

Questionnaire for the public consultation on a block exemption regulation and guidelines on vertical agreements

Fields marked with * are mandatory.

Introduction

Objectives of the public consultation

Article 101(1) of the Treaty on the Functioning of the European Union ("the Treaty") prohibits agreements between undertakings that restrict competition unless, in accordance with Article 101(3) of the Treaty, they contribute to improving the production or distribution of goods or services, or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits and unless they are indispensable for the attainment of these objectives and do not eliminate competition in respect of a substantial part of the product in question ("efficiencies in line with Article 101(3) of the Treaty").

The prohibition in Article 101(1) of the Treaty covers, amongst others, agreements entered into between two or more undertakings operating at different levels of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services (so-called "vertical agreements").

[Commission Regulation \(EU\) No 330/2010](#) on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (Vertical Block Exemption Regulation, "VBER") and the [Commission Notice providing binding guidance on the Commission for the interpretation of the VBER](#) ("Vertical Guidelines") define the currently applicable framework. The VBER will expire on 31 May 2022.

Between October 2018 and September 2020, the European Commission conducted an evaluation of the VBER and the Vertical Guidelines, the findings of which were summarized in a staff working document ("SWD", [SWD\(2020\) 173 final](#)). The results of the evaluation showed that the rules are still relevant and useful to businesses but that certain areas of the rules may need to be adapted. On the basis of these findings, the Commission launched an impact assessment phase looking into policy options for a revision of certain areas of the VBER and Vertical Guidelines with the aim to have the revised rules by 31 May 2022, when the current rules will expire.

On 23 October 2020, the Commission published notably an [inception impact assessment](#) ("IIA") setting out the scope of the impact assessment phase, with a focus on four areas for which the Commission proposed policy options and asked stakeholders to provide feedback by 20 November 2020. During the impact assessment phase, the Commission will collect views from stakeholders on these policy options, their

ability to tackle the issues identified in the evaluation and on any other impacts of the policy options. This questionnaire is one of the key instruments to collect stakeholders' views and the replies to the questionnaire will inform the drafting of the revised rules.

About you

* 1 Language of my contribution

- ☐ Bulgarian
- ☐ Croatian
- ☐ Czech
- ☐ Danish
- ☐ Dutch
- ☒ English
- ☐ Estonian
- ☐ Finnish
- ☐ French
- ☐ German
- ☐ Greek
- ☐ Hungarian
- ☐ Irish
- ☐ Italian
- ☐ Latvian
- ☐ Lithuanian
- ☐ Maltese
- ☐ Polish
- ☐ Portuguese
- ☐ Romanian
- ☐ Slovak
- ☐ Slovenian
- ☐ Spanish
- ☐ Swedish

* 2 I am giving my contribution as

- ☐ Academic/research institution
- ☐ Business association
- ☐ Company/business organisation

- ☐ Consumer organisation
- ☐ EU citizen
- ☐ Environmental organisation
- ☐ Non-EU citizen
- ☐ Non-governmental organisation (NGO)
- ☐ Public authority
- ☐ Trade union
- ☒ Other

* 3 First name

Joseph

* 4 Surname

VOGEL

* 5 Email (this won't be published)

jvogel@vogel-vogel.com

* 9 Organisation name

255 character(s) maximum

Vogel & Vogel
30 avenue d'Iena
75116 PARIS - FRANCE
Tel: 00.33.1.53.67.76.20

* 10 Organisation size

- ☐ Micro (1 to 9 employees)
- ☒ Small (10 to 49 employees)
- ☐ Medium (50 to 249 employees)
- ☐ Large (250 or more)

11 Transparency register number

255 character(s) maximum

Check if your organisation is on the [transparency register](#). It's a voluntary database for organisations seeking to influence EU decision-making.

* 12 Country of origin

Please add your country of origin, or that of your organisation.

- | | | | |
|---|---|--|--|
| <input type="radio"/> Afghanistan | <input type="radio"/> Djibouti | <input type="radio"/> Libya | <input type="radio"/> Saint Martin |
| <input type="radio"/> Åland Islands | <input type="radio"/> Dominica | <input type="radio"/> Liechtenstein | <input type="radio"/> Saint Pierre and Miquelon |
| <input type="radio"/> Albania | <input type="radio"/> Dominican Republic | <input type="radio"/> Lithuania | <input type="radio"/> Saint Vincent and the Grenadines |
| <input type="radio"/> Algeria | <input type="radio"/> Ecuador | <input type="radio"/> Luxembourg | <input type="radio"/> Samoa |
| <input type="radio"/> American Samoa | <input type="radio"/> Egypt | <input type="radio"/> Macau | <input type="radio"/> San Marino |
| <input type="radio"/> Andorra | <input type="radio"/> El Salvador | <input type="radio"/> Madagascar | <input type="radio"/> São Tomé and Príncipe |
| <input type="radio"/> Angola | <input type="radio"/> Equatorial Guinea | <input type="radio"/> Malawi | <input type="radio"/> Saudi Arabia |
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| <input type="radio"/> Argentina | <input type="radio"/> Ethiopia | <input type="radio"/> Malta | <input type="radio"/> Sierra Leone |
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| <input type="radio"/> Australia | <input type="radio"/> Fiji | <input type="radio"/> Mauritania | <input type="radio"/> Slovakia |
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| <input type="radio"/> Bahrain | <input type="radio"/> French Polynesia | <input type="radio"/> Micronesia | <input type="radio"/> South Africa |
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| <input type="radio"/> Barbados | <input type="radio"/> Gabon | <input type="radio"/> Monaco | <input type="radio"/> South Korea |
| <input type="radio"/> Belarus | <input type="radio"/> Georgia | <input type="radio"/> Mongolia | <input type="radio"/> South Sudan |

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| <input type="radio"/> Benin | <input type="radio"/> Gibraltar | <input type="radio"/> Morocco | <input type="radio"/> Sudan |
| <input type="radio"/> Bermuda | <input type="radio"/> Greece | <input type="radio"/> Mozambique | <input type="radio"/> Suriname |
| <input type="radio"/> Bhutan | <input type="radio"/> Greenland | <input type="radio"/> Myanmar | <input type="radio"/> Svalbard and Jan Mayen |
| | | /Burma | |
| <input type="radio"/> Bolivia | <input type="radio"/> Grenada | <input type="radio"/> Namibia | <input type="radio"/> Sweden |
| <input type="radio"/> Bonaire Saint Eustatius and Saba | <input type="radio"/> Guadeloupe | <input type="radio"/> Nauru | <input type="radio"/> Switzerland |
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| <input type="radio"/> Botswana | <input type="radio"/> Guatemala | <input type="radio"/> Netherlands | <input type="radio"/> Taiwan |
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| <input type="radio"/> Brazil | <input type="radio"/> Guinea | <input type="radio"/> New Zealand | <input type="radio"/> Tanzania |
| <input type="radio"/> British Indian Ocean Territory | <input type="radio"/> Guinea-Bissau | <input type="radio"/> Nicaragua | <input type="radio"/> Thailand |
| <input type="radio"/> British Virgin Islands | <input type="radio"/> Guyana | <input type="radio"/> Niger | <input type="radio"/> The Gambia |
| <input type="radio"/> Brunei | <input type="radio"/> Haiti | <input type="radio"/> Nigeria | <input type="radio"/> Timor-Leste |
| <input type="radio"/> Bulgaria | <input type="radio"/> Heard Island and McDonald Islands | <input type="radio"/> Niue | <input type="radio"/> Togo |
| <input type="radio"/> Burkina Faso | <input type="radio"/> Honduras | <input type="radio"/> Norfolk Island | <input type="radio"/> Tokelau |
| <input type="radio"/> Burundi | <input type="radio"/> Hong Kong | <input type="radio"/> Northern Mariana Islands | <input type="radio"/> Tonga |
| <input type="radio"/> Cambodia | <input type="radio"/> Hungary | <input type="radio"/> North Korea | <input type="radio"/> Trinidad and Tobago |
| <input type="radio"/> Cameroon | <input type="radio"/> Iceland | <input type="radio"/> North Macedonia | <input type="radio"/> Tunisia |
| <input type="radio"/> Canada | <input type="radio"/> India | <input type="radio"/> Norway | <input type="radio"/> Turkey |
| <input type="radio"/> Cape Verde | <input type="radio"/> Indonesia | <input type="radio"/> Oman | <input type="radio"/> Turkmenistan |
| <input type="radio"/> Cayman Islands | <input type="radio"/> Iran | <input type="radio"/> Pakistan | <input type="radio"/> Turks and Caicos Islands |

