ECLF
European Competition Lawyers Forum

EUROPEAN COMPETITION LAWYERS FORUM

CONTRIBUTION TO THE PUBLIC CONSULTATION ON THE DRAFT REVISED REGULATION ON VERTICAL AGREEMENTS AND THE VERTICAL GUIDELINES

---

17 September 2021

I. Introduction

1. The European Competition Lawyers´ Forum ("ECLF")[1] is delighted to be able to contribute to the public stakeholder consultation launched by the European Commission ("Commission") on 9 July 2021 regarding its published drafts of the revised Vertical Block Exemption Regulation ("VBER") and the Vertical Guidelines.[2] The proposed texts for these two instruments – both of which have served legal advisors and European businesses well over the years – take into account the findings released in the Commission´s October 2020 Impact Assessment on the range of proposed revisions being considered by the Commission after earlier rounds of consultation.

2. There is much in the Commission´s proposals as they stand which should be applauded, including:

   - the flexibility afforded to manufacturers and brands to combine selective distribution and exclusive distribution models;
   - the finessing of the Commission's position on online sales restrictions in light of EU judicial precedents, especially as regards the permissible scope of a supplier´s control of an online sales channel and its responsibilities in an ´online marketplace´ scenario;
   - the possibility of pricing products differently for on-line and bricks & mortar setting and the minimum level of sales that can be prescribed for "bricks & mortar" sales;
   - the relatively "light touch" approach to the definition of Resale Price Maintenance ("RPM") /maximum prices;
   - the more lenient treatment afforded to restrictions placed on "new" products;
   - the positive approach regarding the fulfilment of contracts;
   - greater flexibility for the adoption of differentiated pricing policies;
   - the definition of quality standards and online "feel" for a supplier´s products;

---

1 The ECLF, founded in 1994, is a group of leading practitioners in EU competition law which is drawn from law firms across the EU. Its aim is to engage in an open dialogue on topical competition law issues and to consider proposals for reform. This response has been compiled by a working group of ECLF members. A list of working group members is set out at Annex 1. While the response has been circulated within the Working Group for comments, its contents do not necessarily reflect the views of all individual members of the Working Group.

2 Refer to https://ec.europa.eu/competition-policy/public-consultations/2021-vber_en

- clearer guidance on single-sourcing and exclusivity relationships;
- clearer guidance on selective distribution issues; and
- the treatment of entry barriers.

3. The structure of this ECLF submission is broken down as follows:

- A discussion on the unresolved ambiguities which continue to characterise the block exemption regime after decades of operation (Section II).
- An overview of certain specific topics where ECLF members feel that the provided guidance could be improved or further elaborated (Section III).
- The conclusions that can be drawn from the preceding discussion (Section IV).

II. Unresolved Ambiguities

4. While ECLF members have little doubt that the proposals being submitted reflect a strong desire on the part of the Commission to adapt both instruments to new market developments and to inject greater legal certainty into certain areas of commercial practice relating to vertical relationships, some residual doubts remain as to whether the proposals can achieve their aim of lowering compliance costs among European businesses. While the complexities of some commercial practices generate a degree of legal uncertainty, and hence high compliance costs, the injection of greater detail in the guidance sometimes itself generates the "straightjacketing" of certain commercial arrangements to minimise compliance risks, which itself drives up business costs by incentivizing sub-optimal business arrangements.

5. *First*, the block exemption regime that applies to vertical relationships has become increasingly complicated over the years, especially as regards the scope of exemptions to general legal principles, the existence of overlapping concepts (*e.g.*, the blurred boundaries between the concepts of "agency", "intermediation" and the "fulfilment" of an order) and the practical difficulties faced in determining the dividing line between critical definitions of 'active sales' policies versus targeted advertisements in a mixed online/offline environment. While this level ambiguity might be the unavoidable result of the desire to provide more qualified or nuanced guidance, it is less valuable to in-house counsel seeking to shape competition law-compliant policies for their companies.

6. *Second*, lying at the heart of the block exemption regime is the idea that automatic exemptions from competition law prohibitions rest on the calculation of market shares, which satisfy competition law regulators that potentially impugned practices are unlikely to generate serious restrictions of competition. However, practice suggests that the calculation of market share is often something that is not a straightforward exercise.

