UK CMA REVIEW OF GUIDANCE ON VERTICAL BLOCK EXEMPTION ORDER
RESPONSE TO PUBLIC CONSULTATION
L'OREAL (UK) LIMITED

Dual distribution

Relationship with guidance on horizontal agreements

1.1 Please clarify 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). 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.

1.2 Here is our suggested amendment to paragraph 6.14 of the Guidance to cover this:

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

1.3 In order to avoid reducing legal certainty regarding dual distribution we recommend that the references to horizontal restrictions in paras 6.15 and 6.22 are removed from the Guidance. Rather than including a reference to "object restrictions", we believe the Guidance should exclude from its scope information exchanges which may be considered to be problematic. See our suggested amendment on this point to paragraph 10.176 of the Guidance, which is set out under para 1.33 of this submission. Here are suggested alterations to 6.15 and 6.22.

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

1.4 We disagree with two aspects of the guidance in paragraph 10.171.

1.5 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.

1.6 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 instead indicate explicitly the type of information exchange that is problematic in paragraph 10.176.

1.7 We are also alarmed 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*".

1.8 We note 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". Instead, we ask 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.

1.9 Regarding the specific categories of information exchanges listed in the Guidance, we do not agree with the inclusion in paragraph 10.176 (a) (and therefore the denial of the block exemption) 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.

1.10 We consider that the exclusion from the Draft Order of this type of information exchange will in practice lead to significant issues for suppliers in general, which will also be to the detriment of resellers and end customers.

1.11 We see no justification for denying the benefit and legal certainty of the block exemption for the exchange of customer-specific sales data. Instead, we ask for it to be included under paragraph 10.175 so that it is covered by the Draft Order in situations where it is not used to impose any hardcore restrictions on the purchaser.

1.12 Our proposed alternative wording for Information Exchange in Dual Distribution (paragraphs 10.170-10.179) set out under paragraph 1.33 of this submission.

Buyers may have a legitimate need to communicate future prices

1.13 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 justifiable requirement for customer-specific sales data

1.14 Customer-specific sales data (volume and value) 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.

1.15 The CMA has not explained why the sharing by a reseller of customer-specific sales data could harm consumers. The main incentive for the supplier is to compete successfully against rival

suppliers by maximizing its sales through all available channels. 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.

1.16 These information exchanges are needed for the proper functioning of vertical relationships whether or not they involve dual distribution.

1.17 Buyers are entirely free to decide whether or not to provide the data. 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.

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

Business planning

1.19 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.

1.20 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

1.21 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.

1.22 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.

1.23 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.

1.24 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

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

1.26 Providing a dynamic view of wholesaler stock situation relative to an average reseller/retailer inventory helps us to manage their stock replenishment and will be of benefit to end-customers who are less likely to face delays in receiving products.

1.27 Without this inventory information, the risk of oversupply and undersupply increases, resulting in harm to customers.

Evaluating and rewarding the performance of resellers and understanding product sales

1.28 We will also need to assess the performance of our resellers and naturally this evaluation needs to be carried out by reference to the value and volume of sales to specific customers (of which we may otherwise have no visibility). Aggregated data are not sufficiently precise to assist us to understand how well the reseller is doing in all the retail environments it is required to serve.

Driving demand and quality through product advice/customer education

1.29 We may need to reach out to the customers of our buyers to provide advice about our products. We need to focus education programs according to the activity and the focus of each retailer and this can only be done if we are able to have a consolidated view of the sales made, including those made directly by our buyers and those made by its resellers. That consolidation necessarily requires us to have access to the sales data from the resellers, in order to know which retailer purchases our products.

Reseller programme compliance

1.30 Receiving non-aggregated customer-specific data from resellers enables us to control and enforce selective distribution systems. Most notably 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 selective distribution system

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

1.31 If we no longer had access to customer-specific data from resellers, then we might be forced to decide between a direct and indirect model as we would not be able to adopt the practices outlined above.

1.32 If suppliers cannot access customer-specific sales data, then business models 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
- Enforce and control a selective distribution system

1.33 Taking into account the above here is our proposed alternative wording for Information Exchange in Dual distribution (paragraphs 10.170-10.179)

10.170 [unamended].

