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Approval of the content of a draft for a

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Guidelines on vertical restraints

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Guidelines on vertical restraints

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COMMISSION NOTICE

Guidelines on Vertical Restraints

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1. INTRODUCTION

1.1. Purpose and structure of these Guidelines

(1) These Guidelines set out the principles for the assessment of vertical agreements and concerted practices under Article 101 of the Treaty on the Functioning of the European Union (hereinafter "Article 101"),[1] and Commission Regulation (EU) [No [X]/2022 of [X] 2022] 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 (hereinafter "VBER").[2] For ease of reference, unless otherwise stated, in these Guidelines, the term "agreement" also covers concerted practices.

(2) By issuing these Guidelines, the Commission aims to help companies conduct their own assessment of vertical agreements under the EU competition rules. However, each agreement must be evaluated in the light of its own facts.[3] These Guidelines cannot therefore be applied mechanically. They are also without prejudice to the case-law of the General Court and the Court of Justice of the European Union (hereinafter "CJEU").

(3) Vertical agreements may be concluded for intermediate and final goods and services. Unless otherwise stated, these Guidelines apply to all types of goods and services, and to all levels of trade.

(4) These Guidelines are structured as follows:

- This first section is an introduction, which includes explanations as to the reasons why and the extent to which the Commission provides guidance on vertical agreements. The remainder of this introduction sets out the context in which Article 101 applies to vertical agreements.
- The second section provides an overview of the positive and negative effects created by vertical agreements. The VBER in its entirety, these Guidelines, and the Commission's enforcement policy in individual cases are based on the consideration of these effects.
- The third section deals with vertical agreements that generally fall outside Article 101(1). While the VBER does not apply to these agreements, it is necessary to provide guidance on the conditions under which vertical agreements fall outside Article 101(1).
- The fourth section provides further guidance on the scope of the VBER. It includes explanations on the safe harbour established by the VBER and the definition of a vertical agreement. This section also deals more specifically with vertical agreements in relation to the online platform economy, which plays an increasingly important role in the distribution of goods and services and where vertical agreements between undertakings may not be easy to categorise under the concepts traditionally associated with vertical agreements. That section also explains the limits of the application of the VBER, as stipulated in Article 2(2) to (4) VBER, and explains the relationship with other

[1] These Guidelines replace the Commission Notice – Guidelines on Vertical Restraints, OJ C 130, 19.5.2010, p. 1.

[2] OJ L, [X], [X].[X].[X], p. [X].

[3] The Commission will continue to monitor the operation of the VBER and these Guidelines and may revise this notice in light of future developments.

block exemption regulations pursuant to Article 2(8) VBER. It also contains a description of the main types of distribution systems. This description is relevant for a number of provisions of the VBER, notably the list of hardcore restrictions provided in Article 4(b) VBER.

- The fifth section addresses the definition of the relevant markets and the calculation of the market shares of the undertakings party to a vertical agreement. It serves to assess whether the market share thresholds provided in Article 3 VBER determining the applicability of the VBER are exceeded.
- The sixth section deals with the hardcore restrictions set out in Article 4 VBER and the excluded restrictions set out in Article 5 VBER, including explanations as to why the qualification as hardcore or excluded restriction is relevant.
- The seventh section contains guidance on the withdrawal of the benefit of the VBER pursuant to Article 29 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (hereafter "Regulation 1/2003")[4] and regulations declaring that the VBER does not apply pursuant to Article 6 VBER.
- The eighth section describes the Commission's enforcement policy in individual cases. To this end, it explains how vertical agreements are assessed under Article 101(1) and 101(3) outside the scope of the VBER, and provides guidance on a non-exhaustive list of specific vertical agreements.

1.2. Applicability of Article 101 to vertical agreements

(5) The objective of Article 101 is to ensure that undertakings do not use agreements, whether horizontal or vertical,[5] to prevent, restrict or distort competition on the market to the ultimate detriment of consumers. Article 101 also pursues the wider objective of achieving an integrated internal market,[6] which enhances competition in the European Union. Undertakings may not use vertical agreements to re-establish private barriers between Member States where State barriers have been successfully abolished.

(6) Article 101 applies to vertical agreements and restrictions in vertical agreements that affect trade between Member States and that prevent, restrict or distort competition.[7] It provides a legal framework for the assessment of vertical restraints,[8] which takes

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4 OJ L 1, 4.1.2003, p. 1.

5 For the application of the VBER, Article 1(1)(a) of the VBER defines a 'vertical agreement' as "an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services". Further guidance on this definition is provided in section 4.2. of these Guidelines.

6 See for example judgments in Case 6/72 *Europemballage Corporation and Continental Can Company v Commission* EU:C:1973:22, paragraphs 25-26; Case C-52/09 *TeliaSonera Sverige* EU:C:2011:83, paragraph 22; Case C-209/10 *Post Danmark A/S v Konkurrencerådet* EU:C:2012:172, paragraphs 20-24 and Case C-413/14 P *Intel Corp. Inc. v Commission* EU:C:2017:632, paragraph 133.

7 See *inter alia* judgments in Joined Cases 56/64 and 58/64 *Grundig-Consten v Commission* EU:C:1966:41; Case 56/65 *Technique Minière* v *Maschinenbau Ulm* EU:C:1966:38; and Case T-77/92 *Parker Pen* v *Commission* EU:T:1994:85.

8 For the application of the VBER, Article 1(1)(b) of the VBER defines a 'vertical restraint as "a restriction of competition in a vertical agreement falling *within* the scope of Article 101(1) [emphasis

into consideration the distinction between anti-competitive and pro-competitive effects. Article 101(1) prohibits agreements that appreciably restrict or distort competition, while Article 101(3) exempts those agreements falling within Article 101(1) that provide sufficient benefits to outweigh their anti-competitive effects.[9]

(7) While there is no mandatory sequence for the assessment of vertical agreements, it generally involves the following steps:

(a) First, the undertakings involved need to establish the market shares of the supplier and the buyer on the market where they respectively sell and purchase the contract goods or services.

(b) If the relevant market share of the supplier and the buyer each do not exceed the 30% market share threshold, the vertical agreement is covered by the safe harbour created by the VBER, provided that it contains neither any hardcore restrictions nor any excluded restrictions that cannot be severed from the rest of the vertical agreement.

(c) If the relevant market share is above the 30% threshold for the supplier and/or the buyer, it is necessary to assess whether the vertical agreement falls within Article 101(1).

(d) If the vertical agreement falls within Article 101(1), it is necessary to examine whether it fulfils the conditions for an individual exemption under Article 101(3).

2. EFFECTS OF VERTICAL AGREEMENTS

(8) The assessment of vertical restraints under Article 101 and the application of the VBER must take into account all relevant parameters of competition, such as prices, output in terms of product quantities, product quality and variety, and innovation. They must also take into account that vertical agreements between undertakings operating at different levels of the production or distribution chain are generally less harmful than horizontal agreements between competitors supplying substitutable goods or services. In principle, this is due to the complementary nature of the activities of the parties to a vertical agreement, which normally implies that pro-competitive actions by one of the undertakings benefit the other party to the agreement, and ultimately consumers. In contrast to horizontal agreements, the parties to a vertical agreement therefore tend to have an incentive to agree on lower prices and higher levels of service, which also benefits consumers. The complementary nature of the activities of the parties to a vertical agreement in placing goods or services on the market also implies that vertical restraints may provide substantial scope for efficiencies, for example by optimising manufacturing or distribution processes and services.

(9) Undertakings with market power may try to use vertical restraints to pursue anti-competitive purposes that ultimately harm consumers. Market power is the ability to maintain prices above competitive levels or to maintain output in terms of product

added]". Further guidance on vertical agreements that generally fall *outside* the scope of Article 101(1) is provided in section 3. of these Guidelines.

[9] See Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97 for the Commission's general methodology and interpretation of the conditions for applying Article 101(1) and in particular Article 101(3).

quantities, product quality and variety or innovation below competitive levels for a not insignificant period of time. The degree of market power normally required for a finding of an infringement under Article 101(1) is less than the degree of market power required for a finding of dominance under Article 102. However, in view of the complementary nature of the activities of the parties to a vertical agreement, the exercise of market power by an undertaking either upstream or downstream would normally hurt the demand for the contract goods or services by the other undertaking party to the vertical agreement. Undertakings party to a vertical agreement therefore usually have an incentive to prevent the exercise of market power by their contract party.

2.1. Positive effects

(10) Vertical agreements may have positive effects, for example lower prices, the promotion of non-price competition or improved quality of services. Arm's length dealings between a supplier and a buyer, which determine only the price and the quantity of a transaction, can often lead to a sub-optimal level of investments and sales, as they do not take into account externalities arising from the complementary nature of the activities of the supplier and its distributors. These externalities fall into two categories: vertical externalities and horizontal externalities.

(11) Vertical externalities arise because the decisions and actions taken at different levels of the supply and distribution chain determine aspects of the sale of goods or services, such as price, quality, related services and marketing, which affect not only the undertaking making the decisions but also other undertakings at other levels of the supply and distribution chain. For instance, a distributor may not gain all the benefits of its efforts to increase sales, as some of these benefits may go to the supplier. This is because for every extra unit a distributor sells by lowering its resale price or by increasing its sales efforts, the supplier benefits if its wholesale price exceeds its marginal production costs. Thus, there may be a positive externality bestowed on the supplier by such distributor's actions. Conversely, there may be situations where, from the supplier's perspective, the distributor may be pricing too high,[10] and/or making too little sales efforts.

(12) Horizontal externalities may arise between distributors of the same goods or services when a distributor is unable to fully appropriate the benefits of its sales efforts. For instance, demand-enhancing pre-sale services provided by one distributor, such as personalised advice in relation to particular goods or services, may lead to higher sales by competing distributors offering the same goods or services and thus create incentives among distributors to free-ride on costly services provided by others. In an omni-channel distribution environment (online and offline), free-riding can occur in both directions.[11] For example, customers may visit a brick and mortar shop to test goods or services or to obtain other useful information on which they base their decision to purchase, but then order the product online from a different distributor. Conversely, customers may gather information in the pre-purchase phase (including inspiration, information, and evaluation) from an online shop, and then visit a brick and mortar shop, ask for and test particular goods or services based on this

[10] Sometimes referred to as "double marginalisation problem".

[11] See Commission Staff Working Document – Evaluation of the Vertical Block Exemption Regulation, document SWD(2020) 172 final of 10.5.2017, p. 31-42 and the referenced evaluation study; Commission, Final report on the E-commerce Sector Inquiry, COM(2017) 229 final, 10 May 2017, paragraph 11.

information, and finally purchase offline in a brick and mortar shop. Where such free-riding is possible and where the distributor that provides pre-sales services is unable to fully appropriate the benefits, this may lead to a sub-optimal provision of such services in terms of quantity or quality.

(13) In the presence of such externalities, suppliers have an incentive to control certain aspects of their distributors' operations. In particular, vertical agreements may allow suppliers to internalise the abovementioned external effects, increase the joint profit of the vertical supply and distribution chain and, under certain circumstances, consumer welfare.

(14) While trying to give a comprehensive overview of the various justifications for vertical restraints, these Guidelines do not claim to be complete or exhaustive. The reasons set out below may justify the application of certain vertical restraints.

(a) The vertical externality issue or double marginalisation problem: The setting of too high of a price by the distributor, not taking into account the effect of its decisions on the supplier, can be avoided by the supplier imposing a maximum resale price on the distributor. To increase the distributor's sales efforts, the supplier may, for example, use selective distribution or exclusive distribution.

(b) The free-rider problem: Free-riding between buyers may occur at the wholesale or retail level, in particular where it is not possible for the supplier to impose effective promotion or service requirements on all buyers. Free-riding between buyers can only occur on pre-sales services and other promotional activities, but not on after-sales services for which the distributor can charge its customers individually. Pre-sales efforts on which free-riding may occur may be important, for example, when the goods or services are relatively new, technically complex or of a high value, or when the reputation of the goods or services is an important determinant of their demand. Non-compete restrictions can help overcome free-riding between suppliers.

(c) To open up or enter new markets: Where a supplier wishes to enter a new geographic market, for instance by exporting to another country, this may involve special sunk investments by the distributor to establish the brand on the market. In order to persuade a local distributor to make these investments, it may be necessary to provide territorial protection so that the distributor can recoup these investments. This may justify restricting distributors located in other geographic markets from selling on the new market (see also paragraph (167) of these Guidelines). This is a special case of the free-rider problem set out in point b) above.

(d) The certification free-rider issue: In some sectors, certain distributors have a reputation for stocking only quality goods or providing quality services (so-called "premium distributors"). In such a case, selling through those distributors may be crucial, in particular for the successful launch of a new product. If the supplier cannot limit its sales to such premium distributors, it runs the risk of being de-listed. There may, therefore, be justifications for allowing exclusive distribution or selective distribution.

(e) The hold-up problem: Sometimes there are client-specific investments to be made by either the supplier or the buyer, such as investments in special equipment or training. For instance, a component manufacturer may have to build new machines and tools in order to satisfy a particular requirement of one

of its customers. Where such client-specific investments cannot be contracted directly, or where such contracting is incomplete, the undertaking concerned may not be able to commit to make the optimal level of investments from the point of view of the supplier and, once selected by the supplier, the buyer may only engage in sub-optimal investments. Vertical agreements may help remove or alleviate such a commitment problem.

(f) The specific hold-up problem that may arise in the case of the transfer of substantial know-how: The know-how, once provided, cannot be taken back and the provider of the know-how may not want it to be used for or by its competitors. In as far as the know-how was not readily available to the buyer, and it is substantial and indispensable for the operation of the agreement, such a transfer may justify a non-compete restriction, which would normally fall outside Article 101(1) in such cases.

(g) Economies of scale in distribution: To have scale economies exploited and thereby see a lower retail price for its goods or services, the manufacturer may want to concentrate the resale of its goods or services on a limited number of distributors. To do so, it could use exclusive distribution, quantity forcing in the form of a minimum purchasing requirement, selective distribution containing such a requirement or exclusive sourcing.

(h) Uniformity and quality standardisation: A vertical restraint may help create a brand image by imposing a certain measure of uniformity and quality standardisation on the distributors, thereby increasing the attractiveness of the goods or services concerned for finals customer and thereby sales. This applies, for instance, in selective distribution and franchising.

(i) Capital market imperfections: Providers of capital such as banks and equity markets may provide capital sub-optimally when they have imperfect information on the solvency of the borrower or where there is an inadequate basis to secure the loan. The buyer or supplier may have better information and may be able, through an exclusive relationship, to obtain extra security for its investment. Where the supplier provides the loan to the buyer, this may lead to the imposition of a non-compete obligation or quantity forcing on the buyer. Where the buyer provides the loan to the supplier, this may be the reason for imposing exclusive supply or quantity forcing on the supplier.

(15) The nine situations listed in the previous paragraph show that generally vertical agreements are likely to help realise efficiencies and develop new markets, and that this may offset possible negative effects. The case is in general strongest for vertical restraints that help the introduction of new and complex goods or services, or protect relationship-specific investments. A vertical restraint is sometimes necessary for as long as the supplier sells its goods or services to the buyer (see in particular the situations described in (a), (b), (f), (g) and (h) of the previous paragraph).

(16) There is a large degree of substitutability between the different vertical restraints. This means that the same inefficiency problem can be solved by different vertical restraints. For instance, it may be possible to achieve economies of scale in distribution by using exclusive distribution, selective distribution, quantity forcing or exclusive sourcing. However, the negative effects on competition may differ between the various vertical restraints, which plays a role when indispensability is assessed under Article 101(3).

2.2. Negative effects

(17) The negative effects on the market which may result from vertical restraints and which EU competition law aims to prevent are notably the following:

(a) Anti-competitive foreclosure of other suppliers or other buyers by raising barriers to entry or expansion;

(b) The softening of competition between the supplier and its competitors and/or the facilitation of (explicit or tacit) collusion[12] among these suppliers, often referred to as the reduction of inter-brand competition.

(c) The softening of competition between the buyer and its competitors or the facilitation of (explicit or tacit) collusion among these buyers. However, a reduction of intra-brand competition (i.e. competition between distributors of the goods or services of the same supplier) is by itself unlikely to lead to negative effects for consumers if inter-brand competition (i.e. competition between distributors of the goods or services of different suppliers) is strong.

(d) The creation of obstacles to market integration, including notably limitations on consumer choice to purchase goods or services in any Member State.

(18) Foreclosure, softening of competition and collusion at the supplier level may harm consumers in particular by increasing the wholesale prices of goods or services (which in turn may lead to higher retail prices), limiting the choice of goods or services, lowering their quality or reducing the level of innovation at the supplier level. Foreclosure, softening of competition and collusion at the distributor level may harm consumers in particular by increasing the retail prices of goods or services, limiting the choice of price-service combinations and distribution formats, lowering the availability and quality of retail services and reducing the level of innovation at the distribution level.

(19) In a market where individual retailers distribute the brand(s) of only one supplier, a reduction of competition between the distributors of the same brand will lead to a reduction of intra-brand competition between these distributors, but may not have a negative effect on competition between distributors in general. In such a case, if inter-brand competition is strong, it is unlikely that a reduction of intra-brand competition will have negative effects for consumers.

(20) Possible negative effects of vertical restraints are reinforced when several suppliers and their buyers organise their trade in a similar way, leading to so-called cumulative effects.[13]

3. VERTICAL AGREEMENTS THAT GENERALLY FALL OUTSIDE THE SCOPE OF ARTICLE 101(1)

3.1. Lack of effect on trade, agreements of minor importance and SMEs

(21) Before addressing the scope of the VBER, its application, and more generally the assessment of vertical agreements under Article 101(1) and 101(3), it is important to

[12] As regards the notions of explicit and tacit collusion, see judgment in joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others v Commission* EU:C:1993:120.

[13] Cumulative effects can notably justify a withdrawal of the benefit of the VBER, see section 7.1. of these Guidelines.

recall that the VBER applies only to agreements falling *within* the scope of application of Article 101(1).

(22) Agreements that are not capable of appreciably affecting trade between Member States (lack of effect on trade) or which do not appreciably restrict competition (agreements of minor importance) fall outside the scope of Article 101(1).[14] The Commission has provided guidance on the lack of effect on trade in the Commission Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (hereinafter "Effect on Trade Guidelines"),[15] and on agreements of minor importance in the Commission Notice on agreements of minor importance which do not appreciably restrict competition under 101(1) of the Treaty on the Functioning of the European Union (hereinafter "De Minimis Notice").[16] These Guidelines are without prejudice to the Effect on Trade Guidelines and the De Minimis Notice, as well as any future Commission guidance in this respect.

(23) The Effect on Trade Guidelines set out the principles developed by the Union Courts to interpret the effect on trade concept and indicate when agreements are unlikely to be capable of appreciably affecting trade between Member States. They include a negative rebuttable presumption that applies to all agreements within the meaning of Article 101(1) irrespective of the nature of the restrictions included in such agreements, thus applying also to agreements containing hardcore restrictions.[17] According to this presumption, vertical agreements are in principle not capable of appreciably affecting trade between Member States when (i) the aggregate market share of the parties on any relevant market within the Union affected by the agreement does not exceed 5%, and (ii) the aggregate annual Union turnover of the supplier generated with the products covered by the agreement does not exceed EUR 40 million.[18] The Commission may rebut the presumption if an analysis of the characteristics of the agreement and its economic context demonstrates the contrary.

(24) As set out in the De Minimis Notice, vertical agreements entered into by non-competitors are generally considered to fall outside the scope of Article 101(1) if the market share held by each of the parties to the agreement does not exceed 15% on any of the relevant markets affected by the agreement.[19] This general rule is subject to two exceptions. Firstly, as regards hardcore restrictions, Article 101(1) applies irrespective of the parties' market shares.[20] This is because an agreement that may affect trade between Member States and which has an anti-competitive object may by its nature and independently of any concrete effect constitute an appreciable restriction on competition.[21] Secondly, the 15% market share thresholds are reduced to 5% where, in a relevant market, competition is restricted by the cumulative effect

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14 See judgment in Case C-226/11 *Expedia Inc. v Autorité de la concurrence* EU:C:2012:795, paragraphs 16 and 17 with further references.

15 OJ C 101, 27.4.2004, p. 81.

16 OJ C C 291, 30.8.2014, p. 1.

17 Effect on Trade Guidelines, paragraph 50.

18 Effect on Trade Guidelines, paragraph 52.

19 De Minimis Notice, paragraph 8, which also includes a market share threshold for agreements between actual or potential competitors, according to which such agreements do not appreciably restrict competition within the meaning of Article 101(1) if the aggregate market share held by the parties to the agreement does not exceed 10% on any of the relevant markets affected by the agreement.

20 See judgments in Case 5/69 *Völk* v *Vervaecke* EU:C:1969:35; Case 1/71 *Cadillon* v *Höss* EU:C:1971:47 and Case C-306/96 *Javico* v *Yves Saint Laurent* EU:C:1998:173, paragraphs 16 and 17.

21 Judgment in Case C-226/11 *Expedia Inc. v Autorité de la concurrence* EU:C:2012:795, paragraph 37.

of parallel networks of agreements. Paragraphs (241) to (243) of these Guidelines deal with cumulative effects in the context of the withdrawal of the benefit of the VBER. The De Minimis Notice clarifies that individual suppliers or distributors with a market share not exceeding 5% are in general not considered to contribute significantly to a cumulative foreclosure effect.[22]

(25) Furthermore, there is no presumption that vertical agreements concluded by undertakings of which one or more has an individual market share exceeding 15% automatically fall within Article 101(1). Such agreements may still lack an appreciable effect on trade between Member States or they may not constitute an appreciable restriction of competition.[23] They therefore need to be assessed in their legal and economic context. These Guidelines include criteria for the individual of such agreements.

(26) In addition, the Commission considers that vertical agreements between small and medium-sized undertakings (hereinafter "SMEs")[24] are rarely capable of appreciably affecting trade between Member States. The Commission also considers that such agreements rarely appreciably restrict competition within the meaning of Article 101(1), unless they include restrictions of competition by object within the meaning of Article 101(1). Therefore, vertical agreements between SMEs generally fall outside the scope of Article 101(1). In cases where such agreements nonetheless meet the conditions for the application of Article 101(1), the Commission will normally refrain from opening proceedings for lack of sufficient interest for the Union, unless the undertakings collectively or individually hold a dominant position in a substantial part of the internal market.

3.2. Agency agreements

3.2.1. Definition of agency agreements

(27) An agent is a legal or physical person entrusted with the power to negotiate and/or conclude contracts on behalf of another person ('the principal'), either in the agent's own name or in the name of the principal, for the purchase of goods or services by the principal, or the sale of goods or services supplied by the principal.

