Paris, 20 November 2020

1. In the context of the public consultation launched on 23 October 2020 by the European Commission (hereinafter, the "**Commission**"), the Association of Lawyers Practicing Competition Law (hereinafter, the "**APDC**") presents the following observations regarding the Commission's inception impact assessment (hereafter, the "**IIA**") on the revision of the European competition rules applicable to vertical agreements, namely Regulation no. 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union (hereinafter, the "**TFEU**") to categories of vertical agreements and concerted practices (hereinafter, the "**Regulation**") and the European Commission Guidelines on vertical restraints published in O. J. of 19 May 2010 (hereinafter, the "**Guidelines**") (the "**Impact Assessment**").

1. Introduction

2. First, the APDC welcomes the Commission's in-depth analysis carried out on the implementation of the Regulation and the Guidelines and its active listening of participants throughout the evaluation phase and its detailed conclusions in the Staff Working Document published on September 8th, 2020.

3. Regarding the Impact Assessment, the APDC welcomes the Commission's general approach consisting in offering more flexibility to companies in their supplier-reseller relationships, in particular concerning active sales restrictions, tacitly renewable non-compete clauses, selective distribution as well as proposed evolutions on online sales.

4. The APDC also commends the Commission's emphasise on the need for a common and consistent framework applicable to the Commission as well as to all National Competition Authorities ("**NCAs**") and national courts. Indeed, one of the almost unanimous requests of the stakeholders in the evaluation phase was the need for greater consistency in the application of the Regulation and the Guidelines within the European Union. It is particularly relevant for companies operating in several Member States and essential in view of the growth of online sales.

5. As highlighted in the various consultations and during the Workshop organised by the Commission in 2019, in response to the objective of integrating intracommunity trade within the Single Market, a large number of brands and retailers are organising and managing their distribution networks on a supranational scale, when it is not on a European one. It is therefore essential for suppliers as well as for brand owners and distribution platforms to be able to rely on a consistent enforcement within the European Economic Area (hereafter "**EEA**").

6. On a preliminary basis, the APDC nevertheless would like to formulate the following observations, before commenting the policy options retained by the IIA.

- Regarding **selective distribution networks**:

  - The IIA does not specifically consider the issue of restrictions on the use of online marketplaces. The APDC invites the Commission to integrate the *Coty* ruling[1] of the European Court of Justice ("**ECJ**") into the revised Regulation and Guidelines. Integrating the principles laid down by the Court is particularly important in light of the divergent interpretations by NCAs (including the Bundeskartellamt and the French Competition Authority) and despite the clarifications provided by the Commission in its Competition Policy Brief of April 2018.

  - The APDC also invites the Commission to confirm that it is possible to combine an exclusive distribution network at the wholesale level with a selective distribution network at the retail level. Indeed, while such two-level distribution systems have been deployed by many brand owners at the European level, certain recent statements seem to question them. It is therefore important that the Commission confirm the validity of such systems.

- **Exchange of information** between suppliers and retailers is a topic that has been largely covered by the Commission's Staff Working Paper. However, it is not specifically targeted by the IIA, although the possible horizontal effects of dual distribution systems are discussed. . The ADPC invites the Commission to clarify the analysis of exchanges of information between suppliers and retailers by providing a clear analysis grid depending on whether the undertakings concerned operate in a single or dual distribution network.

  Since dual distribution is the consequence of the disintermediation of the commercialization of their products directly to consumers by many brands, it is important that these players are not unnecessarily slowed down in the digitalisation movement, particularly through the development of their own e-retail activities alongside those of the distribution companies.

  In particular, it is essential that the Regulation fully plays its role and provides the necessary comfort to undertakings in this movement towards digitalisation of retail activities, either by exempting possible exchanges of information linked to dual distribution when the different parties to these networks have a market share below the 30% threshold, demonstrating the existence of a certain competitive dynamic on the markets concerned, or by allowing companies to carry out their self-assessment of the possible anti-competitive effects of an exchange of information with the retailers, when these same companies are present at the retail level.

[1] ECJ, 6 December 2017, case C-230/16, Coty Germany GmbH/Parfümerie Akzente GmbH.

- The Guidelines currently address the issue of geo-blocking practices (see para. 52). In 2018, the Commission adopted a specific regulation called the **Geo-blocking Regulation**[2]. Even if the first of these texts is intended to be applied only to vertical agreements between companies and the second applies to unilateral practices towards consumers, the APDC invites the Commission to ensure a coherent articulation and application of these two texts, both at its own level and at the level of NCAs.

- **The inclusion of the Commission's Green Deal** in the IIA is in line with recent statements by Commissioner Margrethe Vestager. The APDC nevertheless encourages the Commission to clarify how the Green Deal will be concretely taken into account in the revised version of the Regulation and Guidelines. Does the Commission intend to add a category of "green" agreements outside the scope of Article 101 TFEU? Are additional exemptions envisaged in this respect?

