

# CONSULTATION RESPONSE

**Response to the Questionnaire for the public consultation on a block exemption regulation and guidelines on vertical agreements**

**26 March 2021**

## Introduction / Question 23

### Relevance of VBER & VGL for your organisation

The AIM members are brand owners and national associations representing over 2500 **brands across the EU**. AIM and its members (“We”) are keen to participate to the evaluation of the Vertical Block Exemption Regulation (“VBER”) and Guidelines on Vertical Restraints (“VGL”), as these are crucial instruments to assess the commercial relationship between brand owners and retailers. The VBER/VGL framework has a major impact on market competition, innovation and consumer welfare.

The current VBER and VGL have provided market players with a **good level of legal certainty and resulted in cost savings**, allowing brands to safeguard value and foster growth. AIM members’ overall experience with the VBER and VGL is positive, as both have contributed to good market performance in the EU.

Unfortunately, outside of the scope of the block exemption, **self-assessing agreements remains difficult and can generate legal uncertainty**. In addition, the non-binding character of the VGL has resulted in **inconsistent application of the rules by national competition authorities (“NCAs”)**, in particular with regards to selective distribution, e-commerce, pricing.

We therefore share the view that clarifications or targeted amendments to the VBER/VGL framework would be welcome to address certain shortcomings and reflect **new market dynamics** across sectors, including the **increase in buyer power**.

The future revision should lead to a more balanced framework that enables brands to preserve their value and anticipate some of the already visible challenges linked to the **higher levels of concentration in the retail sector**, especially in the marketplace economy. As the VGL include few references to the online developments whereas online marketplaces have acquired significant market power, stakeholders naturally expect that this will change.

Markets have moved towards an omni-channel approach and brand owners have strived to meet consumers’ needs and expectations by offering them the most beneficial aspects of each channel. Over the past ten years, **brand owners have invested heavily into building omni-channel experiences for consumers**, where the line between online and offline is increasingly blurred. They made **substantial investments** to adapt to customers’ evolving consumption patterns: customers have become increasingly connected and mobile and, as a result, have expressed their willingness to shop products or engage with brands whilst on the move, at any time and from anywhere, without compromising on their ability to enjoy their shopping experience.

Accordingly, **the VBER and VGL should adopt a channel neutral approach and provide more flexibility to brand owners for the organisation of their omni-channel networks** so that they can safeguard the existence of offline and hybrid channels, remain aligned with the brand image they wish to convey, and keep satisfying customers’ ever-growing expectations.

In the light of the above and in the interest of safeguarding competition and value creation, we submit that the VBER framework should be upheld and reinforced to allow brands to continue to innovate, further develop their ecosystems, and make best use of innovative technologies for consumers’ ultimate benefit.

## DUAL DISTRIBUTION

### Question 1

**Do you or your suppliers engage in dual distribution?**

**Yes / No / No opinion**

### Question 2

**Please explain your answer above and give examples of the type of dual distribution you engage in.**

Dual distribution is the basis of some of AIM members' go-to market business models that involve selling both through own direct-to-customers web/physical stores and through third-party resellers in the form of retailers and distributors (either in-store, online or hybrid). Other AIM members are looking to implement dual distribution solutions with in-house e-stores in the near future.

When a brand owner consider establishing or adapting a new distribution network in response to consumer demand, it may opt to open its own brick-and-mortar and online stores, supply independent resellers, use mono-brand and multi-brand stores, and/or decide to focus on certain channels depending on each reseller's location, expertise and consumer reach.

Whilst the ability to recalibrate and remain flexible to adapt to consumer demand in changing market conditions is key to business success, finding the "right" mix of channels is both a dynamic process and a constant challenge. **Dual distribution may take various forms**, as a brand owner may:

- Create a network of independent distributors that includes wholesalers, retailers or both, both exclusive and non-exclusive distributors, which may be organised as a selective distribution system or a franchised network. Retailers may be small or large stores and may operate offline, online or both.
- Sell directly to end-consumers via its own online shop and/or network of retail shops and to third-party distributors/wholesalers while concurrently supplying their own customers (*i.e.*, the retailers).
- Establish an independent distribution system in certain territories but reserve other territories or channels for its own shops or direct sales.

**Distributors are a vital complement to suppliers' brand building strategy** (*e.g.*, pre- and after sales services, product delivery and brand authentication). Depending on consumer demand, profitability, logistics and other considerations, certain specific products or services may only be available via certain channels or via a brand's own store. Given their common interests, **suppliers have a natural incentive to collaborate with distributors to ensure their success**. The inclusion of the locations of both independent resellers' and own stores on a brand's website and the frequent ability for consumers to buy via a brand's website and collect the products via the independent reseller of their choice illustrate this permanent collaboration.

In other words, a supplier does not engage in dual distribution to foreclose its resellers or to monopolise the sale of its products but to **seek the right balance between direct and indirect sales and meet consumer demand**. Without distributors, brand owners could not reach and serve all potential end consumers. Managing a mix of channels has become common practice, in line with the growth of online sales and consumers' expectation of a seamless omni-channel experience.

Whether offline or online, **dual distribution is common and well established, if not ubiquitous**, in various industry sectors. For long, brands have used flagship stores in parallel with their independent reseller networks, and many other types of market operators have traditionally run their own establishments with a direct access to end consumers while collaborating with independent resellers, agents or franchisees.

The European Commission (“EC”) has recognised that today’s **consumers expect an “omni-channel” offer** enabling them to alternate freely between the online and offline channels.<sup>1</sup> In line with these expectations, brands and their distributors have sought to provide such a seamless omni-channel and online-to-offline and offline-to-online (“O2O”) brand and shopping experience.

The COVID-19 crisis has demonstrated that **dual distribution and the omni-channel approach are crucial for brands, retailers and consumers alike**. While direct-to-consumer and e-commerce sales have increased for many brands because of the pandemic, retailers and franchisees have requested brand owners’ support to implement omni-channel capabilities such as *click-and-collect* or *call-and-collect*.

Using the beer sector as an example, Luc Pepperkorn clarified the rationale of the dual distribution exemption as follows: *“The main competition concern, if any, is not the possible loss of competition between the brewers’ pubs and the independent pubs supplied by the brewer, but is **the possible foreclosure effects at the brewers’ level or pubs’ level and resulting loss of competition on those markets.**”*<sup>2</sup>

**This rationale remains entirely valid and relevant today and applies equally to situations of offline and online dual distribution**, since it applies regardless and no grounds legitimate a differentiation.

Brands need sufficient flexibility to be able to meet consumer demand in any particular situation and serve consumers with the products and services they desire, no matter how (online or offline), where (through own retail or independent retail) or when.

### Question 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?**

**Yes / No / No opinion**

### Question 4

**Please explain your answer above.**

Because dual distribution is beneficial for competition on the market and for consumer welfare, **the revised VBER/VGL framework should maintain the existing block exemption for dual distribution, should not limit its scope, and may extend its benefit to wholesalers and/or importers**. The VGL should clarify that dual distribution is indispensable to ensure the delivery of a seamless, reactive omni-channel O2O brand and shopping experience, which increases competition and consumer satisfaction.

Dual distribution helps businesses in the analysis of their vertical arrangements and provides them with legal certainty, which is very valuable for all market operators and consumers alike. Dual distribution is indispensable for brands to develop direct touch points with consumers and complement the role of independent resellers, to better understand and better serve consumers, and to innovate more, better and faster. Dual distribution lets brand owners bring consumers more value, a better experience and better service throughout their purchase journey.

Indeed, **dual distribution allows a more widespread distribution of a product** and may be the most efficient way to distribute a product. Dual distribution schemes are pro-competitive and benefit the consumers (additional choice, more points of sale, increased price competition). It makes it easier to **adapt and respond to all market incentives and customer demands** such as, for example:

- Direct sales to customers who solicit a single contact;

<sup>1</sup> European Commission, 8 September 2020, [“Staff Working Document on the Evaluation of the Vertical Block Exemption Regulation”](#), p.37.

<sup>2</sup> Luc Pepperkorn, 2010, [“Revised EU competition rules for supply and distribution agreements”](#).

- Sales by a highly qualitative single-brand website to meet customer advice needs and convey a brand image;
- Sales to locations that are either too expensive or intended for a passing clientele; or
- Sales by distributors when they are in a better position to meet the needs of local customers.

Manufacturers' direct sales are essential to improve awareness of customers' expectations and test the adequacy of distribution standards. They have also contributed to the development of online sales. **Manufacturers' direct sales benefit consumers through increased intra-brand competition:** more outlets, greater price competition, enhanced/value-added customer experience and greater choice. The exemption of dual distribution **also preserves inter-brand competition through independent distribution channels.**

To the best of our knowledge, this dual role of manufacturers/suppliers has not led to any specific concerns at the European level, illustrating that **there is no issue directly relating to dual distribution.**

While § 12 of the Horizontal Guidelines ("HGL") states explicitly that parties should exclusively assess dual distribution agreements under the VBER and VGL, the revision of the VBER is also an opportunity to reduce confusion at national competition authority ("NCA") level.<sup>3</sup> As this confusion has brought uncertainty, **the revised VGL should include the wording of § 12 HGL.**

**The relationship between manufacturers and distributors in dual distribution systems is fundamentally vertical** despite their (limited) competition for the sale of the manufacturers' products to end consumers. Indeed, no horizontal competition may ever take place downstream without the pre-existing vertical relationship upstream where the complementary value for consumers lies.

Subjecting dual distribution to the HGL would amount to equating it with joint commercialisation, which normally involves two distinct substitute products, not the same product. Accordingly, **the theories of harm expressed in the HGL regarding those arrangements are ill suited to dual distribution.**<sup>4</sup>

Finally, the VGL should also clarify that **suppliers in dual distribution situations are free to collect pricing, volume and other data related to their products from retailers** as long as they do not restrict these retailers' freedom in a manner considered hardcore under the VBER.

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<sup>3</sup> European Commission, "[Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements](#)", (2011/C 11/01) § 12, Fn. 11.

<sup>4</sup> For example, price-fixing (§ 234 HGL) is already a hardcore restriction under the VBER and therefore not exempted by the application of Article 2(4) VBER. As for the restriction on market partitioning (§ 236 HGL), it cannot capture the exclusive distribution of a particular product.

### Question 5

Based on your experience/knowledge, what would be the impact on the following aspects if the exception for dual distribution was to be removed, which would mean that dual distribution was subject to a self-assessment in all cases?

	Very negative	Negative	Neutral	Positive	Very positive	No opinion
a. Competition on the market	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. Harmonised application of the competition rules by competition authorities and national courts	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c. Legal certainty for businesses	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d. Efficiency of distribution systems	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
e. Cross-border trade	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
f. Costs for businesses	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
g. Consumer welfare	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
h. Investment / Economic growth	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
i. Sustainability objectives	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

### Question 6

Please explain your answers above and, if possible, give concrete examples of the impacts you indicated. Please specify the letter of the row of the impact you are referring to.

**(a, d, g and h)** The inability to rely on a block exemption would entail a reduction in intra-brand competition and lead suppliers to adopt a cautious approach in their dealings with distributors, whom they would suddenly have to treat as “direct competitors”. Suppliers may then consider that they should rather refrain from making price recommendations that the VBER authorises to avoid any possible confusion thereof with pricing discussions between direct competitors. They may no longer seek information from distributors, such as general sell-out information on the brand’s products to help assess consumer demand. They may also decide to move towards vertical integration or a third-party only model: in both cases, consumers would be the main victims of this revision. Indeed, suppliers limiting themselves to direct sales could not realistically service all potential customers, while those limiting themselves to indirect sales would prevent consumers from benefitting from a dedicated universe with distinct content, in-depth knowledge of the products and values of the brand.

Likewise, resellers would become reluctant to join distribution networks or to share/sell sales data with/to their suppliers irrespective of the legitimate purpose of such sharing. This disruption would impair the omnichannel experience and entail a loss of value for all, especially consumers.

**Firewall separations would be extremely costly, complex and cumbersome**, and eliminate all the efficiencies informing a brand's decisions about innovation, product development and corresponding sales strategies that ultimately benefit to consumers. Whereas national regulatory frameworks have become less and less tolerant toward wastage (e.g., the recent "Agec" law in France),<sup>5</sup> brand owners could no longer plan demand and production accurately since direct and third-party resellers could no longer look at combined data on the volumes sold to inform production and inventory decisions. Such firewall separations would be particularly prejudicial to suppliers that do not treat direct-to-consumer and wholesale channels as binary options since their customers could no longer combine elements of a product or service offering. They would also prevent a seamless coordination of product launches or advertising campaigns across all channels.

Rather than develop a firewall, some brands may opt to launch certain brands or segments in one channel only, which would ultimately reduce competition and consumer satisfaction, and deprive the European economy from corresponding investments (jobs, real estate leases, etc.). **Beyond intra-brand competition, removing the block exemption would also entail a reduction of inter-brand competition**, as less dual distribution would mean less multi-brand stores and more brand-owned stores, resulting in less innovation and less choice for consumers.

**Limiting the suppliers' freedom to organise the distribution of their products would have a chilling effect on competition on the market, the efficiency of distribution systems, consumer welfare, investment and economic growth. Many shops would close, many jobs would be lost and the supply of differentiated products and services available to end customers would be limited.**

**(b)** Relying on a self-assessment would necessarily lead to legally divergent solutions from one Member State to another. **Manufacturers could no longer recommend prices because competition authorities might construe such activities as pricing discussions between competitors.**

**(c)** The impact on legal certainty for businesses active in dual distribution systems would be highly significant if this exception ended. **Removing the exception would create additional confusion as to whether parties should assess their dual distribution agreement under the HGL or the VGL.** Some resellers may become reluctant to join distribution networks or refuse to share information that the supplier requests for legitimate reasons. Dual distribution has been around for a long time and is widespread in most sectors of the economy. Some distribution systems are even dual in essence, such as the franchise model that involves the development of knowledge before franchisees get to duplicate it. A lack of exemption would render the regulation virtually unnecessary because almost all sectors resort to dual distribution. The same would still be true if the exemption was limited to 20% of the downstream market. In many sectors, distributors are multi-branded and hold more than 20% market share in their catchment area. Limiting the exemption to a certain downstream market share would make it impossible to satisfy it. This is why vertical regulations have always defined the market share of distributors in the upstream supply market. **If the exception for dual distribution were to be removed, this would, at best, introduce enormous uncertainty and, at worst, cause suppliers to operate dual distribution systems in a much less efficient and effective way, if not abandon them entirely.**

**(f)** Businesses would incur higher legal costs owing to reduced legal certainty. It would be highly burdensome and costly to carry out an individual assessment for every case of dual distribution and even more burdensome to do so in only certain cases (i.e., if the market share does not meet the proposed threshold). **Only suppliers with sufficient financial and human resources may be able establish a firewall between their**

<sup>5</sup> French government, 10 February 2020, "[LOI n° 2020-105 relative à la lutte contre le gaspillage et à l'économie circulaire](#)".

