

Summary of the contributions received in the context of the open public consultation on the impact assessment for the review of the Vertical Block Exemption Regulation (EU) No 330/2010

On 18 December 2020, The European Commission (“Commission”) launched a public consultation on the impact assessment for the review of Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty to categories of vertical agreements and concerted practices (“Vertical Block Exemption Regulation” or “VBER”),¹ together with the Guidelines on Vertical Restraints (“Vertical Guidelines”)². 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,³ 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.

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

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

³ 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.

I. 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

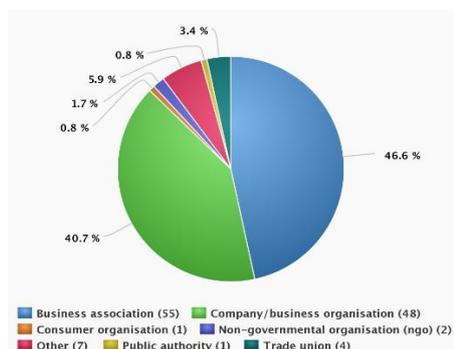
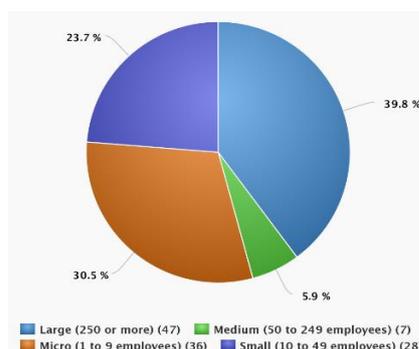


Figure 2: Organisation size



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.

II. 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) active 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 resale 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.

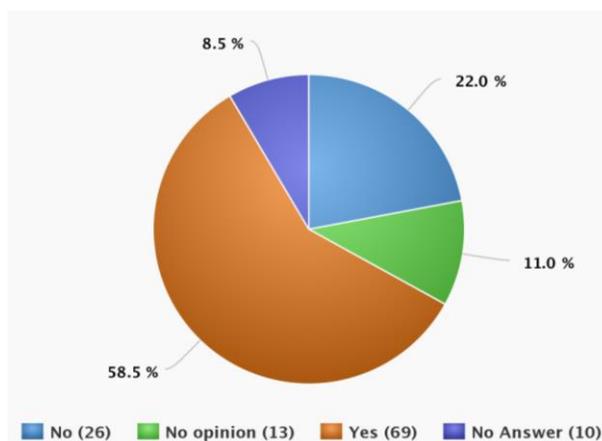
a. Feedback on the policy options

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?

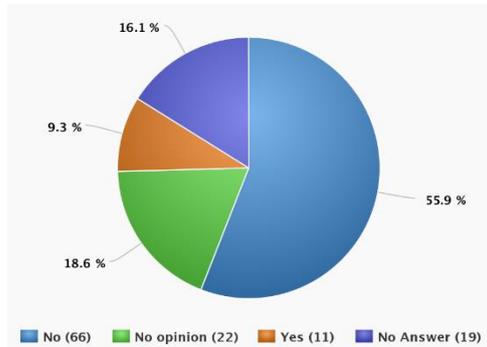
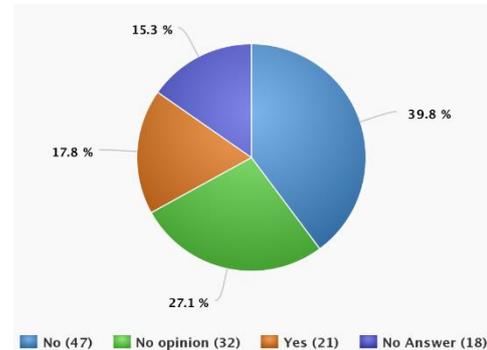


Figure 4: Do you have experience/knowledge of instances where agreements between an importer, which is also active at the retail level, and its distributors could raise horizontal competition concerns?