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~~, in principle,~~ information exchange under the agreement, subject to the Guidance below. ~~However, as explained in paragraph 6.22 of the Guidance, the exemption under the VABEO does not extend to horizontal restrictions of competition by object. Moreover, 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 the vertical agreement (or related documents).~~

~~The benefit of the block exemption provided by Article 3(1) of the VABEO in relation to a particular vertical agreement therefore extends to information exchange only to the extent that it does not restrict competition by object and is genuinely vertical, which is to say that it is required to implement the vertical agreement (ie the 'agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services').~~

10.172 [unamended]

~~10.173 Restrictions of competition 'by object' are those that by their very nature have the potential to restrict competition within the meaning of the Chapter I prohibition. Information exchange between competitors that has the objective of restricting competition on the market will be considered as a restriction 'by object'. In assessing whether an information constitutes a restriction of competition by object, the CMA will take into account the legal and economic context in which the information exchange takes place and to this end, will take into account whether the information exchange, by its very nature, may lead to a restriction of competition.~~

10.174~~ Whether an exchange of information is required to implement the vertical agreement (and therefore genuinely vertical) may depend on the particular distribution model. For example~~, U~~u~~nder 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 ~~generally~~ be considered to be covered by the VABEO.~~be unlikely to constitute a restriction by object and are likely to be genuinely vertical~~. 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) [unamended].

(b) [unamended].

(c) ~~Aggregated~~ 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~~without prejudice to paragraph 11.161 below~~.

(d) – (g) [unamended]

10.176 Conversely, this paragraph sets out an exhaustive list of information exchange that does not benefit from the VABEO because it is ~~e exchange of the following types of information is generally likely to either restrict competition by object or otherwise would be~~generally unlikely to be genuinely vertical.

(a) Information relating to the actual future prices at which the supplier ~~or buyer~~ will sell the contract products downstream, except (i) the exchange of information ~~unless the exchange of such information is necessary to organise a coordinated short-term low price campaign in accordance with the guidance provided in paragraph 8.22(b) of the Guidance, and without prejudice to the possibility to exchange 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.

~~(b) Customer-specific sales data, including non-aggregated information on the value and volume of sales per customer, or information that identifies particular customers, unless in each case such information is necessary to enable the supplier or buyer to adapt the contract products to the requirements of the customer or to provide guarantee or after-sales services or to allocate customers under an exclusive distribution agreement.~~

(c) [unamended].

10.177 – 10.179 [unamended].

2. Flexibility in designing distribution systems

Agency

2.1 We welcome 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. In this context, we note that the reference to "very" before "brief period of time" introduces uncertainty to an otherwise clear framework.

2.2 We 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)*". This 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 heart of the UK verticals framework which allows a supplier to choose its own distribution model.

2.3 Additionally we do not see that 4.18 (c) is relevant to the analysis of agency arrangements falling outside the Chapter 1 prohibition. An entity that chooses a pure agency business model should be able to carry that out for a number of principals and still be a part of each principal's undertaking so we recommend deletion of this subsection (c) of the guidance in its entirety.

2.4 In view of our comments on agency, we propose the following amendments to the Guidance in addition to the deletion mentioned at 2.3 above:

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

2.5 The CMA notes in its 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.

2.6 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).

2.7 On this basis, we would suggest the introduction of 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].

Selective distribution

2.8 We are concerned 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.*")

2.9 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.

2.10 In fact, following the judgement in *Auto 24*, 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**), 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.

2.11 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. We would like it clarified 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,* 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". 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".

2.12 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. 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 the same way as so-called "luxury brands".

2.13 In view of our comments above, we propose 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 distribution 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. […]

2.14 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 existing 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, 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 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*~~.

2.15 We are pleased of the 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 with the unnecessarily 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*). 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.

2.16 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 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,~~87~~ 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

8.73~~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,

2.17 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

2.18 We disagree with certain restrictions included in paragraphs 8.35 and 8.38:

(a) Regarding paragraph 8.35(a) of the Guidance, we would like it clarified 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*". Limitations 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 behavior 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. 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.

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

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 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"];

(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~~.

3. Online sales

3.1 It is crucial that brand owners should have the freedom to incentivise retailers to invest in those seamless 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.

