UK COMPETITION AND MARKETS AUTHORITY REVIEW OF THE GUIDANCE ON THE VERTICAL BLOCK EXEMPTION ORDER

RESPONSE TO PUBLIC CONSULTATION

BRANDS FOR EUROPE

This response is submitted by Brands for Europe, a group of leading brands across numerous industry sectors. The member companies of Brands for Europe are Adidas, Apple, Bose, Canon, ColPal, HP, the LEGO Group, Levi Strauss & Co., L'Oréal, McDonald's, Nestlé, Nike, Panasonic, Philips, Pioneer, P&G, Puig, Swatch Group, Unilever, Whirlpool and Yum!. The group is represented by Baker McKenzie.

This response provides a cross-sectoral Brand owner view on the DRAFT CMA Guidance (**Guidance)** published by the UK Government on 31 March 2022 in relation to the Vertical Agreements Block Exemption Order 2022 (**Draft Order**).

This Response follows our contribution to the roundtable hosted by the UK Competition & Markets Authority (**CMA**) on 14 April 2021, and our written responses of 22 July 2021 and 16 March 2022[1] to the public consultations on the review of the Retained Vertical Block Exemption Regulation (**Retained VBER**) and Vertical Guidelines (**VGL**), (**2021 Response** and **2022 Response**, together **Previous Responses**).

[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1030663/Brands_for_Europe_Response.pdf

1. Introduction

1.1 Brands for Europe fully supports the CMA's initiative to update the Guidance to reflect the need for more flexibility in the design of distribution systems to allow businesses to continue to adapt to future changes and challenges and to respond to evolving customer needs. We also welcome the CMA's initiative of clarifying and simplifying the rules, and providing businesses with up-to-date guidance that reflects the commercial environment reshaped by the growth of e-commerce.

1.2 We welcome a number of aspects of the Guidance, such as the clarification that the Draft Order is capable of covering dual distribution carried out by wholesalers and importers etc. We also appreciate the CMA's desire to provide guidance on when information exchange in a dual distribution context is covered by the Draft Order. However, we urge the CMA to reconsider its proposal regarding certain aspects of the exchange of information in dual distribution scenarios, and the reference to "by object" restrictions (see **section 2**).

1.3 In addition to our comments regarding dual distribution, Brands for Europe also provides specific comments and proposed amendments to the draft VBER and draft Vertical Guidelines in relation to:

(a) Agency, exclusive distribution, selective distribution systems and the guidance on active and passive resale restrictions (**section 3**);

(b) Online sales and online advertising, dual pricing and the equivalence requirement (**section 4**);

(c) Resale price maintenance (**section 5**); and

(d) Excluded restrictions and other provisions (**section 6**).

2. Dual distribution

Vertical agreements between competitors and 'dual distribution'

2.1 We welcome a number of aspects of the Guidance, such as the clarification that the Draft Order is capable of covering dual distribution carried out by wholesalers and importers etc. We also appreciate the CMA's desire to provide guidance on when information exchange in a dual distribution context is covered by the Draft Order.

2.2 However, there are a number of areas where we strongly encourage the CMA to amend the Guidance in the interests of legal certainty.

Relationship with guidance on horizontal agreements

2.3 We would be grateful for clarification that vertical agreements that are non-reciprocal and meet one of the conditions listed in Article 3(5)(i) to (iv) of the Draft Order) but which do not benefit from the block exemption as a result of the supplier's market share will still fall to be considered under the Guidance (and not the guidance relating to horizontal agreements).

2.4 We suspect that this is the CMA's intention since this would be consistent with paragraph 6.15 of the Guidance. Plus, it would not make sense to treat a vertical relationship as a horizontal one simply because the supplier in question exceeds the relevant market share threshold - but we would appreciate this clarity.

2.5 We therefore suggest the following amendment to paragraph 6.14 of the Guidance:

> *6.14 Vertical agreements between competitors ~~that~~ which are reciprocal or do not meet one of the conditions listed in Article 3(5)(i) to (iv) VABEO ~~are not covered by the VABEO~~ should be assessed by reference to relevant current guidance on horizontal agreements, including the guidance on the exchange of information in the context of vertical agreements between competing undertakings.*

Horizontal 'by object' restrictions in the context of dual distribution

2.6 According to paragraph 6.15 and 6.22 of the Guidance, the inclusion in a dual distribution agreement of a "horizontal restriction of competition by object" would prevent the block exemption from applying to the entire agreement. Consequently, those 'by object' restrictions would have the same legal effect as the hardcore restrictions listed in Section 8 of the Draft Order.

2.7 We are very concerned that this approach would significantly reduce legal certainty as regards dual distribution. That is because, in contrast to the Section 8 hardcore restrictions, "horizontal restrictions of competition by object" in a dual distribution context are not specified in the Draft Order.

2.8 As demonstrated by the case law of the Court of Justice and the unpredictable outcome of individual cases, the precise determination of what in practice constitutes a restriction by object is a complex exercise that is inevitably fraught with a high degree of legal uncertainty and unpredictability. Making the availability of the exemption conditional on the absence of such by object restrictions is at odds with the goal of a block exemption, which is to define the specific restrictions or practices that prevent the application of the block exemption in order to simplify the process of compliance for market participants.

2.9 We therefore recommend that these references are removed from the Guidance. Rather than include a reference to "object restrictions", we consider that the Guidance should simply exclude from its scope information exchanges which may be considered to be problematic. See

our suggested amendment to paragraph 10.176 of the Guidance, which is set out in the Annex to this submission.

> *6.15 Where a vertical agreement is non-reciprocal and meets one of the conditions in Article 3(5)(i) to (iv) of the VABEO ~~and does not include a horizontal restriction of competition by object~~, this agreement should be assessed by reference to this Guidance, including to determine whether it benefits from block exemption provided by the VABEO.*
>
> *6.22 ~~Agreements containing any horizontal restrictions of competition by object are not covered by the exemptions set out in Article 3(5) of the VABEO.~~ The benefit of the block exemption provided by the VABEO only covers restraints that are genuinely vertical; it does not extend to horizontal agreements between competing undertakings even where these might be recorded or agreed in the same documents as a vertical agreement (or related documents) that would otherwise fall within Article 3(5) VABEO.*

Dual distribution and information exchange

2.10 We welcome the clarification in paragraph 10.171 that, where dual distribution scenarios are covered by the draft Order, then the benefit of the block exemption covers both the agreement and "in principle" information exchange under the agreement. However, we fundamentally disagree with two aspects of the remaining guidance in paragraph 10.171.

2.11 For the reasons explained above, we do not think it is appropriate or necessary to introduce a vague concept of information exchange that 'restricts competition by object' in a dual distribution context. Paragraph 10.172 of the Guidance does not assist, as it does not specify what information exchanges between a supplier and retailer, for example, would be considered 'object' restrictions.

2.12 Paragraph 10.175 provides examples of information exchange which is "unlikely" to amount to a 'by object' restriction of competition but ultimately provides no guarantee and leaves open the possibility for a party to argue that an information exchange is problematic if it is not listed there. This uncertainty is likely to reduce legal certainty in practice and is unnecessary given that the CMA can, consistent with the rationale of a block exemption, instead indicate explicitly the type of information exchange that is problematic in paragraph 10.176.

2.13 We are also extremely concerned at the idea of linking the availability of the safe harbour to the vague notion of information exchange which is "genuinely vertical, which is to say that it is required to implement the vertical agreement".

2.14 We acknowledge that paragraph 10.175 of the Guidance attempts to shed light on these concepts by providing a non-exhaustive list of examples of information that, when exchanged by the parties in a dual distribution scenario, can "generally be considered" to be unlikely to constitute a restriction by object and are likely to be "genuinely vertical".

2.15 However, the 'necessary to implement" or "genuinely vertical" notions are inherently unclear and will reduce legal certainty. Instead, we urge the CMA to draft the Guidance in such a way that it operates as a broader exemption for information exchange in the vertical context with specific carve-outs for certain exchanges in a dual distribution scenario which would instead fall to be considered under the horizontal guidelines.

2.16 Turning to the specific categories of information exchanges listed in the Guidance, we broadly agree with the proposed classification of various types of information exchange with two major exceptions: the inclusion (and therefore the denial of the block exemption) in paragraph 10.176(a) of information relating to actual future prices at which the buyer will sell the contract products downstream, and in paragraph 10.176(b) of customer-specific sales data, including non-aggregated information on the value and volume of sales per customer.

2.17 We consider that the exclusion from the Draft Order of this type of information exchange will in practice lead to significant issues for suppliers, which will also be to the detriment of their resellers and end customers. Concrete examples showing these issues are identified below.

2.18 In short, we see no competition law justification for denying the benefit and legal certainty of the block exemption for the exchange of customer-specific sales data. Instead, we urge the CMA to specifically include this type of information exchange under paragraph 10.175 so that it is covered by the Draft Order in situations where it is not used to impose any of the hardcore restrictions on the buyer specified in Section 8 of the Draft Order.

2.19 Our proposed alternative wording for paragraphs 10.170-10.179 is contained in the **Annex** to this submission.

Buyers may have a legitimate need to communicate future prices

2.20 Buyers frequently reach out to suppliers to request assistance in producing marketing materials or other merchandising (such as price labels) for the sale of the supplier's products. Additionally a supplier may wish to advertise a buyer promotion in third party media because it wishes to drive consumers to that buyer where for example the supplier has offered funding to support such a promotion. In these scenarios material may contain future prices provided by the buyer (prices which the buyer intends to apply at the relevant time point) which make such materials more relevant to the consumer. The prices will need to be provided in advance so that the marketing material for the buyer or third party media can be produced in time. The prices are reflective of the buyer's own pricing intentions. These are not conditional or reliant on the supplier's own pricing intentions.

Suppliers have a legitimate need for customer-specific sales data

2.21 Brands for Europe is extremely concerned at the proposal that suppliers should not be able to collect customer-specific sales data (volume and value) from their buyers. This type of information is a critical component of the business model of many suppliers across a wide variety of sectors. This is especially the case in respect of distribution at the wholesale level, e.g., when manufacturers sell to third party resellers and will therefore have little to no visibility over follow-on sales to downstream levels (e.g. retailers etc.). The same needs can arise in relation to consumer level data as explained below. It is also necessary in the context of franchising arrangements where accurate sell-out information from the franchisees is particularly important to enable the franchisor to guarantee consistent high quality across the entire franchise system.

2.22 The CMA has not put forward a theory of harm explaining why the sharing by a reseller of customer-specific sales data could harm consumers. Nor is there any decisional practice under EU or UK competition law showing how such harm could arise.

2.23 We understand that a concern may have been expressed (at least in the context of the EU consultation) that a supplier could use customer-specific information received from a buyer in order to 'target' customers of that reseller. Alternatively, where a supplier and a buyer, for example, both serve the same customer, it is theoretically possible that a supplier could gain insights from pricing information it receives from the buyer so as to try to encourage the customer to divert purchases directly to the supplier.

2.24 We are not surprised at the fact that competition issues have not arisen about such scenarios. Quite aside from the question of whether these scenarios would even fall within the scope of the Chapter I prohibition / Article 101(1) TFEU, the principal incentive for the supplier is to compete successfully against rival suppliers by maximizing its sales through all available channels.

2.25 The supplier will always seek to ensure that its entire distribution 'ecosystem' can best meet the demands of customers interested in the brand. The supplier's downstream operations and those of independent resellers are typically complements that can serve different customer preferences and operate under inherently different competitive conditions.

2.26 In fact, the information exchanges below are not confined to, or even specifically triggered by, a scenario of dual distribution. These information exchanges are needed for the proper functioning of vertical relationships.

2.27 If the supplier were to try to limit the ability of its buyers to compete effectively, it would run a serious risk that it would lose sales to rival brands at the level of independent buyers, thus undermining its goal to maximize sales overall. Plus, if a buyer approaches the scale at which it might be more attractive to the buyer to buy direct from the supplier (e.g. due to volume of purchases), then the buyer would typically approach the supplier (and not rely on the supplier approaching it to suggest a modification to its supply chain practices). In fact, in some territories, it is common for suppliers to serve particular accounts directly because the latter has insisted upon this.

2.28 Overall, the supplier has every incentive to ensure that independent buyers remain committed to the brand and invest in promoting the brand and its products. Creating an adversarial relationship with buyers would be against the supplier's own best interests, as it would undermine its ability to compete against rival brands and potentially raise issues under non-competition laws (e.g. provisions relating to fair trading etc.).

2.29 Certain buyers might express concerns about the supplier's use of their sales data to benefit its own downstream operations. However, buyers are entirely free to decide whether or not to provide the data and, in fact, will often charge or be compensated for this information. In the end, the question of whether data can be obtained is one of many commercial considerations that a supplier needs to address to maintain a productive relationship with its buyers.

2.30 Suppliers need customer-specific sales data (volume and value) from their buyers for procompetitive reasons and in particular for the efficient operation of their entire channel network (including their direct and indirect sales). This is explained below.

Reseller incentives and rebates

2.31 It is extremely common for suppliers to pay compensation to their resellers by reference to the sales of those resellers to specific customers or specific retail environments. By having access to non-aggregated data about those customer sales, suppliers are able to calculate reseller and OEM sales representative compensation accurately.

2.32 In some cases a retailer will be paid a bonus based on its individual performance (e.g. for growing business, activating certain promotions etc.) and this will be paid via a wholesaler. In some other instances, a rebate may be paid directly by the supplier to the retailer. The evaluation of the retailer's performance is typically made on the basis of the total purchases made by the retailer, irrespective of whether the purchases are made directly from the supplier or the wholesaler. Under all these models, the supplier will need to obtain the data from the reseller regarding the details of its sales in order to be able to remunerate fairly the retailers for their performance.

