

CONSULTATION RESPONSE – ANNEX

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

26 March 2021

OTHER

Question 112

Please feel free to upload a concise document, such as a position paper, explaining your views in more detail or including additional information and data. Please note that the uploaded document will be published alongside your response to the questionnaire which is the essential input to this open public consultation. The document is an optional complement and serves as additional background reading to **better understand your position.**

Question 113

Do you have any further comments on this initiative on aspects not covered by the previous questions?

The brand ecosystem and current market realities

When the EC revised the VBER ten years ago, it looked *“to take into account the development of the internet as a force for online sales and for cross-border commerce with the aim of increasing consumer choice and price competition”*. Since then, **the market paradigm has profoundly changed: consumers enjoy a brand ecosystem experience that is vastly different**, as products and services reach them in increasingly diverse and rapidly evolving ways, depending on how best to deliver the product features and experience. Different channels are progressively complementary, and brands strive to deliver in one seamless environment the necessary elements to meet and, indeed, exceed consumer expectations, needs, desires and values.

This transformation has had a positive impact for consumers with the emergence of new, smart, personalised means to serve them, whilst the quality of the experience offered to them has consistently increased. It has also changed the overall retail landscape in Europe. The retail network is the route to consumers, whether through brick-and-mortar physical stores, supermarkets, pharmacies, retail outlets, platforms, online marketplaces, apps or connected devices, regardless of whether they engage with our brands online, offline or both. **This omni-channel world is today’s reality for consumers** who have access to endless “digital shelves” through sales channels that open up markets in a very different way, but who also engage in the retail experience in diverse ways. The offline retail world has experienced dramatic changes and physical retailers have had to adapt to this new reality.

Brands’ primary goal is to connect to consumers through these transforming environments and ensure that they effectively convey their identity and the quality of their products, whilst remaining competitive. The intrinsic dedication of brands to innovation and value creation is core to this identity as they constantly strive **to create, craft and develop differentiated products to engage consumers, reflecting their aspirations and addressing their needs with the most effective combination of elements**, including design, innovation, trends, beliefs, traditions, functionality, durability, precision, craftsmanship and competitiveness.

In addition, the FMCG sector has undergone an essential change over the past 10 years with the **evolution of channel economics** between the various market players – **to the benefit of both big retailers, whether online or offline, and digital platforms**. An individual retailer may today represent **20% or more** of a manufacturer’s turnover, whilst this manufacturer’s products may represent **at most 1%-2%** of the retailer’s

turnover.¹ Strong retailers may act as a bottleneck between suppliers in their pursuit to reach consumers. They may have significant market power (retailer bargaining power), irrespective of market share, and control the suppliers' access to the shelves and thus to the consumers. Whilst at first sight this may appear to be a simple shift of contractual power affecting only the manufacturers of FMCG products, this change has also resulted in **detrimental results for consumers** through reduced access to innovative products, potential foreclosure of independent brands and ultimately less choice.

As **strong retailers are essentially free to decide what products consumers may see and purchase**, including their private labels and/or branded products, independent brands depend on them to access consumers. This market power raises a number of issues when it leads to certain, often combined, practices such as margin guarantees / margin compensation demands coupled with threats of de-listing suppliers in case they refuse to cooperate.

These arise when powerful retailers may pressure suppliers to compensate them for margin losses that result from their own pricing policies (quite often following price wars between retailers). The retailers' market power and the threat of de-listing are the only reasons why such demands are successful in practice, and can lead to the foreclosure of suppliers' brands from access to consumers.

Margin compensation demands coupled with threats of de-listings show that powerful retailers try to escape the consequences of their behaviour and avoid effective competition by making the suppliers *de facto* responsible for their margin and by transferring the costs of competition between retailers to their suppliers, of all sizes.

This practice stands in clear contradiction to the general principle of EU competition law per which **each economic operator is responsible for its own margin**. The rules on RPM reflect this principle, although they also contradict it: if the supplier has to accept the retailer's freedom to set consumer prices, the retailer should not be entitled to claim compensation payments whenever it does not meet its margin expectations that depend on its own pricing policy. The principles of economic freedom of contract and pricing guaranteed by EU competition law must come along with economic responsibility.

