APDC

Association des Avocats pratiquant le Droit de la Concurrence

APDC – Review of the Vertical Block Exemption Regulation

Position paper

1. In the context of the public consultation launched on 18 December 2020 by the European Commission (hereinafter, the "Commission"), the Association of Lawyers Practicing Competition Law (hereinafter, the "APDC") presents the following observations regarding the policy options explored by the Commission for revising the Vertical Block Exemption Regulation (hereinafter, the "VBER") and the European Commission's (hereinafter, the "Commission") Guidelines on Vertical Restraints (hereinafter, the "VGL").

I. The exception for dual distribution

2. The VBER currently provides that its exemption does not apply to vertical agreements entered into between competing undertakings, except when "*the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing level*"[1] (the "exception for dual distribution"). The Commission notes that when the VBER was adopted, the exception for dual distribution was meant to cover situations in which suppliers only had negligible activities at the retail level and horizontal competition concerns were therefore unlikely to arise. However, due to the growth of e-commerce, suppliers may engage in dual distribution more easily and the exception may therefore cover a wide scope of situations. As a result, the Commission is considering the opportunity of removing the exception for dual distribution or of limiting its scope, or on the contrary of extending the benefit of the exception to dual distribution by wholesalers and/or importers that do not manufacture the product themselves.

3. The members of the APDC represent both manufacturers and distributors; the position of the APDC on the issue of the exception for dual distribution therefore focuses only on efficiency and compliance with important legal principles. On that basis, the APDC would like to provide below some comments on the following points: experience regarding the current application of the exception for dual distribution (**A**), impracticality of introducing market shares thresholds (**B**), comments on the inclusion of wholesalers and importers in the exception (**C**), and the need for further guidance regarding interactions between manufacturers and distributors in the context of dual distribution (**D**).

1 Article 2(4) of the VBER.

A. Past experience regarding the application of the exception for dual distribution

4. Generally speaking, the APDC has not experienced particular difficulties with the application of the exception for dual distribution as it currently stands and has not witnessed any obvious enforcement gap in that regard – including in the context of the development of online sales. On the contrary, both EU and national case law recognize that suppliers are in principle free to organize their distribution network as they choose,[2] and economic literature also acknowledges that dual distribution may generate efficiencies. In fact, dual distribution is widespread in many industries, and the APDC is not aware of systematic horizontal issues that may have arisen due to a supplier's choice to engage in dual distribution (except sometimes where the supplier is dominant, in which case it will not benefit from the VBER in any event).

5. In that regard, it seems that the Commission similarly has not identified specific issues that would be typically raised by the application of the exception for dual distribution (*e.g.*, increased risks of market partitioning, or of alignment of retail prices, etc.), as the consultation only refers to "*risks of horizontal competition concerns*" in a general way.

6. In any event, the Commission retains the power to withdraw the benefit of the block exemption where a vertical agreement has anticompetitive effects, regardless of the concerned supplier and distributors' market shares.[3] Such a tool is arguably sufficient to address possible concerns that may be raised by dual distribution without warranting the need to remove the exception.

7. Besides, except where a supplier holds a dominant position at the production level, it is generally accepted that the supplier's ability to compete with its own distributors through direct sales to retailers or consumers can be pro-competitive. For instance, Article 4(e) of the VBER aims at protecting the ability for end-users to purchase components or spare parts <u>directly from a supplier</u>, as opposed to an Original Equipment Manufacturer (OEM), as such dual distribution is considered pro-competitive on maintenance markets.

8. Overall, a removal of the exception for dual distribution could create legal uncertainty, as it would require suppliers and distributors to carry out an individual self-assessment of the compatibility of their agreements with Article 101(1) of the Treaty on the functioning of the European Union (hereinafter, the "TFEU"). This could in turn encourage suppliers to either entirely abandon any form of direct sales to consumers, depriving those consumers of an alternative source of supply, or, conversely, to internalise the distribution of their products by setting up fully-owned distribution networks or by entering into agency agreements with formerly independent distributors – which would reduce intra-brand competition.

B. Opportunity to introduce a market share threshold

9. As an alternative to an outright removal of the exception for dual distribution, the Commission mentions the possibility of limiting the scope of the exception through the introduction of an additional market share threshold, whereby the exception would only apply when the supplier and the distributor's combined market share at the retail distribution level does not exceed 20%.

---

[2] *See*, *e.g.*, General Court, ruling of December 12, 1996, case T-88/92, *Givenchy*,. (111). *See* also French Competition Authority, decisions No. 06-D-26 of September 15, 2006, para. 59, and No. 14-D-06 of July 8, 2014, (273).

[3] Vertical Restraints, recitals 74-75.

10. As a result, three different thresholds would have to be complied with in order to benefit from the exemption in the context of dual distribution: (i) the supplier's market share at the production level should not exceed 30%, (ii) the distributor's market share at the (retail or wholesale) distribution level should not exceed 30%, and (iii) the combined market share of the supplier and the distributor at the retail distribution level should not exceed 20%. This would make the application of the VBER particularly complex and uncertain.

11. The new threshold would also raise difficulties and concerns with respect to its practical implementation, as it would be extremely time consuming and costly for both suppliers and distributors to assess whether they fall below the threshold or not. Properly defining markets in vertical relationships is already challenging and it should be noted that retail markets are often local in scope, leading to the need to define multiple (often hundreds of) catchment areas. The challenge would be further reinforced by the fact that in cases of dual distribution, the manufacturer may be selling exclusively online, whereas distributors often have brick-and-mortar shops in addition to their online presence, making the calculation of combined market shares at the retail level even more complicated.

12. In addition, it is doubtful whether the suggested additional threshold would constitute an adequate indicator of potential horizontal issues for the following reasons:

- the threshold fails to take into account the supplier's position at the production level, whereas a lack of intra-brand competition is very unlikely to raise issues if the product at stake has limited market shares; and

- in any case, it does not distinguish between the supplier and the distributor's position at the retail level, meaning that a supplier's ability to engage in direct sales to consumers could depend on its distributor's market shares, and therefore on whether said distributor markets products from brands competing with the supplier's or not.

13. As a result, in a situation where a multi-brand distributor has a market share comprised between 20 and 30 % at the retail level, a supplier could be prevented from engaging in <u>any</u> retail distribution activities, regardless of its market share at the production level. The threshold would therefore fail to foster intra-brand competition whenever the market is characterised by a limited number of strong, multi-brand distributors.

14. For these reasons, the APDC considers that the introduction of market share thresholds related to the exception of dual distribution would create legal uncertainty and impose an unnecessary additional burden on companies.

C. Situation of wholesalers and importers

15. The APDC notes that the situation of wholesalers and importers would *prima facie* appear to be covered by Article 2(4)(b), which provides that the VBER exemption applies to situations where "*the supplier is a provider of services at several levels of trade, while the buyer provides its goods or services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services*". This provision arguably already extends the benefit of the exception for dual distribution to wholesalers and importers.