2.33 Suppliers also need to tailor their promotional efforts to the market and that may mean customising promotional offers per retailer and even per location. In order to do this, suppliers need information at retailer level and even store level about their sales to end customers irrespective of whether the retailer purchased the products from the supplier or from a reseller. This allows the supplier to be more competitive and ensure adequate return on investment.

Special pricing for a specific end-customer deal

2.34 A reseller may request a discount for a specific end user deal via a distributor or from the supplier directly. By having access to information about the sales to that end-user, the supplier can verify that the sale was made and that the discount was passed through to the end-customer.

Business planning

2.35 Suppliers rely on customer-specific non-aggregated sales data from resellers in order to help manage their business (e.g. demand planning, promotions). This allows the supplier to improve sales by channel/region/brand (with a focus on launches/promotions). The goal is to allow the supplier's teams to build a category with resellers and to offer relevant propositions to consumers. Knowing what works and what does not work allows teams to tailor propositions to the benefit of the consumers and to drive turnover for resellers.

2.36 Shopping experiences and consumption habits depend on multiple factors, including location, store environment, marketing approach, size and type of store, seasonality etc.. By obtaining information on customer habits at reseller level, and even perhaps at location level, a supplier can better understand customer habits and therefore adapt its strategy to always improve the customer experience and better compete on the market.

Data insights and reseller sales enablement

2.37 Customer level information from the reseller enables the supplier to benchmark a reseller's performance compared to the market, as well as industry and aggregated market insights.

2.38 For example, suppliers use sell-out data from resellers (e.g. commercial customer company names and quantities per SKU) to be able to produce individualized data-based insights (e.g. on customer segments and customer purchase propensity) which helps resellers to develop their own, individualized sales strategy and targeted campaigns. Suppliers can also show an individual reseller how their sales of products and services compare to an aggregated set of anonymized resellers in their country in a specific product group or even on individual SKUs. Without this data, suppliers would not be able to produce data insights, and certainly not at the required degree of granularity. These data insights are pro-competitive and ultimately benefit end customers by helping resellers to anticipate end-customer needs.

2.39 Often resellers will rely on the capabilities and expertise of the supplier to help them analyse and effectively implement strategies based on their own data. A reseller may struggle to analyse the data with the same sophistication as the supplier and therefore may be at a disadvantage if it could not rely on the supplier to undertake this type of analysis. If the reseller is unable to leverage the supplier's input and this undermines its effectiveness in the market, this could result in the supplier needing to internalize such sales. Suppliers decide to use resellers because it is more efficient and so the move to direct selling could lead to inefficiencies and possibly higher prices due to higher costs.

2.40 In the franchising sector, the gathering of customer-specific sales data is essential for the business since it is aimed at creating a better customer experience and satisfying customer needs. It is essentially a customer centric approach that at the same time helps address the overall business strategy. This kind of transactional data is critical to determine/identify/model segments customers in distinct groups (i.e. clusters) which will then consequently benefit from tailored promotions and experiences. The clusters are determined based on various parameters, such as preferences, frequency, use of promotions etc.. This can be achieved only by acquiring these transactional data. Also loyalty scheme programs, where in place, are dependent on an analysis of customer specific data.

2.41 Additionally, the gathering of these data is of critical importance in order to better estimate products' needs and supply in view of optimizing supply chain as well as operation procedures, which will ultimately benefit the stores' activities. With all this in mind, this data would ultimately help ensure business efficiency and, at the same time, improve the overall customers' journey and engagement with the brand.

Inventory management

2.42 Non-aggregated customer data is critical to provide accurate visibility of inventory. If manufacturers/suppliers do not have accurate visibility of the stock held and sold by their individual resellers and retailers, they cannot reconcile downstream stock levels with their own supply chain data, which is critical for supplying end-customers effectively.

2.43 Sell out data from direct customers alone tells manufacturers/suppliers very little about channel inventory held by channel partners (wholesalers, resellers or retailers) at local (country, region, city) levels. Suppliers need to ensure optimal supply levels at the local level to satisfy customer demand. Partner inventory data is also used to create predictive insights, helping resellers and retailers to prevent stock-out and signalling opportunities for them to proactively replenish their stock to meet customer demand. Providing a dynamic view of their stock situation relative to an average reseller/retailer inventory helps them to manage their stock replenishment and will be of benefit to end-customers who are less likely to face delays in receiving products.

2.44 Without this inventory information, the risk of oversupply and undersupply increases, resulting in harm to customers. Undersupply obviously delays customer access and can damage brand value as customers cannot purchase them when they need them. Oversupply can delay customer access to new and innovative products, as resellers first try to sell existing stock before demanding new products. It is also not sustainable. This information is of course critical for (mono-brand) franchise systems where the availability of inventory is key for profitability.

2.45 Lack of visibility on channel inventory undermines a supplier's ability to predict future demand or revenues, which not only impacts manufacturing forecasts, but also leads to investor uncertainty (public companies not meeting their revenues forecasts are penalized by investors) and, as a result, an increase on the supplier's cost of capital. This undermines a supplier's competitiveness and ultimately harms customers when a supplier passes on this higher cost of capital through higher prices or lower quality.

Evaluating and rewarding the performance of resellers and understanding product sales

2.46 The supplier will also need to assess the performance of its resellers and naturally this evaluation needs to be carried out by reference to the value and volume of sales to specific customers (of which the supplier may otherwise have no visibility). Aggregated data are not sufficiently precise to assist the supplier to understand how well the reseller is doing in all the retail environments it is required to serve. Resellers may have very limited incentives to effectively supply smaller and/or remote stores if the data was provided in an aggregated format.

Driving demand and quality through product advice/customer education

2.47 The supplier may need to reach out to the customers of its direct buyers (e.g. resellers and/or retailers) to provide advice about its products. The supplier needs to focus its education programs according to the activity and the focus of each retailer and this can only be done if the supplier is able to have a consolidated view of the sales made, including those made directly by it and those made by its resellers. That consolidation necessarily requires the supplier to have access to the sales data from the resellers, in order to know which retailer purchases the supplier's products.

2.48 This educational activity is important for driving demand overall, not only that generated by the supplier with its direct customers. If suppliers did not have access to this specific sales information, they could not know where to direct their education program or which retailers to visit, and this would be likely to have a detrimental impact on the sales of the resellers as well as the supplier overall. Indeed, for these reasons, some suppliers will take decisions about their distribution network in a holistic manner and be largely agnostic as to the channels through which their products flow to end customers.

Reseller models for meeting complex customer needs

2.49 In some markets, end customers do not treat 'direct' and 'wholesale' as binary options. Customers may seek to combine elements of a product or service offering from these two channels. For example, there are situations where a supplier sells directly to customers in some geographies but relies on resellers to fulfil the deal in territories where it does not have sufficient capabilities or direct presence. Alternatively, a supplier may sell a solution, but rely on resellers to supply certain hardware or service elements. These reseller-models obviously require that the supplier receives customer-specific information from resellers.

Production planning

2.50 In some markets, e.g. technically complex products such as medical devices, resellers may need to notify the supplier of opportunities/future projects. Resellers may record information relating to these projects in an administrative tool - including products, configurations, and volumes at a customer level. This is crucial because it allows manufacturers to plan the production and supply of their medical products in advance.

Product recall/tracking

2.51 Manufacturers may need to be able to take appropriate measures in case of a recall of a product. For example, the EU Medical Device Regulation may require manufacturers to implement a product tracking system, which would require the manufacturer to know which products are installed at an individual customer. This would require the manufacturer's reseller to inform the medical device manufacturer which specific product it has sold to which specific customer.

Reseller programme compliance

2.52 Receiving non-aggregated customer-specific data from resellers enables the supplier to control and enforce selective distribution systems. In particular, as highlighted by the EU Expert Report, in the context of a selective distribution system, receiving non-aggregated customer-specific data from distributors is a way to enable the supplier to make sure that the goods are not sold to unauthorised distributors and therefore to control and enforce its system.

A restrictive approach to customer-specific sales data would force business models to change to the detriment of the entire supply chain

2.53 If suppliers no longer had access to customer-specific data from resellers, they would not be able to adopt the practices outlined above. In practice, the cost in terms of lost competitiveness would be too high. Many suppliers would find it necessary to choose between a 100% direct or 100% indirect model at the wholesale level in every country in order to continue to have access to the data.

2.54 Limiting indirect distribution could impact the overall service and product availability. There would inevitably be some customers (e.g., smaller customers or those located in less populated regions) that the supplier could not realistically service themselves.

2.55 It is also possible that suppliers may decide against selling direct to retailers simply because they are already selling to wholesalers. That is because, on making one direct sale to a retailer,

there is a real risk that a supplier would no longer be able to receive the type of information listed above (without first undertaking a detailed and complicated analysis under the horizontals guidelines which do not in fact provide legal certainty). This would immediately place the supplier at a competitive disadvantage compared to rivals that do not sell direct to retailers and which could continue to receive this important information from key resellers.

2.56 If reforms were to push suppliers towards a third party /indirect sales only model, this would mean a loss of a direct relationship which in some cases is insisted upon by a large account which desires that relationship with the supplier.

Summary

2.57 If suppliers cannot access customer-specific sales data, then the business models above would be at risk due to the loss in legal certainty. Suppliers in a position of dual distribution would be unable to:

- Provide tailored/customer-specific promotions and investment
- Provide and benefit from data insights
- Forecast and manage channel inventory efficiently
- Evaluate the performance of resellers/retailers
- Meet customer demand when this requires collaborating with resellers to provide solutions to end customers
- Drive demand by educating customers on their products and services in the most efficient manner
- Pay accurate sales compensation to sales employees and resellers/retailers
- Enforce and control a selective distribution system

3. Flexibility in designing distribution systems

3.1 Brands for Europe welcomes the CMA's initiative to update the Guidance to reflect the changes to the retail environment, to offer the necessary flexibility to allow brand owners and retailers to continue to adapt to future changes and challenges, and to provide consumers with the seamless omni-channel experience which they expect. Allowing businesses the freedom to respond with agility to changes in the market and consumer behaviour is essential. The Draft Order and Guidance include revisions to the Retained VBER and VGL which reflect this, and we welcome those revisions. However, in some instances, the Guidance includes language which in our view is insufficiently clear thus endangering the CMA's intentions to provide more flexibility across all relevant distribution methods which would be detrimental to the UK market. Accordingly, in respect of each distribution model, we provide in this section our comments on the CMA's Guidance with a view to clarifying the texts and to providing legal certainty.

Agency

3.2 Brands for Europe welcomes the clarification in footnote 24 of the Guidance that an agent may temporarily acquire the property of the contract goods while selling them on behalf of the principal. It reflects the reality that for many reasons (including tax, consumer laws etc.) title does pass to the agent, but the intermediary does not have, is not set up to have and does not want to have an influence on the commercial conditions of the agreement concerned (notably the price or end-customer) and thus is not acting as an independent distributor. In this context, we note that the reference to "very" before "brief period of time" introduces uncertainty to an otherwise clear framework.

3.3 We noted in the 2021 Response at paragraphs 7.6 - 7.7 our disappointment with the CMA's proposal to follow the European Commission's (**Commission**) rigid approach on "dual role" agents, expressed initially by DG Competition in its Working Paper on "dual role" agents[2], and now in the draft Vertical Guidelines. The analysis framework is overly formalistic and fails to recognise the practical complexity surrounding the relevant dual role scenarios. Many brands would agree to use the agency model with their existing distributors in respect of new launches of a specific line of products, where the intermediary is used as a distributor for all other products. Requiring the brand owner in these instances to cover all relevant risks of the intermediary (i.e., both in respect of the new product launch and the existing product lines) is particularly disproportionate as the costs associated with the distribution business are far greater than those incurred for the agency model. Another example is where a distributor may operate different types of businesses, e.g., a mono-brand concept under genuine agency and a multi-brand concept as a distributor.

3.4 We also note that paragraph 4.22 of the Guidance states that "*for the agreement to be considered an agency agreement for the purpose of applying the Chapter I prohibition, the independent distributor must be genuinely free to enter into the agency agreement* ***(for example the agency relationship must not be de facto imposed by the principal through a threat to terminate or worsen the terms of the distribution relationship****) (emphasis added)*". In our view, the phrase expressed in bold is too wide, and fails to recognise that commercially the mere splitting of a distribution strategy from sole distribution to a model consisting of both distribution and agency could potentially already be considered 'worsen the terms', as part of the product portfolio may be moved from distribution to the agency model. If the distributor wants to keep the same portfolio (and turnover), it will thus have to accept the agency agreement. The CMA should clarify that a supplier's decision to change its distribution model does not in itself amount to a worsening of terms within the meaning of paragraph 4.22 of the Guidance. This goes to the

[2] See European Commission's working paper: *Distributors that also act as agents for certain products for the same supplier.*

heart of the UK verticals framework which allows a supplier to choose its own distribution model.

3.5 In view of our comments on agency, Brands for Europe proposes the following amendments to the Guidance:

Footnote 24 of the Guidance

The fact that the agent may temporarily, for a ~~very~~ brief period of time, acquire the property of the contract goods while selling them on behalf of the principal does not preclude an agency agreement, provided the agent does not incur any costs or risks related to that transfer of property.

Paragraph 4.22 of the Guidance

An independent distributor of some products of a supplier may also be also be considered to act as an agent for other products of that same supplier, provided that the activities and risks covered by the agency agreement can be effectively delineated (for example because they concern products presenting additional functionalities or new features). For the agreement to be considered an agency agreement for the purpose of applying the Chapter I prohibition, the independent distributor must be ~~genuinely~~ free to enter into the agency agreement (in the same way as the supplier remains free at the outset to choose the preferred distribution model) ~~(for example the agency relationship must not be de facto imposed by the principal through a threat to terminate or worsen the terms of the distribution relationship)~~ and, as mentioned in paragraphs 4.10 to 4.14 of this 21 Guidance, all relevant risks linked to the sale of the products covered by the agency agreement, including market-specific investments, must be borne by the principal.