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

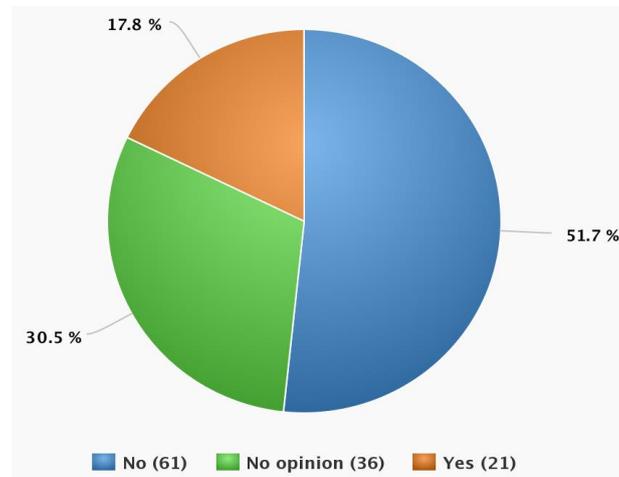
Under the VBER, restrictions of the territory into which, or the customers to whom, the buyer can sell are considered hardcore. The buyer should generally be allowed to actively approach individual customers (active sales) and respond to unsolicited requests from individual customers (passive sales). 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 active 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.

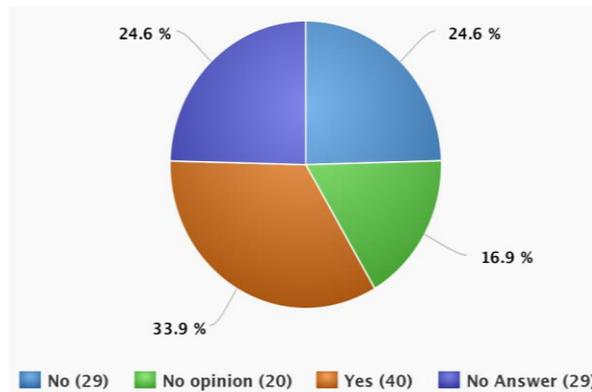
61 out of all 118 respondents across all stakeholder groups did not know of instances where the **combination of exclusive and selective distribution in the same territory** (i.e. exclusivity at the wholesale level within a selective distribution system) did not fully comply with the current rules. However, 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.

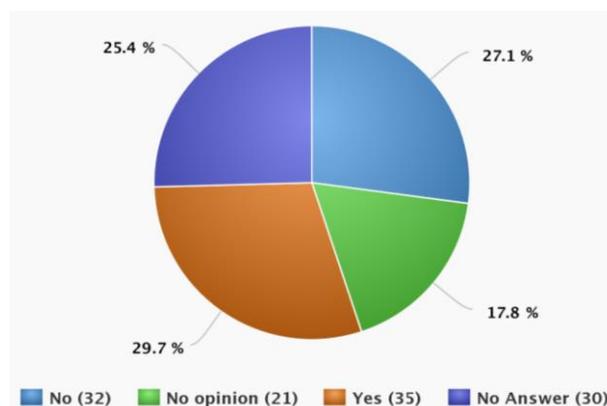
Figure 6: Do you have experience or knowledge of concrete benefits that are created by combining exclusive and selective distribution systems in the same territory at different level of the distribution chain?



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.

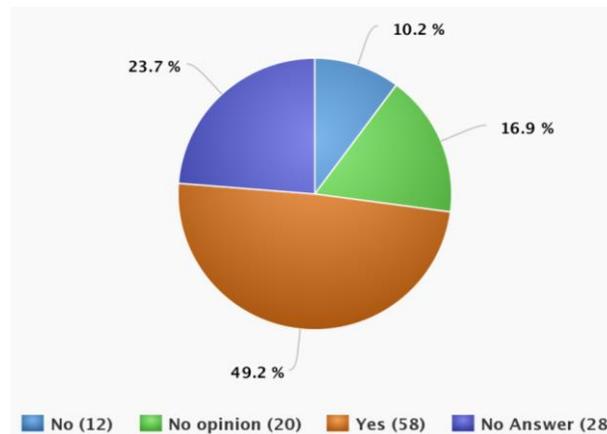
Figure 8: Do you have experience or knowledge of concrete benefits that are created by combining exclusive and selective distribution systems in different territories?



