

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

Fields marked with * are mandatory.

Introduction

Objectives of the public consultation

Article 101(1) of the Treaty on the Functioning of the European Union ("the Treaty") prohibits agreements between undertakings that restrict competition unless, in accordance with Article 101(3) of the Treaty, they contribute to improving the production or distribution of goods or services, or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits and unless they are indispensable for the attainment of these objectives and do not eliminate competition in respect of a substantial part of the product in question ("efficiencies in line with Article 101(3) of the Treaty").

The prohibition in Article 101(1) of the Treaty covers, amongst others, agreements entered into between two or more undertakings operating at different levels of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services (so-called "vertical agreements").

[Commission Regulation \(EU\) No 330/2010](#) on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (Vertical Block Exemption Regulation, "VBER") and the [Commission Notice providing binding guidance on the Commission for the interpretation of the VBER](#) ("Vertical Guidelines") define the currently applicable framework. The VBER will expire on 31 May 2022.

Between October 2018 and September 2020, the European Commission conducted an evaluation of the VBER and the Vertical Guidelines, the findings of which were summarized in a staff working document ("SWD", [SWD\(2020\) 173 final](#)). The results of the evaluation showed that the rules are still relevant and useful to businesses but that certain areas of the rules may need to be adapted. On the basis of these findings, the Commission launched an impact assessment phase looking into policy options for a revision of certain areas of the VBER and Vertical Guidelines with the aim to have the revised rules by 31 May 2022, when the current rules will expire.

On 23 October 2020, the Commission published notably an [inception impact assessment](#) ("IIA") setting out the scope of the impact assessment phase, with a focus on four areas for which the Commission proposed policy options and asked stakeholders to provide feedback by 20 November 2020. During the impact assessment phase, the Commission will collect views from stakeholders on these policy options, their

ability to tackle the issues identified in the evaluation and on any other impacts of the policy options. This questionnaire is one of the key instruments to collect stakeholders' views and the replies to the questionnaire will inform the drafting of the revised rules.

About you

* 1 Language of my contribution

- ☐ Bulgarian
- ☐ Croatian
- ☐ Czech
- ☐ Danish
- ☐ Dutch
- ☒ English
- ☐ Estonian
- ☐ Finnish
- ☐ French
- ☐ German
- ☐ Greek
- ☐ Hungarian
- ☐ Irish
- ☐ Italian
- ☐ Latvian
- ☐ Lithuanian
- ☐ Maltese
- ☐ Polish
- ☐ Portuguese
- ☐ Romanian
- ☐ Slovak
- ☐ Slovenian
- ☐ Spanish
- ☐ Swedish

* 2 I am giving my contribution as

- ☐ Academic/research institution
- ☐ Business association
- ☐ Company/business organisation

- ☐ Consumer organisation
- ☐ EU citizen
- ☐ Environmental organisation
- ☐ Non-EU citizen
- ☐ Non-governmental organisation (NGO)
- ☐ Public authority
- ☐ Trade union
- ☒ Other

* 3 First name

Ief

* 4 Surname

Daems

* 5 Email (this won't be published)

ief.daems@inhousecompetitionlawyers.com

* 9 Organisation name

255 character(s) maximum

Association of Inhouse Competition Lawyers (ICLA)

* 10 Organisation size

- ☐ Micro (1 to 9 employees)
- ☐ Small (10 to 49 employees)
- ☐ Medium (50 to 249 employees)
- ☒ Large (250 or more)

11 Transparency register number

255 character(s) maximum

Check if your organisation is on the [transparency register](#). It's a voluntary database for organisations seeking to influence EU decision-making.

513747339430-11

* 12 Country of origin

Please add your country of origin, or that of your organisation.

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| <input type="radio"/> Afghanistan | <input type="radio"/> Djibouti | <input type="radio"/> Libya | <input type="radio"/> Saint Martin |
| <input type="radio"/> Åland Islands | <input type="radio"/> Dominica | <input type="radio"/> Liechtenstein | <input type="radio"/> Saint Pierre and Miquelon |
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| <input type="radio"/> Algeria | <input type="radio"/> Ecuador | <input type="radio"/> Luxembourg | <input type="radio"/> Samoa |
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| <input type="radio"/> Angola | <input type="radio"/> Equatorial Guinea | <input type="radio"/> Malawi | <input type="radio"/> Saudi Arabia |
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| <input type="radio"/> Bahrain | <input type="radio"/> French Polynesia | <input type="radio"/> Micronesia | <input type="radio"/> South Africa |
| <input type="radio"/> Bangladesh | <input type="radio"/> French Southern and Antarctic Lands | <input type="radio"/> Moldova | <input type="radio"/> South Georgia and the South Sandwich Islands |
| <input type="radio"/> Barbados | <input type="radio"/> Gabon | <input type="radio"/> Monaco | <input type="radio"/> South Korea |
| <input type="radio"/> Belarus | <input type="radio"/> Georgia | <input type="radio"/> Mongolia | <input type="radio"/> South Sudan |
| <input checked="" type="radio"/> Belgium | <input type="radio"/> Germany | <input type="radio"/> Montenegro | <input type="radio"/> Spain |

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| <input type="radio"/> British Indian Ocean Territory | <input type="radio"/> Guinea-Bissau | <input type="radio"/> Nicaragua | <input type="radio"/> Thailand |
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| <input type="radio"/> Brunei | <input type="radio"/> Haiti | <input type="radio"/> Nigeria | <input type="radio"/> Timor-Leste |
| <input type="radio"/> Bulgaria | <input type="radio"/> Heard Island and McDonald Islands | <input type="radio"/> Niue | <input type="radio"/> Togo |
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| <input type="radio"/> Burkina Faso | <input type="radio"/> Honduras | <input type="radio"/> Norfolk Island | <input type="radio"/> Tokelau |
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| <input type="radio"/> Cayman Islands | <input type="radio"/> Iran | <input type="radio"/> Pakistan | <input type="radio"/> Turks and Caicos Islands |
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| <input type="radio"/> China | <input type="radio"/> Israel | <input type="radio"/> Papua New Guinea | <input type="radio"/> United Arab Emirates |
| <input type="radio"/> Christmas Island | <input type="radio"/> Italy | <input type="radio"/> Paraguay | <input type="radio"/> United Kingdom |
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| <input type="radio"/> Cocos (Keeling) Islands | <input type="radio"/> Japan | <input type="radio"/> Philippines | <input type="radio"/> United States Minor Outlying Islands |
| <input type="radio"/> Colombia | <input type="radio"/> Jersey | <input type="radio"/> Pitcairn Islands | <input type="radio"/> Uruguay |
| <input type="radio"/> Comoros | <input type="radio"/> Jordan | <input type="radio"/> Poland | <input type="radio"/> US Virgin Islands |
| <input type="radio"/> Congo | <input type="radio"/> Kazakhstan | <input type="radio"/> Portugal | <input type="radio"/> Uzbekistan |
| <input type="radio"/> Cook Islands | <input type="radio"/> Kenya | <input type="radio"/> Puerto Rico | <input type="radio"/> Vanuatu |
| <input type="radio"/> Costa Rica | <input type="radio"/> Kiribati | <input type="radio"/> Qatar | <input type="radio"/> Vatican City |
| <input type="radio"/> Côte d'Ivoire | <input type="radio"/> Kosovo | <input type="radio"/> Réunion | <input type="radio"/> Venezuela |
| <input type="radio"/> Croatia | <input type="radio"/> Kuwait | <input type="radio"/> Romania | <input type="radio"/> Vietnam |
| <input type="radio"/> Cuba | <input type="radio"/> Kyrgyzstan | <input type="radio"/> Russia | <input type="radio"/> Wallis and Futuna |
| <input type="radio"/> Curaçao | <input type="radio"/> Laos | <input type="radio"/> Rwanda | <input type="radio"/> Western Sahara |
| <input type="radio"/> Cyprus | <input type="radio"/> Latvia | <input type="radio"/> Saint Barthélemy | <input type="radio"/> Yemen |
| <input type="radio"/> Czechia | <input type="radio"/> Lebanon | <input type="radio"/> Saint Helena Ascension and Tristan da Cunha | <input type="radio"/> Zambia |
| <input type="radio"/> Democratic Republic of the Congo | <input type="radio"/> Lesotho | <input type="radio"/> Saint Kitts and Nevis | <input type="radio"/> Zimbabwe |
| <input type="radio"/> Denmark | <input type="radio"/> Liberia | <input type="radio"/> Saint Lucia | |

The Commission will publish all contributions to this public consultation. You can choose whether you would prefer to have your details published or to remain anonymous when your contribution is published. **For the purpose of transparency, the type of respondent (for example, 'business association', 'consumer association', 'EU citizen') country of origin, organisation name and size, and its**

transparency register number, are always published. Your e-mail address will never be published.

Opt in to select the privacy option that best suits you. Privacy options default based on the type of respondent selected

* 14 Contribution publication privacy settings

The Commission will publish the responses to this public consultation. You can choose whether you would like your details to be made public or to remain anonymous.

☐ **Anonymous**

Only organisation details are published: The type of respondent that you responded to this consultation as, the name of the organisation on whose behalf you reply as well as its transparency number, its size, its country of origin and your contribution will be published as received. Your name will not be published. Please do not include any personal data in the contribution itself if you want to remain anonymous.

☒ **Public**

Organisation details and respondent details are published: The type of respondent that you responded to this consultation as, the name of the organisation on whose behalf you reply as well as its transparency number, its size, its country of origin and your contribution will be published. Your name will also be published.

☒ I agree with the [personal data protection provisions](#)

* 15 Please describe the main activity of your organisation (e.g. product(s) and/or service(s) provided)

1000 character(s) maximum

ICLA is an informal association of in-house competition lawyers with currently more than 450 members across the globe. The Association does not represent companies but is made up of individuals as experts in the area of competition law.

* 16 Please describe the sectors that your organisation represents, i.e. sectors in which your members are conducting business.

1000 character(s) maximum

ICLA is not a business/economic operator. ICLA members work for companies which are active in a wide range of sectors. This submission represents the position of ICLA and does not necessarily represent the views of all of its individual members.

*

17 Please indicate the 2 digit NACE Rev.2 code referring to the level of "division" that applies to your business (see part III, pages 61 – 90 of Eurostat's statistical classification of economic activities in the European Community, available [here](#)).

n/a

* 18 Please mark the countries/geographic areas where your main business is located.