Paragraph 4.24 of the Guidance

The risks described in paragraphs 4.11 to 4.14 of this Guidance are more likely to arise if the agent undertakes other activities as an independent distributor for the same principal in the same product market. Conversely, those risks are less likely to arise if the other activities the agent undertakes as an independent distributor concern a different product market. More generally, the less interchangeable the products are, the less likely are those risks to occur. In product markets comprising products ~~not~~ presenting objectively distinct characteristics, such as higher quality, novel~~, additional or different~~ features or additional functions, or in the context of new product launches (including the launch of a different range within the same product market) such delineation appears ~~more difficult~~ easier and there may therefore not be a significant likelihood of the agent being influenced by the terms of the agency agreement, notably regarding the price setting, for the products it distributes independently.

Hardcore restrictions in the context of Brexit

3.6 The CMA notes in its Brexit Guidance[3] (**Brexit Guidance**) that geographic scope is relevant to the concept of the restriction of "passive sales". As an example, the Brexit Guidance refers to exclusive distribution networks, noting that passive sales bans affecting sales to the UK market or UK customers are capable of falling within the scope of the Chapter I prohibition, and may be treated as hardcore restrictions of competition. This example creates uncertainty for businesses where they seek to manage their distribution network "with EU Exit and the amendments made by the Competition SI in mind".

3.7 We refer in this context to new section 60A CA98 which states that the CMA and the UK Courts are bound by an obligation to ensure consistency with EU competition case law that pre-dates

[3] See *Guidance on the functions of the CMA after the end of the Transition Period 1 December 2020*, CMA125 available here: Guidance on the functions of the CMA after the end of the Transition Period (publishing.service.gov.uk)

Brexit. This principle ought to apply to EU case law on imports/re-imports, and in particular, the *Javico* case which notes that vertical agreements concerning exports or imports/re-imports cannot be regarded as having the object of appreciably restricting competition (in that case within the EU)[4]. Applying this judgement by analogy to the UK in line with section 60A CA98, a restriction on sales from outside the UK into the UK cannot be treated as a "by object" restriction of competition within the UK[5].

3.8 In addition, removing the ability for brands to restrict sales from outside the UK into the UK may create significant legal and practical challenges for brands who going forward may need to adjust their distribution system to address the legal and practical consequences of Brexit (e.g., implications of different tax regimes or production regulations and the application of trademark exhaustion in the UK).

3.9 On this basis, we would suggest to introduce the following paragraph after paragraph 8.3 of the Guidance:

New Paragraph 8.4 of the Guidance:

The hardcore restrictions in Article 8 of the [Draft Order] apply to vertical agreements concerning trade within the UK. Therefore, in so far as vertical agreements concern exports outside the UK or imports/re-imports from outside the UK the case law of the CJEU suggests that such agreements cannot be regarded as having the object of appreciably restricting competition within the UK or as being capable of affecting as such trade within the UK [Add footnote: See judgment in Case C-306/96 Javico v Yves Saint Laurent EU:C:1998:173, paragraph 20].

Exclusive distribution

3.10 Brands for Europe welcomes the possibility of operating shared exclusivity allowing a supplier to appoint more than one exclusive distributor in a particular territory or for a particular customer group. We note that paragraph 10.59 of the Guidance notes that the number of distributors must be determined in proportion to the territory/customer group in such a way that it secures a certain volume of business that preserves their investment efforts. Brands for Europe is of the view that consumer demand in a particular territory or by a customer group is also a key factor in this context. In addition, we note that paragraph 10.63 of the Guidance suggests that if the number of distributors appointed by a supplier is too high such that appreciable anti-competitive effects occur, the appointment of these distributors does not become a hardcore restriction as such, but that the benefit of the block exemption is likely to be withdrawn. As set out below, we recommend that this is explicitly mentioned in paragraph 10.59 of the Guidance.

3.11 Brands for Europe welcomes (i) the clarification in paragraph 10.61 of the Guidance that a "customer group" can be one single customer, and that customers do not need be named individually as long as there is a definition for "customer group"; (ii) the express acknowledgement in paragraph 10.62 of the Guidance that the supplier does not need to be commercially active in the reserved territory or towards the reserved customer group; and (iii) that a supplier may restrict the customers of the buyer where they have entered into a distribution agreement with the supplier or with a party that was given distribution rights by the supplier from engaging in active sales into an exclusively allocated territory or to the

[4] See judgment in Case C-306/96 Javico v Yves Saint Laurent EU:C:1998:173, paragraph 20.

[5] Section 60A(7) CA98 provides that the CMA and the Courts may depart from pre-Brexit cases and in certain specified circumstances, however, the CMA has not provided any evidence supporting a view that this may qualify as one of the specified circumstances.

exclusively allocated customer group (ie, to pass on the active sales restriction to the buyer's customers).

3.12 In view of our comments above, Brands for Europe proposes the following amendments to the draft Vertical Guidelines:

Paragraph 10.59 of the Guidance

In line with this rationale, the number of exclusive distributors should be restricted to one or a limited number (ie shared exclusivity) for a particular territory or customer group. Exclusive distribution shall not be used to shield a large number of distributors from competition located outside the exclusive territory. To that end, the number of appointed distributors should be determined in proportion to the allocated territory or customer group in such a way as to secure a certain volume of business that preserves their investment efforts. Where appreciable anti-competitive effects occur as a result of the appointment of disproportionally high number of distributors over an extended period of time, the benefit of the VBER is likely to be withdrawn.

Paragraph 10.63 of the Guidance

[…]However, where the number of exclusive distributors is not limited and determined in proportion to the allocated territory or customer group in such a way as to secure a certain volume of business that preserves their investment efforts or meet consumer demand, such a distribution system is unlikely to bring about efficiency-enhancing effects. Where appreciable anti-competitive effects occur, the benefit of the block exemption provided by the VABEO is likely to be cancelled.

Selective distribution

3.13 Brands for Europe welcomes the additional flexibility provided for to suppliers in the Draft Order and Guidance when operating a selective distribution system. Brands for Europe is very concerned, however, with the sentence added by the CMA in paragraph 10.87 of the Guidance ("*Suppliers who adopt a selective distribution model must therefore take particular care to ensure that the implementation and/or enforcement of any selective distribution arrangement does not lead to any infringement of the Chapter I prohibition.*")

3.14 In addition, we disagree with the addition in paragraph 10.89 of Guidance of the following qualification: *Although the case law does not require that the qualitative criteria be made known to all potential resellers, such transparency may increase the likelihood of fulfilling the Metro criteria*. This qualification is inconsistent with the *Metro* criteria which merely requires criteria to be applied without discrimination, not to be published. This is likely to be misinterpreted as an extra condition or test for a selective distribution system to meet the *Metro* criteria, or even to be covered by the block exemption. Thus, this qualification brings potentially significant legal uncertainty.

3.15 In fact, following the judgement in *Auto 24*[6], and in line with paragraph 259 of the EC's Staff Working Document accompanying the Final Report on the e-commerce sector inquiry (**Final Report**)[7], and in the recent Competition Policy Brief[8], the Guidance should explicitly state that selective distribution criteria (whether qualitative or quantitative in nature) do not need to be published by suppliers and that suppliers are under no obligation to provide the criteria to customers interested in entering the selective distribution system. This would provide additional legal certainty, allowing brand owners to protect their criteria (which in many cases are considered a business secret) from public disclosure.

[6] Judgement of CJEU of 14 June 2012 in *Case* C-158/11 *Auto 24 v Jaguar Land Rover France*

[7] See sector_inquiry_swd_en.pdf (europa.eu)

[8] Competition policy brief, April 2018, ISBN 978-92-79-81339-9, ISSN: 2315-3113.

3.16 In addition, in relation to paragraph 10.89 of the Guidance, the CMA summarizes the case law of the European Courts relating to the use of qualitative selective distribution and the application of the *Metro* criteria. While we welcome this restatement of the case law, Brands for Europe asks the CMA to also clarify that (i) the quality of *all* branded goods (and not only the goods of so-called "luxury" goods) may result not only from their material characteristics but also from the attractiveness (or "aura") of a brand in the eyes of consumers and (ii) the attractiveness (or "aura") of all branded goods can be preserved and enhanced by ensuring that they are displayed and sold in an appropriate retail environment, thus necessitating the use of qualitative selective distribution. This position is supported by the opinion of Advocate General Wahl in *Coty*[9], in which he stated that, with regard to the application of qualitative selective distribution, the same considerations must apply to all brands, not only brands that are traditionally regarded as being so-called "luxury brands". In particular, at paragraph 43 of his opinion, Advocate General Wahl stated: "***Brands, and in particular luxury brands,*** *derive their added value from a stable consumer perception of their high quality and their exclusivity in their presentation and their marketing. However, that stability cannot be guaranteed when it is not the same undertaking that distributes the goods*" (emphasis added). Indeed, it stands to reason that the imposition of qualitative criteria for the presentation and marketing of all branded goods forms an intrinsic part of the quality of the goods in the eyes of consumers. While this may have been explicitly recognised in the past in the case law specifically in relation to so-called "luxury goods", this in no way precludes the application of these principles more broadly to all branded goods. The quality in the eyes of consumers of all branded goods depends on the environment in which such goods are presented and marketed. Similarly, at paragraph 46 of his opinion, Advocate General Wahl explained: "*It should be borne in mind that the compatibility of selective distribution systems with Article 101(1) TFEU ultimately rests on the notion that it may be permissible to focus not on competition 'on price' but rather on other factors of a qualitative nature.* ***Recognition of such compatibility with Article 101(1) TFEU cannot therefore be confined to goods which have particular physical qualities. What matters for the purpose of identifying whether there is a restriction of competition is not so much the intrinsic properties of the goods in question, but rather the fact that it seems necessary in order to preserve the proper functioning of the distribution system which is specifically intended to preserve the brand image or the image of quality of the contract goods***" (emphasis added). Again, this statement applies to all branded goods and not only so-called "luxury brands".

3.17 Moreover, elsewhere in the Guidance, the CMA itself already explicitly recognises that preserving and enhancing the attractiveness of a brand is an important justification for the use of selective distribution. For example, at paragraph 10.103 of the Guidance, the Commission states that selective distribution may generate efficiencies because it helps "*create a brand image*" (we note, however, the Commission's reference to "maintain[ing]" a brand image in this context which we recommend to add to the Guidance too, as set out below). In this regard, at paragraph 10.11(h) of the Guidance, the CMA reasons that selective distribution "*may help create a brand image by imposing a certain measure of uniformity and quality standardisation*
[…] *thereby increasing the attractiveness of the goods or services concerned for final customers and thereby sales*". More specifically, at paragraphs 10.119 and 10.127 of the Guidance, the CMA recognises that restrictions on resellers' use of online marketplaces may be justified by the need to ensure brand protection. The reasoning set out in the draft Vertical Guidelines is aligned with the reasoning relied on by Advocate General Wahl in his opinion in *Coty*. Therefore, we consider it important that the CMA clearly states this principle in the Guidance in order to provide legal certainty that any brand's application of qualitative selective distribution for its products can meet the *Metro* criteria in precisely the same way as so-called "luxury brands".

[9] Case C-230/16, *Coty Germany GmbH v Parfümerie Akzente GmbH*, ECLI:EU:C:2017:603 (*Coty*).

3.18 In view of our comments above, Brands for Europe proposes the following amendments to the Guidance:

Paragraph 10.87 of the Guidance

The possible competition risks of selective distribution systems are a reduction in intra-brand competition and, especially in case of cumulative effect, the foreclosure of certain type(s) of distributors, as well as the softening of competition and potentially the facilitation of collusion between buyers due to limiting their number. ~~Suppliers who adopt a selective distribution model must therefore take particular care to ensure that the implementation and/or enforcement of any selective distribution arrangement does not lead to any infringement of the Chapter I prohibition~~.

Paragraph 10.89 of the Guidance

Purely qualitative selective distribution where dealers are selected only on the basis of objective criteria required by the nature of the product does not put a direct limit on the number of dealers. Provided that the three conditions laid down by the European Court of Justice in the Metro judgment ('Metro criteria') are fulfilled, purely qualitative selective distribution is ~~generally~~ considered to fall outside the scope of the Chapter I prohibition, as it can be assumed ~~-~~that the restriction of intra-brand competition associated with selective distribution is offset by an improvement in inter-brand quality competition. First, the nature of the products in question must necessitate a selective distribution system. This means that, having regard to the nature of the product concerned, such a system must constitute a legitimate requirement to preserve its quality and ensure its proper use. For instance, a selective distribution system that falls outside the scope of the Chapter I Prohibition can be operated for high-quality or high-technology products. Operating a selective distribution system may also be necessary for luxury and branded goods. Whether goods are deemed 'luxury' or 'branded' should in practice only be of limited relevance, as the consumer perception of ~~The quality of~~ such goods may result not just from their material characteristics, but also from the aura of luxury, quality or attractiveness surrounding both the product and the brand experience them. Therefore, establishing a selective ~~distrib~~ution system which seeks to ensure that the goods are displayed in a manner that contributes to sustaining this aura of luxury, quality or attractiveness may be necessary to preserve their ~~quality~~image [CMA to insert footnote: See opinion of Advocate General Wahl in C-230/16, Coty Germany GmbH v Parfümerie Akzente GmbH, ECLI:EU:C:2017:603A, paragraphs 43, 46]. Second, resellers must be chosen on the basis of objective criteria of a qualitative nature, which are laid down uniformly for all potential resellers and are not applied in a discriminatory manner. ~~Although the c~~Case law does not require that the qualitative criteria be made known to ~~all~~ potential resellers, such transparency ~~may increase the likelihood of fulfilling~~ and this is not a requirement under ~~the~~ Metro criteria.~~-~~Third, the criteria laid down must not go beyond what is necessary.

