restrict competition or where the company can show that the obligation generates efficiencies within the meaning of Article 101(3) of the Treaty. By contrast, this option would have a positive impact on companies (including SMEs) that would otherwise be exposed to the harmful effects of across-platform retail parity obligations, as this option would deter the use of such obligations in cases where they do not generate efficiencies. As shown by the evaluation, in particular the evidence from recent enforcement cases[111], the companies that would benefit include new or smaller online intermediaries seeking to enter or expand in intermediation services markets, and companies that use online intermediaries to sell goods or services (across-platform retail parity obligations can raise the price or reduce the quality of intermediation services). Overall, this option can be expected to have a positive impact on businesses (including SMEs) and distribution systems.

Option 2 would exclude all types of parity obligations from the VBER. This option would go beyond Option 1 and deter the use of other types of parity obligation. This option would have a negative impact on retailers, wholesalers and manufacturers that currently apply upstream parity obligations in relation to the prices and conditions under which they buy inputs. It would also negatively impact online intermediaries that use narrow retail parity obligations. In particular, compliance costs would increase for these stakeholders, as they would have to carry out an individual assessment of their parity obligations.

This option was supported by a significant share of suppliers and by some associations representing both suppliers and distributors. Some suppliers that use online intermediation services, in particular in the hotel sector, argued that excluding narrow retail parity obligations from the VBER would restore their pricing freedom, allow them to develop their direct online sales channel and reduce their marketing costs, thereby enabling them to invest more in the services that they provide to consumers[112]. By contrast, other stakeholders, in particular platforms and law firms, argued that narrow

[110] This impact was highlighted by some law firms and business associations that responded to the open public consultation on the draft revised rules.

[111] See the enforcement cases cited in footnote 56.

[112] As already noted, the hotel sector is characterised by the cumulative use of retail parity obligations by online intermediaries whose market shares in some cases exceed the VBER 30% threshold.

retail parity obligations can generate efficiencies, by preventing free riding on the investments of online intermediaries and enabling new online intermediaries to establish themselves. As the evaluation and impact assessment did not produce consistent evidence of harmful effects for upstream parity obligations or for narrow retail parity obligations when used by undertakings below the VBER 30% market share threshold, and as this option would negatively impact businesses that currently use these types of parity obligation, overall this option can be expected to have a negative impact on businesses and distribution systems.

6.2.4. Impact on consumers

Option 1 (excluding across-platform retail parity obligations from the VBER) is likely to deter some online intermediaries from using this type of parity obligation and therefore lead to a reduction in their use. As the evidence gathered during the evaluation indicates that it cannot be assumed that across-platform retail parity obligations increase consumer welfare, namely that they generally generate efficiencies that outweigh their anti-competitive effects, this would be positive for consumers. Moreover, online intermediaries will remain free to use across-platform retail parity obligations in individual cases where the parity obligation does not restrict competition or where the online intermediary can show that the obligation generates efficiencies that meet the conditions of Article 101(3) of the Treaty. In other words, this option would reduce the use of harmful retail parity obligations without jeopardising the benefits that consumers obtain from online intermediaries. Option 1 can therefore be expected to have a positive impact on consumers.

Option 2, (excluding all types of parity obligations from the VBER) is likely to deter some manufacturers, wholesalers and retailers from using upstream parity obligations relating to purchase conditions and to deter some online intermediaries from using narrow retail parity obligations, and therefore to lead to a general reduction in the use of parity obligations. A consumer association expressed support for this option, stating that parity obligations are generally harmful to consumers. However, other stakeholders favoured maintaining the block exemption for upstream parity obligations and for narrow retail parity obligations, referring to their potential to create efficiencies. In view of the lack of consistent evidence that these other types of parity obligation produce harmful effects when used by undertakings below the VBER 30% market share threshold, as well as the potential efficiencies described in Sections 6.2.1 and 6.2.3, Option 2 can be expected to have a neutral or negative impact on consumers.

6.2.5. Impact on enforcement authorities

Under the current rules, enforcement authorities that wish to intervene against parity obligations are required to first withdraw the benefit of the block exemption. This means that the enforcement authority has the burden of showing not only that the parity obligation restricts competition within the meaning of Article 101(1) of the Treaty, but also that it does not fulfil at least one of the four conditions of Article 101(3) of the Treaty. Since the evidence gathered during the evaluation indicates that it cannot be assumed that across-platform retail parity obligations generally fulfil the conditions of

Article 101(3) of the Treaty, this evidential burden is unwarranted for this type of parity obligation.

In view of this, **Option 1** (excluding across-platform retail parity obligations from the VBER) would have a positive impact on enforcement authorities, as it would make it easier for them to pursue across-platform retail parity obligations that harm competition. Instead of the competition authority having to show that the parity obligations do not fulfil one of the conditions of Article 101(3) of the Treaty, the online intermediaries that use across-platform parity obligations would have the burden of showing that the obligations fulfil all four conditions of Article 101(3) of the Treaty. On the other hand, the fact that the block exemption would no longer apply to across-platform retail parity obligations would reduce legal certainty for both companies and enforcement authorities, which would always have to conduct an individual assessment. It would also increase the scope for divergence between authorities in the application of Article 101 of the Treaty. This issue was highlighted by some law firms and business associations. However, these negative impacts would be mitigated to some extent by adding specific guidance on the assessment of parity obligations to the Vertical Guidelines. In particular, this guidance sets out relevant factors that companies and enforcement authorities may take into account in order to assess whether, in particular market contexts, across-platform retail parity obligations are likely to appreciably restrict competition within the meaning of Article 101 of the Treaty and, if so, whether they create efficiencies which fulfil the conditions of the Article 101(3) exception. The guidance also contains hypothetical case studies. Overall, Option 1 can therefore be expected to have a positive impact on enforcement authorities.

Option 2 (excluding all types of parity obligations from the VBER) would have the same positive impact as Option 1 as regards alleviating the evidential burden of enforcement authorities and the same negative impact as regards reducing legal certainty and increasing the scope for divergence between enforcement authorities. However, under this option these impacts would apply for all types of parity obligations. In this respect, it should be noted that the use of upstream parity obligations relating to purchase conditions appears to pre-date the growth of e-commerce, and the evaluation and impact assessment revealed no significant concerns in relation to the use of these obligations by companies with market shares below the VBER 30% threshold. Overall, Option 2 can therefore be expected to have a neutral or negative impact on enforcement authorities.

6.3. Restrictions of active sales

6.3.1. Impact on competition in the market

Option 1 includes three sub-options to expand the exceptions under which active sales restrictions are block-exempted.

The possibility to combine exclusive distribution at wholesale level with selective distribution at retail level in the same territory (**Option 1a)** would entail adding an exception to the VBER to allow active sales restrictions at wholesale level, in order to protect investments by wholesalers in their respective selective retail networks. This option would therefore have a more restrictive impact on intra-brand competition as compared to the baseline. The feedback received from some retailers and the consumer association confirmed this analysis. Retailers further explained that, in such a combination, they would not be able to choose their source of supply according to their needs, or could be prevented from changing suppliers to benefit from better prices or other conditions offered by other suppliers. Therefore, on balance, the expected impact on intra-brand competition of this type of distribution system combination would be negative.

Shared exclusivity (**Option 1b)** would allow suppliers to appoint more than one exclusive distributor for a particular territory or customer group**.** This option relies on the premise that intra-brand competition is better served by appointing multiple exclusive distributors, which compete with one another within an exclusive territory, than by carving up smaller exclusive territories, each of which would be exclusively allocated to one distributor, in order to comply with the current rules. The Expert Report on active sales restrictions confirmed this premise, based on the assessment of several practical cases in which suppliers wished to transition from a free distribution system to an exclusive distribution system to protect the investments of existing distributors, but did not want to choose only one of the existing distributors and had no (business) reasons (other than to comply with article 4(b)(i) of the VBER) to divide a territory into smaller exclusive territories[113]. In view of this, provided that the number of exclusive distributors is low enough to preserve their investment incentives, shared exclusivity is expected to have a positive impact on intra-brand competition.

Option 1c would allow the supplier to require its distributors to pass on certain block-exempted active sales restrictions to buyers further down the distribution chain in all distribution systems. In comparison to the current rules, this option is expected to provide a more appropriate level of protection to both exclusive and selective distribution systems against free riding from other distributors, which would have a positive impact on competition. As indicated by some of the evidence gathered during the evaluation phase[114] and in the Expert Report on active sales restriction[115], allowing active sales restrictions to be passed on would ensure that a cheap sale by the buyer to a customer cannot be used to circumvent a restriction on active sales into a territory exclusively allocated to another distributor. However, as indicated by some stakeholders, the extra protection could also have an adverse impact on intra-brand competition, by limiting access to an exclusive territory for other distributors further down the supply chain. This adverse impact could however be limited if the pass-on requirement remains limited to the first level of the distribution chain (i.e. the direct customers of the buyer that purchased from the supplier). In this case, the possibility for arbitrage is also preserved. Additionally, competition would still take place in the form of passive sales, which cannot be restricted in exclusive distribution systems. Therefore, allowing the pass-on would have a positive impact on competition, provided that this is limited.

Option 2 would allow suppliers to restrict active and passive sales by distributors outside the selective distribution system to unauthorised distributors located within the territory

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113 Expert Report on active sales restrictions, p. 35 - 37; p. 53 - 55.

114 See VBER Evaluation SWD, p. 190.

115 Expert Report on active sales restrictions, p. 53.

where the selective distribution system is operated. By limiting the access of unauthorised distributors to supplies, this option would also limit their ability to free ride on the investment efforts of authorized distributors, while still allowing intra-brand competition between the members of the distribution system. Therefore, any negative impact on competition of this option would be limited. Moreover, this option would allow for a better protection of selective distribution where the supplier wishes to use it only in certain territories and to use free distribution or exclusive distribution in other territories. This increased protection therefore gives suppliers more flexibility to organise their distribution systems, rather than having to use the more restrictive system of selectivity across the entire EEA. This would have a positive impact on competition.

The sub-options in Option 1 and Option 2 could be introduced cumulatively. Given that they are complementary means of providing more flexibility to businesses, the combined application of these options would have the same impact on competition as the impact of each option assessed separately.

6.3.2. Impact on the internal market

Under the current rules, the main reason why active sales restrictions are allowed only in very limited circumstances is to avoid partitioning of the internal market. In addition, the general treatment of passive sales restrictions as hardcore restrictions also aims to preserve the internal market objective.

By allowing the combination of different distribution systems at different levels of the distribution chain in the same territory, **Option 1a** would enable suppliers to reduce costs and facilitate the monitoring of the distribution system (see Section 6.3.3). Suppliers and lawyers have indicated that this would have a positive impact. However, other stakeholders (including some retailers and the consumer association) stressed that by strengthening the supplier’s control over the distribution process, such a combination would consolidate the position of large brands, which would in turn contribute to the fragmentation of the internal market. Based on their enforcement experience, NCAs expressed similar concerns. In view of this evidence, Option 1a is expected to have a negative impact on the internal market.

As regards shared exclusivity (**Option 1b**), stakeholders expressed concerns that its potential benefits for competition (see Section 6.3.1) could become irrelevant if it is misused to shield a large number of distributors from active sales by distributors located outside the exclusive territory, thereby leading to fragmentation of the internal market. Moreover, as explained above, if the number of shared distributors is too high, the risk of free-riding could lead to reduced investment incentives for the exclusive distributors, which would lead to this system not generating efficiencies. In order to avoid abuses and any negative impact on the internal market, shared exclusivity should therefore only allow a limited number of exclusive distributors. The impact assessment considers two options for limiting this number. The draft revised rules published for consultation proposed that the number of distributors appointed should be determined in proportion to the size of the exclusive territory or customer group in such a way as to secure a certain volume of business that preserves the distributors’ investment efforts. However, respondents from all stakeholder groups, as well as some NCAs, considered that both the application of this limit and its legal consequences were unclear. They explained that since active sales restrictions that fail to comply with the exclusive distribution exception are treated as hardcore restrictions, any limit that is open to interpretation or requires an extensive fact-specific analysis risks leading to the new flexibility not being used in practice. Due to this feedback, the impact assessment also considers the option of only block-exempting shared exclusivity up to a (maximum) limited number of distributors per exclusive territory or customer group. This would limit the scope for abuse and the negative impact of this option on the internal market, while also providing sufficient legal certainty for the option to be used in practice. This maximum number would be set at five. While it is challenging to set a precise number that would be appropriate in all instances, in view of the many possible variations in size of exclusive territories or customer groups as well as the differing competitive conditions in different markets and sectors, the impact assessment has confirmed that the clarity and legal certainty provided by setting a clear maximum number would outweigh any negative effects of this number being too low or too high. Setting a maximum number of exclusive distributors will also provide suppliers with more flexibility to determine the number of distributors that would be suitable to preserve the investment incentives of the distributors with regard to the specificities of the situation in terms of sector and size of the territory or customer group allocated, as opposed to a fixed number.

By allowing suppliers to impose active sales restrictions on buyers further down the distribution chain, **Option 1c** provides more protection to exclusive and selective distribution systems, as indicated by some of the evidence gathered during the evaluation[116]. However, this option may also further restrict intra-brand competition, by preventing arbitrage by buyers at several levels of the distribution chain and, consequently contribute to the fragmentation of the internal market. To limit this negative impact in the context of exclusive distribution, the draft revised rules proposed to block-exempt the imposition of active sales restrictions on buyers further down the distribution chain, provided such buyers have themselves entered into an agreement with the supplier or with a party that has been given distribution rights by the supplier. However, this proposal was considered too unclear by stakeholders. In view of this, a more practical alternative would be to limit the exemption to the first level of the distribution chain, irrespective of the type of contracts the buyer or its customers have with the supplier. In practice, this would mean that a supplier using independent distributors (buyers), which in turn resell to other distributors (customers of the buyer) would be able to prevent the latter distributors from selling actively into other exclusive territories, thereby preventing one means for buyers to circumvent the active sales restriction imposed on the buyer. However, the supplier would not be able to impose active sales restrictions on buyers further down the distribution chain. This would still increase flexibility relative to the current rules, while any negative impact on the internal market would be limited, since active sales by customers other than the direct customers of the buyer could not be restricted.

[116] See VBER Evaluation SWD, p. 190.

By allowing a more effective protection of selective distribution systems against active and passive sales from outside the selective distribution system to unauthorised distributors located inside the territory where the selective distribution system is operated, **Option 2** would have a negative impact on the internal market. However, since this option would essentially affect unauthorised distributors that do not meet the criteria used to select distributors, this impact would be limited.

The possibility of applying (some of) the sub-options under Option 1 and Option 2 cumulatively should have the same limited impact on the internal market as the impact of each option assessed separately, since the options include limits which reduce market fragmentation and since passive sales remain possible.

6.3.3. Impact on businesses (including SMEs) and distribution systems

The evaluation has shown that, due to their lack of flexibility, the current rules do not enable businesses to structure their distribution systems according to their needs. More flexibility would therefore benefit businesses. In this context, the impact assessment has shown that the combination of exclusive and selective distribution within the same territory (**Option 1a**) can lead to concrete benefits for some businesses. In particular, some of the evidence gathered during the impact assessment, notably submissions from suppliers and lawyers, showed that this combination would limit suppliers' costs (transaction and/or logistics costs) and facilitate their monitoring of the distribution system, since they would only be dealing with one well-established and experienced wholesaler per territory. Suppliers could also benefit from the wholesalers' existing commercial relationships and experience of the market to establish a network of retailers able to meet the selective criteria. In addition, this sub-option could ensure that all sales partners are sufficiently protected, and, consequently, incentivised to invest in selling the product concerned and promoting the brand. However, it could also have a negative impact on retailers, most of which are SMEs, since it could limit their choice of sources of supply. Therefore, the impact of this option would not be overall positive for all types of businesses.

Shared exclusivity (**Option 1b**) would have a positive impact on businesses throughout the distribution chain. It would provide more flexibility for suppliers to structure their distribution systems according to their needs. It could also create opportunities for SMEs. For instance, if small businesses were appointed as exclusive distributors in larger territories, that could enable them to extend their activities beyond a local or regional scope. The Expert Report on active sales restrictions also described shared exclusivity as an efficient model that allows an easier transition from a free distribution system to a sole exclusive distribution system[117]. By contrast, some stakeholders (a few retailer associations, the consumer association, and online intermediaries), indicated that shared exclusivity could provide too much flexibility for suppliers, without clear limits to avoid it being misused 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, given that it may not incentivise exclusive distributors to make investments

[117] Expert Report on active sales restrictions, p. 54.

if other buyers in the shared exclusive territory/customer group could free-ride on their efforts. These concerns can, however, be addressed by limiting the exemption to a (maximum) limited number of distributors per exclusive territory or customer group.

For businesses, the ability to pass on active sales restrictions to buyers further down the supply chain (**Option 1c**) would also be an improvement in comparison to the current rules. The Expert Report on active sales restrictions[118] and the stakeholder feedback gathered during the impact assessment indicated that this option can enhance the effectiveness and attractiveness of exclusive distribution systems. By preventing some distributors from using third parties (one level down the supply chain) to circumvent the prohibition of active sales into territories or to customer groups exclusively allocated to other distributors, the pass-on principle increases the possibility for distributors to recoup their investments. Some respondents also indicated that the ability to pass on restrictions provides additional protection to selective distributors, by extending the supplier's ability to prohibit sales to unauthorized dealers to distributors outside the selective distribution system (i.e. exclusive distributors appointed in other territories and free distributors).

As shown by the impact assessment, allowing suppliers to restrict active and passive sales from outside the selective distribution system to unauthorised distributors inside the selective distribution territory (**Option 2**) could increase the protection of selective distributors, including SMEs, against unauthorised distributors that do not meet the supplier's quality criteria and which could therefore free-ride on the investment efforts made by selected distributors for the provision of high-quality services. Therefore, it would foster fair competition, increase the efficiency of distribution systems and the incentives for investments, and reduce businesses' costs, irrespective of their size.

As regards compliance costs, all options would decrease these costs to some extent, insofar as all the options would expand the scope of the block exemption to include restrictions on active sales that are currently not exempted.

The combined application of (some of) the sub-options under Option 1 and Option 2 would have the same overall positive impact on businesses as the impact of each option assessed separately.

6.3.4. Impact on consumers

As regards **Option 1a**, although some stakeholders (mainly suppliers and lawyers) consider that the combination of various distribution systems at different levels of the distribution chain in the same territory can be the most efficient way of commercialising certain products, it could also have a detrimental effects on consumers. As explained in previous sections, such a combination would increase suppliers' control over their distribution system and limit retailers' ability to choose their sources of supply. Consequently, competition on price and other parameters would be limited, which would negatively impact consumer welfare.

The impact assessment indicated that shared exclusivity **(Option 1b)** can have a positive impact on consumers, as it would generate more intra-brand competition between

[118] Expert Report on active sales restrictions, p. 53.

distributors inside the exclusive distribution territory. The Expert Report on active sales restrictions confirmed that a system of shared exclusivity tends to increase intra-brand competition that otherwise, on account of the use of single exclusive distributors, would be more restricted. Consumers would normally benefit from such increased intra-brand competition[119]. However, for the consumer association, such distribution arrangements can provide too much flexibility for companies if there are no clear limits to prevent misuse by the supplier. Shared exclusivity would create no efficiency gains and limit the benefits to consumers if the exclusive distributors are protected from active sales from other distributors but have no incentive to invest due to the risk of free riding from other exclusive distributors within the shared territory/customer group. Specifying a limited maximum number of exclusive distributors that can be appointed for a given territory or customer group would, however, avoid this scenario and allow shared exclusivity to deliver benefits to consumers.

As for the ability to pass on active sales restrictions proposed in **Option 1c**, most stakeholders and the Expert Report on active sales restrictions considered it as an improvement in comparison to the current rules[120]. By providing more protection to exclusive and selective distribution systems, this arrangement can increase investment incentives, which can in turn be beneficial to consumers, since they could lead to better sales services. However, to ensure a positive impact on consumers in the context of exclusive distribution, the ability to pass on active sales restrictions should be limited to the first level of the distribution chain. Therefore, the level of protection would remain limited to what is necessary to incentivise investments, while some scope for arbitrage is preserved.

By providing more effective protection for selective distributors against active and passive sales from all types of distributors outside the selective distribution system to unauthorised distributors located inside the selective territory, **Option 2** would, as explained by some of the stakeholders, preserve the investment incentives of both suppliers and distributors. The resulting high levels of investment would in turn have a positive impact on consumers, who will be offered better pre-sales services (e.g. advice, security and traceability) and after-sales services.

The combined application of (some of) the sub options related to Option 1 and Option 2 would also be positive for consumers.

6.3.5. Impact on enforcement authorities

The ability to combine different distribution systems in the same territory (**Option 1a**) would enable suppliers to create very complex distribution systems. Based on their enforcement experience, NCAs consider that such combinations would be more difficult to assess and therefore would have a negative impact on their enforcement work. As for shared exclusivity (**Option 1b**) and the pass-on of active sales restrictions (**Option 1c**), they would have a neutral impact on enforcement authorities, provided that their use is subject to limiting principles that clearly determine which restrictions are hardcore.

[119] Expert Report on active sales restrictions, p. 54.

[120] Expert Report on active sales restrictions, p. 53.

Therefore, by specifying the maximum numbers of exclusive distributors that can be appointed for a given territory or customer group and by limiting the application of the ability to pass on active sales restrictions to the first level of the distribution chain, in the context of exclusive distribution, Option 1b and 1c can facilitate the assessment work of enforcement authorities.

According to the feedback received from some NCAs, **Option 2**, which would allow restrictions of active and passive sales from outside a selective distribution system to unauthorised distributors located within a selective distribution territory can enhance the harmonised application of the competition rules across the EU and facilitate their enforcement practice.

The combined application of (some of) the sub-options under Option 1 and Option 2 would have a neutral or positive impact on NCAs' enforcement practice.

6.4. Specific indirect measures restricting online sales

6.4.1. Impact on competition in the market

The impact assessment showed that **Option 1** would have a positive impact on competition. No longer treating dual pricing as a hardcore restriction would enable suppliers to charge different wholesale prices to hybrid distributors for online and offline sales, adapted to their costs and investment needs, which may be different for brick and mortar stores and for e-shops. This would enable such distributors to increase their sales efforts and investments in pre- and after-sales services and compete more effectively on price or other parameters of competition both with distributors of the same or of other suppliers. Dual pricing would also allow distributors to offset the effect of any possible free-riding between online and offline distribution, as any additional investment efforts could be compensated by the suppliers. The E-commerce Sector Inquiry also found that dual pricing could have pro-competitive effects in terms of addressing free-riding between online and offline sales[121]. In light of the findings of the evaluation study that consumers make parallel and complementary use of various channels and information sources, online and offline, for a single purchase[122], dual pricing is expected to increase the competitiveness of brick and mortar stores that are facing increasing pressure from e-commerce, further exacerbated during the pandemic. Option 1 is expected to have a further positive effect on intra-brand competition, by levelling the playing field between hybrid distributors and distributors that sell only online or only offline, as the current rules only prevent suppliers from charging different wholesale prices to hybrid distributors, but allow the supplier to charge different wholesale prices to pure online or pure offline distributors. Suppliers, law firms, some distributors and some NCAs largely welcomed Option 1, stating that it would have a positive impact on competition.

Online intermediaries and some distributors pointed to a potential negative impact, in the event that dual pricing results in higher online prices. Similarly, other NCAs submitted that where dual pricing may lead to a *de facto* ban of online sales, it would negatively

[121] E-commerce Sector Inquiry, p. 175.

[122] See Section 4.3.2 of the evaluation study.

impact competition. However, Option 1 includes a limiting principle that addresses such risks, by reflecting the recent case law on online sales restrictions, which provides that retailers should not *de facto* be prevented from selling online, notably because preventing online sales could have an impact on cross-border trade[123]. Additional guidance would be provided to explain how dual pricing and this limiting principle can be used in practice, namely by explaining that dual pricing can benefit from the safe harbour, as a means to support investments, offline or online, when agreed between companies with limited market power (i.e. below the VBER 30% market share thresholds). While suppliers would not be required to calculate the price difference based on a correlation with the difference in costs between the two channels, it will be explained that the purpose of the rule is to provide flexibility to support investments. In particular, businesses should consider in their self-assessment that they have the flexibility to grant a lower wholesale price to distributors, but also that arbitrary price differences, unrelated to any actual differences in the costs and investments, could lead enforcement authorities to withdraw the benefit of the VBER and that any price difference should not prevent the effective use of the internet by the distributors, for instance by making it unprofitable for them to sell online.

Moreover, Option 1 would only block-exempt dual pricing in vertical agreements where the parties have market shares below the VBER 30% thresholds and face strong inter-brand competition from the remainder of the market. The consumer survey conducted during the evaluation showed that, following the growth in e-commerce, consumers expect a seamless omni-channel purchasing experience. Therefore, to remain competitive, suppliers are unlikely to increase wholesale prices for products sold online above competitive levels. Stakeholders submitted and the Expert Report on online restrictions[124] also concluded that it is highly unlikely that dual pricing by a supplier with a market share below 30% could be anti-competitive.