   Trying to calculate market share in the context of distribution of goods and services is particularly complex where the products in question are highly differentiated (*e.g.,* premium branded v. 'mass market' consumer cosmetics) or where the markets in question are local and based on geographic catchment areas. Given the potential implications of exceeding the thresholds, this remains a residual concern with the block exemption regime where the defence of one´s rights is likely to occur before a national judge who is not necessarily well versed in the minutiae of competition law (even if the loss of the exemption does not necessarily mean that a contractual restriction is illegal under the terms of Article 101 TFEU).

   As regards smaller or less transparent markets, it is often the case that the relevant market data is simply not available, whether in terms of calculations value or volume. Therefore, any self-assessment process would typically involve an inherent level or risk for private parties, especially given that competition law enforcers such as the Commission and National Competition Authorities have better tools for the collection of the relevant data. The Vertical Guidelines could therefore include some comments on: (i) what level of good faith assessment should be considered sufficient due diligence in a typical self-assessment scenario; and (ii) how the Commission/National Competition Authorities could typically react to those cases where market share calculations are not clearly erroneous due to the *males fides* of the parties.

7. *Third,* while we would commend as a positive idea put forward by the Commission that a “by object” restriction of competition is not necessarily a *per se* infringement, in the absence of further explanation of this position by the Commission, the complexity of implementing such a policy stance may lie beyond the capabilities of many national judges hearing competition law disputes at first instance. It may therefore require the Commission to play a more positive role in the application of such a policy stance, whether by acting as an *amicus curiae* before national courts or by being more receptive in accepting certain notifications (especially those involving more complex

questions involving online distribution issues), despite the policy of decentralized enforcement adopted under Regulation 1/2003.[3]

III. Specific Policies

Dual Pricing

8. One of the main changes being proposed by the Commission relates to the situation where a supplier engages in the practice of dual pricing for its respective online and ´bricks & mortar´ sales (namely, the practice of charging the same distributor a higher wholesale price for products intended to be sold online when compared to products sold through conventional stores). In the past, the Commission's policy discouraged dual pricing on the grounds that it raised online retailers' costs and reduced price competition associated with the growth of e-commerce or that it dissuaded retailers from pursuing online sales channels altogether. However, the Commission has responded to the submissions of stakeholders to the effect that a dual pricing strategy may be legitimately used to address "free-riding" problems and to create a level playing field between online and bricks & mortar sales, taking into consideration differences in the cost base. The more flexible approach proposed by the Commission would allow for a differentiation to occur between sales channels, depending on the actual sales efforts expended, and would encourage hybrid retailers to support investments in more costly (typically bricks & mortar) value added services.[4]

9. EU competition policy currently differentiates between those practices where the manufacturer sets a different (wholesale) price for the same product to the same (hybrid online/bricks & mortar) retailer, depending on the resale channel through which the product is to be sold, and those practices where the manufacturer sets a different wholesale price to different retailers for the same product. According to the Final Report on the E-commerce Sectoral Inquiry:

- The charging of different (wholesale) prices to *different* retailers is generally considered to constitute a normal part of the competitive process.[5]

[3] The ECLF notes the upsurge in Commission infringement actions for vertical restraints cases after its findings in the E-commerce Sectoral Inquiry after many years of vertical restraints policy lying almost exclusively in the hands of the Member States since the adoption of the policy of decentralized enforcement.

[4] Final Report on the E-commerce Sectoral Inquiry {SWD(2017) 154 final}, para. 35.

[5] Final Report on the E-commerce Sectoral Inquiry {SWD(2017) 154 final}, para 37.

- Conversely, a dual pricing policy adopted with respect to *the same (hybrid) retailer* is generally considered to be a ´hardcore´ restriction under the current terms of the VBER, as it restricts online sales[6] and, by implication, amounts to a restriction “by object” under Article 101(1) TFEU.

