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CONSULTATION RESPONSE

Response to the public consultation on the draft revised Regulation on vertical agreements and vertical guidelines

17 September 2021

1. Introduction

1.1. AIM members (we) welcome the opportunity to comment on the drafts of the revised Vertical Block Exemption Regulation (draft VBER) and Vertical Guidelines (draft VGL) published by the European Commission (Commission) on 9 July 2021. The draft VBER and VGL bring a series of much-needed changes, improvements and clarifications to the rules governing vertical agreements and the distribution of goods in Europe. The market has changed significantly since the rules were last revised in 2010 and it is critical that the new competition framework be "fit-for-purpose" in an omnichannel world with more interactive and highly engaged consumers.

1.2. Overall, the draft VBER and VGL reflect the issues raised by stakeholders throughout the evaluation and impact assessment phases. However, we are strongly concerned by the proposed modification of the rules relating to dual distribution, which we believe could single-handedly offset the benefits of the VBER and VGL. In particular, we believe that the introduction of a new combined threshold to qualify for the dual distribution exemption would generate much legal uncertainty and seriously undermine the benefits of the exemption.

2. Dual distribution

2.1. We have strong reservations about the proposed reform of dual distribution, which would result in reduced consumer choice, greater legal uncertainty for business, and less innovative and competitive European markets.

2.2. Agility and flexibility to respond to consumer expectations and needs in today's markets are key. Sharing consumer insights, knowledge and expertise is critical to providing this response, which is why the pro-competitive dynamic of dual distribution has become a fundamental pillar of how goods are distributed in the EU.

2.3. Dual distribution, where a supplier sells its products to consumers both directly and through independent resellers, increases both intra-brand and inter-brand competition at the retail level, but also consumer choice to buy online or offline, price transparency, the number of points of sale, and ultimately the number of jobs involved in serving consumers across a broad number of channels. Dual distribution also enables the creation of multi-brand stores where consumers can compare and choose between competing products in a single retail space, which further increases inter-brand competition.

2.4. Since the end of 2018, stakeholders have been given several opportunities to have their say in the revision process of the VBER and VGL. The alleged issue of dual distribution only came up during the final public consultation of the impact assessment phase, where very few respondents advocated for a change in dual distribution rules. In its summary report, the Commission also concluded that "*respondents provided mixed feedback on whether they have experience/knowledge of situations of dual distribution currently covered by the exception that may raise horizontal competition concerns*".

2.5. In addition, neither the Commission's economic study nor the expert report address the issue of dual distribution or present any evidence of horizontal issues raised by dual distribution. It is therefore surprising to see that the Commission decided to include this reform in the draft VBER and VGL. We note that the UK CMA, having also assessed this issue, concluded that "[b]*usinesses of all sizes and in all sectors commonly operate a dual distribution model (particularly given the growth in online sales) with significant benefits to direct sellers, retailers and consumers (e.g. increased market penetration for direct sellers and retailers, increased choice for consumers, better adaptation to the market's needs, and innovation in distribution models)*".[1]

[1] See paragraph 3.16(a) of the UK Consultation paper, available here.

Exchanging information in the context of a dual distribution relationship is legitimate and necessary because…

- ***… it provides benefits to consumers***:

2.6. Exchanging information to enhance the consumer experience and deliver more value for them underpins the dual distribution approach. Consumer insights allow a supplier to better anticipate and react to market changes, which is essential with respect to the parties' respective investments and logistical constraints (*i.e.*, stocks, supplies, supply chain processes). Retailers must have in-depth knowledge of the products that they offer, and brand owners must be able to check that they fulfil the qualitative criteria necessary to provide a high-quality consumer experience.

2.7. Consumer behaviour and consumer expectations change constantly, and brands need to be able to respond and adjust accordingly. Brands look to optimally serve consumers with the products and services they desire, making them available however (online and offline), wherever (through own retail and independent retail and through own or independent distributors) and whenever consumers want them (at speed).

2.8. To optimise their partnership, a supplier and a distributor also need to exchange data about product performance and upcoming promotion campaigns or product launches. For example, when a new product gets launched, the supplier typically needs to share strategically sensitive information in a detailed way with its distributor for the launch to prove successful. More generally, manufacturers need to exchange information with their distributors to set adequate sales targets or to gain a quick understanding of consumer preferences in relation to their products.

2.9. "Selling blindly" to a large part of the market where access to certain data would be limited or impossible would impact manufacturers' ability to respond to changes in consumer preferences.

- ***… it is necessary to properly operate the supplier-reseller partnership***:

2.10. When exchanged between a supplier and its reseller in the frame of a dual distribution model, information is innocuous and pro-competitive since the parties are partners that work together to maximise the sale of the same products, they do not compete for the sale of competing products – contrary to retailers in a dual role that sell both their supplier's products and their own competing private label products. It is all the more justified that the general 30% market share threshold continues to apply to dual distribution as §85 of the draft VGL does not consider retailers that sell their own private label goods not manufactured by them as competitors of their suppliers of branded goods.

2.11. Getting less information on consumer preferences and product performance that typically feed into product development and improve the overall efficiency of the supply and distribution chain would also impact the production process, resulting in reduced efficiencies for many general operations, distribution and supply chain processes.