(28) In certain circumstances, the relationship between an agent and its principal may be characterised as one in which the agent no longer acts as an independent economic operator. This applies where the agent does not bear any or only insignificant financial or commercial risk associated with the contracts concluded or negotiated on behalf of the principal, as further explained below.[25] In that case, the agency agreement falls outside the scope of Article 101(1). The qualification given to their agreement by the parties or by national legislation is not material for the assessment. Since they constitute an exception to the general applicability of Article 101 to agreements between undertakings, the conditions for categorising an agreement as an agency agreement for the purpose of applying Article 101(1) should be interpreted narrowly.

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22 De Minimis Notice, paragraph 8.

23 See judgment in Case T-7/93 *Langnese-Iglo* v *Commission* EU:T:1995:98, paragraph 98.

24 As defined in the Annex to Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, OJ L 124, 20.5.2003, p. 36.

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

(29) There are three types of financial or commercial risk that are material to the categorisation of an agreement as an agency agreement for the purpose of applying Article 101(1).

– First, there are contract-specific risks, which are directly related to the contracts concluded and/or negotiated by the agent on behalf of the principal, such as financing of stocks.

– Second, there are risks related to market-specific investments. These are investments specifically required for the type of activity for which the agent has been appointed by the principal, that is, which are required to enable the agent to conclude and/or negotiate this type of contract. Such investments are usually sunk, which means that upon leaving that particular field of activity the investment cannot be used for other activities or sold other than at a significant loss.

– Third, there are the risks related to other activities undertaken on the same product market, to the extent that the principal requires under the agency relationship that the agent undertakes such activities not as an agent on behalf of the principal, but at its own risk.

(30) For the purposes of applying Article 101(1) TFEU, an agreement will be qualified as a agency agreement if the agent bears no, or only insignificant, risks of the three aforementioned types. The significance of any such risks undertaken by the agent is generally to be assessed by reference to the revenues generated by the agent from providing the agency services rather than by reference to the revenues generated by the sale of the goods or services covered by the agency agreement. However, risks that are related to the activity of providing agency services in general, such as the risk of the agent's income being dependent upon its success as an agent or general investments in for instance premises or personnel that could be used for any type of activity, are not material to this assessment.

(31) In light of the above, for the purpose of applying Article 101(1), the following list provides examples of features generally found in agency agreements. This is the case where the agent:

(a) does not acquire the property of the goods bought or sold under the agency agreement and does not itself supply the contract services. The fact that the agent may temporarily, for a very brief period of time, acquire the property of the contract goods while selling them on behalf of the principal does not preclude an agency agreement, provided the agent does not incur any costs or risks related to that transfer of property;

(b) does not contribute to the costs relating to the supply/purchase of the contract goods or services, including the costs of transporting the goods. This does not preclude the agent from carrying out the transport service, provided that the costs are covered by the principal;

(c) does not maintain at its own cost or risk stocks of the contract goods, including the costs of financing the stocks and the costs of loss of stocks and can return unsold goods to the principal without charge, unless the agent is liable for fault (for example, by failing to comply with reasonable security measures to avoid loss of stocks);

(d) does not take responsibility for customers' non-performance of the contract (for instance for non-payments by the customer), with the exception of the loss

of the agent's commission, unless the agent is liable for fault (for example, by failing to comply with reasonable security or anti-theft measures or failing to comply with reasonable measures to report theft to the principal or police or to communicate to the principal all necessary information available to him on the customer's financial reliability);

(e) does not assume responsibility towards customers or other third parties for loss or damage resulting from the supply of the contract goods or services, unless, as agent, it is liable for fault in this respect;

(f) is not, directly or indirectly, obliged to invest in sales promotion, including through contributions to the advertising budget of the principal or to advertising or promotional activities specifically relating to the contract goods or services;

(g) does not make market-specific investments in equipment, premises, training of personnel or advertising specific to the contract goods or services, such as for example the petrol storage tank in the case of petrol retailing, specific software to sell insurance policies in the case of insurance agents, or advertising relating to routes or destinations in the case of travel agents selling flights or hotel accommodation, unless these costs are fully reimbursed by the principal;

(h) does not undertake other activities within the same product market required by the principal under the agency relationship (e.g. the delivery of the goods), unless these activities are fully reimbursed by the principal.

(32) Where the agent incurs one or more of the risks or costs mentioned in paragraphs (28) to (31) of these Guidelines, the agreement between the agent and principal will not be qualified as an agency agreement. The question of risk must be assessed on a case-by-case basis, and with regard to the economic reality of the situation rather than the legal form. For practical reasons, the risk analysis may start with the assessment of the contract-specific risks. If the agent incurs contract-specific risks which are not insignificant, that will be enough to conclude that the agent is an independent distributor. If the agent does not incur contract-specific risks, then it will be necessary to continue the analysis by assessing the risks relating to market-specific investments. Finally, if the agent does not incur any contract-specific risks or any risks relating to market-specific investments, the risks related to other activities required under the agency relationship within the same product market may have to be considered.

(33) A principal may use various methods to reimburse the relevant risks, as long as such methods ensure that the agent bears no, or only insignificant, risks of the types set out in paragraphs (28) to (31) of these Guidelines. For example, a principal may choose to reimburse the precise costs incurred, or it may cover the costs by way of a fixed lump sum, or it may pay the agent a fixed percentage of the revenues from the goods or services sold under the agency agreement. To ensure that all relevant risks are covered, it may be necessary to provide a simple method for the agent to declare and request the reimbursement of any costs exceeding the agreed lump sum or fixed percentage. It may also be necessary for the principal to systematically monitor any changes to the relevant costs and to adapt the lump sum or fixed percentage accordingly. Where the relevant costs are reimbursed by way of a percentage of the price of the products sold under the agency agreement, the principal should also take into account that the agent may incur relevant market-specific investments costs even

where it makes limited or no sales for a certain period of time. Such costs have to be reimbursed by the principal.

(34) An independent distributor of some goods or services of a supplier may also act as an agent for other goods or service of that same supplier, provided that the activities and risks covered by the agency agreement can be effectively delineated (for example because they concern goods or services presenting additional functionalities or new features). For the agreement to be considered an agency agreement for the purpose of applying Article 101, the independent distributor must be genuinely free to enter into the agency agreement (for example the agency relationship must not be *de facto* imposed by the principal through a threat to terminate or worsen the terms of the distribution relationship) and, as mentioned in paragraphs (28) to (31) of these Guidelines, all relevant risks linked to the sale of the goods or services covered by the agency agreement, including market-specific investments, must be borne by the principal.

(35) Where an agent undertakes other activities for the same or other suppliers at its own risk, there is a risk that the conditions imposed on the agent for its agency activity will influence its incentives and limit its decision-making freedom when it sells products as an independent activity. In particular, there is a risk that the pricing policy of the principal for the products sold under the agency agreement will influence the incentives of the agent/distributor to price independently the products that it sells as an independent distributor. In addition, the combination of agency and independent distribution for the same supplier raises difficulties in distinguishing between investments and costs that relate to the agency function, including market-specific investments, and those only related to the independent activity. In such cases, the assessment of whether an agency relationship meets the conditions set out in paragraphs (28) to (31) of these Guidelines can therefore be particularly complex.[26]

(36) The risks described in paragraphs (28) to (31) of these Guidelines are of particular concern if the agent undertakes other activities as an independent distributor for the same principal in the same product market. Conversely, those risks are less likely to arise if the other activities the agent undertakes as an independent distributor concern a different product market.[27] More generally, the less interchangeable the products are, the less likely are those risks to occur. In product markets comprising products not presenting objectively distinct characteristics, such as higher quality, novel features or additional functions, such delineation appears more difficult and there may therefore be a significant risk of the agent being influenced by the terms of the agency agreement, notably regarding the price setting, for the products it distributes independently.

(37) To identify the market-specific investments to be reimbursed when entering into an agency agreement with one of its independent distributors that is already active on the relevant market, the principal should consider the hypothetical situation of an agent that is not yet active in the relevant market in order to assess which

[26] Judgment of the Court of 16 December 1975, *Coöperatieve Vereniging "Suiker Unie" UA and others v Commission of the European Communities*, Joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73., ECLI:EU:C:1975:174 paragraphs 537-557.

[27] Judgment of the Court of First Instance (Fifth Chamber) of 15 September 2005, *DaimlerChrysler AG v Commission of the European Communities*, Case T-325/01, ECLI:EU:T:2005:322, paragraphs 100 and 113.

investments are relevant to the type of activity for which the agent is appointed. The only market-specific investments that the principal would not have to cover would be those that relate exclusively to the sale of differentiated products in the same product market that are not sold under the agency agreement but are distributed independently, by contrast to market-specific investments needed to operate in the relevant product market, which the principal would have to cover in all cases. This is because the agent would not incur the market-specific costs corresponding to the differentiated products if it did not also act as an independent distributor for those products in addition to the products it distributes as an agent, provided that it can operate on the relevant market without selling the former. To the extent that the relevant investments have already been depreciated (e.g. investments in activity-specific furniture), the reimbursement may be adjusted proportionately.

(38) Example of how the costs can be allocated in case of a distributor that also acts as agent for certain products for the same supplier.

An independent distributor sells products A, B and C. Products A and B belong to the same product market, which comprises differentiated products presenting objectively different characteristics. Product C belongs to a different product market.

A supplier of product B generally distributes its products using independent distributors. However, for the distribution of a particular type of the same product, namely product A which features a new functionality, it wishes to use an agency agreement, which it offers to its existing independent distributors in the same product market without de iure or de facto requiring them to enter into this agreement.

For the agency agreement not to fall in the scope of Article 101(1) TFEU and to meet the conditions of paragraphs (28) to (31) of these Guidelines, the principal has to cover all relevant investments to the activity of selling each of products A and B (and not only A products) as they belong to the same product market. For example, all costs incurred to adapt or furnish a shop in order to display and sell products A and B are likely to be market-specific. Similarly, the costs of training personnel in order to sell products A and B and costs related to specific storage equipment, which may be needed for products A and B, are also likely to be market-specific. These relevant investments, which would normally be required for an agent to enter the market and start selling products A and B, should be borne by the principal even if the specific agent is already established on that market as an independent distributor.

However, the principal would not have to cover investments for the sale of product C, which does not belong to the same product market as products A and B. Moreover, in case the sale of product B requires specific investments that are not necessary for the sale of product A (e.g. dedicated furniture or staff training), such investments would not be relevant and would therefore not have to be covered by the principal, provided that a distributor can operate on the relevant market comprising products A and B by selling only product A.

As regards advertising, investments in advertising for the agent's shop as such (instead of advertising specific to product A) would benefit both the agent's shop in general as well as the sales of products A, B and C, while only product A is sold under the agency agreement. These costs would therefore be partly relevant for the assessment of the agency agreement, to the extent they relate to the sale of product A which is sold under the agency agreement, while they are also relevant to the general activity of selling products A and B. The cost of an advertising campaign relating exclusively to

products B or C, however, would not be relevant and would therefore not have to be covered by the principal, provided that a distributor can operate on the relevant market selling only product A.

The same principles apply to investments in a website or an online store, since part of these investments would not be relevant, as they would have to be made irrespective of the products sold under the agency agreement. Therefore, general investments in the design of a website would not have to be reimbursed, insofar as the website structure itself could be used to sell products other than those belonging to the relevant product market (e.g. C products or, more generally, products other than A and B). However, investments related to the activity of selling or advertising products in the relevant product market (i.e. both products A and B) on the website would be relevant. Therefore, depending on the level of investment required to advertise and sell A and B products on the website, the principal would have to cover part of the costs of setting up the website or the online store. Any specific investments for advertising or selling product B only would not have to be covered, provided that a distributor can operate on the relevant market selling only product A.

3.2.2. Application of Article 101(1) to agency agreements

(39) Where an agreement meets the conditions to be categorised as an agency agreement for the purpose of applying Article 101(1), the selling or purchasing function of the agent forms part of the principal's activities. Since the principal bears the commercial and financial risks related to the selling and purchasing of the contract goods or services, all obligations imposed on the agent in relation to the contracts concluded and/or negotiated on behalf of the principal fall outside Article 101(1). The assumption by the agent of the obligations listed at the end of this paragraph will be considered to form an inherent part of an agency agreement, as these obligations relate to the ability of the principal to determine the scope of the agent's activity in relation to the contract goods or services. This is essential if the principal is to assume the risks in respect of the contracts concluded and/or negotiated by the agent on the principal's behalf. Thus, the principal is able to determine the commercial strategy in relation to:

(a) limitations on the territory in which the agent may sell these goods or services;

(b) limitations on the customer groups to whom the agent may sell the contract goods or services; or

(c) the prices and conditions at which the agent must sell or purchase the contract goods or services.

(40) By contrast, where the agent bears one or more of the relevant risks described in paragraphs (28) to (31) of these Guidelines, the agreement between agent and principal does not constitute an agency agreement for the purpose of applying Article 101(1). In that situation, the agent will be treated as an independent undertaking and the agreement between agent and principal will be subject to Article 101(1), like any other vertical agreement. For that reason, Article 1(1)(k) VBER clarifies that an undertaking which, under an agreement falling within Article 101(1), sells goods or services on behalf of another undertaking, is a buyer.

(41) Even if the agent bears no, or only insignificant, risks described in paragraphs (28) to (31) of these Guidelines, it remains a separate undertaking from the principal and therefore the provisions concerning the relationship between the agent and the principal may infringe Article 101(1), irrespective of whether they form part of the

agreement governing the sale or purchase of the contract products or a separate agreement. Such provisions may benefit from the VBER, in particular when the conditions provided in Article 5 VBER are fulfilled, or, outside the VBER, they may satisfy the conditions of Article 101(3) in individual cases, as described in section 8.1.2 of these Guidelines. For instance, agency agreements may contain a provision preventing the principal from appointing other agents in respect of a given type of transaction, customer or territory (exclusive agency provisions) and/or a provision preventing the agent from acting as an agent or distributor of undertakings which compete with the principal (single branding provisions). Exclusive agency provisions will in general not lead to anti-competitive effects. However, single branding provisions and post-term non-compete provisions, which concern inter-brand competition, may infringe Article 101(1) if they contribute to a (cumulative) foreclosure effect on the relevant market where the contract goods or services are sold or purchased (see in particular sections 8.2.1 and 6.2.2 of these Guidelines).

(42) An agency agreement may also fall within the scope of Article 101(1), even if the principal bears all the relevant financial and commercial risks, where it facilitates collusion. That could, for instance, be the case when a number of principals use the same agents while collectively excluding others from using these agents, or when they use the agents to collude on marketing strategy or to exchange sensitive market information between the principals.

(43) In the case of an independent distributor that also acts as an agent for certain goods or service of the same supplier, compliance with the requirements set out in paragraphs (34) to (37) of these Guidelines has to be assessed strictly. This is necessary to avoid a misuse of the agency concept in scenarios where the supplier does not actually become active at the retail level, taking all associated distribution decisions and assuming all related risks in accordance with the principles set out in paragraphs (28) to (31), but rather establishes an easy way to control retail prices for those products that allow high resale margins. Since resale price maintenance is a hardcore restriction under Article 4 VBER, as set out in section 6.1.1 of these Guidelines, the agency concept should not be misused by suppliers to circumvent the application of Article 101(1) TFEU

3.2.3. Agency and the online platform economy

(44) Undertakings providing online intermediation services are categorised as suppliers under the VBER (see also paragraphs (60) to (64) of these Guidelines) and can therefore in principle not qualify as agents for the purpose of applying Article 101(1). Moreover, providers of online intermediation services generally act as independent economic operators and not as part of the undertakings of the sellers to which they provide online intermediation services. Strong network effects and other features of the online platform economy can contribute to a significant imbalance in the size and bargaining power of the contract parties and result in a situation where the conditions of sale of the contract goods or services and the commercial strategy are determined by the provider of online intermediation services rather than the sellers of the goods or services that are intermediated. In addition, providers of online intermediation services often serve a very large number of sellers in parallel, which prevents them from effectively forming a part of any of the sellers' undertakings. In addition, providers of online intermediation services typically make significant market-specific investments, for example, in software, advertising and after-sales services, indicating that these undertakings bear significant financial or commercial

risks associated with the contracts negotiated on behalf of the sellers using their online intermediation services.

3.3. Subcontracting agreements

(45) Subcontracting agreements, as defined in the Commission notice of 18 December 1978 concerning the assessment of certain subcontracting agreements in relation to Article 85(1) of the EEC Treaty (hereinafter "Subcontracting Notice"),[28] generally fall outside the scope of Article 101(1). The Subcontracting Notice remains applicable and includes further guidance on the application of this general rule. In particular, the Subcontracting Notice states that, where a contractor imposes limits on the use of technology or equipment that it provides to a subcontractor, this technology or equipment must be necessary to enable the subcontractor to produce the products concerned.[29] It also clarifies the scope of application of this general rule, in particular that other restrictions imposed on the subcontractor generally fall within the scope of Article 101, such as the obligation not to conduct or exploit its own research and development or not to produce for third parties.[30]

4. SCOPE OF THE VBER

4.1. Safe harbour established by the VBER

(46) The block exemption in Article 2(1) VBER establishes a safe harbour for vertical agreements within the meaning of the VBER, provided the market shares held by the supplier and the buyer in the respectively relevant market(s) do not exceed the thresholds in Article 3 of the VBER (see section 5.2. of these Guidelines),[31] and the agreement does not include hardcore restrictions pursuant to Article 4 of the VBER (see section 6.1. of these Guidelines).[32] This safe harbour applies as long as the benefit of the block exemption has not been withdrawn in a particular case by the Commission or the competition authority of a Member State (hereafter "NCA") pursuant to Article 29 Regulation 1/2003 (see section 7.1. of these Guidelines).

(47) Article 2(1) VBER also establishes a safe harbour where a supplier uses the same agreement(s) to distribute several types of goods or services. In such a case of portfolio distribution, the VBER applies to the vertical agreement to the extent, and in relation to those goods or services for which, the conditions of the application of the VBER are fulfilled. Conversely, Article 101 applies to the vertical agreements in relation to those goods or services that the VBER does not cover. This means that there is no block exemption pursuant to Article 2(1) VBER but also no presumption of illegality of such agreements.

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28 OJ C 1, 3.1.1979, p. 2, which defines subcontracting agreements as agreements under which one firm, called 'the contractor', whether or not in consequence of a prior order from a third party, entrusts to another, called 'the subcontractor', the manufacture of goods, the supply of services or the performance of work under the contractor's instructions, to be provided to the contractor or performed on his behalf.

29 See paragraph 2 of the Subcontracting Notice, which provides further clarifications in particular on the use of industrial property rights and know-how.

30 See paragraph 3 of the Subcontracting Notice.

31 Above the market share threshold of 30%, there is no presumption that vertical agreements fall within the scope of Article 101(1) or fail to satisfy the conditions of Article 101(3).

32 As regards excluded restrictions and the meaning of Article 5 VBER, see section 6.2. of these Guidelines.

4.2. Definition of vertical agreement

(48) Article 101(1) refers to agreements between undertakings, decisions by associations of undertakings and concerted practices. It makes no distinction as to whether these undertakings operate at the same level or at different levels of the production or distribution chain. Article 101(1) thus applies to both horizontal agreements and concerted practices, as well as vertical agreements and concerted practices.[33]

(49) Regulation No 19/65/EEC of 2 March 1965 of the Council on application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices,[34] as amended by Council Regulation (EC) No 1215/1999 of 10 June 1999[35] (hereinafter "Empowerment Regulation"), empowers the Commission, in accordance with Article 101(3), to block exempt by regulation vertical agreements and concerted practices.

(50) In accordance with Articles 1 and 3 Empowerment Regulation, Article 1(1)(a) VBER defines a vertical agreement as "an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services".[36] This definition reflects at least three main requirements, which are addressed in turn below.

4.2.1. Unilateral conduct falls outside the scope of the VBER

(51) The VBER applies to vertical agreements and concerted practices. It does not apply to unilateral conduct by undertakings. Such unilateral conduct can fall within the scope of Article 102 of the Treaty on the Functioning of the European Union (hereinafter "Article 102") which prohibits the abuse of a dominant position.[37] For there to be an agreement within the meaning of Article 101, it is sufficient that the parties have expressed their joint intention to conduct themselves on the market in a specific way (so-called concurrence of wills). The form in which that intention is expressed is irrelevant as long as it constitutes a faithful expression of the parties' intention.

(52) If there is no explicit agreement expressing the parties' concurrence of wills, the Commission has to prove for the purpose of applying Article 101 that the unilateral policy of one party receives the acquiescence of the other party. For vertical agreements, there are two ways in which acquiescence with a specific unilateral policy can be established.

(a) Firstly, explicit acquiescence can be deduced from the powers conferred upon the parties in a general agreement drawn up in advance. If the clauses of such a general agreement provide for or authorise a party to adopt subsequently a specific unilateral policy that is binding on the other party, the acquiescence to that policy by the other party can be established on that basis.[38]

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33 See judgment in Case 56/65 *Technique Minière* v *Maschinenbau Ulm* EU:C:1966:38, p. 240.

34 OJ 36, 6.3.1965, p. 35.

35 OJ L 148, 15.6.1999, p. 1.

36 As in Article 1(1)(a) VBER, in these Guidelines, the term "vertical agreement" includes vertical concerted practices, unless stated otherwise.

37 Conversely, if a vertical agreement within the meaning of Article 101 exists, the VBER and these Guidelines are without prejudice to the possible parallel application of Article 102 to this vertical agreement.

38 Judgment in Case C-74/04 P *Commission* v *Volkswagen AG* EU:C:2006:460.

(b) Secondly, for tacit acquiescence it is necessary to show, firstly, that one party requires explicitly or implicitly the cooperation of the other party for the implementation of its unilateral policy and, secondly, that the other party has complied with that requirement by implementing that unilateral policy in practice.[39] For instance, if after a supplier's announcement of a unilateral reduction of supplies in order to prevent parallel trade, distributors reduce immediately their orders and stop engaging in parallel trade, then those distributors tacitly acquiesce to the supplier's unilateral policy. However, this cannot be concluded if the distributors continue to engage in parallel trade or try to find new ways to engage in parallel trade.

(53) In light of the above, general sales terms and conditions, even if imposed by one party and accepted tacitly by the other party amount to an agreement for the purposes of the application of Article 101(1) of the Treaty.[40]

4.2.2. The undertakings operate at different levels of the production or distribution chain

(54) The VBER applies to agreements or concerted practices between two or more undertakings irrespective of their business model. As final consumers do not operate as undertakings, the VBER does not cover vertical agreements or concerted practices with consumers.

(55) Furthermore, to fall within the definition of Article 1(1)(a) VBER, an agreement must be entered into between undertakings operating, for the purposes of the agreement, at different levels of the production or distribution chain. For example, a vertical agreement exists where one of the undertakings produces a raw material or provides a service, and sells it to another undertaking that uses it as an input. Likewise, a vertical agreement exists, for example, where a manufacturer sells a product to a wholesaler that resells it to a retailer.