16. The APDC would therefore welcome a clarification regarding the interpretation of Article 2(4)(b) on this point.

D. Need for further guidance regarding the relationships between suppliers and distributors in case of double distribution

17. While the exception for dual distribution does not, in the APDC's experience, raise systematic horizontal issues that would require a drastic modification of the VBER on this point, the APDC would nevertheless welcome guidance from the Commission as to which aspects of the relationship between the supplier and its distributors could still, in the context of dual distribution, be assessed under the rules applicable to horizontal agreements.

18. In particular, suppliers generally request that distributors report information regarding volume of sales, stocks, potential evolutions of market, etc. In cases of dual distribution, it is currently unclear to which extent such information should be segregated behind firewalls within the manufacturer and/or could be used for its own distribution activities. Additional guidance from the Commission would be useful to provide legal certainty to companies.

19. A confirmation on the Commission's part regarding the extent to which non-compete clauses agreed between suppliers and distributors are covered by the block exemption in a dual distribution context, would also be welcome.

II. Active sales restrictions

20. While the APDC does not directly apply active sales restrictions permitted under Article 4 of the VBER, its members regularly advise businesses (i.e. suppliers or distributors) with respect to the implementation of such restrictions in compliance with the VBER and EU competition law.

21. As indicated in its contributions submitted in November 2020 following the Inception Paper published by the Commission, the APDC would welcome updated rules and clarifications with respect to active sales restrictions. In particular, the APDC considers that to date, there is a lack of legal certainty and a need for clarification regarding a possible combination of a selective distribution and exclusive distribution.

22. The APDC is of the view that amendments of the current rules are required to provide more flexibility to suppliers in the setting up of their route to market strategy at the European level in particular at a time where distribution models are facing a paradigm shift with the boom of online sales which imply to strike the right balance between digitalization and the need to protect offline channels so as to ensure that consumers still have sufficient choices.

A. Combining exclusive distribution at wholesale level and selective distribution at retail level in the same Member State

23. When a supplier organises a selective distribution network, it often sets it up in all the Member States of the European Union (hereinafter, the "EU") to ensure that the tightness of the network and the consistency of the distribution of its products.

24. To this effect, it generally appoints third party wholesalers who invest a lot in the supplier's products or services distribution in their respective Member States. Wholesalers' tasks include among others the selection of and assistance to authorized retailers, brand promotion, control of the "closed" network, and application of the selection criteria in order to ensure high quality distribution and a consistent marketing strategy preserving the brand image.

25. Combining exclusive and selective distribution systems in the same territory A (e.g., a Member State) at different levels (i.e., exclusive distribution at the wholesale level and selective distribution at the retail level) is an effective way to prevent free-riding from other wholesalers from another territory B selling to non-authorized distributors located outside their territory and to encourage investments, resulting in a better quality of supply and services in the said territory.

26. Considering this, the ADPC respectfully suggests expressly allowing exclusivity at the wholesale level within a selective distribution system as suggested in paragraph 63 of the VGL and allowing restricting active sales by a wholesaler in one Member State to authorised retailers in another Member State (where both Member States are part of the selective distribution network) without the specific conditions currently set forth by this provision linked to wholesalers' promotional activities in 'their' territories to support the sales by authorised retailers and where it is not practical to agree by contract effective promotion requirements.

27. This would provide a greater legal certainty and give suppliers more flexibility to design their distribution systems. It would lead to more tightness in the networks, resulting for example in a reduction in the risk of free riding, protecting the efforts and investment of the wholesalers concerned in their countries. This would also have positive impact on the customer welfare, leading to a better quality in services and in the marketing of the goods concerned.

B. Combining exclusive distribution and selective distribution within the EEA depending on the Member States

28. In principle, businesses should be able to combine selective and exclusive distribution in different territories (i.e. implementing a selective distribution system in some Member States while using exclusive distribution in other Member States).

29. Nevertheless, the APDC would welcome a number of clarifications in this respect.

30. First, the APDC takes from the participation to the evaluation phase and some comments from its members that it is unclear whether the exception provided in Article 4(b)(i) of the VBER implies that an exclusive distribution system should be EEA-wide. The APDC would therefore welcome clarity in the VGL as to the fact that appointing exclusive distributors only in certain members states and even in certain part of a member state is possible.

31. Furthermore, in practice, the combination selective and exclusive networks within the EEA raises some difficulties in terms of compliance with the VBER and the. In particular, a supplier may restrict active sales by selective distributors into the exclusive territories allocated to exclusive distributors and not covered by the selective distribution system. However, reversely, a supplier cannot restrict distributors (exclusive of not) operating outside the selective distribution system territories from selling actively or passively into the selective distribution territory (in particular to non-authorized distributors). Such restriction would be a hardcore restriction under Article 4(b) of the VBER.

32. As a consequence, most suppliers implement a selective distribution system at a pan-European level rather than opting for a mix-and-match model depending on the Member States.

33. However, it may be beneficial for businesses to combine selective and exclusive distribution in different territories. Indeed, suppliers do not always have the resources or even the need to implement a selective distribution system across the EEA. For example, a selective distribution system might make sense business wise in Member States in which their brand is already well established but an exclusive distribution might be better suited in Member States in which their brand is less well known or in a start-up phase. Suppliers need some flexibility to adapt their route-to-market depending on how mature their products or services are depending on the Member States within the EEA while preserving their selective distributors' investment and effort to support and advise consumers.

34. Consequently, the APDC favours options 2 and 3 of the Commission's inception paper consisting in:

- 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 TFEU. In particular, the APDC would welcome clarification that:

    - it is possible to combine exclusive distribution at the wholesale level and selective distribution at the wholesale level within the same member state; and

    - an exclusive distribution or a selective distribution network can be implemented only in certain countries.

- 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.

III. Indirect restrictions of online sales

A. Dual pricing

35. Dual pricing refers to the situation where a distributor is charged a higher price for products intended to be resold online than for products intended to be resold offline.

36. According to the VGL, dual pricing is considered as a hardcore restriction that can only be justified in exceptional circumstances, provided that the conditions of Article 101 (3) TFEU are fulfilled. In view of the Commission, "*such circumstances may be present where a manufacturer agrees such dual pricing with its distributors, because selling online leads to substantially higher costs for the manufacturer than offline sales.* (…)"[4].

37. First, the APDC notes that some stakeholders have pointed out to a lack of clarity of the rules relating to dual pricing, leading to an inconsistent interpretation and application of the prohibition across the EU[5]. In particular, the APDC understands that some national competition authorities (hereinafter, the "NCAs"), including for example the Bundeskartellamt, tend to regard price discrimination between distribution channels, whereby pure online players are offered less attractive conditions than offline or hybrid players (selling both online and offline) as a restriction tantamount to dual pricing. Conversely, other NCAs, including the French Competition Authority (hereinafter, the "FCA"), generally consider that price discrimination between distribution channels can only be anticompetitive if the price difference is likely to lead to anticompetitive effects and cannot be objectively justified[6].