2.12. If implemented, the proposed reform would, inter alia, involve the internal reorganisation necessary to ensure that information streams are separate, as certain functions would need to be separated, which goes against the logic of the definition of a single undertaking as confirmed in Article 1(2) of the draft VBER and is often impossible to achieve for small companies or local subsidiaries of large companies with only few employees and/or limited means.

2.13. In practice, this may necessitate to set up new business and IT firewalls, hire more employees, reorganise internal committees where retail and wholesale operations would have to be separated, *etc.*

2.14. In sum, removing the efficiencies and legal certainty conferred by the availability of the block exemption would generate significant additional unjustified costs for suppliers and reduce both competition and consumer choice.

- ***… it is particularly essential in certain contexts***:

2.15. The fundamental difference between a supplier-reseller relation in the dual distribution model and the relation among reseller-reseller horizontal competitors commands that information sharing be treated differently, depending on the context.

2.15.1. In the context of selective distribution (but not exclusively), a minimum level of information exchange is required, as the reseller agrees to invest resources in order to fulfil the supplier's qualitative criteria, mainly related to the quality of the retail environment and customer experience. To maintain the aura of prestige or attractiveness of its products and to provide customers with a coherent retail experience across the suppliers' various sales channels and retailer, the supplier generally trains the reseller's retail staff and share all relevant information about the product needed to guarantee the excellence of the customer experience (both pre- and after-sale). The exchange of data between a supplier and its reseller may also help identify grey market players that pretend to act as genuine consumers and make repetitive purchases from authorised points of sales or websites for the purpose of reselling the products outside selective distribution networks.

2.15.2. In the context of franchise systems, the reduced safe harbour for dual distribution would have significant implications where the franchisor also operates its own stores, as it seems difficult to envisage how a franchising system may operate and serve its end customers properly without intense information exchange between franchisor and franchisees.

- ***… it enables a tailored, performance-driven approach***:

2.16. Suppliers may wish to collect information (SKU, volume and sell-out price relating to the supplier's own products) from their resellers for a number of legitimate reasons:

2.16.1. Understand consumer profiles and trends: Suppliers need to ensure that consumers can find the products that they desire at the prices that they expect. As distributors are differentiated as regards the consumer segments they target and where they are located, many suppliers require information from them to get a more complete view of the market. Without detailed information on the sales made by its distributors, a supplier cannot adapt its offer to actual consumer demand, satisfaction and needs regarding, for example, overall production trends, styles and colours, assortments and prioritisation of delivery and inventory at different distributors/retailers.

2.16.2. Assess the success of a promotion/investment decision: Suppliers may collect sell-out information relating to their products to assess the success of the promotions that they organised (and often financially supported), verify that their support has been passed on to consumers, identify which products to invest in, and better allocate budget, as the data may show whether a consumer is most interested in price or some other factor. Such information may be needed quickly in order to enable the supplier to react to evolving consumer demand/tastes and market conditions.

2.16.3. Manage inventory efficiently: Collecting information is also necessary for many suppliers to efficiently plan their production processes to meet consumer demand as well as for purchasing, planning, and inventory management purposes. It is crucial that suppliers have up-to-date information about the demand for particular products because consumer preferences can change very quickly: if necessary, suppliers should be able to quickly shift stock from retailers where demand is low to retailers where demand is high or to adjust their production planning and assortment planning to avoid the risk of holding high levels of unwanted inventory.

- ***… it enables suppliers to respond to retailers' focus on profitability***:

2.17. Retailers that sell branded goods naturally want to discuss their profitability with the manufacturers of these goods. Profitability is at the heart of discussions with retailers, as this is their main concern, while some retailers even regularly try to secure more back-margin from manufacturers to support their profitability. If such discussions on profitability were to be viewed as taking place between competitors, and therefore no longer possible, multiple sectors, including in particular the FMCG sector, would be seriously hampered, with consumers suffering in particular, due to the inevitable price increases that retailers would carry out to meet their profitability objectives.

2.18. Similarly, discussion about future prices by the retailer, especially promotional prices, should not be perceived as problematic. In many markets, such as for instance FMCG and consumer electronics, the overwhelming majority of instore promotional activities are funded by manufacturers, not retailers: should a dual distribution relationship be perceived as one between competitors, manufacturers would no longer be able (or confident) to discuss the levels of future promotional reductions that they are willing to fund. As retailers would naturally be unwilling to pick the tab from their own profitability, promotional activities would end up curtailed, to the detriment of consumers.

Treating problematic horizontal concerns should not command a full overhaul of the rules:

2.19. A manufacturer should be free to exchange any information with its retailers in the frame of vertical distribution agreement in a dual distribution model except for information regarding manufacturers' direct sales to end customers. Indeed, as the vast majority of the information exchanged in the context of a dual distribution relationship is sound and pro-competitive, it would be wrong to suggest that all information exchanged in this context should have to be assessed on a case-by-case basis under the Horizontal Guidelines (HGL) instead of providing the legal certainty that the vast majority normally satisfies the conditions of Article 101(3) TFEU as per recital 2 of the draft VBER.

2.20. Information exchange cannot simply be disassociated from a vertical supply relationship simply because there is a dual distribution context. Selling to a distributor without any conversation or follow-up about how products are selling makes little to no sense. In a dual distribution relationship, the distributor/retailer is and remains a customer: the horizontal classification would turn conversations with a customer into conversations with a direct competitor, which is dramatically different and would bring about practical impact/issues.