Paragraph 10.103 of the Guidance:

[…] *To assess whether selective distribution is justified to help solve a free-rider problem between distributors (paragraph 10.11(b)) or to help create or maintain a brand image (paragraph 10.11(h)) the nature of the product is very relevant. […]*

3.19 While we welcome the clarifications set out in paragraphs 8.41. 8.42 and 10.121 of the Guidance, we note that the language in paragraph 10.91 of the Guidance which was also included in the VGL remains inconsistent with the rest of the Guidance. This paragraph has been taken out of context by national authorities and courts in the EU to challenge whether certain products "deserve" a selective distribution system even where those agreements are covered by the block exemption. The sentence included in this paragraph states: "*However, where the characteristics of the product do not require selective distribution or do not require*

the applied criteria, such as for instance the requirement for distributors to have one or more brick and mortar shops or to provide specific services, such a distribution system does not generally bring about sufficient efficiency enhancing effects to counterbalance a significant reduction in intra-brand competition". This sentence should be removed, as well as a similar qualification included in paragraph 10.90 of the Guidance. The Guidance should simply state, in line with the Competition Policy Brief[10], that it is permissible to use a selective distribution system (including qualitative and/or quantitative criteria) regardless of the nature of the product; and that this also covers a restriction on the use of a specific online sales channel, such as an online marketplace, or a requirement that the buyer operates one or more bricks and mortar shops. We propose the following particular amendments:

Paragraph 10.90 of the Draft Guidance

The assessment of selective distribution under the Chapter I prohibition also requires a separate analysis of each potentially restrictive clause of the agreement under the Metro criteria. This implies, in particular, determining whether the restrictive clause is proportionate in the light of the objective pursued by the selective distribution system and whether it goes beyond what is necessary to achieve this objective. Such requirements are unlikely to be met by hardcore restrictions. Conversely, for instance, a ban on the use of certain third-party online platforms by a supplier of ~~luxury~~ goods on its authorised distributors may be considered appropriate, as long as it allows authorised distributors to advertise via the internet on third-party platforms and to use online search engines, with the result that customers are usually able to find the online offer of authorised distributors by using such engines, and not going ~~beyond what is necessary to preserve the luxury image of those goods~~. If this is the case, it falls ~~-~~outside the scope of the Chapter I prohibition and no further analysis is required.

Paragraph 10.91 of the Guidance

Even if they do not meet the Metro criteria, qualitative and/or quantitative selective distribution can benefit from the block exemption provided the market shares of both the supplier and the buyer each do not exceed 30% and the agreement does not contain any hardcore restrictions. The benefit of the block exemption provided by the VABEO is not lost if selective distribution is combined with other non-hardcore vertical restraints. The VABEO exempts selective distribution regardless of the nature of the product concerned and regardless of the nature of the selection criteria, and does not need require that the criteria be made known to potential resellers. However, where the characteristics of the product do not require selective ~~distribution or do not require the applied criteria, such as for instance the requirement for distributors to have one or more brick and mortar shops or to provide specific services, such a distribution system does not generally bring about sufficient efficiency enhancing effects to counterbalance a significant reduction in intra-brand competition. Where appreciable anti-competitive effects occur, the benefit of the block exemption provided by the VABEO is likely to be cancelled.~~

3.20 Brands for Europe welcomes the possibility introduced by the CMA in Article 8(3) of the Draft Order to stop active and passive sales to unauthorised distributors by any distributors outside the territory of selective distribution system. We also welcome the CMA's clarification at paragraph 8.70 of the Guidance that a selective distribution system can be combined with an exclusive distribution system within the same territory if they are established at different levels of the value chain (i.e., exclusivity at wholesale level and selective distribution at retail level) and the exclusive wholesaler is not also a member of the selective distribution system. Having said that, we are concerned that the CMA continues to take an unnecessary strict approach to certain scenarios currently set out in paragraph 8.9 of the Guidance (*Example of genuine entry*, *Example of cross-supplies between authorised distributors* and *Example of genuine testing*).

[10] Competition policy brief, April 2018, ISBN 978-92-79-81339-9, ISSN: 2315-3113.

These examples are currently set out as exceptional circumstances where hardcore restrictions may fall outside the scope of Chapter 1 prohibition or, if within scope, fulfil the conditions for individual exemption under section 9(1). We urge the CMA to block exempt these examples. In particular:

(a) ***Combining exclusive distribution and selective distribution in the same territory***: Consistent with the fact that under the Guidance a supplier is given the flexibility to operate an exclusive distribution network at the wholesale level, and a selective distribution system at the retail level in the same territory, active sales restrictions in the specific circumstances set out in paragraph 8.9 of the Guidance (*Example of cross-supplies between authorised distributors*) should be block exempted. In many cases brand owners will not always have the resources, investment and necessary knowledge of the local markets to operate a selective distribution system themselves. Being able to entrust an exclusively appointed wholesaler with the management of that selective distribution system in a particular territory or region helps ensure that the products are widely distributed whilst continuing to offer a seamless consumer experience. The appointed wholesalers in those cases incur significant investment in that territory, and ought to be protected against free-riding by other wholesalers outside the territory. The Guidance should therefore clarify that in those circumstances exclusively appointed wholesalers can be protected from active selling by other wholesalers. Obviously, the block exemption should extend to a restriction on sales by exclusive wholesalers to any unauthorised retailers, where a selective distribution system is operated at the retail level.

(b) ***Exemption for the launch of new brands and new products (under an existing brand)***: regarding the *Example of genuine entry* and the *Example of genuine testing* of the Guidance, which capture protection against active or passive selling where a distributor is the first to sell a new brand or an existing brand on a new market, we urge the CMA to replace these examples with a broader exception which covers the launch of new brands and new products (under an existing brand). The CMA should not only take into account the investments made by the distributor, but also the research and development and other investments made by the supplier which have allowed the development and launch of this new brand/new product. A protection against active/passive sales, as well as a prohibition against cross-sales between retailers (or at least cross-sales to retailers who are not part of the brand owner's retailer network) should be allowed during the launch period.

3.21 On that basis, we propose the following particular amendments:

Amend paragraph 8.9 of the Guidance as below, and move it to follow after paragraph 8.70 of the Guidance, as set out below. Amend also paragraph 8.71 and 8.72 as set out below.

~~*8.9*~~ *8.71*

The examples provided below illustrate cases of exceptional circumstances under which a hardcore restriction may fall outside the scope of the Chapter I prohibition or, if within scope, ~~*fulfil the conditions for individual exemption under section 9(1)*~~*are cases covered by the block exemption.*

Example of genuine entry

A distributor which is the first to sell a new product, a new brand or an existing brand on a new market may have to commit substantial investments if there was previously no demand for the particular type of product in general or for the type of product from the particular producer, in addition to the substantial investments made by the supplier in research and development and other investments to develop and launch this new brand or new product.

In such circumstances, considering that such expenses may often be sunk, the distributor may not enter into the distribution agreement without protection for a certain period of time against active and passive sales into its territory or to its customer group by other distributors. For example, such a situation may occur where a manufacturer established in a particular geographic market enters another geographic market and introduces its products with the help of an exclusive distributor, which needs to invest in launching and establishing the brand on this new market.

Where substantial investments by the distributor and/or supplier to start up or develop the new market are necessary, restrictions of passive sales by other distributors into such a territory or to such a customer group which are necessary for the distributor to recoup those investments generally fall outside the scope of the Chapter I prohibition during the first two years during which the distributor is selling the contract goods or services in that territory or to that customer group, or a longer period where this is necessary to recoup the relevant investments, ~~initial period over which the distributor is selling the contract products in that territory or to that customer group,~~ even though such restrictions would normally be considered hardcore ~~–~~ restrictions presumed to fall within the scope of the Chapter I prohibition.

Example of cross-supplies between authorised distributors

In the case of a selective distribution system, cross-supplies between authorised distributors must normally be permitted (see paragraphs 9.71). However, if authorised wholesalers located in different territories are obliged to invest in promotional activities in the territory in which they distribute the goods or services concerned in order to support the sales by authorised distributors and it is not ~~practical to specify in a contract the required promotional activities~~, ~~restrictions on~~ active sales by these wholesalers to authorised distributors in other wholesalers' territories to overcome possible free-riding are block exempted. ~~may, in an individual case, fulfil the conditions for individual exemption under section 9(1)~~.

Example of genuine testing

In the case of genuine testing of a new product in a limited territory or with a limited customer group or in the case of a staggered introduction of a new product, the distributors appointed to sell the new product on the test market or to participate in the first round(s) of the staggered introduction may be restricted in their active or passive selling outside the test market or the market(s) where the product is first introduced. Active or passive resale restrictions do not fall within the scope of Article 101(1) during the test period or the period of introduction of the new product ~~without falling within the scope of the Chapter I prohibition for the period necessary for the testing or introduction of the product~~.

8.72~~1~~

The hardcore restriction set out in Article 8(2)(c) VABEO consists of the restriction of active or passive sales by members of a selective distribution network to end users, whether professional end users or consumers, without prejudice to the possibility of prohibiting a member of the network from operating out of an unauthorised place of establishment. This means that authorised distributors cannot be restricted in the choice of users, or purchasing agents acting on behalf of those users, to whom they may sell, except to protect an exclusive distribution system operated in another territory (see the first exception to Article ~~8~~4(2)(b)(i)). Within a selective distribution system, authorised distributors should be free to sell to all end users, ~~8~~7 both actively and passively. Subject to the exceptions described in paragraph 8.70 above, t~~T~~he inclusion of such hardcore restriction in an agreement will have the effect of cancelling the benefit of the block exemption provided by the VABEO in relation to that agreement.

Restriction of cross-supplies within a selective distribution system

8.7~~3~~2 Article 8(2)(d) VABEO concerns the restriction of cross-supplies between authorised distributors within a selective distribution system. This means that the supplier cannot prevent active or passive sales between its authorised distributors, which must remain free to purchase the contract products from other authorised distributors within the network, operating either at the same or at a different level of trade. Consequently, selective distribution cannot be combined with vertical restraints aimed at forcing distributors to purchase the contract products exclusively from a given source. It also means that within a selective distribution network, no restrictions can be imposed on authorised wholesalers as regards their sales to authorised distributors. Subject to the exceptions described in paragraph 8.70 above, t~~T~~he inclusion of such hardcore restriction in an agreement will have the effect of cancelling the block exemption provided by the VABEO in relation to that agreement,

3.22 We also note that the CMA should clarify in the Guidance that a supplier may require its authorised retailers and/or any other third party platforms/marketplaces to assist in the legitimate enforcement of the supplier's selective distribution system. We reflect this in our proposal for a new paragraph to be inserted after paragraph 10.91 of the Guidance.

New paragraph 10.92 of the Guidance

A supplier operating a selective distribution system may legitimately enforce its selective distribution system, which includes requiring its authorised distributors to assist the supplier in the legitimate enforcement of its selective distribution system. This includes requiring such authorised distributors to report to the supplier any sales by unauthorised distributors they become aware of. Where authorised distributors also operate a third party platform/marketplace, a supplier may require such authorised distributors to block sales by unauthorised distributors of products that are covered by the selective distribution system on that platform/marketplace.

Active / passive resale restrictions

3.23 Brands for Europe welcomes the definitions of active and passive sales in Article 8 of the Draft Order, as well as the clarification in paragraph 8.49 of the Guidance that offering language options on a website different than the ones commonly used in the distributor's territory is a form of active selling, and that domain name specific to a territory is also active selling.

3.24 As regards paragraphs 8.35 and 8.37 of the Guidance, Brands for Europe notes that these paragraphs should include a specific reference to paragraphs 6.4 and 6.5 of the Guidance, which provide that unilateral conduct falls outside Chapter I and the VABEO. In addition, Brands for Europe disagrees with certain restrictions included in paragraphs 8.35 and 8.38:

(a) Regarding paragraph 8.35(a) of the Guidance, we urge the CMA to clarify that this does not exclude a legitimate request from a supplier to confirm that a sale will be made to another authorised distributor or end user (in the context of selective distribution), or that the sale is not an active sale (in the context of exclusive distribution).

(b) Regarding paragraph 8.35 (d) of the Guidance, an explicit reference should be made to the European Court of Justice judgement in *Bayer/Adalat* where it explicitly noted that *"The mere concomitant existence of an agreement which is in itself neutral and a measure restricting competition that has been imposed unilaterally does not amount to an agreement prohibited by that provision. Thus, the mere fact that a measure adopted by a manufacturer, which has the object or effect of restricting competition, falls within the context of continuous business relations between the manufacturer and its wholesalers is not sufficient for a finding that such an agreement exists*"[11]. Limitations

[11] Bayer AG v Commission of the European Communities (Case T-41/96) [2000] ECR II-3383; BAI and Commission of the European Communities v Bayer AG (Cases C-2/01 and C-3/01) [2004] ECR I-23, para 141

of supplied volumes are legitimate and common in many sectors - e.g., seasonal or temporary products which, by definition, have limited production and volumes which are allocated in limited quantities to distributors.

(c) Regarding paragraph 8.35(i) of the Guidance, a unilateral decision of the supplier to limit languages used on packaging does not constitute a breach of Chapter I. This unilateral behaviour was sanctioned by the Commission as a breach of Article 102, but it is inappropriate to include this as an example of an illegal agreement in the context of VABEO[12]. There can be many different legitimate reasons for limiting the languages used on packaging - for example, some products have very small packaging making it physically impossible to add multiple languages on a given pack, especially when different legislation or regulations require brands to include certain specific information on the packaging of a product. Therefore, there may be entirely legitimate reasons for refusing a request from a retailer to add a particular language on the packaging of a product.

(d) Regarding paragraph 8.37 of the Guidance, we note that the use of differentiated labels, specific language clusters, serial numbers is very common in practice. Unilateral decisions of the supplier to use differentiated labels, specific language clusters, serial numbers should not be included as an example of an illegal agreement in the context of VABEO.