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|------------------------------------|---------------|---|--|
| ○ Central African Republic | ○ Iraq | ○ Palau | ○ Tuvalu |
| ○ Chad | ○ Ireland | ○ Palestine | ○ Uganda |
| ○ Chile | ○ Isle of Man | ○ Panama | ○ Ukraine |
| ○ China | ○ Israel | ○ Papua New Guinea | ○ United Arab Emirates |
| ○ Christmas Island | ○ Italy | ○ Paraguay | ○ United Kingdom |
| ○ Clipperton | ○ Jamaica | ○ Peru | ○ United States |
| ○ Cocos (Keeling) Islands | ○ Japan | ○ Philippines | ○ United States Minor Outlying Islands |
| ○ Colombia | ○ Jersey | ○ Pitcairn Islands | ○ Uruguay |
| ○ Comoros | ○ Jordan | ○ Poland | ○ US Virgin Islands |
| ○ Congo | ○ Kazakhstan | ○ Portugal | ○ Uzbekistan |
| ○ Cook Islands | ○ Kenya | ○ Puerto Rico | ○ Vanuatu |
| ○ Costa Rica | ○ Kiribati | ○ Qatar | ○ Vatican City |
| ○ Côte d'Ivoire | ○ Kosovo | ○ Réunion | ○ Venezuela |
| ○ Croatia | ○ Kuwait | ○ Romania | ○ Vietnam |
| ○ Cuba | ○ Kyrgyzstan | ○ Russia | ○ Wallis and Futuna |
| ○ Curaçao | ○ Laos | ○ Rwanda | ○ Western Sahara |
| ○ Cyprus | ○ Latvia | ○ Saint Barthélemy | ○ Yemen |
| ○ Czechia | ○ Lebanon | ○ Saint Helena Ascension and Tristan da Cunha | ○ Zambia |
| ○ Democratic Republic of the Congo | ○ Lesotho | ○ Saint Kitts and Nevis | ○ Zimbabwe |
| ○ Denmark | ○ Liberia | ○ Saint Lucia | |

The Commission will publish all contributions to this public consultation. You can choose whether you would prefer to have your details published or to remain anonymous when your contribution is published. **For the purpose of transparency, the type of respondent (for example, 'business association', 'consumer association', 'EU citizen') country of origin, organisation name and size, and its transparency register number, are always published. Your e-mail address will never be published.** Opt in to select the privacy option that best suits you. Privacy options default based on the type of respondent selected

* 14 Contribution publication privacy settings

The Commission will publish the responses to this public consultation. You can choose whether you would like your details to be made public or to remain anonymous.

☐ **Anonymous**

Only organisation details are published: The type of respondent that you responded to this consultation as, the name of the organisation on whose behalf you reply as well as its transparency number, its size, its country of origin and your contribution will be published as received. Your name will not be published. Please do not include any personal data in the contribution itself if you want to remain anonymous.

☒ **Public**

Organisation details and respondent details are published: The type of respondent that you responded to this consultation as, the name of the organisation on whose behalf you reply as well as its transparency number, its size, its country of origin and your contribution will be published. Your name will also be published.

☒ I agree with the [personal data protection provisions](#)

* 15 Please describe the main activity of your organisation (e.g. product(s) and/or service(s) provided)

1000 character(s) maximum

Vogel & Vogel is a boutique law firm active in the fields of competition/regulation, distribution and consumer law.

The firm is known for its handling of challenging competition cases involving complex procedural issues and high-level claims in areas such as merger control, State aid, cartels, vertical agreements, abuse of dominance and antitrust litigation on both a domestic and global level. The team is sought not only for their technical ability and legal expertise but also their capability to build sound commercial and strategic advice under tight time constraints. Particular sector strengths include automobile, trucks, motorcycles, energy, media, telecommunications, luxury goods, toys, transport and advertising.

Our contribution is not made on behalf of a specific client but in our own name as we wish to share our experience with the EU Commission on vertical agreements.

- * 16 Please describe the sectors that your organisation represents, i.e. sectors in which your members are conducting business.

1000 character(s) maximum

As stated before, we advise many undertakings active in the following sectors: automobiles, trucks, motorcycles, energy, media, telecommunications, toys, luxury goods, transport and advertising.

- * 17 Please indicate the 2 digit NACE Rev.2 code referring to the level of "division" that applies to your business (see part III, pages 61 – 90 of Eurostat's statistical classification of economic activities in the European Community, available [here](#)).

6910

- * 18 Please mark the countries/geographic areas where your main business is located.

- ☐ Austria
- ☐ Belgium
- ☐ Bulgaria
- ☐ Croatia
- ☐ Cyprus
- ☐ Czech Republic
- ☐ Denmark
- ☐ Estonia
- ☐ Finland
- ☒ France
- ☐ Germany
- ☐ Greece
- ☐ Hungary
- ☐ Ireland
- ☐ Italy
- ☐ Latvia
- ☐ Lithuania
- ☐ Luxembourg
- ☐ Malta
- ☐ Netherlands
- ☐ Poland
- ☐

- ☐ Portugal
- ☐ Romania
- ☐ Slovak Republic
- ☐ Slovenia
- ☐ Spain
- ☐ Sweden
- ☐ United Kingdom
- ☐ Others in Europe
- ☐ America
- ☐ Asia
- ☐ Africa
- ☐ Australia

* 19 Is your company/business organisation a supplier or a buyer of products or services or both?

- ☒ Supplier
- ☐ Buyer
- ☐ Both
- ☐ Not applicable
- ☐ Do not know

20 Please estimate the percentage of your company/business organisation's annual turnover for 2019 and 2020 generated by sales through the Internet ("online sales").

Proportion of online sales

	0 to 25	25 to 50	50 to 75	75 to 100	not applicable
* 2019	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
* 2020	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

21 Please estimate the percentage of your company/business organisation's annual turnover for 2019 and 2020 generated by physical sales channels ("offline sales").

Proportion of offline sales

	0 to 25	25 to 50	50 to 75	75 to 100	not applicable

* 2019	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
* 2020	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

* 22 Please provide explanation if necessary (e.g. variation between 2019 and 2020)

1000 character(s) maximum

We are a law firm. We provide legal services. It is difficult to classify them as online or off line as we are not selling products but offering legal services. If it should be considered that the provision of services through visio-conferences, telephone and e-mails corresponds to online sales, then more than 90% of our services would be online.

* 23 Please describe the relevance of the VBER and the Vertical Guidelines for your organisation.

1000 character(s) maximum

The VBER is very important in our daily business as we advise many suppliers about the structure and functioning of their distribution networks in France and in the EU.
By definition, such distribution agreements are vertical agreements between suppliers and distributors and can contain vertical restraints.

A. How to answer?

You are invited to reply to this public consultation by filling out the eSurvey questionnaire online. The questionnaire is structured as follows: The first part of the questionnaire concerns general information on the respondent. The second part focuses on policy options for a possible revision of the VBER and the Vertical Guidelines in relation to the four areas mentioned in section C of the IIA, namely (a.) dual distribution, (b.) active sales restrictions, (c.) two types of indirect measures restricting online sales and (d.) parity obligations. This is the main part of the questionnaire. It aims at gathering information and views from stakeholders to assess the impact of the policy changes that the Commission is exploring. The third part of the questionnaire addresses other issues and elements to be considered during the impact assessment phase.

The Commission will summarise the **results in a report**, which will be made publicly available on the Commission's [Better Regulation Portal](#).

The questionnaire is available in English, French and German, but you may respond to the questionnaire in any official EU language.

To facilitate the analysis of your reply, we would kindly ask you to **keep your answers concise** and to the point. You may include documents and URLs for relevant online content in your replies. **You are not required to answer every question.** You may respond 'no opinion/no' to questions on topics where you do not have particular knowledge, experience or opinion. Where applicable, this is strongly encouraged in order to ensure that the evidence gathered by the Commission is solid.

You are invited to **read the privacy statement attached** to this consultation for information on how your personal data and contribution will be dealt with.

You have the option of saving your questionnaire as a 'draft' and finalising your response later. In order to do this, click on 'Save as Draft' and save the new link that you will receive from the EUSurvey tool on your computer. Please note that without this new link you will not be able to access the draft again and continue replying to your questionnaire. Once you have submitted your response, you will be able to download a copy of your completed questionnaire.

Whenever there is a text field for a short description, you may answer in **maximum 5000 characters**.

Questions marked with an asterisk (*) are **mandatory**.

To avoid any confusion about the numbering of the questions, please note that you will be asked some questions only if you choose a particular reply to the respective previous one(s).

No statements, definitions, or questions in this public consultation may be interpreted as an official position of the European Commission. All definitions provided in this document are strictly for the purposes of this public consultation and are without prejudice to definitions the Commission may use under current or future EU law or in decisions.

In case you have questions, you can contact us via the following functional mailbox: COMP-VBER-REVIEW@ec.europa.eu;

If you encounter technical problems, please contact the Commission's [CENTRAL HELPDESK](#).

B. Policy options for revising the VBER and Vertical Guidelines

During the evaluation phase, the following areas of the rules were identified as not working well or as well as they could. During the impact assessment phase, the Commission is exploring policy options for revising the VBER and/or the Vertical Guidelines in these areas.

B.1 Exception for dual distribution

Agreements between competitors are not covered by the VBER and should be assessed under the competition rules for horizontal agreements. However, Article 2(4) of the VBER and paragraph 28 of the Vertical Guidelines provide an exception to this rule for dual distribution, namely the situation where a supplier sells its goods or services directly to end customers, thereby competing with its distributors at the retail level ("exception for dual distribution"). When the VBER was adopted, the retail activities of suppliers engaging in dual distribution were considered negligible and unlikely to give rise to horizontal competition concerns. However, the growth of e-commerce has enabled suppliers to engage in dual distribution more easily than in the past.