General comments

3.2 We are concerned by the language used in paragraph 8.32-8.34 of the 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 goes far beyond the European Court of Justice judgement in *Pierre Fabre,* 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, 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[1] (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****."*

3.3 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 ~~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

[1] 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>.

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

3.4 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 European Commission decision in *Guess* 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").

3.5 Therefore, we propose the following amendments:

Paragraph 8.38 of the Guidance:

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

3.6 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).

3.7 Therefore 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 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

3.8 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. We would 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 we would leave the fastest growing sales channel completely to our competitors which is not a long-term viable solution for any company active in the sale of consumer goods.

3.9 We believe that to achieve the full potential of dual pricing and the related pro-competitive effects, 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 a) 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 and b) 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 we may hesitate to implement 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.

3.10 We suggest amendments to paragraph 8.43 of the draft Guidance as follows*:*

"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 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.

3.11 We would also like the CMA to 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 this should cover a brand owner being able to differentiate prices for products that are to be sold in a specialised shop with limited product assortment from a shop with a broad product assortment, even where one retail group operates different types of retail stores. 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.

3.12 Here is our proposed drafting to cover this as a new paragraph after 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. different 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.)

4. Resale price maintenance

Introduction

4.1 To reduce uncertainty we would ask for:

a) further clarity in paragraph 8.22 draft Guidance on the conditions when an exemption to resale price maintenance (**RPM**) will be accepted in case of short-term promotions and product introductions;

b) recognition 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) removal or at least amendment of the language on recommended resale prices (**RRPs**) and maximum prices contained in paragraph 8.24-8.25 draft Guidance.

Minimum Advertising Price Policies (MAPs)

4.2 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.

4.3 To increase the clarity and legal certainty around the lawful use of MAPs, we suggest some amendments to the precise wording of paragraph 8.14 draft Guidance as follows

> *"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."*

4.4 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.

4.5 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. This will increase the likelihood that we will feel confident that we can lawfully adopt MAPs to limit the most detrimental impact of "only price" wars.

Fulfilment contracts

4.6 This 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).

4.7 To avoid uncertainty we suggest the following amendments to the current proposed paragraph 8.18 draft Guidance. 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.

4.8 Secondly, we would like it clarified 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.

4.9 Thirdly we believe that the clarity of paragraph 8.18 draft Guidance would improve if the reference to "genuine" agency situations is removed from this paragraph. If 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. then this reference does not bring any added value.

4.10 Based on the above suggested amendments, we propose paragraph 8.18 draft Guidance is altered as follows:

"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

4.11 We ask that 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.

4.12 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 we 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. 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.

4.13 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.

4.14 Based on the above we suggest paragraph 8.22 draft Guidance is amended as follows:

"(…) Two 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).

Recommended and maximum resale prices and price monitoring

4.15 It is our goal to ensure that our retailers are successful. As such, we provide RRPs following extensive cross-market research on the whole product assortment for the benefit of retailers and consumers. It is often essential for us to communicate to retailers about our resale price recommendations, and to explain the underlying reasons for these recommendations. Purchase prices for retailers for products bought from us are, in the large majority of cases, negotiated or calculated with the RRPs in mind and the (theoretical) 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, we ask for removal of the language, suggesting that RRPs can act as a focal point and thus can be used as (indirect) means to arrive at RPM.

4.16 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.

4.17 The distinction between RPM, RRPs and maximum resale prices remains relevant even in situations of market power. We 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 we fail 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.

4.18 Similarly, brand owners should be able to collect data from retailers about their resale prices to remain competitive against competing brands. 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.

4.19 Based on the above, we suggest 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, 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 we suggest amending paragraph 8.16

"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:

"8.24 *The 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.*

8.25 *An 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."*

5. Excluded restrictions and other provisions

Excluded restrictions

5.1 We believe that non-compete obligations that are tacitly renewable should not remain "excluded restrictions", and that they should be automatically exempt under the UK VABEO. 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.

On this basis, we ask for the Guidance to be amended as follows at Paragraph 95

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

5.2 Requiring a complex business such as ours with multiple brands across different channels and markets to provide the CMA with information regarding their distribution agreements within ten working days is going to be pretty much impossible to achieve. We would ask for Para 11.2 of the guidance to be amended to provide **twenty** working days rather than **ten**.