The impact assessment showed that **Option 2** would be positive for competition, as the application of criteria specific to the online and the offline channel is expected to increase the efficiency and competitiveness of selective distribution systems. Suppliers would be able to design their selective distribution systems without being constrained by having to establish equivalence, which in some instances may be artificial due to the inherent differences between the two channels. Distributors' costs would also be reduced if they no longer have to comply with criteria that are not appropriate to the sales channel that they use. Therefore, further investments adapted to each channel would be encouraged, increasing distributors' competitiveness. Most categories of stakeholders supported Option 2. A few distributors, legal experts and online intermediaries, as well as some NCAs, noted that the use of non-equivalent criteria should not lead to a ban on online sales or to discrimination against online retailers, as this would limit intra-brand competition and make online sales less competitive. However, the limiting principle

[123] CJEU's judgments in the *Pierre Fabre* and *Coty* cases, see footnote 33 above.

[124] Expert Report on Cases dealing with online sales, and online advertising, restrictions at EU and national level ("Expert Report on online restrictions") by Professor Alison Jones, available at: https://ec.europa.eu/competition-policy/document/download/a1dc005a-fe39-4b6a-b033-91eb2069d7a5_en, Sections 1.F, 1.G(i) and 3.B(iv).

included in Option 2, which reflects the case law[125], would ensure that any difference in the criteria imposed for online and offline sales in the context of selective distribution does not deprive authorised distributors of the benefits of e-commerce. The Expert Report on online restrictions also concluded that legal theory and the case law of the CJEU show that restrictions on online selling that are not overall equivalent to the criteria imposed for sales in brick and mortar shops in a selective distribution system are not per se anti-competitive, unless they amount to a *de facto* prohibition on online selling[126].

Adopting Options 1 and 2 cumulatively is also expected to have a positive impact on competition. The two options are complementary, granting suppliers and distributors more flexibility to organise their distribution (or selective distribution in the case of Option 2) in the most efficient way in order to ensure the competitiveness of their online and offline sales.

6.4.2. Impact on the internal market

The current rules treat dual pricing and the lack of equivalence in selective distribution criteria for online and offline sales as hardcore restrictions, because they indirectly make online sales, which are considered a form of passive selling, more difficult, potentially leading to partitioning of the internal market. However, the growth of e-commerce and customers' demand for omni-channel purchasing shows that suppliers would generally have little incentive to restrict online sales, as this would impact their ability to compete.

Against that background, the impact assessment showed that **Option 1** (allowing dual pricing) is expected to have a neutral effect on the internal market. The block exemption would only apply below a 30% market share, i.e. in instances where suppliers face competition from at least 70% of the market. To ensure their ability to compete with other suppliers in such instances, it is expected that suppliers would use dual pricing in order to encourage investment, quality and address any free-riding risks between the online and offline channels, rather than to reduce their retailers' online sales. Moreover, the limiting principle included in Option 1, which reflects the case law[127], would exclude from the safe harbour dual pricing designed to deprive retailers of the benefits of e-commerce, since this could indeed restrict passive sales and thus have a negative impact on the internal market. The expert report on online sales also concluded that, on the basis of the case law of the CJEU, dual pricing for products to be sold online or offline would not be hardcore, unless specifically designed to restrict online sales. When this is not the case, it would not amount to a hardcore restriction capable of partitioning the internal market[128]. Some stakeholders noted that an increase in online prices resulting from dual pricing could increase geographic barriers, but most stakeholder categories considered that dual pricing would not impact the internal market, also taking into account the proposed limiting principle.

[125] CJEU's judgments in the Pierre Fabre and Coty cases, see footnote 33 above.

[126] Expert Report on online restrictions, Section 1.C(ii), 1.G(i) and 3.B(iv).

[127] CJEU's judgments in the Pierre Fabre and Coty cases, see footnote 33 above.

[128] Expert Report on online restrictions, Section 1.F(i) and 3.B(iv).

The impact assessment showed that Option 2 is expected to have a neutral impact on the internal market. Option 2 would enable suppliers facing significant inter-brand competition to design more efficient distribution systems. Against the background of the growth of e-commerce and since the block exemption would only apply below a 30% market share, i.e. in instances where suppliers face competition from at least 70% of the market, suppliers would be unlikely to impose selection criteria intended to disadvantage online selling and partition the internal market. Moreover, the limiting principle included in Option 2, which reflects the case law[129], would exclude this type of non-equivalence from the safe harbour. Suppliers, business associations representing both suppliers and distributors, law firms and some distributors supported Option 2, without identifying any risk for the internal market. A few respondents, mainly online intermediaries and some distributors, considered that Option 2 could have a negative impact if the imposition of non-equivalent criteria dissuaded distributors in a selective distribution system from selling online. The expert report on online restrictions also found that, on the basis of the CJEU's case law, the imposition of non-equivalent criteria would not negatively impact the internal market, as long as the criteria do not result in a ban of online sales[130].

Adopting Options 1 and 2 cumulatively is also expected to have a neutral impact on the internal market. Both options provide for a limiting principle reflecting the case law, which would limit possible restrictions of passive selling capable of partitioning the internal market.

6.4.3. Impact on businesses (including SMEs) and distribution systems

Option 1 is expected to have a positive impact on businesses and distribution systems. Enabling suppliers to support hybrid distributors' investments and sales efforts would help offset the effect of any free riding between online and offline distribution and increase fairness[131]. This would enable businesses, including SMEs, to maintain the competitiveness especially of their physical stores in an environment reshaped by e-commerce[132]. This was confirmed by most categories of stakeholders during the impact assessment. The impact assessment also showed that Option 1 would increase the efficiency of distribution systems, support investment and economic growth, and, in the longer term, help preserve brick-and-mortar networks. This was confirmed by suppliers, law firms, associations representing businesses from across the value chain and some distributors. Some NCAs also view dual pricing as justified from an economic point of view and beneficial to businesses. The E-commerce Sector Inquiry also found that dual

[129] CJEU's judgments in the Pierre Fabre and Coty cases, see footnote 33 above.

[130] Expert Report on online restrictions, Section 3.B(iv).

[131] During the impact assessment and the E-commerce Sector Inquiry, stakeholders argued that the current rules lead to an unlevel playing field between online and offline distribution and result in inefficient distribution systems. See E-commerce Sector Inquiry, p. 174.

[132] The alternative option of offering a fixed fee to support the (offline or online) sales efforts of a distributor, which is possible under the current rules, is not workable in practice, as confirmed by stakeholders, because the same fee is not appropriate for all distributors and it is too burdensome and costly for the supplier to manage different fees. The complexity and lack of flexibility of applying a fixed compensation was also reflected by the Expert Report on online restrictions (Expert Report on Online Sales, Section 1.B(iv)).

pricing could increase the efficiency of distribution systems by addressing free-riding between online and offline sales[133]. Some other NCAs, as well as certain online intermediaries and some distributors expressed concerns as to the potential impact of dual pricing on online distribution. However, the general lack of incentives for suppliers to make online sales more difficult in an omni-channel sales environment, as well as the limiting principle, which reflects the case law[134] and is included in Option 1, would address such concerns. A few stakeholders noted a difficulty in distinguishing between online and offline sales in a multi-channel environment also comprising hybrid distribution models, such as click and collect. However, Option 1 would grant greater flexibility to the parties to take into account the costs of their chosen business model. It would not require that the wholesale prices charged for different types of distribution are different and it would not impose any specific business model on the parties. Option 1 may have a negative impact on businesses in terms of compliance costs, as it provides for a limiting principle the applicability of which businesses will have to include in their self-assessment, while the current rules clearly exclude dual pricing from the safe harbour. Stakeholders stressed that the limiting principle beyond which dual pricing is treated as a hardcore restriction should be clear, in order not to reduce legal certainty and increase their compliance costs.

According to the impact assessment, **Option 2** would have a positive impact on businesses, including SMEs, as it would reduce their costs, by relieving them from unnecessary limitations resulting from criteria inherently linked to one distribution channel that must be replicated in the other, even if by nature they are impossible to reproduce in an equivalent manner and with equivalent results for customers. It is also expected to have a positive impact on distribution systems, by providing suppliers with more flexibility to design their selective distribution systems based on criteria specific to the needs of each channel. Stakeholders of all categories and NCAs also submitted that they expect Option 2 to have a positive impact, reduce complexity, lower costs for businesses and stimulate investments specific to each channel that would improve businesses' competitiveness and online and offline distribution. Some distributors and online intermediaries expressed concerns as to the potential impact of Option 2 on online distribution, should suppliers impose criteria that would discourage online sales. Some NCAs also noted that the difference in criteria should not have the same effect as a ban on online sales. Option 2 would address these risks, as it provides for a limiting principle reflecting the case law[135] and ensuring that non-equivalent criteria would not be exempted in instances where they deprive retailers of the benefits of e-commerce. Moreover, suppliers note that the growth of e-commerce, further accelerated during the COVID-19 pandemic, would not allow them to make online sales of their product more difficult. That would make their selective distribution systems inefficient, as consumers expect to be offered the choice between physical and online purchases. Option 2 is also expected to have a positive impact on legal certainty, capable of further reducing businesses' compliance costs, as they would no longer have to engage in complex

[133] See E-commerce Sector Inquiry, p. 175.

[134] CJEU's judgments in the Pierre Fabre and Coty cases, see footnote 33 above.

[135] CJEU's judgments in the Pierre Fabre and Coty cases, see footnote 33 above.

assessments of the equivalence of criteria. This was confirmed by stakeholders, notably suppliers, law firms and some distributors, as well as the Expert Report on online restrictions[136].

Adopting Options 1 and 2 cumulatively is also expected to have a positive impact on businesses, including SMEs and distribution systems. The two options are complementary, granting suppliers and distributors more flexibility to organise their distribution (or selective distribution in the case of Option 2) in the most efficient way and support investments by retailers offline and online.

6.4.4. Impact on consumers

The evaluation has shown that consumers nowadays expect a genuine omni-channel experience, combining the advantages of the online channel (e.g. swift and easy access) and the offline channel (e.g. high-quality pre- and after-sales services, touch and feel experience). Stakeholders consistently explained that, although they are complementary, online and offline distribution are inherently different as regards costs, infrastructures and characteristics, which are not well reflected in the current rules.

Against this background, **Option 1** would encourage businesses' efforts and investments in pre- and after-sales services in physical shops, and help them compete more effectively and remain sustainable. It would therefore have a positive impact on consumers, as they would be offered more choice, better service quality and the continued availability of a multi-channel purchasing environment also in the long run. The consumer association submitted that dual pricing can be beneficial, by enabling physical retailers to maintain a sufficient profit margin and to compete fairly with online retailers, but also saw a risk that dual pricing could result in higher online prices for consumers or a ban on selling online, negatively impacting consumer welfare. However, suppliers would in principle have no incentive to restrict online sales, as they must remain competitive online against the background of the growing significance of e-commerce and consumers' expectation of omni-channel purchasing. Also, the limiting principle included in Option 1 is intended to reflect the case law[137] and remove the benefit of the VBER if the difference in price deprives hybrid distributors of the benefits of e-commerce.

Stakeholders considered that, to achieve the same level of service irrespective of the distribution channel used, suppliers should be able to apply specific, and even diverging, criteria for online and offline distribution. The impact assessment showed that **Option 2** is expected to positively impact consumers, as the increased flexibility in designing selective distribution systems would increase the efficiency of online and offline distribution, lead to improved services, including tailored advice and channel-specific services, and stimulate investments adapted to each channel and innovation. Option 2 is also expected to address the concern of some stakeholders, notably some distributors, online intermediaries and some NCAs, that the lack of equivalence could limit online sales and thus also consumer choice, as it includes a limiting principle intended to reflect

[136] Expert Report on online restrictions, footnote 62.

[137] CJEU's judgments in the Pierre Fabre and Coty cases, see footnote 33 above.

the case law[138], by removing the benefit of the VBER when the lack of equivalence deprives authorised distributors of the benefits of e-commerce.

Adopting Options 1 and 2 cumulatively is also expected to have a positive impact on consumers, as the options are complementary and both would grant suppliers and distributors more flexibility, which is expected to result in improved service quality and higher investment and innovation, to the benefit of consumers.

6.4.5. Impact on enforcement authorities

Option 1 would address the identified false negative regarding dual pricing, thereby reducing the administrative burden of enforcement authorities in instances of dual pricing below the VBER market share thresholds. This is because enforcement costs are generally lower whenever the rules can be enforced without an extensive assessment, such as when a certain conduct or agreement benefits from the block exemption. However, authorities may have to assess whether the limiting principle included in Option 1 is applicable, which is less clear-cut than treating all dual pricing as a hardcore restriction. NCAs also flagged the importance of a clear limiting principle for the effective enforcement of the rules. As a result, the overall impact of Option 1 on enforcement authorities would be neutral.

Option 2 would address the identified false negative regarding the equivalence principle, thereby reducing the administrative burden on enforcement authorities below the VBER market share thresholds. It would also improve legal certainty, as it would no longer require an assessment of the equivalence of criteria between the online and offline distribution channels, which stakeholders, including NCAs, and the Expert Report on online restrictions[139] flag as particularly complex, due to the inherent differences of the two channels. It would also reduce the risk of diverging interpretations and enforcement of the equivalence principle by different enforcement authorities. While Option 2 would still require an assessment of when the limiting principle it contains is met, this would be offset by the overall simplification and reduction in enforcement authorities' current administrative burden in enforcing the equivalence principle. Option 2 is therefore expected to have a positive impact on enforcement authorities.

The impact of Option 1 is independent of that of option 2 (and vice-versa) with regard to enforcement authorities. Therefore, the cumulative adoption of Options 1 and 2 is expected to be have the same impact as the impact of each option assessed separately.

7. HOW THE OPTIONS COMPARE AND PREFERRED OPTIONS

This section compares the different policy options between themselves and against the baseline scenario as regards their effectiveness, efficiency and coherence, and concludes on the preferred option for each area, also in view of their impacts.

[138] CJEU's judgments in the Pierre Fabre and Coty cases, see footnote 33 above.

[139] Expert Report on online restrictions, footnote 62.

In order to compare the **effectiveness** of the different policy options, we assess their ability to achieve the specific objectives of the VBER, together with the Vertical Guidelines, i.e.:

(1) To identify the conditions that vertical agreements need to meet in order to benefit from the block exemption in a way that eliminates the risk of false positives and reduces the risk of false negatives;

(2) To provide legal certainty to stakeholders.

(3) To provide a common framework of assessment for NCAs and national courts, in order to ensure consistency in the application of Article 101 of the Treaty; and

Eliminating false positives and reducing false negatives is the most relevant criterion used for assessing the effectiveness of the policy options, as the initiative aims primarily at readjusting the scope of the safe harbour provided by the VBER. The ability of a policy option to meet this specific objective is therefore given more weight than the other two specific objectives.

Nevertheless, legal certainty is also of great importance for the effectiveness of the policy options, since without it the VBER and Vertical Guidelines lose much of their usefulness for stakeholders. The clearer the rules, the easier they will be to apply and the more they will help businesses conduct the self-assessment of their vertical agreements.

Providing a common framework of assessment for the Commission, NCAs and national courts is also important, since the consistent application of the vertical rules across the EU contributes to ensuring that businesses operating across the EU benefit from a level playing field, which in turn can contribute to the proper functioning of and to enhancing the European Single Market.

The assessment of **efficiency** takes into account how the policy options will affect the costs that businesses incur in order to verify whether their agreements can benefit from the safe harbour provided by the VBER, and how those costs compare to the benefits of the rules. These costs usually include fees for external consultants (lawyers and economists), as well as the cost of internal legal advice and the time spent by commercial teams to negotiate and review contractual documents. The evaluation has shown that when applying the VBER, a low level of legal certainty and rules that are complex or lack clarity are parameters that strongly increase costs, since they lead to an increased need for legal advice when applying the rules[140].

When it comes to **coherence**, the policy options need to the assessed in light of other Commission rules and guidance on the application of Article 101 of the Treaty and other EU legislation with relevance for vertical supply and distribution agreements.

[140] See, for example, pages 62-67 of the VBER Evaluation SWD. In particular, stakeholders indicated that the low level of legal certainty in the areas where the rules were identified as not functioning well is primarily due to the lack of clarity of certain provisions, and the fact that the rules are not fully adapted to market developments. Stakeholders further argued that the diverging interpretation of the VBER by NCAs and national courts generates additional costs, as it requires businesses to seek specific legal advice for each Member State in which they operate. Finally, during the VBER evaluation, both NCAs and businesses confirmed that the lack of legal certainty can lead to more disputes about the legality of certain vertical restrictions, which results in increased litigation-related costs.

7.1. Dual distribution

7.1.1. Effectiveness

Compared to the baseline, Options 1 and 2 would eliminate the false positive identified during the evaluation, as they would no longer block-exempt dual distribution arrangements that raise competition concerns. However, Option 2 would create a false negative, because it would remove the safe harbour for dual distribution entirely, even for instances that might fulfil the conditions of Article 101(3) of the Treaty. Option 1 is therefore more effective than Option 3 as regards the objective of eliminating false positives and reducing false negatives.

As regards the sub-options identified under Option 1, Option 1a, which would introduce a 10% market share threshold to limit the dual distribution exemption, would eliminate the false positive. However, unlike Option 1b, which limits the dual distribution exception in a more targeted manner, only as regards the exchange of certain types of information, Option 1a risks creating a false negative, as the removal of the safe-harbour would be too broad[141].

Option 1b is the most effective as regards eliminating the false positive that exists with regard to information exchange in dual distribution, as confirmed by both stakeholders, NCAs and the Expert report on information exchange. The concerns that Option 1b may raise as regards false negatives can be addressed by giving more guidance on which type of information exchange in dual distribution raises horizontal concerns and which does not. The same logic applies to Option 1c, which is effective because it removes a false positive as regards dual distribution arrangements entered into by hybrid platforms. Similarly, any possible false negatives could be addressed by providing further guidance on which dual distribution scenarios involving hybrid intermediaries are unlikely to raise concerns under Article 101 of the Treaty (for example situations in which such intermediaries lack market power).

Option 1b and Option 1c target different issues, namely separate false positives under the VBER. A combination of these Options would thus increase their overall effectiveness. Conversely, Option 1a would remove the safe harbour very broadly, thereby increasing the risk of a false negative under the VBER. Any combination that involves Option 1a would therefore reduce the overall effectiveness.

Option 3 does not address false positives but it is effective in that it addresses a false negative. This is because it would provide a safe harbour also for wholesalers and distributors, thereby decreasing compliance costs for these businesses.

As regards the objective of providing legal certainty, the removal of the dual distribution exception altogether (Option 2) would significantly reduce legal certainty, as mentioned by all categories of stakeholders. While Option 1 provides less legal certainty than the

[141] This would not change if the proposed market share threshold for dual distribution did not relate to the retail level, which according to all categories of stakeholders raises major practical problems as regards market definition and market share calculation, but instead related to the share of direct sales of the manufacturer, since such an alternative threshold appears to be at least as volatile and difficult to assess for distributors.

baseline, the feedback of all categories of stakeholders confirms that Option 1a raises particular concerns as regards legal certainty. Option 1b and Option 1c have triggered similar feedback but since the limitation of the exemption is more targeted, the concerns related to legal certainty can to some extent be addressed by giving guidance in the Vertical Guidelines. Option 3 provides additional legal certainty, both on its own or combined with Option 1, as more stakeholders would benefit from the legal certainty provided by being covered by the safe harbour.

As regards providing a common framework of assessment for the Commission, NCAs and national courts, the baseline is the most effective. Since the current rules of the VBER on dual distribution bind the Commission, NCAs as well as national courts, they ensure a high degree of consistency in the enforcement. For the same reason, Option 3 would also be effective in achieving this objective. Conversely, Option 1 is less effective in this respect. As it would limit the scope of the dual distribution exception under the VBER, it would leave room for diverging views as regards the application of Article 101 of the Treaty to situations of dual distribution that would no longer be covered by the VBER. The issue of diverging interpretation could be partially addressed by giving guidance in the Vertical Guidelines. This guidance would bind only the Commission, but it is typically taken into account by both NCAs and national courts, as confirmed during the evaluation of the current rules. Removing the exemption for dual distribution altogether (Option 2) is the least effective option as regards the harmonized application of Article 101 of the Treaty to dual distribution across the EU.

7.1.2. Efficiency

Compared to the baseline, all sub-options under Option 1, as well as Option 2, are likely to increase costs for businesses engaged in dual distribution, whereas Option 3 could decrease costs. Under Option 2, all instances of dual distribution would require an individual assessment under Article 101 of the Treaty, which necessarily entails more time and resources for businesses that use this distribution system. Comparatively, since the sub-options under Option 1 would still block-exempt some instances of dual distribution, they would increase costs but to a lesser extent than Option 2. Since it extends the dual distribution exception to include scenarios where dual distribution is applied by wholesalers and importers, Option 3 could reduce costs for those stakeholders.

7.1.3. Coherence

Overall, Options 1, 2 and 3 would not negatively affect the coherence of the VBER and Vertical Guidelines with other Commission rules and guidance on the application of Article 101 of the Treaty, as they do not propose changes that would conflict with such rules and guidance. Option 1a, for example, is coherent with the De Minimis Notice. The only area where a possible lack of coherence was identified in the evaluation related to the assessment of information exchanges in the context of dual distribution under the Vertical Guidelines and the Horizontal Guidelines. Option 1b would improve coherence in this regard, by providing additional guidance on the assessment of information exchanges in the Vertical Guidelines, as suggested by stakeholders of all categories.

As regards coherence with other EU legislation with relevance for vertical supply and distribution agreements, Option 1c ensures coherence with the Platform-to-Business Regulation as regards the definition of hybrid online intermediaries[142]. This is notably because the relevant definition in the VBER would build on a similar definition in the Platform-to-Business Regulation, while taking into account the specificities of Article 101 of the Treaty and the VBER, for example that it may only govern agreements between undertakings and not agreements with consumers. Option 1c would also be consistent with the proposal for the Digital Markets Act. This is notably because the focus of the Digital Markets Act is on digital gatekeepers, which are undertakings that enjoy market power and therefore do not benefit from the safe harbour provided by the VBER.

7.1.4. Preferred option

In view of the above, the preferred option as regards dual distribution is a combination of Option 1b, Option 1c, and Option 3. The combination of these options is the most effective as regards eliminating false positives. Although these options could, at the same time, create false negatives, they remain the preferred option since the objective of eliminating false positives is more important than that of reducing false negatives. Moreover, the false negatives can be addressed by providing further guidance in the Vertical Guidelines. This guidance would also contribute to a more harmonised application of Article 101 of the Treaty and the VBER as well as contribute to increasing legal certainty. Option 3 reduces compliance costs and thus possible false negatives. Overall, all three options are efficient and ensure coherence with other Commission acts.

The combination of Options 1b, 1c, and 3 would have a positive impact on competition, to the benefit of consumers, since it addresses anti-competitive effects in relation to dual distribution, while additionally incentivising wholesalers and importers to compete at retail level and sell across borders. This combination of options would also have a neutral or positive impact on the internal market, and a positive impact on the efficiency of distribution systems and investments, as well as businesses more generally.

	Effectiveness			Efficiency	Coherence
	Scope of safe harbour	Legal certainty	Harmonised application		
Baseline	0	0	0	0	0
Option 1(a)	+/–	–	–	–	0
Option 1(b)	++	+/–	+/–	+/–	+
Option 1(c)	+	+/–	+/–	–	+
Option 2	+/–	–	–	– –	0

[142] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186, 11.7.2019, p. 57.

Option 3	+	+	+	+	0
Combination of options 1(b), 1(c), 3	++	+/–	+/–	+/–	+

7.2. Parity obligations

7.2.1. Effectiveness

Option 1 would remove the false positive that has been confirmed to exist under the current rules by excluding across-platform retail parity obligations from the scope of the VBER. It is thus effective as regards this specific objective. Option 2 is less effective than Option 1, because it would remove the benefit of the VBER for all types of parity obligations, including those for which the evaluation has not produced consistent evidence of anti-competitive effects, thus creating a false negative under the VBER.

As regards legal certainty, Option 1 and Option 2 would inevitably reduce legal certainty as compared to the baseline, by reducing the scope of the safe harbour. Option 1 would however provide more legal certainty than Option 2, as the reduction of the scope of the safe harbour is more targeted. These reductions in legal certainty would be mitigated to some extent by the addition of specific guidance on the assessment of parity obligations in the Vertical Guidelines.

As regards providing a common framework of assessment for the Commission, NCAs and national courts, it has to be taken into account that retail parity obligations have been subject to enforcement actions that have led to diverging outcomes. In light of this, Option 1 would strengthen harmonization by creating a specific rule in the VBER for across-platform retail parity obligations, supported by the addition of specific guidance in the Vertical Guidelines for the assessment of these and other types of parity obligations outside the VBER safe harbour. Option 2, which would make all types of parity obligations subject to an individual assessment, is more likely to lead to divergent enforcement by NCAs and national courts.

7.2.2. Efficiency

Compared to the baseline, Options 1 and 2 would both likely increase costs for businesses that include parity obligations in their vertical agreements. Excluding some or all types of parity obligations from the VBER would require businesses that wish to use such obligations to carry out an individual assessment under Article 101 of the Treaty. As explained above, this necessarily entails increased time and resource costs. Option 1 would however increase costs to a lesser extent, since it would exclude from the block exemption only one clearly defined type of parity obligation, thus narrowing the number of stakeholders whose compliance costs would increase, as compared to Option 2.