Against this background, the following policy options are considered as indicated in the Inception Impact Assessment regarding the exception for dual distribution (**Options 2 and 3 could be applied cumulatively**):

Option 1: no policy change;

Option 2: limiting the scope of the exception to scenarios that are unlikely to raise horizontal concerns by,

for example, introducing a threshold based either on the parties' market shares in the retail market or on other metrics, and aligning the coverage of the exception with what is considered exemptible under the rules for horizontal agreements;

Option 3: extending the exception to dual distribution by wholesalers and/or importers;

Option 4: removing the exception from the VBER, thus requiring an individual assessment under Article 101 of the Treaty in all cases of dual distribution.

1 Do you or your suppliers engage in dual distribution?

- ☐ Yes
- ☒ No
- ☐ No opinion

* 2 Please explain your answer above and give examples of the type of dual distribution you engage in.

5000 character(s) maximum

We are a law firm and have no distributors. But we have considerable experience of dual distribution as most of our clients have been practicing dual distribution for years without any problem.

3 Based on your experience, do you consider that the exception for dual distribution set out in Article 2(4) of the VBER and paragraph 28 of the Vertical Guidelines should be maintained?

- ☒ Yes
- ☐ No
- ☐ No opinion

* 4 Please explain your answer above.

5000 character(s) maximum

Dual distribution is not a new form of distribution. It does exist in most sectors and has always existed. Franchising is, for example, dual by nature as the supplier first tests a concept that will be duplicated by franchisees and usually the franchisor runs several outlets by himself for many reasons: to continue to test and improve the concept or to establish branches in the locations where the real estate prices are too high for franchisees or where the clientele is not stable. Dual distribution has been recognised as lawful and not infringing the exclusive rights granted to the distributors in a number of decisions of the French Cour de cassation, the French courts of appeal or the French commercial courts.

Dual distribution exists in nearly all distribution networks because the supplier or the distributors have to respond to the different needs of the clientele. Certain clients prefer to have a direct relationship with the supplier: big buyers who do not wish to negotiate with hundreds of dealers or those needing a technical support directly from the supplier; or small clients who wish to buy online directly from the supplier's website. Local clients may prefer to have a direct link with the dealers. Dual distribution is not a choice, it is a response to the demand of the market. It has always been practiced as it is a response to the specific needs

of clients.

All distribution networks try to find the best and most efficient ways to meet the requirements of customers. Sometimes the supplier is better placed to satisfy these requests, sometimes it is the reseller. The situation can change. For example, today, several automotive brands have stopped operating a part of their own branches or subsidiaries and have decided to sell these businesses to dealers (recently the automotive media published articles about the decision of RRG to sell several branches to independant dealers). On the other hand, the websites of the suppliers are generally more qualitative than those of the dealers and clients may prefer to buy on the website of the supplier. The customer decides what is best for him. Therefore dual distribution should be block exempted if the supplier's market share does not exceed 30% and the distributor has no more than 30% market share on the upstream market.

5 Based on your experience/knowledge, what would be the impact on the following aspects if the exception for dual distribution was to be removed, which would mean that dual distribution was subject to a self-assessment in all cases?

Please use the follow-up question to give concrete examples of the likely impacts.

	Very negative	Negative	Neutral	Positive	Very positive	No opinion
a. Competition on the market	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
b. Harmonised application of the competition rules by competition authorities and national courts	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
c. Legal certainty for businesses	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
d. Efficiency of distribution systems	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
e. Cross-border trade	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
f. Costs for businesses	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
g. Consumer welfare	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
h. Investment / Economic growth	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
i. Sustainability objectives	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

6 Please explain your answers above and, if possible, give concrete examples of the impacts you indicated. Please specify the letter of the row of the impact you are referring to.

5000 character(s) maximum

Dual distribution is not a new form of distribution. It does exist in most sectors and has always existed. Franchising is, for example, dual by nature as the supplier first tests a concept that will be duplicated by franchisees and usually the franchisor runs several outlets by himself for many reasons: to continue to test and improve the concept or to establish branches in the locations where the real estate prices are too high

for franchisees or where the clientele is not stable. Dual distribution has been recognised as lawful and not infringing the exclusive rights granted to the distributors in a number of decisions of the French Cour de cassation, the French courts of appeal or the French commercial courts.

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7 Do you have experience/knowledge of instances where situations of dual distribution currently covered by the exception may raise horizontal competition concerns?

- ☐ Yes
- ☒ No
- ☐ No opinion

9 Based on your experience/knowledge, do you consider that an additional threshold should be introduced to ensure that only dual distribution situations that do not raise horizontal competition concerns are block-exempted?

- ☐ Introduce an additional threshold based on the combined market share at the retail level (i.e. dual distribution would be block-exempted if the combined market share of the parties to the agreement does not exceed a certain level in the retail market)
- ☐ Introduce an additional threshold, but not based on the combined market share at the retail level
- ☒ No need for an additional threshold
- ☐ No opinion

14 Please explain your answer.

5000 character(s) maximum

This option of an additional threshold is not reasonable. Introducing a market share threshold on the downstream local markets for distribution to final consumers of 20% or less is even quite alarming. It would lead to the block exemption being denied to almost all current distribution networks.

One must be aware of the fact that there are forms of dual distribution by suppliers and distributors to end consumers in almost all networks active in the economy.

In addition, the market share of distributors in their local catchment area alone is often higher than 20%. Many distributors represent several brands and have therefore more than 20% market share in their catchment area. This is usual for the distribution of perfumes and cars, but also common in other sectors.

This is the situation where data is available. But in most cases, there is no data available regarding market shares in the local downstream distribution markets. It would be impossible for many networks to calculate hundreds or thousands of market shares, simply because these market shares are unknown. When a national competition authority has to review a merger in a distribution sector, it usually needs several months to gather the local market shares and can eventually calculate them only because the authority has the power to ask competitors to give their data, which would be impossible and even forbidden for one brand to do in respect of the other brands.

It would not only be extremely complicated if the market shares had to be calculated, but also an impossibility to opt for a common kind of network if such a calculation could be made, as the result of the market shares in the different areas would most certainly be different, less than 20% here, more than 20% but less than 30% elsewhere and more than 30% somewhere else: there would be as many legal situations as different local market shares.

For those reasons the drafters of the previous vertical block exemption regulations chose to calculate the exemption thresholds for distributors in the upstream market in which contractual products are purchased.

In a nutshell, Option 2 is impractical because it would require the calculation of hundreds or thousands of market shares within each important European network with enormous transaction costs, with the data often not even being available, and in any case would deprive almost all networks of the block exemption, which is not the aim of a block exemption regulation.

15 Based on your experience/knowledge, what would be the impact of introducing an additional threshold of 20% combined market share in the retail market (in line with the threshold in Article 3 of the Block Exemption Regulation for specialisation agreements) on the following aspects? Please, use the follow-up question to give concrete examples of the likely impacts.

	Very negative	Negative	Neutral	Positive	Very positive	No opinion
a. Competition on the market	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
b. Harmonised application of the competition rules by competition authorities and national courts	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
c. Legal certainty for businesses	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

d. Efficiency of distribution systems	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
e. Cross-border trade	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
f. Costs for businesses	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
g. Consumer welfare	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
h. Investment / Economic growth	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
i. Sustainability objectives	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

16 Please explain your answers above and, if possible, give concrete examples of the impacts you indicated. Please specify the letter of the row of the impact you are referring to.

5000 character(s) maximum

This option of an additional threshold is not reasonable. Introducing a market share threshold on the downstream local markets for distribution to final consumers of 20% or less is even quite alarming. It would lead to the block exemption being denied to almost all current distribution networks.

One must be aware of the fact that there are forms of dual distribution by suppliers and distributors to end consumers in almost all networks active in the economy.

In addition, the market share of distributors in their local catchment area alone is often higher than 20%. Many distributors represent several brands and have therefore more than 20% market share in their catchment area. This is usual for the distribution of perfumes and cars, but also common in other sectors.

This is the situation where data is available. But in most cases, there is no data available regarding market shares in the local downstream distribution markets. It would be impossible for many networks to calculate hundreds or thousands of market shares, simply because these market shares are unknown. When a national competition authority has to review a merger in a distribution sector, it usually needs several months to gather the local market shares and can eventually calculate them only because the authority has the power to ask competitors to give their data, which would be impossible and even forbidden for one brand to do in respect of the other brands.

It would not only be extremely complicated if the market shares had to be calculated, but also an impossibility to opt for a common kind of network if such a calculation could be made, as the result of the market shares in the different areas would most certainly be different, less than 20% here, more than 20% but less than 30% elsewhere and more than 30% somewhere else: there would be as many legal situations as different local market shares.

For those reasons the drafters of the previous vertical block exemption regulations chose to calculate the exemption thresholds for distributors in the upstream market in which contractual products are purchased.

In a nutshell, Option 2 is impractical because it would require the calculation of hundreds or thousands of market shares within each important European network with enormous transaction costs, with the data often not even being available, and in any case would deprive almost all networks of the block exemption, which is not the aim of a block exemption regulation.

18 Please explain your answers above and, if possible, give concrete examples of the impacts you indicated. Please specify the letter of the row of the impact you are referring to.