- ☐ Austria
- ☒ Belgium
- ☐ Bulgaria
- ☐ Croatia
- ☐ Cyprus
- ☐ Czech Republic
- ☐ Denmark
- ☐ Estonia
- ☐ Finland
- ☐ France
- ☐ Germany
- ☐ Greece
- ☐ Hungary
- ☐ Ireland
- ☐ Italy
- ☐ Latvia
- ☐ Lithuania
- ☐ Luxembourg
- ☐ Malta
- ☐ Netherlands
- ☐ Poland
- ☐ Portugal
- ☐ Romania
- ☐ Slovak Republic
- ☐ Slovenia
- ☐ Spain
- ☐ Sweden

- ☐ United Kingdom
- ☐ Others in Europe
- ☐ America
- ☐ Asia
- ☐ Africa
- ☐ Australia

* 19 Is your company/business organisation a supplier or a buyer of products or services or both?

- ☐ Supplier
- ☐ Buyer
- ☐ Both
- ☒ Not applicable
- ☐ Do not know

20 Please estimate the percentage of your company/business organisation's annual turnover for 2019 and 2020 generated by sales through the Internet ("online sales").

Proportion of online sales

	0 to 25	25 to 50	50 to 75	75 to 100	not applicable
* 2019	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
* 2020	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

21 Please estimate the percentage of your company/business organisation's annual turnover for 2019 and 2020 generated by physical sales channels ("offline sales").

Proportion of offline sales

	0 to 25	25 to 50	50 to 75	75 to 100	not applicable
* 2019	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
* 2020	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

* 22 Please provide explanation if necessary (e.g. variation between 2019 and 2020)

1000 character(s) maximum

n/a

*23 Please describe the relevance of the VBER and the Vertical Guidelines for your organisation.

1000 character(s) maximum

Please see our response to Question 15 and 16 above.

A. How to answer?

You are invited to reply to this public consultation by filling out the eSurvey questionnaire online. The questionnaire is structured as follows: The first part of the questionnaire concerns general information on the respondent. The second part focuses on policy options for a possible revision of the VBER and the Vertical Guidelines in relation to the four areas mentioned in section C of the IIA, namely (a.) dual distribution, (b.) active sales restrictions, (c.) two types of indirect measures restricting online sales and (d.) parity obligations. This is the main part of the questionnaire. It aims at gathering information and views from stakeholders to assess the impact of the policy changes that the Commission is exploring. The third part of the questionnaire addresses other issues and elements to be considered during the impact assessment phase.

The Commission will summarise the **results in a report**, which will be made publicly available on the Commission's [Better Regulation Portal](#).

The questionnaire is available in English, French and German, but you may respond to the questionnaire in any official EU language.

To facilitate the analysis of your reply, we would kindly ask you to **keep your answers concise** and to the point. You may include documents and URLs for relevant online content in your replies. **You are not required to answer every question.** You may respond 'no opinion/no' to questions on topics where you do not have particular knowledge, experience or opinion. Where applicable, this is strongly encouraged in order to ensure that the evidence gathered by the Commission is solid.

You are invited to **read the privacy statement attached** to this consultation for information on how your personal data and contribution will be dealt with.

You have the option of saving your questionnaire as a 'draft' and finalising your response later. In order to do this, click on 'Save as Draft' and save the new link that you will receive from the EUSurvey tool on your computer. Please note that without this new link you will not be able to access the draft again and continue replying to your questionnaire. Once you have submitted your response, you will be able to download a copy of your completed questionnaire.

Whenever there is a text field for a short description, you may answer in **maximum 5000 characters**.

Questions marked with an asterisk (*) are **mandatory**.

To avoid any confusion about the numbering of the questions, please note that you will be asked some questions only if you choose a particular reply to the respective previous one(s).

No statements, definitions, or questions in this public consultation may be interpreted as an official position of the European Commission. All definitions provided in this document are strictly for the purposes of this public consultation and are without prejudice to definitions the Commission may use under current or future EU law or in decisions.

In case you have questions, you can contact us via the following functional mailbox: COMP-VBER-REVIEW@ec.europa.eu;

If you encounter technical problems, please contact the Commission's [CENTRAL HELPDESK](#).

B. Policy options for revising the VBER and Vertical Guidelines

During the evaluation phase, the following areas of the rules were identified as not working well or as well as they could. During the impact assessment phase, the Commission is exploring policy options for revising the VBER and/or the Vertical Guidelines in these areas.

B.1 Exception for dual distribution

Agreements between competitors are not covered by the VBER and should be assessed under the competition rules for horizontal agreements. However, Article 2(4) of the VBER and paragraph 28 of the Vertical Guidelines provide an exception to this rule for dual distribution, namely the situation where a supplier sells its goods or services directly to end customers, thereby competing with its distributors at the retail level (“exception for dual distribution”). When the VBER was adopted, the retail activities of suppliers engaging in dual distribution were considered negligible and unlikely to give rise to horizontal competition concerns. However, the growth of e-commerce has enabled suppliers to engage in dual distribution more easily than in the past.

Against this background, the following policy options are considered as indicated in the Inception Impact Assessment regarding the exception for dual distribution (**Options 2 and 3 could be applied cumulatively**):

Option 1: no policy change;

Option 2: limiting the scope of the exception to scenarios that are unlikely to raise horizontal concerns by, for example, introducing a threshold based either on the parties’ market shares in the retail market or on other metrics, and aligning the coverage of the exception with what is considered exemptible under the rules for horizontal agreements;

Option 3: extending the exception to dual distribution by wholesalers and/or importers;

Option 4: removing the exception from the VBER, thus requiring an individual assessment under Article 101 of the Treaty in all cases of dual distribution.

1 Do you or your suppliers engage in dual distribution?

☒ Yes

☐

No

☐ No opinion

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

5000 character(s) maximum

Dual distribution is common in many industries. Suppliers typically rely in parallel on different routes to market for their products / services. They may opt for indirect distribution by selling to wholesale distributors (in a two-tier supply chain where the wholesaler resells the products / services to retail dealers) or to retail dealers (in a one-tier supply chain). Moreover, they may also decide to sell their products directly online or via their own brick and mortar stores. The growth of online sales made it particularly easy for suppliers to sell their products directly through their own online shops. Likewise, the growth of online sales is increasingly blurring the lines between the different levels of the supply chain. Wholesale distributors may also sell directly to end-users through their online stores (in particular with regard to B2B sales, it can be difficult to distinguish whether business customers purchase for resale or for end-use).

These developments mirror changing consumer behavior, which was highlighted in the European Commission's Staff Working Document on the evaluation of the Vertical Block Exemption Regulation. As recognized in the document, consumers nowadays expect a seamless omni-channel experience that allows them to switch easily between different sales channels.

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

☒ Yes

☐ No

☐ No opinion

*** 4 Please explain your answer above.**

5000 character(s) maximum

ICLA submits that the exception should be maintained. A removal would significantly harm competition, businesses and consumer welfare in the European Union. With dual distribution being widespread across different industries, numerous relationships between suppliers and their distributors could not benefit from the safe harbour of the VBER absent the exception. If removed, vertical agreements that are normally – and rightfully – exempted under the VBER would require an individual assessment, including: restrictions to sell to unauthorized dealers in selective distribution, legitimate active sales restrictions, restrictions for wholesale distributors to sell directly to end users, non-compete obligations of less than 5 years, maximum resale price agreements. Without the exception, many of these agreements could be considered as anti-competitive horizontal agreements between competitors (such as horizontal market/customer sharing or even price fixing).

Moreover, it is widely accepted that an exchange of commercial information between operators at different levels of a vertical supply chain – i.e., between a supplier and its distributor(s) – is part of a normal business dialogue. It is also recognized that such a business dialogue is generally a source of efficiency. For example,

such commercial discussions allow the supplier to benefit from feedback from its distributors on the price positioning of its products, and on consumer demand that are likely to improve the effectiveness of its distribution network. A vertical exchange of information between the supplier and its distributors may also be the only means to create a level playing field for competition between distributors and online platforms which have access to large amounts of data as part of their business model. However, being considered competitors has an impact on what suppliers can do or share with their distributors. Therefore, if the exception was to be removed, the collection of information that is relevant in the vertical relationship (e.g. retail sales data for better planning and logistics that ensures better availability of products to meet consumer demand and limits over production) could raise horizontal concerns.

Furthermore, removing the exception for dual distribution would significantly increase costs and create difficulties for businesses in the vertical supply chain. It would require a self-assessment whenever distributors enter into a distribution relationship with a supplier that also engages in direct sales. They would even risk being accused of horizontal collusion with the consequence of severe fines. Confronted with such risks, distributors may be deterred from entering into business relationships with suppliers. Moreover, suppliers that lose flexibility to engage in multiple sales channels may opt for selling directly, particularly via online shops.

In addition, the removal would significantly increase the burden for small and medium size dealers (such as local brick & mortar stores) that may already be facing significant competitive pressure from suppliers' direct sales, as well as from the activities of large online platforms. This pressure significantly increased since the beginning of the recent pandemic.

Furthermore, a removal of the exception may severely harm consumers who nowadays expect a fluid omni-channel experience. The European Commission's Staff Working Document on the evaluation of the Vertical Block Exemption Regulation highlights the importance for consumers to switch between multiple different sales channels. However, this presupposes that suppliers enjoy flexibility to use multiple sales channels, including direct and indirect sales. This flexibility would be significantly restricted if the exception for dual distribution was to be removed.

Therefore, ICLA strongly considers that the exception for dual distribution must be retained. In addition, ICLA suggests that the updated rules should clarify that dual distribution is purely a vertical relationship and that collection of information that is relevant in the vertical relationship (e.g. retail sales data for better planning and logistics that ensures better availability of products to meet consumer demand and limits over production) should not give rise to horizontal concerns between the supplier and its distributors at retail level. Please see our response to Q30 for more details on this point.

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

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

	Very negative	Negative	Neutral	Positive	Very positive	No opinion
a. Competition on the market	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

b. Harmonised application of the competition rules by competition authorities and national courts	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
c. Legal certainty for businesses	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
d. Efficiency of distribution systems	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
e. Cross-border trade	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
f. Costs for businesses	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
g. Consumer welfare	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
h. Investment / Economic growth	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
i. Sustainability objectives	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

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

5000 character(s) maximum

Removing the exception for dual distribution would have the following negative effects:

a) and g) Negative impact on inter-brand competition and consumer harm: losing flexibility to choose the routes to market will increase costs for and limit competition between suppliers. Without dual distribution the OEM cannot maintain with its direct sales the same coverage of different geographic areas and different segments of the customer base (small/medium/large).