38. In the APDC's view, the new Vertical Guidelines should include a clear distinction between dual pricing, on the one hand, and price discrimination between distribution channels, on the other hand.

39. Dual pricing consists in offering one and the same distributor different prices depending on whether such distributor resells the products online or offline.

40. Price discrimination refers to the situation where the manufacturer applies different wholesale prices across various distribution channels.

41. In addition, the Commission should clearly state that price discrimination does not constitute a hardcore restriction. In that respect, it rightfully recalled in its final report of the e-commerce inquiry, "*charging different (wholesale) prices to different retailers is generally considered a normal part of the competitive process*" [7]. Similarly, the FCA has recently recalled in its Lego decision (closed with commitments) that differentiating wholesale prices between distribution channels is different from dual pricing and does not amount to a hardcore restriction or a by object restriction. In addition, it should also be underlined that, in certain Member States, such as France, national laws already provide that a manufacturer may apply different terms and conditions to different buyers' categories[8].

---

4 Vertical Guidelines, recital64.

5 Commission's Staff Working Document, Evaluation of the Block Exemption Regulation, p. 211 *et seq*.

6 FCA study on e-commerce, May 2020.

7 European Commission Final Report on the E-commerce Sector Inquiry of 2018, Staff Working Document, (597). See also, French Competition Authority decision No. 21-D-02 dated January 27, 2021, (63-65).

8 *See* Article L. 441-1 of the French Commercial Code.

42. Therefore, a case-by-case analysis would be more appropriate to deal with price discrimination practices.

43. For example, it is true that price discrimination has sometimes been used by a supplier as a mean to restrict online sales by placing online retailers at a competitive disadvantage. This was for example the case in the German Gardena case, where Gardena, a garden product manufacturer, structured its discount scheme in such a way that only brick-and-mortar retailers were able to benefit from the full discount[9]. Similarly, in the Lego case, that has been investigated by several NCAs, the French and German regulators both found that Lego's discount system could be anticompetitive as the criteria set out to benefit from the highest discounts could only be met by offline retailers, without any equivalent being provided for online resellers[10].

44. However, price discrimination can also be pro-competitive as it allows to better take into account the variety of investments that may be required in different distribution channels. In cases where the brick-and-mortar channel incurs higher costs, price differentiation may be used to compensate any potential free-riding effect by online sellers that benefit from the pre-sales efforts and investments of offline retailers. The brick-and-mortal channel may also incur specific costs that do not apply to online retailers, such as offering after-sales services, and vice-versa (for example, as competition is fierce online, investments may be required from an online reseller to ensure the attractiveness of its website).

45. In light of the above, the APDC invites the Commission to clarify in the new Vertical Guidelines the difference between dual pricing and price discrimination, and to clearly indicate that the latter does not constitute a hardcore restriction. In order to ensure a consistency approach throughout the EU, the APDC is also in favor of further guidance being provided by the Commission with respect to the conditions under which price differentiation between distribution channels may be anticompetitive.

46. Second, the APDC considers that, in light of the development of online sales since the previous modification of the VBER and changes in both market conditions and consumer habits, dual pricing should no longer be treated as a hardcore restriction.

47. Indeed, the prohibition of dual pricing was originally justified by the concern that it may impede the development of online sales. In that respect, the Commission indicates in the Vertical Guidelines that it regards dual pricing as a hardcore restriction of passive selling "given the capability of [such restriction] to limit the distributor's access to a greater number and variety of customers".[11]

48. The APDC acknowledges that dual pricing may entail some negative effects, by creating disincentives for hybrid retailers to invest in online sales. This can for example be the case if a supplier implements a rebate system that encourages hybrid distributors to limit their online sales[12] or if the difference between the wholesale prices of the product, depending on whether the retailer will resell it offline or online, largely exceeds the extra-costs incurred by brick-and-mortar outlets. In such cases, dual pricing can have the effect of restricting online sales.

---

9 Bundeskartellamt, decision of November 27, 2013, No. B5-14/13.

10 Bundeskartellamt, decision of July 18, 2016; FCA, decision of January 27, 2021, No. 21-D-02.

11 Vertical Guidelines, recital52.

12 *See e.g.* Bundeskartellamt, decision of December 23, 2013, *Bosch Siemens Hausgeräte GmbH case*, where Bosch implemented a system of performance rebates whereby the more turnover hybrid retailers generated online, the less rebates they received.

49. Furthermore, dual pricing could be seen as a form of monitoring by the supplier of its distributors' activity and of the destination of the products, which could also, in itself, be questionable.

50. Nevertheless, the competitive landscape has since the last reform of the VBER radically changed, even more so since the Covid-19 outbreak that has profoundly modified consumers' habits and, hence, market dynamics.

51. Against this backdrop, the Commission should recognize that dual pricing may nowadays also incorporate pro-competitive effects that warrant for a case-by-case assessment, based on the principle of proportionality. In particular, dual pricing may allow a supplier, by incentivizing its hybrid retailers to invest in offline sales, to preserve or enhance the attractiveness of their stores and the customer experience in the brick-and-mortar channel. As such, dual pricing may serve the purpose of ensuring that consumers benefit from a multi-channel experience, with a greater choice and overall better quality.

52. Although the APDC is not in favor of limiting the possibility of dual pricing to certain types of distribution systems, dual pricing may be particularly well suited for selective distribution systems where investments in brick-and-mortar shops are often significant to meet the manufacturer's criteria (prime location, store design, staff recruitment and education, etc.).

53. In addition, in the APDC's opinion, the exception provided by the Vertical Guidelines, allowing the supplier to apply a fixed fee to support its distributors' efforts, is not sufficient to compensate the general prohibition of dual pricing. In fact, as noted by several stakeholders during the previous consultation and as summarized by the Commission in its Staff Working Document, a fixed fee "*hardly makes sense in view of the diversity of their situations*".[13] The APDC agrees with this observation. A fixed fee does not provide enough flexibility to design a fair pricing policy, which takes into account the evolutions of the market, the variety of distributors and their respective specificities, and other alternatives to incentivize retailers should be available to suppliers.

54. Third, should the Commission consider that dual pricing still ought to be considered as a hardcore restriction, the APDC is of the opinion that the Commission should broaden and clarify the conditions under which dual pricing could benefit from an individual exemption under Article 101 (3) TFEU.

55. Indeed, as it currently stands, paragraph 64 of the VGL may be interpreted as only covering situations where online sales lead to substantially higher costs for the manufacturer than offline sales, therefore justifying a higher wholesale price for products intended to be sold online.

56. However, in practice, there are a variety of situations where dual pricing may produce efficiency gains. For example, the Commission itself noted in its staff working document accompanying its report on the e-commerce Inquiry[14] that "*a dual pricing arrangement [may be] indispensable to address free-riding issues between offline and online sales channels in the case of hybrid retailers that are part of the distribution*" system. While it is unclear whether, at the time, the Commission's finding applied only to dual pricing or more generally to price discrimination schemes, dual pricing may, all the more after the current crisis where online sales have tended to become predominant, prevent hybrid retailers that sell both offline and online from disengaging from offline sales, which could in the long run be overall detrimental to both brand manufacturers, whose brand image

13 Commission's Staff Working Document, Evaluation of the Block Exemption Regulation, p. 214.
14 *Ibid*.

may suffer from these disinvestments, and consumers that could be deprived from a seamless quality shopping experience across various channels.