**direct sales channels and third-party sales channels.** For smaller undertakings, doing so would be so cost-prohibitive, complex and cumbersome that they may end dual distribution entirely.

#### Question 7

**Do you have experience/knowledge of instances where situations of dual distribution currently covered by the exception may raise horizontal competition concerns?**

Yes / **No** / No opinion

#### Question 8

**If you have experience/knowledge of instances of dual distribution currently covered by the exception that may raise horizontal competition concerns, please explain your answer.**

N/A

#### Question 9

**Based on your experience/knowledge, do you consider that an additional threshold should be introduced to ensure that only dual distribution situations that do not raise horizontal competition concerns are block-exempted?**

*Introduce an additional threshold based on the combined market share at the retail level (i.e. dual distribution would be block-exempted if the combined market share of the parties to the agreement does not exceed a certain level in the retail market) / Introduce an additional threshold, but not based on the combined market share at the retail level / **No need for an additional threshold** / No opinion*

#### Question 10

**Please indicate at which level the additional threshold of the combined market share at the retail level should be set.**

*Combined market share in the retail market not exceeding 20% (in line with the threshold in Article 3 of the Block Exemption Regulation for specialisation agreements) / Combined market share in the retail market set at a level higher than 20% / Combined market share in the retail market set at a level lower than 20% / No opinion*

N/A

#### Question 11

**Please explain your answer.**

N/A

**Question 12**

**Please indicate what you consider as the appropriate combined market share threshold and explain your answer.**

N/A

**Question 13**

**Please indicate what the alternative threshold should be and why you consider it more appropriate for defining the scope of the exception for dual distribution.**

N/A

**Question 14**

**Please explain your answer.**

**Introducing an additional market share threshold at the retail level would not address any underlying competition concerns.** It would however raise serious impracticalities, reduce legal certainty and require additional compliance. Calculating accurate market shares is generally a complicated task, especially for new and/or undefined relevant markets. More importantly, operators' market shares are intended to evolve over time while, by contrast, adapting a distribution model (for instance to quit or launch a dual distribution scheme) tends to be a very long, complex and costly process.

**Since competition at the retail level only exists because of the underlying vertical agreement, it would be inappropriate to treat dual distribution as inter-brand competition or to apply lower market share thresholds, whether combined or not.** Whilst this approach might be appropriate to assess the impact of joint-production agreements between two competing manufacturers, it is ill suited to assess a dual distribution agreement.

Finally, **the market shares of the parties should not influence the analysis of a dual distribution agreement**, which will always remain vertical, notwithstanding market share levels. The size of companies cannot help determine whether a relationship between them is vertical or horizontal.

### Question 15

Based on your experience/knowledge, what would be the impact of introducing an additional threshold of 20% combined market share in the retail market (in line with the threshold in Article 3 of the Block Exemption Regulation for specialisation agreements) on the following aspects?

Please, use the follow-up question to give concrete examples of the likely impacts.

	Very negative	Negative	Neutral	Positive	Very positive	No opinion
a. Competition on the market	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. Harmonised application of the competition rules by competition authorities and national courts	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c. Legal certainty for businesses	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d. Efficiency of distribution systems	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
e. Cross-border trade	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
f. Costs for businesses	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
g. Consumer welfare	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
h. Investment / Economic growth	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
i. Sustainability objectives	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

### Question 16

Please explain your answers above and, if possible, give concrete examples of the impacts you indicated. Please specify the letter of the row of the impact you are referring to.

**(c and f)** Such an additional market share threshold would create legal uncertainty and generate significant additional costs. The calculation of downstream market shares of relevant parties would raise practical challenges and competition issues.

**(d)** Such an additional market share threshold would make suppliers more cautious about their everyday practices and distribution networks would suffer inefficiencies owing to a general reluctance to engage in dual distribution. **It is indeed unclear how market operators would have to treat dual distribution agreements falling outside the VBER because its parties meet such a market share threshold.** Managing a distribution system may suddenly become quite complicated, as a different treatment would be necessary to approach different retailers with different market shares for the distribution of the same product and/or the same retailer with different market shares for different product ranges. Finally, such an additional market share threshold would most likely lead to the issues flagged in our response to Question 6.

**Question 17**

Based on your experience/knowledge, what would be the impact of introducing the additional threshold that you consider to be more appropriate, on the following aspects?

Please use the follow-up question to give concrete examples of the likely impacts.

N/A

**Question 18**

Please explain your answers above and, if possible, give concrete examples of the impacts you indicated.

Please specify the letter of the row of the impact you are referring to.

N/A

**Question 19**

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?

Yes / **No** / No opinion

**Question 20**

Please explain your answer.

We see no reason to treat differently the dual distribution agreements of suppliers who are not manufacturers but wholesalers or importers, and consider that the dual distribution exception also applies to the situation where a supplier/manufacturer competes with its distributors at the wholesale level.

**Question 21**

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?

Yes / **No** / No opinion

**Question 22**

Please explain your answer.

The benefits of dual distribution that we describe in this submission apply equally both downstream and upstream, in all situations. Accordingly, we see no reason to treat differently dual distribution by a manufacturer and dual distribution by an importer or wholesaler.

**Question 23**

In your experience/knowledge, how would a potential extension of the scope of the exception for dual distribution to wholesalers impact the following aspects? Please use the follow-up question to give concrete examples of the impacts.

	Very negative	Negative	Neutral	Positive	Very positive	No opinion
a. Competition on the market	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
b. Harmonised application of the competition rules by competition authorities and national courts	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
c. Legal certainty for businesses	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
d. Efficiency of distribution systems	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
e. Cross-border trade	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
f. Costs for businesses	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
g. Consumer welfare	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
h. Investment / Economic growth	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
i. Sustainability objectives	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

**Question 24**

Please explain your answers above and, if possible, give concrete examples of the impacts you indicated. Please specify the letter of the row of the impact you are referring to.

Please see our response to Question 22. Extending the scope of the exception to wholesalers would:

**(a)** Positively increase the number of market players active at the retail level, thus enhancing intra-brand competition.

**(b)** Ensure a harmonised approach by NCAs and national courts, thus eliminating legal uncertainty.

**(c)** Have a positive impact on efficiencies. Resellers and wholesalers could engage in efficiency-enhancing vertical information exchanges without facing the fear that these may give rise to horizontal concerns. The increased flexibility for suppliers and distributors would encourage them to invest in the indirect distribution channel. Reduced costs due to enhanced supply chain efficiencies would also free up resources for investment.

**(f and g)** Lead to increased efficiencies realised from vertical information flows, resulting in reduced costs for each level of the supply chain that may be passed on to consumers, which would in any event benefit from a strengthened omni-channel experience.

**(i)** Enable wholesalers and retailers to include sustainability objectives in their contracts without giving unjustified rise to horizontal concerns.

### Question 25

Based on your experience/knowledge, how would a potential extension of the scope of the exception for dual distribution to importers impact the following aspects?

Please use the follow-up question to give concrete examples of the impacts.

	Very negative	Negative	Neutral	Positive	Very positive	No opinion
a. Competition on the market	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
b. Harmonised application of the competition rules by competition authorities and national courts	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
c. Legal certainty for businesses	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
d. Efficiency of distribution systems	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
e. Cross-border trade	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
f. Costs for businesses	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
g. Consumer welfare	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
h. Investment / Economic growth	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
i. Sustainability objectives	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

**Question 26**

**Please explain your answers above and, if possible, give concrete examples of the impacts you indicated. Please specify the letter of the row of the impact you are referring to.**

Please see our response to Question 22.

**There is no reason to treat differently a manufacturer engaging in dual distribution and an independent importer who takes over the role of a supplier to market products in a particular region while being active downstream.** Accordingly, the scope of the exception for dual distribution should include independent importers that are also active on the retail level. Doing so would:

- (a)** Enable suppliers to expand their distribution network, thus enhancing competition.
- (b)** Ensure a harmonised approach by NCAs and national courts by eliminating legal uncertainty related to horizontal concerns.
- (c)** Increase legal certainty for businesses (both importers and resellers) that can benefit from the safe harbour of the VBER.
- (d)** Have a positive impact on efficiencies, as resellers and importers may engage in efficiency-enhancing vertical information exchanges without giving rise to horizontal concerns.
- (e)** Place importers in a better position to sell to end-customers across multiple countries.
- (f)** Reduce costs for businesses by increasing legal certainty and lead to increased efficiencies realised from vertical information flows, resulting in reduced costs for each level of the supply chain that may be passed on to consumers (*e.g.*, lower prices or better quality, pre-sales services or multichannel experience).
- (g)** Have consumers benefit from increased intra-brand competition and more efficient supply chains, which ultimately result in reduced prices and better quality.
- (h)** Increase flexibility for suppliers and distributors and encourage them to invest in the indirect distribution channel. Reduced costs from enhanced supply chain efficiencies would free up resources for investment.
- (i)** Enable importers and distributors to include sustainability objectives in their contracts, thus promoting the EU sustainability agenda.

### Question 27

Based your experience/knowledge, would any of the following actions be able to ensure that the scope of the exception for dual distribution is appropriate (i.e. instances that may raise horizontal competition concerns are not block-exempted and instances that do not raise horizontal competition concerns or that satisfy the criteria of Article 101(3) of the Treaty are block- exempted)? You can select more than one of **the following options:**

*Introduce an additional threshold / **Extend the scope of the exception to include wholesalers that engage in dual distribution** / **Extend the scope of the exception to include importers that engage in dual distribution** / No action required, the current scope of the exception for dual distribution is appropriate / Remove the exception for dual distribution (dual distribution would no longer be block-exempted and would therefore require an individual effects-based assessment under Article 101 of the Treaty) / **Other***

### Question 28

**Please explain your answer, in particular why you consider that your preferred action(s) are more appropriate than other possible actions**

We believe that wholesalers and importers should also benefit from the block exemption because the reasons for (and benefits of) dual distribution would apply equally to these market operators.

### Question 29

**Please explain your answer, indicating what action should be taken to ensure that the scope of the exception for dual distribution is appropriate and indicating the likely impact of that action on the aspects mentioned in the table in question 25.**

N/A

### Question 30

**Based on your knowledge/experience, please indicate whether you have any other comments or suggestions with regard to the exception for dual distribution. You may also provide additional information which may be relevant for this section (copies of any documents, reports, studies etc.). Please upload the information in files with a maximum size of 1 MB each, using the button below.**

The VBER, the VGL as well as the HGL currently lack clarity as to the type of information that parties to a vertical agreement may exchange and whether such information exchanges are ancillary to the vertical relationship, and therefore included in the scope of the exception for dual distribution, or need to be assessed separately under the HGL. In its Staff Working Document, the EC recognised the need for clear guidance on information exchanges between the supplier and the buyer in dual distribution scenarios. Accordingly, the VGL should clarify that **suppliers operating a distribution network whilst also selling directly to consumers are free to exchange information about their own products with their resellers in the context of a vertical relationship** as long as they do not use such information in a way that would lead to a hardcore restriction under the VBER.

It is widely accepted that the exchange of commercial information between operators at different levels of a vertical supply chain (*i.e.*, between a supplier and its distributor(s)) is **part of normal business dialogue and tends to generate efficiencies**.

As mentioned above, the dual role of manufacturers/suppliers has not led to any specific concerns at the European level. The risk of horizontal exchanges such as mentioned in the *Hugo Boss* case<sup>6</sup> is minimal in practice, as demonstrated by the extreme scarcity of decisions in this area. Functional separations between managers of distributors and direct distribution can prevent that such risks materialise but they are

<sup>6</sup> Danish competition authority, 24 June 2020, [Case 19/04380, Hugo Boss](#).

extremely hard to implement in practice. It would be useful that the VGL provide guidance on this issue, as that would promote a more harmonised application of competition law rules by NCAs.

Brand owners may wish to collect information (passed/aggregated information on SKU, volume, sell-out price relating to the brand's own products) from their resellers for a number of legitimate reasons:

- **Understanding consumer profiles and trends**: As distributors/retailers differ per both their location and the consumer segments that they target, suppliers may require information from them to get a more complete view of the market. Absent such information, their view is limited to those consumers who purchase products from their own downstream operations. Without information on the sales made by retailers, suppliers miss potential sales because they cannot make well-informed decisions based on actual consumer demand as regards, for example, overall production trends, assortments and prioritisation of delivery and inventory at different distributors/retailers. The collection of such data on consumer behaviour promotes stronger inter-brand competition, as it allows the manufacturer to better meet consumers' needs and better position its brand in the market.
- **Assessing the outcome of an advertising operation or investment decision**: Suppliers may collect sell-out information relating to their products to assess the outcome of advertising operations that they organised (and often financially supported) and help decide which products to invest in and how to allocate budget. Access to such data (*e.g.*, KPIs such as transformation rate following certain services rendered by the retailers to put forward the products) showing whether consumers are sensitive to certain forms of advertising or other factor(s) enables suppliers to react rapidly to evolving consumer demands and market conditions.
- **Managing inventory efficiently**: Customer demand for several categories of products vary depending on the season or other changing factors. In order to address demand variations and plan their production and distribution processes accordingly, brands need to collect information. Whilst other sectors may be less sensitive to these aspects, this is particularly important for suppliers of fashion and sporting goods, whose demand fluctuates seasonally whilst consumers expect immediate delivery of their purchases. As consumer preferences can change very quickly, suppliers need up-to-date information about the levels of demand for certain products so that they can shift stock in due time from retailers' outlets where demand is low to others where demand is higher. Such information also enables a more efficient supply chain management and assortment planning with retailers, in line with consumer preference fluctuations. As suppliers can quickly adjust their production and assortment planning, they can better manage the risk of unwanted inventory and comply with regulatory obligations to fight wastage.