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

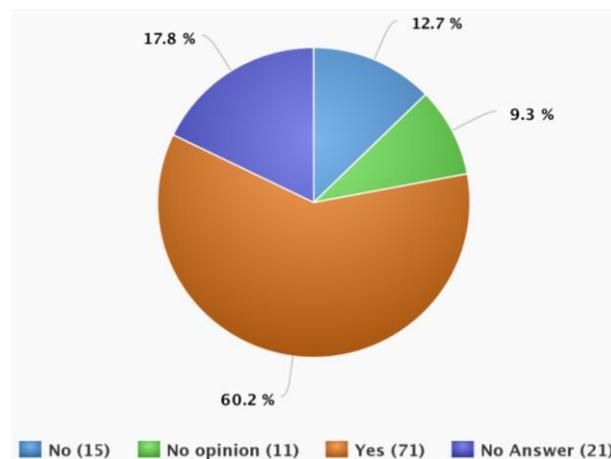
distributors). 21 respondents suggested other options, such as allowing shared exclusivity, modifying the distinction between active and passive sales, especially in the context of online sales, or further clarifying the existing rules.

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.

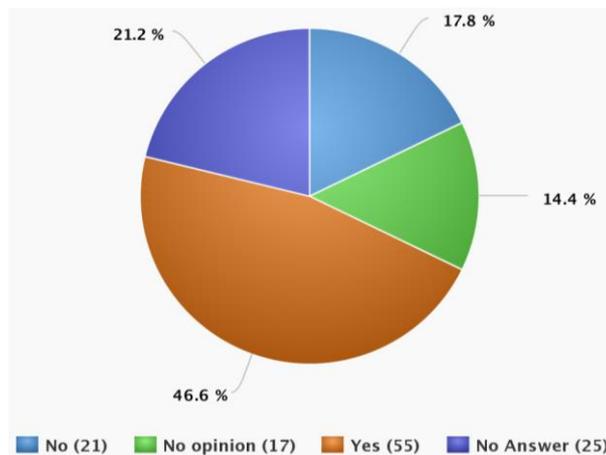
As regards the impact of dual pricing on various parameters, between 41 and 71 out of 118 respondents had no opinion or did not provide an answer, depending on the parameter that the respective question about a possible impact related to. However, for many respondents who replied to this question, dual 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 active 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.

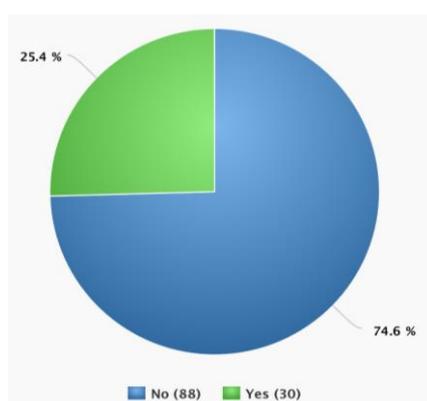
iv. Parity obligations

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).