2. Agency contracts

7. The APDC welcomes the fact that agency contracts is one of the points on which the Commission intends to clarify and simplify the rules, including by incorporating decisional practice and recent case law. However, the IIA mentions agency contracts only in relation to the emergence of online platforms.

8. The APDC reiterates the importance of clarifying and simplifying the definition of agency contracts outside the scope of Article 101 TFEU in the future rules, without limiting these changes to the issue of online platforms.

9. Decisional practice in this area is always based on the analysis of whether or not the risks incurred by the agent are negligible. However, it appears on this point that the Guidelines[3] mark an excessive rigidity which may lead companies to consider too systematically, in their self-assessment, that they are in the presence of a false agency contract. The APDC refers to its Observations of 20 May 2019 on this point (see Annex 3) and invites the Commission to define the list of criteria determining what constitutes a true agent, in particular by emphasising and developing the notion of negligible or economically insignificant risk and by taking up the analysis of case law on the distinction between an agent and the economic reality of an independent trader.

[2] Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (ECC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC.

[3] Points 16 and 17 of the Guidelines as drafted imply that only one of the listed risks is sufficient to consider that an agreement does not constitute a true agency agreement.

10. Moreover, as the classification of the status of agent is relatively complex in certain networks and in particular in schemes, such as sales commission or commission-affiliation schemes, the risk of sanctions resulting from the determination of a sales price by an agent cannot be linked to the sole interpretation or assessment, necessarily subjective, of the level of economic risks that an agent would or would not assume. Under these conditions, it is at least essential that any agency or commission contract, whatever its nature, be presumed to be an agency contract enabling the application of Article 101 TFEU to be avoided, the prosecuting authority being responsible for demonstrating the economic risks actually supported by the agent and for establishing a clear line between what is "true" and what is "false" agent.

3. Resale price maintenance (RPM)

11. First of all, the APDC regrets the lack of change in the Commission's approach to resale price restrictions. It refers to its comments of 20 May 2019 (Annex 2) on this issue and reiterates its view that such restrictions should not be treated as hard-core but should be analysed based on an effects-based approach and following a genuine competitive assessment.

12. Nevertheless, the APDC welcomes the Commission's intention (i) to clarify the treatment of possible efficiencies resulting from RPM and (ii) to consider a discussion with undertakings on concrete examples where efficiencies can be identified and the elements required for an exemption under Article 101(3) TFEU.

13. In this respect, the APDC particularly stresses the following points:

- In the absence of an exemption, the need for a concrete analysis grid concerning the application of the "exceptions" provided for in point 225 of the Guidelines, which must be coupled with a presumption of legality in order, for the companies concerned, to be able to fully benefit from the safe harbour. Here again, many undertakings, in a logic of integration of the Single Market, conduct their commercial policy and launch products at European level, so that if a safe harbour applies, it will be necessary to ensure that the NCAs do not apply it in a differentiated manner at national level.

- A flexible approach to RPM at the wholesale level in cases where retailers/End-customers negotiate directly with manufacturers and do not consider wholesalers as their main commercial interlocutor (see APDC Comments of 20 May 2019, Annex 2 paras. 7-12).

4. Observations on the policy options retained in the IIA

4.1 Dual distribution

14. In its Observations of 20 May 2019 (Annex 2), the APDC had encouraged the Commission to regulate the practice of dual distribution. It therefore welcomes that this issue is given particular attention in the IIA.

15. First of all, as indicated in para. 5 above, beyond the three options considered, the APDC invites the Commission to provide **clear guidelines** regarding **information exchange** in the context of dual distribution networks and to clarify the applicable legal framework (vertical or horizontal regulation).

16. **Options 1 and 4** - Secondly, with regard to policy options, it seems difficult, as suggested in option 1, to maintain the current framework which, as indicated, is insufficient. Similarly, deleting the exemption as considered in option 4 does not seem desirable. Indeed, the withdrawal of the exemption would result in increased costs and legal insecurity for companies.

17. **Option 2** - With regard to option 2, the APDC considers that, before adopting specific thresholds, it is important to analyse the objective of such measure. It seems important not to create an overly rigid framework almost automatically leading undertakings to avoid double distribution due to too low thresholds or an overly restrictive framework. If the Commission targets online platforms with strong market power, it seems possible to address this issue specifically. If the issue is information exchange, then a market share threshold does not seem appropriate and the APDC invites the Commission to consider an additional option consisting in developing guidelines dealing with information exchange in the context of dual distribution networks.

18. **Option 3** - The APDC welcomes option 3 which goes towards more flexibility.

4.2 Active sales restrictions

19. **Option 1** - As with dual distribution, option 1 which consists in not modifying the current rules does not seem appropriate. Indeed, a number of clarifications are necessary.

20. **Option 2** - The APDC welcomes option 2 proposed by the Commission to extend the exceptions concerning active sales restrictions to give more flexibility to undertakings in the implementation of their distribution system. However, the APDC invites the Commission to provide concrete examples.

21. Furthermore, the APDC invites the Commission to confirm that:

- The exception in Article 4(b)(i) does not imply the implementation of an exclusive distribution system in all Member States in which the contract products are distributed.