2.21. The Commission's rationale by which "*possible horizontal concerns are no longer negligible*" owing to the growth of online sales and direct sales to consumers has not been articulated on the basis of a clear theory of harm. The suggested approach to tackle such "possible concerns" appears disproportionate, especially as the Commission has not illustrated the reasons for proposing such a disruptive change with examples of false positive outcomes from the past decades.

2.22. The limited remaining information exchanges of (potential) concern in a dual distribution context could be excluded from the scope of the VBER to maximise legal certainty with the following amendment to Article 2(5) of the VBER:

2.22.1. *The exemption provided for in paragraph 1 shall apply to any exchange of information between the parties,* ***except for the exchange of any information related to the supplier's sales to end customers****, which has to be assessed under the rules applicable to horizontal agreements.*

Completing the current framework with clear guidance would be sufficient to alleviate any potential horizontal concerns:

2.23. In our view, the Commission's original rationale for exempting dual distribution remains entirely valid. The current VBER does not extend its safe harbour to restrictions of concern to the Commission and allows to adequately address any underlying competition concerns associated with dual distribution, as the Commission's decisional practice illustrates well.

2.24. The potential horizontal effects of vertical agreements should not lead to equating these with horizontal agreements. Making dual distribution subject to the HGL would precisely amount to equating dual distribution with joint commercialisation (*e.g.*, non-reciprocal distribution between competing manufacturers). This is entirely inappropriate since joint commercialisation involves cooperation between horizontal competitors on the distribution and sales of their substitute products, whereas dual distribution involves the distribution and sales by the supplier and retailer of one and the same product - the supplier's product. The theories of harm expressed in the current HGL are ill-suited to dual distribution since both undertakings have a mutual interest in selling as much products as possible.

2.25. While the Commission has yet to provide guidance or insights on what types of information sharing may create competition concerns in the context of dual distribution, it has taken the counterintuitive view that such guidance should be provided as part of the new HGL set to be published only several months after the end of the final VBER consultation.

Implementing a lower combined market share threshold would…

- ***… create legal uncertainty and hinder the distribution of goods in Europe***:

2.26. Introducing a lower combined market share threshold at the retail level would greatly limit the benefit of the safe harbour provided by the VBER and undermine its rationale, whereas this is both unnecessary and disproportionate. The new threshold would be virtually impossible to calculate and it is very difficult to imagine how brands and their distributors would be able to assess whether or not they are below the proposed 10% combined market shares threshold. It seems contradictory to suggest that such information can be freely exchanged between the parties whereas, under the HBER and HGL, competitors are not supposed to directly share any data about their respective market shares.

2.27. This introduction would undermine dual distribution and greatly increase legal uncertainty by complicating the existing legal landscape and investment decisions, exposing suppliers to a significant risk of divergent interpretation and enforcement by national competition authorities and national courts.

2.28. The unceasing need for manufacturers to calculate combined retail market shares for each dual distribution agreement that they enter into would be extremely cumbersome and costly. Not to imagine setting up internally what information resulting from what relationship can or cannot be used. It simply doesn't make sense as the information exchanges are there to optimise and create efficiencies in the supply relationship.

2.29. Also, making the availability of the VBER for dual distribution dependent on that threshold would inevitably lead brands to reassess, regress and redeploy their distribution networks on a national basis since retail markets are often national in scope.

2.30. In countless markets, suppliers would likely exceed the threshold because of retailers' market share, which would have them fall automatically above the 10% threshold of Articles 2(4)(a) and (b), regardless of their own market share at retail level. Such new threshold would therefore disproportionately affect suppliers, whose market share at retail level are often minimal.

2.31. Accordingly, the introduction of this new threshold would not match the Commission's goal to expand the scope of dual distribution while creating additional safeguards for eligibility since brands would be blocked or refrain from using dual distribution. This would undoubtedly slow down the collaborative processes with retailers and create unnecessary barriers to the optimisation of dual distribution partnerships, leading some brands to launch products via their own retail network only, thereby lessening both competition and consumer choice.

2.32. In addition, the other situation where the supplier and distributor do not fulfil the conditions of Articles 2(4)(a) or (b) but fulfil the conditions of Article 3 would also create a lot of legal uncertainty. Indeed, while the threshold of Articles 2(4)(a) and (b) is based on the retail market share, the second threshold of Article 3 is based on the supply market share, which is inconsistent and confusing.

- ***… imply that a manufacturer may seek to damage its own distribution channels***:

2.33. If indeed competition concerns in a dual distribution model may only arise from misusing information exchanged, what is the point of introducing a market share threshold? It should be sufficient to frame how information exchanged cannot be used rather than assume it will most likely be misused beyond a certain combined market share at the retail level.

2.34. In reality, a dual distributing manufacturer does not seek to establish any anticompetitive agreement with its retailers, as it has every incentive to foster and support the development of retailers' business since dual distribution is a device to expand reach and output for its products. Why would a manufacturer seek to damage its own distribution channels? Predating resellers' businesses may only be a concern in the presence of substantial market power, not with a market share below 30%.