5000 character(s) maximum

This option of an additional threshold is not reasonable. Introducing a market share threshold on the downstream local markets for distribution to final consumers of 20% or less is even quite alarming. It would lead to the block exemption being denied to almost all current distribution networks.

One must be aware of the fact that there are forms of dual distribution by suppliers and distributors to end consumers in almost all networks active in the economy.

In addition, the market share of distributors in their local catchment area alone is often higher than 20%. Many distributors represent several brands and have therefore more than 20% market share in their catchment area. This is usual for the distribution of perfumes and cars, but also common in other sectors.

This is the situation where data is available. But in most cases, there is no data available regarding market shares in the local downstream distribution markets. It would be impossible for many networks to calculate hundreds or thousands of market shares, simply because these market shares are unknown. When a national competition authority has to review a merger in a distribution sector, it usually needs several months to gather the local market shares and can eventually calculate them only because the authority has the power to ask competitors to give their data, which would be impossible and even forbidden for one brand to do in respect of the other brands.

It would not only be extremely complicated if the market shares had to be calculated, but also an impossibility to opt for a common kind of network if such a calculation could be made, as the result of the market shares in the different areas would most certainly be different, less than 20% here, more than 20% but less than 30% elsewhere and more than 30% somewhere else: there would be as many legal situations as different local market shares.

For those reasons the drafters of the previous vertical block exemption regulations chose to calculate the exemption thresholds for distributors in the upstream market in which contractual products are purchased.

In a nutshell, Option 2 is impractical because it would require the calculation of hundreds or thousands of market shares within each important European network with enormous transaction costs, with the data often not even being available, and in any case would deprive almost all networks of the block exemption, which is not the aim of a block exemption regulation.

19 Do you have experience/knowledge of instances where agreements between a wholesaler, which is also active at the retail level, and its distributors could raise horizontal competition concerns?

- ☐ Yes
- ☒ No
- ☐ No opinion

20 Please explain your answer.

5000 character(s) maximum

If the wholesaler and its distributors are both selling to end consumers, there is a reason for it: the demand of the market, the preference of end consumers. Therefore there is no competition concern as these two undertakings address the different needs of the customers and have no reason to infringe the competition law rules in any way.

21 Do you have experience/knowledge of instances where agreements between an importer, which is also active at the retail level, and its distributors could raise horizontal competition concerns?

- ☐ Yes
- ☒ No
- ☐ No opinion

22 Please explain your answer

5000 character(s) maximum

If the importer and its distributors are both selling to end consumers, there is a reason for it: the demand of the market, the wish of the end consumers. Therefore there is no competition concern as these two undertakings address the different needs of the customers.

23 In your experience/knowledge, how would a potential extension of the scope of the exception for dual distribution to wholesalers impact the following aspects?

Please use the follow-up question to give concrete examples of the impacts.

	Very negative	Negative	Neutral	Positive	Very positive	No opinion
a. Competition on the market	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
b. Harmonised application of the competition rules by competition authorities and national courts	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
c. Legal certainty for businesses	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
d. Efficiency of distribution systems	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
e. Cross-border trade	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
f. Costs for businesses	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
g. Consumer welfare	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
h. Investment / Economic growth	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
i. Sustainability objectives	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

24 Please explain your answers above and, if possible, give concrete examples of the impacts you indicated. Please specify the letter of the row of the impact you are referring to.

5000 character(s) maximum

Extending the dual manufacturer-distributor exemption to the situation of wholesalers or importers with their own network of distributors and selling parallel to their network would be very positive: it would mean more competition as more undertakings would be assured that they can lawfully resort to dual distribution; the needs of the consumers would be better satisfied; there would be more legal certainty due to the benefit of the BER; distribution systems would be more efficient; the costs of an individual assessment would be spared; consumer welfare would increase and it would be favorable to the business in general.

25 Based on your experience/knowledge, how would a potential extension of the scope of the exception for dual distribution to importers impact the following aspects? Please use the follow-up question to give concrete examples of the impacts.

	Very negative	Negative	Neutral	Positive	Very positive	No opinion
a. Competition on the market	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
b. Harmonised application of the competition rules by competition authorities and national courts	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
c. Legal certainty for businesses	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
d. Efficiency of distribution systems	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
e. Cross-border trade	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
f. Costs for businesses	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
g. Consumer welfare	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
h. Investment / Economic growth	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
i. Sustainability objectives	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

26 Please explain your answers above and, if possible, give concrete examples of the impacts you indicated. Please specify the letter of the row of the impact you are referring to.

5000 character(s) maximum

Extending the dual manufacturer-distributor exemption to the situation of wholesalers or importers with their own network of distributors and selling parallel to their network would be very positive: it would mean more competition as more undertakings would be assured that they can lawfully reason to dual distribution; the needs of the consumers would be better satisfied; there would be more legal certainty due to the benefit of the BER; distribution systems would be more efficient; the costs of an individual assessment would be spared; consumer welfare would increase and it would be favorable to the business in general.

27 Based your experience/knowledge, would any of the following actions be able to ensure that the scope of the exception for dual distribution is appropriate (i.e. instances that may raise horizontal competition concerns are not block-exempted and instances that do not raise horizontal competition concerns or that satisfy the criteria of Article 101(3) of the Treaty are block-exempted)? You can select more than one of the following options:

- ☐ Introduce an additional threshold
- ☒ Extend the scope of the exception to include wholesalers that engage in dual distribution
- ☒ Extend the scope of the exception to include importers that engage in dual distribution
- ☐ No action required, the current scope of the exception for dual distribution is appropriate
- ☐ Remove the exception for dual distribution (dual distribution would no longer be block-exempted and would therefore require an individual effects-based assessment under Article 101 of the Treaty)
- ☐ Other

28 Please explain your answer, in particular why you consider that your preferred action(s) are more appropriate than other possible actions

5000 character(s) maximum

It can be explained with two series of arguments:

As said before, the extension of the dual distribution exemption to importers or wholesalers would be very positive.

On the other hand, making the exemption subject to a 20% market share threshold would be very negative.

The balance of the arguments is clear: the exemption must be extended and in no case should the exemption be made dependant on a market share threshold.

This option of an additional threshold is not reasonable. Introducing a market share threshold on the downstream local markets for distribution to final consumers of 20% or less is even quite alarming. It would lead to the block exemption beeing denied to almost all current distribution networks.

One must be aware of the fact that there are forms of dual distribution by suppliers and distributors to end consumers in almost all networks active in the economy.

In addition, the market share of distributors in their local catchment area alone is often higher than 20%. Many distributors represent several brands and have therefore more than 20% market share in their catchment area. This is usual for the distribution of perfumes and cars, but also common in other sectors.

This is the situation where data is available. But in most cases, there is no data available regarding market shares in the local downstream distribution markets. It would be impossible for many networks to calculate hundreds or thousands of market shares, simply because these market shares are unknown. When a national competition authority has to review a merger in a distribution sector, it usually needs several months to gather the local market shares and can eventually calculate them only because the authority has the power to ask competitors to give their data, which would be impossible and even forbidden for one brand to do in respect of the other brands.

It would not only be extremely complicated if the market shares had to be calculated, but also an impossibility to opt for a common kind of network if such a calculation could be made, as the result of the

market shares in the different areas would most certainly be different, less than 20% here, more than 20% but less than 30% elsewhere and more than 30% somewhere else: there would be as many legal situations as different local market shares.

For those reasons the drafters of the previous vertical block exemption regulations chose to calculate the exemption thresholds for distributors in the upstream market in which contractual products are purchased.

In a nutshell, Option 2 is impractical because it would require the calculation of hundreds or thousands of market shares within each important European network with enormous transaction costs, with the data often not even being available, and in any case would deprive almost all networks of the block exemption, which is not the aim of a block exemption regulation.

30 Based on your knowledge/experience, please indicate whether you have any other comments or suggestions with regard to the exception for dual distribution. You may also provide additional information which may be relevant for this section (copies of any documents, reports, studies etc.). Please upload the information in files with a maximum size of 1 MB each, using the button below.

Only files of the type pdf,txt,doc,docx,odt,rtf are allowed

B.2 Active sales restrictions

Agreements or concerted practices aimed at restricting the territory into which, or the customers to whom, a buyer can sell the contract goods or services ("territorial and customer restrictions") are considered hardcore restrictions under the VBER (i.e. they cannot benefit from the safe harbour) and by object restrictions under Article 101 of the Treaty. This means that the buyer should generally be allowed to actively approach individual customers ("active sales") and respond to unsolicited requests from individual customers ("passive sales"). While the current rules generally do not allow restrictions of passive sales (except as provided by Articles 4(b)(iii) and 4(b)(ii) of the VBER), they do permit restrictions of active sales in certain limited cases, notably to protect investments by exclusive distributors (i.e. active sales into exclusive territories can be restricted (4(b)(i) of the VBER) and to prevent sales by unauthorised distributors in territories where a supplier operates a selective distribution system (i.e. members of this system can be restricted from selling to non-members (4(b)(iii) of the VBER).