(56) As the definition in Article 1(1)(a) VBER refers to the purpose of the specific agreement, the fact that one undertaking party to the agreement is active at more than one level of the supply or distribution chain does not preclude the application of the VBER. However, in case agreements between competing undertakings, Article 2(4) VBER must be taken into account. For guidance on Article 2(4) VBER, see section 4.4.3. of these Guidelines.

4.2.3. The agreements relate to the purchase, sale or resale of goods or services

(57) Article 1(1)(a) VBER provides that, to fall within the scope of the VBER, vertical agreements must relate to the conditions under which the supplier and the buyer *"may purchase, sell or resell certain goods or services"*. In accordance with the general purpose of a block exemption regulation, which is to provide legal certainty, Article 1(1)(a) VBER must be interpreted broadly as applying to all vertical agreements, irrespective of whether they relate to intermediate or final goods or services. Both the goods or services supplied and, in the case of intermediate goods or services, the resulting final goods or services, are considered contract goods or services for the purpose of applying the VBER to the respective agreements.

(58) Vertical agreements in the online platform economy, including those entered into with providers of online intermediation services as referred to in Article 1(1)(d)

[39] Judgment in Case T-41/96 *Bayer AG* v *Commission* EU:T:2000:242.

[40] See Commission Decisions in AT.40182 *Guess*, paragraph 97 with reference to settled case law.

VBER, are covered by Article 1(1)(a) VBER. Both the provision of online intermediation services and the goods or services subject to the transactions it facilitates are considered contract goods or services for the purpose of applying the VBER to the agreement on the basis of which online intermediation services are provided and the agreement on the basis of which the intermediated goods or services are supplied.

(59) The VBER does not cover vertical restraints that do not relate to the conditions of purchase, sale and resale of certain contract goods or services. These agreements have to be assessed individually, namely whether they, in the individual case fall within the scope of Article 101(1) and, if so, whether the conditions of Article 101(3) are satisfied. For example, the VBER does not apply to an obligation preventing the parties from carrying out independent research and development, which the parties may have included in their vertical agreement. Another example concerns rent and lease agreements. While the VBER applies to goods sold and purchased for renting to third parties, rent and lease agreements as such are not covered as no good or service is being sold by the supplier to the buyer.

4.3. Vertical agreements in the online platform economy

(60) The online platform economy plays an increasingly important role for the distribution of goods and services. Undertakings active in the online platform economy enable new ways of doing business, some of which are not easy to categorise under the concepts traditionally associated with vertical relationships between suppliers and distributors in the brick and mortar environment.

(61) The VBER categorises undertakings active in the supply and distribution chain as suppliers or buyers. Depending on whether an undertaking falls within one category or the other, the VBER may apply differently, notably in the following areas:

(a) The exemption of non-reciprocal vertical agreements between competitors pursuant to Article 2(4) VBER (see section 4.4 of these Guidelines);

(b) The calculation of market shares for the application of the thresholds stipulated in Article 3(1) VBER (see section 5 of these Guidelines);

(c) The removal of the benefit of the VBER pursuant to Article 4 VBER (see section 6.1 of these Guidelines); and

(d) The exclusion of certain restrictions from the safe harbour provided by the VBER pursuant to Article 5 VBER (see section 6.2 of these Guidelines).

(62) The VBER includes definitions of the concepts of supplier, namely Article 1(1)(d) VBER, and buyer, namely Article 1(1)(j) VBER. To reconcile the difficulty of defining these concepts exhaustively with the objective of the VBER of providing as much legal certainty as possible, these provisions are limited to clarifying that certain types of undertakings fall within one or the other category.

(63) Article 1(1)(d) VBER stipulates that an undertaking which provides online intermediation services qualifies as a supplier under the VBER. This means that, in accordance with the distinction between suppliers and buyers provided by the VBER, the undertaking cannot qualify simultaneously as a buyer within the meaning of Article 1(1)(j) VBER in relation to the transaction that it facilitates. Furthermore, it is clarified in Article 1(1)(d) VBER that a provider of online intermediation services is a supplier under the VBER including where it is party to a transaction that it facilitates. This means that, where an undertaking provides online intermediation

services and therefore falls within the scope of the definition provided in Article 1(1)(d) VBER, this undertaking cannot circumvent its qualification as supplier in relation to the online intermediation services provided, for example by becoming a party to the transaction it facilitates or stipulating contractually that it is a buyer of the goods or services supplied on the basis of such a transaction.

(64) The definition of supplier of online intermediation services in Article 1(1)(d) VBER is based on definitions in Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (hereafter "P2B Regulation").[41] It builds on the notion that an undertaking providing online intermediation services provides such services with a view to facilitating direct transactions between sellers and buyers, or between sellers and consumers using its online intermediation services. Article 1(1)(d) VBER is based on the consideration that a provider of online intermediation services generally provides an infrastructure that allows undertakings to meet and transact with other undertakings or consumers online, without being legally or factually responsible for their transactions.

4.4. Limits to the application of the VBER

4.4.1. Associations of retailers

(65) Article 2(2) of the VBER includes in the scope of application of the VBER vertical agreements entered into by an association of undertakings which fulfils certain conditions, thereby excluding from the safe harbour vertical agreements entered into by all other associations. This means that vertical agreements entered into between an association and individual members, or between an association and individual suppliers, are covered by the VBER only if all the members are retailers, selling goods (and not services) to final consumers, and if each individual member of the association has an annual turnover not exceeding EUR 50 million.[42] However, where only a limited number of the members of the association have an annual turnover exceeding the EUR 50 million threshold and where these members together represent less than 15% of the collective turnover of all the members combined, this will not normally change the assessment under Article 101.

(66) An association of undertakings may involve both horizontal and vertical agreements. The horizontal agreements must be assessed according to the principles set out in the Guidelines on the applicability of Article 101 of the Treaty to horizontal cooperation agreements (hereinafter "Horizontal Guidelines").[43] If that assessment leads to the conclusion that a cooperation between undertakings in the area of purchasing or selling is acceptable, because it meets the specific conditions laid down in those Guidelines relating to purchasing and/or commercialisation agreements, a further assessment will be necessary to examine the vertical agreements concluded by the association with individual suppliers or individual members according to the rules of the VBER, in particular the conditions laid down in Articles 3 to 5, and these Guidelines. For instance, horizontal agreements concluded between the members of

[41] OJ L 186, 11.7.2019, p. 57.

[42] The annual turnover ceiling of EUR 50 million is based on the turnover ceiling for SMEs in Article 2 of the Annex to the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, OJ L124, 20.5.2003, p. 39.

[43] OJ C11, 14.1.2011, p. 1; as amended by Corrigenda OJ C33, 2.2.2011, p. 20. A revision of those Guidelines is forthcoming.

the association or decisions adopted by the association, such as the decision to require the members to purchase from the association or the decision to allocate exclusive territories to the members must first be assessed as a horizontal agreement. Only if that assessment leads to the conclusion that the horizontal agreement is not anti-competitive is it necessary to assess the vertical agreements between the association and individual members or between the association and individual suppliers.

4.4.2. Vertical agreements containing provisions on intellectual property rights (IPRs)

(67) Article 2(3) VBER provides that vertical agreements containing certain provisions which relate to the assignment or use of IPRs can fall within the scope of application of the VBER. Conversely, Article 2(3) VBER excludes all other vertical agreements containing IPR provisions from the scope of application of the VBER.

(68) The VBER applies to vertical agreements containing IPR provisions where five conditions are fulfilled:

(a) The IPR provisions must be part of a vertical agreement, that is, an agreement with conditions under which the parties may purchase, sell or resell certain goods or services;

(b) The IPRs must be assigned to or licensed for use by the buyer;

(c) The IPR provisions must not constitute the primary object of the agreement;

(d) The IPR provisions must be directly related to the use, sale or resale of goods or services by the buyer or its customers. In the case of franchising where marketing forms the object of the exploitation of the IPRs, the goods or services are distributed by the master franchisee or the franchisees; and

(e) The IPR provisions, in relation to the contract goods or services, must not contain restrictions of competition having the same object as vertical restraints that are not exempted under the VBER.

(69) Such conditions ensure that the VBER applies to vertical agreements where the use, sale or resale of goods or services can be performed more effectively because IPRs are assigned to or licensed for use by the buyer. This means that restrictions concerning the assignment or use of IPRs can be covered by the VBER when the main object of the agreement is the purchase or distribution of goods or services.

(70) The first condition makes clear that the context in which the IPRs are provided is an agreement to purchase or distribute goods, or an agreement to purchase or provide services, and not an agreement concerning the assignment or licensing of IPRs for the manufacture of goods, nor a pure licensing agreement. The VBER does not cover for instance:

(a) agreements where a party provides another party with a recipe and licenses the other party to produce a drink with this recipe;

(b) agreements under which one party provides another party with a mould or master copy and licenses the other party to produce and distribute copies;

(c) the pure licence of a trade mark or sign for the purposes of merchandising;

(d) sponsorship contracts concerning the right to advertise oneself as being an official sponsor of an event;

(e) copyright licensing such as broadcasting contracts concerning the right to record and/or broadcast an event.

(71) The second condition makes clear that the VBER does not apply when the buyer provides the IPRs to the supplier, no matter whether the IPRs concern the manner of manufacture or of distribution. An agreement relating to the transfer of IPRs to the supplier and containing possible restrictions on the sales made by the supplier is not covered by the VBER. That means in particular that subcontracting involving the transfer of know-how to a subcontractor does not fall within the scope of application of the VBER (see also section 3.3 these Guidelines). However, vertical agreements under which the buyer provides only specifications to the supplier which describe the goods or services to be supplied fall within the scope of application of the VBER.

(72) The third condition makes clear that in order to be covered by the VBER, the primary object of the agreement must not be the assignment or licensing of IPRs. The primary object must be the purchase, sale or resale of goods or services and the IPR provisions must serve the implementation of the vertical agreement.

(73) The fourth condition requires that the IPR provisions facilitate the use, sale or resale of goods or services by the buyer or its customers. The goods or services for use or resale are usually supplied by the licensor, but may also be purchased by the licensee from a third party supplier. The IPR provisions will normally concern the marketing of goods or services. An example would be a franchise agreement where the franchisor sells goods for resale to the franchisee and licenses the franchisee to use its trade mark and know-how to market the goods or where the supplier of a concentrated extract licenses the buyer to dilute and bottle the extract before selling it as a drink.

(74) The fifth condition highlights the fact that the IPR provisions should not have the same object as any of the hardcore restrictions listed in Article 4 VBER or any of the restrictions excluded from the coverage of the VBER pursuant to Article 5 VBER (see section 6 of these Guidelines).

(75) IPRs relevant to the implementation of vertical agreements within the meaning of Article 2(3) VBER generally concern three main areas: trademarks, copyright and know-how.

4.4.2.1. Trademarks

(76) A trademark licence to a distributor may be related to the distribution of the licensor's products in a particular territory. If it is an exclusive licence, the agreement amounts to exclusive distribution.

4.4.2.2. Copyright

(77) Resellers of goods or services covered by copyright (e.g. books and software) may be obliged by the copyright holder to only resell under the condition that the buyer, irrespective of whether it is another reseller or the end user, shall not infringe the copyright. Such obligations on the reseller, to the extent that they fall under Article 101(1) at all, are covered by the VBER.

(78) Agreements under which hard copies of software are supplied for resale and the reseller does not acquire a licence to any rights over the software but only has the right to resell the hard copies are to be regarded as agreements for the supply of goods for resale for the purpose of the VBER. Under that form of distribution, licensing the software only occurs between the copyright owner and the user of the

software. It may take the form of a "shrink wrap" licence, that is, a set of conditions included in the package of the hard copy which the end user is deemed to accept by opening the package.

(79) Buyers of hardware incorporating software protected by copyright may be obliged by the copyright holder not to infringe the copyright and must therefore not make copies and resell the software or make copies and use the software in combination with other hardware. Such use restrictions, to the extent that they fall within Article 101(1) at all, are covered by the VBER.

4.4.2.3. Know-how

(80) Franchise agreements, with the exception of industrial franchise agreements, are the most obvious example of know-how for marketing purposes being communicated to the buyer.[44] Franchise agreements contain licences of IPRs relating to trademarks or signs, and know-how for the use and distribution of goods or the provision of services. In addition to the licence of IPRs, the franchisor usually provides the franchisee during the duration of the agreement with commercial or technical assistance, such as procurement services, training, advice on real estate and financial planning. The licence and the assistance provided are integral components of the business method being franchised.

(81) Licensing contained in franchise agreements is covered by the VBER where all five conditions listed in paragraph (70) of the Guidelines are met. Those conditions are usually fulfilled as under most franchise agreements, including master franchise agreements, the franchisor provides goods or services, in particular commercial or technical assistance services, to the franchisee. The IPRs help the franchisee to resell the products supplied by the franchisor or by a supplier designated by the franchisor, or to use those products and sell the resulting goods or services. Where the franchise agreement only or primarily concerns licensing of IPRs, it is not covered by the VBER, but the Commission will, as a general rule, apply the principles set out in the VBER and these Guidelines to such an agreement.

(82) The following IPR-related obligations are generally considered necessary to protect the franchisor's IPRs and are, where these obligations fall under Article 101(1), also covered by the VBER:

(a) an obligation on the franchisee not to engage, directly or indirectly, in any similar business;

(b) an obligation on the franchisee not to acquire financial interests in the capital of a competing undertaking so as to give the franchisee the power to influence the economic conduct of such undertaking;

(c) an obligation on the franchisee not to disclose to third parties the know-how provided by the franchisor as long as this know-how is not in the public domain;

(d) an obligation on the franchisee to communicate to the franchisor any experience gained in exploiting the franchise and to grant the franchisor and other franchisees a non-exclusive licence for the know-how resulting from that experience;

[44] Paragraphs 43-45 apply by analogy to other types of distribution agreements that involve the transfer of substantial know-how from the supplier to the buyer.

(e) an obligation on the franchisee to inform the franchisor of infringements of licensed IPRs, to take legal action against infringers or to assist the franchisor in any legal actions against infringers;

(f) an obligation on the franchisee not to use know-how licensed by the franchisor for purposes other than the exploitation of the franchise;

(g) an obligation on the franchisee not to assign the rights and obligations under the franchise agreement without the franchisor's consent.

4.4.3. Vertical agreements between competitors

(83) Whereas pursuant to Article 2(8) VBER, on which guidance is provided in section 4.5 of these Guidelines, the VBER does not apply to vertical agreements if their subject matter falls within the scope of any other block exemption regulation, unless otherwise provided for in such a regulation, the first sentence of Article 2(4) VBER also explicitly excludes vertical agreements entered into between competing undertakings from the scope of application of the VBER, unless the vertical agreements fall within the scope of the exceptions in Article 2(4)(a) and 2(4)(b) VBER. Thus, vertical agreements between competitors that are excluded from the scope of the VBER have to be assessed by reference to the Horizontal Guidelines, including the guidance on the exchange of information in the context of vertical agreements between competing undertakings. Where a vertical agreement falls within the scope of an exception in Article 2(4)(a) or (b) VBER and does not include a horizontal restriction of competition by object, this agreement has to be assessed only by reference to these Guidelines.

(84) Article 1(1)(c) VBER defines a competing undertaking as an actual or potential competitor. Two companies are treated as actual competitors if they are active on the same relevant (product and geographic) market. A company is treated as a potential competitor of another company if, absent the agreement, in case of a small but permanent increase in relative prices, it is likely that the former would, within a short period of time normally not longer than one year, undertake the necessary additional investments or incur other necessary switching costs to enter the relevant market on which the other company is active. This assessment must be based on realistic grounds, having regard to the structure of the market and the economic and legal context within which it operates. This means that the mere theoretical possibility of entering a market is not sufficient. There must be real and concrete possibilities for that undertaking to enter the market without any insurmountable barriers to entry. Conversely, there is no need to demonstrate with certainty that that undertaking will in fact enter the market concerned and, a fortiori, that it will be capable, thereafter, of retaining its place there.[45]

(85) A distributor that provides specifications to a manufacturer to produce particular goods under the distributor's brand name is not to be considered a manufacturer of such own-brand goods and thus a competitor of the manufacturer. Consequently, the

[45] See Commission Notice on the definition of the relevant market for the purposes of Community competition law ('Commission Notice on the definition of the relevant market'), OJ C 372, 9.12.1997, p. 5, paragraphs 20 to 24. A revision of the Commission Notice on the definition of the relevant market is forthcoming. See also the Commission's Thirteenth Report on Competition Policy, point 55, and Judgement of the Court, *Generics (UK) Ltd and Others v Competition and Markets Authority*, Case C-307/18, ECLI:EU:C:2020:52, paragraphs 36-45; Judgement of the Court, *H. Lundbeck A/S and Lundbeck Ltd v European Commission*, ECLI:EU:C:2021:243, paragraph 54-57.

exemption in Article 2(1) VBER applies to agreements between a distributor selling such own-brand goods manufactured by a third party and a supplier of branded goods on the same relevant market. In contrast, distributors that produce goods in-house under their brand name are considered manufacturers. This means that the exemption in Article 2(1) VBER does not apply to agreements between those distributors and suppliers of branded goods in the same relevant market. Such agreements must therefore be assessed under the Horizontal Guidelines.

(86) The second sentence in Article 2(4) VBER contains two exceptions to the general rule that vertical agreements between competitors are excluded from the safe harbour provided by the VBER. Both exceptions, namely Article 2(4)(a) and (b) VBER, concern dual distribution agreements between a supplier of goods or services also active on the retail market and its distributors. These are typically scenarios where the supplier is mainly active on the upstream market and has limited ancillary activities in the retail market. In cases where the aggregate market share of the supplier and the buyer in the relevant market at retail level does not exceed [10]%, horizontal concerns are unlikely to arise and any potential impact on horizontal competition between the parties at the retail level is considered of lesser importance than the potential impact of the parties' vertical agreement on general competition at the supply or distribution level.

(87) Therefore, a vertical agreement between competitors falling under Article 2(4)(a) and (b) VBER is block exempted pursuant to Article 2(1) VBER if the following conditions are fulfilled:

(a) the subject matter of the agreement does not fall within the scope of another block exemption regulation, as set out in Article 2(8) VBER;

(b) the supplier's and the buyer's aggregate market share in the relevant market at retail level does not exceed [10]%, thus not appreciably restricting competition within the meaning of Article 101(1),[46] and the agreement does not contain hardcore restrictions pursuant to Article 4 VBER;

(c) the conditions of Article 2(4)(a) or (b) VBER are fulfilled; and

(d) the agreement does not include horizontal restrictions of competition by object, as set out in Article 2(6) VBER.

This exemption relates to all aspects of the non-reciprocal vertical agreement and any horizontal restrictions by effect, including those resulting from the exchange of information between the competing undertakings. Horizontal restrictions of competition by object are not covered by the exceptions of Article 2(4)(a) or (b).[47] Whether an agreement can be considered a dual distribution agreement for the purpose of applying Article 2(4)(a) or (b) VBER should be interpreted narrowly due to the exceptional nature of this provision.

(88) The exception provided by Article 2(4)(a) VBER concerns situations where the supplier is either a manufacturer, wholesaler or importer and is also a distributor of goods, while the buyer is only a distributor that does not compete with the manufacturer at the upstream level.

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[46] De Minimis Notice, paragraph 8.

[47] See judgement of the Court, *Expedia Inc. v Autorité de la concurrence and Others*, ECLI:EU:C:2012:795, paragraph 37.

(89) The exception provided by Article 2(4)(b) VBER concerns situations where the supplier is a provider of services operating at several levels of trade, while the buyer only operates at the retail level and does not compete with the supplier at the level of trade where it purchases the contract services.

(90) Article 2(5) VBER provides that a vertical agreement between competing undertakings whose aggregate market share at retail level exceeds [10]% is still block exempted pursuant to Article 2(1) VBER if the following conditions are fulfilled:

(a) the subject matter of the agreement does not fall within the scope of another block exemption regulation, as set out in Article 2(8) VBER;

(b) the market share threshold of Article 3 VBER is complied with and the agreement does not contain hardcore restrictions pursuant to Article 4 VBER;

(c) the conditions of Article 2(4)(a) or (b) VBER are fulfilled;

(d) any exchange of information between the parties is compatible with the relevant chapter of the Horizontal Guidelines dealing with the competitive assessment of the exchange of information; and

(e) the agreement does not include horizontal restrictions of competition by object, as set out in Article 2(6) VBER.

(91) Article 2(7) VBER provides that suppliers of online intermediation services within the meaning of Article 1(1)(d) VBER that have a hybrid function, namely where they provide online intermediation services and sell goods or services in competition with undertakings to which they provide such services, cannot benefit from the exceptions for dual distribution. As the retail activities of suppliers of online intermediation services that have such a hybrid function typically raise non-negligible horizontal concerns. they do not fulfil the rationale of the dual distribution exception, which in any case must be interpreted narrowly. For the same reason, any restriction regarding the extent to which or the conditions under which online intermediation services can be provided to third parties shall not be covered by the VBER. This does not only apply to restrictions that are stipulated in an agreement with a buyer of online intermediation services, but also to agreements regarding the purchase of the goods or services sold by the provider of online intermediation services that has a hybrid function.

(92) Vertical agreements with hybrid online intermediation services providers must be assessed on a case-by-case basis, notably by reference to both these Guidelines (see section 8 of these Guidelines) and the Horizontal Guidelines. This assessment must cover all aspects of relationships between providers of online intermediation services that have a hybrid function and the undertakings to which they provide online intermediation services, including for instance any exchange of information between them.

4.5. Relationship with other block exemption regulations

(93) As explained in sections 4.1 and 4.2 of these Guidelines, the VBER applies to agreements between undertakings operating at a different level of the production or distribution chain and relating to the conditions under which the parties may purchase, sell or resell certain goods or services. Such vertical agreements are exclusively assessed under the VBER and these Guidelines, irrespective of the outcome of such assessment. They will benefit from the safe harbour established by

the VBER if the market shares thresholds are not exceeded and the agreements do not contain any hardcore restrictions.

(94) However, Article 2(8) VBER states that the VBER does "not apply to vertical agreements the subject matter of which falls within the scope of any other block exemption regulation, unless otherwise provided for in such a regulation". It is therefore important to verify from the outset if a vertical agreement falls within the scope of application of any other block exemption regulation. For example, as set out in Article 2(4) VBER, vertical agreements concluded between competing undertakings are in principle excluded from the scope of the VBER and have to be assessed under the rules applicable to horizontal agreements. Article 2(4)(a) and (b) VBER provide exceptions to this principle, which must be read in conjunction with Article 2(5) VBER in case the market share threshold of Article 2(4)(a) and (b) VBER is exceeded but the market share threshold of Article 3 VBER is not exceeded. These provisions take into account that the effects that dual distribution agreements have on the market and the possible competition concerns can be similar to horizontal agreements.