57. In conclusion, the APDC considers that dual pricing should be removed from the list of hardcore restrictions (Option 2). At the very least, should the Commission not follow this recommendation, the APDC is of the opinion that the Commission should broaden the circumstances in which a supplier having recourse to dual pricing could benefit from an individual exemption under Article 101 (3) TFEU.

B. Ensuring a level playing field between online and offline sales in selective distribution systems: the equivalence principle

58. By way of principle, members of a selective distribution system should be free to sell, both actively and passively, to all end users, including using the Internet.

59. The Commission thus currently considers that any obligation imposed on appointed resellers that would not be overall equivalent to those applied for offline sales, thereby dissuading appointed resellers from selling online constitutes a hardcore restriction. According to the Commission, "*this does not mean that the criteria imposed for online sales must be identical to those imposed for offline sales, but rather that they should pursue the same objectives and achieve comparable results and that the difference between the criteria must be justified by the different nature of these two distribution modes*"[15] (so-called equivalence principle).

60. The APDC considers that the equivalence principle is overall effective and benefits consumers.

61. In particular, the equivalence principle contributes to the consistency of the supplier's brand image, irrespective of the distribution channel.

62. In addition, it is in line with both (i) the evolution of consumers' purchasing habits, that now expect to have a seamless omni-channel experience when shopping for a particular product or service, be it online or offline, in a mono-brand or multi-brand environment, and (ii) the strategy of brand manufacturers that has evolved accordingly. While brand manufacturers operating a selective distribution system could, in the past, be reluctant to online distribution, they now generally aim, to the extent possible, at setting uniform criteria that can apply across all their distribution channels.

63. Notwithstanding the above, the APDC considers that there is a risk, if the principle of equivalence is interpreted too narrowly, that it may appear as inadequate to reflect the inherent differences between online and offline sales channels.

64. The APDC thus respectfully invites the Commission to relax the current rules on the principle of equivalence by removing the application of not overall equivalent criteria between online and offline sales from the list of hardcore restrictions. The APDC believes that a case-by-case analysis rather than a rigid approach would give more flexibility to brand manufacturers in the setting up and operation of their selective distribution systems and would overall be more appropriate.

65. In that respect, the Commission should notably acknowledge that the specificities of the online sales channel may require the imposition of criteria that do not necessarily mirror those which apply to brick-and-mortar retailers, yet without necessarily leading to a restriction of competition, provided that, overall, (i) the criteria imposed in each channel

---

15 Vertical Guidelines, recital56.

pursue a common objective, such as protecting the brand image of the products, and are proportionate to attain this goal and (ii) the differences do not have the effect of either restricting the ability of hybrid retailers from selling online or placing pure players at a competitive disadvantage.

66. Alternatively, should the Commission continue to treat differences in the criteria that apply to online retailers versus brick-and-mortar as a hardcore restriction, the ADPC suggests that the Commission clarifies its interpretation of the principle of equivalence.

67. In this respect, the APDC notes that the application of the equivalence principle has raised difficulties in the past, with respect notably to identifying the frontier between an acceptable difference and a hardcore restriction. The Commission should thus explain more clearly when the difference between criteria applied offline and online may amount to a restriction of competition, so as to give more legal certainty to brand manufacturers. In this respect, the Vertical Guidelines could be enriched with more practical illustrations of criteria that should overall be considered as equivalent.

68. In conclusion, the APDC takes the view that more flexibility is needed with respect to the application of the equivalence principle. While a level playing field should be ensured between online and offline sales channels and the equivalence principle may contribute to fulfill that role, the imposition by a brand manufacturer of specific criteria for online sales that may differ from that imposed on brick-and-mortar shops should be removed from the list of hardcore restrictions and be subject to a case-by-case analysis, in light of the principle of proportionality. Should the Commission however decide to maintain its current approach (hardcore restriction), further guidance on the interpretation of the principle of equivalence would be welcome so as to give more legal certainty to companies.

IV. Parity obligations

69. The APDC is of the view that there are situations in which parity clauses raise competition concerns:

- <u>Price parity obligations</u> are most likely to raise competition concerns than other parity obligations. The main risk associated with parity obligations related to price, is an increased likelihood of industry-wide price uniformity. The imposition of wide price parity obligations by platforms may result in suppliers losing any incentive to lower their prices on one channel, as it would force them to lower their prices globally on all sales channels.

  The actual effects of such parity obligations depend, among other things, upon the number and size of platforms that benefit from wide parity obligation, the number of suppliers tied to such agreements, the bargaining powers of suppliers and platforms and the compliance by suppliers with such obligation and the availability of meta-search tools.

  For instance, where price parity obligations are imposed by the leading platform, or even a dominant one, or most of the main platforms, with sufficient market powers, such merchant platforms can easily increase their transaction fees without the fear of a supplier "sanctioning" such increase by increasing the resale price only on this platform. Thus, platforms may have an incentive to increase their commission/fee (or at least have no incentive to lower them), which results in a global increase of prices.

Such price parity obligations may thus deprive the partner of some leeway to negotiate a lower commission rate with the platform since this partner cannot decide to favour competing platforms if this platform charges too high commissions.

This also lowers the possibility of new entrants willing to operate a differentiated "low cost" model to penetrate the market. Indeed, such new entrants will not be able to obtain lower prices from suppliers (for instance by reducing the number of services offered) because any discount offered on the new entrant's platform will have to be offered to other platforms with which the supplier as signed parity obligation. Such clauses may therefore lead to the foreclosure of these smaller platforms or new entrants since even when lower commission rates are offered, they cannot differentiate on price and offer customers better conditions.

- <u>Other parity obligations</u>, for instance, parity obligations related to inventory/availability are less likely to have anticompetitive effects. Such parity obligations will increase consumer choice and, thus, access to service, by allowing them to purchase the products/services on a maximum number of platforms.

  For instance, a parity obligation which compels a hotel to make its accommodations available during the whole Christmas break on both its website and on a platform will give consumers a choice between booking a room on the hotel's website (possibly at a lower price) or through the platform (possibly with more services). This will in turn force the platforms to compete with hotels on criteria other than prices, such as services (after sales, cancellation, comparison services, global booking including tickets, car rentals, etc.).

- Nevertheless, parity clauses, whether parity of prices, conditions or availability, should be examined <u>as a whole</u> since several parity clauses often appear in the same contract.

70. Parity clauses may also create benefits in some cases:

- <u>Parity clauses simplify consumer choice</u>: everything is at the same price and available in every channel.

  Indeed, price parity obligations allow consumers to compare prices more easily, using one single platform, thus lowering search and comparison costs. Such reduction of search and comparison costs may, in turn, enhance inter-brand competition and incentivize suppliers to lower their prices.