10. Under the current version of the Vertical Guidelines, it is possible either to agree upon a fixed fee to support the distributor’s offline sales or to engage in a dual pricing policy following a self-assessment being made by the parties under Article 101(3)TFEU where certain conditions can be satisfied (*e.g.,* where online sales would lead to “*substantially higher costs*” for the manufacturer than offline sales of the same product).[7]

11. The policy change being proposed by the Commission regarding dual pricing is welcomed by the ECLF, especially given the frequency with which such policies are used in the marketplace. In foreshadowing this policy change, the Commission is acknowledging that, over the last decade, online sales have developed into a well-established sales channel, whereas physical stores are facing increasing economic pressure (which has been exacerbated most recently during the Covid epidemic).[8] While National Competition Authorities have had little practical experience in investigating potential infringements of competition rules as a result of dual pricing policies, the positions taken thus far have nevertheless been divergent as regards the perceived restrictive nature of such agreement. Accordingly, the potential for fragmentation in the enforcement of competition policy has justified greater clarification by the Commission and the adoption of a more consistent application on EU competition rules regarding dual pricing.[9]

---

[6] Article 4 (b) of the current VBER and para. 52 of the current version of the Vertical Guidelines.

[7] Para. 64 of the current version of the Vertical Guidelines.

[8] Refer to Inception Impact Assessment on the Revision of the VBER and Vertical Guidelines, page 2.

[9] Germany´s Bundeskartellamt is arguably the most proactive European Competition Authority in prosecuting anti-competitive dual pricing practices. An interesting example is the investigation into the discount practices of Lego, which were based *inter alia* on the amount of shelf space dedicated to Lego products within physical retail outlets. The Bundeskartellamt condemned the practice as involving a structural disadvantage for online retailers. The case was ultimately settled on the basis of commitments. Refer to Bundeskartellamt Press Release, “*LEGO changes its discount system—Fairer conditions for online sales*,” published 18 July 2016, available online at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/18_07_2016_Lego.html. For other cases where dual pricing practices in relation to online sales was found to constitute an infringement of national competition rules, refer to the Decisions of the Bundeskartellamt in the respective Decisions of: *Dornbracht*, Decision of 13 December 2011, B 5-100/10; *Gardena*, Decision of 27 November 2011, B 5-144/13; and *Bosch Siemens Hausgeräte*, Decision of 23 December 2013, B 7-11/13.

Conversely, the French **Autorité de la Concurrence** has found that differentiated wholesale prices on objective and proportionate bases may as a general rule result in economic efficiencies as it favors competition between offline and online distributors on an equal footing (Opinion 12-A-20 of 18 September 2012 *relative au fonctionnement concurrentiel du commerce électronique*, para. 220).

12. The draft Vertical Guidelines acknowledge the need for a policy shift and propose to provide that dual pricing would no longer be qualified as a hardcore restriction under Article 4 of the draft revised VBER. While dual pricing may benefit from the safe harbour regime under the VBER (as amended), this exemption is apparently only available to the extent that the price difference is intended "*to incentivise or reward the appropriate level of investments*" and is "*related*" to the difference in the costs incurred in each channel by the distributors at retail level.[10] Conversely, where this price difference may turn online selling into a practice which is "*unprofitable or financially not sustainable*", dual pricing would continue to be regarded as a ´hardcore restriction´ to passive sales.[11] Also, the change in the policy is not explicitly established in Article 4 the draft revised VBER itself. Subject to certain exceptions, it continues to deny the block exemption to restrictions "*of the customer group to whom, a buyer may actively or passively sell the contract goods or services.*"[12] Accordingly, while the Commission´s more flexible approach is to be welcomed, it may entail certain very material challenges in terms of its implementation. A number of these practical challenges are discussed immediately below.

a. Price-to-cost comparison

13. It remains unclear at what level a price differential would be considered to be "acceptable" in order to benefit from an automatic exemption under the draft VBER. While the draft Vertical Guidelines only clarify which extreme situation is clearly prohibited under competition rules (*i.e.*, those situations where online sales are rendered unprofitable), there is no meaningful guidance offered in relation to how the remainder of the price difference spectrum should be treated. While the Guidance suggests that price differences must be cost-related, it does not provide any clarification on which pricing threshold might be problematic in terms of its anti-competitive consequences. Moreover, the implication is that suppliers will be required to monitor the different "related" costs incurred in online and bricks & mortar sales, which would in turn be a largely market-specific exercise that takes into account the different properties of the particular goods being distributed. Additionally, such cost differentiation might not be clearly available for hybrid retailers offering goods both online and offline or any cost assessment would be subject to at time subjective division of costs between various activities, which can have considerable subjective

[10] The Commission's Explanatory Note to the Draft Vertical Vertical Guidelilnes.

[11] Draft Vertical Guidelines, para. 195.