Finally, the rules on the competitive relationship between a vertically integrated supplier and his distributors are not entirely clear in the current VBER/VGL framework. In contrast, § 28 of the TTBER Guidelines recognises that "if without the agreement the parties would not have been actual or potential competitors in any relevant market affected by the agreement they are deemed to be non-competitors." The absence of similar provisions in the VGL has created a degree of legal uncertainty and **it would be useful if the VGL incorporated a provision comparable to § 28 of the TTBER Guidelines.**

## ACTIVE SALES RESTRICTIONS

### Question 31

**Do you or your supplier(s) apply any of the active sales restrictions that are permitted by Article 4 of the VBER?**

**Yes / No**

### Question 32

**Please explain your answer above and give examples of the types of permitted active sales restrictions that you or your supplier(s) engage in.**

Some of AIM members operate exclusive distribution networks for which they appoint a distributor to a territory or customer group into which the distributor will typically invest significant resources and investment to facilitate its distribution of the brand owner's products. **Brands impose active sale restrictions to protect its exclusive distributors against possible free riding on its investments by other distributors.**

The EC recognised in its Staff Working Document ("SWD") that it should delineate active and passive sales more clearly to strike the right balance between allowing consumers to take advantage of the internet to overcome geographic barriers and allowing suppliers and distributors to prevent free riding on their investments.<sup>7</sup>

### Question 33

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

**Yes / No / No opinion**

### Question 34

**Please explain your answer above and give examples if possible.**

The current exception enshrined in Article 4(b)(i) VBER provides a fair amount of certainty but some **limitations to this exception prevent brand owners from stopping free riding and designing their distribution systems to meet consumer needs.** Current rules often prove disconnected from commercial reality and leave little flexibility for suppliers who aim to set up their distribution system efficiently.

- The scope of the exception under Article 4(b)(i) is limited to instances "*where such a restriction does not limit sales by the customers of the buyer*". As this limitation generates unnecessary complexity, **the VBER should allow the supplier to require pass-on of active sales restrictions down the distribution chain.**
- **Active sales restrictions should remain valid when a territory has been reserved** to the supplier or to another distributor and the supplier or distributor does not yet make sales in that territory (but may do in the future).
- We welcome and support the EC's initiative to provide more flexibility to brand owners by allowing them to **appoint two or more distributors for a given exclusive territory/customer group.** This will be extremely useful to suppliers in distribution scenarios that involve significant investments.
- The EC should replace the examples set out in §§ 61-62 VGL with a **broader exception that includes the launch of new brands and new products under an existing brand** and takes into account both the investments made by the distributor and the supplier's R&D and other investments that have allowed

<sup>7</sup> See European Commission, 8 September 2020, "[Staff Working Document on the Evaluation of the Vertical Block Exemption Regulation](#)", pp. 14-15.

the development and launch of this new brand/product. The EC should also assert this broader exception with a protection against active sales, including certain forms of online sales, and a prohibition of cross sales during the launch period.

- The EC should also update the examples included in §§ 51-54 VGL. In its SWD, the EC recognised that *“whereas previously territorial exclusivity was fairly straightforward in its application, nowadays e-commerce makes it easier for buyers to reach sellers outside their territory (and vice-versa). The evaluation study therefore indicated that distribution models which rely on territorial sales restrictions are becoming less viable. As a result, suppliers seem to be moving away from exclusive distribution models, at least at retail level, and shifting towards other distribution models such as selective distribution.”*<sup>8</sup> Accordingly, we recommend to remove the presumption set out in § 52 VGL, which generates more confusion than clarity, and to **revert to a case-by-case analysis based on a set of concordant items of evidence allowing to define if a seller is actively targeting specific consumers.**
- Given the changed market paradigm and new forms of digital interactivity with consumers that have emerged recently, we also recommend that the VBER and VGL **clarify “active” and “passive” sales in the context of selective distribution systems**, in conformity with the Geo-blocking Regulation. Without a clear distinction between online and offline sales, it is quite difficult for brands to incentivise a distributor with an exclusive right for a specific group of clients or a territory. The radical change in the digital landscape commands to end the presumption that online sales are passive sales.
- Finally, the VGL should **clarify how market players may determine whether sales are active or passive without raising competition law concerns** through their monitoring, and how they may “document” their determinations to demonstrate, if necessary, that such or such sales were active or passive indeed.

### Question 35

**Do you have experience or knowledge of instances where the combination of exclusive and selective distribution systems in the same territory (e.g. an EU Member State) but at different levels of the distribution chain may not fully comply with the current rules (e.g. exclusivity at the wholesale level within a selective distribution system)?**

Yes / **No** / No opinion

### Question 36

**Please explain your answer above and give examples if possible.**

Whilst a supplier may combine exclusive and selective distribution in the same territory but at different levels of the distribution chain and comply with the VBER, its inability to protect its appointed wholesalers from free riding will invariably deter it from doing so. Accordingly, **the EC should block-exempt the restrictions on active sales restrictions set out in § 63 VGL** (i.e., “if appointed wholesalers located in different territories have to invest in promotional activities in ‘their’ territories”).

**The VGL should grant brand owners sufficient flexibility to operate an exclusive distribution network at the wholesale level and a selective distribution system at the retail level.** Many brand owners who have not penetrated every European market have set up exclusivity at the wholesale level for distributors/wholesalers responsible for running a selective distribution system at the retail level.

Brand owners do not always have the resources or necessary knowledge of the local markets to operate a selective distribution system themselves. **Being able to entrust an exclusively appointed wholesaler with the implementation/management of that selective distribution system in a particular territory helps**

<sup>8</sup> See European Commission, 8 September 2020, [“Staff Working Document on the Evaluation of the Vertical Block Exemption Regulation”](#), p. 39.

ensure a wide, qualitative and consistent distribution of the products whilst continuing to offer a seamless consumer experience. Such a wholesaler will typically act as a local expert enhancing logistics such as compliance with packaging and labelling requirements. The VGL should clarify that **suppliers can legitimately protect the investments of their exclusively appointed wholesalers from other wholesalers' active selling**. The block exemption should also include a restriction on sales by exclusive wholesalers to any unauthorised retailers if the supplier operates a selective distribution system at the retail level.

#### Question 37

**Do you have experience or knowledge of concrete benefits that are created by combining exclusive and selective distribution systems in the same territory (e.g. an EU Member State) at different levels of the distribution chain (e.g. exclusivity at the wholesale level within a selective distribution system)?**

**Yes** / No / No opinion

#### Question 38

**Please explain your answer**

Combining exclusive and selective distribution systems in the same territory at different levels of the distribution chain is effective to **alleviate free riding** when an exclusive distributor who manages a selective distribution system in a given territory has incurred significant investments to promote the distribution of the brand in that territory.

#### Question 39

**Do you have experience or knowledge of instances where the combination of exclusive and selective distribution systems in different territories (e.g. different EU Member States, with exclusive distribution in Member State X and selective distribution in Member State Y) may not fully comply with the current rules?**

**Yes** / No / No opinion

#### Question 40

**Please explain your answer above and give examples if possible.**

AIM members have experience of combining exclusive and selective distribution systems in different territories and consider that it is **practically difficult, if not impossible, to enforce**.

Indeed, members of a selective distribution system may be restricted from active selling into a territory or to a customer group exclusively allocated to a distributor per § 56 VGL, while § 152 VGL states that the VBER exempts a combination of exclusive distribution and selective distribution only if active selling into other territories is not restricted. The EC should therefore consider revising these two provisions to encourage brand owners to combine exclusive and selective distribution systems in different territories.

#### Question 41

**Do you have experience or knowledge of concrete benefits that are created by combining exclusive and selective distribution systems in the different territories (e.g. different EU Member States with exclusive distribution in Member State X and selective distribution in Member State Y)?**

**Yes** / No / No opinion

**Question 42****Please explain your answer**

Please see our response to Question 40.

Additional flexibility for brand owners to operate different distribution systems in different territories would let them better adapt to key variables such as differences in consumer preferences, market structures or available infrastructures.

Allowing distributors and retailers in non-selective distribution system countries to sell only to end users or authorised resellers where a brand owner operates a selective distribution system would protect authorised resellers' investments from free riders.

Exclusive distribution represents an interesting alternative to selective distribution, in particular (but not only) in smaller markets. Some brand owners use exclusive distribution at wholesale or retail level to allow one retailer with an established local network and the necessary expertise to handle the distribution of their products. Exclusive distribution is also relevant for new product launches, as it enables to test a new product with limited marketing expenses and production costs.

**Question 43**

**Based on your experience/knowledge, what actions would ensure that the exceptions for active sales restrictions provide suppliers with more flexibility to design their distribution systems according to their needs?**

**Allow exclusivity at the wholesale level within a selective distribution system** / *Other action (please specify below)*

**Question 44****Please explain your answer**

Whereas selective distribution generally grants brand owners the opportunity to maintain control over the distribution of their products, the decision to establish and maintain a selective distribution network throughout the European market is not always the best option from an economical perspective.

Several factors have suppliers segment their distribution according to national markets, notably: language, sector-specific legislative requirements (*e.g.*, cosmetic products), or simply different consumer preferences and brand notorieties. In order to make their products available in smaller EU countries, some of AIM members use exclusive distribution, at wholesale or at retail level, to allow a specific retailer with an established local network and the necessary expertise to handle the distribution of their products.

**The VBER/VGL framework is very vague regarding the interaction between the operation of selective and exclusive distribution networks**, in particular when it comes to enforcing the territorial exclusivity contractually agreed with an exclusive distributor vis-à-vis the authorised selective distributors.

We therefore welcome the EC's intention to clarify the rules regarding active sales restrictions, especially in the digital ecosystem where they are difficult to apply and enforce. In particular, we welcome the opportunity to **clarify the interaction between selective and exclusive distribution models**, especially at different levels of trade (wholesale and retail).

Whilst overall the distinction between "active" and "passive" sales in this context remains valid, the EC should update the examples included in §§ 51-54 VGL that are unnecessarily biased towards the protection of online sales whereas not all such sales actually are "passive" in nature. Regardless of these outdated examples and

per the EC's own statements in its final report on the e-commerce sector inquiry,<sup>9</sup> we invite the EC to **list the following online practices as types of active selling**:

- A website using a national domain extension (e.g., .fr or .de) operated by a distributor in order to target customers of a country that is exclusively allocated to another distributor;
- A website using the national language(s) of a country;
- A website running advertising that targets a territory or group of customers;
- A website running a promotion that is clearly targeting a territory or group of customers (e.g., by making specific cultural references); and
- Territory-based banners used on any websites (not just third-party websites) (cf. § 63 VGL).

As stated in our response to Question 34:

- We welcome and support the EC's initiative to provide more flexibility to brand owners by allowing them to **appoint two or more distributors for a given exclusive territory/customer group**. This will be extremely useful to suppliers in distribution scenarios that involve significant investments.
- The scope of the exception under Article 4(b)(i) is limited to instances "*where such a restriction does not limit sales by the customers of the buyer*". As this limitation generates unnecessary complexity, **the VBER should allow the supplier to require pass-on of active sales restrictions down the distribution chain**.
- The EC should replace the examples set out in §§ 61-62 VGL with a **broader exception that includes the launch of new brands and new products under an existing brand** and takes into account both the investments made by the distributor and the supplier's R&D and other investments that have allowed the development and launch of this new brand/product. The EC should also assort this broader exception with a protection against active sales, including certain forms of online sales, and a prohibition of cross sales during the launch period.

See also our responses to Questions 36 and 42.

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<sup>9</sup> § 421 of the European Commission, 10 May 2017, [Final report on the e-commerce Sector Inquiry](#).

### Question 45

Based on your experience/knowledge, what would be the impact on the following aspects of allowing exclusivity at the wholesale level within a selective distribution system?

Please use the follow-up question to give concrete examples of the likely impacts.

	Very negative	Negative	Neutral	Positive	Very positive	No opinion
a. Competition on the market	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
b. Harmonised application of the competition rules by competition authorities and national courts	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
c. Legal certainty for businesses	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
d. Efficiency of distribution systems	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
e. Cross-border trade	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
f. Costs for businesses	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
g. Consumer welfare	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
h. Investment / Economic growth	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
i. Sustainability objectives	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

### Question 46

Please explain your answers above and give concrete examples of the impacts you indicated. Please specify the letter of the row of the impact you are referring to.

**(a and g)** Allowing a brand owner to rely on exclusive distributors to operate a selective distribution system in territories where it does not have the resources or knowledge to invest would have a positive impact on competition. Entrusting an exclusively appointed wholesaler to manage that selective distribution system in a particular territory helps ensure a wide distribution of the products and consistent consumer experience, thereby improving consumer welfare.

**(b, c, d, e, f and h)** While NCAs disagree as to whether combining exclusive distribution at wholesale level with selective distribution at retail level is permissible, the VGL should clarify that exclusive distributors can be protected from active sales in such cases. Doing so would greatly help harmonise the application of competition rules across the EU, facilitate cross-border trade, bring much needed legal certainty, render distribution systems more efficient, which in turn may lead to cost savings for businesses, and ultimately benefit consumers.

#### Question 47

**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?**

**Yes** / No / No opinion

#### Question 48

**Please explain your answer**

The essence of a selective distribution system is the ability for a supplier to select its authorised distributors based on qualitative criteria compatible with the brand image and to prevent them from reselling the products outside of the network. The main consequences of breaching authorised distribution networks are the following:

- Unauthorised resellers cannot guarantee consumers a minimum level of advice, conservation, security, traceability or after-sales, which raises serious issues in terms of consumer welfare.
- The way unauthorised resellers present and offer products for sale either offline or online has a negative impact on brand image and devaluates its value in the long run.
- Unauthorised resellers free ride investments made by the brands and their authorised distributors without having to meet the same requirements (*e.g.*, qualitative criteria).

It is therefore necessary to **restrict sales from outside the territory in which a supplier operates a selective distribution system to unauthorised distributors inside that territory**, as that lies at the very heart of selective distribution. Moreover, restricting sales from inside the territory in which a supplier operates a selective distribution system to unauthorised distributors inside and/or outside that territory is equivalently essential. The revised VGL should clarify that **the members of an authorised distribution network (whether exclusive, selective, at the wholesale or retail level) set up for certain products may not supply such products to any entity that is not another authorised member of the network, and that any unauthorised entity may not solicit, acquire or sell such products.**

Brand owners and authorised retailers have suffered from the lack of harmonisation and efficiency of the legal mechanisms available to protect their networks and the brands themselves at the EU level, including within the scope of the VBER. In addition to the elements detailed in our response to Question 54, we therefore strongly encourage the EC to create such a harmonised and efficient legal environment.

**Question 49**

Based on your experience/knowledge, what would be the impact on the following aspects of allowing restrictions on sales from outside the territory in which a selective distribution system is operated to unauthorised distributors inside that territory?

Please use the follow-up question to give concrete examples of the likely impacts.