The current VBER/VGL framework assumes that suppliers hold a certain control over markets and retailers. This does no longer reflect- today's market reality where the vertical supplier-retailer relationship is often characterised by the retailer's control over the supplier, especially in the FMCG sector.

Accordingly, and to ensure that it is "fitter for purpose" and thereby increasing consumers' benefits, the EC should revise the VBER/VGL framework to **establish a more even level-playing field** between branded goods manufacturers and retailers. **Manufacturers' investments into the value of brands need a more effective legal protection**. While the current VBER mostly contemplates potential restrictive effects resulting from manufacturers' market power, its revised scope should **encompass powerful retailers' market behaviour that one may observe today**.

In particular, **the revised VBER/VGL framework should clarify that, under certain conditions, margin compensation requests coupled with de-listing threats are considered as anti-competitive**. This may also include allowing suppliers to impose RPM to defend their brands against, e.g., sales at loss strategies of

¹ See, for example, Autorité de la concurrence, 31 March 2015, [Avis N° 15-A-06, §253](#) : "The data collected... reveal an **imbalance of forces in this sector**: the share of the main retailers, or retail alliances, in the turnover of the suppliers interviewed (...) would be on average around 20%."

retailers impacting negatively the consumer perception of the value of the brand. Such defence would at least increase efficiencies under Article 101(3) TFEU.

The dual role of retailers

The rapid growth of online platforms has led to the concern that they may distort competition through the dual role they play. In our experience, this phenomenon is not new in the offline retail world where large retailers/buyers have played a similar “dual role” for years, especially in the FMCG sector. The private-label market model for distributors has spread substantially in the past decade, both online and offline, with some private label distributors capturing up to 50 percent market shares by volume.² As a result, **branded products now compete in retail spaces fully controlled by distributors who develop private label/retail brands.**

In the FMCG sector, these distributors have access to commercially sensitive information of innovative brands and are in a position to misuse it for their own benefit. Whether this may have an impact on consumer welfare in the form of consumer choice is up for debate. Generally, the perception of the relationship between consumer choice and innovation is positive, as indeed innovation creates consumer welfare through bringing a wider, more diverse and innovative range of products to market. Consequently, **a negative impact on innovation will lead to a negative impact on consumer choice.** The EC’s own study “The Economic Impact of Modern Retail on Choice and innovation in the EU Food Sector”³ found a statistically and economically significant, progressive correlation between private label growth and a decline in innovation by brands.

Research in the Spanish market by Kantar World Panel confirmed the existence of a risk threshold or tipping point above which private label market shares in a product category restrict innovation. The benchmark analysis of 104 categories in the period 2011-2013 had Kantar conclude that **a private label market share above 35% leads to less innovation and growth in the market.**

The EC has focused too much on promoting intra-brand competition, which may have had a negative impact on innovation. § 102 VGL recognises that inter-brand competition is more important than intra-brand competition from a consumer welfare standpoint. Promoting intra-brand competition may undermine a brand’s competitiveness (e.g., capacity to innovate) and, therefore, inter-brand competition. This is particularly so as brands compete with both retailers and marketplaces selling their private label brands as part of their dual role.

The VGL specifically address two buyer-driven practices (category management and upfront access fees) but under the assumption that these practices are led by leading independent brands (and not by retailers) in order to exclude smaller independent brands. Given the market developments from the past ten years, **the revised VBER and VGL should reflect this new market reality: the dual role of a distributor (whether online or offline) places it in a unique position from a competition standpoint.**

Article 2(4) VBER starts by excluding “*agreements entered into between competing undertakings*” from the application of the VBER, but goes on to include vertical relationships as long as they are non-reciprocal. The EC should confirm that the last sentence of § 27 VGL, read together with § 28 VGL, simply clarifies that **the VBER is applicable to agreements between a manufacturer and a retailer who sells private label/retailer brands.** This makes sense in vertical relationships and should remain that way.