[12] Draft Revised VBER, Article 4(d). See also Articles 4(b) and 4(c).

elements attached to it. However, given that the primary purpose of the VBER is to provide a clear set of rules under which *all* undertakings may determine whether their agreements are exempted from the application of competition rules, the introduction of an uncertain cost test to exempt dual pricing seems to run counter to the very nature of a block exemption regime that should apply across all economic sectors with equal force. The concern is that the self-assessment of dual pricing under the terms suggested imposes an excessive burden on companies to self-assess their agreements, the great majority of which are unlikely to generate anti-competitive effects.

14. As a result, the ECLF considers that it would be helpful to simplify the draft VBER regime as regards dual pricing. The clearest solution might be to eliminate any reference to the cost test as the basis for whether dual pricing falls within the scope of the draft VBER. For those agreements that are eligible for block exemption, it should be sufficient to prescribe that the checking of the price differential should not be so unreasonably high as to render online sales unprofitable. In turn, an assessment on whether dual pricing is "*related*" to actual cost differences might be more appropriate for the sorts of agreements that would otherwise fall *outside* the scope of the [market share?] thresholds set under the VBER.

15. An alternative solution might be to establish a *presumption* that a price differential below a certain threshold (*e.g.,* online prices not exceeding 15% of bricks & mortar prices) would be assumed to be reasonable, and therefore eligible for block exemption treatment.[13] Having said that, some flexibility may be required in setting a single price differential threshold that would be "fit for purpose" for every industry.

16. Finally, the self-assessment mechanism in these circumstances seems especially problematic, given that the block exemption is being offered upon the satisfaction of market share assessments in two markets rather than in one (10% and 30% respectively), coupled with the fact that the parties to an exempted agreement are also obliged to take due account of potential competition.

---

[13] This idea has also been pointed out by some contributions to the public consultation on the Impact Assessment for the review of the VBER: "[a]*lternatively, as suggested by other respondents, the Vertical Guidelines could set a threshold based on a fixed percentage under which the wholesale price for online sales is assumed reasonable in relation to the wholesale price for offline*" (page 10).

b. Information needed from distributors to enforce dual pricing

17. Another concern arises from the need to strike a fair balance in the extent of retailer surveillance that should be necessary to ensure the effective implementation of a dual pricing policy. On the one hand, a supplier may have the legitimate aim to ensure that the products offered by them at a discount are effectively resold in the bricks & mortar channel. (e.g. a distributor might value the marketing effect of having goods on display in physical retailer locations). On the other hand, an excessive level of pricing information may raise concerns about the possibility of vertical price monitoring and the anti-competitive exchange of commercially sensitive information (*e.g.*, where the supplier competes with distributors at the retail level of trade).[14]

18. Accordingly, the ECLF believes that it would be helpful for companies to obtain further guidance in the draft Vertical Guidelines as to where the boundaries are to be drawn as regards the appropriate level of vertical reselling surveillance that is permissible (whether in terms of the periodicity of review, the level of permissible detail, the need to involve third parties, *etc.*). In addition, examples of the methodology that may be used to determine rebates may be *prima facie* less problematic when a supplier seeks to implement a competition law-compliant dual pricing policy. In the experience of many ECLF members, most concerns around the surveillance function could be addressed through the appropriate use of so-called Chinese Walls, which can very effectively be used in practice to avoid the risk of sensitive business information being exchanged.

Agency Agreements

19. Much of the Commission´s discussion on agency agreements is to be welcomed for injecting clarity into how these commercial relationships are to be treated, given their commercial importance. For example, the conclusion that fulfilment contracts can be compatible with the requirements of Article 101 TFEU is highly welcome. By the same token, the Commission should consider clarifying whether Intermediation Online Service (IOS) providers can legitimately be a party to a fulfilment agreement.[15]

---

[14] In any event, we understand the latter situation may be addressed by reference to the 10% threshold that the draft VBER sets for the exemption of the exchange of information in the context of dual distribution, to the extent that it does not involve a restriction of competition by object.