Negative effect on intra-brand competition: Suppliers may decide not to rely on multiple sales channels, which will reduce competition between sales channels/distributors. Furthermore, the impending risk of being accused of horizontal collusion may deter suppliers and distributors to exchange information. This will inevitably create inefficiencies and also reduce small and medium size dealers' ability to compete with online platforms that already have access to large amounts of real-time data as part of their business model.

This will lead to less choice for consumers, who will suffer from reduced inter-brand and intra-brand competition. Moreover, the quality of pre-sales services for consumers may deteriorate if they cannot shop at independent (indirect) brick and mortar stores, based on the supplier's decision to rely solely on direct sales. Reducing the supplier's flexibility to use multiple distribution channels will also significantly disturb consumers' multichannel experience.

b) Removing the benefit of the block exemption will open the doors to diverging and inconsistent approaches by national competition authorities. This will almost inevitably result in a fragmented regulatory landscape with increased costs for businesses and a lack of legal certainty. As a consequence, it will become almost impossible for a supplier to establish a consistent pan-European distribution system that includes both direct and indirect sales channels.

c) Cross-border trade may suffer as suppliers may decide against the use of multiple distribution channels. In particular, suppliers will face significant challenges to establish pan-European distribution systems for their products/services that includes both direct and indirect sales channels.

- d) There will be a very negative impact on the efficiency of distribution systems, as many practices /interactions that are widely accepted to increase efficiencies in a vertical supply chain could be seen as giving rise to horizontal concerns if a supplier and its distributors are considered competitors. For example, while the sharing of information in a vertical supply chain is widely accepted as a source of efficiencies (e.g., to avoid the so-called “bullwhip effect”), it could raise concerns if it were regarded as horizontal information exchange between competitors.
- e) f), and h) Without the benefit of block exemption, businesses will be required to do a self-assessment, which eliminates legal certainty. Due to the expected divergent treatment by national competition authorities, suppliers may be unable to use a uniform pan-European distribution strategy. Instead, they will have to adapt their strategy country-by-country to avoid potential concerns (see the approach concerning platform bans by the German Federal Cartel Office). These developments will significantly increase the costs for businesses, due to reduced efficiencies as well as reduced business opportunities as suppliers may opt to rely exclusively on direct sales channels. Suppliers and distributors may choose not to invest in the indirect sales channel, and it would become less attractive for the supplier to rely on multiple sales channels in parallel.
- i) Finally, removing the exception may also have a negative impact on the sustainability objective. Absent the benefit from the safe harbour, vertical agreements between a supplier and distributors on sustainability may potentially raise horizontal concerns. Therefore, suppliers and distributors may refrain from including such objectives in their contracts.

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

- ☐ Yes
- ☒ No
- ☐ No opinion

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

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

14 Please explain your answer.

5000 character(s) maximum

In relation to Question 7, we would like to note that competition between a supplier and its distributors primarily affects intra-brand competition, and that concerns for intra-brand competition should be addressed by the vertical rules. Moreover, competition between a supplier and a distributor is by definition of a different nature than competition between independent distributors as the supplier owns the brand, designs the products and drives the brand image.

In relation to Question 9, ICLA believes that the current rules and threshold remain appropriate also for the dual distribution scenario. The relationship is primarily vertical and should not be assessed in the same way as a relationship between competitors on the same level (such as between manufacturers).

Introducing another threshold would add complexity and lead to increased uncertainty and costs for companies.

ICLA would also like to mention that the relationship does not become “more horizontal” simply because the parties’ market shares are higher. The relationship remains vertical. This should be stressed in the guidelines.

15 Based on your experience/knowledge, what would be the impact of introducing an additional threshold of 20% combined market share in the retail market (in line with the threshold in Article 3 of the Block Exemption Regulation for specialisation agreements) on the following aspects? Please, use the follow-up question to give concrete examples of the likely impacts.

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

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

5000 character(s) maximum

Please see our response to Question 14 above.

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

5000 character(s) maximum

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

- ☐ Yes
- ☒ No
- ☐ No opinion

20 Please explain your answer.

5000 character(s) maximum

ICLA members are not aware of any competition law concerns. Therefore, ICLA suggests that this situation should be treated similar to that of a supplier and its distributors.

The growth of online sales is increasingly blurring the lines between different levels of the indirect supply chain. Wholesalers may also sell directly to end-users via their online shops. In particular, in the B2B space, it may be impossible for a wholesaler to distinguish whether its business customers purchase for resale or for end-use.

However, the positive effects of these developments (e.g., increased number of players active on the retail level; enhanced omni-channel experience for end-users and consumers) clearly outweigh any potential residual horizontal concerns. Therefore, the scope of the exception for dual distribution should be extended to wholesalers that are also active on the retail level of trade.

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

- ☐ Yes
- ☒ No
- ☐ No opinion

22 Please explain your answer

5000 character(s) maximum

We are not aware of any competition law concerns. The situation should be treated similar to that of a supplier and its distributors.

23 In your experience/knowledge, how would a potential extension of the scope of the exception for dual distribution to wholesalers impact the following aspects?

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

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

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

5000 character(s) maximum

Extending the scope of the exception to wholesalers will have the following very positive effects:

a) and g) Extending the scope to wholesalers will increase the number of players active on the retail level and therefore enhance intra-brand competition. Consumers will benefit from increased intra-brand competition and more efficient supply chains which will ultimately result in reduced prices and better quality. Moreover, consumers can benefit from a strengthened seamless multichannel experience, the importance of which has been recognized by the European Commission in its Staff Working Document on the evaluation of the Vertical Block Exemption Regulation.

b) to f), and h) Extending the scope will ensure a harmonized approach by national competition authorities and national courts and eliminate legal uncertainty whether such wholesaler activities could give rise to horizontal concerns. In addition, it will increase flexibility for suppliers and distributors and will therefore incentivize them to invest in the indirect distribution channel. Enhanced supply chain efficiencies (e.g., realized from vertical information flows) will result in cost reductions that can be passed on to the consumer and free-up resources for investment into innovation. Moreover, wholesaler activities on the retail level will also have a positive impact on cross-border trade, as wholesalers typically possess the logistical capabilities to sell across countries.

i) Extending the scope of the exception will enable wholesalers and retailers to include sustainability objectives in their contracts without having to fear that these may give rise to horizontal concerns.

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

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

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

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

5000 character(s) maximum

In ICLA's view, it is unclear why an independent importer that takes over the role of the supplier to market the products in a particular region and that is also active downstream should be treated differently from a manufacturer engaging in dual distribution. Thus, the scope of the exception for dual distribution should be extended to include independent importers that are also active on the retail level. This will also have positive impacts on the following aspects:

- a) An extension of the scope to include importers will enable suppliers to rely on local importers to manage and expand the distribution network. This will positively impact competition.
- b) It will also ensure a harmonized approach by national competition authorities and national courts as it eliminates legal uncertainty as to whether such activities could give rise to horizontal concerns.
- c) Likewise, an extension will increase legal certainty for businesses (both importers and resellers) that can benefit from the safe harbour of the VBER.
- d) An extension of the scope will have a positive impact on efficiencies as resellers and importers can engage in efficiency-enhancing vertical information exchanges without having to fear that these activities could give rise to horizontal concerns. Furthermore, this will facilitate efforts to create a seamless

multichannel experience for consumers, the importance of which has been recognized by the European Commission in its Staff Working Document on the evaluation of the Vertical Block Exemption Regulation.

e) Importer activities on the retail level will also have a positive impact on cross-border trade, as importers may be in a better position to sell to end-customers across multiple countries.

f) The extension of the scope of the exception will reduce costs for businesses that can rely on the safe harbour. Moreover, increased efficiencies realised from vertical information exchanges will result in reduced costs for each level of the supply chain that will be passed on to the consumer (either as lower prices or better quality, such as improved availability, pre-sales services or multichannel experience).

g) Consumers will benefit from increased intra-brand competition and more efficient supply chains which will ultimately result in reduced prices and better quality. Moreover, consumers can also benefit from a seamless multichannel experience.

h) The extension of the scope will create legal certainty and increase flexibility for suppliers and distributors and will therefore incentivise them to invest in the indirect distribution channel. Reduced costs due to increased efficiencies in supply chain will also free-up resources for investment into innovation.

i) The extension of the scope will enable importers and distributors to include sustainability objectives in their contracts without having to fear that these may give rise to horizontal concerns.

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

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

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

5000 character(s) maximum

As explained in more detail in the responses to Q24 and Q26, wholesalers and importers that engage in dual distribution should be able to benefit from the safe harbour in the same way as suppliers that engage in dual distribution.

As stated above (Q6), removing the exception for dual distribution would have a very negative impact on competition, legal certainty, companies and consumers. In particular, it would make it very difficult for dealers to enter into a distribution relationship with a manufacturer that also sells directly, because many of the business practices that are fully legitimate and accepted as efficiency enhancing in a vertical context

may give rise to competition law concerns if the supplier and its dealers were considered to be competitors. It may also increase the economic pressure on small and medium dealers, particularly brick & mortar dealers, as suppliers may choose for a direct (online) sales model if they lose the flexibility to use multiple direct and indirect routes to market. Competition between a supplier and its distributors is by definition of a different nature than competition between independent distributors as the supplier owns the brand, designs the products and drives the brand image. The increased relevance of dual distribution since the adoption of the current VBER does not alter the nature of competition. Likewise, it does not make the relationship between a supplier and its distributor “more horizontal”. It remains primarily a vertical relationship. This should be clearly recognized in the new VBER and Guidelines.

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

Only files of the type pdf,txt,doc,docx,odt,rtf are allowed

B.2 Active sales restrictions

Agreements or concerted practices aimed at restricting the territory into which, or the customers to whom, a buyer can sell the contract goods or services (“territorial and customer restrictions”) are considered hardcore restrictions under the VBER (i.e. they cannot benefit from the safe harbour) and by object restrictions under Article 101 of the Treaty. This means that the buyer should generally be allowed to actively approach individual customers (“active sales”) and respond to unsolicited requests from individual customers (“passive sales”). While the current rules generally do not allow restrictions of passive sales (except as provided by Articles 4(b)(iii) and 4(b)(ii) of the VBER), they do permit restrictions of active sales in certain limited cases, notably to protect investments by exclusive distributors (i.e. active sales into exclusive territories can be restricted (4(b)(i) of the VBER) and to prevent sales by unauthorised distributors in territories where a supplier operates a selective distribution system (i.e. members of this system can be restricted from selling to non-members (4(b)(iii) of the VBER).

The evaluation has shown that the current rules are perceived as preventing suppliers from designing their distribution systems according to their business needs. The main issues raised in this context include the possibility of combining exclusive and selective distribution in the same or different territories. Moreover, the current rules are considered as not allowing for the effective protection of selective distribution systems against sales from outside the territory in which the system is operated.