	Very negative	Negative	Neutral	Positive	Very positive	No opinion
a. Competition on the market	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
b. Harmonised application of the competition rules by competition authorities and national courts	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
c. Legal certainty for businesses	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
d. Efficiency of distribution systems	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
e. Cross-border trade	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
f. Costs for businesses	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
g. Consumer welfare	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
h. Investment / Economic growth	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
i. Sustainability objectives	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

**Question 50**

**Please explain your answers above and, if possible, give concrete examples of the impacts you indicated. Please specify the letter of the row of the impact you are referring to.**

**(a, b, c, d, f, g and h)** Allowing restrictions on sales from outside the territory in which an authorised reseller operates a selective distribution system to unauthorised distributors inside that territory would have a very positive impact on competition by allowing a brand owner to protect its authorised reseller's investments from sales from outside this territory. Clarifying that a brand owner can require resellers in non-selective distribution system countries to sell only to end users or authorised resellers in territories where it operates a selective distribution system would greatly help harmonise the application of competition laws across the EU, make distribution systems more efficient and lead to cost savings for, and re-investments by, businesses.

A harmonised tool to enforce the rules of selective distribution against unauthorised resellers would greatly help toward effectively stopping them from undermining and jeopardising selective distribution and the substantial investment made by brands and authorised retailers to the ultimate benefit of consumers. Such harmonised tool would provide brand owners with legal certainty and deter such unauthorised resellers from engaging in breaches of selective distribution systems.

### Question 51

Based on your experience/knowledge, which of the following actions could ensure an appropriate list of permitted active sales restrictions in the VBER (i.e. block-exempting restrictions that do not raise competition concerns or that satisfy the criteria of Article 101(3) of the Treaty, and not block-exempting restrictions that may raise competition concerns)? You can select more than one of the following options: ***Extend the scope of the exceptions to allow exclusivity at the wholesale level within a selective distribution system / Extend the scope of the exceptions to allow restrictions on sales from outside the territory in which a selective distribution system is operated to unauthorised distributors inside that territory / Maintain the current rules / Other***

### Question 52

Please explain your answer, in particular why you consider your preferred action(s) more appropriate than **other possible actions**

Please see our response to Question 44.

### Question 53

Please explain your answer, indicating what other action(s) could ensure an appropriate list of permitted active sales restrictions and indicating the likely impact of such action(s) on the aspects mentioned in the **table in question 49**.

Please see our response to Question 44.

### Question 54

Based on your experience, please provide any other comments or suggestions you may have on the rules on active sales restrictions. You may also provide additional information which may be relevant for this section (copies of any documents, reports, studies etc.). Please upload the information in documents with **a maximum size of 1 MB each using the button below**.

Brands should be empowered with proper legal tools to protect their investments into their brand images and the integrity of their selective distribution networks from the illicit behaviours of unauthorised, free riding retailers who sell products on parallel markets.

Unauthorised sales damage both brands and their authorised resellers because unauthorised resellers' ability to offer products at a lower price is often explained by their free riding on the latter's investments into building a high-quality customer experience and brand awareness.

As a result, unauthorised sales damage:

- **Consumers**: Unauthorised sale channels sell unauthorised products, very often next to counterfeited versions of the same products, at approximately the same price. Online marketplaces and price comparison tools have increased the visibility of unauthorised resellers because their main objective is to advertise low prices. As a result, consumers are unable to differentiate between real products sold via unauthorised channels and fake products, with the associated risk to their security and health.
- **Brands**: Sales outside of a brand's authorised network usually do not comply with the brand's criteria relating to the quality of the retail environment or the customer experience. As a result, the brand's (luxury) image is undermined, which ultimately affects the value of the brand for customers. This has very damaging consequences for brands, especially in very competitive markets (such as the luxury market) where consumers easily switch from one brand to another.
- **Authorised resellers**: Meeting brands' requirements to become part of their authorised network usually involves substantial investments. Authorised distributors typically compete based on (i) the quality of the retail experience they offer, (ii) the constantly improving customer service they provide, and (iii) the

ever-evolving environment in which they present products. Unauthorised sellers free ride on those investments, undermine them, thereby competing unfairly.

Although selective distribution is a legitimate restriction of intra-brand competition for the benefit of inter-brand competition, **brands need to be able to enforce the selective distribution networks they have created vis-à-vis third parties across the European Union (“EU”)** in order to maximise their pro-competitive effects.

In practice, it is often quite difficult for brands to identify the source of the breach in the selective distribution system, because **grey market operators often use very sophisticated techniques to avoid traceability** (blurring of bar codes and QR codes, sales via an unidentifiable intermediary outside of Europe, etc.).

**Much needed legal safeguards already are a reality in a few Member States.** In France, Article L.442-2 of the Code de commerce states that the author of a direct or indirect participation in the violation of the prohibition of off-grid resale made to the distributor bound by a selective distribution is liable for damages. In Belgium, one may act on three different grounds: fraud, misuse of quality of an agreed distributor, or “third-party complicity”. In Croatia, Article 63 of the Croatian Trade Act prohibits any behaviour on the part of the dealer that violates good commercial practice in view of competing on a market.

Yet the existing national safeguards are incomplete and heterogeneous. **EU legal instruments would be ideal to enable a harmonious application and enforcement of EU competition rules on selective distribution across the continent, providing both operators with increased legal certainty and consumers with increased product security.** Accordingly, we submit that the **EC should devise legal safeguards akin to the ones devised by the French legislator** and make them an integral part of the EU competition law framework.

The French mechanism embedded in Article L.442-2 of the Code de Commerce enables brands to enforce their selective distribution system vis-à-vis third parties, as they can directly request from unauthorised sellers or intermediaries facilitating the sale of unauthorised goods to take them down. It has proved to be a very effective tool to prevent unauthorised sales. Since this mechanism deals directly with the contractual relationship between suppliers and retailers, we believe that it belongs in the VBER.

In *Coty*,<sup>10</sup> the European Court of Justice (“CJEU”) remarked that *“the absence of a contractual relationship between the supplier and third-party platforms is (...) an obstacle which prevents that supplier from being able to require, from those third-party platforms, compliance with the quality conditions that it has imposed on its authorized distributors”*. The Court also highlighted a corresponding *“risk of deterioration of the online presentation of those goods which is liable to harm their luxury image and thus their very character”*. **This reasoning should apply to all unauthorised distribution channels.**

In addition, **suppliers should be allowed to place resale restrictions on wholesalers (and potentially retailers) when, for instance, they wish to protect their brands.** Although selective distribution allows such restrictions to some extent, setting up a selective distribution system does not make sense in all business cases. It is for example disproportionate for a supplier who does not wish to impose any restrictions for the large majority of their products to have to set up a separate selective distribution system for a limited range of luxury products intended to be sold in small volumes to special segments of the market. It would make much more sense if the said supplier could require that, because brand protection concerns, wholesalers/retailers may only sell those luxury products to end users or certain types of purchasers.

<sup>10</sup> Judgment of 6 December 2017, [Coty Germany GmbH v Parfümerie Akzente GmbH](#), C-230/16, EU:C:2017:941.

## DUAL PRICING

We welcome the EC's willingness to consider policy changes related to indirect restrictions of online sales and fully agree with its conclusions that **the VBER/VGL framework should reflect the current omni-channel commercial reality**. As consumers expect a seamless O2O shopping experience throughout their journey, whether offline, online or both, brand owners should be free to incentivise retailers to invest in those seamless shopping experiences across all channels.

Given the current economic reality, **online players no longer need protection over the brick-and-mortar channel**. However, the current state of the VBER/VGL framework puts the future of high streets at risk. Set to enjoy continuous growth in the future, online sales now represent a significant proportion of total consumer sales. This growth concerns a wide range of product categories, from white goods,<sup>11</sup> over fashion<sup>12</sup>, to fast-moving consumer goods.<sup>13</sup> Although not new, this trend has accelerated because of the COVID-19 crisis, and it looks set to remain even after the end of confinement measures and other restrictions imposed because of COVID-19.<sup>14</sup>

Accordingly, **the EC should revise the current framework that forces brand owners to give an omni-channel/hybrid retailer the same conditions for all of its purchases**, irrespective of the retail channel through which it ended up selling and despite the very different cost structures for the online and offline parts of its operations. As explained in our response to Questions 55-56, this approach can actually disincentivise high-service retailers to keep investing in the services provided in their brick-and-mortar stores. Hybrid retailers/distributors have diverse strategies (focus on online or offline business, either in the short or long run...), which brand owners need to apprehend.

**Brand owners should be free to set different prices and to offer hybrid retailers discounts or compensations to reward and support their in-store efforts**, which would be much more effective than trying to work out a "fixed fee" or setting a minimum in-store turnover target for brick-and-mortar stores. As explained in our response to Question 70, these solutions are not viable in practice.

As brick-and-mortar stores need support and protection to survive, a more flexible approach is essential, and we endorse the EC's intention to pursue this objective. Martijn Snoep, head of the Dutch Competition Authority,<sup>15</sup> several NCAs<sup>16</sup> and many other stakeholders<sup>17</sup> agree that **the VBER and VGL should adopt a more lenient approach towards dual pricing**. Commissioner Vestager rightfully declared recently that, *"in the wake of the COVID crisis (...), we must make sure that investments in brick-and-mortar stores are not discouraged, so that consumers continue to have a choice – not only between online channels, but also whether to buy online or offline."*<sup>18</sup>

<sup>11</sup> See Bain & Company, 14 December 2020, [Covid-19 Catapults White Goods Makers into the Digital Future](#), which notes a 10.5% annual increase of online sales for domestic appliances in 2015-2019.

<sup>12</sup> See McKinsey & Company, 1 December 2020, ["The State of Fashion 2021: In search of promise in perilous times"](#), which notes an almost doubling of digital sales in 2020 with the expectation of only a slight recalibration after the end of the pandemic (pp. 34-37).

<sup>13</sup> See [FMCG in the European e-commerce market](#).

<sup>14</sup> See McKinsey & Company, [How COVID-19 has pushed companies over the technology tipping point—and transformed business forever](#).

<sup>15</sup> See [MLex interview with Martijn Snoep dated 8 May 2019](#).

<sup>16</sup> See [Summary of the contributions of the National Competition Authorities to the evaluation of the Vertical Block Exemption Regulation \(EU\) No 330/2010](#), p. 9.

<sup>17</sup> See European Commission, 8 September 2020, ["Staff Working Document on the Evaluation of the Vertical Block Exemption Regulation"](#), pp. 212-213.

<sup>18</sup> Keynote speech, 12 March 2021 ["EuroCommerce Policy Talk Webinar"](#).

The EC should **block-exempt dual pricing for both online and offline sales** and the VGL should clarify that a **supplier and its retailers are free to exchange information about the sales channel through which they sell the supplier's products** since such activity is not indicative of any attempt to limit or restrict passive sales by the retailer. Suppliers need this information to adjust their strategy to consumer demand and the ever-evolving retail environment, and to remunerate appropriately the efforts made by hybrid retailers, either online and/or offline. **The VBER/VGL framework should explicitly allow a brand owner to collect this data and to reward a retailer for sharing such data, including in situations of dual distribution.**

The VGL should clarify that **differential pricing** (*i.e.*, applying different prices for different retailers) is and **should remain block-exempted**. NCAs have flagged the lack of clarity on this point in the VGL<sup>19</sup> and sometimes taken a divergent approach (*e.g.*, the French competition authority in *LEGO*<sup>20</sup> and the German competition authority in *Gardena*).<sup>21</sup> Brand owners should also be free to adapt their commercial conditions, including their purchase prices, to the type of retail store and breadth of product assortment, even if one retail group operates different types of outlets. This would enable them to reflect the different costs faced by different types of retailers and valorise the different levels of investment made and services offered by those outlets to sell the brand owners' products.

#### Question 55

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

**Yes** / No / No opinion

#### Question 56

**Please explain your answer**

§ 52(d) VGL defines as a hardcore restriction the fact for a supplier to charge a distributor a higher price for products that it intends to resell online than for those it intends to resell offline. **This prohibition creates a real imbalance** in the way brands should treat retailers who are only present online or offline and those who are present both offline and online (so called "hybrid retailers"). Although § 64 VGL qualifies the ban on dual pricing for situations where online sales lead to substantial higher costs for the manufacturer, it does not foresee the issue that **hybrid retailers face considerable higher costs in operating their brick-and-mortar stores** because of costs related to rental rates, training of staff, investments in store attractiveness, *etc.*

**The VGL should reflect the current omni-channel commercial reality:** consumers expect a seamless experience throughout their purchase journey, whether offline, online or both. Whilst e-commerce is an opportunity and a source of growth for our brands, it is crucial to make sure that one channel does not thrive at the expense of the other, and to allow brands to continue to invest in their physical network. Physical stores have much higher operation costs than online channels (lease in high street or premium shopping centres, trained/qualified staff, merchandising, absence of network effects, *etc.*). This will be even more relevant after the COVID-19 crisis, which has disproportionately hit brick-and-mortar retailers.

In the current economic reality, **e-commerce is ubiquitous and does not need protection**. To the contrary, the brick-and-mortar channel needs brands' support to avoid putting the future of high street at risk. The current approach can actually dis-incentivise high-service retailers to keep investing in the service offering

<sup>19</sup> See [Summary of the contributions of the National Competition Authorities to the evaluation of the Vertical Block Exemption Regulation \(EU\) No 330/2010](#), pp. 9-10.

<sup>20</sup> See Autorité de la concurrence's press release, 29 January 2021, "[Lego makes commitments to the Autorité de la concurrence to amend its price discount system](#)".

<sup>21</sup> See Bundeskartellamt's press release, 5 December 2013, "[Bundeskartellamt erwirkt Änderung des Händler-Rabattsystems bei GARDENA](#)".

provided in their brick-and-mortar stores. Brands should have the flexibility to offer hybrid retailers a specific discount off products sold in store to support their in-store and logistics efforts.

For retailers only present either online or offline, brands are free to set differentiated pricing (including potentially to set higher prices for pure e-tailers than for pure brick-and-mortar retailers), financially incentivise the offline effort of the pure brick-and-mortar retailers, and offer rebates (*e.g.*, assortment or growth rebates) that adequately and fairly reward the respective efforts of both types of retailers. Indeed, **dual pricing is the most effective tool to compensate for the higher costs incurred by brick-and-mortar retailers**, and a much better alternative to fixed fees. In essence, the current possibilities of granting a “fixed fee” to support physical stores or to require a minimum quantity sold through physical stores have proven not to be workable solutions.

§ 52(d) VGL states that suppliers may provide their customers with a fixed fee to support their offline or online sales effort. However, **this fixed fee solution is not one that works well in practice** because it would be extremely expensive and burdensome to put in place.<sup>22</sup> How a supplier should determine the fixed fee remunerating the offline efforts of a particular retailer is unclear: should it depend on the surface of its stores, the number of personnel in the respective stores that may promote the supplier’s products or any other measures? In reality, only the actual sales made by the retailer make for a fair measure of remuneration: other measures would require a store-by-store analysis, which is administratively difficult and expensive to put in place for suppliers who distribute products in thousands of stores. Some manufacturers may be prepared to invest in this analysis but they would most likely do so only with their largest customers and not with the majority of smaller retailers.