- ***… limit manufacturers' freedom of choice for the distribution of their goods:***

2.35. The proposed reform would be detrimental for manufacturers, as they may be forced to choose between direct sales only or distribution via retailers only. While manufacturers that already have established a solid activity of selling directly to consumers ("DTC") are unlikely to dismantle this activity, other manufacturers (that have not yet engaged in this activity or that have engaged but are not yet well-established) might simply decide not to go ahead or to withdraw if a balance of interests was to suggest that the disruption to their solid business models would be too excessive to afford and put them at a competitive disadvantage against other manufacturers that do not have DTC activities and still can have these important exchanges of information with their retailer customers.

2.36. While it is legitimate to ensure that retailers and manufacturers do not agree to align their respective reselling prices, the new rules should not dampen manufacturers' freedom and appetite to engage in DTC sales, as this could effectively only lead to limiting consumer choice.

2.37. It should also be clarified that all the concerns mentioned above are linked to the creation of a new threshold, not to the fact that it is too low: any new threshold would constitute an unnecessary and complicating barrier.

- ***… have implications at the wholesale level***:

2.38. It remains unclear whether dual distribution would remain fully exempted at the wholesale level or whether the proposed reform would apply beyond the sole retail level. In the former case, it may well be that wholesale distributors would prove reluctant to share sales information with manufacturers, which would represent a serious issue to manufacturers.

2.39. Although our submission focuses on dual distribution at the retail level and why certain information exchanges are needed to generate consumer benefits, the exact same reasoning applies at the upstream level. Accordingly, we submit that §88 of the revised VGL should be phrased as follows:

2.39.1. "*The exception provided by Article 2(4)(a) VBER concerns situations where the supplier is either a manufacturer, wholesaler or importer and is also a distributor of goods, while the buyer does not compete with the manufacturer at the manufacturing level.*"

- ***… neglect the learnings from the Covid-19 crisis***:

2.40. In contrast with the concerns underlying the proposed reform, dual distribution and the omni-channel approach have proven beneficial to brands, retailers and consumers alike by granting the indispensable flexibility, agility and resilience that market operators needed to keep meeting consumer demand during the COVID-19 crisis. The pandemic amplified the trend towards omni-channel sales models, which is set to remain regardless of the evolution and impact of the sanitary situation on the economy's capacity to recover. Should additional lockdowns occur in the future, the inability to cooperate to implement omni-channel capabilities such as *click-and-collect* or *call-and-collect* could have serious consequences, especially for consumers.

- ***Conclusion***:

2.41. We have grave concerns that the proposed reform would greatly discourage, if not effectively prevent, brand owners from using dual distribution despite its many pro-consumer and pro-competitive effects and call on the Commission to reconsider the implications of such a drastic change on the distribution of goods to consumers in Europe. Implementing it would disproportionately increase the complexity of the self-assessment required to distribute products in Europe and counter the third objective pursued by the Commission in the revision of the VBER: "*reducing compliance costs for businesses by simplifying complex areas of the current rules and streamlining the existing guidance*". Given the abovementioned reasons, the Commission should refrain from introducing the new provisions of articles 2(4) and (b) and leave the existing provisions relating to dual distribution untouched.

3. Marketplace bans

3.1. We welcome the Commission's general confirmation that a supplier may lawfully prevent their authorised retailers from using third-party websites or marketplaces.

3.2. First, we find it relevant that a marketplace ban can fall outside the scope of Article 101 of the TFEU if it meets the requirements laid down in *Metro*.[2]

[2] Judgment of 25 October 1977, Metro SB-Großmärkte v Commission, 26/76, EU:C:1977:167, paragraph 20.

3.3. Second, we welcome that the draft guidelines provide that a marketplace ban shall be exempted if it meets certain criteria (*e.g.*, the market shares of each of the supplier and the buyer do not exceed 30%, other online channels remain are available, *etc.*).

3.4. Finally, the guidance provided by the Commission on individual exemption, in line with the conditions of Article 101(3) of the TFEU, is extremely useful in the permanently evolving digital landscape.

3.5. It would be useful to clarify that the examples provided on individual exemption vis-à-vis online marketplace bans (*e.g.*, §322 of the draft VGL) should not be perceived as exhaustive or peremptory, nor prevent an individual qualitative assessment of the online marketplace ban on a case-by-case basis. For example, the protection of the aura of a prestige or attractiveness of a brand is a constant challenge in the permanently evolving digital landscape.

3.6. It is unclear why the fact that online marketplace could "*allow retailers to create their own brand shop within the marketplace*" may be considered by the Commission or any competition authority when assessing a marketplace ban under Article 101(3) of the TFEU. Indeed, even retailers' brand shops on marketplaces may lead to detrimental situations for (prestige or specialised) brand owners. Even considering that a retailer's brand shop on a marketplace would be isolated in terms of presentation from the rest of the marketplace activity, devaluating products sold on the marketplace will still appear on the customer path.

3.7. As pointed out by the *Coty* judgment, "*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*".[3] This remains true if the marketplace allows retailers to create their own brand shop and this creates 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*." In line with the *Coty* judgment, (prestige and specialised) brand owners should therefore enjoy a maximal level of flexibility regarding third-party marketplaces' bans.