3.25 On this basis, we propose the following particular amendments:

Paragraph 6.4 of the Guidance

6.4 ~~The VABEO~~Chapter I does not apply to unilateral conduct of the undertakings concerned. [….]

8.35 These hardcore restrictions may be the result of direct obligations, such as the obligation not to sell to certain customers or to customers in certain territories or the obligation to refer orders from these customers to other distributors. They may also result from indirect measures aimed at inducing the distributor not to sell to such customers, such as [CMA to insert footnote: As set out in paragraphs 6.4 and 6.5 of the Guidance, if there is no explicit agreement expressing the parties' concurrence of wills, the CMA has to prove for the purpose of applying Chapter I that the unilateral policy of one party receives the (at least tacit) acquiescence of the other party]:

(a) the requirement to request the supplier's prior approval (this does not apply to a legitimate request from a supplier to confirm that a sale will be made to end users or to another authorised distributor (in the context of selective distribution), or that the sale is not an active sale (in the context of exclusive distribution));

(b) the refusal or reduction of bonuses or discounts, and compensatory payments by the supplier if the distributor stops sales to such customers;

(c) the termination of supply;

(d) the limitation or reduction of supplied volumes, for instance, to the demand within the allocated territory or of the allocated customer group [CMA to insert footnote: See judgement of the European Court of Justice in Bayer/Adalat explicitly noting that "The mere concomitant existence of an agreement which is in itself neutral and a measure restricting competition that has been imposed unilaterally does not amount to an agreement prohibited by that provision. Thus, the mere fact that a measure adopted by a manufacturer, which has the object or effect

[12] Case 40134 AB InBev Beer Trade Restrictions

of restricting competition, falls within the context of continuous business relations between the manufacturer and its wholesalers is not sufficient for a finding that such an agreement exists[13]"];

(e) the threat of contract termination or non-renewal;

(f) the threat or carrying out of audits to verify compliance with the request not to sell to certain customer groups or to customers in certain territories (this does not apply to a legitimate request from a supplier to confirm that a sale will be made to end users or to another authorised distributor (in the context of selective distribution), or that the sale is not an active sale (in the context of exclusive distribution));

(g) requiring a higher price for products to be sold to certain customer groups or to customers in certain territories;

(h) limiting the proportion of sales to certain customer groups or to customers in certain territories;

~~*(i) limiting the languages to be used on the packaging or for the promotion of the products;*~~

(j) the supply of another product in return for stopping such sales;

(k) payments to stop such sales;

(l) the obligation to pass-on to the supplier profits from such sales.

8.37 The practices mentioned in paragraphs 8.30 and 8.35 are more likely to be considered a restriction of the buyer's sales when used by the supplier in conjunction with a monitoring system aimed at verifying the destination of the supplied ~~goods~~, ~~such as the use of~~ differentiated ~~labels , specific languages or serial numbers~~.

4. Online sales

4.1 Brands for Europe strongly agrees with the CMA's views that the Retained VBER and VGL need to be updated in line with the current omni-channel commercial reality. Consumers expect a seamless O2O brand and shopping experience throughout their journey, whether offline, online or both. It is therefore crucial that brand owners should have the freedom to incentivise retailers to invest in those seamless O2O brand and shopping experiences across all channels as they wish in order to meet their brand strategy, maximise sales and support from retailers, whilst minimising the risk of free-riding.

4.2 The Draft Order and the Guidance go a long way to reflect this new reality. However, as set out further below, Brands for Europe is of the view that the revised texts occasionally introduce legal concepts or tests which are inconsistent with the case law of the European Court of Justice and/or create legal uncertainty.

General comments

4.3 Brands for Europe is extremely concerned by the language used in paragraph 8.32-8.34 of the draft Vertical Guidelines, in particular in relation to online sales restrictions which are "**capable of significantly diminishing the overall amount of online sales in the market**". This wording

[13] Bayer AG v Commission of the European Communities (Case T-41/96) [2000] ECR II-3383; BAI and Commission of the European Communities v Bayer AG (Cases C-2/01 and C-3/01) [2004] ECR I-23, para 141

goes far beyond the European Court of Justice judgement in *Pierre Fabre*[14], which held that a ban on online sales or a de facto ban on online sales amounts to a by object infringement of Article 101 (rather than a restriction that is merely "capable of significantly diminishing the overall amount of online sales in the market"). This wording is also not consistent with the European Court of Justice judgement in *Coty*[15], as explained in detail in the expert paper produced by Professor Alison Jones in the context of the EC's impact assessment phase of the consultation[16] (emphasis added):

"Pierre Fabre and Coty establish that although a prohibition (or de facto prohibition) on online selling constitutes a hardcore restraint within the meaning of Articles 4(b) and (c), ***other limitations on online selling are not prohibited unless they operate in practice as an absolute prohibition on online selling****. In line with these cases, the Guidelines should therefore make this position clear and that, consequently, some online restraints, including dual pricing practices, limitations on online selling that are not overall equivalent to the criteria imposed in brick and mortar shops in a SDS, marketplace bans and restrictions on the use of price comparison tools and online advertising, do not in general constitute hardcore restraints. The only exception would be if it could be established that the restriction, as was the case in Pierre Fabre, operates in practice as a prohibition on online selling (for example, where combined with other restraints in the agreement or taking account of remaining avenues of online selling available to the distributor, the restraint operates as a de facto prohibition on online selling).*
The Guidelines should also clarify that Article 4 applies only to absolute prohibitions on online selling, not provisions which 'substantially' limit online selling. Extending the prohibition to provisions which substantially restrict online selling would detract from a central goal of the VBER to provide legal certainty*."*

4.4 On that basis, we propose the following general amendments:

Paragraphs 8.32-8.34 of the Guidance

Article 8(2)(b) to (d) VABEO apply irrespective of the sales channel used (whether this is bricks and mortar or online). Vertical agreements which, directly or indirectly, in isolation or combination with other factors, have as their object, to prevent the buyers or their customers from ~~effectively~~ using the internet for the purposes of selling their products online, operate to restrict the territories into which or the customer groups to whom the buyers or their customers may sell the contract goods or services, because they restrict sales to customers located outside the physical trading area of the buyers or their customers.

A ban on online sales, as well as restrictions that de facto ban ~~or limit~~ online sales to the extent that they prevent buyers and their customers from ~~effectively~~ using the internet to sell their products online, have as their object to prevent the buyers or their customers from ~~effectively~~ using the internet to sell their goods or services online. ~~Therefore, a restriction capable of significantly diminishing the overall amount of online sales in the market constitutes a hardcore restriction of active or passive sales within the meaning of Article 8(2)(b) VABEO.~~ The assessment of whether a restriction is hardcore does not depend on market-specific circumstances or the individual circumstances of one or more specific customers.

Restrictions that prevent the ~~effective~~ use of one or more online advertising channels by the buyers or their customers have as their object to prevent the buyers or their customers from

[14] Judgment of the Court (Third Chamber) of 13 October 2011, *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la Concurrence, Ministre de l'Économie, de l'Industrie et de l'Emploi*, C-439/09, ECLI:EU:C:2011:649.
[15] Judgment of the Court (Fifth Chamber) of 6 December 2017, *Coty Germany GmbH v Parfümerie Akzente GmbH*, C-230/16, ECLI:EU:C:2017:941.
[16] Jones, A., 2021. *Expert report on the review of the Vertical Block Exemption Regulation.* [online] Luxembourg: Publications Office of the European Union. Available at: <https://ec.europa.eu/competition-policy/system/files/2021-06/kd0921156enn_VBER_online_sales.pdf> [Accessed 6 September 2021].

> ~~*effectively*~~ *using the internet to sell their products online and thus restrict sales to customers wishing to purchase online and located outside the physical trading area of the buyers or their customers, as they limit the buyers' or their customers' ability to target them, inform them of their offering and to attract them to their online shop or other channels. Moreover, any blanket bans preventing distributors from selling through the internet at all are considered to restrict competition by object and are hardcore restrictions not exempted by the VABEO.*
>
> Paragraph 8.44 of the Guidance
>
> *Online selling or advertising restrictions in vertical agreements benefit from the VABEO as long as they do not, directly or indirectly, have as their object preventing the buyers or their customers from using the internet* ~~*effectively*~~ *for the purposes of selling their products online. Examples of online selling or advertising restrictions benefitting from the block exemption provided by the VABEO include a requirement that online advertising meets certain quality standards or includes specific content or information, or a requirement that the buyer does not use the services of individual online advertising providers not meeting certain quality standards.*

Online criteria and online advertising

4.5 Brands for Europe welcomes the CMA's confirmation that qualitative and quantitative criteria are block exempted (including the requirement that a buyer operates a brick and mortar store), regardless of the distribution system used (paragraph 8.40 of the Guidance). We also welcome the confirmation that a restriction on the use of a specific online sales channel, such as an online marketplace, is block exempted, irrespective of the distribution system used by the supplier (paragraphs 8.41 and 8.412 and 10.121 of the Guidance).

4.6 While we welcome the examples of online advertising restrictions that benefit from the VBER as provided by the CMA in paragraph 8.44 of the Guidance (with proposed amendments suggested above), we note in respect of paragraph 8.38 and 8.39 of the draft Vertical Guidelines, that:

(a) **Regarding paragraph 8.38(d)**: it is perfectly legitimate in the context of selective distribution for a supplier to request a distributor to seek prior approval before starting to sell products online to ensure, that the authorised distributor's website meets the relevant qualitative criteria, and

(b) **Regarding the examples set out in paragraph 8.38(f) and 8.39**: the Commission decision in *Guess*[17] treated a ban on the use of the Guess brand name and trademark in Google AdWords as a "by object" infringement, but the Commission also noted in the Final Report that such restrictions could help avoid confusion with the manufacturer's website. We ask the CMA to reflect this in the Guidance. For example, we ask that the CMA clarifies that the following types of restrictions are block exempted: (i) restrictions on bidding for brand names or trademarks that the distributor does not actually sell under the relevant distribution agreement, (ii) restrictions on including the brand name or trademark in the website URL/domain name, or (iii) restrictions on bidding on terms that point in the direction of a brand as a company/corporate (e.g., "brand.com").

4.7 Therefore, we propose the following amendments:

Paragraph 8.38 of the Guidance:

[17] Commission Decision of 17 December 2019, Case AT.40428 Guess

In addition to the direct and indirect obligations set out in paragraphs 8.30 and 8.35, hardcore restrictions specifically related to online sales may similarly be the result of direct or indirect obligations. Besides a direct prohibition to use the internet as a sales channel, the following are further examples of obligations, directly or indirectly, having the object of preventing distributors from using the internet ~~effectively~~ to sell their products online anywhere, in certain territories or to certain customer groups:

[…]

(d) a requirement that the distributor shall seek the supplier's prior authorisation for selling online (this does not apply to a requirement in the context of selective distribution that the authorised distributor shall seek the supplier's prior authorisation for selling online, to allow the supplier to confirm that the authorised distributor's website meets the relevant qualitative criteria);

[…]

Paragraph 8.39 of the Guidance

A direct or indirect prohibition referred to in 8.38(f), would include a ban on the ~~an obligation on the distributor not to~~ use of the suppliers' trade marks or brand names for bidding to be referenced in search engines, or a restriction to provide price related information to price comparison tools. While a prohibition in the use of one specific price comparison tool or search engine would typically not prevent the effective use of the internet for the purposes of selling online, as other price comparison tools or search engines could be used to raise awareness of a buyer's online sales activities, a prohibition of the use of all most widely used advertising services in the respective online advertising channel could amount to such prevention, if the remaining price comparison tools or search engines are de facto not capable of attracting customers to the buyer's online shop. Restrictions on (1) the use of the supplier's brand name or trademark in the website URL/domain name of the distributor's website to avoid confusion with the supplier's website, (2) the use of brand names or trademarks of products that are not sold by the distributor or point in the direction of a brand as a company/corporate entity (e.g., "brand.com") (which may mislead the consumer) are block exempted

Equivalence requirement

4.8 We welcome the CMA's objective of removing the equivalence requirement. However, we note that the language included in the Guidance does not fully reflect this approach, and indeed has the potential of creating further confusion and/or misinterpretation (see for example the reference in paragraph 8.67 of the Guidance to online criteria "that are not identical" to brick and mortar criteria). Also, the CMA addresses this change in policy only in the section of the draft Vertical Guidelines which deals with selective distribution systems, while this should be applicable to all distribution systems - as is also clear from the rest of the Guidance (e.g., see reference in paragraph 8.40 of the Guidance that quality requirements are block exempted, regardless of the distribution system).

4.9 Therefore, in line with the CMA's intentions, we provide specific suggestions for amendments further below.

Paragraph 8.40 of the Guidance

By contrast, suppliers can give certain instructions to their distributors on how their products are to be sold and for the vertical agreement to benefit from the block exemption provided by the VABEO. A supplier may impose quality requirements on distributors irrespective of the distribution model applied. Methods of sale that do not have as their object the restriction of the territory into which and the customer groups to whom the product and service may be sold

can be agreed upon by the suppliers and its distributors. For instance, vertical agreements that contain quality requirements~~, notably in the context of selective distribution~~, such as the minimum size of the shop, quality requirements for the set-up of the shop (eg with respect to fixtures, furnishing, design, light and floor coverings), quality requirements for the look and feel of the website, product presentation requirements (eg the minimum number of colour options displayed next to each other or of the brand's products exposed, and the minimum space requirement between products, product lines and brands in the shop), can benefit from the block exemption provided by the VABEO. In addition, considering that online and offline channels have different characteristics, it is permissible for a supplier to impose online quality requirements that are not equivalent to those imposed for sales in brick and mortar shops, in as far as the criteria imposed for online sales do not, directly or indirectly, in isolation or combination with other factors, have as their object, to prevent the buyers or their customers from using the internet for the purposes of selling their goods or services online. For example, a supplier may establish specific requirements to ensure certain service quality standards for users purchasing online, such as the set-up and operation of an online after-sales help desk, a requirement to cover the costs of customers returning the product or the use of secure payment systems. These restrictions do not affect a group of customers which can be circumscribed within all potential customers nor the buyers' or their customers' ability to operate their own websites and to advertise via the internet on third-party platforms or online search engines, enabling buyers or their customers to raise awareness of their online activities and attract potential customers.