[15] For example, whereas paragraph 44 of the draft Guidelines indicates that an IOS provider *cannot* be an agent, and while paragraph 178 clarifies that a fulfilment agreement is *not* an agency

20. The clarifications in the guidance regarding risk sharing are helpful to practitioners and industry alike, especially given that issue of risk sharing in the agency context has given rise to a significant degree of uncertainty over the years. Nevertheless, it has to be asked whether the "zero risk" approach adopted by the Commission in the draft Vertical Guidelines appears to be too restrictive in its application to many practical situations. In particular, the Commission proposes to withhold the block exemption from agreements with dual-role agents[16] unless a supplier reimburses the agent for all its costs and risks not only with regard to the products sold via the agency model, but also for all of the party's costs associated with the products sold in the same market via the distributor model. It means that, at least with regard the products sold via the distributor model, the manufacturer bears all the costs and risks of an agency model without the ability to determine at what price the dual role agent may resell its products. This is inconsistent and arguably unnecessary.

21. Accordingly, the ECLF believes that the draft Vertical Guidelines could arguably provide more clarity regarding certain matters such as: (i) explaining that an agency relationship can form part of a wider contractual relationship between parties, with an agency relationship forming just one element of the services to be provided under that relationship; (ii) specifying circumstances where dual-role agency benefits from the block exemption even if the distributor does not reimburse agent for all its costs associated with sales through the distributor model; and (iii) providing some guidance on the approach likely to be adopted by the Commission in relation to bundled services (*e.g.*, by explaining that, in such a setting, the assumption of some level of risk by a contracting party as a part of a different service provided by that party does not automatically lead to the conclusion that an agency relationship does not exist). [17]

---

agreement, can it nevertheless not be the case that an IOS provider can be a party to a fulfilment agreement (given that it is a "*supplier*")? (See discussion below.)

[16] A dual-role agency exists where a supplier uses the same party as an agent for some products (for example in relation to products of higher quality or presenting novel features) and as an independent distributor for other products.

[17] The most typical example of such a scenario available in many Member States would be the provision of logistics services, where the logistics service provider would for technical purposes (tax and ease of accounting) purchase goods to be delivered and then sell them on at an agreed price. As a part of the agency aspect of the relationship, the logistics service provider would *not* assume

22. As regards the possibility of agents working for multiple parties, it must be queried whether the very complex regime proposed by the Commission at paragraphs 34-38 of the draft Guidelines will be capable of being realized in practice.

23. What is arguably the most significant omission in the Vertical Guidelines is the lack of recognition of the need for variations of agency models in relation to online sales channel. This omission of digital service providers from the guidance is likely to lead to problems with the development of new services, as the online channel has its own particular dynamic which generates a range of economic and social welfare benefits. In this regard, there is a particular lack of clarity as to how resale intermediation platforms should be treated (*i.e.*, those platforms that allow brand-owners to control the re-sale of their products purchased by customers). If these parties are not allowed to act as agents because they fall into the category of 'intermediaries´, this could create significant compliance problems for European luxury brand owners, whose commercial reaction might be to shrink the importance of the resale option altogether.

24. The treatment of intermediaries under vertical restraints policy is also linked to the conceptual issue regarding the notion of an Intermediation Online Service (IOS) provider which will now be a "*supplier*".[18] While it may be the case that IOS providers do "*supply*" a service to sellers/brands, reference to the notion of "*supply*" seem to be confusing in the context of the VBER. As the CMA noted in its [Consultation Document](), "*platforms should be categorised neither as agents nor retailers, but instead as a third category of undertaking*" (paragraph 94). While it is open to question whether a "*supplier*" falls comfortably within this "*third category of undertaking*" referred to by the CMA, recourse to the notion of "*supplier*" to embrace an IOS provider is indeed convenient for the Commission where it wishes to prevent IOS providers from fixing price for the transaction(s) they facilitate[19] or being an agent.[20] As such, the draft Guidelines are likely to clash with the Court's case law on agency.[21] This new treatment in the draft Guidelines begs the question whether and how sellers, which in

---

commercial risks for the stock but *would* assume such risk as part of the logistics service in terms of tasks related to delivery, accidental loss, *etc.* (by contrast, specific risk sharing can be different).

[18] A term that is undefined under both the current text of the VBER and in the draft VBER, with Article 1(d) of the draft VBER simply stating that suppliers "*include*" IOS providers and Article 2.4(a) stating that a "*supplier*" can be a manufacturer, an importer or a wholesaler).

[19] Refer to paragraph 179 of the draft Vertical Guidelines.

[20] Refer to paragraph 44 of the draft Vertical Guidelines.