7.2.3. Coherence

Option 1 and Option 2 are both coherent with the Platform-to-Business Regulation and the Digital Markets Act proposal. As mentioned in Section 7.1.3, this is notably because the relevant definition for online intermediaries in the VBER would build on a similar definition in the Platform-to-Business Regulation, while taking into account the specificities of Article 101 of the Treaty and the VBER. Option 1 and Option 2 would be consistent with the proposal for the Digital Markets Act, notably because of the different purpose and scope. Whereas the Digital Markets Act regulates the use of parity and other obligations by a limited number of undertakings with market power that qualify as digital gatekeepers, the VBER and Vertical Guidelines provide a safe harbour and guidance to allow undertakings of all sizes and in all sectors to assess the compliance of their vertical agreements under Article 101 of the Treaty. Therefore, the Digital Markets Act and the VBER would in any case co-exist in a coherent manner as regards parity obligations[143].

7.2.4. Preferred option

In view of the above, the preferred option for parity obligations is Option 1 as it would remove the false positive that has been confirmed during the impact assessment, while being less likely to create a false negative. Option 1 also provides more legal certainty than Option 2, and it strengthens the harmonized application of the VBER across the EU. Option 1 is efficient and coherent with other EU instruments, notably the Platform-to-Business Regulation and the Digital Markets Act proposal.

Option 1 would have a positive impact on competition in the market, because this form of parity obligation is the most likely to produce restrictive effects and cannot be assumed to create efficiencies that fulfil the conditions of Article 101(3) of the Treaty in all cases. Since those conditions incorporate a consumer welfare test, this option will have a positive impact on consumers. As regards the efficiency of the business model and investments, as well as the impact on businesses more generally, Option 1 may have both a positive and a negative impact, but would have no direct impact on the internal market. However, Option 1 would have a positive impact on the work of enforcement authorities, because it would make it easier for them to pursue across-platform retail parity obligations that harm competition.

	Effectiveness			Efficiency	Coherence
	Scope of safe harbour	Legal certainty	Harmonised application		
Baseline	0	0	0	0	0
Option 1	++	–	+	–	+
Option 2	+	– –	–	– –	+

[143] It should also be noted that four EU Member States have adopted laws prohibiting the use of all types of retail parity obligation by hotel booking platforms. These laws therefore prohibit parity obligations that would remain block-exempted under Option 2. Three of these laws are the subject of complaints to the Commission.

7.3. Active sales restrictions

7.3.1. Effectiveness

Option 1a, which would extend the safe harbour to the combination of exclusive distribution at wholesale level and selective distribution at retail level in the same territory, would create efficiency gains for suppliers, however there is a risk that it would not create such efficiencies for retailers. In view of this, it cannot be presumed with sufficient certainty that this option meets the conditions of Article 101(3) of the Treaty. This option would thus risk creating a false positive, not in line with the Treaty.

Option 1b (allowing shared exclusivity) and Option 1c (allowing the pass-on of active sales restrictions) would be the most effective options to avoid false negatives, provided the application of these options is subject to clear limiting principles, as explained in Section 6.3 above. Option 2, which would allow suppliers to impose active and passive sales restrictions to unauthorised distributors located inside the territory where a selective distribution system is operated, also reduces false negatives as it limits free-riding of unauthorised distributors that do not incur the cost linked to the criteria of the selective distribution system.

As regards the objective of providing legal certainty, Option 1a would provide a similar (low) level of legal certainty as the baseline, since it would lead to the constitution of complex combinations of distribution systems and therefore would require complex self-assessment from businesses. As explained above, Option 1b and Option 1c could provide a high level of legal certainty, if the limits to their application are sufficiently clear. In such a case, they would provide a higher level of certainty and decrease assessment costs for businesses when compared to Option 1a and the baseline. As for Option 2, it would provide legal certainty for businesses as it is a rule that is clear to apply.

As regards providing a common framework of assessment for enforcement authorities, Option 1a would be less effective than Option 1b and Option 1c. Option 1a would enable suppliers to operate complex distribution systems that would be more difficult to assess for enforcement authorities. Therefore, the harmonized application of the rules by NCAs would not be guaranteed. Option 1b (shared exclusivity) and Option 1c (pass-on) are more effective options to provide a common framework of analysis for all competition authorities, provided that the limits of their application are clearly specified in the VBER. As regards shared exclusivity, referring to a precise (maximum) number of distributors would ensure that NCAs do not have to perform a complex fact-based assessment to assess the conformity of the distribution system with the VBER. Similarly, limiting the pass-on to the first level of the distribution chain (immediate customer of the buyer in the context of an exclusive distribution system) would also lead to a more harmonised application of the rules.

Option 2 would also allow a harmonized application of the rules as the limitation of active and passive sales to unauthorised distributors inside the territory where a selective distribution system is operated concerns all distributors located outside the selective distribution territory. Therefore, it is in principle simple for enforcement authorities to apply.

7.3.2. *Efficiency*

Compared to the baseline, all sub-options under Option 1 would likely decrease costs for businesses that apply active sales restrictions, as the revised rules would expand the exceptions under which such restrictions are allowed. A similar reasoning would apply as regards Option 2. Both options could ultimately lead to more agreements being covered by the safe-harbour provided by the VBER (if suppliers decide to take advantage of the increased flexibility to include the options in their agreements) which would lead to decreased costs for assessing the compatibility of such agreements with Article 101 of the Treaty. Since there is no data on whether suppliers, faced with increased flexibility, would use one option or sub-option more than the others, it is not possible to estimate whether the cost decrease would be different among the options/sub-options (i.e. whether one option/sub-option would lead to more agreements being covered by the safe-harbour, as compared to other options). In any case, as the options are not mutually exclusive, this appears not to be relevant for the assessment.

7.3.3. *Coherence*

Overall, Options 2 and 3 would not negatively affect the coherence of the VBER and Vertical Guidelines with other Commission rules and guidance on the application of Article 101 of the Treaty, as they do not propose changes that would conflict with such rules and guidance. They would also not have an impact on coherence with other EU legislation with relevance for vertical supply and distribution agreements.

7.3.4. *Preferred option*

In view of the above, the preferred option as regards active sales restrictions would be a combination of Option 1b, Option 1c and Option 2. These options are the most effective in reducing false negatives. They can also provide a high level of legal certainty and a common framework of assessment for enforcement authorities, if the limits to their application are sufficiently clear.

Option 1b, which would allow shared exclusivity, and Option 1c, which would allow the pass-on of active sales restrictions, both increase the efficiency and attractiveness of exclusive distribution. They would thus have a positive impact on suppliers that wish to use this distribution model. Provided that their application is limited, as described above, both options would have a positive impact on competition. These limits would also avoid any negative impact on the internal market that could result from the additional protection of active sales restrictions. Option 2 would also have positive effects on the efficiency of selective distribution. These effects would outweigh the limited negative impacts on competition and the internal market that could result from unauthorised distributors being limited in their ability to compete.

In addition to the positive effects for businesses, consumers would also benefit from the additional intra-brand competition provided by shared exclusivity (Option 1b) and from the increased investment incentives that could result from Option 1c and Option 2. Enforcement authorities would also be positively affected by the preferred option, since they would be designed in a clear manner with limits that are not open to interpretation.

	Effectiveness			Efficiency	Coherence
	Scope of safe harbour	Legal certainty	Harmonised application		
Baseline	0	0	0	0	0
Option 1(a)	+/–	–	–	+	0
Option 1(b)	+	+	+	+	0
Option 1(c)	+	+	+	+	0
Option 2	+	+	+	+	0
Combination of options 1(b), 1(c), 2	+	+	+	+	0

7.4. Specific indirect measures restricting online sales

7.4.1. Effectiveness

Option 1 and Option 2 would be more effective than the baseline as regards removing the false negatives identified during the evaluation since they would allow an extension of the safe-harbour to restrictions that satisfy the conditions of Article 101(3) of the Treaty. However, allowing dual pricing and the application of non-equivalent criteria for online and offline sales without any limits, could risk creating a false positive, since it could lead to a prevention of the effective use of the internet, which is a restriction that does not satisfy the conditions of Article 101(3) of the Treaty and should therefore not be exempted. The limiting principle included in Option 2 and Option 3 would however remove the risk of a false positive.

As regards legal certainty, Option 1 would decrease the level of legal certainty, as compared to the baseline. This is because stakeholders using dual pricing would have to assess the applicability of the limiting principle, which would decrease the legal certainty of including dual pricing in the block exemption. Option 2 would increase the level of legal certainty, as compared to the baseline, under which the equivalence principle proved difficult to apply in practice.

As regards providing a common framework of assessment for enforcement authorities, Option 1 would be less effective than the baseline. By allowing dual pricing to benefit from the block exemption, enforcement authorities would, in principle, no longer need to assess such restrictions whenever the VBER applies (i.e. if the 30% market share threshold is met). However, in practice, they would need to assess whether such restrictions comply with the limiting principle, which may still entail a risk that different authorities would reach diverging conclusions on this point.

As regards the equivalence principle, under the current rules, the inherent differences between online and offline sales channels lead to divergences in enforcement by NCAs. By allowing suppliers to apply non-equivalent criteria for online and offline sales (Option 2), enforcement authorities, in principle, would no longer need to assess such restrictions provided the other conditions of the VBER are met, in particular the 30% market share threshold. However, in practice, enforcement authorities would need to assess whether such restrictions comply with the limiting principle, which also entails a risk that different authorities could reach diverging conclusions. Therefore, Option 3 is as effective as the baseline in this regard.

7.4.2. Efficiency

Compared to the baseline, Options 1 and 2 would both be likely to decrease costs for businesses that include in their agreements dual pricing and non-equivalent criteria for online and offline sales. By no longer qualifying such restrictions as hardcore restrictions, Options 1 and 2 would allow more agreements to benefit from the safe harbour provided by the VBER, which would lead to decreased costs for assessing the compatibility of such agreements with Article 101 of the Treaty. Since the options are not mutually exclusive, it does not appear relevant for the assessment to consider whether one option might lead to a bigger cost decrease than the other.

7.4.3. Coherence

Overall, Options 1 and 2 would not negatively affect the coherence of the VBER and Vertical Guidelines with other Commission rules and guidance on the application of Article 101 of the Treaty, as they do not propose changes that would conflict with such rules and guidance. These options would also not have an impact on coherence with other EU legislation with relevance for vertical supply and distribution agreements, such as the Platform-to-Business Regulation.

7.4.4. Preferred option

In view of the above, the preferred option to address the problems identified as regards specific indirect measures restricting online sales is a combination of Options 1 and 2. Options 1 and 2 are both effective at removing the false negatives identified during the evaluation. By including a limiting principle, they would also avoid creating a false positive. Option 1 would decrease the level of legal certainty, whereas Option 2 would be neutral in terms of legal certainty. While Option 2 would be less effective at providing a common framework of assessment for enforcement authorities, this is outweighed by the positive effects as regards the scope of the safe harbour and legal certainty. Option 3 would be equally effective at providing a common framework for assessment. Moreover, both options are more efficient than the baseline, and would also not have an impact on coherence.

Option 1 and Option 2 would have a positive impact on competition, distribution systems and investments, as well as more generally on businesses and SMEs, as they would enable them to maintain the competitiveness of their physical stores in an environment reshaped by the growth of e-commerce. These options would be neutral as regards the impact on the internal market as well as enforcement authorities, which may still have to assess whether the limiting principle is complied with. However, this assessment would be offset by the overall simplification and reduction in enforcement authorities' current administrative burden. Finally, Option 2 and Option 3 would have a positive impact on consumers, as the increased efficiency of online and offline distribution would lead to improved services, including tailored advice and channel-specific services.

	Effectiveness			Efficiency	Coherence
	Scope of safe harbour	Legal certainty	Harmonised application		
Baseline	0	0	0	0	0
Option 1	+	–	–	+	0
Option 2	+	+/–	+/–	+	0
Combination of options 1 and 2	+	+/–	+/–	+	0

7.5. REFIT (simplification and improved efficiency)

Compared to the currently applicable VBER and Vertical Guidelines, the above-mentioned preferred policy options do not significantly alter the core structure and framework of assessment provided by the rules (e.g. the concepts of hardcore restrictions and excluded restrictions; the market share threshold for both suppliers and buyers, etc.). The preferred policy options mainly impact the scope of the VBER, i.e. the types of vertical agreements and vertical restrictions that are covered by the block exemption. In order to verify whether their agreements can benefit from the safe harbour provided by the VBER, businesses will therefore still need to perform a similar type of assessment as they currently do.

Under the above-mentioned preferred policy options, some restrictions that are currently block-exempted would no longer be block-exempted. This is expected to increase compliance costs for stakeholders that include those restrictions in their agreements, as they would no longer be able to rely on the simpler set of rules provided by the VBER, but would instead need to carry out a more extensive individual assessment under Article 101 of the Treaty. Conversely, however, some restrictions that are currently hardcore restrictions would be block-exempted, which would decrease compliance costs for stakeholders that include those restrictions in their agreements. On balance, therefore, the initiative is not expected to significantly increase the administrative costs for businesses arising from the legislation[144]. Moreover, the initiative does not increase the complexity of the legal framework. On the contrary, as set out in Annex 4 to this report, the initiative would also simplify complex areas of the current rules and streamline the existing guidance, to the extent possible. As such, it is expected that the revision of the VBER and Vertical Guidelines, including not only the issues that are subject to the

[144] It has proven difficult, throughout the evaluation and impact assessment, to quantify the costs incurred by businesses in using the VBER and the Vertical Guidelines to conduct the self-assessment of their agreements (these limitations are further described in Section 4.3.1 and Section 5.2.2. of the VBER Evaluation SWD). As such, it was not possible to estimate the cost savings in a quantitative manner.

impact assessment, but also the updates and clarifications of a technical nature, will overall reduce compliance costs for all stakeholders.

8. HOW WILL ACTUAL IMPACTS BE MONITORED AND EVALUATED?

The revised rules are expected to be in place for 12 years. This 12-year period of validity will allow the Commission and the NCAs to gather sufficient experience on the functioning of the revised rules, which is necessary to inform decisions on any future changes. This period of validity also provides sufficient stability for businesses that wish to introduce new models of distribution or to adapt their current distribution models to the revised rules, as these changes imply costs for them.

It should nonetheless be noted that Article 2(2) of the Empowerment Regulation provides that a block exemption regulation may be repealed or amended where circumstances have changed. Therefore, in the event of substantial changes in the market, the Commission has the possibility to adapt the rules before the expiry of the 12-year period.

In any event, no later than June 2030, the Commission will take stock of the functioning of the revised rules and draw up an evaluation report, *inter alia* on the basis of the information gathered through the continued monitoring.

The Commission plans to continuously monitor how the revised rules are functioning and whether they achieve the policy objectives identified in this Impact Assessment. This will be done in a qualitative manner.

As discussed notably with the JRC, throughout the evaluation and impact assessment process it has proved difficult to quantify the benefits that businesses derive from being able to use a simpler set of rules to self-assess their vertical agreements, and to quantify the costs that they incur in using these rules (these limitations are further described in Section 6 of this report and Section 4.3.1 of the VBER Evaluation SWD). Similarly, it is also difficult to quantify how the rules facilitate the enforcement work of the Commission, the NCAs and the national courts. As a result, it is not possible to provide quantitative monitoring indicators that would allow the Commission to evaluate how these benefits and costs are affected by the revised rules.

It is also difficult to provide quantitative monitoring indicators for the purpose of measuring how the revised VBER and Vertical Guidelines achieve their specific objectives, i.e. providing legal certainty, avoiding false positives and false negatives and providing a common framework of assessment. Legal certainty, in particular, is somewhat subjective and may depend on the difficulties that specific stakeholders encounter when applying the rules to their particular field of activity, which adds to the difficulty in measuring it.

Nevertheless, the Commission will monitor the functioning of the revised rules, primarily by relying on its own enforcement experience and that of the NCAs, but also by monitoring the questions of interpretation that arise before the national and Union courts, as well as through its continuous interactions with stakeholders and their representatives in the context of its enforcement and policy-making work.

The Commission regularly receives complaints (both formal and informal) and conducts *ex-officio* investigations, including in relation to vertical agreements. Through its investigations of vertical agreements, the Commission will be able to ascertain whether the revised rules lead to possible false positives or false negatives and to confirm whether the preferred options have achieved their objectives of eliminating false positives and reducing false negatives. For example, the Commission's enforcement actions may help it understand whether specific restrictions that are block-exempted indeed fulfil the conditions of Article 101(3) of the Treaty; whether new types of restrictions emerge for which further guidance is needed; or whether restrictions that are not block-exempted may be efficiency-enhancing.

The enforcement experience of the NCAs will also be of particular importance for this purpose, as they are the primary enforcers in relation to vertical agreements[145]. The Commission regularly exchanges experience and information with the NCAs about the enforcement of the EU antitrust rules in the context of the European Competition Network. The Commission and the NCAs discuss the application of Article 101 of the Treaty, the VBER and the Vertical Guidelines in relation to real cases in a dedicated Working Group on Vertical Restraints, which meets at least twice per year. In addition, the Commission discusses cases involving vertical agreements bilaterally with NCAs. Article 11 of Regulation 1/2003 provides for various exchanges of information between ECN authorities, including the obligation to inform other authorities about the opening of an investigation and the obligation on NCAs to consult the Commission on any decision that they propose to adopt under Article 101 of the Treaty. These well-established mechanisms will allow the Commission to collect, regularly and systematically, information on the functioning of the revised VBER and Vertical Guidelines. They will also enable the Commission to understand whether the revised rules achieve the specific objective of providing a common framework of assessment in order to ensure a consistent application of Article 101 of the Treaty by NCAs and national courts.

Similarly, the Commission will monitor the enforcement activities of national courts in relation to vertical agreements, paying particular attention to any requests for preliminary rulings brought before the CJEU. Such requests are usually made regarding areas where the national courts find there is insufficient guidance on how to apply the rules. The number of such requests will be an important indicator of whether the rules are sufficiently clear and whether there are any gaps.

Finally, the Commission will also continue to engage directly with stakeholders, e.g. via informal discussions, in order to understand any difficulties encountered by businesses when applying the revised rules and whether the rules provide an appropriate level of legal certainty. The number of requests for clarification and guidance will also be an important indicator of whether the rules provide sufficient legal certainty for stakeholders. In addition, either in reply to these requests or voluntarily, the Commission may also, where warranted, provide additional guidance on more complex areas of the rules, to further enhance the level of legal certainty. For example, where cases give rise to genuine uncertainty because they raise novel or unresolved questions, individual undertakings can seek informal guidance from the Commission, as set out in the Notice

[145] See Section 5.1.4 of the VBER Evaluation SWD.

on Informal Guidance[146]. The Commission may also provide guidance in other forms. For example, DG Competition has published policy briefs or working papers to inform stakeholders about how it interprets particular issues or new case law. Moreover, the Commission's enforcement practice is also a source of guidance, similar to that provided by the case law of the Union courts.

[146] Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters), OJ C 101, 27.4.2004, p. 78–80.

Annex 1: Procedural information

1. LEAD DG, DECIDE PLANNING/CWP REFERENCES

The Directorate-General for Competition of the European Commission ("DG Competition") is the lead DG for the review of 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 practice ("VBER"), together with the Guidelines on Vertical Restraints ("Vertical Guidelines").

The review was registered in the Decide Planning with the reference "PLAN/2020/9083"[147].

2. ORGANISATION AND TIMING

The impact assessment phase was launched on 18 September 2020, following the publication of the evaluation SWD that summarised the results of the evaluation of the VBER and Vertical Guidelines. The inception impact assessment was published on 23 October 2020. It presented the consultation activities that would be conducted by the Commission, namely a public consultation, consultation of the NCAs, expert advice commissioned for specific issues and a consultation on the draft revised rules. It also explained the data collection methodology that would be followed to gather relevant information for the purpose of the evaluation.

The impact assessment of the VBER, together with the Vertical Guidelines, was carried out in close cooperation with other interested Commission services. The inter-service steering group ("ISSG") set up for that purpose comprises representatives of the Directorates-General AGRI, BUDG CLIMA, CNECT, ECFIN, ENV, FISMA,GROW, MOVE, and RTD as well as the Secretariat-General and the Legal Service, which are associated by default to any such initiative. The impact assessment was also discussed with the JRC.

The impact assessment of the VBER, together with the Vertical Guidelines, was also carried out in close cooperation with the NCAs, which were consulted on the policy options as well as the draft revised rules.

The different **milestones of the impact assessment phase** are reflected in the table below:

[147] See more details at https://intragate.ec.europa.eu/decide/sep/?view-dossier-details-id=DORSALE-DOSSIER-2021-18000.

Timing	Step
18 September 2020	Launch of the evaluation in the Commission's Decide Planning
15 October 2020	1st ISSG meeting with the following agenda item: - Discuss draft IIA
23 October 2020	Publication of Inception Impact Assessment (4-weeks comments period)
1st half of December 2020	ISSG update on IIA feedback and discussion of draft online questionnaire (written consultation, follow up exchanges and agreement with ISSG members)
18 December 2020	Publication of the online questionnaire (14-weeks comments period)
25 May 2021	RSB upstream meeting
1 June 2021	2nd ISSG meeting with the following agenda items: - Overview of revised draft VBER/VGL - Update on consultation feedback
24 June 2021	Publication of the summary of the public consultation, the summary of the NCA consultation and the expert reports
9 July 2021	Publication of revised draft VBER/VGL with explanatory memorandum (10-weeks comments period)
29 October 2021	3rd ISSG Meeting with the following agenda items: - Update on feedback to the revised rules - Discussion draft Impact Assessment report
8 December 2021	Consultation of the Regulatory Scrutiny Board
10 December 2021	Opinion of the Regulatory Scrutiny Board

3. EXPERT REPORTS

DG COMP commissioned expert advice in order to inform the impact assessment of three specific areas of the rules for which policy options were identified: online sales restrictions, active sales restrictions and information exchange in dual distribution.

The Expert Report on "cases dealing with online sales and online advertising restrictions at EU and national level" was produced by Alison Jones, a law Professor with extensive practitioner experience in the area of competition law. The purpose of this Expert Report was to analyse how certain online sales restrictions and online advertising restrictions used in vertical agreements have been treated in cases dealt with under Article 101 of the Treaty, at both the EU and national level, since the publication of the 2010 VBER and the Vertical Guidelines. In particular, the Export Report was expected to provide an analysis of vertical restraints such as marketplace bans, restrictions on the use of price comparison websites, restrictions on brand bidding in online advertising and dual pricing provisions across sales channels. On this basis, the Expert Report was required to identify any divergences that have occurred in the relevant case practice and jurisprudence and to consider how the analysis of such restraints under Article 101 of the Treaty should be reflected in a revised set of rules.

The Expert Report on "active sales restrictions in different distribution models and combinations of distribution models" was produced by Frank Wijckmans, a legal practitioner in the area of vertical agreements with an academic background, and Sarah Jacques, also a legal practitioner in the area of vertical agreements. The purpose of the Expert Report was to describe the general regulatory framework of the most common distribution models used in the EEA and present the difficulties encountered in respect of active sales restrictions under the current VBER. On the basis of this overview and taking into account examples provided by businesses, the Export Report was to provide an assessment of the impacts of the different policy options on active sales restrictions identified as part of the Inception Impact Assessment and formulate recommendations in relation to each of these policy options.

The Expert Report on "information exchange in dual distribution" was produced by the law firm Commeo Rechtsanwälte PartGmbB. The purpose of this Report was to provide expert advice on the topic of exchange of information in the scenario of dual distribution. The report presented the competition rules that currently apply to information exchange in this scenario, as well as in vertical and horizontal relationships more generally. The report then discussed the various types of information that companies typically exchange in a dual distribution scenario, the manner in which they conduct such exchanges, the parties to the exchange, the rationale for the exchange and any efficiencies arising from it, the competition concerns that such information exchanges can raise, as well as the measures that companies currently take to mitigate such concerns. The report concluded with recommendations for proposed guidance on information exchange in dual distribution, for inclusion in the revised Vertical Guidelines.