(95) Therefore, the VBER does not apply to vertical agreements covered by the following block exemption regulations or any future block exemption regulations relating to the types of agreements mentioned in the following sub-paragraphs, unless otherwise provided for in the respective regulation:

– Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements;[48]

– Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements;[49]

– Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements.[50]

(96) The VBER does also not apply to the types of agreements between competitors mentioned in the Horizontal Guidelines, unless otherwise provided for in the relevant chapter of the Horizontal Guidelines.

(97) The VBER applies to vertical agreements relating to the purchase, sale or resale of spare parts for motor vehicles and to the provision of repair and maintenance services for motor vehicles. Such agreements only benefit from the VBER if, in addition to the conditions for exemption set out in the VBER, they comply with the additional requirements of Commission Regulation (EU) No 461/2010 of 27 May 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 in the motor vehicle sector, and its accompanying guidelines.

[48] OJ L 93, 28.3.2014, p. 17.
[49] OJ L 335, 18.12.2010, p. 36.
[50] OJ L 335, 18.12.2010, p. 43.

4.6. Main types of distribution systems

(98) A supplier is free to set up its distribution system as it sees fit. The supplier can, for instance, choose vertical integration, which implies selling its goods or services directly to end users or distributing them through its vertically integrated distributors, which are connected undertakings within the meaning of Article 1(2) VBER. Such a distribution system only concerns the organisation inside one specific undertaking and thus falls outside the scope of Article 101(1).

(99) The supplier can also decide to appoint independent distributors. To that end, the supplier may set up one or a combination of other distribution systems. The most common are exclusive distribution, selective distribution and franchising. Since the vertical agreements required to set up such distribution systems are concluded between independent undertakings, they can fall within the scope of Article 101(1) and benefit from the VBER or an individual exemption under Article 101(3), provided that the respective conditions are fulfilled.

4.6.1. Exclusive distribution systems

4.6.1.1. Definition of exclusive distribution systems

(100) In an exclusive distribution system, the supplier allocates a territory or customer group exclusively to one or a limited number of buyers and/or reserves it to itself, while restricting its other buyers within the Union from actively selling into the exclusive territory or to the exclusive customer group.[51]

(101) Suppliers often use this type of system to incentivise distributors to make the financial and non-financial investments needed to develop their brand in a territory where it is not well-known or to sell a new product in a particular territory or to a particular customer group or to increase the focus of the distributors' activities on a particular product (e.g. special marketing or display efforts). As for distributors, through the size of the territory or the customer group exclusively allocated and the protection provided by exclusivity, they seek to secure a certain volume of business and a margin that justifies their investment efforts.

(102) In line with this rationale, the number of exclusive distributors should be restricted to one or a limited number (i.e. shared exclusivity) for a particular territory or customer group. Exclusive distribution shall not be used to shield a large number of distributors from competition located outside the exclusive territory, as this would lead to partition of the internal market. To that end, the number of appointed distributors should be determined in proportion to the allocated territory or customer group in such a way as to secure a certain volume of business that preserves their investment efforts.

(103) The appointed distributors are protected from active sales into the exclusive territory or to the exclusive customer group by other buyers from the supplier. When a supplier allocates an exclusive territory or customer group to more than one distributor, all these distributors benefit from the same protection against active sales from other buyers, while active and passive sales between these distributors cannot be restricted.

(104) The vertical agreements used for exclusive distribution should define the scope of the territory or the customer group exclusively allocated to the distributors. The

[51] See Article 1(1)(g) VBER.

exclusive territory may cover the territory of a Member State or an area that is smaller or larger in size. The exclusive customer group can be defined, for instance, by the occupation of the customers or through a list of specific customers selected on the basis of one or more objective criteria. Depending on those criteria, the customer group may be limited to a single customer.

(105) When a territory or a customer group has not yet been exclusively allocated to one or more distributors, the supplier can reserve such a territory or customer group for itself and should inform its other distributors. This does not require the supplier to be commercially active in the reserved territory or towards the reserved customer group since the supplier may wish to reserve them for the purpose of allocating them to other distributors in the future.

4.6.1.2. Application of Article 101 to exclusive distribution systems

(106) In a distribution system where the supplier exclusively allocates a territory or a customer group to one or more buyers, the main possible competition risks are market partitioning, which may facilitate price discrimination, and reduced intra-brand competition, in particular in the context of sole exclusivity. When most, all, or the strongest of the suppliers active in a market operate an exclusive distribution system, this may also soften inter-brand competition and facilitate collusion, both at the supplier and the distribution level. Lastly, exclusive distribution may lead to the foreclosure of other distributors and thereby reduce intra-brand competition at the distribution level.

(107) Exclusive distribution agreements are exempted by the VBER where both the supplier's and the buyer's market share each do not exceed 30% and where they do not contain any hardcore restrictions. An exclusive distribution agreement can still benefit from the safe harbour provided by the VBER if combined with other non-hardcore vertical restraints, such as a non-compete obligation limited to five years, quantity forcing or exclusive purchasing. However, where the number of exclusive distributors is not limited and determined in proportion to the allocated territory or customer group in such a way as to secure a certain volume of business that preserves their investment efforts, such a distribution system is unlikely to bring about efficiency-enhancing effects. Where appreciable anti-competitive effects occur, the benefit of the VBER is likely to be withdrawn.

(108) The remainder of this section provides guidance for the assessment of exclusive distribution agreements in individual cases above the 30% market share threshold.

(109) The number of distributors to which a territory or a customer groups has been exclusively allocated is important for the assessment of the exclusive distribution system. The higher the number of distributors, the lower the reduction of intra-brand competition is but also the lower the likelihood that the exclusive distributors have an incentive to invest in order to develop that brand and promote the product(s) of the supplier.

(110) The market position of the supplier and its competitors is of major importance, as the loss of intra-brand competition will only be problematic if inter-brand competition is limited. The stronger the position of the supplier, notably above the 30% threshold, the higher the likelihood that inter-brand competition is weak and the greater the risk for competition resulting from the reduction in intra-brand competition.

(111) The position of the supplier’s competitors can have a dual significance. The existence of strong competitors will generally indicate that any reduction in intra-

brand competition, which can be particularly important in the context of sole distribution, is outweighed by sufficient inter-brand competition. However, if the number of suppliers in a market is rather limited and their market position is rather similar in terms of market share, capacity and distribution network, there is a risk of collusion and/or softening of competition. The loss of intra-brand competition can increase that risk, especially when several suppliers operate similar distribution systems. Multiple exclusive dealerships, that is, when multiple suppliers appoint the same exclusive distributor(s) in a given territory, may further increase the risk of collusion and/or softening of competition both at supplier and distributor level. If one or more distributors are granted the exclusive right to distribute two or more important competing products in the same territory, inter-brand competition may be substantially restricted for those brands, especially in the case of linear wholesale tariffs. The higher the cumulative market share of the brands distributed by the exclusive multiple brand distributors, the higher the risk of collusion and/or softening of competition and the more inter-brand competition will be reduced. If one or more retailers are the exclusive distributor for a number of brands, there is a risk that the reduction of the wholesale price by one supplier for its brand will not be passed on by any exclusive retailers to the final consumer, as it would reduce the retailers' sales and profits made with the other brands. Hence, compared to the situation without multiple exclusive dealerships, suppliers will have a reduced incentive to enter into price competition with one another. Such cumulative effects situations may be a reason to withdraw the benefit of the VBER where the market shares of the suppliers and buyers are below the 30% threshold of the VBER.

(112) Entry barriers that may hinder suppliers from creating their own integrated distribution network or finding alternative distributors are less important in assessing the possible anti-competitive effects of exclusive distribution, especially in the context of shared exclusivity. Foreclosure of other suppliers does not arise as long as exclusive distribution is not combined with single branding, which obliges or induces the distributor to concentrate its orders for a particular type of product with one supplier. Although single branding does not require the distributor to purchase the products from the supplier itself, the combination of exclusive distribution and single branding can make it more difficult for other suppliers to find alternative distributors.

(113) Foreclosure of other distributors is not an issue where the supplier operating the exclusive distribution system appoints a large number of exclusive distributors on the same market and those exclusive distributors are not restricted in selling to other non-appointed distributors. Foreclosure of other distributors may however be problematic where there is market power downstream, in particular in the case of very large territories where an exclusive distributor becomes the exclusive buyer for a whole market. An example would be a supermarket chain, which becomes the only distributor of a leading brand on a national food retail market. The foreclosure of other distributors may be aggravated in the case of multiple exclusive dealerships.

(114) Buyer power may also increase the risk of collusion on the buyer side when the exclusive distribution arrangements are imposed by important buyers, possibly located in the same or different territories, on one or several suppliers.

(115) Assessing the dynamics of the market is important as growing demand, changing technologies and changing market positions may make negative effects less likely than in mature markets.

(116) The level of trade is important as possible negative effects may differ between the wholesale and retail level. Exclusive distribution is mainly applied in the distribution of final goods or services. A loss of intra-brand competition is especially likely at the retail level if coupled with large territories, since final consumers may be confronted with little possibility of choosing between a high price/high service and a low price/low service distributor for an important brand.

(117) A manufacturer that chooses a wholesaler as its exclusive distributor will normally do so for a larger territory, such as a whole Member State. As long as the wholesaler can sell the products without limitation to downstream retailers, appreciable anti-competitive effects are unlikely. A possible loss of intra-brand competition at the wholesale level may be easily outweighed by efficiencies obtained in logistics and promotion, especially when the manufacturer is based in a different Member State. The possible risks for inter-brand competition of multiple exclusive dealerships are however higher at the wholesale than at the retail level. Where one wholesaler becomes the exclusive distributor for a significant number of suppliers, there is no only a risk that competition between these brands is reduced, but also a higher risk of foreclosure at the wholesale level of trade.

(118) The assessment of an exclusive distribution system by which a customer group is exclusively allocated by a supplier to one or more buyers is subject to the same factors as those mentioned in paragraphs (100) to (117) of these Guidelines and should also take account of the following guidance:

(119) As for exclusive allocation of territory, the exclusive allocation of a customer group normally makes arbitrage by the customers more difficult. In addition, as each appointed distributor has its own class of customers, distributors that have not been exclusively allocated any customer group may find it difficult to obtain the products from the supplier. Consequently, possible arbitrage by other distributors will be reduced.

(120) An exclusive distribution system that restricts competition in the meaning of Article 101(1) may nevertheless create efficiencies that fulfil the conditions set in Article 101(3) and thus be exempted from the application of Article 101 on an individual basis.

(121) As set out in paragraph (112) of these Guidelines, foreclosure of other suppliers is unlikely to arise unless exclusive distribution is combined with single branding. However, even when exclusive distribution is combined with single branding, anti-competitive foreclosure of other suppliers appears unlikely, except possibly when single branding is applied to a dense network of exclusive distributors with small territories or in case of a cumulative effect. In such a scenario, the principles on single branding set out in section 8.2.1. of these Guidelines should be applied. However, where the combination of exclusive distribution and single branding does not lead to significant foreclosure, it may actually be pro-competitive by increasing the incentives for the exclusive distributor to focus its efforts on a particular brand. Therefore, in the absence of such a significant foreclosure effect, the combination of exclusive distribution with single branding may fulfil the conditions of Article 101(3) for the whole duration of the agreement, particularly if applied at the wholesale level.

(122) The combination of exclusive distribution with exclusive sourcing, which requires the exclusive distributors to buy their supplies for the supplier's brand directly from the supplier, increases the competition risks associated with reduced intra-brand competition and market partitioning, which may in particular facilitate price

discrimination. Exclusive distribution already limits arbitrage by customers, as it limits the number of distributors and is typically combined with active sales restrictions imposed on other distributors in order to protect the investments made by exclusive distributors in the exclusive territory. Exclusive sourcing eliminates in addition possible arbitrage by the exclusive distributors, which are prevented from buying from other distributors in the exclusive distribution system. As a result, the supplier's possibilities to limit intra-brand competition by applying dissimilar conditions of sale to the detriment of consumers are enhanced, unless the combination of exclusive distribution with exclusive sourcing allows the creation of efficiencies leading to lower prices.

(123) The nature of the product can be relevant to the assessment of possible anti-competitive effects of exclusive distribution. Those effects will be less acute in sectors where online sales are more prevalent. It is also relevant to an assessment of possible efficiencies, that is, after an appreciable anti-competitive effect is established.

(124) Exclusive distribution may lead to efficiencies, especially where investments by the distributors are required to protect or build up the brand image and to provide demand enhancing services. In general, the case for efficiencies is strongest for new products, complex products and products whose qualities are difficult to judge before consumption (so-called experience products) or even after consumption (so-called credence products). In addition, exclusive distribution may lead to savings in logistic costs due to economies of scale in transport and distribution.

(125) The efficiencies that may result from shared exclusivity can be considered to outweigh any possible negative effects that such a system can generate provided that the supplier can demonstrate that the number of exclusive distributors has been determined in proportion to the allocated territory or customer group in such a way as to secure a certain volume of business that preserves the investment effort for the distributors.

(126) Exclusive distribution systems based on the allocation of exclusive customer groups that restrict Article 101(1) may also fulfil the conditions set out in Article 101(3) and thus be exempted from the application of Article 101 on an individual basis. Exclusive customer allocation may lead to efficiencies where the investments of the distributors are necessary to build the brand image or where the distributors are required to invest in, for instance, specific equipment, skills or know-how to adapt to the requirements of the exclusive customer group that has been allocated to them or when these investments to lead economies of scale or scope in logistics (for instance, having a dedicated retailer dealing with public administrations' tenders for computers or office supplies). The depreciation period for these investments is an indication of the duration for which an exclusive distribution system based on the allocation of exclusive customer groups may be justified. In general, the justification for exclusive customer allocation is strongest for new or complex products and for products requiring adaptation to the needs of the individual customer. Identifiable differentiated needs are more likely for intermediate products that are sold to different types of professional buyers. Allocation of final consumers is unlikely to lead to efficiencies.

(127) Example of multiple exclusive dealerships in an oligopolistic market

On a national market for a final product, there are four market leaders, which each

have a market share of around 20%. Those four market leaders sell their product through exclusive distributors at the retail level. Retailers are given an exclusive territory which corresponds to the town in which they are located or a district of the town for large towns. In most territories, the four market leaders happen to appoint the same exclusive retailer ("multiple dealership"), often centrally located and rather specialised in the product. The remaining 20% of the national market is composed of small local producers, the largest of these producers having a market share of 5% on the national market. Those local producers sell their products in general through other retailers, in particular because the exclusive distributors of the four largest suppliers show in general little interest in selling less well-known and cheaper brands. There is strong brand and product differentiation on the market. The four market leaders have large national advertising campaigns and strong brand images, whereas the fringe producers do not advertise their products at the national level. The market is rather mature, with stable demand and no major product and technological innovation. The product is relatively simple.

In such an oligopolistic market, there is a risk of collusion between the four market leaders. That risk is increased through multiple dealerships. Intra-brand competition is limited by the territorial exclusivity. Competition between the four leading brands is reduced at the retail level, since one retailer fixes the price of all four brands in each territory. The multiple dealership implies that, if one producer cuts the price for its brand, the retailer will not be eager to transmit this price cut to the final consumer as it would reduce its sales and profits made with the other brands. Hence, producers have a reduced interest in entering into price competition with one another. Inter-brand price competition exists mainly with the low brand image goods of the fringe producers. The possible efficiency arguments for (joint) exclusive distributors are limited, as the product is relatively simple, the resale does not require any specific investments or training and advertising is mainly carried out at the level of the producers.

Even though each of the market leaders has a market share below the threshold, the conditions of Article 101(3) may not be fulfilled and withdrawal of the block exemption may be necessary for the agreements concluded with distributors whose market share is below 30% of the procurement market.

(128) Example of exclusive customer allocation

A company has developed a sophisticated sprinkler installation. The company has currently a market share of 40% on the market for sprinkler installations. When it started selling the sophisticated sprinkler it had a market share of 20% with an older product. The installation of the new type of sprinkler depends on the type of building where it is installed and on the use of the building (e.g. office, chemical plant or hospital). The company has appointed a number of distributors to sell and install the sophisticated sprinkler. Each distributor needed to train its employees for the general and specific requirements of installing the sophisticated sprinkler for a particular class of customers. To ensure that distributors would specialise, the company assigned to each distributor an exclusive class of customers and prohibited active sales to each other's exclusive customer classes. After five years, all the exclusive distributors will be allowed to sell actively to all classes of customers, thereby ending the system of exclusive customer allocation. The supplier may then also start selling to new distributors. The market is quite dynamic, with two recent entries and a number of technological developments. The competitors have market shares between 25% and

5% and are also upgrading their products.

As the exclusivity is of limited duration and helps to ensure that the distributors may recoup their investments and concentrate their initial sales efforts on a certain class of customers in order to learn the trade, and as the possible anti-competitive effects seem limited in a dynamic market, the conditions of Article 101(3) are likely to be fulfilled.

4.6.2. Selective distribution systems

4.6.2.1. Definition of selective distribution systems

(129) As set out in Article 1(1)(h) VBER, in a selective distribution system, the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system.

(130) The criteria used by the supplier to select distributors can be qualitative and/or quantitative in nature. Qualitative criteria are objective criteria required by the nature of the product, such as the training of sales personnel, the service provided at the point of sale, and the product range being sold.[52] Quantitative criteria limit the potential number of dealers more directly by, for instance, requiring minimum or maximum sales or fixing the number of dealers. These criteria can be changed throughout the duration of the selective distribution agreement.

(131) Selective distribution systems are comparable to exclusive distribution systems in that they restrict the number of authorised distributors and the possibilities of resale. The difference with exclusive distribution is the restriction of the number of dealers based on specific selection criteria. Another difference with exclusive distribution is that the restriction on resale associated with selective distribution is not a restriction on active sales into an exclusive territory or to an exclusive customer group, but a restriction on active and passive sales to non-authorised distributors, leaving only authorised distributors and final customers as possible buyers.

4.6.2.2. Application of Article 101 to selective distribution systems

(132) The possible competition risks of selective distribution systems are a reduction in intra-brand competition and, especially in the case of a cumulative effect, the foreclosure of certain type(s) of distributors, as well as the softening of competition and potentially the facilitation of collusion between buyers due to limiting their number.

(133) The assessment of the possible anti-competitive effects of selective distribution should focus first on the compliance of the selective distribution system with Article 101(1). To that end, a distinction needs to be drawn between purely qualitative selective distribution and quantitative selective distribution.

(134) Purely qualitative selective distribution where dealers are selected only on the basis objective criteria required by the nature of the product does not put a direct limit on the number of dealers. Provided that the three conditions laid down by the European

[52] See e.g. judgment in Case T-88/92 *Groupement d'achat Édouard Leclerc v Commission* EU:T:1996:192, paragraphs 125 and seq.

Court of Justice in the *Metro* judgment[53] (so-called "Metro criteria") are fulfilled, purely qualitative selective distribution is generally considered to fall outside Article 101(1), as it can be assumed that the restriction of intra-brand competition associated with selective distribution is offset by an improvement in inter-brand quality competition.[54] First, the nature of the goods or services in question must necessitate a selective distribution system. This means that, having regard to the nature of the product concerned, such a system must constitute a legitimate requirement to preserve its quality and ensure its proper use. For instance, a selective distribution system that falls outside Article 101(1) can be operated for high-quality or high-technology products.[55] Operating a selective distribution system may also be necessary for luxury goods. The quality of such goods may result not just from their material characteristics, but also from the aura of luxury surrounding them. Therefore, establishing a selective distribution system which seeks to ensure that the goods are displayed in a manner that contributes to sustaining this aura of luxury may be necessary to preserve their quality.[56] Secondly, resellers must be chosen on the basis of objective criteria of a qualitative nature, which are laid down uniformly for all potential resellers and are not applied in a discriminatory manner. Although the case law does not require that the qualitative criteria be made known to all potential resellers, such transparency may increase the likelihood of fulfilling the Metro criteria.[57] Thirdly, the criteria laid down must not go beyond what is necessary.[58]

(135) The assessment of selective distribution under Article 101(1) also requires a separate analysis of each potentially restrictive clause of the agreement under the Metro criteria.[59] This implies, in particular, determining whether the restrictive clause is proportionate in the light of the objective pursued by the selective distribution system and whether it goes beyond what is necessary to achieve this objective.[60] Such requirements are unlikely to be met by hardcore restrictions. Conversely, for

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53 See judgments in Case 31/80 *NV L'Oréal and SA L'Oréal v PVBA* EU:C:1980:289, paragraphs 15-16; Case 26/76 *Metro SB-Großmärkte GmbH & Co. KG v Commission* ("Metro I") EU:C:1977:167, paragraphs 20-21; Case C-439/09 *Pierre Fabre Dermo-Cosmetique SAS v Président de l'Autorité de la concurrence* EU:C:2011:649, paragraph 41; Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* EU:C:2017:941, paragraph 24.

54 See judgments Case 26/76 *Metro SB-Großmärkte GmbH & Co. KG v Commission* ("Metro I") EU:C:1977:167, paragraphs 20-22; Case 107/82 *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission* EU:C:1983:293, paragraphs 33, 34 and 73; Case 75/84, *Metro SB-Großmärkte GmbH & Co. KG v Commission* ("Metro II") EU:C:1986:399, paragraph 45; Case T-88/92 *Groupement d'achat Édouard Leclerc v Commission* EU:T:1996:192, paragraph 106.

55 Judgments Case 26/76 *Metro SB-Großmärkte GmbH & Co. KG v Commission* ("Metro I") EU:C:1977:167; Case 107/82 *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission* EU:C:1983:293.

56 See judgment Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* EU:C:2017:941, paragraphs 25 to 29.

57 See also by analogy judgement Case C-158/11 *Auto 24 SARL v Jaguar Land Rover France SAS* EU:C:2012:351.

58 See judgments in Case 31/80 *NV L'Oréal and SA L'Oréal v PVBA* EU:C:1980:289, paragraphs 15-16; Case 26/76 *Metro SB-Großmärkte GmbH & Co. KG v Commission* ("Metro I") EU:C:1977:167, paragraphs 20-21; Case 107/82 *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission* EU:C:1983:293, paragraph 35; Case T-19/91 *Société d'Hygiène Dermatologique de Vichy v Commission* EU:T:1992:28, paragraph 65.