Against this background, the following policy options are proposed regarding the exception for active sales restrictions **(Options 2 and 3 could be applied cumulatively)**:

Option 1: no policy change

Option 2: expanding the exceptions for active sales restrictions to give suppliers more flexibility to design their distribution systems according to their needs, in line with Article 101 of the Treaty;

Option 3: ensuring more effective protection of selective distribution systems by allowing restrictions on sales from outside the territory in which the selective distribution system is operated to unauthorised distributors inside that territory.

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

- ☒ Yes
☐ No

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

5000 character(s) maximum

Typical restrictions include: no active sales to customers/territories exclusively reserved for the supplier or exclusively allocated to another distributor; no sales to unauthorized dealers in a selective distribution system; prohibition for wholesale distributors to sell directly to end-users.

Some ICLA members work for manufacturers, which maintain a variety of different types of distribution networks designed to maximize sales of the products in question taking into account the market conditions and customer preferences.

Such distribution networks may include granting exclusivity for specific territories or customer groups, limiting sales by the supplier and/or active sales by the customers as permitted by the VBER.

Several ICLA members are also employed by companies that operate selective distribution systems, wherein sales to non-authorized members are prohibited and authorised wholesalers are prohibited from selling directly to end-users. Within such selective distribution systems, there may also be limitations on the number of members to be appointed for specific territories.

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

- ☐ Yes
☒ No
☐ No opinion

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

5000 character(s) maximum

The current rules are not in line with commercial reality and limit flexibility for companies to set up their distribution system in the most efficient way.

1. As mentioned by the Commission, the current rules do not permit effectively combining exclusive and selective distribution in same or different territories.

There are many good reasons for granting exclusivity to a distributor/wholesalers for a specific territory. Manufacturers will need to rely on local knowledge for particular markets and distributors/wholesalers need to protect their investments.

Such local knowledge can also be effectively put to use by manufacturers to operate a selective distribution network. We experience that suppliers would like to rely on wholesale distributors to implement, manage and expand the selective distribution system in a country/region. The local wholesale distributor is often in a better position to identify suitable dealers, work with them to meet the selective distribution criteria, manage the authorization process, monitor and enforce compliance. However, this requires significant and continuous investment, which needs to be protected against attempts from other distributors (or the manufacturer) free-riding on these investments by actively selling to the authorized dealers managed by the wholesaler. Granting exclusivity in such circumstances will help protect these investments and also incentivize the wholesaler to expand the selective distribution network, to the ultimate benefit of the end-customer. However, under the current rules, it is difficult to combine selective distribution with exclusive distribution in the same territory. In the absence of market power, ICLA would suggest that the rules be changed to allow for exclusive distribution at wholesale level, while permitting selective distribution at retail level. This would mean allowing manufacturers to protect exclusive distributors from active sales from other resellers.

Manufacturers should also have flexibility to adapt distribution networks to the local market conditions. In some markets, selective distribution may be the best option, but not necessarily in all. The manufacturer may also want to test selective distribution in some key markets before deciding whether to apply across Europe. Under the current rules, it is not possible for a manufacturer to prevent sales to non-authorised dealers from resellers outside the territory. We therefore suggest allowing manufacturers to prevent customers in other territories from selling to non-authorised dealers in a territory in which a selective distribution system is operated.

2. The distribution networks may be different from country to country depending on market size or other factors. In some countries, the manufacturer may sell to wholesalers which in turn sells to retailers. In other countries, the manufacturer may sell to one or more distributors, which in turn sells to wholesalers and so on. However, under current rules, a manufacturer cannot impose restrictions on the customers of the buyer. This limits the flexibility of a manufacturer to adapt the approach best suited for a particular market. It also does not bring the necessary protection in situations where the manufacturer also sells through distributors in other countries. The customers of such distributors would be free to actively sell in the market for which exclusivity has been granted. ICLA suggests that it should be possible for a manufacturer to impose restriction also on the customers of the buyer.

3. ICLA also suggest that the rules should be changed to allow the manufacturer to share exclusivity between two or more distributors for a territory or customer group. Shared exclusivity may increase intra-brand competition, while at the same time enable to manufacturer to protect the wholesale distributors' investment.

4. It must be possible for a company to assign territories to distributors in which they can sell actively while they should not sell actively outside the allocated territory regardless of whether or not these other territories are allocated exclusively. As long as passive sales are possible, it is unclear where the competitive harm lies in granting active sales rights for a particular territory, restricting active sales rights into another territory, if this territory has not been assigned to a different distributor exclusively.

5. The Guidelines should be amended to better fit the current retail landscape and allow manufacturers to rapidly adjust to changing market conditions. The Guidelines currently gives additional protection to the online channel. However, market developments show that the online channel do not need additional protection. The examples on what constitutes passive sales should be updated to fit current market conditions and to be neutral as concerns the type of sales channel used. E.g. it should be clear that active sales also covers websites in local languages or using national domains.

35 Do you have experience or knowledge of instances where the combination of exclusive and selective distribution systems in the same territory (e.g. an EUMember State) but at different levels of the distribution chain may not fully

comply with the current rules (e.g. exclusivity at the wholesale level within a selective distribution system)?

- ☒ Yes
- ☐ No
- ☐ No opinion

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

5000 character(s) maximum

See our response to Question 34 above.

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

- ☒ Yes
- ☐ No
- ☐ No opinion

38 Please explain your answer

5000 character(s) maximum

Often, a manufacturer will rely on wholesaler to implement and manage selective distribution system in a specific territory. This requires significant investment by the wholesaler (e.g., identify suitable dealers, work with dealers to meet selective distribution criteria, manage authorization process, support manufacturer to enforce selective distribution system). Granting exclusivity on the wholesale level will help to protect such investment and therefore provide an incentive to expand and/or maintain the selective distribution system in a given territory or with a particular customer group. Wholesale distributors will only be willing to invest to support the manufacturer in running a selective distribution system if they can calculate the expected return on their investment. This requires a certain degree of protection from authorized wholesale distributors outside the territory that may try to free-ride on the local distributors' investment, particularly by actively selling to the network of authorized dealers in the territory created and managed by the wholesale distributor.

Thus, granting exclusivity on the wholesale level will incentivize the wholesale distributor to invest in the selective distribution system, i.e., by expanding the network and improving the quality of services offered by authorized dealers. In return, the end-customer will benefit from a larger number of authorized dealers, increased competition between these authorized dealers and higher quality (e.g., pre-sales and after-sales services, presentation and marketing).

39 Do you have experience or knowledge of instances where the combination of exclusive and selective distribution systems in different territories (e.g.

different EU Member States, with exclusive distribution in Member State X and selective distribution in Member State Y) may not fully comply with the current rules?

- ☒ Yes
- ☐ No
- ☐ No opinion

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

5000 character(s) maximum

ICLA members are not aware of any significant combinations of such distribution systems. This is due to the limitations of the current rules, where it is impracticable to combine these systems for different territories or customer groups, as manufacturer will not be able to protect its selective distribution system, whilst it also cannot prevent sales into the exclusive territory. Most manufacturers will either use selective distribution or exclusive distribution, with selective distribution being more common.

ICLA sees a need to change the current rules to allow manufacturers to effectively design and operate its distribution systems to fit market conditions in different territories, see also our response to Question 34 above.

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

- ☒ Yes
- ☐ No
- ☐ No opinion

42 Please explain your answer

5000 character(s) maximum

As stated above, under the current rules, this seems inefficient and ICLA is therefore not aware of any combination of these systems in different Member States.

However, ICLA members do have experience with operating the different types of distribution systems. From our experience, there would be clear benefits in being able to effectively combine such networks. The current rules are too strict and do not grant manufacturers the opportunity to effectively set up and operate distribution networks.

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



- ☐ allow exclusivity at the wholesale level within a selective distribution system
- ☒ other action (please specify below)

44 Please explain your answer

5000 character(s) maximum

See also above, in particular our response to Question 34.

First, ICLA supports that exclusivity at wholesale level should be allowed also in combination with selective distribution. Wholesale distributors may play an important role, because a manufacturer may generally rely on the wholesale distributor's support for a given territory or customer group to implement, manage, develop and enforce the manufacturer's selective distribution network (such as, identify suitable dealers, work with the dealers to meet the selective distribution criteria, manage the authorization process, monitor and enforce compliance with the selective distribution requirements, provide training, etc.). This requires a significant and continuous investment from the wholesale distributor. A wholesale distributor will only be willing to make this investment, if it can get protection from other authorized wholesalers that try to free-ride on these investments. Therefore, the exceptions on active sales restrictions should allow the supplier to rely on exclusive authorized wholesale distributors for the implementation, management and enforcement of a selective distribution system in a territory / with a customer group. The wholesale distributor will normally be in a better position to identify dealers that qualify for being added to the selective distribution network, to support them to meet the selective distribution criteria, to manage the authorization process, as well as to monitor and enforce compliance with the selective distribution criteria.

Second, ICLA supports giving manufacturers the possibility to protect territories in which a selective distributions system is operated, by prohibiting resellers outside the territory from selling to non-authorised dealers within the territory in which the selective distribution system is operated.

Third, ICLA also suggest that the rules should be changed to allow the manufacturer to share exclusivity between two or more distributors for a territory or customer group. Shared exclusivity may increase intra-brand competition, while at the same time enable to manufacturer to protect the wholesale distributors' investment.

Finally, ICLA also suggest that other actions should be considered in order to allow manufacturers to adapt its distribution systems to the market conditions and ongoing developments, such as (i) allowing the manufacturer to require customers to pass-on active sales restrictions to their customers; and (ii) updating the Vertical Guidelines to better fit the current retail landscape and allow manufacturers to rapidly adjust to changing market conditions, in particular to remove the current special protection for the online channel.