4. CONSULTATION OF THE RSB

The meeting of the Regulatory Scrutiny Board (RSB) took place on 8 December 2021. The outcome was a positive opinion, issued on 10 December 2021. The following table provides information on how the comments made by the RSB were addressed in this Staff Working Document:

RSB comments	***Action taken***
(1) The introduction should clearly explain the respective roles of the VBER and the Guidelines and the relationship between them. The report should better present the economic context of the initiative. It should better describe the transformation of digital and multi-channel markets since the present VBER (and Guidelines) came into force. It should explain how this has affected the market powers of the	A more detailed explanation of the relationship between the VBER and the Vertical Guidelines was added in the introduction and Section 2.1 of the report. The report also highlights how the problems and related policy options affect both the VBER and the Vertical Guidelines. Additional information, data and figures were added in the introduction and Section 2.1 of the report, both as

respective market participants. The problem analysis should present a competition theory of harm reflecting these changes, stressing thereby the importance of intra-brand competition. On this basis the problem analysis should reveal the main issues under consideration and the policy choices that it aims to inform.	regards the retail sector more generally as well as the development of e-commerce. More detailed data from the E-commerce sector inquiry and the Evaluation Study was also included, to provide more context on the initiative. In addition, more detailed explanations were provided on the problems identified during the evaluation and how they connect to the market developments that have taken place over recent years.
(2) The report should clarify how available evidence supports the problem and impact analyses. Stakeholder views should be confirmed, as far as possible, by other evidence stemming from studies, expert reports, the evaluation, case law and enforcement experience. Overall, economic analysis should have a more prominent role alongside the legal analysis, with particular reference to the underlying theories of competition harm. Where stakeholders' views diverge, the report should explain how these views have been assessed and prioritised to draw conclusions. The report should better explain the efforts undertaken to obtain quantitative data, in particular on administrative costs.	Section 2 of the report now includes more detailed and precise references to the evidence that supports the problem definition. In particular, it indicates the nature of the evidence, i.e. whether it relates to stakeholder views, the enforcement experience of the Commission and NCAs, or other sources, such as studies and expert reports. As regards the assessment of the impacts, Section 6 of the report explains in more detail the overall framework used for assessing the available evidence. In particular, it clarifies why the assessment is mainly focused on the views of enforcement authorities and businesses that have to self-assess compliance of their vertical agreements with Article 101 of the Treaty. It also explains how the assessment deals with diverging views and how the different types of evidence were weighed and prioritised. In addition, the assessment of the impacts of the various policy options includes clearer references to how studies and expert reports were used to cross-check the stakeholder feedback. Additional detail has also been added on the efforts undertaken to obtain quantitative data.
(3) The report should clarify the rationale and the choice behind the policy options. It should give more information on their content, in particular on the types of anticompetitive information exchanges in	Sections 2 and 5 of the report now provide more detailed explanations of the problems identified during the evaluation and how the policy options identified to address those problems evolved in the course of the

dual distribution, the maximum number of distributors in shared exclusivity arrangements and the practical application of the limiting principle in dual pricing. For dual pricing, the report should also explain the coherence with the competition rules for horizontal agreements.	impact assessment. This provides additional context on the rationale behind the policy options. Sections 5 and 6 of the report also provide more concrete information on how each policy option will be implemented in practice, including as regards the limits (e.g. for shared exclusivity and dual pricing).
(4) An evaluation period of 12 years seems too long as the markets develop very fast. The report should consider a shorter period and set intermediate milestones to monitor if the vertical competition rules are keeping up with market developments. The report should also look into the development of quantitative indicators.	Section 8 of the report provides more detailed explanations to support the choice of a validity period of 12 years. While this period is considered to be justified, the report also provides additional information on how the Commission will continuously monitor the functioning of the revised rules. In particular, it explains the mechanisms already in place that allow it to regularly and systematically collect information from the NCAs and how this information will be used. The report also mentions some quantitative indicators that the Commission may use, such as the number and frequency of requests for preliminary rulings or requests for guidance. In addition, the report sets out that no later than June 2030, the Commission will take stock of the functioning of the revised rules and draw up an evaluation report, *inter alia* on the basis of the information gathered through the continued monitoring.
(5) The report should be made accessible for the non-specialist reader. It should be a self-standing document containing all the information necessary for political decision making. Specific competition terms should be better explained in the text and in the glossary.	Overall, illustrative examples have been added to render more concrete the specific competition issues that were identified in the problem definition. Similarly, technical competition terms have been further explained in the text to facilitate the comprehension of the problem and impact analysis.

In addition to the comments set out above, the RSB provided some technical comments, which were taken into account when finalising the Impact Assessment Report.

Annex 2: Stakeholder consultation

This annex presents the results of the consultation activities performed in the context of the impact assessment of the VBER, together with the Vertical Guidelines.

As explained in the context of the first open public consultation[148], the Commission mapped the target audience for the different consultation activities similarly as for the consultations conducted during the evaluation. The Commission thus identified the following stakeholder groups as being similarly interested in (and also similarly affected by) the impact assessment of the VBER, together with the Vertical Guidelines: (i) companies with business operations in the EU, including but not limited to suppliers of goods and services, distributors/retailers of goods and services and platforms/intermediaries active in e-commerce, together with (ii) law firms advising them on related competition issues, (iii) industry associations, (iv) consumer organisations, (v) lawyer associations, and (vi) academics with a focus on EU competition law and notably on vertical restraints.

The various consultation activities consisted of:

- a consultation on inception impact assessment ("IIA");
- an open public consultation based on an online questionnaire;
- a targeted consultation of national competition authorities;
- an open public consultation based on a draft revised VBER and draft revised Guidelines, published for comments.

The different consultation activities mentioned in this annex aimed to gather input from stakeholders on the policy options proposed for the revision of the VBER and Vertical Guidelines, as well as on the other proposals made to clarify, update and simplify the VBER and Vertical Guidelines.

2.1. Consultation on the Inception Impact Assessment

The Commission published the VBER IIA on 23 October 2020, with a 4-week deadline for stakeholders to give feedback. The Commission received 45 submissions as feedback to the IIA. The majority of the entities that provided feedback were companies (20 submissions out of 45) and business associations, either operating at EU level or with national reach (19 submissions out of 45). The Commission also received submissions from two academics, one consumer organisation, one public authority, one NGO and one anonymous entity.

The submissions from stakeholders focused primarily on the four areas of the rules for which the Commission proposed policy options in the IIA.

27 stakeholders provided feedback on the policy options for dual distribution. The feedback was mixed as regards the proposed policy options, with some stakeholders

[148] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12636-EU-competition-rules-revision-of-the-Vertical-Block-Exemption-Regulation/public-consultation_en

favouring a limitation of the scope of the dual distribution exception (either alone or in combination with an extension of the exception to cover also wholesalers and importers), while others favoured a no change option. Stakeholders were less favourable as regards removing the exception altogether. In addition, many stakeholders called for more clarity on the possibility for exchanging information between the supplier and the distributor in the context of dual distribution.

A large number of stakeholders also commented on the policy options for parity obligations. Many stakeholders favoured removing the benefit of the block exemption for all types of parity obligations, though many others argued instead for no change of policy. It was noted that stakeholders representing the hotel sector were generally in favour of removing the benefit of the block exemption for all types of parity obligations, whereas online intermediaries were generally in favour of not changing the current rules.

The stakeholder feedback on the policy options for active sales restrictions was mostly positive, across several stakeholder groups (i.e. manufacturers, retailers, lawyers, lawyers associations, a consumer association and an academic). Stakeholders were generally in favour both of expanding the exceptions to give suppliers more flexibility and of ensuring more effective protection of SDS, by allowing restrictions on sales from outside the selective distribution territory to unauthorised distributors inside this territory. In addition, they made comments on the distinction between active and passive sales and the treatment of these types of sales in the rules.

As regards the policy options for specific restrictions of online sales, stakeholders across all categories were largely in favour of both allowing dual pricing and allowing the application of different criteria for online/offline authorized distributors, with safeguards to be defined in line with the case law. Stakeholders also asked for additional guidance on these issues.

Stakeholders also provided feedback on other issues for which policy options were not put forward. In particular, stakeholders asked for clarifications in the Vertical Guidelines regarding situations in which RPM can lead to efficiencies. Many stakeholders also commented on the need for updating and clarification of the rules regarding other online restrictions, such as marketplace bans, the use of price comparison websites, brand bidding and the obligation to operate physical shops in selective distribution systems. Some stakeholders commented on territorial supply constraints, the rules on franchising, non-compete obligations, agency agreements, and sustainability.

2.2. Open Public Consultation on the basis of an online questionnaire

A summary report of the open public consultation was published on 24 June 2021.[149]

Introduction

On 18 December 2020, The European Commission ("Commission") launched a public consultation on the impact assessment for the review of Commission Regulation (EU) No

[149] The summary report is available at https://ec.europa.eu/competition-policy/system/files/2021-09/VBER_IA_summary_contributions.pdf.

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"),[150] together with the Guidelines on Vertical Restraints ("Vertical Guidelines") [151]. This public consultation aimed in particular at gathering feedback from stakeholders on the policy options set out in the inception impact assessment ("IIA") published by the Commission on 23 October 2020. These policy options concern the possible revision of certain areas of the rules for which the findings of the evaluation, conducted by the Commission between October 2018 and September 2020, have shown that they do not function well or as well as they could.

To gather the widest possible range of comments, the public consultation was open for all stakeholders interested in providing their views on the different areas covered by the online questionnaire. While the online questionnaire was published in English, French and German, participants could reply in any of the 24 official languages of the EU.

The Commission received 118 contributions to the public consultation submitted online. As regards 9 of the 118 contributions, due to a technical failure of the uploading option provided in the online questionnaire, the Commission had to upload manually the attachments that were missing for some of the participants' replies. In addition, 7 contributions were submitted in the context of the public consultation but outside the Better Regulation Portal.

In parallel, the Commission conducted a targeted consultation to receive feedback from the national competition authorities of the European Competition Network ("NCAs") for the VBER review impact assessment. The results of that targeted consultation, notably the experience and views that the NCAs shared in this context, are set out in a separate summary.

The statistics computed in this summary are only based on the contributions to the public consultation submitted via the online questionnaire. The input has been analysed using a data analysis tool,[152] complemented by a manual analysis.

Neither the views of the stakeholders reflected in the contributions 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. The summary of the contributions is preliminary and does not prejudge the outcome of the impact assessment phase, including the draft revised rules to be published for stakeholder consultation at a later stage.

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[150] 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.

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

[152] The tool used is Doris Public Consultation Dashboard, an internal Commission tool for analysing and visualising replies to public consultations. It relies on open-source libraries using machine-learning techniques and allows for the automatic creation of charts for closed questions, the extraction of keywords and named entities from free-text answers as well as the filtering of replies, sentiment analysis and clustering.

Profile of respondents to the online questionnaire

The Commission received 118 replies to the questionnaire. 55 emanate from business associations, 48 from companies/business organisations, 7 from other types of stakeholders, 4 from trade unions, and 2 from non-governmental organisations. The Commission also received one reply from a consumer organisation and one from a public authority. The majority of the contributions were submitted in English, German and French.

In terms of organisation size, 47 replies come from large organisations (250 or more employees), 7 from medium-sized organisations (50 to 249 employees), 28 from small organisations (10 to 49 employees), and 36 from micro organisations (1 to 9 employees).

Figure 1: Profile of respondents

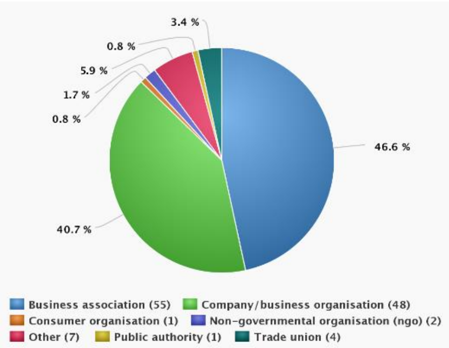
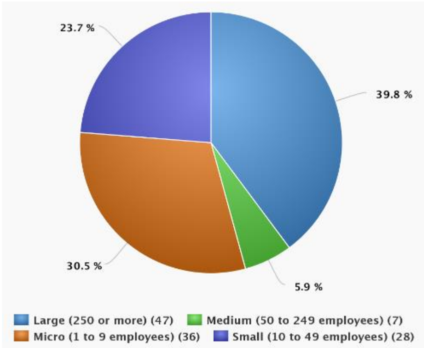


Figure 2: Organisation size



As regards their field of activity, 18 respondents considered themselves as suppliers, while 7 defined themselves as buyers. A significant number of respondents (44) declared that they are active as both supplier and buyer. However, an even higher number of respondents (48) considered this question as not applicable to them.

The respondents to the public consultation also provided an estimate of their activity online and offline:

In 2019, for 28 respondents (mainly suppliers) online sales constituted between 0% and 25% of their annual turnover, while for 9 respondents (mainly distributors), this percentage ranged from 75% to 100% of their turnover. In contrast, the large majority of respondents (79), covering all stakeholder groups, considered this question not applicable to them. The figures for 2020 were similar with a slightly lower number of respondents (25) (mainly suppliers) for which online sales constituted between 0% and 25% of their annual turnover, while for 2 of these respondents this percentage ranged from 25% to 50% of their turnover. Again, a large majority of the respondents (80), covering all stakeholder groups, considered that this question was not applicable to them.

In 2019, for 6 respondents (mainly distributors) offline sales constituted between 0% and 25% of their annual turnover, while for 24 respondents (mainly suppliers) this percentage ranged between 75% and 100% of their turnover. However, the large majority of respondents (83) considered the question not applicable to them. These figures also appear rather stable as regards 2020 with a slightly lower number of respondents (21, mainly suppliers) for which this percentage ranged between 75% and 100% of their turnover while for 4 respondents this percentage constituted between 50% and 75% of their turnover. However, the large majority of respondents (84) considered this question not applicable to them.

Contributions to the online questionnaire

The public consultation aimed in particular at gathering views and evidence from stakeholders on the policy options set out in the IIA concerning four areas of the current rules: (i) dual distribution, (ii) actives sales restrictions, (iii) indirect measures restricting online sales, and (iv) parity obligations.

In addition, stakeholders were asked to provide feedback on other areas of the rules that the Commission is exploring further in the context of the impact assessment phase. These areas cover (i) potential efficiencies resulting from resales price maintenance (RPM) and how to demonstrate such efficiencies, (ii) the treatment of tacitly renewable non-compete clauses, (iii) the possible need for guidance on vertical agreements pursuing sustainability objectives and (iv) the consequences of the COVID-19 pandemic on the business environment relevant for vertical agreements and notably the purchasing behaviour of consumers.

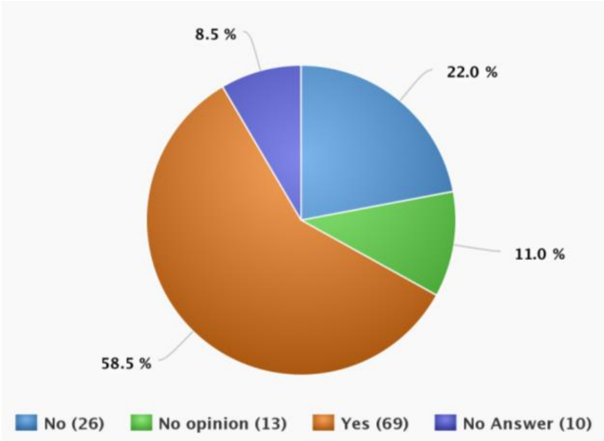
a. Feedback on the policy options

i. Dual distribution

Dual distribution concerns situations where a supplier does not only sell its goods or services through independent distributors but also directly to end customers, thereby competing with its distributors at retail level. Almost two thirds of all respondents indicated that they, or their suppliers, engage in dual distribution (76 out of 118).

69 out of 118 respondents considered that the exception for dual distribution set out in Article 2(4) of the VBER and explained in paragraph 28 of the Vertical Guidelines should be maintained. Most of these respondents considered themselves as suppliers or both, suppliers and buyers, while only a few considered themselves as buyers. The remaining number of respondents that stated that the exception for dual distribution should be maintained considered the question on whether they are suppliers, buyers, or suppliers and buyers, was not applicable to them (28).

Figure 3: Based on your experience, do you consider that the exception for dual distribution set out in Article 2(4) of the VBER and paragraph 28 of the Vertical Guidelines should be maintained?



Respondents argued that a removal of the exception for dual distribution would have negative or very negative effects on a number of relevant parameters, namely competition on the market, the harmonised application of the competition rules by competition authorities and national courts, legal certainty for businesses, the efficiency of distribution systems, costs for businesses, consumer welfare, as well as investment and economic growth. Only as regards cross-border trade and sustainability objectives, there was no majority indicating negative or very negative effects. A number of respondents highlighted the legal certainty provided by the dual distribution exception and that the removal of precisely this certainty would have severe consequence on inter- and intra-brand competition to the detriment of consumers, increasing costs for businesses and jeopardizing efficient distribution.

The respondents provided mixed feedback on whether they have experience/knowledge of situations of dual distribution currently covered by the exception that may raise horizontal competition concerns. 38 respondents indicated that they have such experience/knowledge, while 48 respondents pointed out that they do not have such experience/knowledge, and 32 respondents had no opinion or provided no answer. In their replies, some respondents stressed specifically that, in their view, the exchange of information in dual distribution can raise horizontal competition concerns.

61 out of 118 respondents stated that there is no need for an additional threshold to ensure that only those dual distribution situations are block-exempted that do not raise horizontal competition concerns. Therefore, very few respondents answered the follow-up questions about the level at which such additional threshold based on a combined market share at the retail level should be set. Equally, few respondents provided answers on alternative thresholds and their impact. At the same time, a number of respondents answered the questions that deal more specifically with the impact of the possible introduction of an additional threshold of 20% combined market share in the retail market (which would be in line with the threshold set out in Article 3 of the Block Exemption Regulation for specialisation agreements).

Many respondents that provided an answer indicated that such an additional threshold would have negative or very negative effects on a number of relevant parameters, namely competition on the market, the harmonised application of the competition rules by competition authorities and national courts, legal certainty for businesses, the efficiency of distribution systems, costs for businesses, consumer welfare, as well as investment and economic growth. Only as regards cross-border trade and sustainability objectives, some indicated negative or very negative effects.

66 out of 118 respondents had no experience/knowledge of instances where vertical agreements between a wholesaler, which is also active at the retail level, and its distributors could raise horizontal competition concerns.

As regards importers, 47 of the respondents that provided an answer to this question stated that they have no experience/knowledge of such instances, whereas 21 indicated that agreements between an importer, which is also active at the retail level, and its distributors could raise horizontal competition concerns. A number of respondents (50) had no opinion or did not provide an answer.

Figure 4: Do you have experience/knowledge of instances where agreements between a wholesaler, which is also active at the retail level, and its distributors could raise horizontal competition concerns?

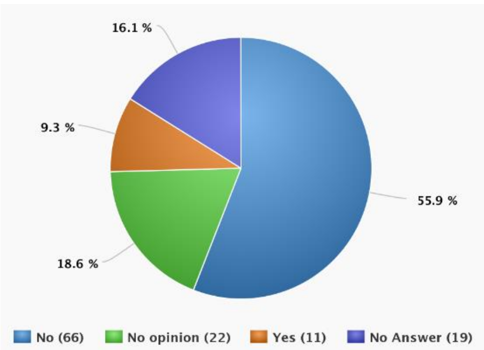
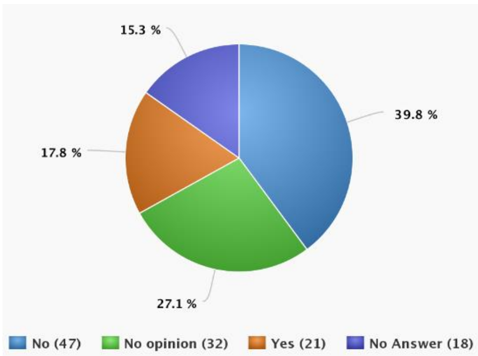


Figure 4: Do you have experience/knowledge of instances where agreements between an importer, which is also active at the retail level, and its distributors could raise horizontal competition concerns?



Furthermore, as regards the impact of a possible extension of the scope of the exception for dual distribution to wholesalers and importers, many respondents that provided an answer considered that the impact of such an extension would be positive or very positive in both cases in relation to all parameters mentioned, except for sustainability objectives for which the respondents generally considered the impact to be neutral.

In reply to the concluding question on the policy options for dual distribution, which allowed respondents to select more than one option, 58 supported the extension to importers, and nearly as many (48) supported the extension to wholesalers. A number of respondents (31) provided no answer and some (21) supported the policy option of introducing an additional threshold to address instances that may raise horizontal competition. Equally, few respondents indicated that they are in favour of other options (14) or stated that no action is required (14), while only very few respondents (4) argued for the removal of the exception altogether.

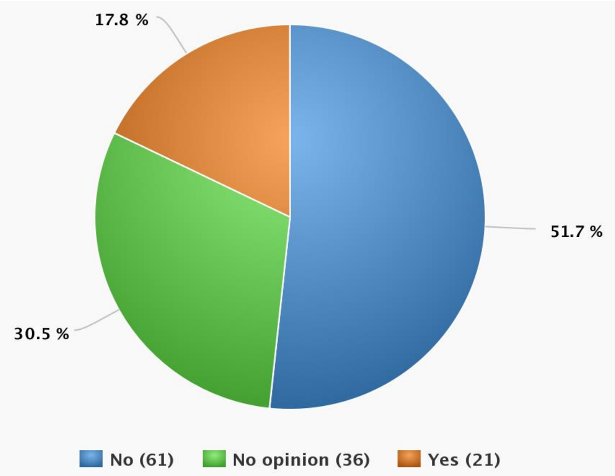
ii. Active sales restrictions

Under the VBER, restrictions of the territory into which, or the customers to whom, the buyer can sell are 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 a limited number of active sales restrictions.

77 out of 118 respondents indicated that they or their suppliers apply actives sales restrictions. In line with what is currently allowed by the VBER, some of the active sales restrictions referred to in the contributions either aimed to prevent other distributors to sell into an exclusively allocated territory or restrict active and passive sales from authorised distributors to unauthorised distributors located inside a territory where selective distribution is operated.

61 of all 118 respondents, mainly consisting of suppliers and business associations, supported a change of the rules on active sales restrictions. Some respondents clarified their views by pointing to the complexity and the lack of flexibility of the current rules. Other respondents explained that these rules do not provide the appropriate level of protection for exclusive and selective distribution. Conversely, for 21 respondents, which are primarily distributors and their business associations, the current rules should remain unchanged as they strike the right balance between the interests of suppliers and distributors, as well as the need to maintain effective competition and incentivise investments. According to some of these respondents, expanding the scope of active sales restrictions allowed under the VBER could have detrimental effects on the internal market and price competition. The remaining respondents did not answer or had no opinion on this point.

Figure 5: Based on your experience/knowledge, do you consider that the current rules allowing certain active sales restrictions should remain unchanged?



To assess the policy options regarding active sales restrictions set out in the IIA, stakeholders were asked to answer two sets of questions.

The first set of questions focused on the combination of exclusive and selective distribution systems in the same territory or in different territories.

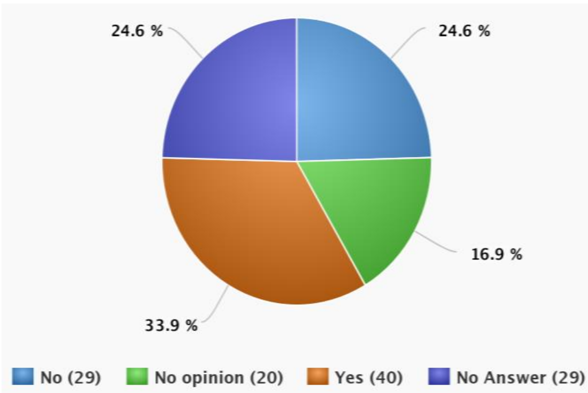
61 out of all 118 respondents across all stakeholder groups did not know of instances where the **combination of exclusive and selective distribution in the same territory** (i.e. exclusivity at the wholesale level within a selective distribution system) did not fully comply with the current rules. However, 6 respondents, which are mainly legal experts, knew of situations where this combination was not applied in compliance with the

current rules and provided examples (e.g. situations where an exclusive wholesaler is protected against active sales from wholesalers active in other Member States).

40 out of all 118 respondents, mainly representing suppliers, supplier associations and legal experts, had knowledge of concrete benefits that can result from the combination of exclusive and selective distribution within the same territory, while 29 respondents did not know of such benefits. As examples of concrete benefits, some respondents mentioned the fact that this combination would limit costs (transaction and/or logistic costs) and facilitate the monitoring of the distribution system since a supplier would only be dealing with one well-established and experienced wholesaler per territory. Other respondents indicated that it could allow the supplier to share the risk with the exclusive wholesaler and to benefit from its existing commercial relationships and experience of the market to establish a network of retailers able to meet the selective criteria. For other respondents, combining exclusive and selective distribution in the same territory would ensure that all sales partners are sufficiently protected, and, consequently, incentivised to invest in sales of the product concerned and to promote the brand. In contrast, respondents that knew of concrete benefits pointed to the negative effect that this combination could generate on intra-brand competition and consumer welfare.

Stakeholders were also asked to evaluate the impact that allowing exclusivity at wholesale level within a selective distribution system can have on different parameters. A large number of respondents did not reply or had no opinion. For many respondents that replied (mainly suppliers, supplier associations and legal experts), the effects of such a combination on distribution efficiency, as well as investments and costs would be very positive, while it would be neutral for cross-border trade and sustainability. Conversely, some respondents (notably some retailers and a consumer association) took the view that by consolidating the position of large brands the combination of exclusive and selective distribution would contribute to the fragmentation of the internal market, reduce intra-brand competition and, in turn, be detrimental to consumer welfare.