The EC should bear in mind that **manufacturers of branded goods face fierce inter-brand competition downstream at the retail level from private label goods in situations where those retailers are in a “judge**

² Per PLMA/Nielsen, “[Private Label Today](#)”, private label market shares in Europe went from a mean average of 33.4% in 2012 to 35.8% in 2019 in a group of 15 EU countries.

³ European Commission, 1 February 2016, “[The economic impact of moder retail on choice and innovation in the EU food sector \(Final report\)](#)”

and jury” position. They can determine the conditions under which they will sell branded goods, which may result in free-riding issues.

The need for flexibility in establishing distribution networks and using certain business models

We welcome the EC’s initiative to update the VBER/VGL framework to take account of the recent changes to the retail environment and grant flexibility to market operators so that they can better **adapt to future changes and challenges and provide consumers with a seamless omni-channel experience.**

Indeed, **brand owners need flexibility to design and adapt their distribution systems to changes** such as the rise of omni-channel distribution, the growth of online retail, the evolution of consumer expectations or the impact of the COVID-19 crisis on consumption patterns and habits. The revised VBER/VGL framework should therefore reflect this need and provide **flexibility for all relevant distribution methods.**

Selective distribution systems

We endorse the EC’s proposals to **ensure a more effective protection of selective distribution systems.** Selective distribution remains a very important tool for many brand owners to protect their brand image, ensure similar levels of quality and customer service across a retail network and avoid free riding by low-service or no-service distributors.

Selective distribution is equally relevant and important to consumers who demand a seamless omni-channel O2O brand and shopping experience across all channels. **Selective distribution helps incentivise retailers to invest and reduces the risk of free riding on brand owners’ and retailers’ investments,** which benefits consumers, brand owners and retailers alike by preserving the quality of products, ensuring their optimal use and preventing counterfeiting.

In order to offer consumers the quality experience they expect when buying branded products, brand owners strive to ensure that consumers get to enjoy the creativity, innovation and *savoir-faire* behind their products in a quality environment that allows for a personalised and tailor-made experience. This is especially true for luxury products. Consistently maintaining the excellence of customer experience and retail environment requires brand owners to **maintain control over their value chains,** from the production to the retail experience offered to customers. **Selective distribution has enabled AIM members to distribute their products in an environment that is compatible with the image of their products.** The VBER/VGL framework has enabled them to **retain control over the environment in which retailers sell their products** and to provide consumers with the retail experience that they expect.

Accordingly, we believe that **the selective distribution rules in the VBER and the VGL are effective in practice, provide legal certainty, and should therefore subsist.** Any update considered should aim to reflect the evolving market dynamics of the omni-channel model. In the omni-channel environment, it is key for brands to seek a high level of qualitative standards for both online and offline environments, although these criteria need not necessarily be identical given the peculiarities intrinsic to each channel. This is essential to ensure the excellence of the consumer experience both in shops and online, whilst allowing for more flexibility and a case-by-case approach in the definition and determination of the qualitative criteria appropriate to the different channels.

The VBER and VGL should better emphasise that **inter-brand and intra-brand competition in a selective distribution model does not only focus on price** but also relies on other factors equally relevant and essential for the enhancement of consumers’ shopping experience, including, *inter alia*, **quality, innovation, and customer service.**

In order to ensure legal certainty for market players and avoid deviating interpretations of the VBER and VGL by national authorities, we recommend **integrating existing EU case law on selective distribution** (including but not limited to the *Coty*⁴ and *Auto 24*⁵ cases).

The legacy of the *Coty* case is particularly important, as it was the occasion for the CJEU to confirm the possibility for brand owners to use “marketplace bans” to prevent their authorised resellers from selling on third-party marketplaces. The CJEU acknowledged that **the preservation of the prestigious image of a good justified the restriction imposed by the brand owner on authorised retailers to select – in a discernible manner – third-party platforms for the sale of such goods based on qualitative criteria**, provided these restrictions are objective, uniform and applied without discrimination to all retailers.