The evaluation has shown that the current rules are perceived as preventing suppliers from designing their distribution systems according to their business needs. The main issues raised in this context include the possibility of combining exclusive and selective distribution in the same or different territories. Moreover, the current rules are considered as not allowing for the effective protection of selective distribution systems against sales from outside the territory in which the system is operated.

Against this background, the following policy options are proposed regarding the exception for active sales restrictions **(Options 2 and 3 could be applied cumulatively)**:

Option 1: no policy change

Option 2: expanding the exceptions for active sales restrictions to give suppliers more flexibility to design their distribution systems according to their needs, in line with Article 101 of the Treaty;

Option 3: ensuring more effective protection of selective distribution systems by allowing restrictions on sales from outside the territory in which the selective distribution system is operated to unauthorised distributors inside that territory.

*** 31 Do you or your supplier(s) apply any of the active sales restrictions that are permitted by Article 4 of the VBER?**

- ☐ Yes
- ☒ No

*** 33 Based on your experience/knowledge, do you consider that the current rules allowing certain active sales restrictions should remain unchanged?**

- ☐ Yes
- ☒ No
- ☐ No opinion

34 Please explain your answer above and give examples if possible.

5000 character(s) maximum

The present legal situation is unsatisfactory; it does not sufficiently protect selective distributors and does not allow the organisation of a real exclusive distribution at the wholesale stage for importers responsible for running a selective downstream network. These problems need to be resolved in the future through recourse to options 2 and 3 that should be combined.

35 Do you have experience or knowledge of instances where the combination of exclusive and selective distribution systems in the same territory (e.g. an EUMember State) but at different levels of the distribution chain may not fully comply with the current rules (e.g. exclusivity at the wholesale level within a selective distribution system)?

- ☐ Yes
- ☒ No
- ☐ No opinion

36 Please explain your answer above and give examples if possible.

5000 character(s) maximum

Where there is a combination of exclusive and selective distribution, active and passive sales must in principle be permitted and cross selling must be possible at all levels of selective distribution. These rules

are not adapted to the situation of a private importer in charge of the distribution in one EU Member State with the task of developing a selective retailer network. In this case, the task of the importer is to focus his work in the development of the retail network and not to sell actively outside the Member State.

37 Do you have experience or knowledge of concrete benefits that are created by combining exclusive and selective distribution systems in the same territory (e.g. an EU Member State) at different levels of the distribution chain (e.g. exclusivity at the wholesale level within a selective distribution system)?

- ☒ Yes
- ☐ No
- ☐ No opinion

38 Please explain your answer

5000 character(s) maximum

Where there is a combination of exclusive and selective distribution, active and passive sales must in principle be permitted and cross selling must be possible at all levels of selective distribution. These rules are not adapted to the situation of a private importer in charge of the distribution in one EU Member State with the task of developing a selective retailer network. In this case, the task of the importer is to focus his work in the development of the retail network and not to sell actively outside the Member State.

39 Do you have experience or knowledge of instances where the combination of exclusive and selective distribution systems in different territories (e.g. different EU Member States, with exclusive distribution in Member State X and selective distribution in Member State Y) may not fully comply with the current rules?

- ☐ Yes
- ☒ No
- ☐ No opinion

41 Do you have experience or knowledge of concrete benefits that are created by combining exclusive and selective distribution systems in the different territories (e.g. different EU Member States with exclusive distribution in Member State X and selective distribution in Member State Y)?

- ☒ Yes
- ☐ No
- ☐ No opinion

42 Please explain your answer

5000 character(s) maximum

The competitive situation of each Member State is not necessarily the same. In certain States, exclusive distribution might be the most efficient distribution system, for example to implement a brand in a country in which it has not been sold up to now. In other Member States, maybe selective distribution corresponds better to the economic and marketing situation of the country.

43 Based on your experience/knowledge, what actions would ensure that the exceptions for active sales restrictions provide suppliers with more flexibility to design their distribution systems according to their needs?

- ☒ allow exclusivity at the wholesale level within a selective distribution system
- ☐ other action (please specify below)

44 Please explain your answer

5000 character(s) maximum

Indeed one solution could be to allow exclusivity at the wholesale level within a selective distribution system. In addition, selective distribution should be afforded greater protection. If a selective distribution network is valid under competition law, the resale by non members of the selective system should be prohibited.

45 Based on your experience/knowledge, what would be the impact on the following aspects of allowing exclusivity at the wholesale level within a selective distribution system?

Please use the follow-up question to give concrete examples of the likely impacts.

	Very negative	Negative	Neutral	Positive	Very positive	No opinion
a. Competition on the market	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
b. Harmonised application of the competition rules by competition authorities and national courts	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
c. Legal certainty for businesses	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
d. Efficiency of distribution systems	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
e. Cross-border trade	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
f. Costs for businesses	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
g. Consumer welfare	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
h. Investment / Economic growth	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
i. Sustainability objectives	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

46 Please explain your answers above and give concrete examples of the impacts you indicated. Please specify the letter of the row of the impact you are referring to.

5000 character(s) maximum

This option would certainly be an incentive for suppliers to expand in new Member States and to appoint importers in these States to develop a selective retail distribution network.

47 Do you have experience or knowledge of benefits that can result from restricting sales from outside the territory in which a selective distribution system is operated to unauthorised distributors inside that territory?

- ☒ Yes
- ☐ No
- ☐ No opinion

48 Please explain your answer

5000 character(s) maximum

It is very difficult to have at the same time a selective distribution system in certain Member states and an exclusive distribution system in other Member states. Exclusive distributors can sell to non Members of the network in their own State or outside their State who in turn can sell freely in the selective countries, ruining the efforts of qualitative distribution of the selective distributors.

49 Based on your experience/knowledge, what would be the impact on the following aspects of allowing restrictions on sales from outside the territory in which a selective distribution system is operated to unauthorised distributors inside that territory?

Please use the follow-up question to give concrete examples of the likely impacts.

	Very negative	Negative	Neutral	Positive	Very positive	No opinion
a. Competition on the market	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
b. Harmonised application of the competition rules by competition authorities and national courts	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
c. Legal certainty for businesses	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
d. Efficiency of distribution systems	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
e. Cross-border trade	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
f. Costs for businesses	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

g. Consumer welfare	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
h. Investment / Economic growth	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
i. Sustainability objectives	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

50 Please explain your answers above and, if possible, give concrete examples of the impacts you indicated. Please specify the letter of the row of the impact you are referring to.

5000 character(s) maximum

It would protect the services rendered to consumers by the selective distributors in the selective countries.

51 Based on your experience/knowledge, which of the following actions could ensure an appropriate list of permitted active sales restrictions in the VBER (i.e. block-exempting restrictions that do not raise competition concerns or that satisfy the criteria of Article 101(3) of the Treaty, and not block-exempting restrictions that may raise competition concerns)? You can select more than one of the following options:

- ☒ Extend the scope of the exceptions to allow exclusivity at the wholesale level within a selective distribution system
- ☒ Extend the scope of the exceptions to allow restrictions on sales from outside the territory in which a selective distribution system is operated to unauthorised distributors inside that territory
- ☐ Maintain the current rules
- ☐ Other

52 Please explain your answer, in particular why you consider your preferred action(s) more appropriate than other possible actions

5000 character(s) maximum

It would be very positive to allow exclusivity at the wholesale level within a selective distribution system and to allow restrictions on sales from outside the territory in which a selective distribution system is operated to unauthorised distributors inside that territory. In addition, selective distribution should afforded greater protection. If a selective distribution network is valid under Competition law, the resale by non members of the selective system should be prohibited.

54 Based on your experience, please provide any other comments or suggestions you may have on the rules on active sales restrictions. You may also provide additional information which may be relevant for this section (copies of any documents, reports, studies etc.). Please upload the information in documents with a maximum size of 1 MB each using the button below.

Only files of the type pdf,txt,doc,docx,odt,rtf are allowed

B.3 Indirect restrictions of online sales

Online sales are generally considered a form of passive sales and restrictions preventing distributors from selling through the internet are considered hardcore restrictions that cannot benefit from the safe harbour and as by object restrictions under Article 101 of the Treaty. The current rules apply the same approach to two types of indirect measures that may make online sales more difficult. Paragraph 52(d) of the Vertical Guidelines provides that charging the same distributor a higher wholesale price for products intended to be sold online than for products sold offline (“dual pricing”) is a hardcore restriction. Paragraph 56 of the Vertical Guidelines states that the same applies to imposing criteria for online sales that are not overall equivalent to the criteria imposed for sales in physical shops (“equivalence principle”) in the context of selective distribution. A supplier may, for example, require delivery within specified timeframes in online stores as an equivalent to a requirement for immediate delivery in physical stores or require the creation of an online helpdesk for online stores as equivalent to the service provided in physical stores.

Over the last decade, online sales have developed into a well-functioning sales channel, whereas physical stores are facing increasing pressure. During the evaluation, stakeholders indicated that the rules on dual pricing prevent them from incentivising investments, notably in physical stores, by not allowing them to differentiate wholesale prices based on the costs of each channel. Stakeholders also pointed to a lack of legal certainty in the application of the equivalence principle, as online and offline sales channels are inherently different, and it is difficult to assess when a divergence in the criteria used for each channel amounts to a hardcore restriction under the VBER.