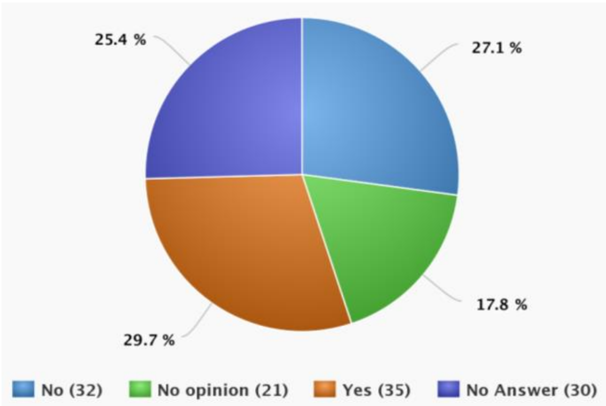
Figure 6: Do you have experience or knowledge of concrete benefits that are created by combining exclusive and selective distribution systems in the same territory at different level of the distribution chain?



As regards the **combination of exclusive and selective distribution in different territories**, 53 out of all 118 respondents from all stakeholder groups were unaware of instances where it is applied in a manner that is not compliant with the current rules. 10 out of all 118 respondents, which are notably legal experts, pointed to situations where such a combination does not comply with the current rules (e.g. situations where exclusive distributors are prevented from selling to unauthorised distributors located in the territory where selective distribution is operated).

Respondents provided mixed feedback on the concrete benefits that can result from the combination of exclusive and selective distribution in different territories. 35 out of all 118 respondents, which are mainly suppliers, supplier associations and legal experts, knew of such benefits (e.g. better geographic coverage and better adaptation of the distribution system to the size and characteristics of each geographic market), while 32 out of all 118 respondents without distinction between stakeholder groups did not have experience of such benefits. 21 out of 118 respondents indicated that they had no opinion while 30 respondents did not reply to this question.

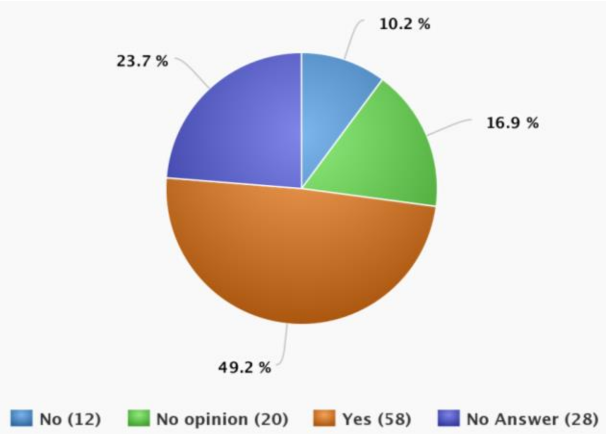
Figure 8: Do you have experience or knowledge of concrete benefits that are created by combining exclusive and selective distribution systems in different territories?



The second set of questions relates to the restriction of sales from outside the territory in which a selective distribution system is operated to unauthorised distributors inside that territory.

58 out of all 118 respondents across all stakeholder groups had knowledge of or experience with the benefits that could result from allowing this type of active sales restriction. In particular, some respondents explained that this could increase the protection of selective distribution systems against unauthorised distributors that did not meet the related quality criteria and could therefore free-ride on the investment efforts made by selected distributors for the provision of high-quality services. Some respondents also considered that preserving the investment incentives of both suppliers and distributors would be beneficial to consumers, which would be offered access to better pre-sales services (e.g. advice, security and traceability) and after-sales services. 12 respondents (approximately 10%) with no discernible distinction between stakeholder groups did not have knowledge of such benefits. A significant number of respondents had no opinion (20) or did not reply to this question (28).

Figure 9: Do you have experience or knowledge of benefits that can result from restricting sales from outside the territory in which a selective distribution system is operated to unauthorised distributors inside that territory?



As regards the impact that such a restriction of sales from outside the territory in which a selective distribution system is operated to unauthorised distributors inside that territory could have on various parameters, a large number of respondents did not reply to the questions in the questionnaire or had no opinion. For a majority of the respondents who answered this question, the impact of this restriction would be positive or very positive, as it would foster fair competition, increase the efficiency of distribution systems and the incentives for investments, reduce businesses' costs and enhance consumer welfare, while the effect on sustainability and cross-border trade would be neutral. However, for a minority of respondents, allowing the restriction of sales from outside the territory in which a selective distribution system is operated to unauthorised distributors inside that territory could lead to a fragmentation of the single market, and limit intra-brand competition, which could, in turn, be detrimental to consumers.

In reply to the concluding question on the policy options for active sales restrictions, which allowed multiple choices, 61 out of all 118 respondents supported the option allowing for the restriction of active sales to unauthorised distributors located within the territory where a selective distribution system is operated. To a lesser extent, respondents (39), which are mainly suppliers and supplier associations, also supported the possibility to combine exclusivity at wholesale level and selective distribution at retail level within the same territory. A nearly equal number of respondents (40) did not answer and a minority supported maintaining the current rules (9 respondents mainly distributors). 21 respondents suggested other options, such as allowing shared exclusivity, modifying the distinction between active and passive sales, especially in the context of online sales, or further clarifying the existing rules.

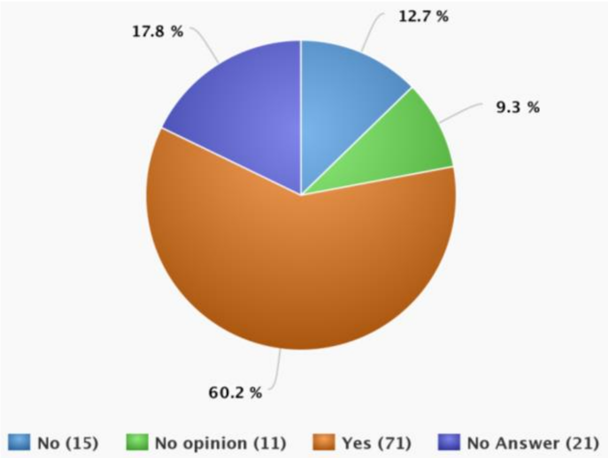
iii. Indirect measures restricting online sales

Dual pricing means charging the same distributor a higher wholesale price for products intended to be sold online than for products sold offline. This measure, which indirectly makes online sales more difficult, is considered a hardcore restriction under the current rules.

71 out of all 118 respondents stated that they have knowledge or experience of concrete benefits that can be generated by allowing ***dual pricing***. Some respondents underlined

that the rationale for classifying dual pricing as a hardcore restriction, which is based on the concern that a distributor could be deterred from generally selling online, is outdated. Since the adoption of the VBER, online sales have become increasingly important, while physical shops are under pressure, even more so since the beginning of the COVID-19 pandemic. Therefore, by preventing suppliers from reflecting the difference in costs incurred by their distributors for sales on online and offline channels, the current rules do not sufficiently account for services offered by physical shops. Allowing dual pricing would thus enable distributors to increase their sales efforts and investments in pre- and after-sales services in physical shops. By recognising the inherent difference between the two distribution channels, dual pricing would also help offsetting the effect of any possible free-riding between online and offline distribution and enable physical shops to compete effectively. Respondents also argued that dual pricing would be beneficial for consumers, as it would ensure a multi-channel experience, provide greater choice of products and better services.

Figure 10: Do you have experience or knowledge of benefits that can be generated by dual pricing between online and offline sales?



Conversely, 15 out of all 118 respondents from all stakeholders groups did not know which benefits can result from allowing dual pricing. Some of them considered that dual pricing could have the same effect as a direct ban of online sales or amount to a form of resale price maintenance. Accordingly, respondents argued that it could lead to a price increase that would be detrimental to consumers. By the same token, since manufacturers are increasingly selling directly online, they might have incentives to keep wholesale prices for online retailers high rather than discounting prices for physical shops. Some respondents also pointed to the fact that the same incentives can be achieved through less restrictive means such as a direct payment for cost or investment related to physical sales.

40 out of 118 respondents, which consists of a majority of suppliers and supplier associations, did not have knowledge of competition concerns that could result from allowing dual pricing, while 31 respondents (approximately 26%), which are mainly distributors and associations of distributors, mentioned such concerns and provided examples. First, some respondents pointed to the difficulty to distinguish online from offline sales in a multi-channel environment. Second, respondents also indicated that if dual pricing is used to discriminate the online channel disproportionality without justifiable motives and to artificially increase online prices, this will limit intra-brand

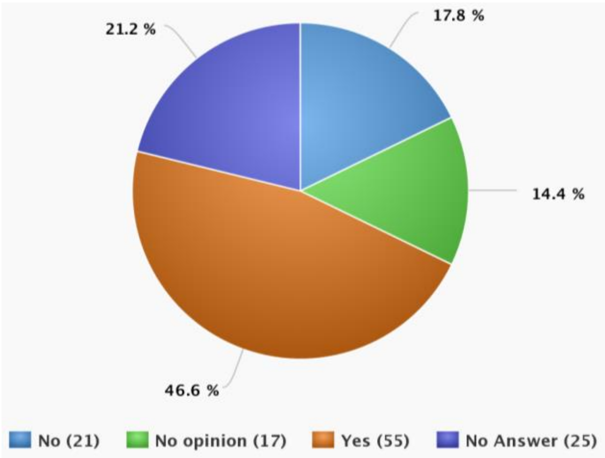
competition and, as a result, lead to higher prices, thus reducing consumer welfare. Some respondents also considered that making online sales more expensive could increase geographic barriers.

As regards the impact of dual pricing on various parameters, between 41 and 71 out of 118 respondents had no opinion or did not provide an answer, depending on the parameter that the respective question about a possible impact related to. However, for many respondents who replied to this question, dual pricing can have a positive or very positive impact on competition, enhance the efficiency of distribution systems, as well as support investment and economic growth. The adoption of clear new rules in this respect would also foster a harmonised application of the rules by competition authorities and national courts), as well as increase legal certainty for businesses and, therefore, reduce application costs, while the effect on cross-border trade and sustainability would be neutral.

Stakeholders were also asked possible safeguards to ensure that dual pricing cannot be misused to prevent online sales. For some respondents, the appropriate safeguard could be that dual pricing should not lead to a ban or a *de facto* ban of online sales. It was also pointed out that in the current omni-channel environment, suppliers have no incentive to ban online sales, so dual pricing would only be imposed to the extent required to accommodate the different costs and needs of the online and offline channel respectively. Other respondents suggested that dual pricing should be assessed on the basis of one or several criteria, such as the pursuit of a legitimate purpose (e.g. protect a brand image, ensure the quality of a product), the nature of the product, or the characteristics of the market. The assessment could also take into account whether the price difference is proportionate to the effort and investment made by the distributors concerned and does not materially disadvantage the online channel, or that it objectively reflects the different circumstances/costs of the different distribution channels. Alternatively, as suggested by other respondents, the Vertical Guidelines could set a threshold based on a fixed percentage under which the wholesale price for online sales is assumed reasonable in relation to the wholesale price for offline.

Imposing criteria for online sales that are not overall equivalent to the criteria imposed in brick-and-mortar shops in a selective distribution system ("equivalence principle") is another indirect measure restricting online sales which is considered a hardcore restriction under the current rules. 55 out of all 118 respondents, among which a significant number of suppliers, supplier associations and legal experts, indicated that they have knowledge or experience of benefits that can result from allowing the application of criteria for online sales that are **not overall equivalent** to the criteria imposed on brick-and-mortar shops, while 21 respondents did not know of such benefits. Some of the respondents pointed to the fact that consumers nowadays want to benefit from a genuine omni-channel experience combining the advantages of the online channel (e.g. swift and easy access) and the offline channel (e.g. high-quality pre-sales and after-sales services, touch and feel experience). Against this backdrop, the two distribution channels appear complementary. However, respondents also insisted on the fact that online and offline distribution is inherently different with regard to costs, infrastructures, and characteristics. As defined in the current rules, the equivalence principle appears too rigid to reflect those differences and its application is therefore costly and difficult. Some respondents considered that to achieve the same level of service irrespective of the distribution channel used, suppliers should be able to apply specific, and even diverging, criteria. More flexibility in the definition of qualitative and quantitative criteria would provide suppliers with more legal certainty and reduce costs. According to these respondents, this would also benefit consumers, as it would generate more innovation for both distribution channels and enhance inter-brand competition.

Figure 71: Do you have experience or knowledge of benefits that can be generated from the application of different criteria for online and offline sales in selective distribution systems?



54 out of all 118 respondents did not have knowledge of or experience with competition concerns that can result from the application of different criteria to online and offline channels. 13 out of all 118 respondents, which were primarily distributors, distributor associations and legal experts, had knowledge of such concerns. Some of them indicated that this could lead to discrimination against online players or online distribution as such. In addition, this could limit competition in between channels and discipline pricing behaviour, thus resulting in high prices and reduced consumer choice.

As regards the impact of the application of different criteria to the online and offline channel on various parameters, many respondents expressed no opinion or did not answer. However, among the respondents who replied some considered that removing the equivalence principle from the hardcore list can have a positive or a very positive impact. They notably mentioned the fact that this would ensure effective competition in between distribution channels, lower business costs, and stimulate a diversity of investments adapted to the characteristics of each distribution channel. Some respondents also considered that this would be positive for consumers, as they would benefit from tailored advice and specific services depending on the channel used. Respondents also mentioned that the relaxation of the equivalence principle would provide more legal certainty and ensure a harmonised application of the rules. It would also be positive for sustainability, while having neutral effects on cross-border trade.

Stakeholders were also asked about possible safeguards to ensure that the application of different criteria to the online and offline channel cannot be misused to prevent online sales. In this respect, some respondents indicated that any new rules should ensure that the criteria for online sales do not discourage the use of the internet or do not lead to a direct or an indirect ban of online sales. For other respondents, a useful tool for assessing the lawfulness of the criteria could derive from the principles developed by the Court of Justice in the *Metro* judgment and thus be based on the fact that the criteria applied by manufacturers are objective, proportionate, transparent, non-discriminatory and necessary in light of the specific circumstances. In addition, some respondents suggested that the Commission should provide guidance and/or a list of examples in the Vertical Guidelines to explain how the criteria should be assessed.

In reply to the concluding question on the policy options for indirect measures limiting online sales set out in the IIA, which allowed multiple choices, 69 out of all 118 respondents considered that dual pricing should no longer be treated as a hardcore restriction, and 54 out of all 118 respondents supported removing the equivalence principle from the hardcore list. 11 respondents are in favour of maintaining the current rules, while 9 respondents suggested other measures such as supporting offline sales through a fixed or variable fee, which the distributor could use to support offline sales through qualitative investments.

Lastly, stakeholders were asked whether they would reply differently to the question regarding the policy options for indirect measures limiting online sales if the rules on actives sales restrictions permitted more exceptions. None of the respondents who answered this question (46) replied in the affirmative, indicating that they considered that both sets of rules do not serve the same purpose. A nearly equal number of respondents (38) had no opinion and 34 did not answer this question.

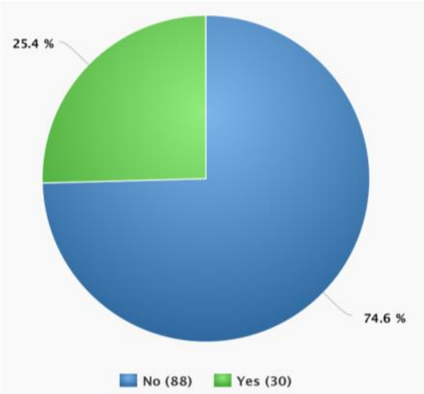
iv. Parity obligations

Parity obligations require a business to offer the same or better conditions to its contracting party as those offered on any other sales channel, or on the company's direct sales channels.

43 out of all 118 respondents had experience/knowledge of parity obligations, including an almost equal number of respondents that had requested such an obligation or accepted it.

30 out of all 118 respondents had experience/knowledge of instances where parity obligations raised competition concerns. 13 of these respondents stated that the competition concerns raised by parity obligation were linked to the fact that they covered both direct and indirect sales/marketing channels. Some of them either stated that the competition concerns raised by parity obligations were linked to the fact that they covered indirect sales/marketing channels (e.g. other platforms or intermediaries) (6) or had no opinion (6).

Figure 12: Do you have experience or knowledge of instances where parity obligations raise competition concerns?



4 respondents referred to other reasons for competition concerns, such as the market power of platforms that use parity obligations or concerns that the Commission's proposal for a Digital Markets Act could address. Only one respondent stated that the competition concerns raised by parity obligations were linked to the fact that it covered direct sales/marketing channels (e.g. a company's own website).

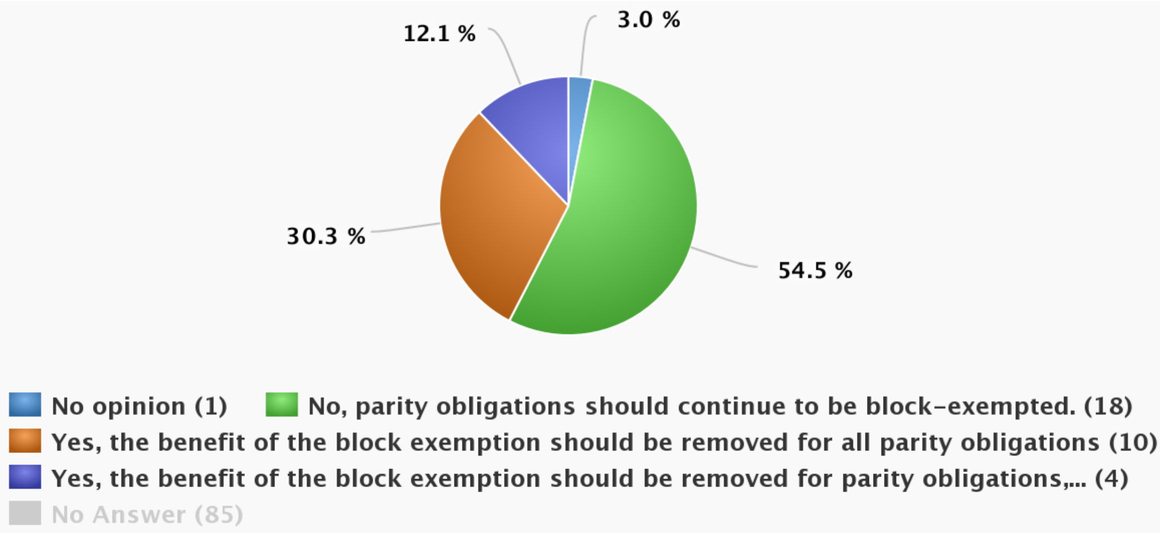
The respondents with experience or knowledge of instances where parity obligations raised competition concerns provided mixed feedback on whether these competition concerns depend on the sector in which they are used, with 9 respondents answering in the affirmative and 10 answering in the negative. Their feedback was also mixed in reply to a question about further distinctions (allowing for multiple replies), namely between (i) retail and wholesale parity obligations (6 respondents considered this distinction necessary), (ii) parity obligations relating to price, inventory, availability and other conditions (6 respondents considered this distinction necessary), (ii) different types of intermediaries concerned, such as sales platforms and price comparison websites (5 respondents considered this distinction necessary), and (iv) transactions covered by the parity obligation taking place online and offline (6 respondents considered this distinction necessary). 4 respondents considered other distinctions necessary, without however putting forward clear-cut distinctions but rather highlighting that various forms of parity obligations exist. 13 respondents did not consider any further distinctions necessary, and 3 respondents had no opinion in this regard.

34 out of all 118 respondents had experience/knowledge of instances where parity obligations created benefits. 15 of these respondents had no opinion on whether the benefits created by parity obligations were linked to the type of sales/marketing channels that those parity obligations covered. Those that had an opinion provided mixed feedback on whether the benefits created by parity obligations were linked to the fact that they covered direct, indirect, or both direct and indirect sales/marketing channels. In fact, most of the respondents that had an opinion on whether the benefits created by parity obligations were linked to the type of sales/marketing channels that those parity obligation covered, stated that these benefits are due to other reasons (10). Respondents mentioned different benefits, in particular the provision of better services and increased incentives to invest and innovate, as well as different reasons as to why parity obligations could create them, in particular the prevention of free riding and the reduction of transaction costs, them.

13 respondents expressed an opinion on whether, based on their experience/knowledge, the extent to which parity obligations created benefits depended on the sector in which they were used. 11 out of these 13 respondents stated that the extent to which parity obligations created benefits did not depend on the sector in which they are used, two respondents replied that it depended to a small extent on the sector concerned. The feedback was also mixed when looking at benefits created by parity obligations based on possible further distinctions (allowing for multiple replies), namely between (i) retail and wholesale level parity obligations (7 respondents), (ii) parity obligations relating to price, inventory, availability and other conditions (5 respondents), (iii) different types of intermediaries concerned, such as sales platforms and price comparison websites (6 respondents), and (iv) transactions covered by the parity obligation taking place online and offline (5 respondents). 12 respondents did not consider that any benefits that parity obligations could create were based on further distinctions, and 5 respondents had no opinion.

Taking into account any competition concerns that may be raised by parity obligations and any benefits they may create, based on their experience/knowledge, 18 respondents that had an opinion on parity obligations stated that they should continue to be block exempted. However, 10 respondents took the opposite position, arguing that the benefit of the block exemption should be removed for all parity obligations. Only few respondents stated that the benefit of the block exemption should be removed but only for parity obligations that relate to indirect sales/marketing channels (e.g. other platforms/intermediaries) (4), and none of them stated that the benefit of the block exemption should be removed only for parity obligations that relate to direct sales/marketing channels (e.g. a company's own website).

Figure 13: Taking into account any competition concerns that maybe raised by parity obligations and any benefits they may create, based on your experience/knowledge do you consider that the benefit of the block exemption should be removed for these obligations, by placing them in the list of excluded restrictions in Article 5 VBER?



As regards the impact of removing the benefit of the block exemption for parity obligations that relate to indirect sales/marketing channels, the respondents that had an opinion in this regard provided mixed feedback. Almost equal numbers of these respondents identify a positive and a negative impact on various relevant parameters, namely competition on the market, the harmonised application of the competition rules by competition authorities and national courts, efficiency of distribution systems, consumer welfare, investment and economic growth, as well as sustainability objectives. Only as regards legal certainty for businesses, and costs for businesses, many respondents that had an opinion stated that the impact of removing the benefit of the block exemption for parity obligations that relate to indirect sales/marketing channels was negative or very negative.

The feedback was clearer as regards the impact of removing the benefit of the block exemption for parity obligations that relate to direct sales/marketing channels, as well as the impact of removing the benefit of the block exemption for all parity obligations. Many respondents that had an opinion stated that this impact would be negative or very negative on competition on the market, the harmonised application of the competition rules by competition authorities and national courts, legal certainty for businesses, the efficiency of distribution systems, costs for businesses, consumer welfare, as well as investment and economic growth. Only as regards sustainability objectives, many respondents considered the impact to be neutral.

b. Feedback on other issues

i. RPM

As regards resale price maintenance (RPM), 36 out of all 118 respondents had experience or knowledge of concrete instances where RPM could have led to efficiencies if the parties had not refrained from using RPM, whereas only 19 out of all 118 respondents had such experience or knowledge with regard to concrete instances where RPM had actually led to efficiencies.

The respondents listed a variety of potential efficiencies that can be generated by the use of RPM. Many respondents stated that RPM could help increase the distributors' investment in customer services and mitigate the risk of free-riding by distributors who solely focus on price competition. Some respondents also indicated that RPM could increase investments in research and development by suppliers, as it could increase their willingness to make market entry a success. Some respondents also mentioned potential efficiencies in the context of franchising contracts, arguing that franchise systems would rely on a uniform appearance and common marketing activities. Other respondents pointed to efficiencies generated by RPM in vertical agreements between a supplier and a buyer that executes a prior agreement between the supplier and a specific end user (so-called fulfilment contracts).

More than half of the respondents who indicated that they know of instances where parties have refrained from using RPM state that companies face a lack of legal certainty even in scenarios of product launches and short-term promotions, which are already covered by the current Vertical Guidelines. They indicated that due to these uncertainties and a rather strict approach of the competition authorities in the EU, companies did not make use of these exceptions despite their pro-competitive effects. Therefore, most respondents called for more guidance to be provided in the Vertical Guidelines to ensure a reliable legal framework.

ii. Non-compete clauses

Stakeholders were asked whether they had experience or knowledge of instances where it would not be appropriate to block-exempt a tacitly renewable non-compete obligation. 51 out of all 118 respondents, including a majority of suppliers or supplier associations, had no such experience. However, some respondents specified that the exemption of tacitly renewable non-compete obligations was only appropriate if both parties would be able to renegotiate or terminate the agreement either at any time during the contract duration or at the end of the five year period with a reasonable notice and without any specific reasons. They also pointed to the fact that costs should not deter the buyer to terminate the contract.