  This is even truer in the case of narrow parity obligations, where parity obligations still allow suppliers to charge different prices between platforms, thus maintaining a certain level of intra-brand competition, enhanced by price transparency.

- Parity obligations are usually implemented as a way to prevent free-riding practices from suppliers which use downstream online platforms to promote and sell their products or services, while also selling them via other channels (other platforms, own websites or other offline sales channel) at a lower price. In the

2015 Booking case [16], the FCA decided to maintain the so-called "narrow parity" clause, which it found justified by the existence of a risk of free riding. Indeed, the FCA considered that the maintenance of a narrow price parity clause was an appropriate and balanced tool to stimulate competition on the online platform market, while protecting the investments made by these platforms.

In such case, end-customers may use the platforms to learn about the product or services and subsequently complete the transaction directly on the supplier's website or through other channels. This results in suppliers' free-riding on the investments made by the platforms in order to increase their own sales.

Online platforms usually invest in promotional services to enhance demand (marketing, advertising, retargeting services) as well as other services enhancing consumer welfare (after-sales support, guarantees, comparison services etc.). Yet, the free-riding practices necessarily undermine investment and efficiency downstream – as the platform will not see a return on its investment.

In order to tackle this free riding phenomena and maintain an appropriate level of investments, platforms sometimes have to integrate price parity obligations in their contracts.

It should nevertheless be noted that the existence of a risk of free riding has not been observed in France since the ban on price parity clauses, by the law of 6 August 2015 (see below), in contracts with hoteliers. Indeed, there has been no decrease in sales by OTAs to the benefit of direct sales through the hotel's distribution channels. The reason could be that OTAs have significant means to ensure that consumers carry out the act of purchase on their websites (access to a multilingual telephone service, access to numerous advantages for subscribers to their program, including additional discounts, smartphone access via an application dedicated to all their bookings, etc.).

71. To date, a difference can be made between narrow and wide parity clauses in the light of the decision-making practice of competition authorities since wide parity clauses (contrary to narrow parity clauses) often lead to commitments by operators implementing them, in order to remove them.

- The APDC would therefore welcome option 2 proposed by the Commission, i.e. "*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)*".

  An analysis by the effects would be relevant since, in any case, the companies implementing these clauses and which would hold more than 30% of market shares could not benefit from the exemption of the regulation.

- It should also be noted that a per se prohibition of these parity clauses would probably not have any significant impact in France since French law has already banned the narrow price parity clause in contracts concluded with hoteliers[17]

[16] FCA, decision of April 21, 2015, No. 15-D-06 on practices implemented by Booking.com B.V., Booking.com France SAS and Booking.com Customer Service France SAS in the online hotel reservation sector, (138, 139).

[17] *See* Article L. 311-5-1 (2) of the Tourism Code, established by the law No. 2015-990 of 6 August 2015 for growth, activity and equal economic opportunities ('the Macron Law'), provides that "the hotelier remains free to grant the customer any discount or tariff advantage of any kind, any clause to the contrary being

and since the French Courts[18] have ruled that parity clauses can infringe Article L. 442-3 b) of the Commercial Code (which prohibits clauses that "automatically give the benefit of more favourable conditions granted to competing businesses by the co-contractor") or even Article L. 442-6, I, 2° of the Commercial Code (which prohibits clauses that create a significant imbalance in the rights and obligations of the parties).

- In any case, almost all stakeholders have pointed out the fact that the VBER and the VGL do not provide sufficient guidance on how to assess the compatibility of parity obligations with Article 101 TFEU, thus resulting in a divergent treatment of these restrictions by NCAs and in legal uncertainty for operators.

  Therefore, in addition to the policy options proposed by the Commission, the APDC suggests that the VGL provide clear guidance on the specific conditions taken into consideration in order to assess whether a price parity obligation will be considered as anticompetitive or not and concrete examples of such parity obligations. The following criteria should, as an example, be taken into consideration: the market power of the parties, the sector in which the parity obligation is provided and whether such obligations are generalized or not; the type of parity obligation at stake (narrow or wide); the conditions on which they apply (price or other conditions); the type of operators by which they are applied (sales platforms or not; online or offline etc.) etc.

unenforceable". This provision therefore prohibits the narrow price parity clause in contracts concluded with hoteliers.

18 Firstly, the judgment of the Paris Commercial Court dated of 29 November 2016 (which has not been appealed against) considered that the price and conditions clauses (wide and narrow) in Booking.com's contracts infringed Article L. 442-6(2)(d) of the Commercial Code and the former Article L. 442-6(1)(2) of the Commercial Code prohibiting clauses creating a significant imbalance in the rights and obligations of the parties. These clauses were therefore annulled (not the availability clause).
Secondly, following a judgment of the Paris Commercial Court dated of 7 May 2015 and then a ruling of the Paris Court of Appeal of 21 June 2017, the French Supreme Court ("*Cour de cassation*"), in a ruling dated of 8 July 2020, confirmed the nullity of the price parity, conditions, and last available room clauses on the ground of L. 442-6 (2)(d) of the Commercial Code, but only to the extent that they apply to competing OTAs (wide parity clauses). It challenged the reasoning of the Court of Appeal on the combination of the price parity, conditions and last available room clauses as constituting a significant imbalance based on L. 442-6 (1)(2) of the Commercial Code and referred the case back to the Court of Appeal to examine whether the price and conditions (wide and narrow) parity clause, without the last available room clause, still lead to an imbalance in the rights and obligations of the parties.

V. Other aspects

1. RPM

1.1. The economic point of view

72. The Organisation for Economic Co-operation and Development (hereinafter, the "OECD"), in a policy roundtable on RPM published in 2008[19], evidenced that, under certain conditions, price maintenance can improve the efficiency of distribution networks. It can thus produce significative efficiency gains (i) by eliminating double margins, (ii) by improving the quality of services provided by distributors, or (iii) by encouraging them to keep sufficient stocks.

73. As far as double margins are concerned, the practice between distributor and producer is that the latter "*successively sets wholesale and retail prices*" above marginal cost by allocating "*a positive margin to itself in order to maximise its profit*". This situation has the effect of reducing the total profits of the companies active along the vertical chain and therefore ultimately the welfare of consumers – for instance, undertakings may refrain from investing in R&D. In contrast, the setting of resale prices by the producer allows a producer and his distributor to take into account the effect of their respective prices, gain foreseeability and thus eliminates the problem of double margins which will ultimately benefit the end-consumer through, for instance, increased investments that producers (and even distributors to some extent) may make.

74. As far as quality of services is concerned, the imposition of prices by the supplier on the distributor may allow the latter to obtain a sufficient margin and thus to provide optimal services to the final consumer. Indeed, distributors often provide services such as sales information, consumer advice, free delivery to the final consumer, aiming at making the product more attractive to the final consumer. However, when the distributor has a low margin, then, as a consequence, it has no other choice than to lower the quality of its products[20]. The setting of a resale price could also, in some circumstances, prevent the loss of customers who would go to competing distributors, as these offer low prices for the same products but without a service to guarantee the quality of the product. The setting of a resale price would therefore make it possible to anticipate free riding according to the OECD study[21]. This is even more true if one appreciates the growing increase in online sales gained over offline sales.