4. Resale price maintenance (RPM)

4.1. We welcome the Commission's greater willingness to accept potential pro-competitive effects arising from RPM. In particular, we welcome the clarification brought by §182 VGL of the exceptional circumstances under which RPM may be exempted, especially with regards to new products. We understand that RPM for seasonal products, which require substantial investments by retailers and offer a short period of time to recover them, would fall under the scope of the exemptions laid down in §182. In such cases, all customers would benefit from the additional services without distinction, and RPM can be justified by the need to avoid free riding to secure retailers' ability to recover their investments. We would however welcome the introduction of a specific mention on seasonal products in §182 in order to maximise legal certainty.

4.2. We also welcome that practical guidance is provided on the possibility of exemption in the case of maximum or recommended RPM above the 30% threshold and that the use of algorithms/price monitoring software is not deemed problematic in and of itself.

4.3. However, we would have welcomed more guidance from the Commission with respect to:

(i) The assessment of RPM in the context of selective distribution networks (*i.e.*, for products that require a high-level retail service and/or are perceived by consumers via their allure and

[3] Judgment of 6 December 2017, Coty Germany GmbH v Parfümerie Akzente GmbH, C-230/16, ECLI:EU:C:2017:941, paragraph 48.

prestigious image). As requested by national competition authorities in the context of their common consultation on the reform of Regulation n°330/2010, the Commission should notably clarify the legitimate necessity for manufacturers to protect their brand image from devaluating promotional operations ("*the Exemption Regulation on vertical agreements and the Guidelines do not provide sufficient legal certainty on the assessment of resale price restrictions in the context of selective distribution networks. In this particular context, suppliers could indeed defend that the protection of their brand image or the characteristics of their products or services could justify practices that would restrict the ability of buyers to determine their resale price*".)

(ii) What should be considered as falling under the definition of "*experience*" and "*complex products*".

(iii) The factors that should be taken into account with regard to combatting free riding.

(iv) What exactly is a "*new product*", which level of novelty is required, whether "commercial innovations" (*e.g.*, new flavour) would be covered.

(v) The introduction of a brand in a new channel.

4.4. Finally, maximum or recommended resale prices are still considered as likely to act as a focal point and thus lead to RPM when the supplier is powerful. To ensure more legal certainty, §§184 and 185 draft VGL should be clarified.

5. Minimum advertised pricing (MAP)

5.1. We welcome the differentiation between minimum advertised price (MAP) guidelines and RPM set out in §174 of the draft VGL. As long as the retailer's actual pricing is not bound and it can communicate the actual price at the point of sale, whether offline or online, minimum advertised price guidelines do not interfere with his pricing sovereignty.

5.2. However, clearer guidance on MAP, as distinguished from RPM, would be extremely helpful. MAP as such does not constitute RPM, unless it is applied in a manner that would be tantamount to RPM (*e.g.*, stopping retailers from offering discounts). There are core differences between MAP and RPM because MAP applies only to advertising but places no restriction on retail pricing.

5.3. A retailer's price advertising of a specific product typically aims at bringing customers into the shop and win sales for the entire shopping basket. A retailer may indeed advertise a very low price (sometimes below marginal cost) on popular items to generate a higher frequency of visits to its store and win customers that will also buy other products earning him a higher margin. This practice distorts price setting between different brands in a store and may also hurt brand manufacturers and their incentives to invest.

5.4. After a retailer advertises a product at a very low price, consumer willingness to pay for the product may fall due to (i) consumers feeling that they are treated unfairly when they are offered a higher price later or (ii) consumers fearing regret when they buy at a higher price than they previously observed, because they believe they might have missed out on a better offer somewhere else. These motivations are known to reduce the willingness to pay for a product and thus reduce demand. As a result, the incentives for manufacturers to invest in product quality may decline.

5.5. In sum, MAP is an instrument for limiting the degree to which retailers use low advertised prices for their products to attract customers to their marketplace to sell unrelated products. MAP can correct distortions of inter-brand competition and maintain incentives for manufacturers to invest in product quality. Unlike RPM, MAP preserves the incentives for inter-brand competition within the store. However, it allows brand manufacturers to prevent an externality imposed on them by the retailer's

efforts to enhance the demand for unrelated goods sold at high margin. For these reasons, MAP should not be treated as equivalent to RPM.

6. Competition between distributors' brands and branded goods in the same relevant market

6.1. The distinction inherited from §27 VGL and further clarified in §85 of the draft VGL per which a distributor is to be a considered a competitor of suppliers of branded goods in the same relevant market only when it produces these goods in-house (and not when it provides specifications to a third-party manufacturer) is not logical. It is in stark contradiction to the commercial reality in certain sectors such as FMCG, *i.e.*, competition on the shelves between branded goods and private label products, irrespective of where and by whom they were manufactured. We do not see how this could be brought in line with the Commission's decision practice on assessing competitive relationships and the case law of the Court of Justice of the European Union (CJEU) in that respect. § 85 of the draft VGL requires a comprehensive revision.

6.2. It is not clear why the fact that a distributor itself produces goods under its own brand or sub-contracts this function to a third party should be determinative as to whether the VBER applies. This is particularly the case given that many manufacturers/brands themselves do not manufacture their products in-house, but rather sub-contract manufacturing to third parties. The distinction drawn by §85 of the draft VGL therefore risks blurring the competitive relationship between manufacturers/brands and distributors altogether.

6.3. Since private label goods very much compete with branded goods on the downstream market, it has absolutely no relevance how retailers manufacture their goods (upstream) when selling in competition against branded goods downstream.

