



February 18, 2022

Ms. Sophie Moonen

Unit A.1– Antitrust Case Support and Policy

Directorate-General for Competition

Per email: COMP-VBER-REVIEW@ec.europa.eu

Ref. HT.6179 PROPOSED GUIDANCE RELATING TO INFORMATION EXCHANGE IN THE CONTEXT OF DUAL DISTRIBUTION (VERTICAL BLOCK EXEMPTION REGULATION AND VERTICAL GUIDELINES)

Dear Ms. Moonen,

The Antitrust Committee of the International Bar Association was pleased to participate in the public consultation on the European Commission's published revised drafts of the Vertical Block Exemption Regulation (VBER) and Guidelines on Vertical Restraints (VGL) which closed on 17 September 2021.

In that regard, we are now pleased to comment on the Commission's additional targeted public consultation on proposed guidance relating to information exchange in the context of dual distribution, to be added to the new VGL.

This new section provides welcome additional guidance on what was probably the most intensively debated issue raised by the draft new VBER. We strongly commend the Commission for having responded so constructively to the stakeholder feedback on dual distribution information exchanges, in particular given the Commission's original stated intention to address this issue in the context of the ongoing review of the rules on horizontal collaboration. We and many other stakeholders asked that guidance be provided in the new VGL and we are glad to see that this will be the case. In particular, we welcome the Commission's explicit recognition of the potential positive impact of vertical agreements on competition in general at the upstream and downstream level, and that the exchange of information between buyer and seller can contribute to such positive effects.

We also welcome the indication that the new VGL will make it clear that the new VBER covers exchange of information between supplier and buyer that is necessary to improve the production or distribution of the contract goods or services by the parties, and that this will apply to dual distribution. The examples given in paragraphs 12 to 14 of the consultation document are very useful.

We also consider it helpful that the Commission recognises that technical or administrative measures such as firewalls can effectively minimise the risk that the information exchange will raise horizontal concerns.

We would only suggest some small changes. These are that:

- in paragraph 4 a reference to a SSNIP test be added to discussion on the definition of a competing undertaking, for consistency with the VBER and with the Commission's Market Definition Notice;
- in paragraph 11 it be clarified that "where one party communicates information without the other party having requested it" there will not be considered to be any exchange if the receiving party promptly and unambiguously rejects the information;
- in paragraph 14 the words "Information relating to actual future prices" be replaced by "Individualised data regarding intended future prices", to make it clear that this refers to future and not to current prices, and for consistency with the Commission's Horizontal Guidelines; and
- in paragraph 14, in order to align paragraph 14(a) more closely with paragraph 13(e) (which allows for an exchange of information on the prices at which a buyer resells relative to legitimate recommended or maximum pricing), the proviso in paragraph 14(a) should be amended as follows: "...and without prejudice to the possibility to exchange information ~~on~~ related to the supplier's recommended resale prices or maximum resale prices...".

Finally we observe that, although this is not completely clear from the consultation document, it appears to us that the 10% retail market share threshold previously introduced in the draft VBER has been abandoned. This would be very welcome, as the new 10% threshold introduced unnecessary complexity and significant practical

difficulties to the distribution rules. We agree with the Commission that the relevant test here should not be a market share threshold, but rather whether an exchange of information is necessary or not to improve the production or distribution of the contract goods or services.

Yours sincerely,



Daniel G. Swanson
Co-Chair Antitrust Committee



Thomas Janssens
Co-Chair Antitrust Committee