Accordingly, we submit that **the VBER/VGL framework should incorporate the clarification and resulting added legal security that the *Coty* judgment brought about, which covers all products and not only luxury products, as the EC recognised in its April 2018 policy brief.**⁶ Indeed, marketplace bans present several benefits for brands and consumers alike.

- First, they **allow brands to safeguard their image and ensure the high-quality service** they wish to offer to consumers. For brand owners, it is of key importance to establish an environment supported by significant investments to create a unique shopping experience. When their authorised distributors sell on online marketplaces, brands have no direct contractual relationship with online marketplaces and no ability to enforce their qualitative criteria defined and agreed with their distributors.
- Second, they **protect consumers against the dangers of sales outside authorised networks and counterfeiting**. One of the main objectives of selective distribution is to guarantee consumers the authenticity of the products they are offered. Therefore, one key qualitative criterion often imposed upon authorised resellers is the complete absence of counterfeited products, which may not only cause severe damages to a brand image but also directly put consumers’ health or security at risk.
- Finally, they are sometimes necessary to **comply with national legislation**. In France, for example, suppliers have an obligation to police their own network. As a result, authorised distributors can hold suppliers liable for failing to prevent sales outside the selective distribution network, including via third-party marketplaces.

The current VBER offers essential agility and flexibility by exempting quantitative and qualitative selective distribution regardless of the nature of both the products and selection criteria, which. A stricter approach may well make selective distribution unworkable in practice and/or undermine its benefits. **Selective distribution criteria are essential to build and maintain brand value**. As key partners for the promotion of high-quality service, range and presentational offering of a brand’s products, retailers need incentives to take into account the broader impact of their actions in promoting the brand.

Whilst overall the rules under the current framework are clear and functional, we welcome the EC’s intention **to clarify or simplify them where necessary, fill in gaps, and foster a more harmonised interpretation and enforcement**. Indeed, brand owners have been struggling to maintain consistent and workable selective distribution systems because some national authorities and courts have subjected them to a **level of scrutiny at odds with the EU regulatory framework**.

Whereas consumer demands and changing market circumstances require flexibility, including the capacity to adapt and tailor selective distribution networks, some national authorities have conveyed the ungrounded sentiment that selective distribution systems would be “anti-e-commerce” or “a cover for RPM”. As selective

⁴ Judgment of 6 December 2017, *Coty Germany GmbH v Parfümerie Akzente GmbH*, C-230/16, EU:C:2017:941.

⁵ Judgment of 14 June 2012, *Auto 24 v Jaguar Land Rover France*, C-158/11, ECLI:EU:C:2012:351.

⁶ European Commission, Competition policy brief, April 2018, “[EU competition rules and marketplace bans: Where do we stand after the *Coty* judgment?](#)”, p. 4.

distribution typically covers several EU Member States, **such divergent approach across NCAs and national courts has a negative impact** – not only on the selective distribution system in the respective jurisdiction(s), but also across the entire selective distribution network.

Accordingly, the EC should consider using its powers under **Article 11 and Article 16 of Regulation 1/2003** to ensure **a more consistent enforcement of EU competition law rules throughout the EU**, as necessary and appropriate. The EC should also honour its commitment made in the final report on the e-commerce sector inquiry, where it noted that it would do so by **broadening the dialogue on e-commerce-related enforcement within the European Competition Network** (“ECN”).⁷ The current divergences erode legal certainty and act as concrete obstacles for the implementation of consistent selective distribution networks across Europe.