6.4. The market reality is that private label products are designed to, and effectively do, compete downstream with branded products. If they did not compete downstream, why would retailers in certain sectors use direct comparisons to branded goods in advertising their own private label goods? Accordingly, their respective owners should logically be perceived and treated as competitors at the retail level.

6.5. Against this background, we ask the Commission to revise § 85 of the draft VGL by taking into consideration (i) how competition works between branded goods and private label products both on the upstream manufacturing markets and the downstream selling markets and (ii) its own decisional practice as well as the case law of the CJEU.

7. Dual pricing and the equivalence principle

7.1. §195 VGL offers a much-needed opportunity for brands to ensure a fairer repartition of costs within their omnichannel networks that reflects the difference in their distributors' cost structures, and to reward investments into the quality of the sale environment and customer experience.

7.2. It is however problematic for suppliers to have to justify their dual pricing strategies based on "*the differences in the costs incurred in each channel by the distributors at retail level*". Suppliers are not in a position to know the costs incurred by their customers for their offline and online operations respectively and may therefore not know how to set their "dual price" in a way that is in line with the guidelines.

7.3. The combined deletion of §56 VGL and addition of §221 VGL, which allows "*a supplier operating a selective distribution system* (to) *impose on its authorised distributors criteria for online sales that are*

not identical to those imposed for sales in brick and mortar shops", offers a welcomed opportunity for brands to adapt their qualitative criteria to the specificities of each sales channel.

7.4. We are confident that these two possibilities will enable brand owners to enjoy more flexibility in terms of commercial conditions offline and online but also to organise their authorised sales channels offline and online. These new rules are adapted to market developments such as the growth of online sales.

7.5. The Commission recently mentioned that these evolutions derived from a clear consensus between suppliers and retailers. We are therefore confident that this will incentivise or reward the appropriate level of investments in relation to the costs incurred, notwithstanding the channel.

7.6. However, we wish to highlight that the value of specific services that retailers provide for manufacturers makes for a more tangible basis for discounts in the form of price reductions than the costs incurred by the distributors. For example, advisory services provided by a retailer for its offline sales but not for its online sales should justify price differentiation within the framework of a dual price strategy. In other words, the level of performance provided by a retailer should matter at least as much as its financial investments.

7.7. Accordingly, the Commission should clarify that "*an appropriate level of investments*" may take the form of both financial and non-financial investments. Absent this clarification, some NCAs and national courts could adopt a very restrictive approach as to what is "*appropriate*", what the relevant costs are, etc.

8. Territorial/customer restrictions

8.1. The wording on territorial/customer restrictions in the draft VBER has changed quite significantly, especially regarding the different sets of rules for exclusive and open distribution. The draft Guidelines provide a long list of indirect restrictions that may constitute hardcore restrictions, including some restrictions that sound more like unilateral behaviour by the supplier rather than an illegitimate agreement between a supplier and a reseller (*e.g.*, the reduction of supplied volumes to the demand in a particular territory/customer group, or limiting the languages to be used on packaging or promotion (§189 of the draft VGL)).

8.2. In particular, §50 of the current VGL revamped into §189 of the draft VGL now states that "*hardcore restrictions may be the result of* (…) *indirect measures aimed at inducing the distributor* (…) *not to sell to certain customers or to customers in certain territories or the obligation to refer orders from these customers to other distributors*", including in particular "*limiting the languages to be used on the packaging or for the promotion of the products*".

8.3. How are manufacturers and suppliers supposed to define the proper, full list of "*languages*" of reference that should not be "*limited*"? Are manufacturers obliged to include on pack all the languages of the European Union or to accommodate all distributors' requests to have additional languages added, irrespective of the size of the pack, at the risk of being found to violate Article 101 TFEU? Based on the current EU legislation on labelling, suppliers have no obligation to print all EU languages on the packaging, while retailers are free to use stickers with other languages.

8.4. Brand manufacturers need flexibility in the way they organise their production, label their products and design their marketing strategy to respond to market and consumer preferences as well as comply with the regulatory requirements, which differ across the EU. Framing manufacturers' freedom to decide what language(s) to include on pack could disrupt their geographical organisation and have serious implications on their supply chain.

8.5. Manufacturers could end up being forced to create labels that are not in line with their marketing strategy in order to accommodate multiple unnecessary languages on the limited space available on pack, which would have significant supply chain and cost implications.

8.6. "*Limiting the languages*" goes beyond pro-active intent to obstruct certain languages from being placed on labels. Space on labels is limited: how can companies know which additional languages to include, short of adding all EU languages, to be compliant?

8.7. §191 of the draft VGL also deserves clarification regarding the monitoring by use of "*language clusters*": there are synergies and efficiencies as to why certain languages are clustered together, *e.g.*, FR-DE-NL, to meet requirements in several Member states via a single label. "*Clusters*" follow a logic and should not, *per se*, be tagged as a problematic monitoring system (the same is true for differentiated labels or serial numbers).

9. Unauthorised sales

9.1. Article 4(c) of the draft VBER is positive. While we welcome that this new provision strengthens brands' ability to contractually restrict unauthorised sales and are hopeful that it can be useful to improve our European legal grounds in terms of the fight against grey market, we remain convinced that it will remain toothless without an enforcement mechanism that allows brands to oppose their selective distribution networks vis-à-vis third parties.