When it deals with a hybrid retailer, **a brand owner is constrained in the way it can fairly reward its customers**. Because a customer is hybrid, the brand owner cannot incentivise that customer’s offline effort in the same way that it can reward the offline effort of a pure brick-and-mortar retailer. Taking growth rebates as an example, the prohibition on dual pricing suggests that a brand owner needs to have one set of rebates that would apply to its hybrid customer’s sales overall, without enabling the brand owner to fairly remunerate the offline growth or online growth (as the case may be) of that customer. The reality is that **hybrid retailers compete directly with pure online retailers and pure brick-and-mortar retailers**. Brands should therefore be able to treat them equally.

Accordingly, the EC should recognise that suppliers might reward fairly the offline or online efforts of their distributors without being constrained by dual pricing rules created when the omni-channel environment where manufacturers and retailers operate nowadays did not yet exist. Indeed, **online and offline sales channels rely on very different cost structures** to bring the products to consumers. As investments into staff, store space and promotions have substantially different costs in the online and offline world, the EC should recognise that suppliers might reward those retailers who make that physical space available.

Allowing for dual pricing would enable brand owners to **support effectively and efficiently the different sales channels within one retail organisation based on the particular needs and costs of each retail channel or format and on their actual performance**. The in-store environment can be key to establishing a product, as it is important for customers to experience products physically and receive advice and services from well-trained staff at brick-and-mortar stores.

**Applying dual wholesale pricing or differentiated levels of discounts/bonuses depending on the resale channel would level the playing field between pure brick and mortars, pure online stores and hybrid retailers**. This would be an effective way to incentivise (hybrid) retailers to invest in the necessary pre- and after sales services, store attractiveness and customer experience both online and offline. Brand owners could better support hybrid retailers to continue to invest in attractive brick-and-mortar shops and

<sup>22</sup> See European Commission, 8 September 2020, “[Staff Working Document on the Evaluation of the Vertical Block Exemption Regulation](#)”, p. 214, which notes the consensus that a fixed-fee support does not work.

remunerate fairly their online retail business, thereby providing consumers a wider access to a broader selection of products and better level and quality of services.

Given the global trend toward further digitalisation, **suppliers need to be properly represented by partners in front of end consumers not only offline but also online.** In particular, brand owners should be able to support those retailers who want to invest in a web shop to decrease their dependence on third-party marketplaces. Providing targeted compensation and investment for retailers who use such marketplaces or establish their own online store would allow a fair compensation of the hybrid partners' online and offline sales.

Although the EC recognises that **free-riding issues** between offline and online sales channels may occur if the costs between both channels differ significantly,<sup>23</sup> the current definition of relevant situations is quite narrow, as it neglects the significant cost difference between offering sales services offline or online. Dual pricing would enable brand owners to **support hybrid retailers against possible free riding by low service retailers, both offline and online.** Free riding does not only occur when online sales lead to higher costs for manufacturers (cf. § 64 VGL) but also when low service retailers benefit from customer services offered by high service retailers. Brand owners would be better equipped to support hybrid retailers that invest in offering valuable services to customers, regardless of the sales channel through which they offer them.

The current prohibition of dual pricing leads suppliers to undercompensate hybrid retailers (because suppliers disregard investments made on the online sales channel) or overcompensate them (because suppliers disregard the lower costs associated with online sales). Bonuses and turnover-related discounts stimulate competition by rewarding efficient retailers who have supported the sales of the supplier's products through their investments in promotion and services. **Allowing brand owners to offer more targeted bonuses for specific retail formats would facilitate investment and innovation and provide a better outcome for customers.**

In the absence of market power, it is hard to conceive what consumer harm could be done by a supplier putting in place dual pricing for its hybrid customers. If applied fairly, dual pricing is the best way to create a fair repartition of costs within the members of a selective distribution network. **Consequently, the EC should no longer consider dual pricing for hybrid retailers as a restriction by object and define the conditions under which it can be compatible with the VBER framework.**

In conclusion, allowing dual pricing **would generate varied benefits:**

- More effective incentives for dealers to invest in pre- and after sales services,
- Additional protection from free riders,
- A fairer remuneration of hybrid retailers' online sales, and
- Increased product availability, innovation, and consumer choice and experience.

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<sup>23</sup> Both § 64 VGL and §§ 600-601 of the European Commission, 10 May 2017, [Final report on the e-commerce Sector Inquiry](#) recognise this.

### Question 57

**Do you have experience or knowledge of instances where dual pricing between online and offline sales would raise competition concerns?**

Yes / **No** / No opinion

### Question 58

**Please explain your answer**

Brand owners seek to maximise the sales of their products, irrespective of the sales channel through which they generate these sales. **Dual pricing has inherent pro-competitive effects**, as it stimulates both intra-brand and inter-brand competition by providing more incentives to retailers to compete on price and sales services for the brand owner's products.

If a brand owner holds no dominant position and faces competition from other manufacturers, any attempt on his part to use dual pricing to raise prices to supra-competitive levels would lead to sale losses, as distributors and their customers would switch to other manufacturers' products. Similarly, **brand owners have no incentive to use dual pricing as a means to achieve a total ban on online sales**, contrary to what some NCAs claimed during the public consultation:<sup>24</sup> if a brand owner took such an approach, it would leave the fastest growing sales channels to its competitors, resulting in massive losses and disgruntled distributors. In the current omni-channel retail environment, such dubious strategies are not viable solutions.

**Dual pricing may raise competition concerns when it does not relate to the sales channel through which a distributor resells the products** but instead to the territory in, or customer group to, which the distributor resells the products. That form of dual pricing may potentially restrict active and passive cross-border sales or passive sales to a territory/customer group exclusively allocated to a competing retailer. Yet such effects may only arise when dual pricing explicitly depends on the territory/customer group to which the retailer resells the products and not only on the sales channel through which the retailer resells.

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<sup>24</sup> See European Commission, 8 September 2020, "[Staff Working Document on the Evaluation of the Vertical Block Exemption Regulation](#)", p. 213; as well as European Commission, [Summary of the contributions of the National Competition Authorities to the evaluation of the Vertical Block Exemption Regulation \(EU\) No 330/2010](#), p. 9.

## Question 59

Based on your experience/knowledge, what would be the impact on the following aspects of block-exempting dual pricing between online and offline sales?

	Very negative	Negative	Neutral	Positive	Very positive	No opinion
a. Competition on the market	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
b. Harmonised application of the competition rules by competition authorities and national courts	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
c. Legal certainty for businesses	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
d. Efficiency of distribution systems	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
e. Cross-border trade	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
f. Costs for businesses	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
g. Consumer welfare	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
h. Investment / Economic growth	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
i. Sustainability objectives	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

## Question 60

Please explain your answers above and, if possible, give concrete examples of the impacts you indicated. Please specify the letter of the row of the impact you are referring to.

**(a and h)** Per our responses to Questions 56 and 58, block-exempting dual pricing would increase both intra-brand and inter-brand competition and support investment and economic growth. The possibility to provide bonuses/rebates reflective of the respective offline and online results of hybrid retailers would incentivise the latter to make the necessary investments to promote the sales of brand owners' products in each channel, which would increase intra-brand competition. Hybrid retailers would be in a much better position to compete with both types of pure retailers and would not be penalised for investing in customer services. Such increased intra-brand competition would in turn increase inter-brand competition, as brand owners could reward hybrid retailers if they increase the sales of the brand's products. Block-exempting dual pricing would likely increase suppliers and retailers' respective investments, as they could more easily design and implement the appropriate incentives for such investments.

**(b and c)** Block-exempting dual pricing would increase legal certainty for all market operators and promote a harmonised application of competition law by NCAs and national courts across the EU.

**(d and f)** Increasing clarity around the legality of a particular conduct invariably leads to cost savings.<sup>25</sup> Allowing for dual pricing between offline and online sales would save companies time and cost to try to implement the ill-suited solutions currently offered under the VGL. Dual pricing would help prevent free riding by online stores and would be the simplest way of incentivising physical stores, as it would allow to distinguish the needs and costs of each channel or type of store and to offer retailers incentives to invest in quality service, display and presentation.

**(g)** The increased competition in terms of service offering and wider product range availability across all sales channels, especially brick-and-mortar shops, would enhance consumer welfare through increased choice and reduced proximity of retail outlets. Indeed, consumers value the possibility to feel and experience products and to gain adequate pre-sale advice by well-trained staff in a physical shop. Bricks-and-mortar stores offer services that online stores are unable to offer, such as product sampling, which is beneficial for consumers. Maintaining a healthy high street presence of physical shops will have long-term benefits for consumers.

### Question 61

**Case law provides that prohibiting online sales is a hardcore restriction that cannot benefit from the safe harbour provided by the VBER. What would in your view be the appropriate safeguard to ensure that dual pricing between online and offline sales would not result in a prohibition of online sales?**

Per our responses to Questions 57 and 58, suppliers do not have any incentive to use dual pricing as a means to impose a total prohibition of online sales, as doing so would likely lead to a loss of turnover. Suppliers focus on increasing their sales and reach, irrespective of the channel through which they end up selling. **Supporting offline efforts should not amount to an (indirect) prohibition of online sales**, as retailers are entirely free to choose their favourite sales channel(s), notwithstanding the additional support by suppliers for offline efforts. We expect that hybrid players will still utilise both channels and sell (some of their stock) online, as online sales tend to target a different audience. In a post-COVID-19 world, consumers will continue to engage in online shopping and hybrid-retailers will remain incentivised to sell through their online stores.

### Question 62

**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?**

**Yes** / No / No opinion

### Question 63

**Please explain your answer**

The EC recognised in the SWD that it may no longer be appropriate to require a supplier to impose overall equivalent criteria on both online and offline sales. Notwithstanding the preservation of the brick-and-mortar option, which is crucial for consumers to experience, feel and touch the products, we welcome the EC's initiative to reflect in the VGL that **the online and offline retail channels have very different characteristics**.

The EC initially set out the equivalence principle in § 56 VGL to ensure that manufacturers would not dissuade distributors from selling online by applying criteria to online sales that were not overall equivalent to those applied to offline sales. Per its own evaluation of the VBER during the evaluation phase, **the EC should reassess the effectiveness of the equivalence principle against the current retail landscape**, which has completely transformed over the last decade because of the accelerated digitalisation and ensuing changes in consumer behaviour and expectations.

Today's consumer journey is a fluid omni-channel process whereby consumers may switch within the online channel, between online and offline channels, within the offline channel, and even between mono-brand

<sup>25</sup> See European Commission, 8 September 2020, "[Staff Working Document on the Evaluation of the Vertical Block Exemption Regulation](#)", pp. 64-66.

and multi-brand distributors. **Consumers expect to enjoy a continuous omni-channel O2O brand and shopping experience when engaging with a particular product, whether online or offline.** Accordingly, brand owners aim at creating seamless omni-channel environments to allow for the optimisation of consumer choice and a high-quality brand experience.<sup>26</sup>

Unfortunately, **the equivalence principle hinders this objective by preventing brand owners from responding to consumer expectations.** Indeed, some NCAs have enforced the equivalence test very strictly and rewritten selective distribution agreements by making wholesale changes to the service requirements that brand owners may impose on retailers online and in-store.

More broadly, we believe that **the line between offline/online criteria will be more and more blurred in the future.** Qualitative criteria will constantly evolve to apprehend new “phygital” technologies and emerging ways of selling as well as evolving consumer consumption patterns, to the constant benefit of the latter.

**Block-exempting the application of different criteria for online and offline sales in selective distribution systems would have a positive impact on competition** and give brand owners some agility to adapt to changes in the retail landscape and to leverage new technologies to better meet consumer expectations.

#### Question 64

**Do you have experience or knowledge of instances where the application of different criteria for online and offline sales in selective distribution systems would raise competition concerns?**

Yes / **No** / No opinion

#### Question 65

**Please explain your answer.**

N/A

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<sup>26</sup> See European Commission, 8 September 2020, “[Staff Working Document on the Evaluation of the Vertical Block Exemption Regulation](#)”, p. 204.

**Question 66**

Based on your experience/knowledge, if the application of different criteria for online and offline sales in selective distribution systems were to be block-exempted, what would be the impact on the following aspects?

	Very negative	Negative	Neutral	Positive	Very positive	No opinion
a. Competition on the market	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
b. Harmonised application of the competition rules by competition authorities and national courts	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
c. Legal certainty for businesses	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
d. Efficiency of distribution systems	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
e. Cross-border trade	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
f. Costs for businesses	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
g. Consumer welfare	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
h. Investment / Economic growth	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
i. Sustainability objectives	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

**Question 67**

Please explain your answers above and, if possible, give concrete examples of the impacts you indicated. Please specify the letter of the row of the impact you are referring to.

Removing the “equivalence” criteria would:

**(a)** Encourage competition between online and offline sales by creating a level playing field that takes into account the differences between both channels and allow manufacturers to take into account market realities and to adapt to each channel.

**(b)** Facilitate a more harmonised application by clarifying which criteria suppliers may use for each channel.

**(c)** Improve legal certainty by clarifying the requirements, whereas the “equivalence” requirement has been unclear to NCAs and national courts.

**(d)** Allow manufacturers to take into account the inherent differences between the online and offline sales channels when setting up their distribution system, thereby letting them better adapt to changes in the retail landscape and leverage new technologies.

- (e) Enable manufacturers to design a selective distribution system for the EU, thus enhancing cross-border trade.
- (f) Decrease costs for businesses owing to the increased legal certainty and harmonised criteria.
- (g) Enable online and offline channels to compete on a level playing field and improve consumer welfare.
- (h) Incentivise suppliers to invest in setting up a selective distribution system across sales channels.
- (i) Enable suppliers to take into account sustainability goals.

#### Question 68

**Case law provides that prohibiting online sales is a hardcore restriction that cannot benefit from the safe harbour provided by the VBER. In your view, what would be the appropriate safeguard to ensure that the application of different criteria for online and offline sales in a selective distribution system would not result in a prohibition of online sales?**

An effects-based analysis enables to flag limitations to online sales resulting from different criteria for online and offline sales and deriving from disproportion/discrimination. Given the fundamental differences between the online and offline sales channels, **the equivalence test is devoid of relevance and does not even help identify requirements that may amount to *de facto* restrictions on online sales.** In addition, per the CJEU's judgment in *Coty*,<sup>27</sup> restrictions on how a distributor may sell products online do not have the object to restrict where or to whom distributors can sell the products.