The VGL should **grant brand owners more flexibility in the design of selective distribution systems and allow them operate these in accordance with their brand positions**. In addition to our responses to Questions 31 to 54, we submit the following:

- **Article 1(e) VBER:** The definition of “selective distribution systems” is clear and provides a good level of legal certainty. Following the judgement in *Auto 24*,⁸ this definition should **explicitly mention that manufacturers are under no obligation to publish their selective distribution system criteria** (whether qualitative or quantitative in nature) **or to provide them to prospect retailers interested in entering the selective distribution system**. Doing so would provide additional legal certainty by allowing brand owners to protect their criteria, which often are business secrets, from public disclosure.
- **Article 5(1)(c) VBER and §182 VGL:** Excluding from the VBER an obligation prohibiting authorised dealers to sell the brands of specific competitors is **artificial** because this is hardly ever used in practice. Regardless, the EC should consider covering this restriction in the block exemption.
- **§175 VGL:** The VGL should clarify that **brand owners can tailor the application of their selective criteria to the local environments where they operate their selective distribution systems** and that **they are under no obligation to apply identical criteria across the EEA**. Applying the same terms to different territories is inherently difficult, as each will vary in terms of retailers’ and customers’ financial abilities, economy, legislation and overall market development. For the same reasons, the VGL should also provide **more flexibility in relation to limited-stock or end-of-season products**. Before a new product launch, a brand owner typically looks to clear out its stock: when that stock does not contain sufficient products for all authorised dealers, it should be free to select the ones to which it may sell these products without falling within the scope of Article 101(1) TFEU.
- **§176 VGL:** National authorities and courts took this provision out of context to challenge whether certain products “deserve” a selective distribution system, even if those agreements are covered by the VBER. The EC should remove this paragraph and the VGL should simply state that **it is permissible to use a selective distribution system** (including one based on qualitative criteria only) **for any products** (and not just for those whose characteristics would justify it).

Finally, the revised VGL should explicitly **allow a supplier to require its authorised dealers and/or any other third party platform/marketplace to assist in the legitimate enforcement of its selective distribution system**. Beyond refraining from selling to or buying from unauthorised resellers, authorised resellers could then assist by reporting to the supplier any unauthorised sales of which they become aware. The VGL should also clarify that **a supplier may require its authorised resellers who operate on a marketplace to block the sales of selectively distributed products by unauthorised resellers on that marketplace**.

⁷ European Commission, 10 May 2017, [Final report on the e-commerce Sector Inquiry](#), § 75.

⁸ Judgment of 14 June 2012, [Auto 24 v Jaquar Land Rover France](#), C-158/11, ECLI:EU:C:2012:351.

Fulfilment services

Several sectors have seen an increase in the use of intermediaries who adhere to the commercial conditions agreed beforehand between their supplier and a particular customer (whether a retailer or a consumer) and focus solely on executing that agreement (*e.g.*, by taking over logistical functions). Both agreements between the supplier and the intermediary and between the intermediary and the customer are “vertical agreements” within the meaning of Article 1(1)(a) VBER. In these situations, the intermediary does not have an influence on the commercial conditions of the agreement concerned and therefore does not act as an independent distributor. At the same time, the intermediary may not fulfil the requirements of the agency exception either, for example because it does not “negotiate and/or conclude contracts” on behalf of the supplier (§12 VGL), nor does it acquire the ownership of the contract goods intended for delivery (§16 VGL).

In other words, **the current VBER/VGL framework does not provide for an adequate assessment of the role of such intermediaries and the respective fulfilment services that they provide.** This has led brand owners to adopt artificial, economically sub-optimal distribution structures to ensure compliance with the VBER/VGL framework. Accordingly, we invite the EC to **reflect the economic reality of fulfilment services** and to **consider extending the block exemption to cover the use of intermediaries who adhere to the commercial conditions** (notably the price and end-customer) **agreed beforehand between their supplier and a particular customer and focus solely on the execution/fulfilment of that agreement.**

These are two relevant examples of fulfilment contracts:

