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INTERNATIONAL BAR ASSOCIATION

ANTITRUST COMMITTEE

**SUBMISSION TO THE EUROPEAN COMMISSION REGARDING THE DRAFT REVISED
VERTICAL BLOCK EXEMPTION REGULATION (Draft VBER) AND THE DRAFT
VERTICAL GUIDELINES (Draft VGL)**

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1. Introduction

The International Bar Association's Unilateral Conduct And Behavioural Issues Working Group (the “**Working Group**”) sets out below its submission in response to the public consultation in relation to Commission Regulation (EU) No 330/2010 (the Vertical Block Exemption Regulation, “**VBER**”), together with the Commission Guidelines on Vertical Restraints (“**VGL**”).

The International Bar Association is the world's leading organisation of international legal practitioners, bar associations and law societies. It takes an interest in the development of international law reform and seeks to shape the future of the legal profession throughout the world.

Bringing together antitrust practitioners and experts among the IBA's 30,000 international lawyers from across the world, with a blend of jurisdictional backgrounds and professional experience spanning all continents, the IBA is in a unique position to provide an international and comparative analysis in this area. Further information on the IBA is available at <http://ibanet.org>.

The Working Group welcomes the opportunity to comment on the draft VBER and VGL as has the Working Group welcomed the opportunity to comment on the policy options for a revision of certain areas of the VBER and VGL raised earlier this year (see submission of 25 March 2021). The Working Group's central focus is to provide an international forum for thought leadership with respect to competition / antitrust law developments. The Working Group comprises lawyers with significant experience in a number of jurisdictions and brings together experience from advising a large number of clients in matters related to the VBER and VGL. As such, the Working Group has sought to share its perspective on certain points raised in the draft VBER and the draft VGL.

2. General Remarks

As mentioned previously, the Working Group believes that the VBER and the VGL have proven helpful for businesses and their advisers. In the light of the changing economy and the increased trend towards online sales, however, the Working Group concurs that amendments have become necessary. The Working Group therefore welcomes the Draft VBER and the Draft VBL and the Commission's aim to give guidance to businesses. However, the Working Group is concerned that some of the new provisions fail to provide the requisite guidance and certainty and might lead to some further complexity instead of clarifying the vertical rules to be applied across the EU.

While recognising the need to introduce more nuance to remove a risk of false negatives, the Working Group believes that in certain respects the new Drafts may have become too complex for many businesses/advisers (especially in relation to smaller businesses which the Drafts appear intended to afford greater protection) easily to understand and apply. The unintended result may be to chill reliance on the VBER and thus undermine its value as a tool that allows businesses the confidence to develop innovative and efficient strategies within a clearly understood compliance paradigm.

3. Assessment of General Topics of the Draft VBER and the VGL

3.1 Scope of the Draft VBER and the VGL

The Working Group welcomes that the Draft VBER and the Draft VGL seek to clarify some provisions of the previous VBER and VGL. The Working Group further welcomes the approach whereby aspects of the VGL are included in the VBER itself (for example, the definition of active and passive sales). Overall, the Draft VBER and the VGL reflect much of the feedback from public consultation, in particular the need to make the rules clearer and more consistent. These positive modifications and clarifications include in particular:

- A clear approach on exclusive distribution, selective distribution and “free distribution” by regrouping the various provisions in a more consistent way (Article 4(b), (c) and (d) of the Draft VBER). This can be expected to allow businesses to optimise distribution to the benefit of various customer bases.
- The more lenient approach for both exclusive distribution (through the introduction of shared exclusivity) and selective distribution (through the permission, under defined circumstances, of additional restrictions on sales to unauthorised distributors). The additional clarifications on the scope of active sales restrictions as well as non-competes is also welcomed.
- Increased flexibility and clarifications for agency agreements.
- The increased flexibility for RPM for fulfilment contracts and for MAP clauses.
- The adoption of a “middle of the road” approach for parity obligations, with the exception of parity obligations imposed by Online Intermediation Services (OIS) platforms.
- The more flexible approach for online sales restrictions, particularly in relation to online marketplace bans and dual pricing.

On the other hand, the Working Group does have concerns about the more restrictive approach taken by the Commission to address its own concerns about “false negatives”, in particular

- A perhaps unduly harsh treatment against OIS platforms, including general positions that OIS platforms (i) cannot impose MFNs; (ii) cannot be considered true agents; and (iii) cannot benefit from the dual distribution exemptions. A wholesale treatment against this type of provisions involving OIS platforms may reduce flexibility for suppliers and prevent suppliers and resellers from realizing much needed efficiency-enhancing arrangements with online platforms. It might also chill the ability to develop new online platforms and prove to be overly static as markets and means of distribution continue to evolve.