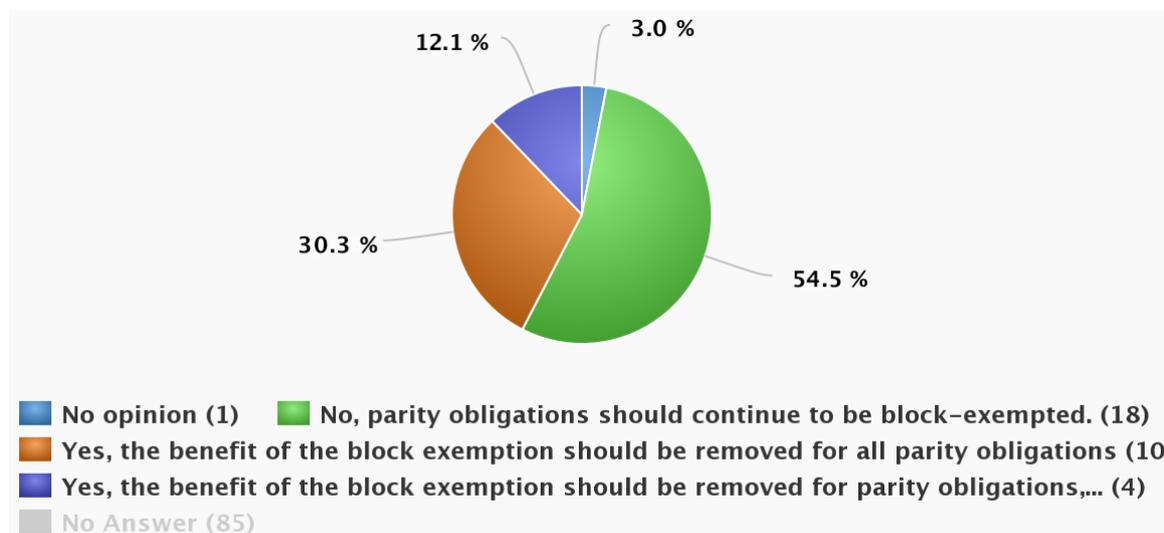
The respondents with experience or knowledge of instances where parity obligations raised competition concerns provided mixed feedback on whether these competition concerns depend on the sector in which they are used, with 9 respondents answering in the affirmative and 10 answering in the negative. Their 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), (iii) 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 obligations 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.

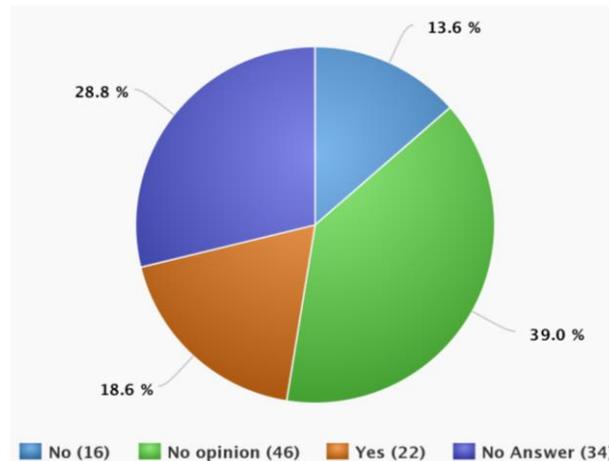
iii. Sustainability

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 guidelines⁴ 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).

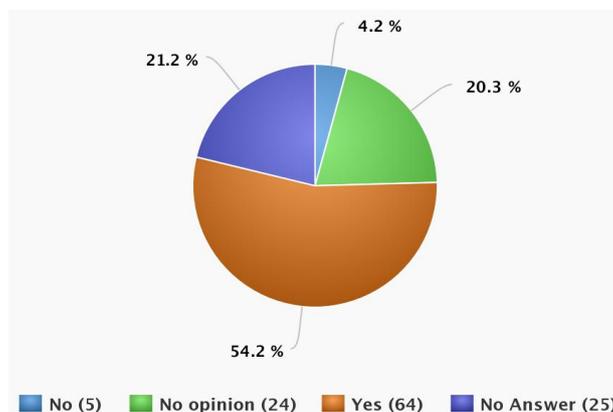
Other respondents suggested that sustainability gains should be recognised explicitly as potential efficiency gains under Article 101(3) TFEU and that the rules should clarify a number of aspects in the vertical context, such as how to measure consumer benefits in the relation to sustainability, how 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.

⁴ 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.