#### Question 69

**Based on your experience/knowledge, which of the following actions should be taken in relation to the two types of indirect restrictions on online sales mentioned in this section? (multiple answers possible)**

***No longer treating dual pricing between online and offline sales as a hardcore restriction, with safeguards to be defined in line with the case law* / *No longer treating the application of different criteria for online and offline sales in selective distribution systems as a hardcore restriction, with safeguards to be defined in line with the case law* / *Maintaining the current rules: these types of indirect restrictions of online sales should continue to be treated as hardcore restrictions* / *Other***

<sup>27</sup> Judgment of 6 December 2017, *Coty Germany GmbH v Parfümerie Akzente GmbH*, C-230/16, EU:C:2017:941.

**Question 70**

**Please explain your answer, in particular why you consider your preferred action(s) to be more appropriate than other possible actions.**

The EC should no longer treat dual pricing between online and offline sales as a hardcore restriction, whether in selective distribution systems or not, as there is no ground for differentiation. As explained in our response to Question 60, block-exempting dual pricing, if necessary with appropriate safeguards in line with case law, would bring increased competition, enhanced consumer welfare, cost savings and higher legal certainty. In comparison, all other options would result in suboptimal results.

The current rules on dual pricing provide insufficient clarity and legal certainty, lead to a disparate application of the rules throughout the EU, imply higher compliance costs, decrease investments in customer services, and minimise the possibility for retailers to invest in promoting the sales of branded products. Therefore, **status quo is not an option**. As explained in our response to Question 56, **the fixed fee solution to support offline or online sales is not one that works well in practice**. Relying on this exception is quite difficult, especially in European-wide distribution networks, as it requires substantial resources to engage in a case-by-case analysis and determine a reasonable fixed fee or amount of in-store sales for each brick-and-mortar store. For brands distributed by thousands of retailers across the EU, this is clearly an impossible endeavour.

Although a better option than maintaining the *status quo*, broadening the type of cases that can benefit from an individual exemption of dual pricing under Article 101(3) TFEU would nevertheless prove less effective than a clear block exemption of dual pricing between online and offline sales. Many AIM members refrain from using these limited exceptions because of their **inconsistent interpretation by national courts and NCAs** and the high risk that they refuse justifications for using these exceptions. The same holds true for the current limited exception on dual pricing allowed in § 64 VGL.

**Maintaining the equivalence test is no longer appropriate, as it does not take into account market realities** such as the inherent differences between the sales channels. Furthermore, as many manufacturers operate pan-EU distribution system, adjustments in one country will invariably lead to similar adjustments in other countries. A clearer set of rules would greatly help NCAs and national courts prove more consistent in their application.

**Question 71**

**Please explain your answer, indicating what would be the appropriate action and its likely impact on the aspects mentioned in the table on question 66.**

We refer to our responses to Questions 60, 67 and 70.

**Question 72**

**Would your reply to this question be different if the rules on active sales restrictions included more permitted exceptions (see section B.2 above)?**

Yes / **No** / No opinion

**Question 73**

**Please explain your answer.**

The distinction between active and passive is extremely important to a manufacturer who seeks to protect an exclusive distributor against another distributor's active sales. Our response to Question 70 applies to any distribution system: **permitting a broader exception for active resale restrictions would have little practical significance in the context of dual pricing and online/offline sales criteria**. We also note that the equivalence test is generally more relevant to the retail level, whilst the use of exclusive distribution network is more common at the wholesale level.

#### Question 74

**Based on your experience/knowledge, please provide any other comments or suggestions you may have on the rules for these two types of indirect restrictions on online sales. You may also provide additional information which may be relevant for this section (copies of any documents, reports, studies etc.). Please upload the information in files with a maximum size of 1 MB each, using the button below.**

Considering current market dynamics, the current treatment of dual pricing as a hardcore restriction is no longer appropriate. The economic landscape has changed significantly, with a substantial shift towards online sales globally. **Dual pricing should be removed from the list of hardcore restrictions and block-exempted in the revised VBER.**

To offset free riding, suppliers need greater flexibility to support the efforts by hybrid retailers for their (often more costly) offline sales efforts. In our experience, it is not always practically possible to determine fixed-fees for every service in each of the (thousands) of point of sales of the various retailers.

**Reforming the equivalence principle to address this lack of coherence would create additional legal certainty.** In practice, it is very difficult to determine what is “equivalent” because the dynamics of the offline and online channels are quite distinct. Accordingly, the application of different criteria for online and offline sales in selective distribution should no longer be treated as a hardcore restriction.

Indeed, **the EC should allow brand owners to treat the offline and online channels differently** by defining specific qualitative and quantitative criteria for each of both. Although both the EC and CJEU have already hinted at the possibility for suppliers to create a specific set of qualitative criteria for their online retailers, it remains unclear how the existing jurisprudence on quantitative criteria applies to the online sales channel.

The EC should therefore clarify that **brands may determine different quantitative criteria for their physical and online sales channels, provided these criteria pursue the same objective and remain coherent.** Indeed, because of the wider geographical reach of online retailers compared to physical shops, brands should have the flexibility to limit the number of authorised online retailers to better control their selective distribution network.

Brand owners remain concerned by the **divergence in the interpretation and application of the VBER and VGL by NCAs and national courts** (e.g., the numerous communications from the German competition authority on the “correct” interpretation of *Coty*).<sup>28</sup> In *Coty*, the CJEU endorsed the EC’s interpretation of the VGL as regards third-party platforms, which the VGL should clarify explicitly to avoid any future misinterpretation.

**§ 54 VGL should allow brand owners to limit and/or control *a priori* resellers’ use of online price comparison tools that may negatively affect their brand image** if these do not offer safeguards against practices such as ranking legitimate authorised retailers behind counterfeited and grey market products by non-authorised retailers.

The VBER and the VGL do not provide guidance on restrictions placed on resellers regarding the use of brand names and trademarks for search engines (e.g., Google AdWords). For instance, **the VGL should clarify when restrictions on the use of brand names or trademarks in search engines are likely to be hardcore restrictions of EU competition law.** Whilst the EC decision in *Guess* treated a ban on the use of the Guess brand name and trademark in Google AdWords as a “by object” infringement, the EC also remarked in the final report on the e-commerce sector inquiry that such restrictions could help avoid confusion with the

<sup>28</sup> See for example: Andreas Mundt, President of the Bundeskartellamt, [6 December 2017](#); [Bundeskartellamt publication](#) (October 2018); Kallfass, head of the Bundeskartellamt’s German and European antitrust law policy unit ([MLex, 27 February 2019](#)).

manufacturer's website.<sup>29</sup> The VGL should clarify that no competition concerns arise in such cases and that restrictions on bidding for brand names or trademarks that the distributor does not actually sell or for a particular positioning in the list of results rendered by search engines such as Google AdWords are block exempted. This clarification would be beneficial for all vertical agreements, not only selective distribution agreements.

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<sup>29</sup> European Commission, 10 May 2017, [Final report on the e-commerce Sector Inquiry](#), §§ 632 and 997.

## PARITY OBLIGATIONS

### Question 75

**Do you have experience/knowledge of parity obligations?**

Yes / **No**

### Question 76

**If you have experience/knowledge of parity obligations, please indicate whether you have this experience/knowledge because you requested a parity obligation or because you accepted a parity obligation? (multiple answers possible)**

*I have requested a parity obligation / I have accepted a parity obligation / Other experience/knowledge*

N/A

### Question 77

**If you have experience/knowledge of parity obligations, please explain this experience/knowledge.**

N/A

### Question 78

**Do you have experience or knowledge of instances where parity obligations raise competition concerns?**

Yes / **No**

### Question 79

**Please explain your answer.**

Parity clauses are rather pro-competitive in that they allow manufacturers to reduce their cost base and therefore reduce consumer prices.

### Question 80

**If you replied 'yes' to the previous question, please indicate whether the competition concerns raised by the parity obligations are linked to the type of sales/marketing channels that the obligation covers:**

*The competition concerns raised by the parity obligation are linked to the fact that it covers indirect sales/marketing channels (e.g. other platforms or intermediaries) / The competition concerns raised by the parity obligation are linked to the fact that it covers direct sales/marketing channels (e.g. own website) / The competition concerns raised by the parity obligation are linked to the fact that it covers both direct and indirect sales/marketing channels / The competition concerns raised by the parity obligation are due to other reasons (please provide details below) / No opinion*

N/A

### Question 81

**Please explain your answer by reference to the competition concerns of which you have knowledge or experience.**

N/A

### Question 82

**Based on your experience/knowledge, does the extent to which parity obligations raise competition concerns depend on the sector in which they are used?**

N/A

**Question 83**

**Please explain your reply**

N/A

**Question 84**

**As regards any competition concerns raised by parity obligations, based on your experience do you consider it necessary to apply further distinctions? (multiple replies possible)**

**Yes, it is necessary to consider whether the parity obligation concerns the retail or the wholesale level / Yes, it is necessary to consider whether the parity obligation relates to price, inventory, availability or other conditions / Yes, 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) / Yes, it is necessary to consider whether the transactions covered by the parity obligation take place online or offline / Yes, it is necessary to consider further distinctions (please specify these in the box below) / No / No opinion**

**Question 85**

**If you replied yes to any of the options in this question, please explain in each case why you consider it necessary to apply the distinction by reference to the competition concerns raised by the particular type of parity obligation.**

Wholesale parity clauses whereby a distributor requires its supplier to offer purchasing prices/conditions that are similar to or better than what it makes available to other distributors have not given rise to significant competition law concerns in the past.

**Question 86**

**Do you have experience or knowledge of instances where parity obligations create benefits?**

**Yes / No**

**Question 87**

**Please explain your reply and provide examples where possible.**

Wholesale parity clauses tend to enhance consumer welfare by generating cost-efficiencies, better prices and conditions that are passed on to consumers.

**Question 88**

**Please indicate whether the benefits created by the parity obligations are linked to the type of sales/marketing channels that the parity obligation covers:**

*The benefits created by the parity obligation are linked to the fact that it covers indirect sales/marketing channels (e.g. other platforms or intermediaries) / The benefits created by the parity obligation are linked to the fact that it covers direct sales/marketing channels (e.g. own website) / The benefits created by the parity obligation are linked to the fact that it covers both direct and indirect sales/marketing channels / The benefits created by the parity obligation are due to other reasons (please provide details below) / **No opinion***

N/A

**Question 89**

**Please explain your answer by reference to the benefits of which you have knowledge or experience.**

N/A

**Question 90**

**Based on your experience/knowledge, does the extent to which parity obligations create benefits depend on the sector in which they are used?**

*Yes, to a large extent / Yes, to a small extent / No / **No opinion***

N/A

#### Question 91

**Please explain your reply**

N/A

#### Question 92

**As regards the benefits created by parity obligations, based on your experience/knowledge do you consider it necessary to apply further distinctions? (multiple replies possible)**

*Yes, it is necessary to consider whether the parity obligation concerns the retail or the wholesale level / Yes, it is necessary to consider whether the parity obligation relates to price, inventory, availability or other conditions / Yes, 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) / Yes, it is necessary to consider whether the transactions covered by the parity obligation take place online or offline / No / **No opinion***

N/A

#### Question 93

**Please explain in each case why you consider it necessary to apply the distinction by reference to the benefits created by the particular type of parity obligation.**

N/A

#### Question 94

**Taking into account any competition concerns that may be 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?**

*No, parity obligations should continue to be block-exempted / Yes, the benefit of the block exemption should be removed for parity obligations, but only for parity obligations that relate to indirect sales/marketing channels (e.g. other platforms/intermediaries) / Yes, the benefit of the block exemption should be removed for parity obligations, but only for parity obligations that relate to direct sales/marketing channels (e.g. own website) / Yes, the benefit of the block exemption should be removed for all parity obligations / No opinion*

N/A

#### Question 95

**Please explain your answer, in particular by reference to any differences or similarities between parity obligations relating to direct and indirect sales/marketing channels.**

N/A

#### Question 96

**Based on your experience/knowledge, what would be the impact on the following aspects of removing the benefit of the block exemption for parity obligations that relate to indirect sales/marketing channels?**

	Very negative	Negative	Neutral	Positive	Very positive	No opinion
a. Competition on the market	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. Harmonised application of the competition rules by competition authorities and national courts	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c. Legal certainty for businesses	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d. Efficiency of distribution systems	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
e. Costs for businesses	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
f. Consumer welfare	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
g. Investment / Economic growth	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
h. Sustainability objectives	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

**Question 97**

Please explain your answers above and, if possible, give concrete examples of the impacts you indicated. Please specify the row of the impact you are referring to.

N/A

**Question 98**

In your opinion, what would be the impact on the following aspects of removing the benefit of the block exemption for parity obligations that relate to direct sales/marketing channels?

	Very negative	Negative	Neutral	Positive	Very positive	No opinion
a. Competition on the market	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. Harmonised application of the competition rules by competition authorities and national courts	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c. Legal certainty for businesses	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

d.	Efficiency of distribution systems	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
e.	Costs for businesses	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
f.	Consumer welfare	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
g.	Investment / Economic growth	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
h.	Sustainability objectives	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

**Question 99**

Please explain your answers above and, if possible, give concrete examples of the impacts you indicated. Please specify the row of the impact you are referring to.

N/A

**Question 100**

Based on your experience, what would be the impact on the following aspects of removing the benefit of the block exemption for all parity obligations?

		Very negative	Negative	Neutral	Positive	Very positive	No opinion
a.	Competition on the market	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b.	Harmonised application of the competition rules by competition authorities and national courts	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c.	Legal certainty for businesses	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d.	Efficiency of distribution systems	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
e.	Costs for businesses	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
f.	Consumer welfare	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
g.	Investment / Economic growth	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
h.	Sustainability objectives	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

**Question 101**

Please explain your answers above and, if possible, give concrete examples of the impacts you indicated. Please specify the row of the impact you are referring to.

- (a)** Parity obligations can have pro-competitive effects and result in lower prices for consumers.
- (c)** The VBER provides legal certainty for businesses: removing parity clauses from its scope would greatly reduce legal certainty, especially for companies with low market shares, where the competitive impact would be minimal / non-existent.
- (d)** Parity obligations can reduce costs and therefore improve the efficiency of distribution systems.
- (e)** Conducting individual assessments for all agreements with parity obligations would increase legal costs.
- (f)** Parity obligations can result in lower prices for consumers.

## RESALE PRICE MAINTENANCE

We welcome the EC's willingness to consider RPM during the impact assessment phase. As the VBER does not authorise RPM, AIM's members cannot have any experience of the benefits generated by such practice. However, **the debate on RPM should remain as pragmatic as possible** because market operators need solutions that work well in practice.

We regret that the EC has limited the scope of the impact assessment of RPM to possible efficiency arguments that might justify an individual exemption in very limited circumstances. **The EC should clarify the circumstances in which the conditions of Article 101(3) TFEU are fulfilled but also the situations in which Article 101(1) TFEU does not apply in the first place.** It should also revise the overly strict interpretation of the buyer's ability to determine its sales prices under Article 4(a) VBER.