Against that background, the following policy options are proposed for these two types of indirect restrictions of online sales **(Options 2 and 3 could be applied cumulatively)**:

Option 1: no policy change;

Option 2: no longer treating dual pricing as a hardcore restriction, with safeguards to be defined in line with the case law;

Option 3: no longer treating as a hardcore restriction the imposition of criteria for online sales that are not overall equivalent to the criteria imposed for sales in physical stores in a selective distribution system, with safeguards to be defined in line with the case law.

55 Do you have experience or knowledge of benefits that can be generated by dual pricing between online and offline sales?

- ☒ Yes
- ☐ No
- ☐ No opinion

56 Please explain your answer

5000 character(s) maximum

An absolute ban on dual pricing is not justified. Indeed, the distribution costs of the different sales channels are not the same and the services offered by the different channels differ and have different costs. It is

completely reasonable for a supplier to be able to pay for the costly services rendered in stores if a supplier wishes to keep some physical outlets.

57 Do you have experience or knowledge of instances where dual pricing between online and offline sales would raise competition concerns?

- ☐ Yes
- ☒ No
- ☐ No opinion

58 Please explain your answer

5000 character(s) maximum

There is no reason today to believe that Internet sales should be protected in an unreasonable way. The Internet has long since won the battle, so it is no longer necessary to overprotect it with rules that disadvantage physical stores. Physical stores are undergoing an unprecedented crisis and have to face important and increasing costs that do not usually affect websites or not at the same degree. The preferential treatment granted to online sales by the rigid ban on dual remuneration as advocated by the German Competition Authority, the BKA, must be stopped as soon as possible. As physical stores render specific services to the brand and to consumers but face higher costs, it is more than reasonable to compensate these costs. In this respect, there is absolutely no competition concern but simply a restoration of fair and efficient competition between two competing sales channels.

59 Based on your experience/knowledge, what would be the impact on the following aspects of block-exempting dual pricing between online and offline sales?

Please use the follow-up question to give concrete examples of the likely impacts.

	Very negative	Negative	Neutral	Positive	Very positive	No opinion
a. Competition on the market	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
b. Harmonised application of the competition rules by competition authorities and national courts	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
c. Legal certainty for businesses	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
d. Efficiency of distribution systems	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
e. Cross-border trade	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
f. Costs for businesses	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
g. Consumer welfare	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
h. Investment / Economic growth	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
i. Sustainability objectives	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

*** 60 Please explain your answers above and, if possible, give concrete examples of the impacts you indicated. Please specify the letter of the row of the impact you are referring to.**

5000 character(s) maximum

There is no reason today to believe that Internet sales should be protected in an unreasonable way. The Internet has long since won the battle, so it is no longer necessary to overprotect it with rules that disadvantage physical stores. Physical stores are undergoing an unprecedented crisis and have to face important and increasing costs that do not usually affect websites or not at the same degree. The preferential treatment granted to online sales by the rigid ban on dual remuneration as advocated by the German Competition Authority, the BKA, must be stopped as soon as possible. As physical stores render specific services to the brand and to consumers but face higher costs, it is more than reasonable to compensate these costs. In this respect, there is absolutely no competition concern but simply a restoration of fair and efficient competition between two competing sales channels.

61 Case law provides that prohibiting online sales is a hardcore restriction that cannot benefit from the safe harbour provided by the VBER. What would in your view be the appropriate safeguard to ensure that dual pricing between online and offline sales would not result in a prohibition of online sales?

5000 character(s) maximum

There is no reason today to believe that Internet sales should be protected in an unreasonable way. The Internet has long since won the battle, so it is no longer necessary to overprotect it with rules that disadvantage physical stores. Physical stores are undergoing an unprecedented crisis and have to face important and increasing costs that do not usually affect websites or not at the same degree. The preferential treatment granted to online sales by the rigid ban on dual remuneration as advocated by the German Competition Authority, the BKA, must be stopped as soon as possible. As physical stores render specific services to the brand and to consumers but face higher costs, it is more than reasonable to compensate these costs. In this respect, there is absolutely no competition concern but simply a restoration of fair and efficient competition between two competing sales channels.

As long as dual remuneration does not exclude competition from internet sales, there should be no limit to dual service remuneration and compensation of costs.

62 Do you have experience or knowledge of benefits that can be generated from the application of different criteria for online and offline sales in selective distribution systems?

- ☒ Yes
- ☐ No
- ☐ No opinion

63 Please explain your answer

5000 character(s) maximum

There are today significant differences between the sales channels. Therefore the application of different criteria according to these differences should be allowed.

64 Do you have experience or knowledge of instances where the application of different criteria for online and offline sales in selective distribution systems would raise competition concerns?

- ☐ Yes
☒ No
☐ No opinion

65 Please explain your answer.

5000 character(s) maximum

The difference of criteria would be justified and would not lead to competition concerns as this difference can be explained by the specificities of each sales channel.

66 Based on your experience/knowledge, if the application of different criteria for online and offline sales in selective distribution systems were to be block-exempted, what would be the impact on the following aspects?

	Very negative	Negative	Neutral	Positive	Very positive	No opinion
a. Competition on the market	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
b. Harmonised application of the competition rules by competition authorities and national courts	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
c. Legal certainty for businesses	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
d. Efficiency of distribution systems	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
e. Cross-border trade	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
f. Costs for businesses	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
g. Consumer welfare	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
h. Investment / Economic growth	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
i. Sustainability objectives	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

67 Please explain your answers above and, if possible, give concrete examples of the impacts you indicated. Please specify the letter of the row of the impact you are referring to.

5000 character(s) maximum

The selective criteria could be better adapted to the particularities of each channel.

68 Case law provides that prohibiting online sales is a hardcore restriction that cannot benefit from the safe harbour provided by the VBER. In your view, what would be the appropriate safeguard to ensure that the application of different criteria for online and offline sales in a selective distribution system would not result in a prohibition of online sales?

5000 character(s) maximum

As long as the different criteria are proportionate and do not exclude competition from internet sales, there should be no limit to these criteria. It must be underlined that there is no reason today to believe that Internet sales should be protected in an unreasonable way. The Internet has long since won the battle, so it is no longer necessary to overprotect it with rules that disadvantage physical stores.

69 Based on your experience/knowledge, which of the following actions should be taken in relation to the two types of indirect restrictions on online sales mentioned in this section?

You can select more than one of the following options:

- ☒ No longer treating dual pricing between online and offline sales as a hardcore restriction, with safeguards to be defined in line with the case law
- ☒ No longer treating the application of different criteria for online and offline sales in selective distribution systems as a hardcore restriction, with safeguards to be defined in line with the case law
- ☐ Maintaining the current rules: these types of indirect restrictions of online sales should continue to be treated as hardcore restrictions
- ☐ Other

70 Please explain your answer, in particular why you consider your preferred action(s) to be more appropriate than other possible actions.

5000 character(s) maximum

There is no reason today to believe that Internet sales should be protected in an unreasonable way. The Internet has long since won the battle, so it is no longer necessary to overprotect it with rules that disadvantage physical stores and advantage internet sales. Physical stores are undergoing an unprecedented crisis and have to face important and increasing costs that do not usually affect websites or not at the same degree. The preferential treatment granted to online sales by the rigid ban on dual remuneration as advocated by the German Competition Authority, the BKA, must be stopped as soon as possible. Competition law must be neutral and must not be governed by political preferences such as a preference for Internet sales.

71 Please explain your answer, indicating what would be the appropriate action and its likely impact on the aspects mentioned in the table on question 66.

5000 character(s) maximum

Differentiated remuneration between Internet and physical sales should be possible as well as differentiated criteria for the two channels.

72 Would your reply to this question be different, if the rules on active sales restrictions included more permitted exceptions (see section B.2 above)?

- ☐ Yes
- ☒ No
- ☐ No opinion

73 Please explain your answer

5000 character(s) maximum

There is no link between these two issues.

74 Based on your experience/knowledge, please provide any other comments or suggestions you may have on the rules for these two types of indirect restrictions on online sales. You may also provide additional information which may be relevant for this section (copies of any documents, reports, studies etc.). Please upload the information in files with a maximum size of 1 MB each, using the button below.

Only files of the type pdf,txt,doc,docx,odt,rtf are allowed

B.4 Parity obligations

Parity clauses require a company to offer the same or better conditions to its contract party (for example, an online platform) as it offers on certain other sales channels. So-called wide parity clauses generally relate to the conditions offered on all sales channel (including other platforms and the company's direct sales channels), whereas so-called narrow parity clauses generally relate only to the company's direct sales channels (for example, the company's website).

Parity obligations can be agreed at wholesale or retail level, and they can relate to price or non-price conditions (e.g. inventory or the availability of goods or services).

All types of parity obligations are currently block-exempted by the VBER. The evaluation showed an increase in the use of parity obligations across sectors, notably by online platforms. National competition authorities and courts have identified anti-competitive effects of obligations that require parity with other

indirect sales or marketing channels (e.g. other platforms or other online or offline intermediaries).