75. Finally, as far as stocks are concerned, the study argues that the imposition of a retail price by the producer to the distributor can induce the latter to order more (without the RPM, the retailer may sometimes fear that prices will decrease which may prevent him from keeping sufficient stock), and thus to hold more stock of goods (and to better compete with online platforms whose business models always imply having a significant amount of products in stock) which will ultimately benefit to the end-consumer. The benefit of this gain depends on several factors, namely the level of fluctuations in

[19] OECD, Round Table on Resale Price Maintenance, October 16, 2008, contribution of France, available (in French) at the following address:http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2008)54&docLanguage=Fr.

[20] OECD, Round Table on Taxed Sales Prices, 2008, (44, 45).

[21] OECD, Round Table on Taxed Sales Prices, 2008, (47).

demand, the need for perfect competition between distributors, the verification of other pricing methods, such as "*unsold stock policies*".[22]

1.2. The current decision-making practice of the French Competition Authority

76. To date, the decisional practice of the FCA is quite limited in relation to RPM proceedings in which efficiency arguments have been taken into account. Indeed, while the argument has been put forward in various cases prior to 2015, to our knowledge, none of the infringement decisions found that RPM could lead to efficiency gains.

77. In a 2006 decision, the FCA raised the issue of whether minimum resale prices could be imposed on authorised distributors for perfumes in order to preserve the luxury image and brand of these products. The FCA found that "*it is not for the FCA to determine what level of price is appropriate to grant a product a luxury image. But when a supplier chooses to entrust the distribution of its product to independent companies, it must in all cases comply with Articles L. 410-1 and L. 420-1 of the Commercial Code* [whose provisions are equivalent to those of Article 101(1) TFEU]*, which foresee the distributor's freedom to set its prices, subject only to provisions prohibiting resale at a loss. In this case, the illicit practices allowed the companies involved in the vertical agreements to obtain the profits corresponding to the existence of an integrated distribution network without bearing the costs, which are very high*"[23] The FCA therefore completely rejected the possibility of efficiency gains deriving from the need to ensure the brand image of the products in question.

78. In the context of an appeal against this decision, the Paris Court of Appeal also ruled in 2012, on the alleged efficiency gains, by stating that "*while individual exemption may be granted on the basis of concrete considerations, in the present case the applicant companies justify their practices solely on the basis of* […] *Article 101(1) of the TFEU*"[24]. It established that "*an economic study* [on] *'selective distribution systems for luxury goods: practices, justifications and analysis in terms of economic well-being' without establishing in any way, in what way and how, the practice implemented and found to be of concrete cause of efficiency within the meaning of* [Article 101(3) TFEU]". Should the applicants have relied on the provisions of Articles 101(3) TFEU, the Paris Court of Appel could have reached a different solution.

79. Furthermore, in 2007[25], in the toys case, Lego claimed an efficiency argument by *contending* that resale price maintenance benefits consumers by reducing the inefficiency caused by double margins. The FCA replied that "***the elimination of the double margin can only offset the negative effect of reducing competition in very specific circumstances** (**<u>weak competition from producers on the upstream market and weak competition from distributors on the downstream market, strong bargaining power of producers vis-à-vis distributors</u>**), which are not met in the toy sector. With regard to the implementation of minimum prices (for example, through the application of a resale loss threshold), this work shows that the elimination of the double margin is never sufficient to compensate for the loss of consumer surplus due to the reduction in competition*", (emphasis added)[26]. While the FCA did not accept Lego's

22 OECD, Round Table on Taxed Sales Prices, 2008, (51, 52).

23 FCA, decision No. 06-D-04 bis of March 13, 2006, corrected on March 24, 2006, *on practices identified in the luxury perfume sector*, §779, available at the following address: https://www.autoritedelaconcurrence.fr/sites/default/files/commitments//06d04.pdf.

24 Paris Court of Appeal, Pole 5, Chamber 7, Judgement No. 1199 of January 26, 2012, General Repertoire No. 2010/23945.

25 FCA, decision No. 07-D-50 of December 20, 2007, *on practices implemented in the toy distribution sector*, available at the following address: https://www.autoritedelaconcurrence.fr/sites/default/files/commitments//07d50.pdf.

26 *Op. cit*., (719).

contentions, it nonetheless clarified the particular circumstances where an efficiency gain could be characterized, namely "*weak competition from producers on the upstream market and weak competition from distributors on the downstream market, strong bargaining power of producers towards their distributors*"[27].

80. **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?**

81. <u>The launch of a new product:</u> the Commission, in its VGL[28], considers that fixed <u>selling</u> prices can lead to efficiencies, "*particularly, when a manufacturer launches a new product, fixed selling prices can be useful, in particular, <u>during the introductory period when demand is growing</u>*", (emphasis added). Two remarks can be made:

- would it not be preferable, for the sake of legal certainty, to indicate a period of time during which such fixed prices are likely to lead to efficiencies? This clarification as to the temporal scope of efficiency presumption would bring legal certainty; and

- the length of the efficiency presumption should also depend on the sector of activity, as the profitability of certain products may be faster than others, so the necessity of temporary fixed prices varies from one product to another.

82. <u>Efficiency defence in the event of coordinated low price campaigns in the context of franchise or similar distribution systems:</u> the Commission Guidelines also mention under paragraph 225 that a coordinated low-price campaign of short duration (usually 2-6 weeks) is an example of situation whereby RPM can lead to efficiencies and therefore might benefit from an individual exemption under Article 101 (3) TFEU.

83. Two remarks also on this point:

- the Commission might consider removing the reference to franchise or similar distribution system and extend this “exception” to all type of low price promotion campaigns; and

- it may be appropriate to clarify this period as well by indicating whether the 2–6-weeks period is merely indicative or not[29].

84. <u>Minimum resale price requirements and brand image protection:</u> in some cases, it might be interesting for a manufacturer to implement resale prices that are at least equal to the cost price (i.e. taking into account marketing costs) in order to preserve the image of the brand or the image of its products. To draw a parallel with other types of restrictions, the preservation of the luxury/brand image is for example a key element when building selective distribution networks. In this respect, in *Coty* Germany (2017), a restrictive clause prohibiting authorized distributors from reselling their products on third-party platforms was considered lawful by the European Court of Justice[30] subject that three following conditions be met, namely (i) the preservation of the essential characteristics of the products concerned, (ii) if it is objective and uniform and if it applies in the same way to all distributors (iii) and finally if it is proportionate to the objective pursued. While the APC appreciate that *Coty* concerned an online restriction in the context of selective

[27] *Ibid.*
[28] Vertical Guidelines, recital 125.
[29] European Commission, *Guidelines on Vertical Restraints*, (225).
[30] ECJ, ruling of December 6, 2017, No. C-230/16, *Coty Germany GmbH/Parfümerie Akzente GmbH*.

distribution and not price restriction, the APDC respectfully submit that the EJC has nevertheless accepted in this case a restriction notably on the basis of the protection of the brand image. Thus, the preservation of the brand image can, under certain conditions, characterize as an efficiency gain and, therefore, may justify departing from certain (hardcore) restrictions such as restrictions on resale prices.