59 See paragraph (134) of these Guidelines.

60 See judgment Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* EU:C:2017:941, paragraphs 43 et seq.

instance, a ban on the use imposed in a discernible manner third-party online platforms by a supplier of luxury goods on its authorised distributors may be considered appropriate, as long as it allows authorised distributors to advertise via the internet on third-party platforms and to use online search engines, with the result that customers are usually able to find the online offer of authorised distributors by using such engines, and not going beyond what is necessary to preserve the luxury image of those goods.[61] If this is the case, it falls outside of Article 101(1) and no further analysis is required..

(136) Even if they do not meet the Metro criteria, qualitative and/or quantitative selective distribution systems can benefit from the safe harbour, provided the market shares of both the supplier and the buyer each do not exceed 30% and the agreement does not contain any hardcore restriction.[62] The benefit of the exemption is not lost if selective distribution is combined with other non-hardcore vertical restraints, such as a non-compete obligation. The block exemption applies regardless of the nature of the product concerned and the nature of the selection criteria. However, where the characteristics of the product do not require selective distribution[63] or do not require the applied criteria, such as the requirement for distributors to have one or more brick and mortar shops or to provide specific services, such a distribution system does not generally bring about sufficient efficiency enhancing effects to counterbalance a significant reduction in intra-brand competition. Where appreciable anti-competitive effects occur, the benefit of the VBER is likely to be withdrawn.

(137) The remainder of this section provides guidance for the individual assessment of selective distribution system that do not fulfil the Metro criteria and are not covered by the VBER, or in the case of cumulative effects resulting from parallel networks of selective distribution in the same market.

(138) The market position of the supplier and its competitors is of central importance in assessing possible anti-competitive effects, as the loss of intra-brand competition can only be problematic if inter-brand competition is limited. The stronger the position of the supplier, notably above the 30% threshold, the higher the risk for competition resulting from the increased loss of intra-brand competition. Another important factor is the number of selective distribution networks present in the same market. Where selective distribution is applied by only one supplier in the market, quantitative selective distribution does not normally create net negative effects. In practice, however, selective distribution is often applied by several suppliers in a particular market.

(139) The position of competitors can have a dual significance. On the one hand, the existence of strong competitors will generally indicate that the reduction in intra-brand competition, which can be particularly important in the context of sole distribution, is outweighed by sufficient inter-brand competition. On the other hand,

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61 See judgment Case C-230/16, *Coty Germany GmbH v Parfümerie Akzente GmbH* EU:C:2017:941, paragraphs 43 et seq., and in particular paragraph 67.

62 See judgments in Case C-439/09 *Pierre Fabre Dermo-Cosmetique SAS v Président de l'Autorité de la concurrence* EU:C:2011:649; see also by analogy Case C-158/11 *Auto 24 SARL v Jaguar Land Rover France SAS* EU:C:2012:351.

63 See for example judgments of the General Court in Case T-19/92, Groupement d'achat Edouard Leclerc v Commission [1996] ECR II-1851, paragraphs 112 to 123; Case T-88/92 Groupement d'achat Edouard Leclerc v Commission [1996] ECR II-1961, paragraphs 106 to 117, and the case law referred to in the preceding footnote.

in the case of a cumulative effect, when a majority of the leading suppliers in a market apply selective distribution, there could be foreclosure of certain types of distributors (i.e. price discounters). The risk of foreclosure of more efficient distributors is greater with selective distribution than with exclusive distribution, given the restriction on sales to non-authorised dealers in selective distribution. That restriction is designed to give selective distribution systems a closed character in which only the authorised distributors that fulfil the criteria have access to the product while making it impossible for non-authorised dealers to obtain supplies. Accordingly, selective distribution is particularly well suited to avoid pressure by price discounters (whether offline or pure online distributors) on the margins of the manufacturer, as well as on the margins of the authorised distributors. Foreclosure of such distribution formats, whether resulting from the cumulative use of selective distribution or from its use by a single supplier with a market share exceeding 30%, reduces the possibilities for consumers to take advantage of the specific benefits offered by these distribution formats such as lower prices, more transparency and wider access to the product.

(140) Where the VBER applies to individual selective distribution networks, the withdrawal of the block exemption or the disapplication of the VBER may be considered in the case of cumulative effects. However, a cumulative effects problem is unlikely to arise when the share of the market covered by selective distribution does not exceed 50%. Also, competition concerns are unlikely to arise where the market coverage exceeds 50%, but the aggregate market share of the five largest suppliers does not exceed 50%. Where both the share of the five largest suppliers and the share of the market covered by selective distribution exceed 50%, the assessment may vary depending on whether or not all five largest suppliers apply selective distribution. The stronger the position of the competitors that do not apply selective distribution, the less likely that other distributors will be foreclosed. Competition concerns may arise if all five largest suppliers apply selective distribution. Such would particularly be the case if the agreements concluded by the largest suppliers contain quantitative selection criteria which directly limit the number of authorised dealers or when the qualitative criteria applied foreclose certain distribution formats, such as a requirement to have one or more brick and mortar shops or to provide specific services that can typically only be provided in a particular distribution format. The conditions of Article 101(3) are in general unlikely to be fulfilled if the selective distribution systems that contribute to the cumulative effect prevent access to the market to new distributors that are capable of adequately selling the products in question. In particular, final consumers are unlikely to benefit from efficiencies if the distribution systems only include certain existing channels while excluding from the market price discounters or pure online distributors which offer lower prices to consumers. More indirect forms of quantitative selective distribution, resulting for instance from the combination of purely qualitative selection criteria with a requirement for the dealers to achieve a minimum amount of annual purchases, are less likely to produce net negative effects, if the amount does not represent a significant proportion of the dealer's total turnover achieved with the type of products in question and does not go beyond what is necessary for the supplier to recoup its relationship-specific investment and/or realise economies of scale in distribution. A supplier with a market share not exceeding 5% is in general not considered to contribute significantly to a cumulative effect.

(141) Entry barriers are mainly relevant in the case of foreclosure of non-authorised distributors from the market. Entry barriers could be significant when selective

distribution is applied by manufacturers of branded products as it will generally take time and considerable investment for distributors excluded from the selective distribution system to launch their own brands or obtain competitive supplies elsewhere.

(142) Buying power may increase the risk of collusion between distributors. Distributors holding a strong market position may induce the suppliers to apply selective criteria that would foreclose market access to new and more efficient distributors. Consequently, buying power may appreciably change the analysis of possible anti-competitive effects of selective distribution. Foreclosure of more efficient distributors from the market may especially arise where a strong dealer organisation imposes selection criteria on the supplier aimed at limiting distribution to the advantage of its members.

(143) Article 5(1)(c) of the VBER provides that the supplier may not impose an obligation causing the authorised distributors, either directly or indirectly, not to sell the brands of particular competing suppliers. This provision aims specifically at avoiding horizontal collusion to exclude particular brands through the creation of a selective group of brands by the leading suppliers. Such an obligation is unlikely to be exemptible when the market share of the five largest suppliers is equal to or exceeds 50%, unless none of the suppliers imposing such an obligation belongs to the five largest suppliers on the market.

(144) Competition concerns relating to the foreclosure of other suppliers will normally not arise as long as other suppliers are not prevented from using the same distributors, as, for example, when selective distribution is combined with single branding. In the case of a dense network of authorised distributors or in the case of a cumulative effect, the combination of selective distribution and a non-compete obligation may pose a risk of foreclosure of other suppliers. In that case, the principles set out in section 2.1. of these Guidelines on single branding apply. Where selective distribution is not combined with a non-compete obligation, foreclosure of competing suppliers from the market may still be a concern where the leading suppliers apply not only purely qualitative selection criteria, but also impose on their distributors certain additional obligations such as the obligation to reserve a minimum shelf-space for the supplier’s products or to ensure that the distributor’s sales of the supplier’s products reach a minimum share of the distributor's total turnover. Such a problem is unlikely to arise if the share of the market covered by selective distribution is does not exceed 50% or, where this coverage ratio is exceeded, if the market share of the five largest suppliers does not exceed 50%.

(145) Assessing the dynamics of the market is important as growing demand, changing technologies and changing market positions may make negative effects less likely than in mature markets..

(146) Selective distribution may be efficient when it leads to savings in logistical costs due to economies of scale in transport, which may occur irrespective of the nature of the product (see paragraph (14)(g) of these Guidelines). However, such an efficiency is usually only marginal in selective distribution systems. To assess whether selective distribution is justified to help solve a free-rider problem between distributors (see paragraph (14)(b) of these Guidelines) or to help create or maintain a brand image (see paragraph (14)(h) of these Guidelines), the nature of the product is important. In general, the use of e for selective distribution to achieve these types of efficiencies is more likely to be justified for new products, complex products or products whose

qualities are difficult to judge before consumption (so-called experience products) or even after consumption (so-called credence products). The combination of selective distribution with a location clause, to protect an authorised distributor against competition from other authorised distributors opening a shop in its vicinity, may in particular fulfil the conditions of Article 101(3) if the combination is indispensable to protect substantial and relationship-specific investments made by the authorised distributor (see paragraph (14)(e) of these Guidelines). To ensure that the least anti-competitive restraint is used, it is relevant to assess whether the same efficiencies can be obtained at a comparable cost by, for instance, service requirements alone.

(147) Example of quantitative selective distribution

On a market for consumer durables, brand manufacturer A, which is the market leader with a market share of 35%, sells its product to final consumers through a selective distribution system. There are several criteria for admission to the system: the shop must employ trained staff and provide pre-sales services, there must be a specialised area in the shop devoted to the sales of the product and similar hi-tech products, and the shop is required to sell a wide range of models of the supplier and to display them in an attractive manner. Moreover, the number of admissible retailers in the systemis directly limited through the establishment of a maximum number of retailers per number of inhabitants in each province or urban area. Manufacturer A has 6 competitors in that market. Brand manufacturers B, C and D are its largest competitors with market shares of respectively 25%, 15% and 10%, whilst other manufacturers have smaller market shares. A is the only manufacturer that uses selective distribution. The selective distributors of brand A always handle a few competing brands. However, competing brands are also widely sold in shops which are not members of manufacturer A's selective distribution system. There are various channels of distribution: for instance, brands B and C are sold in most of A's selected shops, but also in other shops providing a high quality service, and in hypermarkets. Brand D is mainly sold in high service shops. Technology is evolving quite rapidly in this market, and the main suppliers maintain a strong quality image for their products through advertising.

On this market, the coverage ratio of selective distribution is 35%. Inter-brand competition is not directly affected by the selective distribution system of A. Intra-brand competition for brand A may be reduced, but consumers have access to low service/low price retailers for brands B and C, which have a comparable quality image to brand A. Moreover, access to high service retailers for other brands is not foreclosed, since there is no limitation on the capacity of selected distributors to sell competing brands, and the quantitative limitation on the number of distributors for brand A leaves other high service retailers free to distribute competing brands. In this case, in view of the service requirements and the efficiencies that these are likely to provide and the limited effect on intra-brand competition, the conditions of Article 101(3) are likely to be fulfilled.

(148) Example of selective distribution with cumulative effects

On a market for a particular sports article, there are seven manufacturers, whose respective market shares are 25%, 20%, 15%, 15%, 10%, 8% and 7%. The five largest manufacturers distribute their products through quantitative selective distribution, whilst the two smallest use different types of distribution systems, which results in a coverage ratio of selective distribution of 85%. The criteria for access to the selective

distribution systemsare uniform across the manufacturers: the distributors are required to have one or more brick and mortar shops, those shops are required to have trained personnel and to provide pre-sale services, there must be a specialised area in the shop devoted to the sales of the product, and a minimum size for this area is specified. The shop is required to sell a wide range of the brand in question and to display the product in an attractive manner, the shop must be located in a commercial street, and the product must represent at least 30% of the total turnover of the shop. In general, the same distributor is authorised for all five brands. The two brands which do not use selective distribution usually sell through less specialised retailers with lower service levels. The market is stable, both on the supply and on the demand side, and there is strong product differentiation with brand image being important. The five market leaders have strong brand images acquired through advertising and sponsoring, whereas the two smaller manufacturers have a strategy of cheaper products, with no strong brand image.

On this market, access to the five leading brands by general price discounters and pure online distributors is denied. This is because the requirement that the product represents at least 30% of the activity of the distributors and the criteria on presentation and pre-sales services rule out most price discounters from the network of authorised distributors. Moreover, the requirement to have one or more brick and mortar shops excludes pure online distributors from the network. As a consequence, consumers have no choice but to buy the five leading brands in high service/high price shops. This leads to reduced inter-brand competition between the five leading brands. The fact that the two smallest brands can be bought in low service/low price shops does not compensate for this, because the brand image of the five market leaders is much better. Inter-brand competition is also limited through multiple dealerships. Even though there exists some degree of intra-brand competition and the number of distributors is not directly limited, the criteria for admission are strict enough to lead to a small number of distributors for the five leading brands in each territory.

The efficiencies associated with such quantitative selective distribution systems are low: the product is not very complex and does not justify a particularly high service. Unless the manufacturers can prove that there are clear efficiencies associated with their selective distribution system, it is likely that the block exemption will have to be withdrawn, due to the presence of cumulative restrictive effects resulting in less choice and higher prices for consumers.

4.6.3. Franchising

(149) Franchise agreements contain licences of intellectual property rights relating in particular to trademarks or signs and know-how for the use and distribution of goods or services. In addition to the licence of IPRs, the franchisor usually provides the franchisee during the lifetime of the agreement with commercial or technical assistance. The licence and the assistance are integral components of the business method being franchised. The franchisor is in general paid a franchise fee by the franchisee for the use of the particular business method. Franchising may enable the franchisor to establish, with limited investments, a uniform network for the distribution of its products. In addition to the provision of the business method, franchise agreements usually contain a combination of different vertical restraints concerning the products being distributed, in particular selective distribution, non-compete obligations, exclusive distribution or weaker forms thereof.

(150) Franchising (with the exception of industrial franchise agreements) presents some specific characteristics, such as the use of a uniform business name, the application of uniform business methods (including the licensing of IPRs) and the payment of royalties in return for the benefits granted. In view of these specificities, provisions that are strictly necessary for the functioning of such distribution systems can be considered as falling outside Article 101(1). This concerns, for instance, restrictions that prevent the know-how and assistance provided by the franchisor from benefiting his competitors[64] and a non-compete obligation with regard to the goods or services purchased by the franchisee that is necessary to maintain the common identity and reputation of the franchise network. In the latter case, the duration of the non-compete obligation is irrelevant as long as it does not exceed the duration of the franchise agreement itself.

(151) Franchise agreements are covered by the VBER where both the supplier's and the buyer's market shares do not exceed 30%.[65] The licensing of IPRs contained in franchise agreements is dealt with in paragraphs (67) to (82) of these Guidelines. Vertical restraints contained in franchise agreements will be assessed under the rules applicable to the distribution system that most closely relates to the nature of the specific franchise agreement. For instance, a franchise agreement that gives rise to a closed network since members are forbidden from selling to non-members shall be assessed under the rules applicable to selective distribution. In contrast, a franchise agreement that grants territorial exclusivity and protection from active sales by other franchisees shall be assessed under the rules applicable to exclusive distribution.

(152) Franchising agreements that include hardcore restrictions, including RPM, [66] shall not be covered by the VBER. The Agreements that are not covered by the VBER require an individual assessment under Article 101. This assessment should take into account that the more important the transfer of know-how, the more likely it is that the vertical restraints create efficiencies and/or are indispensable to protect the know-how and thus fulfil the conditions of Article 101(3).

(153) Example of franchising

> A manufacturer has developed a new format for selling sweets in so-called fun shops where the sweets can be coloured on demand from the consumer. The sweets manufacturer has also developed the machines to colour the sweets and produces the colouring liquids. The quality and freshness of the liquid is of vital importance to producing good sweets. The manufacturer made a success of its sweets through a number of own retail outlets all operating under the same trade name and with the uniform fun image (e.g. common shop style and advertising). In order to expand sales, the sweets manufacturer has started a franchising system. To ensure a uniform product quality and shop image, the franchisees are obliged to buy the sweets, liquid and colouring machine from the manufacturer, to operate under the same trade name, to pay a franchise fee, to contribute to common advertising and to ensure the confidentiality of the operating manual prepared by the franchisor. In addition, the franchisees are only allowed to sell from the agreed premises to end users or other

64 See judgment in Case 161/84 *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis* EU:C:1986:41, paragraph 16.

65 See also paragraphs (86) to (95), in particular paragraph (92).

66 See judgment in Case 161/84 *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis* EU:C:1986:41, paragraph 23.

franchisees. They are not allowed to sell other sweets in their shops. The franchisor is obliged not to appoint another franchisee nor operate a retail outlet himself in a given contract territory. The franchisor is also under the obligation to update and further develop its products, the business outlook and the operating manual and to make these improvements available to all franchisees. The franchise agreements are concluded for a duration of 10 years.

Sweet retailers buy their sweets on a national market from either national producers that cater for national tastes or from wholesalers that import sweets from foreign producers in addition to selling sweets from national producers. On that market, the franchisor's products compete with a number of national and international brands of sweets, sometimes produced by large diversified food companies. The franchisor's market share of the market for machines for colouring food is below 10%. The franchisor has a market share of 30% on the market for sweets sold to retailers. There are many points of sale for sweets in the form of tobacconists, general food retailers, cafeterias and specialised sweet shops.

Most of the obligations contained in the franchise agreements can be deemed necessary to protect IPRs or to maintain the common identity and reputation of the franchise network and thus fall outside Article 101(1). The restrictions on selling (i.e. the determination of a contract territory and selective distribution) provide an incentive to the franchisees to invest in the franchise concept and the colouring machine and to help maintain the common identity, thereby offsetting the loss of intra-brand competition. The non-compete clause excluding other brands of sweets from the shops for the full duration of the agreements allows the franchisor to keep the outlets uniform and prevents competitors from benefiting from its trade name. In view of the high number of outlets available to other sweets producers, it does not lead to any serious foreclosure. Consequently, the franchise agreements are likely to fulfil the conditions for exemption under Article 101(3) to the extent that they fall under Article 101(1).

5. MARKET DEFINITION AND MARKET SHARE CALCULATION

5.1. Market Definition Notice

(154) The Commission Notice on the definition of relevant market for the purposes of Community competition law ("Market Definition Notice") provides guidance on the rules, criteria and evidence which the Commission uses when considering market definition issues.[67] The relevant market for the purpose of applying Article 101 to vertical agreements should therefore be defined on the basis of that guidance and any future guidance relating to the definition of relevant market for the purposes of EU competition law. These Guidelines only deal with specific issues that arise in the context of the application of the VBER, and that are not covered by the Market Definition Notice.

5.2. The calculation of market shares under the VBER

(155) Under Article 3 VBER, the market share of both the supplier and the buyer are decisive to determine if the block exemption applies. In order for the VBER to apply, the market share of the supplier on the market where it sells the contract goods or

[67] OJ C 372, 9.12.1997, p. 5–13.

services to the buyer and the market share of the buyer on the market where it purchases the contract goods or services, must not exceed 30%. For agreements between SMEs it is in general not necessary to calculate market shares (see paragraph (26) of these Guidelines).

(156) At the distribution level the vertical restraints usually concern not only the sale of products between supplier and buyer, but also their resale. As different distribution formats usually compete, markets are in general not defined by the form of distribution that is applied, namely exclusive, selective or free distribution. Where suppliers generally sell a portfolio of products, the entire portfolio may determine the product market definition when the portfolio and not the individual products contained in the portfolio are regarded as substitutes by the buyers.

(157) Where a vertical agreement involves three parties, each operating at a different level of trade, each party's market share must not exceed 30% in order for the VBER to apply. As specified in Article 3(2) VBER, where in a multi-party agreement an undertaking buys the contract goods or services from one undertaking that is a party to the agreement and sells the contract goods or services to another undertaking that is also a party to the agreement, the VBER only applies if its market share does not exceed the 30% threshold both as a buyer and a supplier. If, for instance, in an agreement between a manufacturer, a wholesaler (or association of retailers) and a retailer, a non-compete obligation is agreed, then the market shares of the manufacturer and the wholesaler (or association of retailers) on their respective supply markets must not exceed 30% and the market share of the wholesaler (or association of retailers) and the retailer must not exceed 30% on their respective purchase markets in order to benefit from the VBER.

(158) Where the vertical agreement, in addition to the supply of the contract goods or services, also contains IPR provisions (such as a provision concerning the use of the supplier's trademark), which help the buyer to market the contract goods or services, the supplier's market share on the market where it sells the contract goods or services is relevant for the application of the VBER. Where a franchisor does not supply goods or services for the resale of these goods or services, but provides a bundle of goods or services combined with IPR provisions that together form the business method being franchised, the franchisor needs to take account of its market share as a provider of a business method for the provision of specific goods or services to end users. For that purpose, the franchisor needs to calculate its market share on the market where the business method is exploited by the franchisees to provide goods or services to end users. The franchisor must therefore base its market share on the value of the goods or services supplied by its franchisees on this market. On such a market, the franchisor's competitors may be providers of other franchised business methods, but also suppliers of substitutable goods or services not applying franchising. For instance, without prejudice to the definition of such a market, if there was a market for fast-food services, a franchisor operating on such a market would need to calculate its market share on the basis of the relevant sales figures of its franchisees on this market.

5.3. Calculation of market shares under the VBER

(159) As set out in Article 7(a) VBER, the market shares of the supplier and the buyer should in principle be calculated on the basis of value data. Where value data are not available, substantiated estimates can be made on the basis of other reliable market information such as volume figures.

(160) The in-house supply of intermediate goods or services for the supplier's own use may be relevant for the competition analysis in a particular case, but it will not be taken into account for the purposes of market definition or for the calculation of market shares under the VBER. By contrast, pursuant to Article 7(c) VBER, in the case of dual distribution of final goods (i.e. where a supplier of final goods also acts as a distributor of those goods on the market), the market definition and market share calculation should include the supplier's sales of its own goods made through its vertically integrated distributors and agents. Integrated distributors are connected undertakings within the meaning of Article 1(2) VBER.[68]

6. APPLICATION OF THE VBER

6.1. Hardcore restrictions under the VBER

(161) Article 4 VBER contains a list of hardcore restrictions, which are considered serious restrictions of competition that should in most cases be prohibited because of the harm they cause to consumers. Vertical agreements that include one or more hardcore restrictions are excluded as a whole from the scope of application of the VBER.

(162) The hardcore restrictions in Article 4 VBER apply to vertical agreements concerning trade *within* the Union. Therefore, in so far as vertical agreements concern exports outside the Union or imports/re-imports from outside the Union the case law of the CJEU suggests that such agreements cannot be regarded as having the object of appreciably restricting competition within the Union or as being capable of affecting as such trade between Member States.[69]

(163) Hardcore restrictions pursuant to Article 4 VBER are generally restrictions of competition by object within the meaning of Article 101(1).[70] Restrictions of competition by object within the meaning of Article 101(1) are agreements which, by their very nature, have the potential to restrict competition.[71] In that regard, it is apparent from the Court's case-law that certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects.[72] A finding of a restriction by object requires an individual assessment of the vertical agreement concerned. In contrast, hardcore restrictions correspond to a category of restrictions under the VBER for which it is presumed that they generally result in harm to competition so that a vertical agreement containing such a hardcore restriction cannot be block exempted pursuant to Article 2(1) VBER.