Regarding parity obligations, the following policy options are proposed:

Option 1: no policy change;

Option 2: removing the benefit of the block exemption for obligations that require parity relative to specific types of sales channels, by including such obligations in the list of excluded restrictions (Article 5 VBER). These obligations would thus require an individual effects-based assessment under Article 101 of the Treaty. Conversely, parity obligations relating to other types of sales channels would continue to be block-exempted, on the basis that they are more likely to create efficiencies that satisfy the conditions of Article 101(3) of the Treaty. For example, the benefit of the block exemption could be removed for parity obligations that relate to indirect sales and marketing channels, including platforms and other intermediaries, while maintaining this benefit for parity obligations that relate to direct sales and marketing channels, including own websites;

Option 3: removing the benefit of the block exemption for all types of parity obligations, by including them in the list of excluded restrictions (Article 5 VBER), thus requiring an individual effects-based assessment in all cases.

*** 75 Do you have experience/knowledge of parity obligations?**

- ☒ Yes
☐ No

76 If you have experience/knowledge of parity obligations, please indicate whether you have this experience/knowledge because you requested a parity obligation or because you accepted a parity obligation? (multiple answers possible)

- ☐ I have requested a parity obligation
☐ I have accepted a parity obligation
☒ Other experience/knowledge

77 If you have experience/knowledge of parity obligations, please explain this experience/knowledge.

5000 character(s) maximum

As a lawyer, I have knowledge of several cases in which parity obligations have been requested by platforms. I have also knowledge of platforms that are not asking them so far, as long as they develop their services. Once they will be absolutely essential for undertakings active on the market, it is likely that they will ask such parity clauses in the future.

*** 78 Do you have experience or knowledge of instances where parity obligations raise competition concerns?**



Yes

☐ No

79 Please explain your answer.

5000 character(s) maximum

Yes, they can limit the competition from new platforms.

*** 80 If you replied 'yes' to the previous question, please indicate whether the competition concerns raised by the parity obligations are linked to the type of sales/marketing channels that the obligation covers:**

- ☐ The competition concerns raised by the parity obligation are linked to the fact that it covers indirect sales/marketing channels (e.g. other platforms or intermediaries)
- ☐ The competition concerns raised by the parity obligation are linked to the fact that it covers direct sales/marketing channels (e.g. own website)
- ☒ The competition concerns raised by the parity obligation are linked to the fact that it covers both direct and indirect sales/marketing channels
- ☐ The competition concerns raised by the parity obligation are due to other reasons (please provide details below)
- ☐ No opinion

*** 81 Please explain your answer by reference to the competition concerns of which you have knowledge or experience.**

5000 character(s) maximum

The main problem concerns the competition of other platforms. The problem is that platforms can have an important economic power.

82 Based on your experience/knowledge, does the extent to which parity obligations raise competition concerns depend on the sector in which they are used?

- ☐ Yes, to a large extent
- ☐ Yes, to a small extent
- ☒ No
- ☐ No opinion

83 Please explain your reply

5000 character(s) maximum

The competition concerns depend on the power of the platform.

84 As regards any competition concerns raised by parity obligations, based on your experience do you consider it necessary to apply further distinctions? (multiple replies possible)

- ☐ Yes, it is necessary to consider whether the parity obligation concerns the retail or the wholesale level
- ☐ Yes, it is necessary to consider whether the parity obligation relates to price, inventory, availability or other conditions
- ☐ Yes, if intermediaries are concerned, it is necessary to consider the type of intermediary, i.e. sales intermediaries (e.g. sales platforms) or advertising /marketing intermediaries (e.g. websites that offer only price comparison)
- ☐ Yes, it is necessary to consider whether the transactions covered by the parity obligation take place online or offline
- ☐ Yes, it is necessary to consider further distinctions (please specify these in the box below)
- ☒ No
- ☐ No opinion

*** 86 Do you have experience or knowledge of instances where parity obligations create benefits?**

- ☒ Yes
- ☐ No

87 Please explain your reply and provide examples where possible.

5000 character(s) maximum

Yes, regarding the services offered to consumers, but the issue is the balance between the benefits and the concerns.

*** 88 Please indicate whether the benefits created by the parity obligations are linked to the type of sales/marketing channels that the parity obligation covers:**

- ☐ The benefits created by the parity obligation are linked to the fact that it covers indirect sales/marketing channels (e.g. other platforms or intermediaries)

- ☐ The benefits created by the parity obligation are linked to the fact that it covers direct sales/marketing channels (e.g. own website)
- ☐ The benefits created by the parity obligation are linked to the fact that it covers both direct and indirect sales/marketing channels
- ☒ The benefits created by the parity obligation are due to other reasons (please provide details below)
- ☐ No opinion

89 Please explain your answer by reference to the benefits of which you have knowledge or experience.

5000 character(s) maximum

The main benefit relies in the service offered to consumers.

90 Based on your experience/knowledge, does the extent to which parity obligations create benefits depend on the sector in which they are used?

- ☐ Yes, to a large extent
- ☐ Yes, to a small extent
- ☒ No
- ☐ No opinion

91 Please explain your reply

5000 character(s) maximum

92 As regards the benefits created by parity obligations, based on your experience/knowledge do you consider it necessary to apply further distinctions? (multiple replies possible)

- ☐ Yes, it is necessary to consider whether the parity obligation concerns the retail or the wholesale level
- ☐ Yes, it is necessary to consider whether the parity obligation relates to price, inventory, availability or other conditions
- ☐ Yes, if intermediaries are concerned, it is necessary to consider the type of intermediary, i.e. sales intermediaries (e.g. sales platforms) or advertising /marketing intermediaries (e.g. websites that offer only price comparison)
- ☐

Yes, it is necessary to consider whether the transactions covered by the parity obligation take place online or offline

- ☒ No
- ☐ No opinion

94 Taking into account any competition concerns that may be raised by parity obligations and any benefits they may create, based on your experience/knowledge do you consider that the benefit of the block exemption should be removed for these obligations, by placing them in the list of excluded restrictions in Article 5 VBER?

- ☐ No, parity obligations should continue to be block-exempted.
- ☒ Yes, the benefit of the block exemption should be removed for parity obligations, but only for parity obligations that relate to indirect sales /marketing channels (e.g. other platforms/intermediaries)
- ☐ Yes, the benefit of the block exemption should be removed for parity obligations, but only for parity obligations that relate to direct sales/marketing channels (e.g. own website)
- ☐ Yes, the benefit of the block exemption should be removed for all parity obligations
- ☐ No opinion

95 Please explain your answer, in particular by reference to any differences or similarities between parity obligations relating to direct and indirect sales /marketing channels.

5000 character(s) maximum

96 Based on your experience/knowledge, what would be the impact on the following aspects of removing the benefit of the block exemption for parity obligations that relate to indirect sales/marketing channels?

	Very negative	Negative	Neutral	Positive	Very positive	No opinion
a. Competition on the market	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
b. Harmonised application of the competition rules by competition authorities and national courts	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

c. Legal certainty for businesses	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
d. Efficiency of distribution systems	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
e. Costs for businesses	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
f. Consumer welfare	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
g. Investment / Economic growth	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
h. Sustainability objectives	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

97 Please explain your answers above and, if possible, give concrete examples of the impacts you indicated. Please specify the row of the impact you are referring to.

5000 character(s) maximum

The regime of parity obligations is already very different from one Member State to another. In many States, there are specific regulations against such obligations as they are considered abusive or restrictive. So it would not change substantially the situation and the burden on the undertakings if they were subject to an individual assessment.

98 In your opinion, what would be the impact on the following aspects of removing the benefit of the block exemption for parity obligations that relate to direct sales/marketing channels?

	Very negative	Negative	Neutral	Positive	Very positive	No opinion
a. Competition on the market	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
b. Harmonised application of the competition rules by competition authorities and national courts	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
c. Legal certainty for businesses	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
d. Efficiency of distribution systems	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
e. Costs for businesses	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
f. Consumer welfare	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
g. Investment / Economic growth	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
h. Sustainability objectives	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

99 Please explain your answers above and, if possible, give concrete examples of the impacts you indicated. Please specify the row of the impact you are referring to.

5000 character(s) maximum

It would certainly favor competition from new competing platforms.

100 Based on your experience, what would be the impact on the following aspects of removing the benefit of the block exemption for all parity obligations?

	Very negative	Negative	Neutral	Positive	Very positive	No opinion
a. Competition on the market	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
b. Harmonised application of the competition rules by competition authorities and national courts	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
c. Legal certainty for businesses	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
d. Efficiency of distribution systems	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
e. Costs for businesses	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
f. Consumer welfare	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
g. Investment / Economic growth	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
h. Sustainability objectives	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

101 Please explain your answers above and, if possible, give concrete examples of the impacts you indicated. Please specify the row of the impact you are referring to.

5000 character(s) maximum

As the main competition concerns are linked to parity obligations regarding indirect sales, a general non exemption may be too large.