- **Fulfilment wholesalers deliver products to retailers with whom the brand owner has directly negotiated the price for its products.** Such retailers are often the most important resellers of brand owners’ products. Brand owners wish to compensate them for the specific investments they make in promoting the brand owners’ products. Yet the brand owners do not sell these products directly to the resellers but instead rely on “fulfilment wholesalers”, mainly for logistical reasons. In some cases, the retailer rather than the supplier will choose the “fulfilment wholesaler”, particularly when the retailer sources products from a variety of sources, does not want to keep large quantities of stock or seeks to improve transport efficiencies. In such cases, the wholesaler who fulfils the sale, whilst formally taking title and/or risks, has not incurred costs or made investments in its relationship with that retailer. In certain cases, the brand owner covers the realisation risk (*i.e.*, the risk that the retailer would not pay the full price of the delivered products). **Yet the VGL does not recognise that a “fulfilment wholesaler” with title on the products may qualify as a genuine agent.**
- **Brands frequently sell to consumers online via their own branded websites.** Certain third-party online intermediaries provide technological solutions for the online sale and delivery of products sold by brand owners via their own websites to consumers. The consumer-purchasing journey consists of an online acquisition of the products directly from the brand owner’s website. A brand owner may use third-party intermediaries to support (i) the operation of its own website, (ii) the technological functions of the platform, including the actual online purchasing mechanism, management of payment solutions, *etc.*, or (iii) the delivery of the product to consumers. The intermediary provides the services “behind the scene” while the brand owner’s website remains the interface underpinning the consumer-purchasing journey. The intermediary does not itself compete for customers, as the business model of the intermediary is to support the brand owner’s own marketing and delivery activities. However, title to the products passes to the intermediary very shortly before the consumer has submitted its order online, in many cases for tax reasons or because of consumer laws.

The current VBER/VGL framework does not correctly reflect the economic reality of these intermediaries. The intermediary’s execution of the agreement per the conditions upon which the supplier and a particular customer agreed should not be considered a restriction of competition within the meaning of Article 101(1) TFEU since these conditions are no longer subject to competition once the agreement has been concluded. This type of arrangement is clearly pro-competitive, as it allows brand owners to expand into new markets.

Accordingly, the EC should **extend the availability of the block exemption to fulfilment services** by allowing wholesalers/distributors and certain online intermediaries to perform the services for which a supplier contracted with them, including the delivery of products to the retailer or end-customer at a pre-agreed price.

The dual role of intermediaries

AIM welcomes the EC's initiative to update the VBER and VGL to reflect the need for more flexibility in the design of distribution systems. Against this background, the **rigid approach** expressed by the EC in its Working Paper on the "dual role" of agents is surprising.⁹ The overly formalistic analysis framework set out in the Working Paper fails to recognise the **practical complexity surrounding the relevant dual role scenarios**.

As **the costs incurred are far greater for a distribution model than for an agency model**, it seems unreasonable to require that all relevant risks linked to the sale of goods should be borne by the principal, including for products sold outside an agency agreement when these are in the same market as other products sold by the same party under an agency agreement.

MRP, RRP, MAP and discussions on prices

As explained above, retailers often demand ex-ante guaranteed margins from manufacturers (or unilaterally impose ex-post compensation charges to meet their margin requirements) and often make such demands **subject to threats of delisting or other retaliating measures**. Essentially "reverse" RPM may arise because of such pressures and enforcement actions should consider these aspects and avoid focusing solely on manufacturers.

§ 226 VGL provides that a maximum fixed price is permissible "provided it does not amount to a minimum or fixed sale price as a result of pressure from, or incentives offered by, any of the parties." **The EC should clarify that, absent such pressure or incentives, maximum resale prices cannot amount to RPM, notwithstanding market power considerations**, which would increase legal certainty for specific distribution schemes currently underused because of possible restrictive interpretations.

Manufacturers need to communicate to retailers about their resale price recommendations. Resale data is critical for manufacturers to define their future strategy: as they need to understand how the market responds to their price recommendations, they seek information from resellers on actual resale prices. The EC should not consider these communications with retailers as an indication of RPM. **Monitoring of retail prices is part of the normal commercial activity of well-managed companies and it should not pose specific concerns unless retaliation (or threats thereof) have taken place.**

The VGL suggest that price recommendations may be problematic if "*most or all of the resellers*" follow them. Yet the fact that distributors follow recommendations should not give rise to concerns absent threats or other measures encouraging compliance with them. The VGL also indicate that a supplier with a strong market position should be careful before proposing "*price recommendations*" to its customers. We submit that **the market position of a supplier should not be relevant in this context because the key criterion to determine whether a supplier is involved in illegal RPM is whether it has come to an agreement with a retailer on a particular minimum or fixed price level**. The current approach creates legal uncertainty for manufacturers, especially for those holding a market share higher than 30% products.