- It is possible for an exclusivity to cover only one Member State or part of a Member State without the agreement being considered to contain a hardcore restriction.

22. **Option 3** - This option is necessary for brand owners which choose to combine selective distribution and exclusive distribution in different EEA territories or whose selective distribution system covers only certain territories. The use of such distribution system is essential for brands that do not have sufficient penetration and sales volume to justify the establishment of an EEA-wide selective distribution system. In such context, the APDC considers it important to ensure the protection of selective distribution networks against resales from a retailer located in a non-selective territory to a selective territory within the EEA. It emphasizes that it is also important that this protection be extended and recognized for sales made by non-authorized retailers within a territory covered by selective distribution.

4.3 Online sales

23. **Option 1** - Given the growth of online sales, again, the APDC believes that option 1, which consists in maintaining the current framework, does not seem appropriate.

24. **Option 2** - However, the APDC welcomes option 2, which consists in no longer treating dual pricing as a hardcore restriction. Indeed, as stated in its Observations of 20 May 2019 (Annex), the APDC believes that the application of dual pricing or different commercial conditions could be an effective means of compensating any free-riding effect between online and offline sales and would be likely to generate efficiency gains and improve consumer welfare. It would be a means to ensure that distributors operating physical points of sale maintain a qualitative in-store experience based on product demonstration and personalised advice.

25. Moreover, apart from the very specific cases of *Lego* in Germany[4] and now in France[5] (not yet settled), NCAs have not had to deal with such dual pricing practices, showing that they remain exceptional, so that an effect-based approach would be sufficient to dissuade actors who would wish to discourage online sales by this means.

26. On the other hand, the flexibility given to brands in the Guidelines to allow the setting of remuneration in absolute terms for services rendered in physical point of sale and/or online is in reality impractical for a large number of brands as it requires an annual adaptation and monitoring of the quantities sold online and in physical point of sale by hybrid distributors.

[4] Bundeskartellamt, press release of 18 July 2016 concerning Lego's commitments to change its rebate system by introducing fairer conditions for online sales.

[5] French Competition Authority, market test of 30 July 2020 relating to the commitments proposed by Lego France to address the competition concerns identified in the investigation resulting from a referral by Cdiscount and EMC Distribution.

27. Finally yet importantly, brands and retailers are now in a very different context than the one in which the Regulation and Guidelines were adopted in 2010. Today, all brand owners and distributors are developing their commercial strategy around digital technology, so that reticence or obstacles to online commerce no longer exist or remain confined to very exceptional situations. For example, in France, the French Competition Authority's latest decisions in relation to online sales restrictions concern very specific products such as chainsaws in the *Stihl* case[6], for which it is questionable why the possibility of an individual exemption from Article 101(3) TFEU to online sales restrictions was not applied, as expressly provided for in the Pierre Fabre ruling[7] of the ECJ.

28. **Option 3** - The APDC welcomes such option, which offers actual flexibility as regards the "equivalence principle" and the assessment of the selection criteria applied by operators of selective distribution networks. This option is in line with the greater flexibility that brands should be able to access today, given their increasing openness to digital and the gradual disappearance of reticence to e-commerce in recent years (except in exceptional cases where an effects-based approach should suffice).

29. Greater flexibility is particularly desirable for the following subjects: supervision of the use of third-party platforms and price comparison tools, monitoring in the use of keywords, etc. Finally, as the Commission points out, although today's context is different from the 2010 one, the free riding effect between the online and offline channels still exists and it is legitimate for a network's head to seek to compensate such effect one way or another, especially in the context of a sanitary crisis where consumers are less and less inclined to travel and are increasing the proportion of their online purchases, further weakening the networks of physical points of sale.

30. Furthermore, we share the Commission's position on sustainability to align with the Green Deal objectives. These objectives are particularly important both for suppliers and brands that seek, in addition to innovation and sales experience, to use sustainability as a differentiating element to meet their customers' attention and interests. The "green" constraint could thus be taken into account by the various players in the marketing chain, notably in the definition of distribution standards in the coming years or in the promotion of product reuse and container recycling (e.g. the possibility of offering a refill service in shops, the use of recyclable advertising on sale place, etc.).

31. Finally, the APDC is of the opinion that an additional policy option should be considered by the Commission consisting in extending option 3 beyond selective distribution networks. Thus, the Commission should recognise the possibility for suppliers who wish to distribute their products through pure-players to impose specific criteria on these players.

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6 French Competition Authority, decision No. 18-D-23 of 24 October 2018 relating to practices implemented in the sector of distribution of motorcycling equipment.

7 ECJ, case C-439/09 of 13 October 2011, Pierre Fabre Dermo-Cosmétique SAS.

4.4 Most-favoured-nation clause

32. Here again, the APDC advocates an effects-based approach. This would not be otherwise in the case of a restriction that may prove beneficial in certain circumstances, and where situations that have led to sanctions are ultimately relatively rare in practice.