85. French commercial case law might also be useful for the Commission to identify concrete examples where French Courts have accepted restrictions by suppliers concerning certain promotional behavior by resellers. Below are relevant examples:

- the Paris Court of Appeals confirmed by the *Cour de cassation* has judged that the fact for a supplier to refuse to authorize a reseller in its selective network because products were commercialized in degrading conditions was not an anticompetitive practice[31];

- French case law also admitted as licit a contractual clause prohibiting promotional operations degrading for the products or the brand or prohibiting discounting sales for luxury products. For example, the Paris Court of Appeal considered as licit a clause in Cartier Parfums contracts providing that "*any promotional operations by mean of discount as well as any loss leader price strategy will be seen as undermining the prestige and brand reputation*"[32];

- the IP French case law can also usefully be reminded in this respect. The French *Cour de cassation* has judged that Chanel may refuse that its products be commercialized through a tendering procedure after degrading presentation through degrading advertisement in de-stocking locations launching significant rebates[33].

86. Damage theory analysis and intra-band competition and inter-brands competition: damage theory relies on a hypothesis-based reasoning to determine whether a commercial practice harms consumer. According to Xavier Boutin, most vertical restraints have the direct effect of reducing intra-brand competition but not inter-brand competition. Price-fixing practices allow non-price inter-brand competition between retailers to continue, which is not the case, for example, with territorial exclusivity clauses, which eliminate this form of competition and intra-brand competition. Currently, competition authorities sanction price fixing practices without any factual or theoretical elements. Therefore, firstly, minimum resale price requirements would not be prohibited *per se*, a case-by-case analysis could be conducted. Secondly, different analysis could also be conducted depending on whether inter-brand or intra-brand competition is affected. Indeed, Elzinga and Mills (2008) consider that "[b]*y reducing intra-brand price competition, RPM can promote interbrand competition by eliminating free riding at the distribution level on aspects such as service provision*"[34]

87. The dual pricing system for online sales: this mechanism prohibits manufacturers from charging the same retailer different wholesale prices for the same product, depending on whether the products are to be sold online or offline. Such practice is currently

31 Paris Court of Appeals, ruling of January, 2016, No. 13/11588 and *Cour de cassation* 8 June 2017, No.16-15.372.

32 Paris Court of Appeals, ruling of March 30, 1992, Parfumerie Le Lys c/ SA Cartier; Paris Court of Appeals, ruling of December 9, 1992, SA Michel Swiss c/ SA Montaigne Diffusion, No.91/23198.

33 *Cour de cassation*, ruling of October 4, 2011, No.10-20.914 ; *Cour de cassation*, ruling of March 23, 2010, No.09-65.839.

34 European Commission, *Support studies for the evaluation of the VBER: support study and study on consumer purchasing behaviour in Europe: final report*, June 5, 2020, available at the following address: https://ec.europa.eu/competition/publications/reports/kd0420219enn.pdf.

considered as being a hardcore restriction when applied to the same retailers under the block exemption regulation. However, it can be exempted on the basis of Article 101(3) TFEU, under certain circumstances, in particular "*where such an agreement would be indispensable to remedy free riding*"[35].

88. Resale price maintenance and algorithms: the specificity of the algorithm mechanism and the problems of price transparency must be taken into account. These mechanisms of algorithms "adapting" prices should also lead to certain efficiency gains concerning new market entrants and new products. Besides, in 2019, the French and German competition authorities emphasised in their joint study entitled *Algorithms and Competition* that " *there might be a need to assess potential (counteracting) efficiencies associated with the algorithm*"[36]. It may also be interesting to take into account, in the particular context of the Covid-19 pandemic, the efficiencies that can be achieved through online sales, and therefore particularly those made through and/or enhanced by algorithms.

89. Proposed sectoral guidelines: finally, the analysis of efficiencies proposed by the Commission in its Guidelines is very theoretical. Thus, two remarks can be made:

- since their market dynamics can prove to be different, it might be appropriate to differentiate the assessment of efficiencies depending on the sector at stake: two sectors of activity will not necessarily lead to the same compensation for the negative impact of the agreement on prices, output and other relevant elements; and

- it might be appropriate to clarify in (much) more detail what is meant by "*economic progress*" in the future Guidelines on Vertical Restraints.

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

91. The anticompetitive effects of tacitly renewable non-compete obligations can notably occur when the non-compete obligation:

- would raise barriers to entry or to the expansion on a market for a competitor;

- would be harmful to consumers, notably if:

    - they increase prices,

    - they limit the consumers choices or,

    - they diminish quality or innovation.

92. Those anticompetitive effects could be more important if the non-compete obligation is tacitly renewed after a duration of 5 years. However, it seems also possible to balance the negative effects of this tacit renewal if the parties are able to exit the contract at any time, with sufficient prior notice and at a reasonable cost as envisaged by the Commission.

[35] European Commission, *Final Report on the E-Commerce Sector Inquiry*, (37).

[36] FCA and Bundeskartellamt, joint study *Algorithms and Competition*, November 2019, (29), available at the following address: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Algorithms_and_Competition_Working-Paper.pdf?__blob=publicationFile&v=5.

93. Thus, it seems that the tacit renewal of non-compete obligations after a duration of 5 years would have negative effects only if practically speaking at least one party to the contract would not have the ability to exit the contract at any time, with sufficient prior notice and at a reasonable cost. This might notably occur if such party to the contract is economically dependent on one of the others. However, in such a situation the alleged victim of the tacit renewal after a duration of 5 years should prove the negative effects of the non-compete obligation.

2. Sustainability

94. To the best of the APDC's knowledge, the question of how to take into account sustainability efforts when assessing vertical restraints has not been a focal point in the discussions on this topic by all stakeholders so far. Indeed, to date, the discussions on competition law and sustainability efforts have focused very much on horizontal agreements between competitors, state aids and how sustainability objectives should be considered in merger control. That being said, the APDC considers that sustainability efforts are relevant to the competitive assessment including for vertical restraints and should be taken into account to exempt vertical restrictions in certain circumstances.

95. For example, one could envisage flexibility on assessment of RPM to foster concrete efforts by suppliers to launch more sustainable products acknowledging that those efforts have a cost and that there might be a need to preserve the suppliers and retailers' margins to incentivise continuous innovation and sustainable efforts (*e.g.* fair trade procurement, child labour free supply chains, plastic free packaging, pesticide free products, local production, green logistics, etc.).