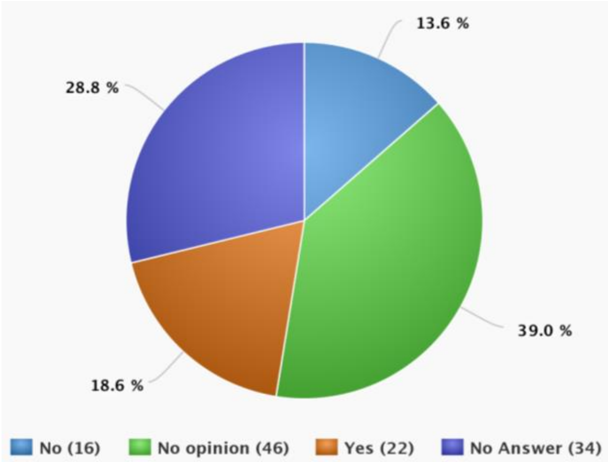
In contrast, 17 out of all 118 respondents, which were mainly retailers, retailer associations or legal experts, had knowledge of instances where exempting a tacitly renewable non-compete would be inappropriate. For some of those respondents, this exemption could lead to imposing non-compete obligations of an indefinite duration. Others respondents specifically referred to examples where manufacturers or importers could impose non-compete clauses on a permanent basis as a result of their bargaining power vis-à-vis small and medium-sized distributors, notably in the car industry or in the agricultural sector.

iii. Sustainability

To the question whether the current rules are an obstacle for vertical agreements pursuing sustainability objectives, a 34 out of all 118 respondents across all stakeholder groups did not answer, and 46 out of 118 had no opinion.

For 22 respondents, which were mainly suppliers and legal experts, vertical agreements that pursue sustainability objectives could be hindered by the current rules. As reason for this, respondents mentioned, for instance, the fact that the current rules do not automatically exempt long-term contracts exceeding five years supporting the Green Deal objectives, such as Power Purchase Agreements. Other respondents indicated that manufacturers were not allowed to impose quotas/targets on distributors or to incentivise them to achieve certain sustainability objectives for the product mix they sell. Moreover, respondents pointed out that, under the current rules, suppliers could not require authorised resellers to direct a minimum of their supplies to a particular wholesaler dedicated to a territory. Some respondents also pointed to the fact that the equivalence principle did not permit the application of differentiated sustainability criteria for online and offline distribution. In contrast, 16 respondents, with no significant difference between stakeholder groups, considered that the current rules are not an obstacle for vertical agreements pursuing sustainability objectives. Some respondents however warned against the misuse of sustainability to foreclose markets and distort competition.

Figure 14: Do you have experience or knowledge of situations where the current rules create obstacles for vertical agreements that pursue sustainability objectives?



Some respondents pointed to a need for specific guidance on vertical agreements that pursue sustainability objectives. In this respect, the Dutch NCA's guidelines[153] on sustainability are mentioned as a useful approach. More specifically, some respondents requested guidance on how to use sustainability objectives as a criterion for selective distribution systems. Other respondents asked for more clarity on the treatment of long-term vertical agreements or agreements including RPM pursuing sustainability objectives. However, some respondents called on the Commission more generally to ensure that sustainability considerations are not abused by manufacturers to justify serious restrictions of competition (green-washing).

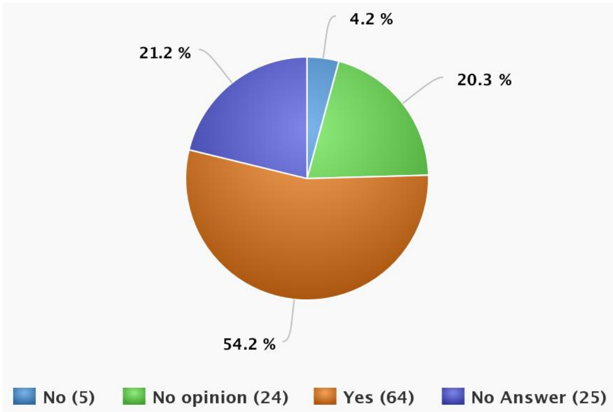
Other respondents suggested that sustainability gains should be recognised explicitly as potential efficiency gains under Article 101(3) TFEU and that the rules should clarify a number of aspects in the vertical context, such as how to measure consumer benefits in the relation to sustainability, how to demonstrate that a "fair share" of the benefits is going to consumers and to what extent benefits to consumers in other markets or society as a whole can be taken into account. The guidance could also provide clarifications on the extent to which companies along the distribution chain can develop joint initiatives or exchange information to achieve better sustainability performance. In contrast, other respondents did not see the need for specific guidance for vertical agreements, as they considered that this is more important for horizontal agreements or for antitrust in general.

[153] Guidelines regarding sustainability claims of the Netherlands Authority for Consumers and Markets, (https://www.acm.nl/sites/default/files/documents/guidelines-suistainability-claims.pdf).

iv. *Impact of the COVID-19 pandemic*

64 out of all 118 respondents, with no distinction among stakeholders groups, had experience or knowledge regarding the impact of the COVID-19 pandemic on market trends that were relevant for the revision of the VBER and the Vertical Guidelines.

Figure 15: Do you have experience or knowledge regarding the impact of the Covid-19 crisis on the market trends that are relevant for the revision of the VBER and Vertical Guidelines?



Respondents explained that the COVID-19 pandemic has had a negative impact on the distribution sector and consumer purchasing behaviour. The lockdown measures taken in the context of the pandemic have led to an increase in online sales, which has further accelerated the steady increase of e-commerce already noticeable before the crisis. According to the respondents, this trend could persist since the reopening of physical shops has so far not led to any changes. Another effect of the pandemic and the related increase of online sales was the increase of free-riding by unauthorised distributors or grey market operators selling counterfeit products.

Against this backdrop, the respondents that answered this question pointed to a need for further measures to facilitate the recovery of actors at all levels of the distribution chain. Respondents also pointed to an increasing need to eliminate the existing distortions of competition between online and offline distribution. To that end, some of them called for new rules that would provide suppliers with more flexibility to support brick-and-mortar shops and related investments in high-quality services.

2.3. Consultation of national competition authorities

A summary report of the consultation of national competition authorities was published on 24 June 2021.[154]

<u>Introduction</u>

On 23 October 2020, the Commission published an inception impact assessment ("IIA") setting out different policy options for the areas of the current rules that, based on the results of the evaluation phase, may require changes. Considering that the national

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[154] The summary report is available at https://ec.europa.eu/competition-policy/system/files/2021-06/VBER_IA_summary_contributions_from_NCAs.pdf.

competition authorities of the European Competition Network ("NCAs") have extensive experience in applying the VBER, and whereas they frequently exchange their views within a dedicated Working Group of the European Competition Network, the Commission decided to gather feedback from the NCAs on the possible impact of the policy options set out in the IIA and other areas to be further analysed during the impact assessment phase. A similar consultation took place during the evaluation phase of the VBER review. The Commission conducted this targeted consultation through a dedicated online questionnaire inviting all NCAs to share their experience and views.

20 NCAs replied to the targeted consultation for the VBER review impact assessment.[155]

The purpose of this summary is to give an overview of the replies received from the NCAs, and outline their main points and views, without reference to specific points raised by NCAs or individual views expressed by them. Therefore, in the following, reference is made generically to "NCAs", and only where NCAs expressed diverging views, both sides of the argument are presented.[156]

This summary follows the structure of the online questionnaire used for the public consultation, which mirrored the policy options and other issues set out in the IIA.

Section I of this summary deals with the replies of the NCAs on questions regarding the policy options for the four areas identified during the VBER evaluation as possibly requiring changes, namely (a.) dual distribution, (b.) active sales restrictions, (c.) specific indirect measures restricting online sales, and (d.) parity obligations. Section II deals with other issues explored during the impact assessment for the review of the VBER. Section III includes additional points and views submitted by NCAs during the consultation period.

I. POLICY OPTIONS

a. Dual distribution

NCAs considered that the exception for dual distribution set out in Article 2(4) of the VBER should in principle be maintained but that this exception should be adapted notably in light of the growth of e-commerce and the increase of direct sales by manufacturers.

According to NCAs, removing the exception for dual distribution entirely is likely to have a negative impact on legal certainty and the harmonized application of the VBER across the EU. In this respect, some of the NCAs highlighted the pro-competitive effects and efficiency gains related to dual distribution.

In their replies to questions about a possible limitation of the scope of the exception for dual distribution, NCAs supported a policy change to ensure that vertical agreements between competitors only benefit from the VBER in instances where horizontal concerns

[155] 19 national competition authorities of the Member States and one national competition authority of a Contracting Party to the EEA Agreement provided feedback.

[156] The contributions received from the NCAs cannot be regarded as the official position of the Commission and its services and thus do not bind the Commission.

are unlikely to arise. In fact, a number of NCAs stated that they have experience with concrete instances where dual distribution scenarios currently exempted by the VBER raise horizontal concerns. More specifically, most of the NCAs supported the introduction of a market share threshold to take into account the horizontal concerns that can arise in instances of dual distribution. Only very few alternatives to a market share threshold were suggested, such as the introduction of a threshold relating to the size of the manufacturer's direct sales.

A number of NCAs argued that in any case further guidance on the scope of the exemption under Article 2(4) of the VBER would be warranted, including on the interplay between the Vertical Guidelines and the Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements[157], and the application of Article 2(4) of the VBER to hybrid platforms.

In light of their relatively limited case experience with dual distribution involving wholesalers and importers, NCAs provided mixed feedback on whether the scope of the exception for dual distribution should be extended to cover them. Some NCAs stated that in their view the differences between manufacturers on the one hand and wholesalers and importers on the other hand are not significant. Therefore, these NCAs supported an extension of the exception for dual distribution pursuant to Article 2(4) of the VBER to both wholesalers and importers. Other NCAs considered that the incentives of wholesalers and importers are not comparable with the incentives of manufacturers, or stated that the extension of the exception for dual distribution is likely to have a negative impact on competition on the market.

b. Active sales restrictions

NCAs provided mixed feedback in their answers to the questions dealing with a possible softening of the current approach to active sales restrictions. As a general remark, a few NCAs noted that the impact of such policy changes would also depend on the distinction drawn between active and passive sales under the revised VBER and the revised Vertical Guidelines.

Some NCAs stated that the rules on active sales restrictions should remain unchanged, while other NCAs stated that these rules should be at least simplified in the VBER and clarified in the Vertical Guidelines. A few NCAs supported the policy option proposing to allow a combination of exclusive distribution at wholesale level with selective distribution at retail level, while other NCAs indicated that they did not have sufficient experience with such a combination to express an informed view. Furthermore, some NCAs stated that a combination of exclusive distribution at wholesale level with selective distribution at retail level is likely to have a negative impact on various parameters of competition, in particular cross-border trade. It was also considered that

[157] Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements Text with EEA relevance OJ C 11, 14.1.2011, p. 1

changes to the rules on active sales restrictions would have an impact on competition enforcement.

Some NCAs supported the policy option to allow restrictions of active and passive sales from outside a selective distribution system to unauthorised distributors located within the territory where selective distribution applies. They argued that such a policy change would help realise efficiencies generated by selective distribution, increase legal certainty, and enhance the harmonised application of competition rules across the EU. Other NCAs stated that further protection of selective distribution systems is likely to have a negative impact on cross-border trade.

In their answers to the questions on active sales restrictions, a few NCAs addressed additional points that in their respective view would require clarifications under the revised VBER and the revised Vertical Guidelines, such as franchising and territorial supply constraints.

c. Specific indirect measures restricting online sales

As regards dual pricing (i.e. charging the same distributor a higher wholesale price for products intended to be sold online than for products to be sold offline) and the equivalence principle (i.e. imposing criteria for online sales that are not overall equivalent to the criteria imposed on brick-and-mortar shops), a majority of NCAs supported maintaining the status quo, which classifies dual pricing and breaches of the equivalence principle as hardcore restrictions.

The NCAs submitted that block exempting dual pricing would not take into account the harm that dual pricing can have on competition to the detriment of consumers, in particular where dual pricing may lead to a de facto ban of online sales. In this context, NCAs argued that it is also not sufficiently certain that dual pricing would typically fulfil the four conditions of Article 101(3) TFEU. Furthermore, they argued that, if dual pricing was no longer considered a hardcore restriction, it would be difficult to show in practice that an individual dual pricing practice has anti-competitive effects. A few NCAs pointed to potential benefits of dual pricing, for instance that it allows suppliers to consider effectively the cost structure of brick-and-mortar shops, that it incentivises these shops to invest in their on-site customer services, and/or that it can prevent online retailers from free-riding on those investments.

In their replies, NCAs acknowledged that the equivalence principle is difficult to apply in practice. However, they also noted that breaches of the equivalence principle can have similar anti-competitive effects as dual pricing. In addition, it was indicated that the question of whether the equivalence principle applies only to selective distribution or to all types of distribution systems would require clarifications under the revised VBER and the revised Vertical Guidelines.

d. Parity obligations

A majority of NCAs indicated that they had experience or knowledge of instances where parity obligations raise competition concerns. Some NCAs referred to concerns about parity obligations relating to indirect sales/marketing channels (e.g. other platforms or intermediaries), whereas other NCAs referred to concerns about parity obligations relating to both direct (e.g. own website) and indirect sales/marketing channels.

As regards concerns about parity obligations more generally, NCAs indicated that they arise notably because parity obligations may soften competition and facilitate collusion between platforms or intermediaries. Additionally, NCAs noted that parity obligations may foreclose entry or expansion by new or smaller intermediaries.

Furthermore, while many NCAs did not have knowledge of instances where parity clauses create benefits, those NCAs that reported to have such knowledge indicated that these benefits may be created in connection with parity obligations that relate to direct channels. A few NCAs stated more specifically that investment incentives and the prevention of free-riding are among such benefits.

Although many NCAs pointed out that their experience is mostly related to cases involving the hotel booking or food-ordering sector, the majority of NCAs found that competition concerns regarding parity clauses arise independent of the sector. As regards further distinctions between different types of parity obligations, the feedback of the NCAs was mixed in that they did not clearly support one of the possible distinctions mentioned in the online questionnaire (e.g. the distinction between parity obligations that concern the retail and the wholesale level; whether it needs to be considered whether the parity obligation relates to price, inventory, availability or other conditions; whether, if intermediaries are concerned, it is necessary to consider the type of intermediary, i.e. sales intermediaries (e.g. sales platforms) or advertising/marketing intermediaries (e.g. websites that offer only price comparison); or whether the transactions covered by the parity obligation take place online or offline).

In light of the above, a majority of NCAs supported a removal of the benefit of the block exemption for parity obligations by adding them to the list of excluded restrictions in Article 5 of the VBER. However, NCAs provided mixed feedback on whether all parity obligations or only those related to indirect sales channels should be excluded from the benefit of the block exemption. Some found that a distinction between so-called wide retail parity clauses (which require suppliers to offer the platform the same or better prices and conditions as those offered on any other sales channel) and narrow retail parity clauses (which generally only bind the supplier’s direct online channel) is necessary as the latter are, according to them, less likely to raise competition concerns.

II. OTHER ISSUES EXPLORED DURING THE IMPACT ASSESSMENT FOR THE REVIEW OF THE VBER

a. *Efficiencies resulting from resale price maintenance*

NCAs stated that they did not have substantial experience or knowledge of instances where resale price maintenance (RPM) led or could have led to efficiency gains. They agreed that RPM should remain a hardcore restriction under the VBER. More specifically, some NCAs argued that RPM is typically not indispensable to realise certain efficiency gains.

However, most NCAs considered that it would be helpful if the revised VGL included more guidance on which practices amount to RPM and on the conditions under which efficiencies can be argued for the use of RPM and the evidence needed for this purpose. More specifically, NCAs suggested providing more examples and further explanations as to how Article 101(3) TFEU can be applied to RPM, for example, to address free-riding concerns.

b. *Tacitly renewable non-compete obligations*

NCAs indicated that they did not have substantial experience or knowledge of tacitly renewable non-compete obligations. They generally supported block-exempting such non-compete obligations, provided there is a sufficient degree of legal certainty for the undertakings concerned, particularly in that the buyer can terminate or renegotiate the agreement at any time with a reasonable notice period and at reasonable cost.

c. *Vertical agreements pursuing sustainability objectives*

As regards agreements that pursue sustainability objectives, NCAs noted that, although the discussion has so far centered around horizontal cooperation agreements, sustainability objects are becoming increasingly relevant in the context of supply and distribution systems, and more generally as regards the vertical dimension of agreements between undertakings. However, NCAs stated that they still have little experience with such agreements. Therefore, some of them indicated that it would be useful if guidance was provided in the Vertical Guidelines, for example, by reference to examples setting out the conditions that a vertical agreement pursuing a sustainability objective would need to fulfil. It was also suggested that sustainability should not only be taken into account as an efficiency gain under 101(3) TFEU but that the revised VBER and the revised Vertical guidelines could also refer to scenarios where agreements that are detrimental to sustainability should be considered as restrictions of competition under 101(1) TFEU, for example an agreement not to communicate on the sustainability performances of the products to avoid competing on this parameter.

d. *Impact of the Covid-19 pandemic*

NCAs noted that the Covid-19 pandemic has had a significant impact on the economy as such and on distribution models in particular. According to them, it has further amplified the increase in online sales, potentially combined with a lasting shift in consumer preferences. NCAs argued that the impact assessment should be fully reflective of these developments.

III. ADDITIONAL POINTS AND VIEWS SUBMITTED BY NCAS DURING THE CONSULTATION PERIOD

a. *Treatment of platforms under the VBER*

NCAs shared the view that platforms play an increasingly important role for the distribution of goods and services and that some of the ways of doing business enabled by platforms are not easy to categorise under the concepts traditionally associated with vertical relationships between manufacturers and distributors in the brick-and-mortar environment. Against this backdrop, it was suggested to consider excluding platforms from the VBER altogether, as the VBER may not present an appropriate framework to address platforms. However, the majority of the NCAs indicated that they would rather welcome clarifications in the VBER and the Vertical Guidelines on the application of the VBER to platforms to increase legal certainty.

b. Approach to online restrictions more generally

NCAs agreed that the VBER and the Vertical Guidelines will need to be updated in light of online restrictions that have emerged or have become more prevalent over the last decade. The updated rules will need to clarify how the VBER applies to these types of restrictions, notably under which conditions such restrictions would amount to a hardcore restriction and in which cases they may benefit from the block exemption. In this context, it was argued that under the revised VBER and Vertical Guidelines, restrictions should be qualified as hardcore if they severely restrict online sales. Such an approach would be stricter than finding a hardcore restriction if the restriction amounts to a (de facto) ban on online sales.

2.4. Consultation on draft revised VBER and draft revised Guidelines

A summary report of the consultation was published on 22 November 2021.[158]

Introduction

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"), together with the Guidelines on Vertical Restraints ("Vertical Guidelines").

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,

[158] The summary report is available at https://ec.europa.eu/competition-policy/system/files/2021-11/contributions_summary_draft_revised_VBER_and_VGL.pdf.

which was taken into account when preparing the draft revised VBER and Vertical Guidelines.

The Commission received 150 submissions from stakeholders with comments on the draft revised VBER and Vertical Guidelines.

In addition, 6 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 discussions 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.

Profile of respondents

Of the 150 submissions received, 102 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, 1 from a trade union and 1 from a public authority. 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, 40 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), the e-commerce sector, the franchising sector and the Horeca sector.

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.

All categories of stakeholders that commented on this area were critical of 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 **10% retail market share threshold introduced in Article 2(4) of the draft revised VBER**. 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 clear 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 it appears that 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 also 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. 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 a business model 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 various 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 modifications to the proposals, such as referring to the share of the manufacturer's direct sales in relation to its overall sales, instead of the new market share threshold of 10% of the retail market proposed in Article 2(4) of the draft revised VBER, or to take into account the combined sales of the manufacturer and all its 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 submissions 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 than 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. 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). 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 renders the rules less abstract. Similarly, some retailer associations considered that the draft revised Article 4 provides clear boundaries on what is lawful and what constitutes a hardcore restriction depending on which distribution system is used. However, a few other respondents (essentially lawyers and lawyer associations) consider that the proposed new structure is unnecessarily complex and could be simplified. They argue that, for the purpose of classifying restrictions of active or passive sales as hardcore, the only real distinction is between a selective and a non-selective distribution system. Consequently, the draft revised Article 4 could be simplified by deleting Article 4(d) which covers free distribution and specifying in Article 4(b), which currently covers exclusive distribution, that it also applies to all agreements that do not meet one or more of the requirements of exclusive distribution as defined in Article 1(1)(f) VBER.

Some respondents also commented on **the changes proposed in the draft revised rules to address several false negatives** identified during the evaluation concerning active sales restrictions. These changes extend the block exemption to certain active sales restrictions which are not currently block-exempted but for which it can be assumed with sufficient certainty that they generally fulfil the conditions of Article 101(3) of the Treaty.

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 their investment efforts.

Some respondents (mainly consisting of suppliers, supplier associations as well as lawyers and lawyer associations) support the proposal to allow shared exclusivity on the basis 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 many 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 respondents, 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 respondents (essentially retailer associations, a consumer association and online intermediaries) consider that the proposal to allow shared exclusivity provides too much flexibility for suppliers, without imposing clear limits to prevent it from being misused by suppliers to shield a large number of distributors from active sales coming from other territories. Some of them question the benefits of allowing shared exclusivity. They argue that it does not incentivise distributors to make investments, as other buyers in the shared exclusivity system could free-ride on their efforts. Other respondents are concerned 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 respondents, notably consumer associations and retailer associations, considered that allowing shared exclusivity could contribute to the fragmentation 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 respondents across stakeholder groups indicate that the draft revised rules do not clearly state the legal consequences of appointing a disproportionate number of distributors. In this regard, some respondents (notably a lawyer association and online intermediaries) 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 respondents suggest that more guidance or examples could be provided in the Vertical Guidelines to explain how this principle is to be applied. Alternatively, for other respondents (mainly lawyer associations), more certainty could be achieved by basing the proportionality of the number of shared exclusive distributors 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/kilometers, number of inhabitants. Another suggestion made by some respondents 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 respondents, 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 respondents across all stakeholder groups consider that allowing suppliers to pass on active sales restrictions is an improvement. For some of these respondents, it can enhance the effectiveness and the attractiveness of exclusive distribution systems. By preventing some distributors from using third parties to circumvent restrictions of 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 respondents also considered that the pass-on proposals provide additional protection for selective distributors, because whereas 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.

Respondents across all stakeholder groups called for clarification of the circumstances in which restrictions of active sales may be passed on. Some respondents question 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 respondents also consider that the Vertical Guidelines should provide some examples of scenarios in which the pass-on can be used.

The third proposal allows the supplier to **restrict buyers and their customers from selling actively or passively to unauthorized distributors located in a territory where it operates a selective distribution system**.

Some respondents (among which suppliers, supplier associations as well as lawyers and lawyer associations) which support this change indicate that it provides an appropriate level of protection for selective distribution systems. However, these respondents also raised issues regarding the implementation of the proposal. In particular, some respondents wonder whether and how suppliers can rely on it before national or EU courts, especially in the absence of a harmonised application mechanism. They argue that, without such a mechanism, this proposal would not be used. Some submissions suggest 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 respondents acknowledge that the VBER is not the right vehicle for the implementation of such enforcement tool, but suggest 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 respondents also raise additional points. First, some respondents call 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 respondents (mainly suppliers and supplier associations as well as lawyers) call 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 some products. Some of them also mention that any restrictions of active sales would be limited to the wholesale level.

NCAs provide limited feedback on the proposals regarding active sales restrictions. As regards the new structure of Article 4, some NCAs considered it to be an improvement which is likely to facilitate the understanding of the rules by businesses, as well as the self-assessment of their vertical agreements. Other NCAs 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 without selective 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. One NCA also raised more technical issues, one of them relating to the circumstances in which the supplier has to inform all its other buyers about the territory or customer group that has been exclusively allocated. This NCA wondered 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.

iii. 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 (so-called "**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 (the so called "**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 respondents 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 online intermediaries 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 respondents, including online intermediaries, 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. One found the proposed changes positive and welcomed that dual pricing does not have to directly reflect differences in cost 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. While it would have preferred to maintain the current rule, a second NCA did not object to the change, but suggested simplifying the guidance provided in the draft Vertical Guidelines. A third NCA suggested reverting to the current rules, as it considers that it may be difficult to enforce the proposed limiting principle. A fourth NCA expressed concern that the relaxation will allow suppliers to control resellers' ability to sell online and that businesses and enforcers will have difficulty applying the limiting principle.

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 not be block exempted. The consumer association BEUC, one NCA and some suppliers and supplier associations welcomed 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 online intermediaries noted that, overall, the proposed threshold appears to favour brands and suppliers. A significant number of respondents, 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.

iv. 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 relating to parity obligations was mixed. Respondents 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, this proposal was supported by all the respondent distributors and their associations, by half of the respondent online intermediaries and their associations, 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 respondents 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 respondent platforms and their associations, as well as a significant share of law firms and their associations. These respondents argued that the proposal would increase legal uncertainty and increase the scope for divergent enforcement at national level. These respondents 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 respondent suppliers and their associations, predominantly from the hotel sector, a minority of law firms and their associations, the consumer association BEUC and one public authority. 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 proposed new guidance on parity obligations in the Vertical Guidelines. These NCAs argued 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 government ministry favoured the exclusion of all types of parity obligations from the VBER. These respondents criticised the fact that the proposal preserves the block exemption of parity obligations relating to offline sales channels (contrary to the remedies imposed by competition authorities on hotel booking platforms). They also referred to the Booking.com decision and related Supreme Court judgment in Germany, stating that they consider the court’s findings to be relevant also to other sectors and supply structures.

b. Feedback on other issues

i. RPM

Distributors mostly welcomed that the Commission did not propose changes to its policy, i.e. it intends to continue treating RPM as a hardcore restriction. Mostly suppliers continued to argue that the Commission's RPM policy should be generally relaxed. However, they welcomed the Commission's willingness to acknowledge efficiencies, as expressed in the guidance on circumstances under which RPM may qualify for an individual exemption under Article 101(3) of the Treaty. Law firms welcomed clarifications in the guidance on RPM but indicated that the draft revised rules raise further questions that need to be addressed.