- ***It is necessary to create an enforcement mechanism***:

9.2. Acknowledging that it does not fall within the remit of the VBER, we nevertheless call upon the Commission to create such an enforcement mechanism, as we have consistently called for throughout the current consultation process. In particular, we wonder how brand owners may rely on this provision before national and EU courts and would welcome any corresponding guidelines in the revised VGL.

9.3. We remain extremely concerned by the absence of a harmonised enforcement mechanism tool in the draft VBER to protect selective/exclusive distribution systems. Since this mechanism directly deals with the contractual relationship between suppliers and retailers, we believe it has its place in the revised VBER and call the Commission to introduce a similar or identical provision within the revised VBER. Such mechanism would also be in line with recent national cases emerging across Europe and acknowledging selective distribution networks as such.[4]

9.4. Some countries, already aware of the risks to which brand owners are exposed, have been precursors and introduced specific legal mechanisms. For instance, France has been a pioneer in this area and introduced new provisions in 1996 to punish the fact of contributing directly or indirectly to the violation of a selective distribution network (now Article L.442-2 of the French Commercial Code). The French law provides a system that is unique in Europe, which includes a presumption of irregular supply (and thus reversing the burden of proof, which is always extremely difficult for brand owners to provide) as soon as a violation, even an indirect one, of a selective/exclusive distribution network is established (*i.e.*, complicity in a contractual infringement or disorganisation of the network).

[4] See, *e.g.*, Milan IP Court July 3, 2019 / R.G.50977 2018, Sisley Italia SRL v. Amazon Europe Core or Milan Tribunal Business Civil Section 10182/2020 Shiseido Europe S.A. and Shiseido Italy S.P.A. v. Amazon Europe Core S.A.R.L., Amazon EU S.A.R.L. and Amazon Services Europe S.A.R.L.

9.5. While we understand that the VBER, being an exemption regulation, is not the right vehicle for the implementation of such enforcement tool, we call upon the Commission to highlight the importance of clear legal standing on this throughout the European Union and call for the creation of a dedicated regulation dealing, for instance, with unfair commercial practices between businesses.

10. Combination of selective and exclusive distribution

10.1. The Commission has remained unclear on this topic. Brand owners that have not penetrated every European market may wish to set up exclusivity at the wholesale level for a distributor/wholesaler that is responsible for running a selective distribution system at the retail level. Such combination of exclusive and selective distribution systems in the same territory pursues a double legitimate objective.

10.2. On the one hand, the exclusivity granted to a distributor/wholesaler in a territory enables the latter, as a local expert, to make continuous investments and to dedicate time and efforts to maintain in-depth expertise in local consumers' preferences and specificities as well as develop the selective distribution network and find new partners. Restrictions of active sales into this territory from other wholesalers operating in other territories enable this exclusive wholesaler to recoup its investments without fear of free riding (while authorised distributors/wholesalers remain free to resell their products to other authorised distributors/wholesalers located in other territories). The possibility for the exclusive distributor/wholesaler to focus on the local wholesale market (*e.g.*, by implementing local selective distribution via selection of authorised retailers and ensuring that the latter complies at all times with predetermined qualitative criteria, enhancing logistics such as compliance with packaging and labelling requirements, *etc.*) enables a duplication of selective distribution benefits and facilitates local consumers' access to high-quality products and associated services.

10.3. On the other hand, a selective distribution system implemented at the retail level induces retailers/distributors to provide consumers with specific services and advice necessary given the technical nature and image of the products. Beyond improving consumer welfare, such a system aims at protecting the image of brands.

10.4. Selective distribution ran by an exclusive distributor/wholesaler in a territory A simply mirrors selective distribution run by a brand owner in a territory B. Such a coherent distribution system seeks to ensure that products are displayed in a manner that enhances their value and reputation. It also benefits the consumers that may have not been otherwise able to find the products in the said territory A if the brand owner has not found a distributor willing to invest in developing that market.

10.5. We therefore strongly believe that the mere fact of combining these distribution models, both separately permitted by Articles 4(b)(i) and 4(b)(iii) of the VBER, does not raise specific competition concerns, which the Commission should confirm clearly. Absent this confirmation, the Commission should at the very least clarify the theory of harm that underpins the reasoning explaining why such combination needs to remain outside the scope of the VBER safe harbour.

11. Dual role of agents

11.1. We welcome the clarification that a brief temporary passing of title does not in itself preclude an agency agreement. The Commission should however clarify that an undertaking (*e.g.*, a department store operating its own website) can sell online as a genuine agent on behalf of a supplier (itself acting as a principal) without being categorised as an online intermediation service, which appears to be regarded as a supplier under the draft VBER and cannot therefore in principle qualify as an agent for the purpose of applying Article 101 of the TFEU. In other words, the status of online intermediation service should not affect the possibility for an undertaking to carry out online sales

in its own name but on behalf of a supplier, *i.e.*, it should be possible to benefit from the VBER safe harbour if online intermediation services are provided on a standalone basis and unbundled from other services or a distribution agreement.

11.2. The Commission should reconsider its views on distributors that also act as agents for certain products for the same supplier. This competition law risk recently raised by the Commission is quite complex and raises important concerns *vis-à-vis* stakeholders' flexibility in defining their business model. The approach retained in the draft VGL seems unworkable and overly rigid.