Paragraph 8.67 of the Guidance should to be completely removed:

~~*Taking into account the fact that online and offline channels have different characteristics, a supplier operating a selective distribution system may impose on its authorised distributors criteria for online sales that are not identical to those imposed for sales in brick and mortar shops, in as far as the criteria imposed for online sales do not, directly or indirectly, in isolation or combination with other factors, have as their object preventing the buyers or their customers from using the internet effectively for the purposes of selling their products online. For example, a supplier may establish specific requirements to ensure certain service quality*~~ *standards for ~~users purchasing online, such as the set-up and operation of an online after-sales help desk, a requirement to cover the costs of customers returning the product or the use of secure payment systems. These restrictions do not affect buyers' or their customers' ability to operate their own websites and to advertise via the internet on third party platforms or online search engines, enabling buyers or their customers to raise awareness of their online activities and attract potential customers.~~*

Dual pricing

4.10 Brands for Europe welcomes the CMA's proposal to clarify in paragraph 8.43 Guidance that dual pricing for buyers operating a hybrid model (i.e. the same buyer pays a different purchase price depending on whether the contract goods are resold online or offline) can benefit from the block exemption provided by the Draft Order, and thus should not be considered as a hard core restriction of competition. For the reasons set out in more detail in paragraphs 5.1 to 5.10, 5.15 to 5.17 and 5.22 to 5.25 of the 2021 Response, the proposal is really necessary to take into account the market reality that the nature, costs and investments of both sales channels are different and the online sales channel as such does no longer need any specific protection.

4.11 Brands for Europe wants to stress that offering the possibility to apply dual wholesale pricing or differentiated levels of discounts/bonuses according to the resale channel through which products are sold, will level the playing field between pure brick and mortars, pure online stores and hybrid retailers and thus be an effective way to incentivise (hybrid) retailers to invest in the

necessary pre- and after sales services, store attractiveness and customer experience (both on and offline). This will allow brand owners to better support hybrid retailers to continue to invest in attractive brick and mortar shops (as well as remunerate fairly their online retail business), providing a wider access for all consumers (including those without or limited access to e-commerce) to a broader selection of products as well as to a better level and quality of services.

4.12 Therefore, dual pricing could contribute to increased intra-brand competition, where hybrid retailers will have the opportunity to better compete on equal footing with both pure online and brick and mortar shops and will not be penalised if investing in attractive customer services. At the same time, such increased intra-brand competition would also result in increased inter-brand competition as hybrid retailers would be rewarded to increase the sales of the brand owner's products. Allowing for dual pricing not only increases competition but equally has the possibility to increase investments both by manufacturers and retailers, as the appropriate incentives for such investments can be more easily designed and implemented.

4.13 At the same time, Brands for Europe, wants to emphasize that as long as the brand owner has no market power and faces competition from other manufacturers, any attempt to use dual pricing to raise prices in a given market or sales channel to supra-competitive levels would result in loss of overall sales by the brand owner as distributors and their customers would switch to other manufacturer's products. For the same reason, brand owners would certainly not have any incentive to use dual pricing as a means to achieve a total ban on online sales. The only result of such an approach would be that such a brand owner would leave the fastest growing sales channel completely to its competitors, likely resulting in a massive loss of sale as well as disgruntled distributors and end-users. In the current omni-channel retail environment, this is not a long term viable solution for any company active in the sale of consumer goods.

4.14 For the reasons set out above, Brands for Europe, while welcoming the proposed recognition that dual wholesale pricing for off- and online sales can benefit from the block exemption provided by the VABEO, is of the opinion that to achieve the full potential of dual pricing and the related pro-competitive effects, as set out briefly above in paragraph 4.11 and in more detail in paragraphs 5.1 to 5.10, 5.15 to 5.17 and 5.22 to 5.25 of the 2021 Response, the CMA should amend the conditional language regarding instances in which dual pricing could benefit from the block exemption. To ensure that undertakings will really use dual pricing in practice it should be clear that the principle is that dual pricing based on the respective sales channel through which the reseller will resell the contract goods can benefit from the VABEO block exemption. In addition, the CMA should clarify that such dual pricing will only not benefit from the block exemption if the wholesale price difference has as its clear object to prevent the effective use of the internet for the purposes of selling online. If such clarifications are not made Brands for Europe believes that most brand owners might continue refraining from implementing dual pricing, in particular because of the inherent difficulties to demonstrate for each specific case that the wholesale price difference bears a close relationship with the difference in costs incurred in the different sales channels.

4.15 This would therefore lead to the same situation as today, where brand owners refrain from making use of the possibility to offer a fixed fee to support the offline sales channel of hybrid resellers.

4.16 Based on the above suggested amendments, Brands for Europe proposes to redraft paragraph 8.43 draft Guidance as follows (changes to the current draft Guidance are indicated in red):

> *"A requirement that the same buyer pays a different price for products intended to be resold online than for products intended to be resold offline can benefit from the block exemption provided by the VABEO. Such difference in price can be an effective means~~, in so far as it has as its object~~ to incentivise or reward the appropriate level of investments respectively made online and offline as it can compensate for the difference in costs, investments or market*

opportunities for each channel. ~~Such difference in price should be related to the differences in the costs incurred in each channel by the distributors at retail level. To that end, the wholesale price difference should take into account the different investments and costs incurred by a hybrid distributor so as to incentivise or reward that hybrid distributor for the appropriate level of investments respectively made online and offline, as~~ Only where the wholesale price difference is entirely unrelated to the difference in costs, investments and market opportunities incurred in each channel, ~~such price difference is unlikely to bring about efficiency enhancing effects. Therefore, where the wholesale price difference~~ and has as its object preventing the ~~effective~~ use of the internet for the purposes of selling online it amounts to a hardcore restriction, ~~as~~ as set out in paragraph 8.32. This would, in particular, be the case where the price difference makes the ~~effective~~ use of the internet for the purposes of selling online unprofitable or financially not sustainable.

4.17 Finally, Brands for Europe wants to repeat its request to the CMA to explicitly clarify in the Guidance that differential pricing (i.e., applying different prices for different retailers) is and should remain block exempted. This means that brand owners can charge different prices for retailers only operating pure online stores and retailers that also operate a brick and mortar store. In addition, the CMA should explicitly clarify that suppliers may differentiate the commercial conditions, including the purchase price, depending on the type of retail store. A brand owner should therefore be able to differentiate prices for products that are to be sold in a specialised shop with limited product assortment (e.g., consumer electronics store, toys store, pet shop) from a shop with a broad product assortment (e.g., supermarket), even where one retail group operates different types of retail stores. In that way, brand owners can tailor their commercial conditions to reflect the different costs faced by different types of retailers and valorise the different level of investment made and services offered by those shops to sell the brand owners' products. Such distinctions between commercial conditions are merely a reflection of the outcome of the normal competitive process and should not be considered indicative of a restriction of competition.

4.18 Brands for Europe therefore proposes to include an additional paragraph in the Guidance after the current paragraph 8.43

Equally, under the VABEO suppliers are allowed to apply different commercial conditions, including different purchase prices, for different buyers operating a different sales model (e.g. different purchase prices for a buyer selling offline only compared to a buyer operating a pure online or hybrid resale model), without needing to justify the difference in commercial conditions. Such different commercial conditions are also covered by the block exemption provided by the VABEO in case the different buyers form part of the same undertaking (e.g. differentiate purchase prices for products that are to be sold in a specialised shop with limited product assortment (e.g., consumer electronics store, toys store, pet shop) from a shop with a broad product assortment (e.g., supermarket), even where one retail group operates different types of retail stores.)

5. Resale price maintenance

Introduction

5.1 Brands for Europe welcomes the additional clarifications proposed by the CMA in the draft Guidance with regard to pricing related topics such as Minimum Advertising Pricing Policies (**MAPs**), and fulfilment contracts. These proposals are indeed necessary to ensure that the Guidance will be in line with the current economic and market reality and to allow suppliers to provide the necessary incentives and support to resellers to invest in valuable pre- and after-sales services and ensure consumer choice and quality offering. While welcoming these proposals, Brands for Europe thinks that the actual wording of the relevant paragraphs in the draft Guidance on MAPs and fulfilment contracts could be enhanced to provide further clarity to businesses and ensure much needed legal certainty on the important topic of promotional and pricing related conduct. Therefore, Brands for Europe provides in this section some suggestions to amend the draft Guidance on these points.

5.2 Although, the draft Guidance provides some much needed additional flexibility regarding certain pricing related practices, Brands for Europe is disappointed to see that the CMA has not yet made use of the current review process to provide additional clarifications or make further changes on other points such as recommended and maximum resale prices and Section 9 CA98 exemptions to the principle prohibition of resale price maintenance (**RPM**). In particular, Brands for Europe calls upon the CMA to:

a) provide further clarity in paragraph 8.22 draft Guidance on the conditions when a Section 9 CA98 exemption to RPM will be accepted in case of short term promotions and product introductions;

b) recognize in paragraph 8.22 draft Guidance that in specific circumstances RPM is allowed to overcome free-riding problems, notably in the case of replenishment sales or loss-leader conduct;

c) remove or at least amend the unnecessarily suspicious language on recommended resale prices (**RRPs**) and maximum prices contained in paragraph 8.24-8.25 draft Guidance.

5.3 Finally, Brands for Europe wants to reiterate its request to the CMA to fully take into account the evolved market reality showing a clear shift of power away from brand owners to retailers. As already explained in more detail in paragraph 3.4 to 3.6 of the 2021 Response, there is a clear shift in power from brand owners/suppliers to big retailers/e-tailers and platforms that often place strong pressure on suppliers to seek price/margin protection against competition from other retailers. This should be reflected in the draft Guidance, for instance by including in the list of behaviour indicative of RPM in paragraph 8.2 some reseller initiated conduct such as threats of de-listing or requests for fixed margin or additional margin protection. This would provide a clear signal to resellers that their behaviour can equally qualify as RPM.

Minimum Advertising Price Policies (MAPs)

5.4 Brands for Europe welcomes the CMA's acknowledgment in paragraph 8.14 that, except for the specific cases where the supplier accompanies MAPs with further measures limiting the resellers freedom to determine the final resale price, MAPs, as a unilateral policy, do not constitute RPM as such.

5.5 Brands for Europe wants to stress that for the reasons set out in more detail in paragraphs 3.15 to 3.18 of the 2021 Response, it fully supports the inclusion of this clarification in the draft Guidance and asks the CMA to maintain this clarification in the final version of the Guidance. MAPs, as a unilateral policy that only restrict resellers to advertise prices below a certain level,

do not prevent resellers from ultimately selling below a certain price and can therefore rightly not be qualified as RPM. In addition, similarly to arguments in favour of allowing for the communication of recommended resale prices, MAP is equally justified for the benefit of retailers and customers in helping retailers to understand how to best position a product for optimal customer experience and incentivizing retailers to provide consumers with important information about the product's features, benefits and performance. Furthermore, allowing a MAP-policy would take away some of the most visible (online) price promotions thus limiting the detrimental impact of (algorithmic) price adjustments and counteract, albeit only partially, the most negative consequences of cases of replenishment sales and loss leader conduct.

5.6 To increase the clarity and legal certainty around the lawful use of MAPs, Brands for Europe would nevertheless propose to include some limited amendments to the precise wording of paragraph 8.14 draft Guidance as follows (changes to the current draft Guidance are indicated in red)

> *"Similarly, minimum advertised price policies ("MAPs"), which prohibit ~~retailers~~ resellers from advertising prices below a certain amount set by the supplier, do not constitute RPM as such. If unilaterally set, MAPs may generate efficiencies as they assist in limiting free-riding between buyers (see paragraph 10.11(b) of this Guidance). MAPs may ~~also~~ amount to RPM ~~for instance~~ but only in cases where the supplier sanctions ~~retailers~~ resellers for ultimately selling below the respective MAPs, requires them not to offer discounts or prevents them from communicating that the final price could differ from the respective MAP."*

5.7 Brands for Europe is of the opinion that the first proposed change (replacing retailer by the more generic reseller) is necessary to reflect that MAPs do as such not constitute RPM regardless of the level of the distribution chain where the reseller is active. There is no reason to conclude that MAPs which prohibit wholesalers from advertising prices below a certain amount set by the supplier, would constitute RPM, in situations where the same MAP would not constitute RPM in case solely directed at retailers.

5.8 The second proposed change is intended to make it more explicit that the CMA acknowledges that MAPs do not constitute RPM as such but can only be considered to constitute RPM in case the supplier takes certain specific follow-up actions that restrict the freedom of the reseller to decide on the actual final resale price it will charge to the customers. Brands for Europe believes that this amendment will provide further legal certainty to businesses and gives a clearer message that MAPs by themselves do not constitute or are indicative of RPM. This will increase the likelihood that businesses will feel confident that they can lawfully adopt MAPs amongst others to limit the most detrimental impact of only price wars.

Fulfilment contracts

5.9 Brands for Europe applauds the CMA for including paragraph 8.18 in the draft Guidance which recognises the existence of fulfilment contracts and accepts that in this context the fixing of the resale price between the supplier and the fulfilment agent (i.e. the company that executes a prior agreement between the supplier and a specific customer) does not constitute RPM even in cases where the fulfilment agent acquires title over the contract goods or accepts more than insignificant risks and can therefore not rely on the agency exception as laid down in paragraph 4.26 draft Guidance.