We invite the EC to take into account the outcome of the 2019 stakeholder workshop, which demonstrated that the stakeholders' concerns over RPM were far from limited to the possible situations where Article 101(3) TFEU efficiencies would be acceptable.<sup>30</sup> NCAs raised similar concerns.<sup>31</sup> **The EC should take a more nuanced approach to RPM by taking into account market realities, the evolving retail landscape and the increased shift in market and bargaining power to retailers.** The EC should also recognise that competition and consumer welfare imply low prices but also **product diversity, product availability and customer services.**

The EC should reconsider whether it is still justified to maintain the qualification for RPM as a hardcore restriction even if implemented by parties with a very low market share. **The EC should take into account the recent case law in *Budapest Bank*,<sup>32</sup> *Generics*<sup>33</sup> and *Cartes Bancaires*<sup>34</sup>** per which only those agreements where evidential practice shows that they undoubtedly and inevitably have a negative impact on competition can be qualified as *by object* restrictions.

In the light of the economic theory and the results of the evaluation study of RPM in the book sector, clear evidential practice of undoubtedly negative impact on competition is lacking in case of RPM. This finding would be even truer in case both supplier and retailer have only a limited market share and thus would be subject to fierce inter-brand competition. **The theories of harm relating to RPM in the VGL are highly unlikely to materialise in case of sufficient inter-brand competition.**

Notwithstanding the changed market realities and competitive structure of the distribution market, **the VGL focuses almost entirely on (limiting) the behaviour of suppliers/manufacturers** based on the assumption that they are the stronger party in the supplier-distributor relationship. Since 2010, **concentration has increased at distribution level**, stronger retailers and retail networks/alliances have emerged and e-commerce mastodons have solidified very strong market positions.

Accordingly, **the VGL should adopt a more balanced approach to the supplier/retailer relationship** by taking into account both sides' interests. It is wrong to assume that retailers act in the only interest of consumers, as profit maximisation drives all market operators, including retailers. The focus on low price only leads to

<sup>30</sup> European Commission, 8 September 2020, "[Staff Working Document on the Evaluation of the Vertical Block Exemption Regulation](#)", pp. 137-138.

<sup>31</sup> European Commission, 8 September 2020, "[Staff Working Document on the Evaluation of the Vertical Block Exemption Regulation](#)", pp. 125-126.

<sup>32</sup> Judgment of 2 April 2020, [Gazdasági Versenyhivatal v Budapest Bank Nyrt., and others](#), C-228/18, EU:C:2020:265.

<sup>33</sup> Judgment of 30 January 2020, [Generics \(UK\) Ltd, and others v Competition and Markets Authority](#), C-307/18, EU:C:2020:52.

<sup>34</sup> Judgment of 11 September 2014, [Groupement des cartes bancaires v European Commission](#), C-67/13, EU:C:2014:2204.

decreased room for retailers to invest in customer services and a more limited possibility for brand owners to invest in product innovation and differentiation. This ultimately leads to a situation where the manufacturer develops fewer products, fewer shops make them available, and less or no customer services come with them.

The VGL should acknowledge the **shift in power from brand owners/suppliers to big retailers/e-tailers and platforms** that often place strong pressure on suppliers to seek price/margin protection against competition from other retailers. The VGL should recognise that retailers' threats of delisting brands in instances where other retailers undercut their prices might also amount to RPM. Cases in Belgium<sup>35</sup> and Portugal<sup>36</sup> showed that retailers could be the driving force behind RPM. Accordingly, the VGL should state that competition authorities ought to impose sanctions on retailers/distributors in case they infringe RPM rules.

**The suspicion against recommended retail prices ("RRPs") and price monitoring is unjustified and unnecessarily strict.** Article 4(a) VBER has a balanced approach in distinguishing between the unlawful agreement to "*restrict the buyer's ability to determine its sale price*" on the one hand and the lawful unilateral conduct of providing recommended prices on the other. Brand owners have a stake in ensuring that its retailers are successful. A supplier typically establishes RRP's following extensive cross-market research on its whole product assortment. It is often essential for brand owners to communicate to retailers about their resale price recommendations and to explain the underlying reasons for these recommendations. Brand owners must also understand why retailers have not followed the recommendation, particularly if retailers reacted to market forces that brand owners are not aware of, as such information may trigger innovation and further investment to adjust to market conditions and enhance efficiency, which ultimately benefits consumers. In addition, manufacturers negotiate prices for retailers with the (expected) margins that the retailer can earn, while actual market performance is also part of the discussion, without any intention or desire to engage in RPM. Accordingly, the EC should remove the language in §§ 48 and 226-229 VGL per which RRP's can act as a focal point and serve as (indirect) means to arrive at RPM. The VBER and VGL should clarify that RPM is limited to those cases where there is an agreement or concerted practice to fix prices and that, absent any pressure to stick to a price, RRP's, price monitoring and price discussions are not sufficient to constitute RPM, as they do not restrict a buyer's ability to determine its sale price.

Similarly, **brand owners should be able to collect data from retailers about their resale prices.** The VGL have inspired some NCAs to treat resale price monitoring unnecessarily strictly. Resale data helps inform brand owners' future strategy, production, development, marketing strategies, *etc.* As conversations with retailers about these data points aim to optimise product distribution and pricing and ensure the availability of products throughout markets, courts and authorities should not treat them as interference with the commercial policy of the retailers or an indication of RPM.

**It is extremely important for brand owners to understand how the market responds to such price recommendations and to know the actual resale prices of their products.** By seeking to obtain resale price information from their retailers about their products, manufacturers do not attempt to limit their retailers' liberty to fix their own prices and commercial policies, as these communications actually improve inter-brand competition on the merits.

In addition, **the VGL should better distinguish RPM, RRP's and MRPS, even in situations of market power.** Absent any pressure exercised to fix the price, RRP's and maximum resale prices never amount to RPM and cannot lead to a breach of Article 101(1) TFEU, even in situations of market power. Accordingly, the EC should

<sup>35</sup> Autorité de la Concurrence, Décision n° ABC-2015-I/O-19-AUD, 22 June 2015, [Affaire CONC-I/O-06/0038 – Hausses coordonnées des prix de vente de produits de parfumerie, d'hygiène et de droguerie](#).

<sup>36</sup> See the press releases of the Portuguese Competition Authority: 21 December 2020, "[The AdC imposed fines on six large retail food chains and two suppliers for price fixing, harmful to consumers](#)" and 9 December 2020, "[AdC issues Statement of Objections to supermarkets and Beiersdorf for price fixing, harmful to consumers](#)".

remove the reference in the VGL that RRP and MRPs could act as a focal point and amount to fixed resale prices or RPM even in the absence of pressure to adopt a fixed price.

Finally, per the request that NCAs made in the context of their common consultation on the reform of Regulation 330/2010, **the EC should clarify its position on supposedly “indirect” forms of RPM.** In particular, it should clarify whether the legitimate necessity for manufacturers to protect their brand image from devaluing promotional operations may be a valid justification “to interfere in the pricing policy of their retailer”, as requested by NCAs themselves.<sup>37</sup>

#### Question 102

**Taking into account that RPM is considered a hardcore restriction under the VBER and that, as stated in the Vertical Guidelines, RPM may exceptionally lead to efficiencies, do you have experience or knowledge of concrete instances where RPM has led to efficiencies, or could have led to efficiencies if the parties had not refrained from using RPM?**

*Yes, I have experience or knowledge of concrete instances where RPM has led to efficiencies / **Yes, I have experience or knowledge of concrete instances where RPM could have led to efficiencies if the parties had not refrained from using RPM** / No / No opinion*

#### Question 103

**If you replied yes, please explain and describe the concrete instance of RPM as well as the efficiencies**

As other competition authorities have accepted in the past,<sup>38</sup> **RPM might be an appropriate tool to address free-riding concerns that do not only arise in case of new product launches and short term promotions.** The VGL should therefore set out the criteria under which RPM implemented to combat free riding can benefit from the Article 101(3) TFEU exemption.

It is widely recognised that **RPM can generate substantial efficiencies.**<sup>39</sup> § 225 VGL acknowledge the potential for RPM to allow distributors to engage in an optimal level of promotional effort, serve as an effective tool to allow retailers to provide an optimal level of customer services and reduce free riding from retailers who do not provide such services and would otherwise undercut high service retailers.

Given the clear rise of low-service retailers both online and offline, retailers that invest in qualitative pre- and after sales services may lose market share because of other retailers that solely focus on price. Because of price transparency and algorithmic pricing/price matching, the price cut of one (online) retailer can have a devastating effect for the value generated by all other retailers and the brand owner. **This focus on pricing at the expense of customer experience and service can lead to increased instances of misleading or fraudulent sales as well as counterfeits,** which have a very detrimental effect on customers, responsible retailers and brand owners alike. Such issues do not only arise when a brand owner launches a new product, they can also last over the lifetime of a product.

<sup>37</sup> European Commission, “[Summary of the contributions of the National Competition Authorities to the evaluation of the Vertical Block Exemption Regulation \(EU\) No 330/2010](#)”, pp. 6-7: “*The VBER and the VGL arguably do not provide sufficient legal certainty with regard to the assessment of resale price restrictions in the context of selective distribution networks. In this particular context, suppliers may argue that the protection of their brand image or the characteristics of their products or services would justify practices that restrict the ability of buyers to determine the resale price.*”

<sup>38</sup> See for example the [Tooltechnic case](#) in which the Australian Competition and Consumer Commission granted conditional authorisation to Tooltechnic to engage in minimum resale price maintenance to market its premium Festool brand of power tools.

<sup>39</sup> Bishop and Walker, 2010, *The Economics of EC Competition Law: Concepts, Application and Measurement*, 2<sup>nd</sup> Edition, pp. 202-204, and Goyder, 7 November 2008, “[Is Nothing Sacred? Resale Price Maintenance and the EU Policy Review on Vertical Restraints](#)” in Konkurrensverket (ed.) *The Pros and Cons of Vertical Restraints*, pp. 167-193.

Two particular examples other than those already set out in the VGL (short-term promotion and new production introduction) show that RPM (or to a lesser extent a Minimum Advertising Pricing (MAP) policy) might generate efficiencies: the case of “replenishment” sales and this of “loss leaders”.

**The “replenishment” situation** occurs when a consumer has seen, experienced and been advised on the product at a high-service bricks-and-mortar/online specialised store but subsequently turns to (online) stores to buy a “replenishment”, often through a “subscribe to save” scheme that further enhances the “locked-in” effect. Suppliers and specialised retailers make substantial investments in providing an optimal shopping experience to convince customers to buy a brand owner’s product for the first time. Once the customer has felt, used and experienced the product, the customer then turns to low service, low cost (online) retailers to make subsequent purchases of the same product or product replacement or equivalent. This is a clear example of the low-cost/low-service retailer free riding on substantial investments made by both supplier and retailer in convincing customers to make that initial sale. RPM (or MAP-policy to avoid the visual aspects of the low price offers) would provide an appropriate solution to support the high service retailers in continuing to invest in offering these crucial services to the benefit of consumers.

**The “loss leader” conduct** occurs when a low-service/low-price retailer chooses to offer a product category champion at a very low price (sometimes below purchase price) for a short time to attract consumers in their store and sell them many other products at full price. **The effects of this type of conduct are detrimental to the image of the brands’ product and limit the possibility for competing retailers to make a decent margin.** In the short term, such conduct may lead competing retailers to no longer offer the particular product for sale for as long as the loss leader promotion runs, thus limiting the availability of the particular product during that time, and possibly also in the longer run as it is hard to re-list a particular product at certain retailers. In the long term, the retailers’ willingness to sell a particular range of products or to stock new products will decrease, which will affect brand owners’ ability and incentive to invest in product innovation and diversification. In the end, this leads to fewer products released on the market, sold by fewer shops that will offer fewer services to customers. **RPM or fixed minimum prices (or MAP-policy) would be an appropriate means to address the negative consequences of the “loss leader” conduct** with expected efficiencies in terms of wider product availability and more product innovation.

Should the EC not accept to exempt RPM in cases of “replenishment” sales or to combat loss leader conduct, **allowing the implementation of a MAP-policy would be welcome.** As in a MAP-policy the retailers are only restricted to advertise prices below a certain level, they are not prevented from selling below a certain price. Similarly to arguments in favour of allowing for the communication of RRP, MAP is equally justified for the benefit of retailers and customers in helping retailers to understand how to best position a product for optimal customer experience. In addition, allowing a MAP-policy would take away some of the most visible (online) price promotions thus limiting the detrimental impact of (algorithmic) price adjustments as explained above.

#### Question 104

**The evaluation has shown a lack of clarity and guidance as regards the conditions under which efficiencies can be argued for the use of RPM and the evidence needed for this purpose, in your view, what measures could be taken to address this lack of clarity and guidance?**

We welcome the EC’s intention to identify the “concrete instances regarding the conditions under which efficiencies for RPM can be claimed and the evidence that is required to satisfy the conditions of Article 101(3) TFEU”.

The VGL acknowledge that RPM may lead to efficiencies and consumer benefits, in particular by preventing free riding at the distribution level, protecting a retailer’s high investments on products’ display, advertising, qualitative and tailored advice, and client experience, whilst others are practising low prices aimed only at attracting consumers. Unfortunately, this acknowledgement has shown limited practical value in current enforcement. Both the VBER and the VGL should better clarify the criteria for the exemption of RPM under

Article 101(3) TFEU. More specifically, we take the view that the current blacklisting of minimum RPM clauses as hardcore restrictions is overbroad and that the EC should consider listing a few “carve outs” in Article 4 VBER.

We would appreciate a clarification on the compatibility of RPM for seasonal products or the launch of new products. We also encourage the EC to evaluate the impact of RPM on specific products, such as luxury cosmetics, clothes, bags, watches or jewellery, when there is sufficient inter-brand competition, lower price elasticity, and the conditions of compatibility with Article 101(3) are fulfilled.