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

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

	Very negative	Negative	Neutral	Positive	Very positive	No opinion
a. Competition on the market	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

b. Harmonised application of the competition rules by competition authorities and national courts	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
c. Legal certainty for businesses	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
d. Efficiency of distribution systems	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
e. Cross-border trade	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
f. Costs for businesses	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
g. Consumer welfare	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
h. Investment / Economic growth	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
i. Sustainability objectives	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

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

5000 character(s) maximum

As stated above, exclusivity at the wholesale level will incentivize wholesalers to invest in managing and expanding a selective distribution network in the relevant territory/ with a relevant dealer group. This will lead to:

- Increased intra-brand competition by adding more authorized dealers to the network (as wholesale distributor will be incentivized to invest in promotion and expansion of selective distribution network in the territory / with the customer group) thereby also eventually increasing inter-brand competition;
- Improved harmonized application of the rules by adding clarity that granting exclusivity on the wholesale level is not a hardcore restriction and therefore benefits from the safe harbor of the VBER;
- Improved legal certainty for businesses for the same reasons;
- Increased efficiency: manufacturers can rely on wholesale distributors to manage selective distribution in a given territory. Local wholesale distributors will often be better suited to identify right candidates to add to the network, to work with them to reach the criteria and to manage the authorization process and monitor and enforce compliance with the criteria;
- Increased cross-border trade, as it will be easier for manufacturer to rely on wholesale distributors to expand into new territories. Manufacturers may also rely on exclusive wholesale distributors for a region;
- Reduced costs for businesses: reduced costs for manufacturers; return on investment for wholesale distributors; reduced costs for authorized dealers that get support from wholesale distributors to meet selective distribution criteria;
- Consumer benefits from larger number of authorized dealers, increased intra-brand competition, higher quality of services, marketing and presentation;
- Incentive for wholesale distributors to expand selective distribution network;
- Relying on wholesale distributors may also enable manufacturer to include sustainability objectives in selective distribution system (e.g., as part of selective distribution criteria).

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

- ☒ Yes
- ☐ No
- ☐ No opinion

48 Please explain your answer

5000 character(s) maximum

Given that the current rules do not allow for such restrictions, ICLA members have limited experience with this.

However, it seems fairly obvious to ICLA that restricting outside sales to unauthorized distributors will ensure consistent application. This will also increase the incentive for authorized distributors to invest in qualification and quality distribution of products, if they don't have to fear unfair competition from territories where distributors don't have to comply with selective criteria (most selective distribution networks use a mix of qualitative and quantitative selective distribution systems) or competition from unauthorized dealers in the same territory sourcing from outside. It could also prevent free-riding and ensure that sustainability, quality, service and other criteria of a selective distribution model can form a level playing field across all areas for all participants.

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

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

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

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

5000 character(s) maximum

See already above, in particular our responses to Questions 34 to 48, as well as following positive impacts:

- a), d), f) and h): Changing the rules would give manufacturers and distributors incentives to invest in quality, innovation and sustainability in particular territories, while protecting against unfair competition from outside. This will lead to both increased intra-brand competition and increased inter-brand competition - in particular on value-added services for consumers. Changing the rules would also allow manufacturers the possibility to design the distribution systems to maximize sales throughout the network, as well as test different concepts in limited territories.
- g) Protection from unauthorized sales provides incentive to invest in quality and innovation. Consumer welfare is more than just price.

ICLA notes that such changes would have to be set out clearly – in order to avoid legal uncertainty and the divergent decision making which has happened for other aspects of current rules.

51 Based on your experience/knowledge, which of the following actions could ensure an appropriate list of permitted active sales restrictions in the VBER (i.e. block-exempting restrictions that do not raise competition concerns or that satisfy the criteria of Article 101(3) of the Treaty, and not block-exempting restrictions that may raise competition concerns)? You can select more than one of the following options:

- ☒ Extend the scope of the exceptions to allow exclusivity at the wholesale level within a selective distribution system
- ☒ Extend the scope of the exceptions to allow restrictions on sales from outside the territory in which a selective distribution system is operated to unauthorised distributors inside that territory
- ☐ Maintain the current rules
- ☒ Other

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

5000 character(s) maximum

See already above, the current rules are not in line with commercial reality and significantly limit flexibility and the possibility to incentivize investments. A seller should be free to set up its distribution system in the way that suits it, as long as there are no harmful restrictions and in the absence of market power.

The current rules also prevent suppliers from realizing the full efficiencies from a selective distribution system. Currently, it is not viable for a manufacturer to run exclusive distribution and selective distribution in parallel, either on different levels of the supply chain or in different territories. Particularly on the wholesale level, exclusivity may provide an incentive for wholesalers to invest in the implementation, maintenance of a selective distribution system, to the ultimate benefit of the end-customer.

Currently, the exception for permitted active sales restriction is limited to situations where a territory or customer group is allocated to one exclusive distributor. There seems to be no reasonable explanation why

the manufacturer should not be allowed to appoint more than one exclusive distributor while at the same time protecting them from active sales. Shared exclusivity may increase intra-brand competition, while at the same time enable to manufacturer to protect the wholesale distributors' investment. The desire to allow shared exclusivity was recognized in the Commission's Inception Impact Assessment paper, but it is missing from this questionnaire.

The Vertical Guidelines should also be updated to recognize the significant changes in the retail sector since first adopted – in particular to make the Guidelines neutral and not to give particular protection to one particular sales channel. In the absence of market power, manufacturers should have the flexibility to design their distribution systems to best fit their product and maximize sales.

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

5000 character(s) maximum

Please see answers above, particularly to question 34 for suggested changes to the current rules.

Changing the rules to allow for more flexibility for manufacturers to design their distribution networks would have a very positive effect:

- a) Increased intra-brand competition by adding more authorized dealers to the network (as wholesale distributor will be incentivized to invest in promotion and expansion of selective distribution network in the territory. This would also likely result in increased inter-brand competition as manufacturers would be able to test new distribution concepts in smaller territories – thus leading to innovation in service and quality;
- d), f), h) and i) Manufacturers would be able to better design and test distribution systems to fit the relevant products and market conditions. This would lead to efficiencies and reduced costs for businesses – and would also benefit innovations and R&D. This could also allow manufacturers and distributors to experiment with better solutions for achieving sustainability objectives.
- g) Consumers benefits from larger number of authorized dealers, increased intra-brand competition, higher quality of services, marketing and presentation. Allowing manufacturers and distributors more flexibility would therefore also increase consumer welfare.

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

Only files of the type pdf,txt,doc,docx,odt,rtf are allowed

B.3 Indirect restrictions of online sales

Online sales are generally considered a form of passive sales and restrictions preventing distributors from

selling through the internet are considered hardcore restrictions that cannot benefit from the safe harbour and as by object restrictions under Article 101 of the Treaty. The current rules apply the same approach to two types of indirect measures that may make online sales more difficult. Paragraph 52(d) of the Vertical Guidelines provides that charging the same distributor a higher wholesale price for products intended to be sold online than for products sold offline (“dual pricing”) is a hardcore restriction. Paragraph 56 of the Vertical Guidelines states that the same applies to imposing criteria for online sales that are not overall equivalent to the criteria imposed for sales in physical shops (“equivalence principle”) in the context of selective distribution. A supplier may, for example, require delivery within specified timeframes in online stores as an equivalent to a requirement for immediate delivery in physical stores or require the creation of an online helpdesk for online stores as equivalent to the service provided in physical stores.

Over the last decade, online sales have developed into a well-functioning sales channel, whereas physical stores are facing increasing pressure. During the evaluation, stakeholders indicated that the rules on dual pricing prevent them from incentivising investments, notably in physical stores, by not allowing them to differentiate wholesale prices based on the costs of each channel. Stakeholders also pointed to a lack of legal certainty in the application of the equivalence principle, as online and offline sales channels are inherently different, and it is difficult to assess when a divergence in the criteria used for each channel amounts to a hardcore restriction under the VBER.

Against that background, the following policy options are proposed for these two types of indirect restrictions of online sales **(Options 2 and 3 could be applied cumulatively):**

Option 1: no policy change;

Option 2: no longer treating dual pricing as a hardcore restriction, with safeguards to be defined in line with the case law;

Option 3: no longer treating as a hardcore restriction the imposition of criteria for online sales that are not overall equivalent to the criteria imposed for sales in physical stores in a selective distribution system, with safeguards to be defined in line with the case law.

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

- ☒ Yes
- ☐ No
- ☐ No opinion

56 Please explain your answer

5000 character(s) maximum

As also pointed out above, ICLA agrees that the online channel is well established and physical stores are facing increased pressure. This development has been clear for several years – but is even more apparent with the pandemic across all product sectors.

Initially, by dual pricing, we understand having different pricing to the same retailer depending on whether sales are made offline or online. There is some confusion on this, in particular on whether manufacturers should be required to offer the same (or equivalent) pricing to different dealers depending on whether they

sell online or offline. Such price discrimination is currently block exempted, though the French and German authorities seem to have taken a different view. This should be clarified when revising the rules.

As concerns dual pricing, under the current VBER, manufacturers have struggled with how to incentivize retailers to invest in physical stores. The current possibilities of granting a “fixed fee” to support physical stores or to require a minimum quantity sold through physical stores are not workable in practice – especially where a manufacturer has thousands of customers across Europe, which is often the case.

The simplest way of incentivizing physical stores is through dual pricing, for instance by allowing manufacturers to grant an extra rebate to a hybrid dealer for the sales made through the physical stores or even to differentiate between different type of stores depending on quality / intensity of investments. This would allow manufacturer to effectively reward retailers depending on the needs and cost of each channel or type of store – which in turn would offer retailers incentives to invest in quality service, display, presentation and customer service. Having such flexibility could also help manufacturers launch new products by rewarding dealers willing to ensure demonstration to customers.

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

- ☐ Yes
- ☒ No
- ☐ No opinion

58 Please explain your answer

5000 character(s) maximum

Experience with such dual pricing is limited – due to the current rules. However, based on general experience with distribution systems and pricing, it is difficult to envisage situations where such dual pricing would cause competition concerns. A lower transfer price for offline sales would merely compensate retailer for higher fixed costs for their local stores.

Manufacturers aim to maximise sales through any channels and online sales are very important in the current environment. Ensuring that investments are made both for online and offline presentation of products is however key. Provided the manufacturer operate in a competitive market, i.e. in the absence of market power, any attempt to use dual pricing to prevent online sales or raise prices, would be extremely risky for a manufacturer – as it would most likely simply result in loss of turnover – as consumers switch to other products.

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

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

	Very negative	Negative	Neutral	Positive	Very positive	No opinion
a. Competition on the market	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

b. Harmonised application of the competition rules by competition authorities and national courts	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
c. Legal certainty for businesses	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
d. Efficiency of distribution systems	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
e. Cross-border trade	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
f. Costs for businesses	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
g. Consumer welfare	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
h. Investment / Economic growth	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
i. Sustainability objectives	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

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

5000 character(s) maximum

As stated above, different purchase prices are the only viable means to support and compensate dealers for different cost structures. This will help to preserve brick&mortar stores, which came under significant pressure to the growth of online sales. This was only accelerated by the COVID-19 pandemic.