(164) However, hardcore restrictions do not necessarily fall within the scope of Article 101(1). If a hardcore restriction under the VBER is objectively necessary for a vertical agreement of a particular type or nature, for instance, to ensure compliance with a public ban on selling dangerous substances to certain customers for reasons of safety or health, this agreement falls exceptionally outside the scope of Article

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68 For these market definition and market share calculation purposes, it is not relevant whether the integrated distributor sells in addition goods or services of competitors.

69 See judgment in Case C-306/96 *Javico* v *Yves Saint Laurent* EU:C:1998:173, paragraph 20.

70 See Commission, Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice, SWD(2014) 198 final, p. 4.

71 See judgment in Case C-8/08 *T-Mobile Netherlands* EU:C:2009:343, paragraph 31.

72 See judgment in Case C-67/*13 Groupement des Cartes Bancaires* EU:C:2014:2204, paragraph 49.

101(1). In light of the above, in particular that hardcore restrictions are generally restrictions of competition by object, the Commission will apply the following principles when assessing a vertical agreement:

(a) Where a hardcore restriction within the meaning of Article 4 VBER is included in a vertical agreement, this agreement is likely to fall within Article 101(1).

(b) An agreement that includes a hardcore restriction within the meaning of Article 4 VBER is unlikely to fulfil the conditions of Article 101(3).[73]

(165) An undertaking may demonstrate pro-competitive effects under Article 101(3) in an individual case.[74] For this purpose, the undertaking has to substantiate that efficiencies are likely and that these efficiencies are likely to result from including the hardcore restriction in the agreement, when demonstrating that all the conditions of Article 101(3) are fulfilled. Where this is the case, the Commission will assess the negative impact on competition that is likely to result from including the hardcore restriction in the agreement before making an ultimate assessment of whether the conditions of Article 101(3) are fulfilled.[75]

(166) The examples in the following three paragraphs of these Guidelines are meant to illustrate under which exceptional circumstances a hardcore restriction may fall outside the scope of Article 101(1).

(167) Example of genuine entry

A distributor which is the first to sell a new brand or an existing brand on a new market, thereby ensuring a genuine entry, may have to commit substantial investments if there was previously no demand for the particular type of product in general or for the type of product from the particular producer. In such circumstances, considering that such expenses may often be sunk, the distributor may not enter into the distribution agreement without protection for a certain period of time against active and passive sales into its territory or to its customer group by other distributors.

For example, such a situation may occur where a manufacturer established in a particular national market enters another national market and introduces its products with the help of an exclusive distributor, which needs to invest in launching and establishing the brand on this new market. Where substantial investments by the distributor to start up and/or develop the new market are necessary, restrictions of passive sales by other distributors into such a territory or to such a customer group which are necessary for the distributor to recoup those investments generally fall outside the scope of Article 101(1) during the first two years during which the distributor is selling the contract goods or services in that territory or to that customer

73 See judgment in case C-439/09 *Pierre Fabre*, EU:C:2011:649, paragraph 57.

74 See in particular paragraphs (14)(a) to (i) of these Guidelines describing in general possible efficiencies related to vertical restraints and section 6.1.1. of these Guidelines on resale price restrictions. See for general guidance on this the Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97.

75 Such an assessment is without prejudice to the fact that a specific restriction may nevertheless be automatically void if it amounts to a violation of the prohibitions regarding passive sales set out in the Geoblocking Regulation, see Article 6(2) of Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC.

group, even though such restrictions would normally be considered hardcore restrictions presumed to fall within the scope of Article 101(1).

(168) Example of cross-supplies between authorised distributors

In the case of a selective distribution system, cross-supplies between authorised distributors must normally remain free (see paragraph 187 of these Guidelines). However, if authorised wholesalers located in different territories are obliged to invest in promotional activities in the territory in which they distribute the goods or services concerned in order to support the sales by authorised distributors and it is not practical to specify in a contract the required promotional activities, restrictions on active sales by these wholesalers to authorised distributors in other wholesalers' territories to overcome possible free-riding may, in an individual case, fulfil the conditions of Article 101(3).

(169) Example of genuine testing

In the case of genuine testing of a new product in a limited territory or with a limited customer group or in the case of a staggered introduction of a new product, the distributors appointed to sell the new product on the test market or to participate in the first round(s) of the staggered introduction may be restricted in their active selling outside the test market or the market(s) where the product is first introduced without falling within the scope of Article 101(1) for the period necessary for the testing or introduction of the product.

6.1.1. Resale price maintenance

(170) The hardcore restriction set out in Article 4(a) VBER concerns resale price maintenance (hereafter "RPM"), that is, agreements or concerted practices having as their direct or indirect object the establishment of a fixed or minimum resale price or a fixed or minimum price level to be observed by the buyer.[76] A vertical agreement or concerted practice that relates to a certain range within which the buyer has to price is therefore not in line with Article 4(a) VBER.

(171) RPM can be established through direct means. This is the case for contractual provisions or concerned practices that directly establish the retail price and therefore result in clear-cut restrictions.[77] Such restrictions include contractual provisions allowing the supplier to set the price that the buyer has to charge its customer or prohibiting the buyer to sell below a certain price level. The restriction is also clear-cut where a supplier requests a price increase and the buyer complies with such a request.

(172) RPM can also be achieved through indirect means, including incentives to observe a minimum price or disincentives to deviate from a minimum price. The following examples are meant to provide a non-exhaustive list of such indirect means:

[76] For the distinction between vertical agreements and concerted practices see paragraphs (48) to (51) of these Guideines. However, this distinction has so far not played an important role in the enforcement practice since it is not necessary to distinguish between the two to find an infringement of Article 101. Furthermore, it should be noted that RPM can be linked to other restrictions, including horizontal collusion in the form of hub-and-spoke arrangements, which are addressed in the Horizontal Guidelines, paragraph 55.

[77] See, for example, Commission Decisions in AT.40182 *Guess*, paragraphs 84, 86, and 137.

– Fixing the distribution margin;

– Fixing the maximum level of a discount that the distributor can grant from a prescribed price level;

– Making the grant of rebates or the reimbursement of promotional costs by the supplier subject to the observance of a given price level;

– Linking the prescribed resale price to the resale prices of competitors; and

– Threats, intimidations, warnings, penalties, the delay or suspension of deliveries or contract terminations in relation to the observance of a given price level.

(173) However, as set out in Article 4(a) VBER, the imposition of a maximum retail price or the determination of a resale price recommendation by the supplier does not in itself amount to RPM. However, if the supplier combines such a maximum price or resale price recommendation with incentives to apply a certain price level or disincentives to lower the sales price, this can amount to RPM. An example of incentives to apply a certain price level would be the reimbursement of promotional costs in case of compliance with the maximum resale price or the recommended resale price. An example of disincentives to lower the sales price would be an intervention of the supplier in case the buyer deviates from the maximum or recommended resale price by, for instance, threatening to cut further supplies.

(174) Similarly, minimum advertised price polices ("MAPs"), which prohibit retailers from advertising prices below a certain amount set by the supplier, may also amount to RPM for instance in cases where the supplier sanction retailers for ultimately selling below the respective MAPs, require them not to offer discounts or prevent them from communicating that the final price could differ from the respective MAP.

(175) Direct or indirect means of achieving price fixing can be made more effective when combined with measures aimed at identifying price-cutting distributors, such as the implementation of a price monitoring system, or the obligation on retailers to report other members of the distribution network that deviate from the standard price level. These measures are, however, in themselves not sufficient for a finding of RPM since they may be used by suppliers to increase the efficiency of the supply or distribution chain or for other purposes unrelated to direct or indirect means of achieving RPM.

(176) Price monitoring is increasingly used in e-commerce where both manufacturers and retailers often use specific price monitoring software.[78] Such price monitoring does not constitute RPM as such. It however increases price transparency in the market, which allows manufacturers to effectively track the resale prices in their distribution network and to intervene swiftly in case of price decreases. It also allows retailers to effectively track the prices of their competitors and report price decreases to the manufacturer, together with a request to intervene against such price decreases.[79]

[78] See Commission Staff Working Document accompanying the Final Report on the E-commerce Sector Inquiry, document SWD(2017) 154 final of 10.5.2017, paragraphs 602-603.

[79] See Commission Decisions in AT.40182 *Pioneer*, paragraphs 136 and 155; AT.40182 *Denon & Marantz*, paragraph 95; AT.40181 *Philips*, paragraph 64; See Commission Decisions in AT.40182 *Pioneer*, paragraphs 136; AT.40465 *Asus*, paragraph 27.

(177) In the case of agency agreements, the principal normally establishes the sales price, as it bears the commercial and financial risks relating to the sale. However, where such an agreement cannot be qualified as an agency agreement for the purposes of applying Article 101(1) (see in particular paragraphs (40) to (43) of these Guidelines), an obligation preventing or restricting the agent from sharing its commission with the customer, irrespective of whether the commission is fixed or variable, is a hardcore restriction under Article 4(a) VBER. To avoid the use of such a hardcore restriction, the agent should be left free to reduce the effective price paid by the customer without reducing the income for the principal.[80]

(178) The fixing of the resale price in a vertical agreement between a supplier and a buyer that executes a prior agreement between the supplier and a specific end user (hereinafter "fulfilment contract") does not constitute RPM where the end user has waived its right to choose the undertaking that should execute the agreement. In such a case, the fixing of the resale price does not result in a restriction of Article 101(1) since the resale price is no longer subject to competition in relation to the end user concerned. However, this only applies in case the fulfilment contract does not constitute an agency agreement falling outside the scope of Article 101(1), as described in particular in paragraphs (40) to (43) of these Guidelines for instance because the buyer acquires the ownership of the contract goods intended for resale or because it assumes more than insignificant risks in relation to the execution of the contract. In contrast, where the end user has not waived its right to choose the undertaking that should execute the agreement, the supplier cannot fix the resale price without infringing Article 4(a) VBER. However, it may set a maximum resale price with a view to allowing price competition for the execution of the agreement.

(179) Article 4(a) VBER is fully applicable in the online platform economy. In particular, if an undertaking is a provider of online intermediation services according to Article 1(1)(d)VBER, it is a supplier and must therefore comply with Article 4(a) VBER to avoid a hardcore restriction with regard to the intermediated goods or services. While this does not prevent an online intermediation services provider from incentivising the users of the online intermediation services to sell their goods or services at a competitive level or to reduce their prices, Article 4(a) VBER prohibits the online intermediation services provider from imposing a fixed or minimum sales price for the transaction that it facilitates.

(180) The CJEU has held on several occasions that an agreement establishing minimum or fixed retail prices, which prevents the buyer from determining its resale prices independently, restricts competition by object within the meaning of Article 101(1).[81] However, as mentioned in paragraphs (163) to (165) of these Guidelines, the qualification of a restriction as a hardcore restriction, and by object restriction, does not mean that agreements that amount to RPM are *per se* infringements of Article 101. Where undertakings consider that RPM is efficiency enhancing in an individual case, they may bring forward efficiency justifications under Article 101(3).

(181) RPM is generally considered a serious restriction of competition, as it can restrict intra-brand and/or inter-brand competition in different ways:

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80 See, for instance, Commission Decision in Case No IV/32.737 *Eirpage*, in particular paragraph 6.

81 Judgements in 243/83 *Binon v AMP* EU:C:1985:284, paragraph 44; C-311/85 *VVR v Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* EU:C:1987:418, paragraph 17; C-27/87 *SPRL Louis Erauw-Jacquery v La Hesbignonne SC* EU:C:1988:183, paragraph 15.

(a) The direct effect of RPM is the elimination of intra-brand price competition by preventing all or certain distributors from lowering their sales price for the brand concerned, thus resulting in a price increase for that brand.

(b) RPM may facilitate collusion between suppliers, notably in markets prone to collusive outcomes, for instance, where suppliers form a tight oligopoly and a significant part of the market is covered by RPM agreements. This may also be the case where suppliers distribute their goods or services through the same distributors, thus allowing them to use the latter as a vehicle for implementing the collusive equilibrium. RPM makes it generally easier to detect whether a supplier deviates from the collusive equilibrium by cutting its price. This means that if a supplier decided not to enforce its RPM policy with a view to increasing its retail sales, RPM would allow the other suppliers to detect the resulting retail price decrease more easily and react accordingly.

(c) RPM may facilitate collusion between buyers at the distribution level. The resulting loss of price competition seems particularly problematic when RPM is inspired by the buyers. Strong or well organised buyers may be able to force or convince one or more of their suppliers to fix their resale price above the competitive level, thereby helping the buyers reach or stabilise a collusive equilibrium. RPM serves as a commitment device for retailers not to deviate from the collusive equilibrium through discounting prices.

(d) RPM may reduce the pressure on the supplier's margin, in particular where the manufacturer has a commitment problem, that is, where it has an interest in lowering the price charged to subsequent distributors. In such a situation, the manufacturer may prefer to agree to RPM, so as to help it to commit not to lower the price for subsequent distributors and to reduce the pressure on its own margin.

(e) By avoiding price competition between distributors, RPM may prevent or hinder the entry and expansion of more efficient or new distribution formats, thus reducing innovation at the distribution level.

(f) RPM may be implemented by a supplier with market power to foreclose smaller rivals. The increased margin that RPM may offer distributors may entice them to favour the supplier's brand over rival brands when advising customers, even where such advice is not in the interest of these customers, or not to sell these rival brands at all.

(182) However, RPM may also lead to efficiencies, in particular where it is supplier driven. If undertakings invoke Article 101(3) claiming that RPM may lead to efficiencies, it is for them to put forward concrete evidence to substantiate this claim and to show that the conditions of Article 101(3) are indeed fulfilled in the individual case. Three examples of such an efficiency defence are set out below.

(a) When a manufacturer introduces a new product, RPM may be an efficient means to induce distributors to better take into account the manufacturer's interest to promote this product, in particular if it is a completely new product, and to increase sales efforts. If the distributors on the respective market face competitive pressure, this pressure may induce them to expand overall demand for the product and make the launch of the product a success, also for the benefit of consumers. Article 101(3) requires that less restrictive means do not exist. To meet this requirement, suppliers may, for example, demonstrate that it

is not feasible in practice to impose on all buyers effective promotion requirements by contract. Under such circumstances, the imposition of fixed or minimum retail prices for a limited period of time in order to facilitate the introduction of a new product may be considered on balance pro-competitive.

(b) Fixed resale prices, and not just maximum resale prices, may be necessary to organise a coordinated short term low price campaign (of 2 to 6 weeks in most cases), which will also benefit consumers. In particular, they may be necessary to organise such a campaign in a distribution system in which the supplier applies a uniform distribution format, such as a franchise system. Given its temporary character, the imposition of fixed retail prices may be considered on balance pro-competitive.

(c) In some situations, the extra margin provided by RPM may allow retailers to provide (additional) pre-sales services, in particular in case of experience or complex products. If enough customers take advantage of such services to make their choice but subsequently purchase at a lower price with retailers that do not provide such services (and hence do not incur these costs), high-service retailers may reduce or eliminate these services that enhance the demand for the supplier's product. RPM may help to prevent such free-riding at the distribution level. The supplier will have to convincingly demonstrate that the RPM agreement is necessary in order to overcome free riding between retailers on these services. In this case, the likelihood that RPM is found pro-competitive is higher when competition between suppliers is fierce and the supplier has limited market power.

(183) The safe harbour provided by the VBER covers recommending a resale price to a reseller or requiring the reseller to respect a maximum resale price when the market share of each of the parties to the agreement does not exceed the 30% threshold, provided it does not amount to a minimum or fixed sales price as a result of pressure from, or incentives offered by, any of the parties, as set out in paragraphs (172) to (173) of these Guidelines. The remainder of this section provides guidance for the assessment of recommended or maximum prices above the market share threshold.

(184) The possible competition risk of recommended and maximum prices is that they will work as a focal point for the resellers and might be followed by most or all of them. Moreover, recommended and maximum prices may soften competition or facilitate collusion between suppliers.

(185) An important factor for assessing possible anti-competitive effects of recommended or maximum resale prices is the market position of the supplier. The stronger the market position of the supplier, the higher the risk that a recommended or maximum resale price leads to a more or less uniform application of that price level by the resellers, because they may use it as a focal point. They may find it difficult to deviate from what they perceive to be the preferred resale price proposed by such an important supplier on the market.

(186) Where appreciable anti-competitive effects are established for recommended or maximum resale prices, the question of a possible exemption under Article 101(3) arises. For maximum resale prices, avoiding double marginalisation, may be particularly relevant. A maximum resale price may also help ensure that the brand in question competes more forcefully with other brands, including own label products, distributed by the same distributor.

6.1.2. Hardcore restrictions pursuant to Article 4(b) to (d) VBER

6.1.2.1. General principles pursuant to Article 4(b) to (d) VBER

(187) Article 4(b) to (d) VBER provides a list of hardcore restrictions and exceptions that apply depending on the distribution system operated by the supplier: exclusive distribution, selective distribution or free distribution. The hardcore restrictions set out in Article 4(b), 4(c)(i) and (d) of the VBER concern agreements or concerted practices that, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object the restriction of sales by a buyer or its customers, in as far as those restrictions relate to the territory into which or the customer groups to whom the buyer or its customers may sell the contract goods or services. Article 4(c)(ii) and (iii) of the VBER provide that, in a selective distribution system, the restriction of cross-supplies between the members of the selective distribution system operating at the same or different levels of trade as well as the restriction of active or passive sales to end users by members of the selective distribution system operating at the retail level of trade constitute hardcore restrictions.

(188) Article 4(b) to (d) VBER applies irrespective of the sales channel used. Vertical agreements which, directly or indirectly, in isolation or combination with other factors, have as their object, to prevent the buyers or their customers from effectively using the internet for the purposes of selling their goods or services online, restrict the territories into which or the customer groups to whom the buyers or their customers may sell the contract goods or services, as they restrict sales to customers located outside the physical trading area of the buyers or their customers.[82] A ban of online sales, as well as restrictions *de facto* banning or limiting online sales to the extent that these *de facto* deprive buyers and their customers from effectively using the Internet to sell their goods or services online, have as their object to prevent the buyers or their customers from effectively using the internet to sell their goods or services online. Therefore, a restriction capable of significantly diminishing the overall amount of online sales in the market constitutes a hardcore restriction of active or passive sales within the meaning of Article 4(b) to (d) VBER. The assessment of whether a restriction is hardcore cannot depend on market-specific circumstances or the individual circumstances of one or specific customers. Restrictions that prevent the effective use of one or more online advertising channels by the buyers or their customers[83] have as their object to prevent the buyers or their customers from effectively using the internet to sell their goods or services online and thus restrict sales to customers wishing to purchase online and located outside the physical trading area of the buyers or their customers, as they limit the buyers' or their customers' ability to target them, inform them of their offering and to attract them to their online shop or other channels.

(189) These hardcore restrictions may be the result of direct obligations, such as the obligation not to sell to certain customers or to customers in certain territories or the obligation to refer orders from these customers to other distributors. It may also result from indirect measures aimed at inducing the distributor not to sell to such customers, such as:

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82 See also judgement in Case C-439/09 *Pierre Fabre Dermo-Cosmetique SAS v Président de l'Autorité de la concurrence* EU:C:2011:649, paragraph 54.

83 See Commission Decisions in AT.40182 Guess, paragraph 118-126.

(a) the requirement to request the supplier's prior approval;[84]

(b) the refusal or reduction of bonuses or discounts,[85] and compensatory payments by the supplier if the distributor stops sales to such customers;

(c) the termination of supply;

(d) the limitation or reduction of supplied volumes, for instance, to the demand within the allocated territory or of the allocated customer group;

(e) the threat of contract termination[86] or non-renewal;

(f) the threat or carrying out of audits to verify compliance with the request not to sell to certain customer groups or to customers in certain territories;

(g) requiring a higher price for products to be sold to certain customer groups or to customers in certain territories;

(h) limiting the proportion of sales to certain customer groups or to customers in certain territories;

(i) limiting the languages to be used on the packaging or for the promotion of the products;

(j) the supply of another product in return for stopping such sales

(k) payments to stop such sales;

(l) the obligation to pass-on to the supplier profits from such sales.

(190) It may further result from the supplier not providing a Union-wide guarantee service, whereby the supplier normally reimburses all distributors for providing a mandatory guarantee service, even in relation to products sold by other distributors into their territory.[87]

(191) The practices mentioned in paragraphs (187) and (189) of these Guidelines are more likely to be considered a restriction of the buyer's sales when used by the supplier in conjunction with a monitoring system aimed at verifying the destination of the supplied goods, such as the use of differentiated labels, specific language clusters or serial numbers.

(192) In addition to the direct and indirect obligations laid down in (187) to (190) of these Guidelines, hardcore restrictions specifically related to online sales may similarly be the result of direct or indirect obligations. Besides a direct prohibition to use the internet as a sales channel, the following are further examples of obligations, directly or indirectly, having the object to prevent distributors from effectively using the

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84 See for example judgement in Case T-77/92 *Parker Pen v Commission* EU:T:1994:85, paragraph 37.

85 See for example judgment in Case T-450/05 *Peugeot Nederland v Commission* EU:T:2009:262, paragraph 47.

86 See for instance judgment in Case T-62/98 *Volkswagen v Commision* EU:T:2000:180, paragraph 44.

87 If the supplier decides not to reimburse its distributors for services rendered under the Union-wide guarantee, it may be agreed with these distributors that a distributor which makes a sale outside its allocated territory will have to pay the distributor authorised in the territory of destination a fee based on the cost of the services to be carried out, including a reasonable profit margin. This type of scheme may not be seen as a restriction of the distributors' sales outside their territory (see judgment of the Court of First Instance in Case T-67/01 *JCB Service* v *Commission* [2004] ECR II-49, paragraphs 136 to 145).

internet to sell their goods or services online anywhere, in certain territories or to certain customer groups:

(a) a requirement that the distributor, irrespective of the distribution system it operates, shall prevent customers located in another territory from viewing its website or shall automatically re-route its customers to the manufacturer's or other distributors' websites. This does not exclude an obligation on the distributor to offer on its website links to websites of other distributors and/or the supplier;[88]

(b) a requirement that the distributor, irrespective of the distribution system it operates, shall terminate consumers' online transactions once their credit card data reveal an address that is not within the distributor's territory;[89]

(c) a requirement that the distributor shall only sell in a physical space or in the physical presence of specialised personnel;[90]

(d) a requirement that the distributor shall seek the supplier's prior authorisation for selling online;

(e) a requirement that the distributor shall not use the supplier's trademarks or brand names on its website;

(f) a direct or indirect prohibition to use a specific online advertising channel, such as price comparison tools or advertising on search engines, or other online advertising restrictions indirectly prohibiting the use of a specific online advertising channel, such as an obligation on the distributor not to use the suppliers' trademarks or brand names for bidding to be referenced in search engines, or a restriction to provide price related information to price comparison tools. While a prohibition in the use of one specific price comparison tool or search engine would typically not prevent the effective use of the internet for the purposes of selling online, as other price comparison tools or search engines could be used to raise awareness of a buyer's online sales activities, a prohibition in the use of all most widely used advertising services in the respective online advertising channel could amount to such prevention, if the remaining price comparison tools or search engines are de facto not capable to attract customers to the buyer's online shop.