Here are five examples:

- **Allow RPM during pricing promotions for a period of up to 6 weeks:**  
An exception in Article 4 VBER combined with a clarification in the VGL may recognise instances where RPM makes sense, even during promotional campaigns of a somewhat longer duration when significant investments were necessary to prepare and launch the promotional campaigns. **A more suitable, and longer, timeframe for promotions would allow manufacturers to adequately prepare and implement promotional activities.** Given the obvious consumer benefits in the form of low prices, the VGL should not limit this exemption to franchising/similar distribution systems. The EC should clarify that RPM is also possible when the brand owner funds the promotion in full.
- **Extend the automatic exemption to an RPM scheme that prohibits retailers from reselling below cost (i.e., below their net invoice purchase price plus a reasonable profit margin)**  
Although national law may treat it as an unfair trading practice, below-cost pricing may also be part of a loss-leader policy whereby a retailer attracts customers by using certain products as baits outside the promotion campaigns negotiated with the manufacturer of these products. Retailers who sell tens of thousands of products are not concerned about the brand image of a particular product that they use as a loss leader. Once it has eroded the image of a product, the retailer can simply “switch” to another product it can use as bait.
- **Allow RPM to let manufacturers position the prices of new products in existing markets and existing products in new geographic markets:**  
In such situations, there does not seem to be any basis for the proposition that RPM may lead to a supra-competitive price for the product at stake. Accordingly, we submit that **fixed resale prices for new product launches implemented for an adequate duration (of up to six months) should meet the conditions for an exemption.**
- **Allow RPM when intra-brand competition is not a concern:**  
For example, (i) in presence of an exclusive distributor in a country, or (ii) when the reseller is more akin to a logistics provider who receives title and resells products in its name, or (iii) when the distributor wishes to rely on the manufacturer to set a competitive price for the products.
- **Allow RPM in case of a new product launches:**  
Given the significant consumer benefits of promoting a product for a short time period, **agreements on resale prices for new product launches should be block exempted and not simply covered by a clarification in the VGL.** The absence of block exemption for RPM dissuades brand owners from setting fixed retail prices for such launches, which limits the retailers’ willingness to make the investments necessary to make market entry a success. This, in turn, affects brand owners’ willingness to invest in product innovation and leads to long-term consumer harm by delaying or even preventing the entry of new products on the market. Based on the time it takes a new product to enter successfully an already competitive market, **the block exemption should apply for a period of no less than six months.** The theories of harm articulated in the VGL as regards RPM could not realistically materialise in the context of an RPM agreement of limited duration. As all parties are aware that the agreement will end after a short period, this severely restricts the expected profits from collusion. Accordingly, **the VBER should cover agreements on resale price in case of new product launches for a period of 6 months** and the VGL should clarify that **RPM agreements for product launches may exceed the period of 6 months** if such longer period is necessary (e.g., to recoup investments).

In the alternative, and at a minimum, **the VGL should clarify that fixed resale prices for product launches (§ 225 VGL) are likely to meet the requirements of Article 101(3) TFEU** and fix an “introductory period” of 6 months given the obvious consumer benefits that the introduction of new products on the market generates.

The EC should remove Footnote 59 of the VGL per which this exception is only available when “*it is not practical for a supplier to impose by contract effective promotion requirements*” because **RPM has clear efficiency benefits over contractual requirements**, which are extremely difficult to specify for each individual retailer and very costly to monitor and enforce.

The VGL should clarify that **fixed resale prices for product launches are possible in any distribution system**, including in case of selective and exclusive distribution networks, as well as for franchising.

Finally, **the VGL should clarify which criteria it considers as relevant to determine whether a product qualifies as a new product**. In particular, the VGL should state that any product that introduces substantial additional features to an existing product or requires significant investments in terms of research and development or promotion/marketing is a new product.

## NON-COMPETE OBLIGATIONS

### Question 105

**Do you have experience or knowledge of instances where it would not be appropriate to block-exempt a tacitly renewable non-compete obligation?**

**Yes** / No / No opinion

### Question 106

**Please explain and, if possible, provide concrete examples.**

Not exempting non-compete obligations with an indefinite duration or one that exceeds five years creates legal uncertainty and increases assessment costs for companies. The VBER/VGL framework should either cover these unproblematic obligations or, at the very least, provide additional guidance to clarify the practical treatment of non-compete obligations that exceed a duration of five years.

The requirement for a reasonable notice period and/or reasonable cost to benefit from the exemption is superfluous and a source of potential divergence among NCAs and national courts. It would not be appropriate to block-exempt a tacitly renewable non-compete obligation in a long-term exclusive distribution agreement where the buyer has the right to fully negotiate and terminate the contract.

## SUSTAINABILITY

### Question 107

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

**Yes / No / No opinion**

### Question 108

**Please list those situations below, give concrete examples if possible and explain why you consider that the current rules create obstacles to vertical agreements in the particular situation.**

Sustainability considerations have become an important aspect influencing consumers' buying decisions. As brand owners prioritise and implement sustainability-driven projects across the supply chain, they should be able to enforce sustainability requirements on their independent resale channels. As some sustainability measures require implementation in physical stores (e.g., offer consumers in-store recycling services), brand owners need the legal discretion to impose such requirement as part of their distribution systems.

While it may already be possible to achieve this as part of a selective or exclusive distribution agreement, it seems otherwise difficult to envisage how brand owners may enforce sustainability-driven requirements on independent resellers. Accordingly, the revised VBR/VGL framework should clarify how suppliers may implement such sustainability projects outside their selective and exclusive distribution networks.

### Question 109

**Do you see a need for specific guidance on vertical agreements that pursue sustainability objectives? If so, what type of guidance would be necessary? Please explain your reply. What particular aspects should this guidance cover?**

It would be useful to receive guidance as to whether, and to what extent, achieving sustainability objectives positively counterweighs any restrictive effect on competition in the context of an Article 101(3) analysis.

## COVID-19 IMPACT

### Question 110

**Do you have experience or knowledge regarding the impact of the Covid-19 crisis on market trends that are relevant for the revision of the VBER and Vertical Guidelines (e.g. innovation in or impacts on distribution models and strategies or on consumer behaviour)?**

**Yes / No / No opinion**

### Question 111

**Please explain your answer by reference to market trends and their relevance for specific rules in the VBER and Vertical Guidelines (please specify which ones).**

The retail sector has been going through significant changes long before the COVID-19 crisis. **The pandemic has accelerated the rapid growth of online sales and omni-channel services that had been developing over the last decade.**<sup>40</sup> This crisis has particularly affected brick-and-mortar stores and **highlighted the relevance of omni-channel networks**, as the increase in online sales did not compensate for the losses incurred by physical stores when they had to close.

Consumers more than ever embrace an omni-channel approach inclusive of both e-commerce and brick-and-mortar stores. Nevertheless, the latter need to offer a special experience and value, which requires brand owners' dedicated support and investment. **Without extra flexibility, brick-and-mortar stores may slowly disappear.**

The growth of online sales is present across different product categories, such as white goods,<sup>41</sup> fashion<sup>42</sup>, luxury products,<sup>43</sup> and fast moving consumer goods.<sup>44</sup> This trend is not new but has accelerated because of the COVID-19 crisis. In addition, **the effects on digitalisation and increased uptake of online sales caused by COVID-19 will remain** after the end of confinement measures and other restrictions imposed.<sup>45</sup>

Despite the disruption caused by the pandemic, consumers continue to be the brands' key factor in determining how they want to organise their distribution since **successful brands serve consumers on their terms**. Because of the crisis, many brand owners have had to streamline their operations and redefine their customer propositions and business models.<sup>46</sup> Those retailers and brands that are able to adapt quickly to consumer and workforce trends will more likely be able to succeed in a competitive market during times of disruption as these trends accelerate.<sup>47</sup>

The pandemic has forced consumers to have a limited shopping experience, at times reduced to e-commerce only. Nevertheless, **e-commerce cannot really replace the shopping experience in a brick-and-mortar store**, as consumers often need to touch, test and feel products.

<sup>40</sup> KPMG, 14 January 2021, "[Future of Retail, 2021](#)", and Harvard Business Review, 28 December 2020, "[What did 2020 do to retail?](#)"

<sup>41</sup> See Bain & Company, 14 December 2020, "[Covid-19 Catapults White Goods Makers into the Digital Future](#)", which notes a 10.5% annual increase of online sales for domestic appliances in 2015-2019.

<sup>42</sup> See McKinsey & Company, 1 December 2020, "[The State of Fashion 2021: In search of promise in perilous times](#)", which notes an almost doubling of digital sales in 2020 with the expectation of only a slight recalibration after the end of the pandemic (pp. 34-37).

<sup>43</sup> See Bain & Company, 10 December 2020, "[Pandemic Spurs a transformation in the luxury market](#)".

<sup>44</sup> See LENGOW, 25 June 2020, "[FMCG in the European e-commerce market](#)".

<sup>45</sup> See McKinsey & Company, "[How COVID-19 has pushed companies over the technology tipping point—and transformed business forever](#)".

<sup>46</sup> McKinsey & Company, 1 December 2020, "[The State of Fashion 2021: In search of promise in perilous times](#)".

<sup>47</sup> KPMG, 14 January 2021, "[Future of Retail, 2021](#)".

Across many sectors, direct-to-consumer (“D2C”) channels have grown in share of total sales,<sup>48</sup> as consumers want a direct connection with the brand.<sup>49</sup> **D2C has become an increasingly important channel for manufacturers along with the accelerated online sales.**<sup>50</sup> As consumers have been limited to online shopping because of lockdown restrictions, retailers with digital capabilities secured sales, whilst those without online channels truly struggled.<sup>51</sup> Even post-pandemic, **online sales will continue to be the primary driver of growth for many brands**, in line with consumer trends already visible and established before the COVID-19 crisis.<sup>52</sup>

Brick-and-mortar stores are not an autonomous channel, as they belong to an omni-channel network. Accordingly, **the trend towards omni-channel sales models has continued to be the winning strategy for brands during the pandemic.**<sup>53</sup> A successful omni-channel strategy includes a combination of flagship or mono-brand stores by the brand, multi-brand offerings by third-party retailers, an enhanced company website, direct-to-consumer channels and online retailers.<sup>54</sup>

**It is vital for brands and retailers to continue to readjust business models around remote engagements**, as the accelerated growth in digital and omni-channel adoption continues.<sup>55</sup> Whilst many physical stores will likely return to growth in the coming years, any brand that expects to drive growth through physical stores alone will face difficulties.<sup>56</sup>

As the significant growth of online sales triggered by **the COVID-19 crisis has disproportionately affected offline retailers**, physical stores more than ever continue to require investments to provide consumers with features and experiences that they cannot get online, especially if the trend of local shopping is indeed to remain post-pandemic.<sup>57</sup> Neighbourhood doors continue to attract consumers to support local products,<sup>58</sup> and consumers are shopping mindfully, cost-consciously and locally, with an emphasis on sustainability in brands’ value chains.<sup>59</sup> **Brands need to carry on reinventing themselves and designing retail networks around the consumer, location and purpose of stores.**

Besides, AIM’s members have witnessed that **the COVID-19 crisis has also accelerated the trend of unauthorised sales of (luxury) products** (*i.e.*, outside authorised distribution networks), which stresses the need for an adequate and harmonised legal framework within the VBER.

The EC published a 2020 Temporary Framework Communication<sup>60</sup> that provides antitrust guidance on how companies may cooperate to respond to urgent situations related to the current COVID-19 outbreak, including as regards the supply of “essential products and services”, and many NCAs issued guidelines on

<sup>48</sup> Bain & Company, 14 December 2020, [“Covid-19 catapults white good makers into the digital future”](#).

<sup>49</sup> McKinsey & Company, 25 January 2021, [“Sporting Goods 2021, The Next Normal for an Industry in Flux”](#).

<sup>50</sup> KPMG, 14 January 2021, [“Future of Retail, 2021”](#).

<sup>51</sup> KPMG, 14 January 2021, [“Future of Retail, 2021”](#).

<sup>52</sup> McKinsey & Company, 1 December 2020, [“The State of Fashion 2021: In search of promise in perilous times”](#).

<sup>53</sup> McKinsey & Company, 1 December 2020, [“The State of Fashion 2021: In search of promise in perilous times”](#).

<sup>54</sup> Bain & Company, 14 December 2020, [“Covid-19 catapults white good makers into the digital future”](#).

<sup>55</sup> Accenture, 13 August 2020, [“COVID-19: New habits are here to stay for retail consumers”](#).

<sup>56</sup> KPMG, 14 January 2021, [“Future of Retail, 2021”](#).

<sup>57</sup> Bain & Company, 10 December 2020, [“Pandemic Spurs a transformation in the luxury market”](#).

<sup>58</sup> Accenture, 13 August 2020, [“COVID-19: New habits are here to stay for retail consumers”](#).

<sup>59</sup> Accenture, 13 August 2020, [“COVID-19: New habits are here to stay for retail consumers”](#) and McKinsey & Company, 1 December 2020, [“The State of Fashion 2021: In search of promise in perilous times”](#).

<sup>60</sup> European Commission, 8 April 2020, [“Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak”](#)

business cooperation agreements during the COVID-19 pandemic. It would certainly be useful if the EC enshrined **guidelines on EU-wide *force majeure* situations** as part of the revised VBER/VGL framework.

## About AIM

AIM (Association des Industries de Marque) is the European Brands Association, which represents manufacturers of branded consumer goods in Europe on key issues that affect their ability to design, distribute and market their brands.

AIM comprises 2500 businesses ranging from SMEs to multinationals, directly or indirectly through its corporate and national association members. Our members are united in their purpose to build strong, evocative brands, placing the consumer at the heart of everything they do.

AIM's mission is to create for brands an environment of fair and vigorous competition, fostering innovation and guaranteeing maximum value to consumers now and for generations to come. Building sustainable and trusted brands drives the investment, creativity and innovation needed to meet and exceed consumer expectations.

### AIM's corporate members

AB InBev • Arla Foods • Bacardi Limited • Barilla • Beiersdorf • Bel Group • BIC • Chanel • Coca-Cola • Colgate-Palmolive • Coty • Danone • Diageo • Dr. Oetker • Essity • Estée Lauder • Ferrero • Freudenberg/Vileda • FrieslandCampina • General Mills • GlaxoSmithKline • Heineken • Henkel • JDE • Johnson & Johnson • Kellogg • KraftHeinz • LEGO • Levi Strauss • Lindt & Sprüngli • L'Oréal • LVMH • Mars • McCain Foods • McCormick • Mondelēz • Nestlé • Nike • Nomad Foods Europe • Orkla • PepsiCo • Pernod Ricard • Procter & Gamble • Puma • RB • Royal Philips • Sanofi • Savencia Fromage & Dairy • SC Johnson • Signify • Unilever

### AIM's national association members

Austria Markenartikelverband • Belgilux BABM • Czech Republic CSZV • Denmark MLDK • Finland FFDIF • France ILEC • Germany Markenverband • Hungary Márkás Termékeket Gyártók Magyarországi Egyesülete • Ireland Food & Drink Federation • Italy Centromarca • Netherlands FNLI • Norway DLF • Portugal Centromarca • Russia RusBrand • Spain Promarca • Slovakia SZZV • Sweden DLF • Switzerland Promarca • United Kingdom British Brands Group

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