96. Those efforts could also, in certain circumstances, justify longer term exclusivities or non-compete provisions which would not necessarily benefit from the current version of the block exemption. To illustrate this, the APDC refers to the Commission's DSD decision[37] in which it has considered environmental protection as a legitimate goal that can trigger the successful application of article 101 (3) TFEU. In this case, the Commission exempted a long-term exclusivity clause inserted in a service agreement through which DSD, the German undertaking operating the largest system for the collection and recovery of sales packaging in Germany (i.e. Der Grüne Punkt)[38], undertook to purchase collection and sorting services from a single collector (initially during 15 years, reduced to 9 years following the Commission's exemption). The Commission considered the exclusivity clause as contrary to article 101 (1) TFEU because it prevented competing collectors from entering the market given DSD's pivotal role but exempted it under article 101 (3) TFEU because it was*, inter alia*, needed for the parties to recover their substantial investments, plan the provision of the service in the long term, organise it in a way to make it efficient and reliable and ultimately give direct practical effect to environmental objectives[39].

97. The APDC appreciates that each decision granting an individual exemption is obviously case-specific and that it might be difficult to grant an automatic blanket sustainability exemption under the upcoming version of VBER and/or VGL. However, this shows that

---

37 Commission decision 2001/837/EC of September 17, 2001, relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Cases COMP/34493 – DSD, COMP/37366 – Hofman + DSD, COMP/37299 – Edelhoff + DSD, COMP/37291 – Rechmann + DSD, COMP/37288 – ARGE and five other undertakings + DSD, COMP/37287 – AWG and five other undertakings + DSD, COMP/37526 – Feldhaus + DSD, COMP/37254 – Nehlsen + DSD, COMP/37252 – Schönmakers + DSD, COMP/37250 – Altvater + DSD, COMP/37246 – DASS + DSD, COMP/37245 – Scheele + DSD, COMP/37244 – SAK + DSD, COMP/37243 – Fischer + DSD, COMP/37242 – Trienekens + DSD, COMP/37267 – Interseroh + DSD) (OJ 2001 L 319, p. 1).

38 *See* (7.

39 *See* (141) to (163) and especially (145).

there is room for the VBER and/or VGL to better capture sustainability efforts in the analysis of the efficiency defence.

98. In light of the above, the APDC would welcome significant developments in the next generation VBER and/or VGL on how sustainability efforts should be factored into the competitive assessment of vertical restraints to allow businesses to benefit from an exemption when justified.

3. Covid impact

99. The Covid-19 pandemic had an impact on businesses, in particular with a boom of ecommerce as described by the OECD recently[40]. However, these changes were already well advanced before the pandemic occurred and the growth of ecommerce has simply accelerated during this period.

100. In this respect, the APDC is of the view that digitalisation of the economy, changes in route to market models and in consumer habits have been covered at length during the evaluation phase and following consultations. Therefore, the APDC is not convinced that the Covid-19 pandemic should be specifically addressed in the next generation VBER and/or VGL.

101. The APDC believes, however, that times of crisis (not limited to the current pandemic) should be factored into the competitive analysis and that it would be relevant for the Commission to envisage specific exceptions/derogations allowing businesses to depart from certain existing rules in times of crisis provided the latter are able to put forward concrete facts to justify such exemption. For example, the Commission could consider concretely in the VGL derogations to RPM prohibition or flexibility on exclusivities or non-compete obligations to address market specific situations such as shortages, logistic difficulties, raw material price increases, etc.

102. In conclusion, while the APDC would welcome some developments relevant to the competitive analysis of vertical restraints in times of crisis in the updated VBER and VGL, the APDC respectfully submits that it does not see specific reasons to specifically cover the Covid-19 pandemic. If the Commission does cover this topic in the upcoming VBER and/or VGL, the APDC would welcome concrete guidance to ease the application of such exceptions or derogations by businesses in practice.

[40] E-commerce in the time of COVID-19, 7 October 2020.

Specific considerations concerning the Commission Working Paper on distributors who also act as agents for certain products for the same supplier.

103. The APDC has already made submissions during the evaluation phase and recently in response to the Inception Paper asking for clarification and practical guidance concerning the application of the agency concept (see our Paper dated 20 November 2020). While the APDC appreciates that agency agreements is not the focus of the Commission's questionnaire, it takes the opportunity of this consultation to share views about the Commission Working Paper on distributors who also act as agents for certain products for the same supplier (the "Working Paper") published on 5 February 2021. Indeed, agency agreements will be covered in the Vertical Guidelines, so the APDC would like to share views with the Commission on certain practical questions and risks associated with the approach taken in the Working Paper.

104. The Working Paper points out two key risks with respect to the dual role of agent / distributor: influence and cost-allocation. This paper focus on the second one.

105. With respect to cost-allocation, the Working Paper focuses on the hypothesis of a distributor not yet active in the relevant market. Under this scenario, the principal is required to cover all market-specific investments, save those exclusively relating to the sale of differentiated products under the independent distribution model.[41]

106. The APDC would welcome the following clarifications:

- the Working Paper limits the guidance to scenarios involving product differentiation. The Vertical Guidelines should provide broader guidance on dual roles. Indeed, limiting the considerations on dual roles to products differentiation scenarios could artificially limit the application of dual models while there may be other scenarios where dual roles do not raise issues.

- then, the Commission should clarify further when costs "exclusively" relate to the independently distributed products. Businesses need to understand better which costs the principal need to cover and why on the basis of concrete examples in particular since in practice certain cost might be shared (e.g. transport).

- furthermore, guidance would be needed on the Working Paper approach to "general" agency services that require partial reimbursement. In particular, (i) what constitutes a general agency function that requires reimbursement and (ii) what is the level of reimbursement required? The concept of shared cost in the Working Paper would also need to be clarified[42].

- finally, the approach to the need to cover costs in the same product market in agency relationships should be addressed in the Vertical Guidelines.

107. Beyond these practical questions and the need for further clarification for businesses, the APDC respectfully submits that the overall approach to cost allocation taken by the Working Paper could raise negative effects.

---

41 Commission's Working Paper, (20, 22).

42 Commission's Working Paper, (21).

108. This approach risks limiting the use of dual agent / distributors systems if the supplier in practice must cover all common costs. It would therefore be important beyond the question of shared cost to consider the volume and value of the sales respectively relating to the agency or the distributor channel.

109. In addition, how does the Commission address the issue of distributors also distributing competing products (i.e. products from the supplier' competitors?). The Working Paper as currently drafted raises a risk of distortion of competition if the supplier opting for a dual system ends up financing the route to market of its competitors.

110. Finally, how does the Commission address the risk of double counting where several suppliers opt for a dual system and each of them covers the full common costs?

111. The APDC considers that it would be important not to discourage dual systems. As acknowledged by the Commission in the Inception Papers, businesses need flexibility to organize their route to market but also legal certainty. Thus, the APDC submits that the Commission should consider a pro-rata approach to cost allocation in dual systems striking the right balance between the supplier (principal) bearing the costs linked to the services of the agency model and the agent not bearing the financial or commercial risks for the activities for which it has been appointed as agent.