5.10 Brands for Europe believes, for the reasons set out in more detail in paragraphs 7.1 to 7.5 of the 2021 Response, that the exemption from the RPM prohibition in case of fixing the resale price in a fulfilment contract context is indeed warranted and provides for a practical solution for those circumstances where the offer to the buyer, including the price competition, takes place

directly between the supplier and the specific customer (end-user or retailer) but the contract is executed by a third party (fulfilment agent).

5.11 Brands for Europe would nevertheless ask the CMA to consider making some amendments to the current proposed paragraph 8.18 draft Guidance to avoid any misunderstanding and to limit the room for divergent interpretation by courts.

5.12 First of all, Brands for Europe suggests to replace "end user" with the more generic concept of customer to make clear that a fulfilment contract can exist regardless of whether the initial agreement concluded by the supplier which will be executed by the fulfilment agent, has been concluded with a retailer or a private or industrial end user. Brands for Europe sees no reason why the fulfilment contract exemption to the RPM prohibition would only be applicable in case the supplier concludes the initial agreement with an end user, and not when the initial agreement is concluded with a specific retailer. The same reasons justifying the exemption in case of an end user, i.e. price competition only takes place at the level of the supplier, is also applicable in case of a specific retailer.

5.13 Secondly, Brands for Europe proposes to clarify that the fulfilment contract exemption to the RPM prohibition not only applies in cases where the specific customer has waived its right to choose the undertaking that will execute the prior agreement with the supplier, but also, in the alternative, in cases where the customer has indicated that it does not intend to have any further price negotiations with the undertaking that will execute the prior agreement. This change is necessary to capture those cases where the customer in the prior agreement still wants to have the possibility to choose the undertaking that will execute the prior contract based on other factors than price such as for example, proximity, speed or quality of delivery, or other not price related factors. In similar vein, Brands for Europe, suggests to clarify that the waiver requirement is satisfied also in those cases where the customer has already selected the undertaking that needs to execute the prior agreement and refers to that undertaking in the prior agreement with the supplier. In that way, all circumstances in which price competition for the customer concerned no longer plays a role, which is the determining factor for the application of the fulfilment contract exemption, will be covered.

5.14 Thirdly, Brands for Europe is of the opinion that the clarity of paragraph 8.18 draft Guidance would improve if the reference to "genuine" agency situations is removed from this paragraph. If we understand the purpose of this reference correctly, the CMA intends to clarify that in situations covered by "genuine" agency as described in paragraphs 4.27 to 4.30 of the draft Guidance, the fulfilment contract exemption does not apply. However, in these cases the supplier, as principal, would be able to determine the resale price to be applied by the "genuine" agent in accordance with paragraph 4.26 draft Guidance. Therefore, this reference does not bring any added value.

5.15 Based on the above suggested amendments, Brands for Europe proposes to redraft paragraph 8.18 draft Guidance as follows (changes to the current draft Guidance are indicated in red):

> *"The fixing of the resale price in a vertical agreement between a supplier and a buyer that executes a prior agreement between the supplier and a specific ~~end user~~ customer (referred to in this Guidance as a 'fulfilment contract') does not constitute RPM where the ~~end user~~ customer has indicated that it will not seek to further negotiate pricing with the undertaking that will execute the agreement or has waived its right to choose the undertaking that should execute the agreement (including where the vertical agreement between the supplier and a specific customer explicitly names the undertaking that will execute the agreement). In such a case, the fixing of the resale price does not result in a restriction within the scope of the Chapter I prohibition since the resale price is no longer subject to competition in relation to the ~~end user~~ customer concerned. ~~However, this only applies in case the fulfilment contract does not constitute an agency agreement falling outside the scope of the Chapter I prohibition, as~~*

~~*described in particular in paragraphs 4.27 to 4.30 of the Guidance. This may be because the buyer acquires the ownership of the contract goods intended for resale or because it assumes more than insignificant risks in relation to the execution of the contract.*~~ *In contrast, where the* ~~*end user*~~ *customer has not indicated that it will not seek to further negotiate pricing with the undertaking that will execute the agreement or has not waived its right to choose the undertaking that should execute the agreement, the supplier cannot fix the resale price without the restriction falling within Article 8(2)(a) of the VABEO. However, it may set a maximum resale price with a view to allowing price competition for the execution of the agreement."*

Individual exemptions based on Section 9 CA98 on the RPM prohibition

5.16 Brands for Europe wants to reiterate its position that the CMA should provide in the Guidance further clarity on the circumstances in which it will accept a ***Section 9 CA98*** efficiency argument to allow for the use of RPM, both by clarifying the conditions for product introduction or short term price promotions, as well as explicitly recognizing that RPM is considered appropriate to overcome free-riding issues and by including specific examples where the CMA will consider RPM to be lawful to overcome such free-riding issues.

5.17 First of all, Brands for Europe advocates that, just as the CMA did for dual pricing, the CMA should clarify that agreements on resale prices in the limited situations relating to new product launches and short term promotions can benefit from the VABEO block exemption, and not merely covered by a clarification in the Guidance acknowledging that an argument for an individual exemption based on Section 9 CA98 might be available.

5.18 Such a change is warranted given the significant consumer benefits of RPM in expanding demand and promoting a product for a short time period. Particularly in case of the launch of a new product, the current absence of a block exemption for RPM leads to a situation where brand owners refrain from setting a fixed retail price, thereby negatively impacting the willingness of retailers to make investments in the marketing/promotion and customer services needed to make market entry a success. This, in turn, has a negative effect on the willingness of brand owners to invest in product innovation and launch in the first place. Aside from an inefficiently low level of customer services, this leads to long-term consumer harm by delaying or even preventing the entry of new products on the market thereby slowing product innovation, as well as acting as a disincentive for retailers to make investments for entering a new market (segment) thus hampering wider market penetration. In addition, any of the theories of harm articulated in the draft Guidance in respect of RPM are highly unlikely to be realistic in the context of an RPM agreement of limited duration. With market shares not exceeding the current VABEO thresholds, an RPM agreement of fixed and limited duration is therefore even more unlikely to give rise to collusive outcomes than an indefinite RPM agreement.

5.19 In the alternative, and at a minimum, the Guidance should clarify:

a. **Fixed resale prices for product launches**: given the obvious consumer benefits (introduction of new products on the market), the CMA should clarify that it will accept at least as an "introductory period" of 6 months or any longer period which is necessary (e.g., to recoup investments). The CMA should further clarify that any product which introduces substantial additional features to an existing product of the same manufacturer (renovated existing products/categories) or requires significant investments in terms of research and development or promotion/marketing should be considered as a new product. Furthermore, the CMA should remove wording that this exception is only available where *"it is not practical for a supplier to impose on all buyers effective promotion requirements by contract"*, because RPM has clear efficiency benefits over contractual requirements, which are extremely difficult to specify for each individual retailer, and very costly to monitor and enforce. It should be

made clear that fixed resale prices for product launches are possible in any distribution system, including in case of selective and exclusive distribution networks, as well as for franchising.

b. **Fixed resale prices for short term low price campaigns**: more flexibility is necessary here. There is no reason to limit this exemption to franchising/similar distribution systems only, given the obvious consumer benefits (low prices). In addition, the Guidance should not limit the short term promotion period to a maximum of 6 weeks but should allow for more flexibility and longer term promotions, in particular when such campaigns are linked to considerable investments for the preparation and launch of the promotional campaigns.

5.20 Secondly, Brands for Europe calls upon the CMA to recognize explicitly that RPM might be an appropriate and lawful means to overcome free-riding issues and include specific examples in which case it will accept a Section 9 CA98 efficiency argument to justify RPM as a lawful solution to overcome free-riding issues. As further explained in paragraphs 3.15 to 3.18 of the 2021 Response, Brands for Europe is of the opinion that RPM, in cases of replenishment sales or loss-leader conduct, should benefit from the Section 9 CA98 exemption. The clear negative effects of free-riding in situations of replenishment sales or loss-leader conduct are not limited to experience or complex products, and can only be effectively countered by the implementation of RPM.

5.21 Based on the above, Brands for Europe proposes to redraft paragraph 8.22 draft Guidance as follows (changes to the current draft Guidance are indicated in red):

"(...) ~~Two~~ Three examples of such an efficiency defence are set out below.

(a) When a manufacturer introduces a new product, including products which introduce substantial additional features to an existing product of the same manufacturer, or existing products that were renovated following significant investments in research and development and/or promotion/marketing RPM can benefit from the block exemption of the VABEO. In case of a new product introduction, RPM may be an efficient means to induce distributors to better take into account the manufacturer's interest to promote this product, ~~in particular if it is a completely new product,~~ and to increase sales efforts. If the distributors on the respective market face competitive pressure, this pressure may induce them to expand overall demand for the product and make the launch of the product a success, also for the benefit of consumers. ~~section 9(1) requires that less restrictive means do not exist. To meet this requirement, suppliers may, for example, demonstrate that it is not feasible in practice to impose on all buyers effective promotion requirements by contract~~. Under such circumstances, the imposition of fixed or minimum retail prices for a limited period of time, (of 6 months in most cases, or longer where this may be justified based on the level of investment in research and development and/or promotion/marketing), ~~that does not go beyond what is strictly necessary~~ in order to facilitate the introduction of a new product, ~~might be considered in certain circumstances~~ may be considered, on balance, pro-competitive and to meet the conditions of section 9(1).

(b) Fixed resale prices, and not just maximum resale prices, may be necessary to organise a coordinated short term low price campaign (of two to six weeks in most cases, or longer where this may be justified based on the level of investment in promotion/marketing), which will also benefit consumers, and can thus benefit from the block exemption of the VABEO. ~~In particular, they may be necessary to organise such a campaign in a distribution system in which the supplier applies a uniform distribution format, such as a franchise system~~. Given its temporary character, the imposition of fixed retail prices may be considered on balance pro-competitive and to meet the conditions of Section 9(1).

(c) In some situations, the extra margin provided by RPM may allow retailers to provide

(additional) pre-sales services. If enough customers take advantage of such services to make their choice but subsequently purchase at a lower price with retailers that do not provide such services (and hence do not incur these costs), high-service retailers may reduce or eliminate these services that enhance the demand for the supplier's product. RPM may help to prevent such free-riding at the distribution level. The supplier will have to convincingly demonstrate that the RPM agreement is necessary in order to overcome free riding between retailers on these services. In this case, the likelihood that RPM is found procompetitive is higher when competition between suppliers is fierce and the supplier has limited market power.

Particular examples where RPM to overcome free-riding at the distribution level is likely to be procompetitive and to meet the conditions of Section 9(1), are situations of replenishment sales and loss-leader conduct.

- *The "replenishment" free riding occurs where a consumer will have seen, experienced and been advised on the product at a full-service bricks and mortar/online retailer but subsequently turns to a no service bricks and mortar/online retailer to buy a "replenishment" (often combined with a "subscribe to save" scheme which further enhances the "locked in" effect on the customer). Such "replenishment" free riding often occurs, but is not limited to customers relying on no service bricks and mortar/online retailers to make subsequent purchases of the same product (e.g. para-pharmaceutical products, dietary food products, cosmetics, etc.), product family (e.g. game extensions, accessories for consumer electronics, etc.), or product replacement (e.g. sports shoes), where the no service bricks and mortar/online retailer free rides on substantial investments made by both supplier and retailer in convincing customers to make that initial sale.*
- *The loss leader free riding occurs where a low service or no service retailer offers a product category champion product at a very low price for a period of time (sometimes at or below the purchase price).*

Recommended and maximum resale prices and price monitoring

5.22 Finally, Brands for Europe welcomes the explicit acknowledgment by the CMA that recommended resale prices, maximum resale prices and price monitoring, as unilateral conduct, does not constitute RPM and therefore is covered by the block exemption provided by the VABEO. However, Brands for Europe is very disappointed that the CMA has not yet made use of the opportunity presented by the current review of the vertical regime, to make a clear brake with the prior EU Vertical Guidelines by removing all the unhelpful language contained in the current EU Vertical Guidelines that creates legal uncertainty around the lawfulness of RRPs, maximum resale prices and price monitoring.

5.23 The current suspicion in the EU VGL (and in the current enforcement practice of some NCAs) against RRPs, maximum resale prices, and price monitoring in particular, is unjustified and unnecessarily strict. **Article 8(2)(a) VABEO** has a balanced approach in distinguishing between the unlawful agreement to "restrict the buyer's ability to determine its sale price" on the one hand and the lawful unilateral conduct of providing recommended prices on the other. It is important to recognise this and ensure the enforcement is also balanced in that respect.

5.24 It is a brand owner's goal to ensure that its retailers are successful. As such, RRPs are established by the suppliers following extensive cross-market research on the whole product assortment for the benefit of retailers and consumers. It is often essential for brand owners to communicate to retailers about their resale price recommendations, and to explain the underlying reasons for these recommendations. It is also important for brand owners to understand why retailers have not followed the recommendation, particularly if retailers are reacting to market forces of which brand owners are not aware and which in turn would help brand owners to innovate and invest further to adjust to market conditions in a manner that is efficiency enhancing and ultimately benefits consumers. In addition, purchase prices for retailers for products bought from the

supplier are in the large majority of cases negotiated or calculated with the RRPs in mind and the (potential) margins that the retailer can earn if it chooses to sell at or around the level of the RRPs. Actual market performance is then obviously part of the discussion for the next sale season or year, without any intention or desire to engage in RPM. Therefore, the CMA should remove the language, suggesting that RRPs can act as a focal point and thus can be used as (indirect) means to arrive at RPM. The VABEO and Guidance should make clear that RPM is limited to those cases in which there is an agreement or concerted practice between supplier and retailer to fix prices, and that RRPs, price monitoring and price discussions without pressure to stick to a price are in themselves always insufficient to constitute RPM, as they don't restrict the buyer's ability to determine its sale price, but are merely a unilateral conduct of the supplier. In that regard it should be clarified that the mere fact that resellers sell at RRPs or maximum resale prices, or that wholesale purchase prices are periodically negotiated with the RRPs in mind cannot result in a finding of (tacit) acquiescence in the sense of paragraph 6.5 (b) or (c) of the Guidance.