Finally, we would also welcome **guidance on Minimum Advertised Price (MAP)**, as some of AIM members would like to limit the advertising of prices that they believe does not support the level of service that consumers should enjoy. MAP-policy would reinforce the selective distribution system and benefit

⁹ European Commission's working paper, 5 February 2021, "[Distributors that also act as agents for certain products for the same supplier](#)"

consumers by enhancing the level of service provided, as it would prevent discounting retailers from free riding on retailers who furnish the appropriate level of service and then capture some of the increased demand those services generate. The absence of MAP policies may also damage the image of brands as it contributes to creating a perception among consumers that the price of products is not right.

Enforcement of the VBER/VGL framework at national level

Based on our experience over the past ten years, **the differences in application and enforcement of the VBER at national level has become an area of increasing concern**. The non-uniform, fragmented approach across the continent prevents businesses from operating in a reliable legal environment. **The lack of uniform interpretation of the VBER and VGL is particularly significant in the digital space**, as Member States have applied these rules in very different ways, or sometimes even seem to have ignored them and created new ones at odds with them. In a fast-moving digital environment, this has led our brands to remain cautious, hence less innovative in the way they present their products to customers.

We therefore recommend that the EC be **more pro-active in its role as overseer and coordinator of competition law enforcement within the ECN**. The EC should maintain a dialogue with the NCAs within the ECN while strengthening its efforts to ensure a consistent application of EU competition rules on vertical restraints. In addition, **the EC should make more frequent use of its existing powers under Regulation 1/2003** (e.g., by submitting amicus curiae briefs before national courts under Article 15(3), carefully reviewing NCA decisions under Article 11(4), or removing the competence of NCAs to apply Article 101 TFEU in a specific case under Article 11(6)). This would further **ensure that the VBER and VGL are interpreted uniformly across the Single Market and provide a consistent approach** (both on restrictions and on practices not considered as harmful) across the EU and national levels, thereby greatly enhancing legal certainty.

Market share thresholds

The VBER relies on a safe-harbour mechanism according to which, in the absence of hardcore restrictions, agreements concluded by companies with market shares below 30% do benefit from the applicability of the block exemption. **This framework creates a good level of legal certainty for the assessment of vertical agreements**. We support the presumption of legality provided by the VBER and is in favour of maintaining the status quo as far as the market share thresholds are concerned.

In our view, **there are even situations in which supplier market shares in excess of 30% should not deprive these suppliers from the benefit of the VBER**. Whilst companies should conduct self-assessment of their vertical agreements if these do not automatically benefit from the application of the VBER, such self-assessment remains challenging and is subject to high evidentiary standards that are virtually impossible to meet. In addition to advocating at the very least the status quo regarding the current market share thresholds, we recommend that the EC **consider options to increase legal certainty for the assessment of such agreements**. In particular, **vertical agreements entered into by companies whose market shares range between 30% and 40% and that do not contain hardcore restrictions deserve more comfort**. In the absence of hardcore restrictions, it is unclear why such agreements should not also benefit from an automatic exemption. For instance, the VGL could specify that anticompetitive effects are unlikely to arise from such agreements.

Agency and fulfilment model

We submit that the scope of the agency model should be more flexible and capture fulfilment partners. Manufacturers tend to negotiate the conditions of business transactions directly with end customers. In many cases, end customers initiate negotiations by way of a formalised private tender procedure or request for quotation sent to several manufacturers. Owing to objective economic reasons, an independent third-party distributor becomes involved, primarily for logistic reasons. The distributor buys the products from the manufacturer as an independent contractor and resells them to the end customer in its own name and for

its own account. The VGL should clarify that, **in situations of existing preceding competition between a manufacturer and an end customer, the former might benefit from enhanced flexibility regarding the agreements that they can establish regarding the transfer of goods to the latter.**

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

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