(193) By contrast, under the VBER the suppliers are allowed to give certain instructions to their distributors on how their products are to be sold. It is permissible for a supplier to impose quality requirements on distributors irrespective of the distribution model applied. The modalities of sales that do not have as their object the restriction of the

88 Article 3 of Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, OJ L 60I , 2.3.2018, p. 1–15.

89 Article 5 of Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, OJ L 60I , 2.3.2018, p. 1–15.

90 Case C-439/09 *Pierre Fabre Dermo-Cosmetique SAS v Président de l'Autorité de la concurrence* EU:C:2011:649, paragraphs 36-37.

territory into which and the customer groups to whom the product and service may be sold can be agreed upon by the suppliers and its distributors. For instance, vertical agreements that contain quality requirements, notably in the context of selective distribution, such as the minimum size of the shop, quality requirements for the set-up of the shop (e.g. with respect to fixtures, furnishing, design, lightening and floor coverings), quality requirements for the look and feel of the website, product presentation requirements (e.g. the minimum number of colour options displayed next to each other or of the brand's products exposed, and the minimum space requirement between products, product lines and brands in the shop), are covered by the VBER.[91]

(194) Vertical agreements including a restriction on the use of a specific online sales channel, such as online marketplaces, or setting quality standards for selling online, can benefit from the block exemption, irrespective of the distribution system used by the supplier in as far as such restriction does not, directly or indirectly, in isolation or combination with other factors, have as its object, to prevent the buyers or their customers from effectively using the internet for the purposes of selling their goods or services online or from effectively using one or more online advertising channels, as explained in paragraph (188) above. These restrictions do not affect a group of customers which can be circumscribed within all potential customers nor the buyers' or their customers' ability to operate their own websites and to advertise via the Internet on price comparison tools or online search engines, enabling buyers or their customers to raise awareness of their online activities and attract potential customers. Therefore, unless they have the indirect object of preventing the effective use of the internet for the purposes of selling online, such sales restrictions do not amount to a restriction of the territories into which or the customers to whom the distributors or their customers can sell the contract goods or services. Such block-exempted restrictions in principle include:

(a) a direct or indirect ban on sales on online marketplaces;[92]

(b) a requirement that the buyer operates one or more brick and mortar shops or showrooms as a condition for becoming a member of the supplier's distribution system;

(c) a requirement that the buyer sells at least a certain absolute amount (in value or volume, but not in proportion of its total sales) of the contract goods or services offline to ensure an efficient operation of its brick and mortar shop. This absolute amount of required offline sales can be the same for all buyers, or determined individually for each buyer on the basis of objective criteria, such as the buyer's size in the network or its geographic location.

(195) A requirement that the same buyer pays a different price for products intended to be resold online than for products intended to be resold offline can benefit from the safe harbour of the VBER, in so far as it has as its object to incentivise or reward the appropriate level of investments respectively made online and offline. Such difference in price should be related to the differences in the costs incurred in each channel by the distributors at retail level. To that end, the wholesale price difference

[91] For other examples, see Commission Staff Working Document accompanying the Final Report on the E-commerce Sector Inquiry, document SWD(2017) 154 final of 10.5.2017, paragraph 241.

[92] Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* ECLI:EU:C:2017:941, paragraphs 64-69; see also section 8.2.3. of these Guidelines.

should take into account the different investments and costs incurred by a hybrid distributor so as to incentivise or reward that hybrid distributor for the appropriate level of investments respectively made online and offline, as where the wholesale price difference is entirely unrelated to the difference in costs incurred in each channel, such price difference is unlikely to bring about efficiency-enhancing effects. Therefore, where the wholesale price difference has as its object to prevent the effective use of the internet for the purposes of selling online it amounts to a hardcore restriction, as set out in paragraph (188) of these Guidelines. This would, in particular, be the case where the price difference makes the effective use of the internet for the purposes of selling online unprofitable or financially not sustainable.

(196) Online advertising restrictions in vertical agreements benefit from the block exemption as long as they do not, directly or indirectly, have as their object to prevent the buyers or their customers from effectively using the internet for the purposes of selling their goods or services online, namely they do not directly or indirectly prevent the effective use of one or more specific online advertising channels. Examples of online advertising restrictions benefitting from the safe harbour of the VBER include a requirement that online advertising meets certain quality standards or includes specific content or information, or a requirement that the buyer does not use the services of individual online advertising providers not meeting certain quality standards.

6.1.2.2. Distinction between active and passive sales

(197) A restriction of the territory or customer group into which a buyer or its customers can sell the contract goods or services can concern active or passive sales into that territory or to those customers. Article 1(l) and (m) VBER provides the definitions of active and passive sales.

(198) Article 1(m) VBER provides that selling to customers who have not been actively targeted by setting up one's own website or online shop, irrespective of whether on an own server or hosted on a third party server, qualifies as passive sales, as it is a way to allow potential customers to reach a particular distributor. The use of a website may have effects that extend beyond the distributor's own territory and customer group, for instance, by enabling online purchases by customers located outside the physical trading area of the distributor. If, absent any active targeting by the distributor of a specific territory or customer group, a customer from that territory or customer group visits the website of a distributor and contacts the distributor, and if such contact leads to a sale, including delivery, this is considered passive selling, as the customer's access to the distributor's website stems from the effective use of the internet by the customer. The same applies if a customer opts to be kept automatically informed by the distributor and such information leads to a sale. Similarly, using search engine optimisation techniques on a website, namely using tools or techniques intended to improve the ranking of that website on search engines, is a form of passive selling.

(199) Conversely, offering on a website or online shop, language options different than the ones commonly used in the territory in which the distributor is established normally indicates that the distributor's activities are directed at the territory in which that language is commonly used and thus amounts to a form of active selling.[93] Offering

[93] Judgment in Cases C-585/08 and C-144/09, *Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v Oliver Heller,* ECLI:EU:C:2010:740, paragraph 93.

on a website or online shop an English language option is not considered as indicating that the distributor's activities are directed at English-speaking territories, as English are commonly used in EU Member States. Similarly, setting up one's own website or online shop with a domain name corresponding to a territory other than the one in which the distributor is established is a form of active selling into that territory, while offering a website or online shop with a generic and non-country specific domain name is considered a form of passive selling.

(200) Targeted online advertising or promotion is a form of active selling. In particular, in many instances, online advertising allows the distributor to determine in advance the audience that will be seeing its online advertising and thus to select the territories or customer groups that would be targeted by its advertisement. Targeted online advertising reaching customers within an exclusive territory or an exclusive customer group allocated to other distributors can thus be restricted. This includes, for instance, personalised advertising targeting customers in the exclusive territory or customer group or bidding for paid referencing on a search engine targeting an exclusive territory or customer group or any other form of online advertising enabling the distributor to design the advertisement so as to target or exclude customers in exclusive territories or customer groups. By contrast, online advertising or promotion which is meant to reach customers in a distributor's own territory or customer group but which cannot be limited to that territory or customer group, is considered a form of passive selling, to the extent that it is not designed to target customers across specific territories or customer groups. Examples of such general advertising is sponsored content on a website of a local or national newspaper that may be accessed by any visitor of that website, or the use of price comparison tools with generic and not country-specific domain names. Conversely, if such general advertising is made in languages not commonly used in the territory in which the distributor is established or on websites with domain names corresponding to a territory other than the one in which the distributor is established, it is a form of active selling into that territory, as it would no longer be meant to reach customers in the distributor's own territory. The participation in public procurement is categorised as a form of passive selling irrespective of the type of the public procurement procedure (e.g. open procedure, restricted procedure). This qualification is coherent with public procurement law. If the participation in a public tender was to be qualified as active sale, intra-brand competition would be significantly reduced in such markets, thus contradicting the rationale of public procurement law which includes facilitating intra-brand competition. As a result, restricting the participation of a buyer in public procurement is be a hardcore restriction under Article 4(b) to (d) VBER. Similarly, responding to private tenders is a form of passive selling. A private tender is a form of unsolicited sales request addressed to multiple potential suppliers and the submission of a bid in response to a private tender is therefore passive selling.

(201) As set out in Article 1(1)(n) VBER, in the context of restrictions amounting to a "restriction of active or passive sales" according to Article 4 VBER, all forms of selling other than those defined as passive sales in the VBER and further explained in these Guidelines are considered active sales.

6.1.2.3. Application of the general principles

(202) Article 4(b) to (d) VBER provides a list of hardcore restrictions and exceptions that apply depending on the distribution system operated by the supplier: exclusive distribution, selective distribution or free distribution.

6.1.2.4. Where the supplier operates an exclusive distribution system

(203) The hardcore restriction set out in Article 4(b) VBER concerns agreements or concerted practices that, directly or indirectly, have as their object the restriction of the territory into which or of the customer group to whom a buyer, to which an exclusive territory or customer group has been allocated, may actively or passively sell the contract goods or services.

(204) There are five exceptions to the hardcore restriction laid down in Article 4(b) VBER.

(205) First, Article 4(b)(i) VBER allows the supplier to restrict active sales by an exclusive distributor into a territory or to a customer group exclusively allocated to other buyers, or reserved to the supplier. In order to preserve their investment incentives, the exclusively appointed distributors should be appropriately protected against active sales, including online advertising, into the territory or to the customer group exclusively allocated to them by the other buyers of the supplier within the Union, including buyers to which other territories or customer groups have been exclusively allocated by the supplier. Where the active sales restrictions imposed on other buyers of the supplier do not provide an appropriate level of protection to safeguard the appointed distributor's incentives to invest in the exclusive territory and thus to justify the establishment of an exclusive distribution system, the benefit of the VBER is likely to be withdrawn.

(206) Sales by an exclusive distributor's customers into a territory or to a customer group that the supplier has exclusively allocated to other distributors can also undermine the latter distributors' incentives to invest in quality or demand-enhancing services. To protect the investment incentives of exclusively appointed distributors, the supplier may require that such other distributors, and their customers that have entered into a distribution agreement with the supplier or with a party that was given distribution rights by the supplier, are restricted from engaging in active sales into the exclusively allocated territory or to the exclusively allocated customer group (i.e. to pass on the active sales restriction to the buyer's customers).[94]

(207) The supplier is allowed to combine the allocation of an exclusive territory and an exclusive customer group by, for instance, appointing an exclusive distributor for a particular customer group in a specific territory.

(208) The protection of exclusively allocated territories or customer groups is not absolute. To prevent market partitioning, passive sales into such territories or to such customer groups cannot be prohibited. However, Article 4(b) VBER only concerns restrictions of sales by the buyer or its customers, which means that the supplier is not prevented from accepting a total or partial restriction, both online and offline, on both active and passive sales into the exclusive territory or to (all or some of) the customers constituting an exclusive customer group.

[94] The pass on is allowed by the VBER when the market share of the supplier party to the contract on the market where it sells the goods or services to the buyer does not exceed 30% and when the market share of the buyer on the market where it purchases the contract goods or services does not exceed 30%.

(209) Second, Article 4(b)(ii) VBER allows the supplier that combines the application of an exclusive distribution system and a selective distribution system in different territories to restrict an exclusive buyer from selling actively or passively to unauthorised distributors located in a territory where the supplier operates a selective distribution system which means that the supplier has either appointed selected distributors or has reserved the territory for the application of such a selective distribution system. The protection of the selective distribution system extends to active and passive sales by the customers of the exclusive buyer, which can also be prevented from selling to unauthorised distributors located inside the selective distribution system.

(210) Third, Article 4(b)(iii) VBER allows a supplier to restrict the place of establishment of the buyer to which an exclusive territory or customer group is allocated ("location clause"). This implies that the benefit of the VBER is not lost if it is agreed that the buyer will restrict its distribution outlet(s) and warehouse(s) to a particular address, place or territory. For a mobile distribution outlet, an area may be defined outside which it cannot be operated. The use by a distributor of an own website cannot be considered comparable to the opening of a new outlet in a different location and thus cannot be restricted.[95]

(211) Fourth, Article 4(b)(vi) VBER allows a supplier to restrict active and passive sales by an exclusive wholesaler to end users, as the supplier can keep the wholesale and retail levels of trade separate. However, this exception does not preclude the possibility of allowing the wholesaler to sell to certain end users (e.g. a few large ones), while not allowing sales to (all) other end users.

(212) Fifth, Article 4(b)(v) VBER allows a supplier to restrict a buyer of components, to whom the components are supplied for incorporation, from reselling them to competitors of the supplier who would use them to manufacture the same type of goods as those produced by the supplier. The term 'component' includes any intermediate goods and the term 'incorporation' refers to the use of any input to produce goods.

6.1.2.5. Where the supplier operates a selective distribution system

(213) The hardcore restriction set out in Article 4(c)(i) VBER concerns agreements or concerted practices that, directly or indirectly, have as their object the restriction of the territory into which or the customer groups to whom a selective distributor may actively or passively sell the contract goods or services.

(214) There are five exceptions to the hardcore restriction laid down in Article 4(c)(i) VBER.

(215) The first exception concerns the restriction of active sales by authorised distributors outside the selective distribution system. It allows the supplier to restrict active sales, including online advertising, by authorised distributors into other territories or to customer groups exclusively allocated to one or more distributors or reserved exclusively to the supplier. The supplier can require that the restriction of active sales into an exclusive territory or to an exclusive customer group be passed on by the buyer to its customers that have entered into a distribution agreement with a supplier or with a party that was given distribution rights by the supplier.

[95] See judgment in Case C-439/09 *Pierre Fabre Dermo-Cosmetique SAS v Président de l'Autorité de la concurrence* EU:C:2011:649, paragraphs 56-57.

(216) The second exception allows a supplier to restrict authorised distributors and customers of these distributors from selling to unauthorised distributors located in any territory where the supplier operates a selective distribution system, which means that the supplier has either appointed selected distributors or has reserved the territory for the application of such a selective distribution system. The restriction may cover active or passive sales, at any level of trade.

(217) The third exception allows the supplier to prevent authorised distributors from operating their business from different premises or from opening a new outlet in a different location ("location clause"). This implies that the benefit of the VBER is not lost if it is agreed that the buyer will restrict its distribution outlet(s) and warehouse(s) to a particular address, place or territory. For a mobile distribution outlet, an area may be defined outside which it cannot be operated. The use by a distributor of an own website cannot be considered comparable to the opening of a new outlet in a different location and thus cannot be restricted.

(218) The fourth exception allows a supplier to restrict active and passive sales by an authorised wholesaler to end users, as the supplier can keep the wholesale and retail levels of trade separate. However, this exception does not preclude the possibility of allowing the wholesaler to sell to certain end users (e.g. a few large ones), while not allowing sales to (all) other end users.

(219) The fifth exception allows a supplier to restrict an authorised buyer of components, to whom the components are supplied for incorporation, from reselling them to competitors of the supplier who would use them to manufacture the same type of goods as those produced by the supplier. The term 'component' includes any intermediate goods and the term 'incorporation' refers to the use of any input to produce goods.

(220) The hardcore restriction set out in Article 4(c)(iii) VBER excludes the restriction of active or passive sales by members of a selective distribution network to end users, whether professional end users or consumers, without prejudice to the possibility of prohibiting a member of the network from operating out of an unauthorised place of establishment (see the third exception to Article 4(c)(i) and paragraph (217) of these Guidelines). This means that authorised distributors cannot be restricted in the choice of users, or purchasing agents acting on behalf of those users, to whom they may sell, except to protect an exclusive distribution system operated in another territory (see the first exception to Article 4(c)(i) and paragraph (215) of these Guidelines). Within a selective distribution system, the authorised distributors should be free to sell to all end users, both actively and passively.

(221) Considering that online and offline channels have different characteristics, a supplier operating a selective distribution system may impose on its authorised distributors criteria for online sales that are not identical to those imposed for sales in brick and mortar shops, in as far as the criteria imposed for online sales do not, directly or indirectly, in isolation or combination with other factors, have as their object, to prevent the buyers or their customers from effectively using the internet for the purposes of selling their goods or services online. For example, a supplier may establish specific requirements to ensure certain service quality standards for users purchasing online, such as the set-up and operation of an online after-sales help desk, a requirement to cover the costs of customers returning the product or the use of secure payment systems. These restrictions do not affect a group of customers which can be circumscribed within all potential customers nor the buyers' or their

customers' ability to operate their own websites and to advertise via the internet on third-party platforms or online search engines, enabling buyers or their customers to raise awareness of their online activities and attract potential customers.

(222) A selective distribution system cannot be combined with an exclusive distribution system, as defined in Article 1(1)(g) VBER, within the same territory, as this would lead to a hardcore restriction of active or passive sales to end users by the authorised distributors pursuant to Article 4(c)(i) VBER. However, the supplier may commit to supplying only one or a limited number of authorised distributors in a specific part of the territory where the selective distribution system is operated. The supplier may also commit not to make any direct sales itself into that territory. In addition, as allowed by the second exception to Article 4(c)(i) VBER, the supplier may impose a location clause on its authorised distributors.

(223) The hardcore restriction set out in Article 4(c)(ii) VBER concerns the restriction of cross-supplies between authorised distributors within a selective distribution system. This means that the supplier cannot prevent active or passive sales between its authorised distributors, which must remain free to purchase the contract products from other authorised distributors within the network, operating either at the same or at a different level of trade.[96] Consequently, selective distribution cannot be combined with vertical restraints aimed at forcing distributors to purchase the contract products exclusively from a given source. It also means that within a selective distribution network, no restrictions can be imposed on authorised wholesalers as regards their sales to authorised distributors.

6.1.2.6. Where the supplier operates a free distribution system

(224) The hardcore restriction set out in Article 4(d) VBER concerns agreements or concerned practices that, directly or indirectly, have as their object the restriction of the territory into which or the customer groups to whom a buyer may actively or passively sell the contract goods or services.

(225) There are five exceptions to the hardcore restriction laid down in Article 4(d) VBER.

(226) First, Article 4(d)(i) VBER allows the supplier to restrict active sales, including online advertising, by a buyer into a territory or to a customer group reserved exclusively to the supplier or allocated exclusively to other buyers. The supplier can require that the restriction of active sales into an exclusive territory or to an exclusive customer group be passed on by the buyer to its customers that have entered into a distribution agreement with a supplier or with a party that was given distribution rights by the supplier. However, the protection of exclusively allocated territories or customer groups is not absolute, as passive sales into such territories or to such customer groups cannot be prohibited.

(227) Second, Article 4(d)(ii) VBER allows the supplier to restrict a buyer and its customers from selling actively or passively to unauthorised distributors located in a territory where the supplier operates a selective distribution system or which the supplier has reserved for the operation of such a selective distribution system. The restriction may cover active or passive sales at any level of trade.

(228) Third, Article 4(d)(iii) VBER allows a supplier to restrict the place of establishment of a buyer ("location clause"). This implies that the benefit of the VBER is not lost if

[96] See, for example, Commission decision in case AT.40182 - *Guess*, paragraphs 65 to 78.

it is agreed that the buyer will restrict its distribution outlet(s) and warehouse(s) to a particular address, place or territory. For a mobile distribution outlet, an area may be defined outside which it cannot be operated. The use by a distributor of its own website cannot be considered comparable to the opening of a new outlet in a different location and thus cannot be restricted.[97]

(229) Fourth, Article 4(d)(vi) VBER allows a supplier to restrict active and passive sales by a wholesaler to end users, as the supplier may keep the wholesale and retail levels of trade separate. However, this exception does not exclude the possibility of allowing the wholesaler to sell to certain end users (e.g. a few large ones), while prohibiting it from selling to other end users.

(230) Fifth, Article 4(d)(v) VBER allows a supplier to restrict a buyer of components, to whom the components are supplied for incorporation, from reselling them to competitors of the supplier, which would use them to manufacture the same type of goods as those produced by the supplier. The term 'component' includes any intermediate goods and the term 'incorporation' refers to the use of any input to produce goods.

6.1.3. Restrictions of the sales of spare parts

(231) The hardcore restriction set out in Article 4(e) VBER concerns agreements that prevent or restrict end users, independent repairers, wholesalers and service providers from obtaining spare parts directly from the manufacturer of those spare parts. An agreement between a manufacturer of spare parts and a buyer that incorporates those parts into its own products, such as original equipment manufacturers (OEMs), may not, either directly or indirectly, prevent or restrict sales by the OEM of those spare parts to end users, independent repairers, wholesalers or service providers. Indirect restrictions may arise particularly when the supplier of the spare parts is restricted in supplying technical information and special equipment, which are necessary for the use of spare parts by users, independent repairers or service providers. However, the agreement may place restrictions on the supply of the spare parts to the repairers or service providers entrusted by the OEM with the repair or servicing of its own goods. This means that the OEM may require its own repair and service network to buy spare parts from itself or from other members of its selective distribution system, where it operates such a system.

6.2. Restrictions that are excluded from the VBER

(232) Article 5 VBER excludes certain obligations found in vertical agreements from the coverage of the VBER irrespective of whether the market share threshold in Article 3(1) VBER is exceeded or not. Article 5 VBER defines obligations for which it cannot be assumed with sufficient certainty that they fulfil the conditions of Article 101(3). There is no presumption that the obligations specified in Article 5 VBER fall within the scope of Article 101(1) or fail to satisfy the conditions of Article 101(3). The exclusion of these obligations from the VBER means only that they are subject to an individual assessment under Article 101. Moreover, unlike Article 4 VBER, the exclusion from the block exemption provided by Article 5 VBER is limited to the specific obligation, if that obligation can be

[97] See judgment in Case C-439/09 *Pierre Fabre Dermo-Cosmetique SAS v Président de l'Autorité de la concurrence* EU:C:2011:649, paragraphs 56-57.

severed from the rest of the vertical agreement. This means that the remainder of the vertical agreement continues to benefit from the block exemption.