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- Reduction of the dual distribution exemption, which will increase cost of doing business and might dis-incentivize suppliers from operating downstream alongside their own distributors even if that is an optimal route to market; or might even lead to increased vertical integration in certain sectors.

The Working Group is concerned that this more restrictive approach to dual distribution and online intermediation platforms could increase compliance costs, and will discourage suppliers and distributors from entering into efficiency enhancing arrangements.

In addition, the Working Group is concerned that many of the new rules and exemptions limit VBER's scope for application to a great extent. As a result, the new VBER and new VGL might not be able to provide the enhanced flexibility which the Commission hopes to give to businesses. The Working Group perceives a risk that some of the new rules have become overly complex, requiring too much by way of detailed self-assessment to reduce compliance costs and provide workable guidance for businesses.

3.2 Market Share Considerations

The Working Group believes that the newly introduced combination of the several different market share thresholds make the application of the VBER more difficult than before. With the newly proposed market share thresholds in Article 2(4) lit. a and lit. b (10%) and Article 2(5) (between 10-30%), in Article 3 (30%) of the Draft VBER and the reference to the De Minimis Notice in #24-26 (5/15%) of the Draft VGL, the various levels of market shares introduce some complexity to determine which of the rules of the VBER will be applicable, if any.

Market share calculations in multi-product markets, across various geographies and channels can be a difficult exercise for many businesses to contend with. While the Working Group notes that the lower thresholds might be intended to afford smaller businesses a greater level of protection than larger, well-established businesses. In some markets, shares may be particularly unstable at around the 10% level, which adds to the risk that smaller business will struggle to be sure of which side of the threshold they fall. In seeking to fine-tune the thresholds, the draft VBER may inadvertently impose on businesses a need to constantly reassess and recalibrate business models, increasing the cost of compliance. The Working Group suggests that Commission reconsider whether a less graduated approach would be better for certainty, such that a single threshold might be retained. Indeed, 30% may still be appropriate in most cases, as firms with market power generally would be well in excess of this figure.

For instance, a supplier with a direct sales channel (D2C distribution) will have to carefully assess whether dual distribution in relation to some retailers leads to market shares above 10%. In this case, the information exchange between the supplier and the retailer ceases to be covered by the VBER (Article 2(5)). The practical consequences of this are not fully clear, in particular as the new rules for horizontal agreements are still being revised.

4. Assessment of Specific Topics of the Draft VBER and the VGL

4.1 Sales Agents

The Working Group welcomes that the Draft VGL incorporate the content of the Commission's Working Paper on Agents. In general, the Draft VGL seem to contain a more flexible approach in line with common business models. The Working Group welcomes in particular the following changes:

- The clarification in #31(a) of the Draft VGL according to which the acquisition of the property of the contract goods while selling them on behalf of a principal does not preclude any agency agreement, provided the agent does not incur any costs or risks related to that transfer of property.
- The fact that the Draft VGL now explicitly clarify (with examples) that a principal may use various methods to reimburse the relevant risks if such methods ensure that the agent bears no, or only insignificant risks (#33 of the Draft VGL).

The Working Group would have welcomed a clarification regarding the fact that a principal in an agency agreement is allowed to prevent an agent from sharing its commission with its customers. While this seems to follow from #39 of the Draft VGL, clearer wording would have been better to avoid any further discussions on this.

4.2 Treatment of Online Intermediation Platforms

The Working Group believes that the treatment of OIS would benefit from some further consideration and revisions. In particular, the rules for platforms are not fully clear or consistent: The Draft VBER determines that online intermediation platforms are "suppliers" and states explicitly that they cannot qualify as agents. However, ECJ case law cannot be altered by the VBER or the VGL. Therefore, the criteria the ECJ applied to agency agreements must still be applicable. OIS which fulfil these criteria may therefore still be agents, regardless of the wording in the Draft VGL.

The implication of the determination that an OIS platform is always a "supplier" itself is not clear and fails to recognise the double-sided nature of such platforms: Does this mean that platforms "supply" intermediation services only? If they are also "suppliers" of the goods or services sold on their platform (which seems to be the intention: # 179 of the Draft VGL), what is the implication under contract law and who is the "buyer" (and to whom might the buyer have recourse)?