[21] See, e.g., judgments in Cases T-325/01 Daimler Chrysler v Commission EU:T:2005:322; C-217/05 Confederación Espanola de Empresarios de Estaciones de Servicio v CEPSA EU:C:2006:784; and C-279/06 CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL EU:C:2008:485.

the Commission's view already have limited bargaining power vis-à-vis online platforms, can still set the price on online intermediation service platforms without running afoul of the resale price maintenance rules (unless they sell directly via the platform as a "marketplace"). In this respect, it is also worth noting that the CMA does not seem to exclude the possibility that an online platform/IOS provider can be classified as an agent.[22]

25. Given the increasing importance of digital distribution, greater clarity will no doubt be required by the industry as regards the legal classification of IOS providers – for the moment, they seem to be swimming between the Scylla of an inflexible agency regime and the Charybdis created by the policy choice that online sales channels will be compelled to satisfy the same agency rules that clearly apply more comfortably to the world of bricks & mortar distribution.

Non-compete Clauses

26. The Commission has possibly missed an opportunity to clarify its thinking regarding the duration of a legitimate non-compete clauses, which is a problem that is inherited from the existing vertical restraints regime. It is still uncertain to ECLF members whether such clauses are in fact strictly limited for a maximum term of 5 years or are capable of being re-negotiated after 5 years (with the latter being preferred option).

27. There is also nothing in the draft VBER or in the Vertical Guidelines to suggest that a wide non-compete obligation is not available in the selective distribution context (for a duration of up to 5 years). This has often resulted in practice in the drafting of non-compete clauses in very broad terms in a selective distribution setting so as to benefit from the block exemption; these clauses are in turn diluted in their impact through the exclusion of some providers from the scope of the non-compete obligation. This practice has the effect of incentivizing clients to opt for wider non-compete obligations than they might actually require.

28. Finally, the Commission´s position is explained by reference to its stated concern that its intention is to avoid a general boycott situation. This appears to be at odds with the experiences of ECLF members, who have not experienced such concerns in practice. Moreover, it widely that the Commission, to the extent that it is confronted

[22] Refer to the discussion in sections 2.18(a) and 6.4(a) of the Consultation Document.

with such a situation, should seek to utilize the enforcement mechanism already available to it under Article 6 of the VBER.

Resale Price Maintenance/Recommended Prices

29. Lying at the heart of EU vertical restraints policy is the evolution in the Commission´s thinking over the past three decades as regards the treatment of Resale Price Maintenance (RPM) practices. Unfortunately, while there are clear signs that the Commission is keeping an open mind about RPM, it is still the case that it is described as a "by object" restriction of competition (para 170 *etc.*), which means that the position it espouses to the effect that some instances of RPM may be permissible becomes difficult to reconcile with such a categorization. The ECLF suggests that it might be helpful for the Commission to treat RPM - and indeed all restrictions falling within Article 4 of the VBER – as practices that are capable of being justified by the parties as having no appreciable effect on competition. This would be consistent with the precedents developed by the European Courts and would hopefully open up a coherent means by which the Commission could explore the possibility of practices falling within Article 4 of the VBER being considered under the "by effect" category rather than the very blunt instrument that is provided by the "by object" category.

30. The practical issue that arises in practice as regards recommended retail prices (and to a degree, maximum retail prices) is that, regardless of any specific pressure being applied by a supplier, similarly placed distributors either follow recommended retail prices of their own volition or reflect maximum retail prices in their pricing decisions where these have been specified. This can often occur over extended periods of time. The rationale often invoked by distributors for engaging in such conduct is that it facilitates the ease with which business can be done (often to reduce costs associated with developing detailed pricing methodologies by retailers). In some settings, this can lead to *prima facie* irrational behavior in order to achieve a more compliant business setting, including the artificial (at times random) changing of retail prices by retailers or the inclusion by suppliers of some recommended prices that they know the distributor will *not* follow. When this type of conduct occurs in parallel with various forms of marketplace monitoring by suppliers, for whatever reason, or some accidental communications (e-mail, messages) that are interpreted significantly after said communications has occurred, the inference is often readily drawn by Competition Authorities that suppliers are indirectly enforcing RPM under the guise of the retail prices being merely ´recommended´. Accordingly, although the official EU

competition law position surrounding recommended retail prices has not given rise to any significant changes over many years, clarification would still be useful on matters such as: (i) the types of safeguards that could be taken when issuing recommendations; and (ii) the level of care that should be respected when suppliers monitor retail prices.