At the same time, all categories of stakeholders ask for a clarification of the Commission's position on Minimum Advertised Prices ("**MAPs")**, on which the current VBER and Vertical Guidelines are silent. Suppliers interpret 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 BEUC 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.

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 pursuant to which the buyer/distributor executes a prior agreement between the supplier and a specific end customer. Some respondents (essentially lawyer associations) support 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.

One NCA considered that fulfilment contracts amount to RPM under the current VBER.

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 online intermediaries 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.

As regards restrictions on the use of **online marketplaces**, while suppliers and law firms welcomed the clarifications, certain distributors and online intermediaries 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.

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 online intermediaries 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 one of the NCAs, asked for clarifications regarding the treatment of restrictions on the use of price comparison tools and of search engines.

Stakeholders also had minor comments on the updated guidance relating to when online restrictions are considered to restrict active sales and when they restrict passive sales or the requirement that distributors operate a brick and mortar shop or make an absolute amount of sales offline the majority not opposing the proposed approach.

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 respondents 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.

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 respondents 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.

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, platforms, 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 respondents from all stakeholders' 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 respondents express the need for additional clarifications.

Some respondents call for more clarity regarding the nature of products that justify the use of a selective distribution system. For some respondents (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.

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 respondents (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 respondents (essentially lawyers, lawyer associations and supplier associations) suggest 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)

Respondents have 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 respondents (mainly lawyers) argue that some of the examples of TSCs mentioned in the Vertical Guidelines should be deleted as they seems to refer to unlateral 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. For other respondents, a definition of TSCs should be added to the draft revised rules. The latter should also explicitly state that TSCs are hardcore restrictions which prevent the establishment of a single market for sourcing.

ix. Sustainability

Some stakeholders suggested that specific guidance should be provided in the Vertical Guidelines in relation to sustainability objectives. They ask, 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 request 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 respondents 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). Finally, one respondent suggested introducing the concept of relative market power. As regards market definition, one respondent 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 respondents (representing the distribution/retail side of the supply chain and the platform economy) 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 respondents commented on the harmonised application of the VBER and Vertical Guidelines. Respondents 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.

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. Moreover, a few stakeholders 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 respondent 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.

2.5. Workshop on information exchange in dual distribution

Introduction

In order to inform the review of both the VBER and Vertical Guidelines as well as the HBERs and the Horizontal Guidelines, the Commission organised a workshop on 15 October 2021. The workshop aimed to gather additional information on various aspects of exchange of information in the context of dual distribution, to enable the Commission to provide the necessary guidance in the revised Horizontal and Vertical Guidelines. The workshop was organised with different stakeholders who had indicated in the public consultations conducted as part of the review of these two instruments that they have specific concerns regarding information exchange in the context of dual distribution.

Approximately 50 participants attended the workshop. They represented both suppliers/manufacturers as well as buyers/distributors, active in different sectors, and each organisation was represented by one or two participants. Participants received a list of questions in advance of the workshop, which they could use for their preparation and as a structure for the workshop discussions. The workshop included two rounds of discussions in four separate groups, the composition of which changed between each round. Representatives of DG Competition joined the groups as observers. In each group, a designated moderator took notes, presented the outcomes to all participants at the end of the workshop, and prepared a summary. The four summaries are provided below.

Summaries of the discussions

Group 1

On the types of information exchanged:

- The participants expressed their view that the question should focus on the fact that information is exchanged in the context of a vertical supply relationship, where sometimes a situation of dual distribution may occur. Participants stressed that information exchange is natural in a vertical relationship. Therefore, the answers provided by the participants to this question relate to examples of information exchange which is needed to facilitate a vertical relationship.
- Some participants also mentioned in the discussion that the proposed 10% aggregated market share threshold at retail level [*n.b.*: as proposed in the draft revised VBER] will not work in practice, because it is difficult to calculate such a market share in a vertical relationship, which could result in a lot of suppliers ceasing to sell directly to consumers, thereby reducing competition at the retail level.
- The type of information or data exchanged varies depending on the context and the level of distribution chain (supplier/wholesale/retail);
- Reporting information relating to inventory data and demand forecasting is typical in a vertical supply chain to realize efficiencies inherent in the vertical distribution model;
- Examples of inventory data shared by participants: sell-out information related to quantity of sales, balance on hand, customer returns, defective balance on hand;
- Some participants share annual statements, monthly business reports, franchisee data, information about planned new products; safety information and regulations relating to the products; other information as a feedback from customers to suppliers;
- Feedback from suppliers – information which explains the product to distributor partners, marketing materials, innovations to be offered by the supplier; it is important for the suppliers to make sure demand meets supply and production capacity; the use of the advantages of indirect sales channels by supplier (e.g. distributor partners) necessitate the exchange of information;
- Participants discussed that the impact of the new VBER rules on and the importance of information exchange at the wholesale distribution level should be taken into account - wholesale distributors, who typically sell suppliers' products to resellers/retailers and not to consumers/end users, work on high volumes and deliver high efficiencies, even though they work on low margins – the efficiencies result in availability and variety of products where the suppliers don't have the know-how and logistical capacity to reach resellers directly. Good visibility on inventory levels and demand forecasting is key to find the right balance between under-stocking (which will cause delays for customers) and over-stocking (which can be very expensive, particularly for distributors operating on low margins). Otherwise, both instances can lead to inefficiencies: delays, increased costs and increased prices. This may endanger the viability of the wholesale distribution business.
- Participants agreed that, depending on the type of information, in general recent/real-time information is needed in order to achieve timely and efficient delivery of the products in the vertical chain. It may happen that suppliers exchange future

information with their distributors, like promotions which are about to take place in the near future, and such information exchange is crucial to collaborate with partners across the vertical chain.

- Distribution forecast are another example of information that has a “future” element in the vertical supply chain since stock planning is of paramount importance to make the vertical relationship going.
- Sales reporting is typically individualized per product.
- Comments on the frequency of the exchange appeared in the discussion on whether the data is past, present or future. Actors at different levels of the supply chain share the view that data has to be recent and real-time which in itself necessitates frequent exchanges.
- Information in a vertical relationship is exchanged two-way: supplier-distributor and vice-versa. E.g., Sales and inventory reports are typically communicated by distributor to supplier (e.g. balance on hand, on order quantity, defective balance on hand, units sold); by supplier to distributor (e.g., estimated ship dates or actual ship dates; carrier name listed; open orders).
- The participants raised the point that the term “strategic”, as used in the context of horizontal relationship, is not similarly applicable in a vertical relationship;
- Some of the participants made the point that information exchange between a supplier and a distributor can be forward looking with the purpose to build the distribution strategy, for example – promotion activities, product marketing, customer experience etc.
- From the discussion, the participants left the impression that in a vertical supply chain such information is typically agreed between the parties in order to define and assess the key performance indicators;
- Sometimes information may be provided ad hoc upon request.

On what types of information are necessary for dual distribution:

- Some of the participants shared the opinion that the question implies that there is a dual distribution agreement between a distributor and a supplier, where in fact there is no such thing as dual distribution agreement. Participants explained that there may be a dual distribution situation, not an agreement. Distributor has to accept the fact that manufacturer unilaterally may decide to open a direct sales channel and distributors do not have influence on this subjective commercial decision taken by the supplier. The only thing the distributor can do is to be an efficient distributor and for this certain information has to be exchanged – information is critical for products to be delivered (quality and diversity of products, delivery). Therefore, information exchange is needed to implement the vertical relationship, whether or not there is a de facto dual distribution situation.
- First and foremost – this is a vertical relationship. If one cuts off the communication link, then the whole model will be compromised and will stop existing.
- Important for distributors: Inventory management and demand forecast.

- There might be some information which from a horizontal point of view might be critical. The question is more like what the supplier is allowed or not allowed to do with this information.
- It is Important for the Commission to point out what risks are there, if any;
- Participants suggested that the question should be focused on what is clearly beyond the allowed under the rules and what should not be exchanged and what creates horizontal concerns.
- Conclusion: definitely not banning information exchanges in a vertical chain. Still, a view was expressed that handling of data by suppliers should not be used in a discriminatory way by the suppliers.

On what types of information or data should not be exchanged in the context of dual distribution:

- not allowed to share: sales prices; strategy on prices;
- but certain information is needed in order to bring the products to the market from the supplier through the distributor – the term "strategic" in the horizontal context does not carry the same meaning as in the vertical relationship.

On the practical or technical measures companies take to ensure that information exchange is solely used to achieve efficiencies:

- Some participants raised the fact that there is an increasing level of competition between suppliers and retailers at retail level vis-à-vis consumers. These participants raised the point that information exchange is important but in such cases it must be done in a safe way and where it is necessary to the performance of the vertical relationship between the supplier and the distributor in a dual set-up;
- This created a discussion that it is not clear what Chinese walls mean, how they should be implemented in practice – certain participants raised the concern that practically it is impossible in a vertical supply chain to implement such measures (e.g. in the case of franchises);
- Participants in general could not provide specific examples of safeguards that can be applied in practice in a vertical relationship.
- The participants agreed that more guidance is needed as to safeguards depending on the significance of the supplier, the intensity of the competition and the type of data (so not to apply to all situations). Some participants expressed the views that it is ultimately up to the supplier to implement these safeguards and handle the information in a compliant way.

Group 2

On the type of information exchanged:

- The question was first addressed in a broader sense. The group agreed that dual distribution is mainly vertical in nature. As a result, there was agreement that there must be a safe harbour for information exchanges in dual distribution scenarios for participants in such arrangements to be able to harness the ensuing pro-competitive effects. Some participants made clear that they found the wording of the first question a wrong starting point in that dual distribution is not at all a horizontal issue and that information must be exchanged for it to work, which should, a priori, not raise any concerns.

- Beyond this question of definition, a majority of the participants agreed that there must still be boundaries for information sharing in such scenarios, given the existing competitive relationship between players engaged in dual distribution: As such, the information gathered must not be abused by the receiving end in order to gain an undue competitive advantage. While the group agreed that product-related information is necessary for the vertical relationship to work, some of the information shared can be more critical. Some argued that this would concern, for example, information on resale prices and other strategical and recent/future data. Furthermore, some participants raised strong doubts about the exchange of individualised client data particularly from the distributors' perspective. In this regard, participants argued that where the information is not necessary to be shared for performing the vertical relationship, the exchange should not take place.
- Nonetheless, the issue was defined as multi-faceted and not always corresponding to the "classic" dual distribution scenario of a supplier and a distributor selling to end customers (e.g. multi-tiered distribution, b2b dual distribution). Some participants argued that it will depend on the individual layout of the distribution relationship and the individual level of the supply chain whether the information exchange raises concerns or not. As a result, flexible solutions would be appreciated by most participants. For example, such a flexible approach could entail a safe harbour for some types of information generally seen as unproblematic, with a closer analysis of the context where more strategic types of information are shared.
- Overall, the group agreed that more concise guidance would be required for determining the boundaries between helpful and harmful information exchanges. This may either concern the type of information itself or the means/the context of the information exchange.

On what types of information are necessary for dual distribution / what types of information or data should not be exchanged in the context of dual distribution / the practical or technical measures companies take to ensure that information exchange is solely used to achieve efficiencies:

- No consensus could be established with regard to these questions, with conflicting opinions from the supplier and distributor sides.
- Suppliers: With dual distribution being a multi-faceted issue, the competitive assessment always depends on the exact type of distribution scenario. As a result, potential issues in some sectors should not impede on working systems in other sectors. There must not be a "one-size-fits-all approach", neither with the view to establishing an exhaustive list of information to be legally shared nor to clean teams and other such arrangements.
- Distributors: Issue was mostly taken with regard to customer data and a practice of linking the sharing of such data to economic bonuses for suppliers. It was also asked to implement a prohibition to share such (individualised) data with third parties and to prevent suppliers from forcing distributors to transmit intelligence from anything else than is either available publicly or from the balance sheet of the distributor.

- However, there was consensus that a clearer guidance would be highly appreciated in order to level the playing field and give more legal certainty to all the actors involved.

Group 3

On the type of information exchanged:

- The session was divided in two different groups. On the one hand, car dealers associations shared concerns about the regular (sometimes daily) transmission of sensitive and strategic information (management feedback) to car manufacturers, who increasingly sell via their own direct to consumers (D2C) channels (mainly online). Car dealers fear that such information could be used by car manufacturers to attract customers to their D2C channels. No car manufacturers were represented in this session.
- On the other hand, a wider group of participants (manufacturers and law firms) agreed that exchanges of information are vital to the relationship between a supplier and a retailer. They consider this relationship to be vertical, even in cases of dual distribution (because they are selling the same product). Participants explained that information exchanges are usually in one direction (typically: from supplier to the retailer before the product is sold and from the retailer to the supplier after the product is sold). That information is aggregated, shared on a regular basis (varies between weekly, monthly or quarterly), and relates to the past, present and future. It relates to the suppliers' products only and no information about the supplier's D2C activities is ever exchanged.
- One example of the necessity to exchange future information was the need to request retailers to share forecasts about how much products they will sell, so that the supplier can adapt its stock). Stock management was frequently mentioned as an example to justify information exchanges, citing the French law on circular economy which bans the destruction of unsold products to explain suppliers' need to communicate with the retailer to optimise production. One participant mentioned that the Commission is reflecting about extending this ban at EU level in its upcoming Sustainable Products Initiative (SPI).
- Manufacturers insisted that there should not be any presumption that information exchanges in cases of dual distribution are problematic.

On what types of information are necessary for dual distribution / what types of information or data should not be exchanged in the context of dual distribution / the practical or technical measures companies take to ensure that information exchange is solely used to achieve efficiencies:

- The session was a mix between retailers' associations and brand manufacturers. The preliminary comments that were made were that dual distribution is a situation and not an agreement and that there should be no "one size fits all" solution applicable to all sectors and types of agreement (franchise, selective distribution, "classical" supplier/retailer relationship).
- One representative of a retailer stated that suppliers' dual distribution activities raise some horizontal concerns, notably in the case of promotional campaigns but did not elaborate further.

- One representative of the franchise sector advocated for status quo, and insisted that there should not be any presumption that information exchanges are problematic. Also other brand representatives added that dual distribution increases competition, and that limiting exchanges of information would limit the possibility to increase competition through dual distribution. In addition, it was also argued that limiting exchanges of information could lead to an increase in brands' D2C activities (at the expense of their distributors) because they need the data about the performance of their products.
- One brand who has implemented a selective distribution network insisted that information exchanges is the essence of a successful selective distribution system. There have been no concerns from selective retailers about potential issues raised by dual distributors. One brand representative stated that dual distribution has always been there in the physical world. D2C online sales is just mirroring what luxury brands have always done in the physical world.
- With regards to the necessity of information exchanges, retailers' representatives argued that only information relating to the performance of the contract should be allowed (i.e. information needed or retailers to sell the product). Brands insisted that information exchanges need to go both ways, in order for brands to know how customers react to the products.
- A representative of a brand highlighted that in the chemical sector, online distribution is not yet a reality. He also advocated for the status quo, as he feels that it works well for physical distribution.
- One franchise representative explained that Chinese walls would be very difficult to implement, especially for smaller companies.
- Representatives of retailers clarified that their concerns are about the potential misuse of information, not the exchange of information in itself.

Group 4

Attempts to categorise the trigger for the information exchange:

- Setting up or planning a distribution system (new distributor, renewal of relationship)
- Setting up a logistics solution (ex: drop-shipment).

Attempts to categorise the information and the temporality for sharing information:

- Volume planning information: information about orders, availability about models, stocks, volume targets;
- Customer information: customer products, customer satisfaction, warranty information;
- Pricing information, financial support when provided;
- Performance information: standards fulfilled, benchmarking;
- Past, present and future information can be relevant (examples from the automotive sector):
    - o Past information: Performance of dealers, customer satisfaction
    - o Present information is need to operate an efficient network: dealer stock

    - Future information: future availability, delivery schedule, volume targets

- In the FMCG sector, information can be exchanged, such as seller data, on a weekly or monthly basis, with details per category of products, per reference, per country or per category of customers, with the purpose to make the supply chain efficient.
- There can be business justification to exchange information on promotions, future marketing campaigns or target price, so the supplier can arrange for more production. (Reference was made to case law in Denmark related to Hugo Boss.)
- Hard core restrictions are already included in VBER and Guidelines (ex: resale price maintenance or "future price information").

Information exchanges work both ways:

- Information from distributor to supplier, and information supplier to distributor are important.
- Information necessary in dual distribution.
- Differences to be made according to the type of distribution. In the case of selective distribution, when qualitative criteria are applied, the supplier may need additional information.

On the types of actors exchanging information:

- Supplier to buyer information: products available, products in stock or to be manufactured, purchase price, Recommended Retail price, commercial advice.
- Buyer to supplier: what does the buyer want to buy, what price, etc.
- Commercial advice: from franchisor to franchisee.
- Establishing a network (for example to select the right investors for long-term investment).
- Category management could be a category of its own.
- Situations can be very different. In the situation of car manufacturers, information exchanges is inherent to the system (ie. car orders, etc). On the contrary, asking for strategic information on a very frequent basis creates a problem. For FMCG products, it can be necessary to allocate products on a daily basis.

On the benefits of information exchange:

- Many members of the group, representing diverse sectors (FMCG, Food, Automotive), expressed the view that, generally speaking, information is exchanged only when it is relevant.
- Information exchange is highly relevant for efficiency of the supply chain.
- It is essential to the execution of the distribution contract, as it allows the head of the network to ensure the selection criteria are fulfilled.
- The ultimate objective of exchanging information is to continue offering attractive products. This is a common interest of all parties.
- Information exchange has a pro-competitive effect, through optimising supply chains. For example, suppliers and retailers are working together on a day-to-day basis, compared to 10 years ago.

- There is a legitimate interest in getting the information to plan for the future (product development). However, it is relevant to take into account that big companies or brands have more capacity to analyse the data than smaller actors.

On the relevance and need for European intervention:

- Some actors questioned the existence or relevance of concerns justifying EU intervention or Commission guidance on the topic of information exchange.
    - An objection by effect [to data exchange] would require a market analysis.
    - There shouldn't be a presumption that some information exchange isn't necessary. A focus on retail overshadows that information cooperation has been happening for a long time in the B2B sector.
- Requests for more information were addressed to the European Commission, to detail the concerns (for example, the existence of false positive cases or potential spill-over effects).
- Other actors pointed out that Commission guidance could bring legal certainty (FMCG), or actually boost B2B data exchanges as the current uncertainty leads to choosing a cautious approach to information exchange and ultimately to less information exchange (e-commerce platform).
    - For example, guidance from the Bundeskartellamt is available for the food industry. It is missing in the digital space, where EC guidelines could help.
    - The BKartA guidance accepts efficiency of information exchanges, as it is good for consumers (for ex: relevant campaigns per month of the year).
    - Another concrete example is marketing campaigns, where only one brand is involved, but all actors in the distribution chain have an interest in being involved (brand own sales, dealer sales).
- Guidance on information exchange for sustainability is highly relevant.
- Information exchange in a given distribution system and outside of this distribution system may need to be assessed differently.
- Differentiating between legitimately collecting the information and how this information is used may be relevant.
- Dual distribution and relationships with existing partners shouldn't be affected by the decision to also implement a direct-to-consumer sales strategy.
- Concerns about abuse of dominance, or about collusion, are distinct from the collection and use of information or the context of dual distribution. It is also distinct from the intention to complete a distribution network (for example through adding direct-to-consumer sales strategy). These points were echoed by many actors.
- One actor expressed a preference for a "black list", meaning a list of practice on what can't be done. (FMCG)
- Another actor pointed that hybrid actors are developing and blurring boundaries, a joint VBER/HBER approach may be needed. (e-commerce).
- The Commission could provide more guidance on how to implement Chinese walls (retail), although this could prove difficult, given the complexity of some distribution networks (specialty-chemicals).

- One risk is that if dual distribution is too complex or too costly to assess, suppliers are incentivized to simply focus on direct-to-consumer sales strategies, thereby cutting off retailers. (FMCG).

2.6. Additional consultation on draft revised VBER and draft revised Guidelines – new section on information exchange in dual distribution

A summary report of the consultation was published on 12 May 2022.

Introduction

On 4 February 2022, the Commission launched a targeted additional public consultation, in the context of the review of the VBER, together with the Vertical Guidelines, on guidance to be added to the draft revised Vertical Guidelines relating to information exchange in the context of dual distribution ('draft new section'). This guidance was subject to an additional public consultation as it had not been part of the consultation on the draft revised rules that took place in the summer 2021 (see Section 2.4 above).

61 stakeholders and 6 national competition authorities ('NCAs') submitted comments in response to the public consultation.

Those submissions are summarised below. This summary does not prejudge the outcome of the impact assessment of the VBER and Vertical Guidelines. Neither the views of the stakeholders expressed in the submissions nor the views set out in this summary represent the official position of the Commission or its services and these views do not bind the Commission in any way.

Stakeholder and NCA feedback

All categories of stakeholders welcomed the opportunity to provide comments on the draft new section. A few stakeholders commented on paragraphs 1 to 9 of the draft new section, which concerned the scope of the dual distribution exceptions in the Regulation replacing the VBER. Most of the stakeholders commented on the proposed test for block-exempting information exchange in scenarios of dual distribution and the examples illustrating the application of the test (paragraphs 9 to 17). Some stakeholders used the opportunity to comment on other issues not covered in the draft new section.

Scope of the dual distribution exceptions

Some stakeholders argued that the new guidance on the definition of non-reciprocal vertical agreements, which is a prerequisite for the dual distribution exceptions to apply, is too narrow, notably as it would exclude instances where the contract goods are resold to the supplier, regardless of the circumstances of such sales. Others took note of changes to the definition of potential competitor and invited the Commission to clarify the guidance on making investments or incurring other necessary costs 'within a short period of time', in particular to harmonize that guidance with other instruments, notably the Horizontal Guidelines. Stakeholders provided mixed feedback on the guidance relating to the sale of own-brand products; in particular, the application of the block exemption where such products are manufactured by third parties, as opposed to being manufactured in-house, in which case the block exemption would not apply.

Some stakeholders argued that it would be inappropriate to construe the dual distribution exceptions narrowly, as proposed in the draft new section, in view of the purpose of the VBER to provide a 'safe harbour'.

All categories of stakeholders welcomed the clarification that the dual distribution exception applies where the supplier sells *goods* at 'several levels of trade', including scenarios where the supplier is active upstream as a manufacturer and downstream as a wholesaler. Some stakeholders suggested that the scope of the dual distribution exception relating to *services* should be similarly extended, namely it should not be limited to scenarios where the parties compete at the retail level.

Assessment of information exchanges

All categories of stakeholders welcomed the introduction of a test for the assessment of information exchange in dual distribution, with further guidance provided, based on examples in the Vertical Guidelines. Some stakeholders stated that the test should apply irrespective of whether the combined market share of the parties to the vertical agreement exceeds 10% at retail level.

All categories of stakeholders welcomed the fact that the draft new section recognized the pro-competitive effects of information exchange in dual distribution. However, some stakeholders asked for a clarification that unsolicited communications of information do not amount to an exchange of information where the receiving party promptly and unambiguously rejects the information.

Stakeholders provided mixed feedback on the appropriateness of the proposed test for block-exempting information exchange in dual distribution ('necessary to improve the distribution of the contract goods or services'). Stakeholders primarily representing suppliers considered that the proposed test was too strict and listed various types of information whose exchange they considered to be pro-competitive, notably customer-related information (for example to negotiate special wholesale terms for large customers, to operate a customer loyalty scheme, or to monitor the distributor's compliance with selective or exclusive distribution agreements). On the other hand, stakeholders primarily representing distributors considered that the draft guidance was too permissive and expressed the concern that manufacturers would be able to rely on the new guidance to force distributors to share details on pricing and customers, which would allow the manufacturer to align its pricing or serve the customers directly.

Some NCAs noted that the proposed test essentially restated some of the conditions set out in Article 101(3) of the Treaty. They considered that the test should be whether the exchange of information is *necessary for the implementation of the vertical agreement*.

Some stakeholders, mainly law firms, argued that the draft new section does not make clear whether it is the parties to the agreement or the authority or claimant alleging an infringement of competition law that bears the burden of proving (lack of) necessity of a particular information exchange, and whether the necessity test applies only in scenarios of dual distribution.

Some NCAs raised concerns that the formulation of the proposed test was too permissive and argued that the burden should be on the parties to the agreement to show that the information exchange is necessary to improve the production or distribution of the contract goods or services.

All categories of stakeholders welcomed the provision of examples of information exchange in the draft new section and considered that this would increase legal certainty. Many stakeholders also welcomed the guidance stating that specific types of distribution system might necessitate the exchange of specific types of information. However, some stakeholders requested further clarifications in this respect, for example, as to whether particular types of information would meet the necessity test when exchanged in a free distribution model. Some stakeholders also requested clarifications regarding some of the types of information listed in the guidance as being examples of information that generally meets the necessity test. Some stakeholders provided additional examples of information which, in their view, would also meet the proposed test.