B.5 Other aspects

B.5.1. Resale price maintenance (“RPM”) refers to restrictions that set a fixed or minimum resale price to be observed by the buyer. Given that RPM eliminates price competition between a supplier’s distributors and, based on enforcement experience, is generally unlikely to lead to efficiency gains, it is considered a hardcore restriction under the VBER (i.e. it cannot benefit from the safe harbour) and a by object restriction under Article 101 of the Treaty. However, the Vertical Guidelines recognise that supplier-driven RPM may, in certain circumstances, lead to efficiencies, e.g. to achieve an expansion of demand during the launch of a new product or to avoid the undercutting of a coordinated short-term low price campaign in a franchising system. The evaluation has identified a lack of clarity and guidance as regards the conditions under which

such efficiencies can be argued and the evidence needed to meet the threshold for an individual exemption under Article 101(3) of the Treaty. Stakeholders pointed out that, as a result, companies prefer not to run the financial and reputational risk of including RPM restrictions in their vertical agreements.

102 Taking into account that RPM is considered a hardcore restriction under the VBER and that, as stated in the Vertical Guidelines, RPM may exceptionally lead to efficiencies, do you have experience or knowledge of concrete instances where RPM has led to efficiencies, or could have led to efficiencies if the parties had not refrained from using RPM?

- ☐ Yes, I have experience or knowledge of concrete instances where RPM has led to efficiencies
- ☒ Yes, I have experience or knowledge of concrete instances where RPM could have led to efficiencies if the parties had not refrained from using RPM
- ☐ No
- ☐ No opinion

103 If you replied yes, please explain and describe the concrete instance of RPM as well as the efficiencies

5000 character(s) maximum

As long as inter brand competition is fierce, RPM has more advantages than it raises concerns. RPM is first an incentive of the distributor to focus on the quality of the service. It has to offer pre-sale, sale and after sale services in order to develop the clientele. Consumers often demand that prices be the same in the same network. They do not understand why the same product has a different price in the same network and have the impression that they have been cheated if the same product is offered at a different price level by certain distributors. RPM is also a way to protect customers against excessive prices by certain members of the network, for example for spare parts needed by the clients. In addition, if the products are sold at a market price, according to the competition of other brands, the distributors will not claim additional rebates from the supplier who will be able to invest in research, development of new products, innovation, etc. which would not be possible if he had to constantly reduce the resale price by the granting of additional rebates as requested by the distributors in order to compete with low prices of distributors of the same brand.

104 The evaluation has shown a lack of clarity and guidance as regards the conditions under which efficiencies can be argued for the use of RPM and the evidence needed for this purpose, in your view, what measures could be taken to address this lack of clarity and guidance?

Please substantiate your reply.

5000 character(s) maximum

It is true that the efficiencies linked to RPM are not clearly explained in the current guidelines. But this is not the main issue. The main issue is that RPM should be block exempted in case of fierce interbrand competition, this means for brands having less than 20% market share. In addition, for all brands, the conditions for an exemption of certain RPM practices should be better explained and extended (for example, for the launch of a new product or a new brand, for at least 12 months).

B.5.2. Non-compete obligations of an indefinite duration or exceeding 5 years are excluded from the benefit of the VBER and therefore require an individual effects-based assessment under Article 101 of the Treaty.

Non-compete obligations that are tacitly renewable beyond a period of 5 years are deemed to have been concluded for an indefinite duration. The evaluation has indicated that this broad exclusion of non-compete clauses from the benefit of the block exemption may result in false negatives, by covering non-compete obligations that satisfy the conditions of Article 101(3) of the Treaty. In particular, the exclusion of tacitly renewable non-compete obligations could be considered unjustified, to the extent that the buyer is able to terminate or renegotiate the agreement at any time with a reasonable notice period and at reasonable cost. Moreover, the overly broad scope of the exclusion is considered to create an unnecessary administrative burden and additional transaction costs for businesses, since it forces them to periodically renegotiate their contracts despite there being a willingness on both sides to continue the contractual relationship beyond five years.

In this context, the Commission is exploring the possibility of block-exempting tacitly renewable non-compete obligations for the duration of the agreement, provided that the buyer can terminate or renegotiate the agreement at any time with a reasonable notice period and at reasonable cost.

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

- ☐ Yes
- ☒ No
- ☐ No opinion

106 Please explain and, if possible, provide concrete examples.

5000 character(s) maximum

The absolute and rigid 5-year limit for benefiting from the block exemption for contractual non-compete clauses is too strict. It should be possible to provide for renewable 5-year clauses where the contracting party has an option not to renew, or to terminate the contract, also to avoid the transaction costs associated with the renegotiation.

B.5.3 Sustainability agreements

In recent years, there have been increasing discussions about the compatibility of agreements between supply chain operators to foster sustainability objectives with Article 101 of the Treaty. No specific issues relating to sustainability agreements in the vertical supply chain were identified during the evaluation. However, in line with the objectives of the European Green Deal, specific considerations as regards the impact of the current framework for vertical agreements on sustainability objectives will be taken into account in the impact assessment phase of the VBER review.

107 Do you have experience or knowledge of situations where the current rules create obstacles for vertical agreements that pursue sustainability objectives?

- ☐ Yes
- ☒ No
- ☐ No opinion

108 Please list those situations below, give concrete examples if possible and explain why you consider that the current rules create obstacles to vertical agreements in the particular situation.

5000 character(s) maximum

109 Do you see a need for specific guidance on vertical agreements that pursue sustainability objectives? If so, what type of guidance would be necessary? Please explain your reply. What particular aspects should this guidance cover?

5000 character(s) maximum

B.5.4. Impact of the Covid crisis

The COVID-19 crisis that began in March 2020 has had a significant impact on the economy. In particular, there appears to have been a significant increase in e-commerce as a result of the measures taken to contain the spread of the pandemic. Given that these developments are very recent, they could not be taken into account during the evaluation phase of the VBER review. However, as indicated in the staff working document, in view of their importance, the effects of the COVID-19 crisis on the supply and distribution arrangements should be evaluated and, if possible, quantified at this stage of the review of the rules.

110 Do you have experience or knowledge regarding the impact of the Covid-19 crisis on market trends that are relevant for the revision of the VBER and Vertical Guidelines (e.g. innovation in or impacts on distribution models and strategies or on consumer behaviour)?

- ☒ Yes
- ☐ No
- ☐ No opinion

111 Please explain your answer by reference to market trends and their relevance for specific rules in the VBER and Vertical Guidelines (please specify which ones).

5000 character(s) maximum

The Covid-19 crisis has had important economic implications that have not spared the distribution sector. In particular, it has led to an important increase in online sales. This expansion of the Internet sales makes it all the more necessary to ensure absolute neutrality in competition regulation in relation to the various sales

channels and to eliminate the current system of absolute preference for online sales, which ultimately has detrimental effects on physical commerce.

112 Please feel free to upload a concise document, such as a position paper, explaining your views in more detail or including additional information and data. Please note that the uploaded document will be published alongside your response to the questionnaire which is the essential input to this open public consultation. The document is an optional complement and serves as additional background reading to better understand your position.

The maximum file size is 1 MB

Only files of the type pdf,txt,doc,docx,odt,rtf are allowed

113 Do you have any further comments on this initiative on aspects not covered by the previous questions?

3000 character(s) maximum

Certain subjects are not covered by the consultation.

- Distinction between unilateral conduct and agreement. Certain Guidelines consider that a refusal to accept a candidate in a selective distribution network although the candidate fulfills the selection criteria is automatically an agreement with the other members of the network subject to competition law or restrictive agreements. This seems to be a mistake. A refusal to approve a candidate into a selective distribution system can be an agreement with one or several members of the network, for example if the supplier has agreed on a quantitative selection with his distributors and refuses an additional candidate. But if a supplier refuses to deal with a candidate for personal reasons (for ex.: previous misconduct, previous bad results, previous non performance of contractual obligations, previous failure to pay invoices in due time, lack of confidence, many litigations all lost by the former distributor, etc), this is clearly a legitimate unilateral conduct and not an agreement subject to competition law, even if the candidate meets the qualitative criteria. This should be clarified.

- Agency agreements: a working paper has been published about dual distribution between agents and distributors. However, this working paper is difficult to understand and seems very reluctant to permit such dual distribution although it correspond to the needs of end clients. Therefore, such dual distribution should be admitted more easily.

- Shared exclusivity: exclusive distribution is defined as exclusivity rights granted to one sole distributor. In the past, certain BER have accepted shared exclusivity, for example: two exclusive distributors in one territory. This would be very useful for agricultural equipment. There are usually 4 or 5 exclusive distributors for tractors of different brands in one exclusive zone. There are other distributors for other agricultural equipment dealing with these distributors and their clients, but it would be useful to be able to appoint 2 or 3 exclusive distributors in the same territory to meet the needs. Therefore shared exclusivity should be block exempted.

- One physical outlet as a qualitative condition required in order to have the products presented in a physical outlet: it is important to keep this possibility.

- Clarification of the possibility of restrictions on sales on platforms. The EU Commission and the FCA have recognised the possibility to ban or restrict sales on platforms and decided that this possibility is not limited to luxury products. The BKA has interpreted the Coty judgment a contrario as limited to luxury products,

which is inaccurate. The Coty judgment also considers that selective distribution is possible for luxury products. It is not possible to make an a contrario interpretation saying that selective distribution is possible only for luxury products. This error of law of the BKA should be rectified as soon as possible.

*** 114 Please indicate whether the Commission services may contact you for further details on the information submitted, if required.**

- ☒ Yes
☐ No

Contact

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