Shared Exclusivity

31. A major recommendation which is to be welcomed under the draft VBER will allow suppliers to appoint more than one distributor per exclusive territory, while still allowing those distributors to benefit from the VBER´s automatic exemption. Although the VBER does not establish an upper limit for the number of distributors that can be appointed, the draft Vertical Guidelines indicate that the number of exclusive distributors must be "*limited*", "*can't be a large number*" and must be determined in proportion to the territory/customer group in such a way that it secures a certain volume of business which preserves their investment efforts. While the Commission´s relaxation of the notion of "exclusive" should be welcomed, one can anticipate that the uncertain scope of this category of distributors might give rise to legal challenges by distributors appointed in other geographic territories who seek to sell into those geographic areas where they consider that the group of appointed "exclusive" distributors is too broad in scope (*i.e.*, there are too many distributors in the allocated territory) to justify the grant of "shared" exclusivity. In order to prevent such challenges, and to increase legal certainty, it would be advisable for the Commission to provide some further guidance on the basis upon which the "shared exclusivity" category can be limited.

Category Management

32. The inclusion of the discussion on category management in the draft Vertical Guidelines is also welcomed, but it may be the case that an opportunity has been missed to explain the Commission´s thinking in this area on a number of practical issues which have a material impact on the way in which these practices affect competitive dynamics. For example, industry could benefit greatly from Commission guidance on issues such as: (i) the means by which antitrust risks can be reduced in those cases where a so-called "category captain" works for different distributors; and (ii) the provision of further detail on the most appropriate means of managing

information flows within a supplier´s business where it also holds the role of a category manager. In both cases, there may *inter alia* be a need to use different employees as account and category managers, there may be a need to erect Chinese walls and the need to adopt other measures to ensure that the flow of competitive information is kept to the minimum required to overcome the potential conflict of interest situation in which a category captain might find itself. At the very least, the Commission should consider elaborating upon the types of circumstances where these situations may be problematic and the type of of behavior that could minimize such antitrust risk. In the absence of such guidance, the existence of conflict of interest situations might at times lead to apparently irrational commercial reactions designed to manage antitrust risk.

Parity Clauses

33. The Commission´s position that 'narrow' parity clauses seem to escape the prohibition of Article 5 (1) of the VBER is a development that should also be welcomed. In the absence of the Commission playing a more active role in the enforcement of vertical restraints policy under the decentralization regime that is in place under Regulation 1/2003 and given the heated debates on this issue in recent years a clearer position and potentially a provision of a framework to analyse parity clauses by the Commission would be welcome.

IV. Conclusions

34. The ECLF welcomes the Commission´s efforts to upgrade vertical restraints policy to take into account marketplace developments and new ways of thinking about the impact of vertical restraints on the structure of competition and its impact on consumer welfare. We have sought to point out those areas of the Commission´s guidance where we believe that greater flexibility is required in terms of rules that need to be followed (on the basis of the “less is more” principle) but have also asked for greater clarity where we believe that critical concepts remain ambiguous and will therefore hamper effective implementation.

35. One area where we believe the Commission needs to take more affirmative action is in relation to the agency doctrine and its necessarily nuanced application in a digital world. Simply applying traditional agency theory to the online world does not seem to be a feasible option. We would therefore recommend that the Commission re-evaluate its policy positions in this regard. To this end, we would welcome the Commission

clarifying its approach to the positive steps that can be taken by industry to prevent anti-competitive information flows and insulate firms from engaging in problematic practices by virtue of their twin role of platform provider and supplier (or category captain/supplier).

36. Finally, we believe that addressing some of the traditional concepts which render the block exemption regime difficult to apply in a world of self-assessment would benefit from the Commission introducing some guidance as to the leeway afforded to undertakings when making judgement calls about matters such as market shares and the likelihood of market entry.

ANNEX 1
MEMBERS OF THE ECLF WORKING GROUP

- **British Institute of International and Comparative Law:** Dr Liza Lovdahl Gormsen
- **Cleary Gottlieb**: Antoine Winckler
- **King's College London:** Peter Alexiadis (Chair)
- **Ellex:** Martin Mäesalu
- **Uria Menéndez:** Edurne Navarro Varona
- **Squire Patton Boggs:** Francesco Liberatore/Estellon Elling