Other issues that appear to require clarity are:

- May some parity clauses be considered as RPM?
- Can the user of platform services set a fixed or minimum sales price without infringing the RPM rules?

In addition, the revised VBER will not to apply at all where a platform offers goods/services in competition with the companies they provide with intermediation services for (i.e., where a platform is a dual distributor – so-called “hybrid platforms”). Many platforms today are “hybrid platforms” and third parties still benefit from access to these. By excluding these platforms from the application of the VBER, a significant part of today’s distribution business will be excluded from the VBER, without offering other clear rules for these business models. This considerably limits the VBER’s scope. The Working Group suggests that some flexibility and guidance is at least put into the VGL for hybrid platforms. The Working Group doubts that it is justified to completely exclude hybrid platforms.

4.3 Dual Distribution

The Working Group agrees that there is a clear trend towards dual distribution, which was driven by the emergence of online sales. Many more companies are now affected by the dual distribution rules because they sell directly through their websites as well as acting through agents or distributors, and these days there is significant investment in “omni-channel” distribution. As a result, the more restrictive rules on dual distribution might encourage suppliers to stop relying on the B2B channel of resellers to sell their products and/or to vertically integrate downstream into retail distribution.

Under the new VBER (Article 2(5)), dual distribution is exempted only if (i) the share of each of the supplier and the buyer is below the 10% *de minimis* threshold, or (ii) the share of the supplier and the buyer is above 10% but below 30%. Above the 10% *de minimis* threshold, the VBER would not cover any information exchange, and this would be assessed as a horizontal information exchange under the Horizontal Guidelines.

This strict approach on dual distribution ignores that suppliers and resellers need to engage in a significant amount of communication/information exchange for efficient distribution.

The new rules (Article 2(5) VBER) would in effect require suppliers and resellers to set up firewalls and have separate marketing/sales teams for the same products, which would significantly increase compliance costs. However, only the largest companies can attempt the kind of sophisticated ring-fencing required for comfort under the current approach.

Against this background, the Working Group has the following suggestions on dual distribution:

First, it would be important for the Commission to (i) consider applying more lenient rules for information exchange in the dual distribution context in terms of the types of information that can or cannot be exchanged in the vertical distribution context; and (ii) provide guidance on firewalls, clean teams, and other solutions that the Commission would consider suitable. In that connection, the Working Group supports the relatively lenient UK approach (e.g. *Football Replica Kit*) compared to the seemingly overly strict approach of the Danish authority (see The Danish Competition Appeals Tribunal: Exchange of information on prices, discounts and quantities in relation to future sales between retailers of clothing items was illegal (kfst.dk)).

Second, the Working Group suggests that any guidance on information exchange in the dual distribution context should be provided in the VGL and not the Horizontal Guidelines. Otherwise, the cross-reference to the Horizontal Guidelines would conflate the notion that dual distribution is overall a vertical arrangement, with horizontal concerns. The Working Group therefore believes that clear guidance on information exchange between suppliers with direct sales channels and their retailers should be included in the Draft VGL and not in the Horizontal Guidelines.

4.4 Exclusive Distribution

The Working Group welcomes that the Draft VBER now allows for shared exclusivity, i.e., it is no longer necessary to allocate one area to one single distributor to benefit from the VBER, but the territory or customer groups may be shared among several exclusive distributors (see Article 1(1)(g) of the Draft VBER). The Working Group supports this amendment.

However, the Working Group sees the need for some further guidance as to when the number of distributors is proportionate to the territory or the customer group allocated as this may be difficult to assess given possible asymmetry of information between upstream, suppliers and distributors (especially in the case of dual distribution, where information exchange of any sort may be dangerous). Some concrete examples in the Draft VGL would be helpful.

4.5 Selective Distribution

The Working Group welcomes that the Draft VBER clarifies some important issues regarding selective distribution. In particular, the Working Group welcomes that the Commission took account of the *Coty* judgment and also clarifies that selective distribution systems that do not meet the *Metro* criteria may still be exempted by the VBER. See also Section 4.8 below.

In addition, it is an important step forward that the Commission recognizes the need for greater protection of authorised distributors in a selective distribution system. Even when a brand owner decides against applying one single distribution system across Europe, the brand owner will now have the possibility to make sure that retailers outside the system do not actively supply unauthorized resellers located into the selective distribution area, thus undermining the selective distribution system.