Changing the rules to allow for more flexibility for manufacturers to use pricing to incentivize and reward retailers also for investments in physical stores would have a very positive effect:

- a) and g Increased intra-brand competition by incentivising retailers to invest in service, presentation and displays in physical stores – including in offering value-added services to consumers. This would likely increase the possibility of intra-brand competition, including on services offered to consumers.
- d) and f) The costs of trying to reward retailers through fixed cost fees is very high. Rewarding retailers through the pricing structure is much simpler and easy to handle for manufacturers.
- g) As a result of the possibility to reward investments, consumers would benefit from additional services and maintaining the possibility to actually touch and try products.

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

5000 character(s) maximum

Generally, manufacturers do not have an incentive to limit online sales – as it would likely lead to loss of turnover. Under the current case law, notably the Pierre Fabre judgement, an outright ban of online sales remains a violation of Article 101 TFEU as it restricts cross-border sales.

Dual pricing, however, is only intended to incentivize a particular sales channel (i.e. how products are sold)

and should be allowed unless such dual pricing is actually based on where or to whom sales are being made or would amount to a de facto ban of online sales by using a prohibitive price disadvantage which is not justified by the brick&mortar, service, quality or other investments into offline sales. While this will have to be assessed on a case-by-case basis, the Commission may provide guidance through specific examples.

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

- ☒ Yes
☐ No
☐ No opinion

63 Please explain your answer

5000 character(s) maximum

As recognized by the Commission, online and offline sales channels are inherently different. Manufacturers need to have the freedom to adapt the criteria to each channel to ensure the best possible experience for consumers across all channels and to ensure a consistent brand image. Achieving “equivalence” under such circumstances can be difficult and will be subject to judgement. This can be risky where some competition authorities have a strict view on what constitutes equivalence – effectively resulting in competition authorities setting the criteria.

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

- ☐ Yes
☒ No
☐ No opinion

65 Please explain your answer.

5000 character(s) maximum

The original aim with the “equivalence” requirement was to avoid retailers being dissuaded from online sales. However, as development has shown, there is no longer any need for special protection of the online channel. It is hard to see the rationale for maintaining such requirement.

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

	Very negative	Negative	Neutral	Positive	Very positive	No opinion
a. Competition on the market	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

b. Harmonised application of the competition rules by competition authorities and national courts	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
c. Legal certainty for businesses	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
d. Efficiency of distribution systems	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
e. Cross-border trade	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
f. Costs for businesses	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
g. Consumer welfare	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
h. Investment / Economic growth	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
i. Sustainability objectives	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

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

5000 character(s) maximum

Removing the “equivalence” criteria would have the following impacts:

a) Spur competition between online and offline sales by creating a level playing field that takes into account the inherent differences between the two sales channels. It would also allow manufacturers to more easily adapt the criteria for each channel taking into account market developments;

b) Improved harmonized application by clarifying what criteria can be applied to each channel. The “equivalence” requirement has led to different approaches by NCAs;

c) Improve legal certainty by clarifying the requirements. The meaning of the “equivalence” requirement has been unclear and resulted in legal uncertainty;

d) Allowing different criteria will enable manufacturers to take into account the inherent differences between the online and offline sales channels when setting up a selective distribution system;

e) Introducing clear rules at EU level will enable manufacturers to design a selective distribution system for the European Union. This will clearly increase cross-border sales;

f) Cost for business will fall due to legal certainty and the ability to apply harmonized criteria in the whole EU;

g) Consumer welfare will benefit from rules that enable online and offline channels to compete on a level playing field. As stated above, the rules in the 2010 VBER and Guidelines aimed at protecting online sales. Today, the online sales channel does not require such specific protection;

h) Applying criteria that are customized to the relevant sales channel will incentivize manufacturers to invest in setting up a selective distribution system across sales channels (under the current rules, the easiest solution is to simply exclude online dealers, and several suppliers have taken this route);

i) Applying different criteria may also enable suppliers to take into account sustainability goals.

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

5000 character(s) maximum

While it is clear that an outright or de facto ban on online sales is a restriction by object of passive sales under Article 101 TFEU (Pierre Fabre), it is also clear that a restriction on how a distributor can sell products online is not a restriction by object to restrict where or to whom products are sold (Coty).

There is no need for additional safeguards – if the setting of different criteria has as its object to restrict where or to whom products are sold, this would be an object restriction falling outside the VBER. Otherwise, different criteria should be covered by the block exemption – provided of course, market share thresholds are not exceeded.

The analysis would have to be done on a case-by-case. The Commission could provide detailed guidance in the updated Guidelines, by providing criteria that would normally be seen as a de facto prohibition of online sales and thus of passive sales, because a retailer cannot reasonably comply with them.

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

You can select more than one of the following options:

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

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

5000 character(s) maximum

As stated before, notably in the reply to question 60 above, allowing manufactures the flexibility to use dual pricing to incentivise investments in physical stores, would be beneficial for competition, consumer welfare and would lead to lower costs and more efficient distributions systems. Online and offline sales channels

have different cost structures. Maintaining the hardcore restriction for dual pricing is not in line with economic reality, where resellers are struggling to maintain and invest in physical stores while facing price competition from online sales. This development is only accelerated by the COVID-19 pandemic.

As there is uncertainty about the current rules (notably on what constitutes dual pricing), maintaining the status quo is not appropriate. The fixed fee solution is also not workable in practice – so limited in use.

In the same way, maintaining the equivalence test is also not appropriate as it is (no longer) needed, it does not take into account the inherent differences between the sales channels and as it has restricted the ability of manufacturers to quickly adjust to market developments and consumer expectations. Having such requirement has led to overly strict enforcement by some competition authorities. As many manufacturers operate pan-EU distribution system, adjustments in one country will invariably lead to similar adjustments in other countries. Ensuring clear rules would therefore also lead to consistent application both by national authorities and courts.

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

5000 character(s) maximum

Please see our response to Questions 60 and 70 above.

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

- ☐ Yes
- ☒ No
- ☐ No opinion

73 Please explain your answer

5000 character(s) maximum

Suppliers should be allowed more flexibility with regard to the overall structure of their distribution system, but also with regard to the use of online and offline sales. Hence, allowing more exceptions for the restriction of active sales in an exclusive distribution system does not eliminate the need to enable suppliers to differentiate pricing between online and offline sales channels, i.e. within any distribution system, and to apply different criteria within a selective distribution system.

74 Based on your experience/knowledge, please provide any other comments or suggestions you may have on the rules for these two types of indirect restrictions on online sales. You may also provide additional information

which may be relevant for this section (copies of any documents, reports, studies etc.). Please upload the information in files with a maximum size of 1 MB each, using the button below.

Only files of the type pdf,txt,doc,docx,odt,rtf are allowed

B.4 Parity obligations

Parity clauses require a company to offer the same or better conditions to its contract party (for example, an online platform) as it offers on certain other sales channels. So-called wide parity clauses generally relate to the conditions offered on all sales channel (including other platforms and the company's direct sales channels), whereas so-called narrow parity clauses generally relate only to the company's direct sales channels (for example, the company's website).

Parity obligations can be agreed at wholesale or retail level, and they can relate to price or non-price conditions (e.g. inventory or the availability of goods or services).

All types of parity obligations are currently block-exempted by the VBER. The evaluation showed an increase in the use of parity obligations across sectors, notably by online platforms. National competition authorities and courts have identified anti-competitive effects of obligations that require parity with other indirect sales or marketing channels (e.g. other platforms or other online or offline intermediaries).

Regarding parity obligations, the following policy options are proposed:

Option 1: no policy change;

Option 2: removing the benefit of the block exemption for obligations that require parity relative to specific types of sales channels, by including such obligations in the list of excluded restrictions (Article 5 VBER). These obligations would thus require an individual effects-based assessment under Article 101 of the Treaty. Conversely, parity obligations relating to other types of sales channels would continue to be block-exempted, on the basis that they are more likely to create efficiencies that satisfy the conditions of Article 101(3) of the Treaty. For example, the benefit of the block exemption could be removed for parity obligations that relate to indirect sales and marketing channels, including platforms and other intermediaries, while maintaining this benefit for parity obligations that relate to direct sales and marketing channels, including own websites;

Option 3: removing the benefit of the block exemption for all types of parity obligations, by including them in the list of excluded restrictions (Article 5 VBER), thus requiring an individual effects-based assessment in all cases.

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

- ☒ Yes
- ☐ No

76 If you have experience/knowledge of parity obligations, please indicate whether you have this experience/knowledge because you requested a parity

obligation or because you accepted a parity obligation? (multiple answers possible)

- ☒ I have requested a parity obligation
- ☒ I have accepted a parity obligation
- ☐ Other experience/knowledge

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

5000 character(s) maximum

Some of our members have used or been subject to parity clauses.

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

- ☒ Yes
- ☐ No

79 Please explain your answer.

5000 character(s) maximum

In some specific cases, for example, when parity clauses are widely used at the retail level by undertakings with substantial market power in a certain sector, parity clauses can lead to a levelling of prices across platforms with less opportunities to compete for smaller platforms.

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

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

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

5000 character(s) maximum

If competition concerns arise, these concerns relate primarily to widely used retail parity clauses which cover other platforms i.e. where most platforms require dealers on their platform to offer products/ services at the same price / conditions as on other platforms or intermediaries.

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

- ☐ Yes, to a large extent
- ☐ Yes, to a small extent
- ☒ No
- ☐ No opinion

83 Please explain your reply

5000 character(s) maximum

In our view, it is their widespread use by large players in a sector rather than the sector in which parity clauses are used that could lead to competition concerns.

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

- ☒ Yes, it is necessary to consider whether the parity obligation concerns the retail or the wholesale level
- ☐ Yes, it is necessary to consider whether the parity obligation relates to price, inventory, availability or other conditions
- ☐ Yes, if intermediaries are concerned, it is necessary to consider the type of intermediary, i.e. sales intermediaries (e.g. sales platforms) or advertising /marketing intermediaries (e.g. websites that offer only price comparison)
- ☐ Yes, it is necessary to consider whether the transactions covered by the parity obligation take place online or offline
- ☐ Yes, it is necessary to consider further distinctions (please specify these in the box below)
- ☐ No
- ☐ No opinion

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

5000 character(s) maximum

Contrary to retail parity clauses, wholesale parity clauses, where a customer requires its supplier to offer the same or better purchases price/conditions that it makes available to other customers have not given rise to significant competition law concerns in the past.

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

- ☒ Yes
☐ No

87 Please explain your reply and provide examples where possible.

5000 character(s) maximum

In the case of wholesale parity clauses, their inclusion could lead to better prices and conditions. For retail parity clauses they could assist a platform to grown and to distinguish itself from competitors while allowing protection from free riding.