11.3. If all the costs and risks behind agency must be borne by the principal, it should be understood that agency, which may involve enhanced services and the ultimate expression of brand owners, requires more investment at large than independent distribution (more staff, higher capex, *etc.*). In certain situations, stakeholders may therefore need time and flexibility to gradually convert their business models in their best interest without it being regarded as a misuse of the agency concept and an indirect way for a supplier to control retail prices.

11.4. In this scenario, a distributor would therefore need to act for a limited period as an agent in a city and as a distributor in another with complete separation of such activities. Individual assessments are therefore more than welcome on this matter. Once again, further guidance and flexibility are welcome for businesses (different business models in different cities/geographical markets, different business models between online/offline channels, different business models in limited periods, strict measures to preserve the partners' decision-making freedom or to reimburse the costs, risks incurred, implementation of Chinese walls, *etc.*).

12. Online intermediation services

12.1. It is unclear why providers of online intermediation services should be considered as suppliers, since in most cases they do not produce or sell any products. Therefore, we believe that providers of online intermediary services should only be considered as suppliers when they produce and sell products on their platform that directly compete with their suppliers'.

12.2. The definition of online intermediation services providers is both very broad and confusing in light of the definition of online marketplaces in §313 of the draft VGL. The Commission has also retained a very general approach under §44 of the draft VGL, per which "*undertakings providing online intermediation services are categorised as suppliers under the VBER and can therefore in principle not qualify as agents for the purpose of applying Article 101(1)*". If maintained, this approach would simply deprive suppliers and distributors in the European Union from concluding partnerships with online players other than on a purchase-resale relationship basis. This would not only create additional risks of free riding on "traditional" retailers, but would also deprive consumers from innovative/additional customer experiences online.

12.3. We also believe that this approach is too restrictive: online intermediation services should only not qualify as an agent in the exceptional cases where they are also suppliers, as defined in the above paragraph.

12.4. Finally, we believe that Article 2(7) of the draft VBER is not required to address horizontal issues. The Commission proposes to exclude from the scope of the VBER non-reciprocal vertical agreements entered into between "*a provider of online intermediation services that also sells goods or services in competition with undertakings to which it provides online intermediation services*" and such a competing undertaking on the ground that "*the retail activities of* [OIS providers] *that have a hybrid function typically raise non-negligible horizontal concerns*".

12.5. While we acknowledge that the retail activities of OIS providers can raise horizontal concerns, we consider that any serious horizontal issues are already excluded from the scope of the VBER, and that Article 2(7) of the draft VBER is therefore unnecessary to address such horizontal concerns. Also, the complex wording of this provision may cause confusion and lead to inconsistent interpretations and enforcement, particularly at national court and national competition authority level.

12.6. Accordingly, we would recommend to delete Article 2(7) in the revised VBER. Alternatively, we would suggest to amend Article 2(7) as follows:

12.6.1. "*The exceptions of Article 2(4)(a) and (b) shall not apply where a provider of online intermediation services that also sells goods or services in competition with the undertakings to which it provides online intermediation services enters into a non-reciprocal vertical agreement with such a competing that undertaking, except in relation to the access by the provider of online intermediation services to information related to the sales activities of the undertaking that uses the online intermediation services, which has to be assessed under the rules applicable to horizontal agreements.*"

13. Active sales restrictions

13.1. The new definition of active sales offers a useful clarification that will allow brands to better protect the exclusivities allocated to their distributors in certain territories of the EU. This addition will be particularly welcome in the digital world where the qualification of all online sales as passive sales made it virtually impossible to enforce exclusive distribution contracts.

13.2. The practical contours of the new possibility for the supplier to oblige its buyers to pass active sales restrictions on to their customers should however be clarified to give sufficient confidence and legal certainty for suppliers to implement it.

13.3. In particular, the Commission should clarify which criteria and/or methods suppliers should use to:

(vi) determine what is a good "limited number" of distributors/buyers (per §§100 and 102 of the draft VGL),

(vii) calculate the "*volume of business that preserves the investment of the appointed distributors*" (per §125 of the draft VGL),

(viii) monitor their buyers' passing active sales restrictions on to end customers, and

(ix) intervene when their buyers do not pass active sales restrictions on to end customers without it being considered as an attempt to restrict free movement of goods.

14. Qualitative criteria and their coherence throughout the customer experience

14.1. As customers' digital experience is no longer linear, we welcome the possibility for brands to determine qualitative criteria for their authorised distributors when they advertise their products, either directly (such as through online platforms) or indirectly (via price comparison tools). This will allow brands to consolidate the coherence of the experience that customers are offered and to align their distributors' practices with their own.

15. Protection of the acquis

15.1. §194 of the VGL provides a useful reconfirmation of some of the most essential provisions of the existing framework, such as the brick and mortar clause, a direct or indirect ban on sales on online marketplaces (codification of the *Coty* precedent), as well as "*a requirement that the buyer sells at least a certain absolute amount (in value or volume, but not in proportion of its total sales) of the contract goods or services offline to ensure an efficient operation of its brick and mortar shop*".

16. Resale prices permitted in tripartite fulfilment arrangements

16.1. The Commission should clarify that when a supplier agrees on a price directly with the end customer and assigns the fulfilment of the order to an independent dealer, no resale price restriction occurs.

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.

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EU Transparency register ID no.: 1074382679-01