4.6 RPM/Fulfilment Contracts

The Working Group notes that there is not much change to the overall approach regarding RPM, but the clarification that fulfilment contracts do not amount to RPM is useful and welcomed, as certain suppliers were already relying on this interpretation of the law despite it being unclear in the current VGL. Fulfilment contracts clearly seem beneficial as they allow buyers to negotiate better prices from the upstream supplier than would otherwise be available from distributors

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The position that the use of price monitoring software does not, “in itself”, constitute RPM (and indeed may increase supply-chain efficiencies) is also useful, but may require further elucidation as to when such practice may be problematic.

The Draft VGL repeat the statements in the existing VGL about the risk that a maximum resale price obligation “leads to a more or less uniform application of that price level by the resellers, because they may use it as a focal point.” However, price caps tend to be used where demand for the supplier’s products is high, to counter the obvious incentive of distributors to increase margins prices (which would damage the supplier’s brand and prejudice consumers). In markets where resellers have pricing power, the counterfactual to a maximum price restriction is likely higher prices to consumers, not lower. The fact that the a price cap may lead to uniform retail prices is a reflection of this pricing power, not a lessening of competition occasioned by the price cap itself. It would seem helpful if the VGL were to recognise that this is not indicative of competition concerns, even if the supplier has a high market share.

There unfortunately seems no realistic prospect at this stage of the Commission treating RPM as an “effect” rather than “by object infringement”. However, it would seem helpful if the Commission in the Draft VGL could provide additional examples of scenarios in which RPM is likely compliant with Article 101(3) TFEU. The Working group suggests that the Commission include an illustrative example of a case in which an RPM agreement is “necessary in order to overcome free riding between retailers” as per para 182(c) of the Draft VGL, based on the facts of the Australian *Tooltechnics* case, for example.

4.7 Parity Obligations

The proposed solution of treating parity obligations as an excluded restriction (rather than a hardcore restriction) seems, in the Working Group’s view, a reasonable compromise.

#345 of the Draft VGL refers to retailers imposing parity obligations on suppliers in relation to the conditions under which the supplier’s goods or services are sold by other retailers, and notes that this will “generally” involve prohibited RPM. However, the Draft VGL also provide that “in cases where undertakings are able to implement such retail parity obligations in compliance with the rules relating to minimum RPM, the obligations are covered by the block exemption”. This seems to suggest that parity obligations relating to non-price conditions of sale (e.g. levels of after-sales service) would be block exempted – if so, the Commission should make that clearer.

The draft VGL list various factors that are relevant to the assessment of whether various types of parity obligations breach Article 101(1) TFEU or satisfy Article 101(3) TFEU, but provide no clear guidance on how to apply these factors. For example, it is not clear at which level the “market position” of an OIS platform might become problematic (#346 of the draft VGL), or at what point the share of sales through a direct channel is considered “significant” (#347 of the draft VGL), or when buyers will be considered to represent a “considerable share of total demand”? Although precise levels may vary depending on the other relevant factors identified, this could be addressed with some illustrative examples. Without better guidance market

participants may conclude that introducing necessary protection carries too much antitrust risk.

4.7 Online Distribution: Dual Pricing and online marketplace bans

The more flexible approach on dual pricing and on online marketplace bans is most welcome and addresses real commercial concerns of suppliers and distributors/resellers.

The Working Group supports the increased flexibility brought about by #195 of the Draft VGL that allows suppliers to reward investments that need to be made by brick & mortar resellers to market and sell their products, and prevent free riding. This increased flexibility is warranted given that today the online sales channel is a much more established, and in fact the brick & mortar channel is increasingly under threat by the significant increase of e-commerce.

The Working Group also agrees that the more lenient approach on online marketplace bans, which essentially codifies the *Coty* case law, is also justified. As the *Coty* judgment rightly clarified, legitimate conduct does not amount to a complete ban on the use of the Internet as a sales channel, but is rather a restriction on the modalities of the sale that is designed to protect the image and positioning of their brand, and discourage the sale of counterfeit products (#315 of the Draft VGL).

However, the strict approach on restriction on the use of price comparison tools or advertising on search engines (see #192 of the Draft VGL) appears to be inconsistent with the more flexible approach vis-à-vis online marketplace bans. As the Commission acknowledges, both types of restrictions have the same key goal, which is to protect the brand image and positioning of the products in question (compare #315 of the draft VGL for online marketplace bans vs. #325 of the draft VGL for price comparison tools). In addition, from the perspective of resellers, online marketplaces can be viewed as a substitute for price comparison tools, as they essentially both constitute a sales channel. The Working Group would welcome a more consistent approach, laying out the general criteria that the Commission will take into account in its assessment of this type of restriction.