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

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

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

- ☐ Yes, to a large extent

- ☐ Yes, to a small extent
- ☒ No
- ☐ No opinion

91 Please explain your reply

5000 character(s) maximum

Benefits of party clauses could arise in any sector.

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

- ☒ Yes, it is necessary to consider whether the parity obligation concerns the retail or the wholesale level
- ☐ Yes, it is necessary to consider whether the parity obligation relates to price, inventory, availability or other conditions
- ☐ Yes, if intermediaries are concerned, it is necessary to consider the type of intermediary, i.e. sales intermediaries (e.g. sales platforms) or advertising /marketing intermediaries (e.g. websites that offer only price comparison)
- ☐ Yes, it is necessary to consider whether the transactions covered by the parity obligation take place online or offline
- ☐ No
- ☐ No opinion

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

5000 character(s) maximum

The benefits of parity clauses at the wholesale level could be easier to identify than wide retail parity clauses.

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

- ☒ No, parity obligations should continue to be block-exempted.
- ☐

Yes, the benefit of the block exemption should be removed for parity obligations, but only for parity obligations that relate to indirect sales /marketing channels (e.g. other platforms/intermediaries)

- ☒ Yes, the benefit of the block exemption should be removed for parity obligations, but only for parity obligations that relate to direct sales/marketing channels (e.g. own website)
- ☐ Yes, the benefit of the block exemption should be removed for all parity obligations
- ☐ No opinion

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

5000 character(s) maximum

The concerns we might have on wide parity clauses at the retail level could materialize if those clauses are widespread in a sector and/or are applied by companies with large market share, so it might make sense to continue applying the VBER to all parity clauses.

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

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

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

5000 character(s) maximum

The VBER provides a useful screening tool with its market share threshold, with the effect that only those cases that might have a substantial impact on competition (where market shares are high) warrant a further and more attentive examination of the competitive effect and its benefits.

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

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

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

5000 character(s) maximum

Please see our response to Question 97 above.

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

	Very negative	Negative	Neutral	Positive	Very positive	No opinion

a. Competition on the market	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
b. Harmonised application of the competition rules by competition authorities and national courts	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
c. Legal certainty for businesses	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
d. Efficiency of distribution systems	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
e. Costs for businesses	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
f. Consumer welfare	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
g. Investment / Economic growth	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
h. Sustainability objectives	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

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

5000 character(s) maximum

The removal of the benefits of the block exemption would create greater uncertainty for businesses, especially companies with low market share, where the competitive impact would be minimal / non-existent. For that reason, we advocate retaining the benefits of the block exemption for all agreements, and individual examination for those situations where there are competitive affects because of the market share of the parties or the widespread use in an industry.

We provide a list of concrete examples below:

- Parity obligations can have pro-competitive effects and result in lower prices for consumers;
- The VBER provides legal certainty for businesses: removing parity clauses from its scope will reduce legal certainty;
- Parity obligations can reduce costs and therefore improve the efficiency of distribution systems;
- Conducting individual assessments for all agreements with parity obligations will increase legal costs;
- Parity obligations can result in lower prices for consumers.

B.5 Other aspects

B.5.1. Resale price maintenance (“RPM”) refers to restrictions that set a fixed or minimum resale price to be observed by the buyer. Given that RPM eliminates price competition between a supplier’s distributors and, based on enforcement experience, is generally unlikely to lead to efficiency gains, it is considered a hardcore restriction under the VBER (i.e. it cannot benefit from the safe harbour) and a by object restriction under Article 101 of the Treaty. However, the Vertical Guidelines recognise that supplier-driven RPM may, in certain circumstances, lead to efficiencies, e.g. to achieve an expansion of demand during the launch of a new product or to avoid the undercutting of a coordinated short-term low price campaign in a franchising system. The evaluation has identified a lack of clarity and guidance as regards the conditions under which

such efficiencies can be argued and the evidence needed to meet the threshold for an individual exemption under Article 101(3) of the Treaty. Stakeholders pointed out that, as a result, companies prefer not to run the financial and reputational risk of including RPM restrictions in their vertical agreements.

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

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

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

5000 character(s) maximum

In addition to the exceptions already foreseen in the Vertical Guidelines, which we agree should further be clarified, RPM may lead to efficiencies including in the following instances:

- Manufacturers that are concerned with maintaining a strong brand name and a reputation for quality or durability with end customers, might want to use minimum resale price contracts so that its products are not offered at a discount. When prices are discounted by wholesalers and retailers, the end customer may ultimately purchase the product at a price point that undermines the brand image perception that the manufacturer wants to project. This can ultimately create repercussions as consumers might associate lower prices with lesser quality.

As an example, for certain (luxury or exclusive) products high prices are an essential element of the brand image. In addition, the supplier may wish to protect the reputation or image of the product and prevent it from being used by retailers as a loss leader to attract customers.

Suppliers may also want to ensure that the distribution channel maintains a certain level of investment into the creation of a qualitative and specialized sales environment in order to bring certain products to the market. Distributors that are faced with low-price competition see their margins come under pressure, and might lead them to reduce investments, ultimately to the detriment of the customers who are no longer able to benefit from the professional sales and support environment that some products may require.

- RPM may also be used to prevent free riding by retailers on the efforts of other competing retailers which spend time, money and efforts promoting and explaining the technical complexities or attributes of the product to create a sales environment to attract new customers, or to convey the image of the brand to consumers. For example, a retailer may choose to price its products at a higher price, but in return invest in a highly trained and skilled sales personnel that can properly explain and demonstrate to customers the use of a complex product such as computers or other high-tech equipment. The customer may after acquiring this information choose to buy the computer from a retailer that sells it at a lower price and does not explain or demonstrate its uses. This will cause the initial retailer to rethink its business strategy, ultimately lowering its prices and reducing the skill-level of its trained sales force –to the detriment of the customer. Similarly, one retailer may invest heavily into creating experiences for its consumers rather than purely focusing on

sales. With the world at a consumer's finger tips on their smart phones, such retailers deserve protection against free riding. RPM would therefore lead to increased competition on the merits of other criteria like quality, service, sustainability and it would not kill competition.

- Efficiencies may also arise in case of so-called 'fulfillment models', where a manufacturer becomes directly involved in the negotiation of the conditions of a business transaction with an end-customer – either upon request of the customer or due to the highly technical nature of the products concerned. Often the negotiation is initiated by way of a tender procedure or a request for quotation to several manufacturers. However, to facilitate the ordering and support process, the supply will run through a distributor which buys the products from the manufacturer as an independent contractor and resells them to the end-customer. The same situation may arise in a two-tier distribution set-up, where a manufacturer and a reseller rely on a wholesale distributor to "fulfil" a deal. On both scenarios, being able to set resale pricing in these circumstances would allow to ensure that pricing benefits are passed on downstream. Having to leave room for independent margin setting by the distributor may not allow the supplier to be as aggressive in pricing as it could be absent that requirement, in particular where competition occurs at the level of the pricing negotiations with the end-customer and in fierce competition with other manufacturers. Such a fulfillment model should not be seen as a restriction to competition, because competition has already taken place at the moment of the tender or request for quotation. The fact that both parties (intentionally) rely on an intermediary to fulfil this arrangement does not result in any harmful effect on competition.

Finally, it should be noted that manufacturers which would like to have more control about their final price could choose not to distribute products through independent distributors but rather to organize the distribution themselves, which ultimately means that no intra-brand competition whatsoever remains. One may argue that this outcome would be less beneficial to consumers.

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

Please substantiate your reply.

5000 character(s) maximum

ICLA very much agrees with the conclusion that there is a lack of clarity and guidance as regards the conditions under which efficiencies can be argued for the use of RPM, and the evidence that is needed for this purpose. It would be helpful to receive better guidance in the Vertical Guidelines, by listing the relevant assessment criteria as well as the precise circumstances under which RPM does not raise competition law concerns, including by way of examples.

First, the Vertical Guidelines makes the explicit statement that undertakings have the possibility to plead an efficiency defense under Article 101(3) TFEU in an individual case. However, it is not clear whether and under what circumstances a possible efficiency defense could be successful. For example, would elements (referred to in response to Question 103 above) such as the protection of strong brand name and reputation or avoiding free riding have a reasonable chance to be taken into account? We note that the Guidelines currently highlight that "The parties will have to convincingly demonstrate that the RPM agreement can be expected to not only provide the means but also the incentive to overcome possible free riding between retailers on [additional pre-sales] services". While that is a high burden, it also remains unclear how it can be overcome.

Furthermore, it would be helpful for the Vertical Guidelines to clarify under which circumstances RPM would

be allowed for the introduction of a new product. What would be considered a 'new' product (and what about new or updated versions of products), for how long can such practice last, and what are the elements that can be taken into account in terms of the suppliers' interest to promote the product? When it comes to the exception of a coordination short-term low price campaign, it should be clarified what is meant with a "franchise system or similar distribution system". In fact, it should be carefully assessed whether short-term discounting campaigns could not be considered pro-competitive more broadly.

Finally, there should be clarity that in case of significant competition on a given market, maximum or recommended resale pricing should by default not lead to competition concerns.

B.5.2. Non-compete obligations of an indefinite duration or exceeding 5 years are excluded from the benefit of the VBER and therefore require an individual effects-based assessment under Article 101 of the Treaty. Non-compete obligations that are tacitly renewable beyond a period of 5 years are deemed to have been concluded for an indefinite duration. The evaluation has indicated that this broad exclusion of non-compete clauses from the benefit of the block exemption may result in false negatives, by covering non-compete obligations that satisfy the conditions of Article 101(3) of the Treaty. In particular, the exclusion of tacitly renewable non-compete obligations could be considered unjustified, to the extent that the buyer is able to terminate or renegotiate the agreement at any time with a reasonable notice period and at reasonable cost. Moreover, the overly broad scope of the exclusion is considered to create an unnecessary administrative burden and additional transaction costs for businesses, since it forces them to periodically renegotiate their contracts despite there being a willingness on both sides to continue the contractual relationship beyond five years.

In this context, the Commission is exploring the possibility of block-exempting tacitly renewable non-compete obligations for the duration of the agreement, provided that the buyer can terminate or renegotiate the agreement at any time with a reasonable notice period and at reasonable cost.

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

- ☐ Yes
- ☒ No
- ☐ No opinion

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

5000 character(s) maximum

We welcome the Commission's attention to this subject.

One of our members employed in the telecoms industry has experience of negotiating mobile network roaming agreements with other telecoms operators, where one operator agrees to provide the other with the possibility to roam on its network. A discounted roaming rate is offered in exchange for minimum annual volume commitments that may amount to a non-compete obligation, as they may account for more than 80 per cent of the visiting operator's traffic in the host operator's territory.