(b) In the absence of such explicit acquiescence, an agreement may be established based on tacit acquiescence. For that it is necessary to show first, that one party requires explicitly or implicitly the cooperation of the other party for the implementation of its unilateral policy and second that the other party has complied with that requirement by implementing that unilateral policy in practice.

(c) Tacit acquiescence may also be deduced from the level of coercion exerted by a party to impose its unilateral policy on the other party or parties to the agreement in combination with the number of distributors that are actually implementing in practice the unilateral policy of the supplier. For instance, a system of monitoring and penalties, set up by a supplier to penalise those distributors that do not comply with its unilateral policy, points to tacit acquiescence with the supplier's unilateral policy if this system allows the supplier to implement in practice its policy. However, such tacit acquiescence cannot be concluded if the distributors continue to engage in conduct contrary to the communicated unilateral policy. Similarly, the mere application by resellers of RRPs or maximum resale prices communicated by a supplier, cannot be considered as indicative of tacit acquiescence of the supplier's unilateral communication.

5.25 The distinction between RPM, RRPs and maximum resale prices remains relevant even in situations of market power. Brand owners are of the view that RRPs and maximum resale prices, in absence of any pressure exercised to fix the price, would, even in situations of market power, not amount to resale price maintenance and cannot be a breach of the Chapter I CA98 prohibition. Therefore, the reference that RRPs and maximum resale prices could, even without any pressure to adopt a fixed price, act as a focal point and thus be considered as fixed resale prices or RPM should be removed from the draft Guidance. At a minimum, the reference to maximum resale prices should be removed in this context, as Brands for Europe fails to see how a unilateral measure which aims at keeping the resale price low, can be considered as a restriction of competition that generates negative effects for consumers.

5.26 Similarly, brand owners should be able to collect data from retailers about their resale prices to remain competitive against competing brands. The current EU Vertical Guidelines have inspired some NCAs to treat resale price monitoring unnecessarily strictly. Resale data helps inform brand owners' future strategy, production, development, marketing strategies etc. Resale price data allows the brand owners to better position their products in the market and can help the brand owners to take a view on the RRP (which they set unilaterally) to compete effectively with other brands. Conversations with retailers about these data points as such should not be treated as interference with the commercial policy of the retailers which is indicative of RPM, as their main purpose is to generate efficiencies in terms of optimal distribution of products across online and offline channels, ensuring availability of products throughout markets and offering the products the consumer wants at a fair and competitive price. All of this makes it

extremely important for brand owners to understand how the market responds to these price recommendations, to understand the actual resale prices that are applied for their products in the market, and to seek information from resellers on actual resale prices. These communications with retailers, and the fact that brand owners seek to obtain resale price information from retailers should not be interpreted as an attempt to limit reseller's liberty to define their own commercial policy and price. In fact, they strongly improve inter-brand competition on the merits.

5.27 Based on the above, Brands for Europe suggests the CMA to make a number of changes to the current draft Guidance to further enhance legal certainty and reflect market reality:

- To ensure consistent use of language and clarification that maximum resale price and RRPs as such are not as such indicative of RPM, Brands for Europe proposes to amend paragraph 8.13 draft Guidance.

"However, as set out in Article 8(2)(a) of the VABEO, the imposition of a maximum retail price or the determination of a resale price recommendation by the supplier do not constitute RPM as such ~~does not in itself amount to RPM~~, including where the maximum resale price is set at a level where the reseller only has a very limited, or no distribution margin. ~~However~~Only if the supplier combines such a maximum price or ~~with~~ resale price recommendation with incentives to apply a certain price level or disincentives to lower the sales price, ~~this~~ can this amount to RPM. An example of incentives to apply a certain price level would be to make the reimbursement of promotional costs conditional upon reselling at ~~in case of compliance with~~ the maximum resale price or the recommended resale price without allowing the reseller to sell below the maximum resale price or the recommended resale price. An example of disincentives to lower the sales price would be an intervention of the supplier in case the buyer deviates from the maximum or recommended resale price by, for instance, threatening to cut further supplies.

- To provide further clarification on price monitoring Brands for Europe suggest to amend paragraph 8.16 draft Guidance

"Price monitoring is increasingly used in e-commerce where both manufacturers and retailers often use specific price monitoring software. Such price monitoring does not constitute RPM as such and is mostly used to stay price competitive and to decrease resale price for the benefit of consumers. It however increases price transparency in the market, which allows manufacturers to effectively track the resale prices in their distribution network and to intervene swiftly in case of price decreases. It also allows retailers to track the prices of their competitors effectively and report price decreases to the manufacturer, together with a request to intervene against such price decreases. However, price monitoring may only amount to RPM where it is accompanied or followed by supplier intervention against retailer price decreases."

- To delete entirely the current paragraphs 8.24 and 8.25 draft Guidance or at a minimum implement the following changes:

"8.24The possible competition risk of recommended ~~and maximum~~ prices is that they ~~will~~ could work as a focal point for the resellers and might be followed by most or all of them which in turn might facilitate RPM. Moreover, recommended ~~and maximum~~ prices may soften competition or facilitate collusion between suppliers.

8.25An important factor for assessing possible anti-competitive effects of recommended ~~or maximum~~ resale prices is the market position of the supplier. The stronger the market position of the supplier, the higher the risk that a recommended ~~or maximum~~ resale price leads to a more or less uniform

application of that price level by the resellers, because they may use it as a focal point. They may find it difficult to deviate from what they perceive to be the preferred resale price proposed by such an important supplier on the market."

6. Excluded restrictions and other provisions

Excluded restrictions

6.1 As mentioned in Previous Responses, Brands for Europe is of the view that non-compete obligations that are tacitly renewable should not remain "excluded restrictions", and that they should be automatically exempt under the UK VABEO.

6.2 There are no meaningful risks in allowing such obligations to be automatically exempt under the UK VABEO, primarily because the availability of the block exemption is already subject to the relevant market share thresholds. The risk of any party exerting market power in this context is therefore already addressed.

6.3 On this basis, Brands for Europe asks the CMA updates the Guidance as set out below.

Paragraph 95 of the Guidance

Non-compete obligations are excluded by the VABEO and must be assessed on a case-by-case basis if their duration is indefinite or exceeds five years. Non-compete obligations that are tacitly renewable beyond a period of five years are covered by the block exemption, provided that the buyer can effectively renegotiate or terminate the vertical agreement containing the obligation with a reasonable notice period and at a reasonable cost, thus allowing the buyer to effectively switch its supplier after the expiry of the five-year period. ~~Non-compete obligations that are tacitly renewable beyond a period of five years are also not covered by the VABEO because they are deemed to have been concluded for an indefinite duration (see Article 10(2)(a) of the VABEO).~~ In general, non-compete obligations are exempted under the VABEO where their duration is limited to five years or less and no obstacles exist that hinder the buyer from effectively terminating the non-compete obligation at the end of the five-year period. […]

Other provisions

6.4 As mentioned in the 2021 Response, Brands for Europe is of the view that requiring businesses to provide the CMA with information regarding their distribution agreements within ten working days is unreasonably strict and in most cases impossible to achieve. This is particularly the case for suppliers who operate pan-European or global distribution networks (including in the UK), for multiple brands across different channels and markets. While providing such information in a timely fashion is in the companies' interests where a legal matter arises, the suggested timeframe is unrealistic and fails to recognize the complexity of today's distribution arrangements.

6.5 Brands for Europe therefore asks that the CMA updates its Guidance as follows:

Paragraph 11.2 of the Guidance

Requests for information will be made in writing and must be complied with within twenty~~ten~~ working days commencing with the relevant day. […]

Annex

Suggested amendments in relation to the draft section on "Information exchange in dual distribution"

10.170 As explained in paragraphs 6.13 to 6.21 of the Guidance, Article 3(5)(i)-(iv) of the VABEO contains four exceptions to the general rule that vertical agreements between competitors cannot benefit from the block exemption provided by the VABEO. Vertical agreements entered into between competing undertakings are specified only to the extent that they are nonreciprocal, and —

(a) 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;

(b) the supplier is a provider of services at several levels of trade, while the buyer provides its products at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services;

(c) the supplier is a wholesaler of goods, while the buyer is a distributor and not a competing undertaking at the wholesale level, or

(d) the importer is an importer of goods, while the buyer is a distributor and not a competing undertaking at the level of trade where it purchases the goods or at the importation level.

10.171 If the conditions of Article 3(5), points (i), (ii), (iii) or (iv) are fulfilled, the exemption provided by Article 3(1) of the VABEO applies to the vertical agreement in question including information exchange under the agreement, subject to the Guidance below.

10.172 For the purposes of this Guidance, information exchange includes any communication of information by one party to the other, irrespective of the characteristics of the exchange, for instance whether the information is communicated by only one party or by both parties, or whether the information is exchanged in writing or orally. It is also immaterial whether the parties expressly agree the form and content of the information exchange or if it takes place on an informal basis, including, for example, where one party communicates information without the other party having requested it.

10.174, Under an exclusive distribution agreement, it may be necessary for the parties to exchange information relating to the territories or customer groups that are allocated to the buyer or reserved to the supplier. Under a franchise agreement, it may be necessary for the franchisor and franchisee to exchange information relating to the application of a uniform business model across the franchise network.

Lastly, in a selective distribution system, it may be necessary for the supplier to obtain information from distributors relating to their compliance with the selection criteria.

10.175 The following is a non-exhaustive list of examples of information that, when exchanged by the parties to a non-reciprocal vertical agreement that fulfils the conditions of Article 3(5), points (i), (ii), (iii) or (iv) of the VABEO can be considered to be covered by the VABEO.. Unless indicated otherwise, the examples cover information communicated by the supplier or the buyer, irrespective of the frequency of the communication and irrespective of whether the information relates to past, present or future conduct.

(a) Technical information relating to the contract products, such as information relating to the registration, certification or handling of the contract products, notably when such goods or services must comply with regulatory measures, and information that enables the supplier or buyer to adapt the contract products to the requirements of the customer.

(b) Information relating to the supply of the contract products, including information relating to production, inventory, stocks, sales volumes and returns.

(c) Customer-specific sales data and information relating to customer purchases of the contract products, customer preferences and customer feedback, including non-aggregated information on the value and volume of specific contract goods or services per customer, and information that identifies particular customers, provided that such information exchange is not used to impose any of the hardcore restrictions on the buyer specified in Section 8 of the VABEO.

(d) Information relating to the prices at which the contract products are sold by the supplier to the buyer.

(e) Information relating to the supplier's recommended resale prices or maximum resale prices for the contract products and information relating to the prices at which the buyer resells the products, provided that such information exchange is not used to directly or indirectly restrict the buyer's ability to determine its sale price or to enforce a fixed or minimum sale price within the meaning of Article (8)(2)(a) of the VABEO, and without prejudice to paragraph 11.161, point (a) below concerning information relating to actual future downstream sale prices.

(f) Information relating to the marketing of the contract products, including information on new products to be purchased and sold under the vertical agreement, as well as information on promotional campaigns for the contract products, without prejudice to point (e) of this paragraph or paragraph 11.161 below.

(g) Performance-related information, including aggregated information communicated by the supplier to the buyer relating to the marketing and sales activities of other buyers of the contract products, provided that this does not enable the buyer to identify the activities of particular competing buyers, as well as information relating to the volume or value of the buyer's sales of the contract products relative to the buyer's sales of competing products.

10.176 Conversely, this paragraph sets out an exhaustive list of information exchange that does not benefit from the VABEO because it is generally unlikely to be genuinely vertical.

(a) Information relating to the actual future prices at which the supplier will sell the contract products downstream, except (i) the exchange of information on the supplier's recommended resale prices or maximum resale prices for the contract products, provided that such information exchange is not used to directly or indirectly restrict the buyer's ability to determine its sale price or to enforce a fixed or minimum sale price within the meaning of Article (8)(2)(a) of the VABEO; or (ii) the exchange of information on fixed resale prices that facilitates the introduction of a new product or that is necessary to organise a coordinated short-term low price campaign.

(c) The exchange of information relating to goods sold by a buyer under its own brand name with a manufacturer of competing branded goods, unless the manufacturer is also the producer of the own-brand goods.

10.177 Exchanges of information between a supplier and buyer in a dual distribution scenario that do not benefit from the exemption provided by Article 3(1) of the VABEO must be assessed individually under the Chapter I prohibition, taking into account current relevant guidance on horizontal agreements. The other provisions of the vertical agreement between the supplier and buyer may nonetheless benefit from the exemption provided by Article 3(1) of the VABEO, provided that the agreement otherwise complies with the conditions set out in the VABEO.

10.178 Exchanges of information between a supplier and buyer in a dual distribution scenario that do not benefit from the block exemption provided by the VABEO do not necessarily infringe the Chapter I prohibition. However, such exchanges are subject to the presumptions established by relevant case law relating to exchanges of information between competitors. In particular, undertakings that

participate in a concerted practice and that remain active on the market are presumed to take into account information exchanged with their competitors in determining their conduct on the market.

10.179 The parties to an exchange of information that does not benefit from the block exemption provided by the VABEO may take precautions to minimise the risk that the information exchange will raise horizontal concerns. For example, they may exchange only aggregated sales information or ensure an appropriate delay between the generation of the information and the exchange. Another possible precaution is to use technical or administrative measures, such as firewalls, to ensure, for example, that information communicated by the buyer is accessible only to the personnel responsible for the supplier's upstream activities and not to the personnel responsible for the supplier's downstream direct sales activity.