Some NCAs favoured a stricter approach and suggested that the guidance should state that the examples provided *may* meet the necessity test, rather than stating that these examples can *generally* be considered to meet the test. More specifically, some NCAs questioned whether the exchange of past or present resale prices is generally necessary to improve the production or distribution of the contract goods or services.

Stakeholders expressed differing views as to whether the exchange of customer-specific sales information should be considered "generally not necessary". Suppliers, in particular, provided examples of why the exchange of such information may be necessary to improve production or distribution, at least at the wholesale level. They referred, for example, to the organization of marketing campaigns and projects to provide customer-specific services. On the other hand, some distributors expressed concerns that, if the exchange of customer-specific sales information was block-exempted in scenarios of dual distribution, suppliers might require distributors to communicate such information for the purpose of selling to those customers directly (disintermediation).

Some stakeholders asked for more clarity regarding the legal consequences of engaging in information exchanges that do not meet the test of necessity and therefore fall outside the block exemption. In this context, stakeholders argued that the references to the Horizontal Guidelines and the case law relating to information exchange between competitors were not adequate, because, in their view, those Guidelines and that case law concern inter-brand restrictions, whereas in scenarios of dual distribution any concerns relate primarily to intra-brand competition.

Many stakeholders welcomed the reference in the draft new section to precautions that undertakings may take to minimise the risk that information exchanges will raise horizontal concerns. Some stakeholders, however, mentioned that such precautions, notably firewalls, are costly, that further guidance on how to implement them technically would be helpful and that it should be clarified whether implementing such precautions could bring information exchanges within the scope of the safe harbour.

Other comments

A small number of stakeholders used the opportunity of the additional public consultation to submit comments on other areas of the draft revised VBER and Vertical Guidelines that had been subject to the public consultation (from 9 July 2021 to 17

September 2021). In particular, they commented on the proposed exclusion from the block exemption of vertical agreements entered into by providers of online intermediation services (‘OIS’) with a hybrid function. Some of these stakeholders considered that the exclusion was inappropriate, while others asked for more guidance, including more generally on the definition of OIS provider. On the other hand, the NCAs generally restated their support for excluding from the block exemption the agreements of hybrid OIS providers.

Annex 3: Who is affected and how?

1. PRACTICAL IMPLICATIONS OF THE INITIATIVE

The initiative consists in a revised and updated VBER and Vertical Guidelines. As such, the initiative is largely a continuation of the existing rules, which the evaluation fundamentally confirmed to be useful and relevant rules for stakeholders.

In the assessment of the practical implications of the initiative, it is important to recall that the VBER, together with the Vertical Guidelines, does not impose any additional compliance obligations on businesses beyond those reflected in Article 101 of the Treaty. On the contrary, the rules aim to facilitate the work of businesses that have to self-assess their vertical agreements to ensure compliance with Article 101 of the Treaty.

The revised VBER and Vertical Guidelines will primarily have practical implications for businesses and, indirectly, the law firms and other professionals advising businesses on compliance with Article 101 of the Treaty. The revised VBER and Vertical Guidelines will also have implications for the NCAs and national courts. Indirectly, the revised VBER and Vertical Guidelines will also affect consumers, but the initiative has no practical implications for them.

1.1. BUSINESSES

The stakeholder group that would primarily be affected by the initiative is businesses, as they are the stakeholders that mostly use the VBER and Vertical Guidelines in their daily work. In practice, businesses use the VBER and the Vertical Guidelines to self-assess the compliance of their vertical agreements with Article 101 of the Treaty. They use the VBER to identify whether their agreements meet the conditions of the block exemption. If an agreement meets the conditions set out in the VBER, businesses know that the agreement benefits from the safe harbour and that Article 101(1) of the Treaty does not apply to it. Businesses use the Vertical Guidelines to inform their understanding of the VBER conditions and to have more guidance when determining whether an agreement meets the conditions of the safe harbour. They also use the Vertical Guidelines for more guidance in self-assessing agreements that fall outside the safe harbour and are thus subject to Article 101(1) and 101(3) of the Treaty.

In the evaluation of the current rules, stakeholders unanimously confirmed that the VBER and the Vertical Guidelines are useful tools that greatly facilitate the self-assessment by businesses of vertical agreements required by the wider legal framework. Since the initiative does not alter the core structure and framework of assessment provided by the rules, under the revised rules, businesses would need to perform a similar type of assessment as they currently do when checking their agreements against the conditions set out in the VBER. Overall, therefore, the initiative would have clear benefits for businesses, as they would be able to continue relying on a VBER and Vertical Guidelines. The initiative also revises the rules to address the problems of scope, clarity and complexity. Additional clarity and rules that are simpler would greatly increase the level of legal certainty provided, which would in turn increase the ability of the rules to facilitate self-assessment by businesses.

The benefits of the VBER are particularly important for SMEs, whose market shares are generally low and therefore do not exceed the market share thresholds of the VBER, enabling them to benefit more often than other businesses from the block exemption.

Indirectly, law firms and other professionals advising businesses on compliance with Article 101 of the Treaty would also benefit from a clearer set of rules, which would allow them to more effectively advise businesses.

In particular, the preferred options set out in Section 8 of the report have different practical implications for different categories of businesses.

The preferred options as regards dual distribution would have practical implications for manufacturers that currently benefit from the exemption of dual distribution, as the scope of the dual distribution exception would cover only information that is necessary to improve the production or distribution of the contract goods or services by the parties. Manufacturers would thus potentially have to limit their information exchanges in order to remain covered by the VBER. This would also affect distributors, as they are also party to the information exchanges. Overall, if businesses have to implement measures to ensure that certain types of information are not exchanged in dual distribution, for example setting up Chinese Walls, such measures would increase costs for them. The preferred options would also have practical implications for hybrid online intermediation services providers, as they would be excluded from the scope of the dual distribution exemption, and on wholesalers and importers, who would be included in the scope of the dual distribution exception. In practical terms, hybrid online intermediation services providers would face an increased burden and increased compliance costs, as they would no longer be able to rely on a simpler set of rules to self-assess their vertical agreements. This might discourage them from engaging in dual distribution. The opposite would be true for wholesalers and importers engaging in dual distribution, who would thus potentially be encouraged to engage in dual distribution more often.

The preferred option as regards parity obligations would primarily affect online intermediaries that use across-platform retail parity obligations. In practice, these companies would need to conduct an individual assessment of the compliance of their parity obligations with Article 101 of the Treaty, given that this type of parity obligation would be excluded from the VBER. The preferred option would also have practical implications for businesses that use the services of online intermediaries that impose across-platform retail parity obligations, as the use of such obligations is expected to decrease following their exclusion from the VBER.

As regards active sales restrictions, the preferred options would affect both suppliers and distributors engaged in exclusive and selective distribution. Both these types of businesses would be able to impose or benefit from active sales restrictions in more situations. They would thus benefit from the increased flexibility and protection given by the options and would face reduced compliance costs.

As regards the preferred options for specific indirect measures restricting online sales, both options would have practical implications for suppliers and distributors. In practice, suppliers would be able to use dual pricing and to apply non-equivalent criteria for online and offline sales, without running the risk that their agreements fall outside the scope of the VBER. Distributors would also be affected, since the use of dual pricing might increase (and their wholesale prices might therefore be affected) and the criteria imposed on selective distributors might differ for online and offline sales, in which case distributors might have to adapt their businesses to comply with the new criteria.

1.2. ENFORCEMENT AUTHORITIES

The initiative would also have practical implications for the Commission, NCAs and national courts, all of which use the VBER and Vertical Guidelines in their enforcement work. Since the VBER is binding on NCAs and national courts, they would have to take into account its revised provisions in order to assess the compatibility of vertical agreements with Article 101 of the Treaty. The Vertical Guidelines, which are binding on the Commission, do not bind NCAs or national courts, but they are typically taken into account when assessing the compatibility of vertical agreements with Article 101 of the Treaty. Overall, since the initiative would not fundamentally alter the core structure and framework of assessment provided by the VBER (e.g. the concepts of hardcore restrictions and excluded restrictions; the market share threshold for both suppliers and buyers, etc.), it would not have significant practical implications as regards the assessment that enforcement authorities carry out when enforcing Article 101 of the Treaty. The impact on enforcement authorities is explained in more detail in Section 6 of the report.

1.3. CONSUMERS

The initiative is not expected to have any direct practical implications for consumers, as the VBER and Vertical Guidelines do not apply to them and are usually not used by them in any relevant manner. Indirectly, however, consumers would be affected by the initiative, in that they may benefit from lower prices, increased quality and variety of products and services, as well as the results of increased incentives to innovate delivered by competition in the supply and distribution chain. This is explained in more detail in Section 6 of the report.

2. SUMMARY OF COSTS AND BENEFITS

As explained in the report, it proved difficult to collect quantitative evidence on the costs and benefits of the identified policy options. The difficulty in quantifying the costs and benefits of the VBER, together with the Vertical Guidelines, had already become apparent during the VBER evaluation. As explained in the VBER evaluation SWD, this is because businesses appear to assess the costs they incur to ensure compliance of their business operations with competition law at a general level, notably without distinguishing between the type of agreement concerned or the instrument relied on for the purposes of their self-assessment. As such, it was not possible to estimate the effects on costs in a quantitative manner.

I. Overview of Benefits (total for all provisions) – Preferred Options		
Description	***Amount***	***Comments***
Direct benefits		
Reduced negative impact of information exchange in dual distribution	Not possible to quantify	The option of limiting the scope of the dual distribution exemption to cover only information exchange necessary to improve the production or distribution of the contract goods or services by the parties may discourage the exchange of additional information and thus reduce the risk of collusion that could arise from such exchange
Reduced negative impact of hybrid platforms engaging in dual distribution	Not possible to quantify	The option of excluding hybrid platforms from the exemption of dual distribution may reduce the incentives of such providers to engage in dual distribution thus reducing the negative impact on competition
Compliance cost reductions for wholesalers and importers engaging in dual distribution	Not possible to quantify as it is difficult to gather data on the number of wholesalers and importers engaged in dual distribution or that might start doing so in view of the initiative	The preferred option for dual distribution would extend the exemption to wholesalers and importers, thus allowing them to rely on a simpler set of rules when assessing the compliance of their agreements with Article 101 of the Treaty
Reduced negative impacts of across-platform retail parity obligations	Not possible to quantify as it is difficult to gather data on the number of online intermediaries that use across-platform retail parity obligations and the level of reduction in the use of such obligations that would result from the initiative	Requiring online intermediaries that wish to use across-platform retail parity obligations to carry out an individual compliance assessment may lead to a reduction in their use and consequently, a reduction of the negative impacts of such obligations
Compliance cost reductions for businesses that apply active sales restrictions	Not possible to quantify	By allowing active sales restrictions in more instances, business that apply these restrictions can rely on a simpler set of rules when assessing the compliance of their agreements

		with Article 101 of the Treaty
Increased flexibility for suppliers to protect the investments of exclusive distributors	Not possible to quantify	The preferred option of allowing shared exclusivity and the pass-on of active sales restrictions (with the envisaged limits) both increase the efficiency and attractiveness of exclusive distribution and allow for a better protection of the investments of exclusive distributors
Increased protection of selective distribution systems and the investments made by distributors	Not possible to quantify	Allowing restrictions on active and passive sales from outside the selective distribution system to unauthorised distributors inside the selective distribution territory could increase the protection of selective distribution systems against unauthorised distributors that do not meet the related quality criteria and which could therefore free-ride on the investment efforts made by selected distributors for the provision of high-quality services
Compliance cost reductions for suppliers who engage in dual pricing or apply non-equivalent criteria for online and offline sales	Not possible to quantify as it is difficult to gather data on the number of suppliers who engage in dual pricing or apply non-equivalent criteria for online and offline sales, or who might start doing so in view of the initiative	The preferred option for this area would remove dual pricing and the application of non-equivalent criteria for online and offline sales from the list of hardcore restrictions, thus allowing suppliers who apply these restrictions to rely on a simpler set of rules when assessing the compliance of their agreements with Article 101 of the Treaty
Decreased costs for distributors	Not possible to quantify	The option of removing the application of non-equivalent criteria for online and offline sales from the list of hardcore restrictions may lead to a reduction in distributors' costs, if they no longer have to comply with criteria that are not appropriate to the channel they use
Legal certainty	Not possible to quantify	Overall, the initiative is expected to

		increase the level of legal certainty as compared to the existing rules. During the evaluation, stakeholders explained that legal certainty resulting from the application of the VBER, together with the Vertical Guidelines, can lead to less legal disputes between the parties to an agreement
Indirect benefits		
Increased consumer choice due to more dual distribution	Not possible to quantify	The extension of the exemption to wholesalers and importers could increase dual distribution thus increasing choices for consumers
An improved offer for businesses and consumers that use online intermediation services	Not possible to quantify	Deterring the use of across-platform retail parity obligations may result in lower-priced, higher quality and more varied online intermediation services for business users and consumers
Increased intra-brand competition due to shared exclusivity	Not possible to quantify	Consumers can benefit from increased intra-brand competition if more than one exclusive distributor is appointed per exclusive territory or customer group
Better pre-sales and after-sales services for consumers	Not possible to quantify	A better protection of the investments made by distributors in a selective distribution system may result in higher levels of investment that would lead to consumers being offered better pre-sales and after-sales services
Increased investment incentives and competition	Not possible to quantify	No longer considering dual pricing a hardcore restriction would enable suppliers to offer wholesale prices to hybrid distributors for online and offline sales adapted to their costs and investment needs. This would enable distributors to increase their sales efforts and investments in pre- and after-sales services and compete

		more effectively, to the benefit of consumers
Improved efficiency of online and offline distribution	Not possible to quantify	The option of removing the application of non-equivalent criteria for online and offline sales from the list of hardcore restrictions could increase the efficiency of online and offline distribution, lead to improved services, including tailored advice and channel-specific services, and stimulate investments adapted to each channel and innovation, to the benefit of consumers
Improved competitiveness of physical stores	Not possible to quantify	The preferred options as regards online sales would enable suppliers to incentivise the investments of hybrid distributors in physical stores, thus allowing these distributors to maintain the competitiveness of their physical stores in an environment reshaped by the growth of e-commerce, to the benefit of consumers

II. Overview of costs – Preferred options							
		Citizens/Consumers		Businesses		Administrations	
		One-off	Recurrent	One-off	Recurrent	One-off	Recurrent
Scope of dual distribution exemption limited to cover only the exchange of necessary information	Direct costs				Increased costs for businesses to ensure that only necessary information is exchanged in the context of dual distribution		Reduced enforcement costs (easier to enforce Art. 101 of the Treaty without having to withdraw the VBER)
	Indirect						

	costs						
Exclusion of hybrid platforms from dual distribution exemption	Direct costs				Increased compliance costs for hybrid platforms		Reduced enforcement costs (easier to enforce Art. 101 of the Treaty without having to withdraw the VBER)
	Indirect costs		Exclusion may disincentivise undertakings from entering intermediation services markets, online intermediaries from making investments to enter markets for the sale of good or services, to the detriment of consumers				
Scope of dual distribution exemption extended to cover wholesalers and importers	Direct costs				Reduced compliance costs for wholesalers and importers		Reduced enforcement costs
	Indirect costs						
Across-platform retail parity obligations excluded from VBER	Direct costs				Increased compliance costs for businesses using these obligations		Reduced enforcement costs (easier to pursue across-platform retail parity obligations that produce anti-competitive effects)
	Indirect costs				Discourage the use of this type of		

					parity obligations where they are necessary to protect investments		
Shared exclusivity	Direct costs				Reduced compliance costs for businesses using shared exclusivity		Enforcement costs should not be significantly impacted
	Indirect costs						
Allowing the pass-on of active sales restrictions	Direct costs				Reduced compliance costs for businesses using active sales restrictions		Enforcement costs should not be significantly impacted
	Indirect costs						
Allowing restriction of active sales from outside the selective distribution territory	Direct costs				Reduced compliance costs for businesses using active sales restrictions in this scenario		Enforcement costs should not be significantly impacted
	Indirect costs						
Removing dual pricing from list of hardcore restrictions	Direct costs				Reduced compliance costs for businesses engaging in dual pricing		Enforcement costs should not be significantly impacted
	Indirect costs						
Removing equivalence principle from list of	Direct costs				Reduced compliance costs for businesses using this		Enforcement costs should not be significantly impacted

hardcore restrictions					restriction		
	Indirect costs						

Annex 4:

Issues of a technical nature relating to the clarity, completeness and complexity of the rules

As explained in Section 2.1.1 of the report, the evaluation has shown that there is scope to clarify, simplify and update some areas of the rules, other than the four areas related to the scope of the rules (i.e. dual distribution, parity obligations, active sales restrictions and restrictions of online sales).

The evaluation has shown that the lack of clarity, the gaps in the rules and the fact that the rules are outdated contribute to a reduction in legal certainty, as well as diverging interpretations of some provisions of the VBER by NCAs and national courts, as well as the Vertical Guidelines, which do not bind NCAs or national courts but which they often take into account. These issues generate an additional burden and costs for businesses. Applying the rules as they currently stand requires an increased need for legal advice and can force suppliers and distributors to assess compliance risks for each Member State in which they operate and to adjust their business practices according to the approach taken by the respective NCA and national courts. It may also lead to suppliers and distributors adopting the approach of the NCA or national court that has the strictest interpretation, which may lead to a chilling effect on pro-competitive conduct. Moreover, litigation-related costs may also increase, since a lack of legal certainty often leads to more disputes about the legality of certain vertical restrictions.

The complexity of the rules also affects businesses, in that they often need to obtain external legal advice in order to apply the rules properly. This is especially burdensome for SMEs, which may be deterred from entering into vertical agreements due to the high costs involved.

The areas other than the four areas related to the scope of the rules, where there is nevertheless scope to clarify, simplify and update are areas that do not require a change in substance, or areas in which the existing case law or available evidence does not leave much margin for substantive changes. In this regard, it should be recalled that in setting the scope of the safe harbour, the Commission is bound by the competition rules set out in the Treaty and the requirements of the Empowerment Regulation of 1965, as well as by the case law of the EU Courts. Therefore, the Commission does not always have much margin to make changes. For example, where the case law or the enforcement practice of the Commission and NCAs have found that particular restrictions do or do not qualify as hardcore restrictions under the current VBER, the Commission must take this evidence into account as strongly opposing any policy options that would lead to a different interpretation[159]. The Commission is also limited in that it is only empowered to declare, in the VBER, that the prohibition of Article 101(1) of the Treaty does not apply to certain

[159] This is the case, for example, of resale price maintenance. Recent enforcement practice and case law have consistently confirmed the treatment of resale price maintenance as a restriction by object, and restrictions by object are presumed to be unlikely to fulfil the conditions of Article 101(3) of the Treaty. Therefore, there needs to be strong evidence to support a block exemption.

types of agreement that meet the conditions of Article 101(3), but it is not empowered to declare which agreements fall inside or outside the scope of Article 101 of the Treaty[160].

Moreover, there are limitations inherent to an instrument that applies so broadly. Ideally, in order to provide legal certainty, the conditions of the block exemption should be clear and comprehensible enough for stakeholders to understand and apply them, such that they are able to predict whether their agreements are covered by the block exemption. However, the VBER and the Vertical Guidelines cover a wide range of economic sectors, business models, agreements and restrictions, some of which evolve over time. When defining the conditions of the block exemption, it is particularly difficult to predict how markets and vertical restraints will evolve over time. In view of this, the block exemption necessarily relies on conditions that require some interpretation in their application to specific cases. The same applies to the Vertical Guidelines, which, for the same reasons, cannot be exhaustive in covering every possible type of agreement or restriction, in the different scenarios in which they arise in practice. As a result, while it is always possible to provide more detailed guidance and improve the clarity of the rules, and to simplify the rules to a certain extent, it is unrealistic to expect that the VBER and the Vertical Guidelines will ever provide absolute legal certainty for all types of vertical agreements across all sectors of the economy.

These issues of clarity, completeness and complexity are mainly of a technical nature and can generally be addressed without altering the substance of the rules. Therefore, no policy options were identified to address these issues. Nevertheless, these issues are addressed in the initiative, i.e. the revised VBER and Vertical Guidelines, as described in more detail in this annex.

Clarity and completeness of the rules

A number of areas of the rules were identified during the evaluation as lacking clarity, requiring additional guidance or updates to reflect the recent market developments. Among these areas, one that was more prominently raised during the evaluation regarded **online restrictions and the platform economy**. In order to address this issue, the Commission proposed a number of clarifications in the revised rules.

First, the rules would incorporate the guiding principles for the assessment of online restrictions drawn from the case law of the CJEU, which is binding on the Commission, namely in *Pierre Fabre* and *Coty,* by providing additional guidance, in line with this case law, on when certain online restrictions amount to a hardcore restriction under the VBER. For example, the guidance would clarify that restrictions in the operation of an online shop by the distributor and restrictions on the use of entire online advertising channels, such as price comparison websites or paid referencing in search engines amount to a hardcore restriction. This is because to be able to sell online, distributors should have the ability to set up their own online shops and to advertise online, which is crucial for attracting potential customers to that shop. Conversely, the guidance would clarify that other online restrictions, such as marketplace bans can be block exempted

[160] Where this issue has been addressed in long-standing case law, such as regarding agency agreements, the Commission can only provide its own interpretation of how the criteria in the case law apply to particular situations.

below the VBER thresholds, subject to a limiting principle, as distributors' ability to sell online will have been ensured and suppliers may have an interest in introducing certain restrictions, for instance to set quality standards or protect the value of their brand on the internet.

Second, the rules would include a clearer definition of active and passive sales, as well as additional guidance on how to apply these concepts to certain types of online conduct. They would also propose further guidance on how to assess certain online restrictions, such as the use of marketplace bans and price comparison tools, in the light of Article 101 TFEU and the case law.

As regards the platform economy, the revised VBER would include a definition of online intermediation services provider, inspired by the Platform-to-Business Regulation. The revised Vertical Guidelines would include specific guidance on how to apply Article 101 TFEU to online intermediation services providers, including on whether they can qualify as genuine agents, in accordance with the relevant case law of the CJEU, which is binding on the Commission.

Another area identified by stakeholders as requiring additional guidance concerned **agency agreements**. In order to address this, the revised Vertical Guidelines would explain in a more detailed manner how to assess the risks borne by an agent, as well as clarify the application of the rules to distributors that also act as agents for certain products for the same supplier. These clarifications reflect the case law of the CJEU, which is binding on the Commission and NCAs.

RPM was another area for which stakeholders indicated a lack of clarity, in particular whether minimum advertised pricing policies ("MAPs") qualify as a hardcore restriction under the VBER. To address this issue, the revised Vertical Guidelines would confirm, in line with enforcement experience, that MAPs, constitute (indirect) RPM. Furthermore, stakeholders indicated a lack of clarity as regards the conditions under which RPM can benefit from the exemption of Article 101(3) of the Treaty. In order to address the issue, the revised Vertical Guidelines would include more detailed examples of such cases. Moreover, the revised Vertical Guidelines would also clarify whether fulfilment contracts constitute RPM.

Additional clarifications would also be added on the Commission's existing policy as regards **non-compete clauses**, which are included in the list of excluded restrictions, as well as on the specificities of **franchising**, as a distribution model, to facilitate the self-assessment in these instances.

Finally, some stakeholders suggested that further guidance should be provided as regards vertical agreements pursuing **sustainability objectives**. To this end, the Vertical Guidelines would notably include the existing policy on how sustainability benefits can be accommodated in the assessment of individual cases under Article 101 (3) of the Treaty, as set out in the September 2021 Competition Policy Brief.[161]

[161] Available here: https://op.europa.eu/en/publication-detail/-/publication/63c4944f-1698-11ec-b4fe-01aa75ed71a1/language-en/format-PDF

Complexity of the rules

The evaluation has shown that the complexity of the rules is one important factor affecting their limited effectiveness and efficiency. Stakeholders pointed among other things to unclear wording or structure (e.g. exceptions to exceptions in Article 4 of the VBER), as well as guidance, which is not presented in a consistent manner for some areas. All of these issues make the rules challenging to use, especially for SMEs, which may lack the necessary resources and expertise.

In order to address this issue, the rules propose revised drafting in certain areas of the VBER to simplify complex legal structures. For example, the provisions on territorial and customer restrictions in Article 4(b) of the current VBER would be split into three distinct sets of provisions, each of which would explain the rules that apply to each of the main distribution systems (exclusive, selective or free distribution). In addition, the revised Vertical Guidelines would provide a detailed explanation of the characteristics of each of these distribution systems. This would make it easier for stakeholders to identify which rules apply in their particular case.

Moreover, the revised Vertical Guidelines would be restructured to present the guidance on each topic in a more comprehensive manner. For example, the provisions on RPM, which were previously scattered in different parts of the text, would be gathered in one dedicated section, making it easier for businesses to be acquainted with all the relevant rules.

Overall, an effort would also be made to simplify the language, avoid legal jargon and, whenever possible, to present the issues in a way that they can be understood by non-legal professionals.