The initial term may often be for a period of two or three years, with the agreement then continuing until either party terminates, on reasonable notice. Agreements often remain in place beyond five years, as it is convenient for both parties not to have to renegotiate them, even though both parties are free to do so after the initial two or three year term.

We ask the Commission to consider expanding the proposed exclusion to include any agreements with initial

terms of less than five years which are tacitly renewable after the initial term. These types of agreement should have the benefit of the block exemption, provided that the buyer can renegotiate or terminate the agreement at any time after the initial term has expired (with a reasonable notice period and at reasonable cost).

We therefore propose the following changes to the wording of Article 5(1): wording of 5(1)(a) to remain the same, and the wording of the last paragraph to state as follows:

“For the purposes of point (a) of the first subparagraph, a non-compete obligation with an initial term of five years or less, which is subsequently tacitly renewable, shall not be deemed to have been concluded for an indefinite period, provided that either party can terminate or renegotiate the agreement at any time after the initial term, with a reasonable notice period and at reasonable cost.”

It should also be acknowledged that in long-cycle businesses, five years might not be the appropriate term of an agreement.

B.5.3 Sustainability agreements

In recent years, there have been increasing discussions about the compatibility of agreements between supply chain operators to foster sustainability objectives with Article 101 of the Treaty. No specific issues relating to sustainability agreements in the vertical supply chain were identified during the evaluation. However, in line with the objectives of the European Green Deal, specific considerations as regards the impact of the current framework for vertical agreements on sustainability objectives will be taken into account in the impact assessment phase of the VBER review.

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

- ☐ Yes
- ☒ No
- ☐ No opinion

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

5000 character(s) maximum

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

5000 character(s) maximum

There are many types of vertical and conglomerate agreements that may pursue sustainability objectives. Some examples include alignment between energy companies, airlines and engine makers on switching to bio fuels, or between supermarkets and their suppliers on the re-use of packaging materials. While there

may be horizontal elements to these types of alignment that could generate competition law scrutiny, we do not see any issues from a vertical perspective that require changes to the VBER or Guidelines.

For further background, please also find ICLA's input paper entitled: "Competition Policy supporting the Green Deal", available on ICLA's website: <http://competitionlawyer.co.uk/ICLA/Documents.html>.

B.5.4. Impact of the Covid crisis

The COVID-19 crisis that began in March 2020 has had a significant impact on the economy. In particular, there appears to have been a significant increase in e-commerce as a result of the measures taken to contain the spread of the pandemic. Given that these developments are very recent, they could not be taken into account during the evaluation phase of the VBER review. However, as indicated in the staff working document, in view of their importance, the effects of the COVID-19 crisis on the supply and distribution arrangements should be evaluated and, if possible, quantified at this stage of the review of the rules.

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

- ☒ Yes
- ☐ No
- ☐ No opinion

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

5000 character(s) maximum

We see an overall need for flexibility so that businesses can adapt their business models to try to recuperate as quickly as possible, also taking into account the accelerated growth of online sales and the consequences that may have on a variety of different market operators.

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.

The maximum file size is 1 MB

Only files of the type pdf,txt,doc,docx,odt,rtf are allowed

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

3000 character(s) maximum

In digital markets, the delineation between horizontal and vertical agreements is becoming more and more blurred, especially concerning new cooperation models based on data. Data is the key input of digital markets and cooperation in form of data sharing or data pooling, which has intrinsic horizontal and vertical characteristics, is critical for the success of such markets. Whether these forms of data sharing or pooling belong to the categories of vertical or horizontal agreements should be clarified.

The current 30% threshold in Art. 3 and 7 VBER and recitals 86-95 of the Guidelines does not correspond to the economic reality in oligopolistic markets, where there are only a few players due to the economies of scale and the high upfront investments. Hence, those players that enjoy a higher market share are deprived from legal certainty in their vertical relationships. The EC should consider increasing those thresholds to at least 40%, or at least consider applying different thresholds according to the characteristics of each market. The Guidelines do not provide enough guidance for self-assessment. There is a need for more clarity and updated procedures in order to increase legal certainty and to reduce hurdles in terms of time and cost. On the procedural aspect, where the self-assessment of parties' agreements does not provide sufficient legal security as to the compliance with the conditions of Article 101(1) and 101(3) TFUE, and where the vertical cooperation is of a certain magnitude and complexity, an informal and faster procedure to gather the EC's guidance should be introduced. The EC's current Guidance letters have proven to be ineffective to provide an ex ante response to the most novel and difficult issues – and have therefore never been used. The revised version of the VBER and Guidelines could seek to specify the instances in which market operators are able to request a Guidance Letter from the EC. We believe that an appropriate guidance procedure should be voluntary, confidential and time-efficient and should be tailored to the specificities of each case, similar to the informal guidance of agreements provided by the EC during the COVID-19 outbreak. This would limit the risk of an ex-post review with major consequences.

ICLA welcomes the EC's engagement on the topic of the dual role agent/distributor through its working paper. More certainty is indeed needed when the same distributor has both an agent and a distributor hat. To that end, additional details and hypothetical scenarios in the Guidelines would add legal certainty, would add clarity on business models companies can engage in, and could lead to more investment in the markets for the benefit of consumers.

Likewise, ICLA would welcome additional details and recommendations on the EC's approach to fulfillment contracts – see also our response at Q103 above on this topic.

We appreciate the opportunity to comment, and remain available to discuss any questions.

* 114 Please indicate whether the Commission services may contact you for further details on the information submitted, if required.

- ☒ Yes
☐ No

Contact

COMP-VBER-REVIEW@ec.europa.eu



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

**Comments from the Association of Inhouse Competition
Lawyers ('ICLA')**

Question 30. Based on your knowledge/experience, please indicate whether you have any other comments or suggestions with regard to the exception for dual distribution. You may also provide additional information which may be relevant for this section (copies of any documents, reports, studies etc.).

1. ICLA invites the European Commission to clarify the assessment of information exchanges that occur in the context of a dual distribution relationship. The VBER, the Guidelines as well as the Horizontal Guidelines currently lack clarity as to whether such information exchanges are ancillary to the vertical relationship and therefore included in the scope of the exception for dual distribution, or if they need to be assessed separately under the Horizontal Guidelines. In its Staff Working Document, the European Commission recognized the stakeholders' desire for clear guidance on information exchanges between the supplier and the buyer in dual distribution scenarios. However, this topic is missing from this questionnaire.
2. It is widely accepted that an exchange of commercial information between operators at different levels of a vertical supply chain – i.e., between a supplier and its distributor(s) – is part of a normal business dialogue. It is also recognized that such a business dialogue is generally a source of efficiency. For example, such commercial discussions allow the supplier to benefit from feedback from its distributors on the price positioning of its products, and on consumer demand that are likely to improve the effectiveness of its distribution network. The current lack of guidance may deter companies from sharing commercial information with their respective business partners upstream or downstream in the vertical supply chain at all. This may, in turn, cause significant inefficiencies (e.g., overstocking, delay in supplies, etc.), which may ultimately harm the consumer.
3. Moreover, information exchanges between a supplier and its distributors may be necessary to create a level playing field particularly for small and medium sized dealers to compete with large online platforms which already have access to large amounts of real-time data as part of their business model.
4. In its contribution to the European Commission's evaluation of the Horizontal rules (available on ICLA's website: <http://competitionlawyer.co.uk/ICLA/Documents.html>),

ICLA already stressed that a consistent approach to the treatment of dual distribution across the European Commission's regulations and guidelines is vital for legal certainty.

5. The revised VBER and the Vertical Guidelines as well as the Horizontal Guidelines should therefore clearly recognize that information flows between operators at different levels of a vertical supply chain are part of a normal business dialogue and that such a business dialogue is generally a source of efficiency.
6. Taking this as a starting point, ICLA invites the European Commission to clarify in the revised VBER and the revised Guidelines the types of vertical information exchanges that are unproblematic, because they cannot be considered a restriction of competition and fall outside the scope of Article 101(1) TFEU (for example, information on quantities sold, customer information, quantities on stock and quantities returned by customers, as well as demand forecasts).
7. In addition, the revised vertical rules should also identify the conditions under which the VBER provides a safe harbour for information exchanges in a dual distribution scenario, because the efficiencies generated from such exchanges generally outweigh any potential anti-competitive concerns (e.g., sales and margin information, information on promotional activities, information on recommended resale prices).
8. Finally, the revised rules need to clarify the legal test and the standard of proof in order to assess whether an information exchange that originates from a vertical supply relationship constitutes horizontal collusion or not. A test and standard of proof that is not sufficiently clear risks casting a suspicion of illegality on all discussions between a supplier and its distributors relating to their commercial activities, despite the fact that there are legitimate business reasons that justify such exchanges and pro-competitive efficiencies aligned to it.



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

**Comments from the Association of Inhouse Competition
Lawyers ('ICLA')**

Question 74. Based on your experience/knowledge, please provide any other comments or suggestions you may have on the rules for these two types of indirect restrictions on online sales. You may also provide additional information which may be relevant for this section (copies of any documents, reports, studies etc.). Please upload the information in files with a maximum size of 1 MB each, using the button below.

1. In the field of vertical restraints, there is currently significant divergence in interpretation of the rules by national courts and authorities, including divergent interpretation of the Coty judgment between the Commission and the German authority.
2. This causes uncertainty to business and leads many manufacturers to adapt to the strictest application of the rules – to avoid the risk of fines. For instance and as mentioned in previous ICLA submissions, several manufacturers chose to remove the ban on selling on market places following the German authority's strict position on this topic.
3. In addition, ICLA would like to raise the question of differentiated pricing to wholesalers depending on the channel the wholesaler sells to.
4. While a manufacturer is generally free to differentiate its sale price when selling directly to online and brick and mortar dealers, this becomes difficult under the current rules when a manufacturer relies on a wholesale distributor. Granting a wholesale distributor a different purchase price based on the channel to which the wholesaler resells the product might be regarded as an indirect type of customer restriction and thus a hardcore restriction according to Art. 4(b) of the VBER.
5. However, it does not make any economic sense why the manufacturer should be allowed to take the different cost structures into account when selling directly to dealers, whereas this risks becoming a hardcore restriction (with the risk of significant fines) if the manufacturer opts for a two-tiered indirect distribution channel.
6. Furthermore, without different purchase prices from the manufacturer, the wholesale distributor will not be in a position to support brick & mortar stores out of its own margin,

as margins on the wholesale level are typically too low to compensate for the different cost structures between online and offline sales.