6.2.1. Non-compete obligations exceeding a duration of five years

(233) Pursuant to Article 5(1)(a) VBER, non-compete obligations exceeding a duration of five years are excluded from the benefit of the VBER. Non-compete obligations are arrangements that cause the buyer purchasing from the supplier or from another undertaking designated by the supplier more than 80% of the buyer's total purchases of the contract goods and services and their substitutes during the preceding calendar year, as defined by Article 1(1)(e) VBER. This means that the buyer is prevented from purchasing competing goods or services or that such purchases are limited to less than 20% of its total purchases. If no relevant data is available for the buyer's purchases in the calendar year preceding the conclusion of the vertical agreement, the buyer's best estimate of its annual total requirements may be used instead. However actual purchasing data should be used as soon as it is available.

(234) Non-compete obligations are not covered by the block exemption if their duration is indefinite or exceeds five years. Non-compete obligations that are tacitly renewable beyond a period of five years are covered by the block exemption, provided that the buyer can effectively renegotiate or terminate the vertical agreement containing the obligation with a reasonable notice period and at a reasonable cost, thus allowing the buyer to effectively switch its supplier after the expiry of the five-year period. If, for instance, the vertical agreement provides for a five-year non-compete obligation and the supplier provides a loan to the buyer, the repayment of that loan should not hinder the buyer from effectively terminating the non-compete obligation at the end of the five-year period. Similarly, when the supplier provides the buyer with equipment which is not relationship-specific, the buyer should have the possibility to take over the equipment at its market asset value once the non-compete obligation expires.

(235) Pursuant to Article 5(2) VBER, the five-year duration limit does not apply when the contract goods or services are resold by the buyer "from premises and land owned by the supplier or leased by the supplier from third parties not connected with the buyer". In such cases, the non-compete obligation may be of the same duration as the period of occupancy of the point of sale by the buyer. The reason for this exception is that it is normally unreasonable to expect a supplier to allow competing products to be sold from premises and land owned by the supplier without its permission. By analogy, the same principles apply where the buyer operates from a mobile outlet owned or leased by the supplier from third parties not connected with the buyer. Artificial ownership constructions, such as a transfer by the distributor of its proprietary rights over the land and premises to the supplier for only a limited period, intended to avoid the five-year limit cannot benefit from this exception.

6.2.2. Post term non-compete obligations

(236) Pursuant to Article 5(1)(b) in conjunction with Article 5(3) VBER, post-term non-compete obligations on the buyer are excluded from the VBER, unless the obligation is indispensable to protect know-how transferred by the supplier to the buyer, and is limited to the point of sale from which the buyer has operated during the contract period, and is limited to a maximum period of one year. This is only the case where the know-how is substantial within the meaning of Article 1(1)(h) VBER. This means that the know-how must include information that is significant and useful to the buyer for the use, sale or resale of the contract goods or services.

6.2.3. Non-compete obligations imposed on members of a selective distribution system

(237) Article 5(1)(c) VBER concerns the sale of competing goods or services in a selective distribution system. The VBER covers the combination of selective distribution with a non-compete obligation, requiring authorised distributers not to resell competing brands. However, if the supplier prevents its authorised distributors, either directly or indirectly, from buying products for resale from one or more specific competing suppliers, such an obligation is not covered by the block exemption. The objective of excluding this type of obligation is to avoid a situation whereby a number of suppliers using the same selective distribution outlets prevent one or more specific competitors from using these outlets to distribute their products. Such a scenario would amount to foreclosure of a competing supplier through a form of collective boycott.

6.2.4. Parity obligations

(238) The fourth exclusion from the block exemption, which is set out in Article 5(1)(d) VBER, concerns retail parity obligations imposed by suppliers of online intermediation services which cause buyers of those services not to offer, sell or resell goods or services to end users under more favourable conditions using competing online intermediation services. The end users may be undertakings or final consumers. The conditions may concern prices, inventory, availability or any other terms or conditions of offer or sale. The parity obligation may be express or it may be applied by other direct or indirect means, including the use of differential pricing or other incentives or measures whose application depends on the conditions under which the buyer of the online intermediation services offers goods or services to end users using competing suppliers of online intermediation services. For example, a supplier of online intermediation services may incentivise buyers to grant it parity relative to competing suppliers of such services by offering better visibility for the buyer's goods or services on its website or by charging lower commission rates.

(239) All other types of parity obligation are covered by the block exemption of the VBER. This includes, for example, retail parity obligations relating to the direct sales or marketing channels of suppliers of goods or services (so-called 'narrow' parity); parity obligations relating to the conditions under which goods or services are offered to undertakings that are not end users, and parity obligations relating to the conditions under which manufacturers, wholesalers or retailers purchase goods or services as inputs (see section 8.2.5. of these Guidelines for the assessment of parity obligations in individual cases where the VBER does not apply).

7. WITHDRAWAL AND NON-APPLICATION

7.1. Withdrawal of the benefit of the VBER (Article 29 Regulation 1/2003)

(240) The Commission may withdraw the benefit of the VBER pursuant to Article 29(1) of Regulation 1/2003, if it finds that, in a particular case, a vertical agreement to which the VBER applies has certain effects that are incompatible with Article 101(3). Moreover, if, in a particular case, such an agreement has effects that are incompatible with Article 101(3) in the territory of a Member State, or in a part thereof, which has all the characteristics of a distinct geographic market, the NCA of that Member State may also withdraw the benefit of the VBER, pursuant to Article 29(2) of Regulation

1/2003. Article 29 of Regulation 1/2003 does not mention the courts of the Member States, who therefore have no power to withdraw the benefit of the VBER,[98] unless the court concerned is a designated competition authority of a Member State pursuant to Article 35 of Regulation 1/2003.

(241) The Commission and the NCAs may withdraw the benefit of the VBER in two scenarios. Firstly, they may withdraw the benefit of the VBER if a vertical agreement falling within the scope of Article 101(1) has *in isolation* effects on the relevant market which are incompatible with Article 101(3). Secondly, as referred to in recital 18 of the VBER, they may also withdraw the benefit of the VBER if the vertical agreement has these effects *in conjunction* with similar agreements entered into by competing suppliers or buyers. This is because parallel networks of similar vertical agreements can produce cumulative effects that are incompatible with Article 101(3). The restriction of access to the relevant market and the restriction of competition therein are examples of such cumulative effects that can justify a withdrawal of the benefit of the VBER.[99]

(242) Parallel networks of vertical agreements are to be regarded as similar if they contain the same type of restrictions producing similar effects on the market. Such cumulative effects may arise, for example, in the case of shared exclusivity or selective distribution, from parity obligations or non-compete obligations. As regards selective distribution, a situation of sufficiently similar parallel networks may exist if, on a given market, certain suppliers apply purely qualitative selective distribution while other suppliers apply quantitative selective distribution, with similar effects on the market. Such cumulative effects may also arise when, on a given market, parallel selective distribution networks use qualitative criteria that foreclose distributors. In these circumstances, the assessment must take account of the anti-competitive effects attributable to each individual network of agreements. Where appropriate, the withdrawal of the benefit of the VBER may be limited to particular qualitative criteria or particular quantitative criteria which, for example, limits the number of authorised distributors.

(243) The responsibility for an anti-competitive cumulative effect can only be attributed to those undertakings that make an appreciable contribution to it. Agreements entered into by undertakings whose contribution to the cumulative effect is insignificant do not fall under the prohibition of Article 101(1).[100] They are therefore not subject to the withdrawal mechanism.[101]

(244) Pursuant to Article 29(1) of Regulation 1/2003, the Commission may withdraw the benefit of the VBER on its own initiative or on the basis of a complaint. This includes the possibility for NCAs to ask the Commission to withdraw the benefit of

98 Nor may the courts of the Member States modify the scope of VBER, by extending its sphere of application to agreements not covered by the VBER. Any such extension, whatever its scope, would affect the manner in which the Commission exercises its legislative competence (judgment in Case C-234/89 *Stergios Delimitis* v *Henninger Bräu AG* EU:C:1991:91, paragraph 46).

99 However, a cumulative foreclosure effect is unlikely to exist if the parallel networks of vertical agreements cover less than 30% of the relevant market, see De Minimis Notice, paragraph 10.

100 Individual suppliers or distributors with a market share not exceeding 5 %, are in general not considered to contribute significantly to a cumulative foreclosure effect, see De Minimis Notice, paragraph 10; and judgment in Case C-234/89 *Stergios Delimitis* v *Henninger Bräu AG* EU:C:1991:91, paragraphs 24 to 27.

101 The assessment of such a contribution will be made in accordance with the criteria set out in enforcement policy in individual cases, as set out in section 8. of these Guidelines.

the VBER in a particular case, without prejudice to the application of the rules on case allocation and assistance within the European Competition Network,[102] and without prejudice to their own withdrawal power pursuant to Article 29(2) of Regulation 1/2003. If at least three NCAs ask the Commission to apply Article 29(1) of Regulation 1/2003 in a particular case, the Commission will discuss the case within the framework of the ECN with a view to deciding whether or not to withdraw the benefit of the VBER. In this context, the Commission will take utmost account of the views of the NCAs that have asked the Commission to withdraw the benefit of the VBER to reach a timely conclusion on whether the conditions for a withdrawal in the specific case are fulfilled.

(245) It follows from Article 29(1) and (2) of Regulation 1/2003 that the Commission has the exclusive competence to withdraw Union-wide in that it may withdraw the benefit of the VBER in respect of vertical agreements restricting competition on a relevant geographic market which is wider than the territory of a single Member State, whereas NCAs may only withdraw such benefits in relation to the territory of their respective Member State.

(246) Therefore, the withdrawal power of an individual NCA relates to cases where the relevant market covers one single Member State, or a region located exclusively in the respective Member State. In such a case, the NCA of that Member State has the competence to withdraw the benefit of the VBER in relation to the vertical agreement that has effects that are incompatible with Article 101(3) on this national or regional market. This is a concurrent competence in that Article 29(1) VBER also empowers the Commission to withdraw the benefit of the VBER in relation to a national or regional market, provided the vertical agreement at hand may affect trade between Member States.

(247) Where several separate national or regional markets are concerned, several competent NCAs can withdraw the benefit of the VBER in parallel.

(248) It follows from the wording of Article 29(1) of Regulation 1/2003 that, where the Commission withdraws the benefit of the VBER, it has the burden of proving firstly that the VBER applies to the respective vertical agreement, which means that it must fall within the scope of Article 101(1),[103] and secondly that this agreement has effects that are incompatible with Article 101(3), which means that it fails to fulfil at least one of the four conditions of Article 101(3).[104] Pursuant to Article 29(2) of Regulation 1/2003, the same requirements apply where a NCA withdraws the benefit of the VBER in relation to its Member State. In particular, as regards the burden of proving that the second requirement is fulfilled, Article 29 requires the competent

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102 See Chapter IV of Regulation 1/2003.

103 If a vertical agreement falls outside the scope of Article 101(1), as set out in section 3. Of these Guidelines, the question of the application of the VBER does not arise because the VBER is meant to define categories of vertical agreements that normally satisfying the conditions laid down in Article 101(3), which presupposes that a vertical agreement falls within the scope of Article 101(1), see the explicit reference in Article 101(3), to agreements, decisions and concerted practices, as well as Article 101(1).

104 It is sufficient for the Commission to substantiate that one of the four conditions of Article 101(3) is not fulfilled. This is because, for the Article 101(3) exemption, all four conditions must be met.

competition authority to substantiate that at least one of the four conditions of Article 101(3) is not met.[105]

(249) If the requirements of Article 29(1) of Regulation 1/2003 are fulfilled, the Commission may withdraw the benefit of the VBER in an individual case. Such a withdrawal, and its requirements as set out in the previous paragraphs, must be distinguished from the findings in a Commission decision pursuant to Chapter III of Regulation 1/2003. However, a withdrawal can be combined, for example, with the finding of an infringement and imposition of a remedy, and even with interim measures, as done in previous Commission decisions.[106]

(250) If the Commission withdraws the benefit of the VBER pursuant to Article 29(1) of Regulation 1/2003, it has to take into account that the withdrawal can only have ex nunc effects, i.e. the exempted status of the agreements concerned will remain unaffected for the period preceding the date at which the withdrawal becomes effective. In the case of a withdrawal pursuant to Article 29(2) of Regulation 1/2003, the NCAs concerned must also take into account its obligations under Article 11(4) of Regulation 1/2003, in particular to provide the Commission with any relevant envisaged decision.

7.2. Regulation declaring that the VBER does not apply (Article 6 VBER)

(251) In accordance with Article 1a Empowerment Regulation, Article 6 VBER enables the Commission to exclude from the scope of the VBER, by means of regulation, parallel networks of similar vertical restraints where these cover more than 50% of a relevant market. Such a measure is not addressed to individual undertakings but concerns all undertakings whose agreements fulfil the conditions set out in a regulation referred to in Article 6 of the VBER. When assessing the need to adopt such a regulation, the Commission will consider whether an individual withdrawal would be a more appropriate remedy. The number of competing undertakings contributing to a cumulative effect on a market and the number of affected geographic markets within the Union are two aspects that are particularly relevant in this assessment.

(252) The Commission will consider the adoption of a regulation pursuant to Article 6 VBER if similar restraints that cover more than 50% of the relevant market are likely to appreciably restrict access to this market or competition therein. This may in particular be the case when parallel selective distribution networks covering more than 50% of a market are liable to foreclose the market due to the use of selection criteria which are not required by the nature of the relevant goods or services or

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105 The requirement under Article 29 of Regulation 1/2003 regarding the burden of proof of the competent competition authority follows from the situation in which the VBER does not apply and an undertaking invokes Article 101(3) in an individual case. In such a situation, the undertaking has the burden of proof pursuant to Article 2 of Regulation 1/2003 to show that all four conditions of Article 101(3) are met. To this end, it must substantiate its claims, see e.g. Commission Decision in AT.39226 *Lundbeck*, upheld in judgments in Case T-472/13 *Lundbeck v Commission* EU:T:2016:449, and Case C-591/16 P *Lundbeck v Commission*.

106 The Commission has used its power to withdraw the benefit of one of the previously applicable block exemption regulations in the Commission decisions of 25 March 1992 (interim measures), and of 23 December 1992 relating to a proceeding under Article 85 of the EEC Treaty in Case IV/34.072 – *Mars/Langnese and Schöller* upheld by judgment in Case C-279/95 P *Langnese-Iglo v Commission* EU:C:1998:447, and the Commission decisions of 4 December 1991 (interim measures), and of 4 December 1991 relating to a proceeding under Article 85 of the EEC Treaty in Case IV/33.157 – *Eco System/Peugeot*.

which discriminate against certain forms of distribution of such goods or services. To calculate the 50% market coverage ratio, account must be taken of each individual network of vertical agreements containing restraints, or combinations of restraints, producing similar effects on the market. However, Article 6 VBER does not require the Commission to act where the 50% market-coverage ratio is exceeded.

(253) The effect of a regulation adopted pursuant to Article 6 VBER is that the VBER becomes inapplicable in respect of the restraints and the markets concerned, and that Article 101(1) and (3) therefore apply fully.

(254) Any regulation referred to in Article 6 VBER must clearly set out its scope. Therefore, the Commission must firstly define the relevant product and geographic market(s), and secondly the type of vertical restraint in respect of which the VBER will no longer apply. As regards the latter aspect, the Commission may modulate the scope of the regulation according to the competition concern that it intends to address. For instance, while all parallel networks of single-branding type arrangements may be taken into account in view of establishing the 50% market coverage ratio, the Commission may nevertheless restrict the scope of a regulation adopted pursuant to Article 6 VBER to non-compete obligations exceeding a certain duration. Thus, agreements of a shorter duration or of a less restrictive nature might be left unaffected, in consideration of the lesser degree of foreclosure attributable to such restraints. Similarly, if, on a particular market, undertakings practice selective distribution in combination with additional restraints, such as non-compete obligations or quantity-forcing, a regulation adopted pursuant to Article 6 VBER may concern only such additional restraints. Where appropriate, the Commission may also specify the market share level which, in the specific market context, may be regarded as insufficient to bring about a significant contribution by an individual undertaking to the cumulative effect.

(255) Article 1a of the Empowerment Regulation requires that a regulation adopted pursuant to Article 6 VBER foresees a transitional period of not less than six months before it becomes applicable. This period is meant to enable the undertakings concerned to adapt their vertical agreements accordingly.

(256) A regulation adopted pursuant to Article 6 VBER will not affect the exempted status of the agreements concerned for the period preceding the date of application of this regulation.

8. ENFORCEMENT POLICY IN INDIVIDUAL CASES

8.1. The framework of analysis

(257) Where the safe harbour provided by the VBER does not apply to a vertical agreement, it is relevant to examine whether, in the individual case, the vertical agreement falls within the scope of Article 101(1) and, if so, whether the conditions of Article 101(3) are satisfied. Provided that they do not contain restrictions of competition by object and in particular hardcore restrictions of competition, there is no presumption that vertical agreements falling outside the VBER due to the market share thresholds being exceeded fall within the scope of Article 101(1) or fail to satisfy the conditions of Article 101(3). Such agreements require an individual assessment. Agreements that either do not restrict competition within the meaning of Article 101(1) or which fulfil the conditions of Article 101(3) are valid and enforceable.

(258) Pursuant to Article 1(2) Regulation 1/2003 undertakings do not need to notify a vertical agreement to benefit from an individual exemption under Article 101(3). In the case of an individual examination by the Commission, it is the Commission which bears the burden of proof that the vertical agreement in question infringes Article 101(1). The undertakings claiming the benefit of Article 101(3) bear the burden of proving that the conditions of that provision are fulfilled. When likely anti-competitive effects are demonstrated, undertakings may substantiate efficiency claims and explain why a certain distribution system is indispensable to bring likely benefits to consumers without eliminating competition before the Commission decides whether the agreement satisfies the conditions of Article 101(3).

(259) The assessment of whether a vertical agreement has the effect of restricting competition will be made by comparing the situation on the relevant market with the vertical restraints in place with the situation that would prevail in the absence of the vertical restraints in the vertical agreement. In the assessment of individual cases, the Commission will take, as appropriate, both actual and likely effects into account. For vertical agreements to be restrictive of competition by effect, they must affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation, or the variety or quality of the goods or services can be expected with a reasonable degree of probability. The likely negative effects on competition must be appreciable.[107] Appreciable anticompetitive effects are more likely to occur when at least one of the parties to the agreement has or obtains some degree of market power and the agreement contributes to the creation, maintenance or strengthening of that market power, or allows the parties to the agreement to exploit such market power. Market power is the ability to maintain prices above competitive levels or to maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a not insignificant period of time. The degree of market power normally required for a finding of an infringement under Article 101(1) is less than the degree of market power required for a finding of dominance under Article 102.

8.1.1. Relevant factors for the assessment under Article 101(1)

(260) In assessing individual vertical agreements between undertakings with market shares above the 30% threshold, the Commission will undertake a full competition analysis. The following factors are particularly relevant to establish whether a vertical agreement brings about an appreciable restriction of competition under Article 101(1):

(a) the nature of the agreement;

(b) the market position of the parties;

(c) the market position of competitors (upstream and downstream);

(d) the market position of buyers of the contract goods or services;

(e) the level of trade affected;

(f) the nature of the product; and

(g) the dynamics of the market.

[107] See section 3.1. of these Guidelines.

(261) Other factors may also be taken into account depending on their relevance for the assessment of the vertical agreement concerned.

(262) The importance of individual factors may vary depending on the circumstances of the case. For instance, a high market share of the parties is usually a good indicator of market power, but in the case of low entry barriers market power may be sufficiently constrained by actual or potential entry. It is therefore not possible to provide firm rules of general applicability on the importance of individual factors.

(263) Vertical agreements can take many shapes and forms. It is therefore important to analyse the nature of the agreement in terms of the restraints that it contains, the duration of those restraints and the percentage of total sales on the (downstream) market affected by those restraints. It may be necessary to go beyond the express terms of the agreement. The existence of implicit restraints may be derived from the way in which the agreement is implemented by the parties and the incentives that they face.

(264) The market position of the parties provides an indication of the degree of market power, if any, possessed by the supplier, the buyer or both. The higher their market share, the greater their market power is likely to be. This is particularly so where the market share reflects cost advantages or other competitive advantages vis-à-vis competitors. Such competitive advantages may, for instance, result from being a first mover on the market (having the best site, etc.), from holding essential patents or having superior technology, from being the brand leader or having a superior portfolio. The degree of product differentiation can also be a relevant indicator for the presence of market power.

(265) The market position of competitors is also important. The stronger the competitive position of competitors and the greater their number, the lower the risk that the parties will be able to individually exercise market power and foreclose the market or soften competition. It is also relevant to consider whether there are effective and timely counterstrategies that competitors would be likely to deploy. However, if the number of undertakings in the market is rather small and their market positions (in terms of e.g. size, costs and R&D potential) similar, vertical restraints may increase the risk of collusion. Fluctuating or rapidly changing market shares are in general an indication of intense competition.

(266) The market position of the downstream customers of the parties to the agreement provides an indication of whether or not one or more of those customers possess buyer power. The first indicator of buyer power is the market share of the customer on the purchasing market. That share reflects the importance of its demand for possible suppliers. Other indicators focus on the position of the customer on the resale market where it is active, including characteristics such as a wide geographic spread of its outlets, own brands including private labels and its brand image among final customers. In some circumstances, buyer power may prevent consumer harm from an otherwise problematic vertical agreement. This is particularly so when strong customers have the capacity and incentive to bring new sources of supply on to the market in the case of a small but permanent increase in relative prices.

(267) Entry barriers are measured by the extent to which incumbent firms can increase their price above the competitive level without attracting new entry. As a general rule, entry barriers can be said to be low when the exercise of market power by incumbents can be expected to be prevented or eroded by effective and likely entry within one or two years. Entry barriers may result from a broad range of factors such

as economies of scale and scope (including network effects of multi-sided businesses), government regulations (especially where they establish exclusive rights), state aid, import tariffs, intellectual property rights, ownership of resources where the supply is limited (due to e.g. natural limitations), essential facilities, a first mover advantage and brand loyalty of consumers created by strong advertising over a period of time. The question whether certain of those factors should be described as entry barriers depends particularly on whether they entail sunk costs. Sunk costs are costs that have to be incurred to enter or be active on a market but cannot be recovered upon exiting the market. Advertising costs to build consumer loyalty are normally sunk costs, unless an exiting firm could either sell its brand name or use it somewhere else without a loss. When entry requires high sunk costs, the threat of fierce competition by incumbents post-entry may deter such entry, as potential entrants cannot justify the risk of losing their sunk investments. Entry barriers may be present only at the supplier or buyer level or at both levels.

(268) As entry in general requires at least some sunk costs, actual competition is in general more effective and will weigh more heavily in the assessment of a case than potential competition.

(269) Vertical restraints and vertical integration may also work as an entry barrier by making access more difficult and foreclosing (potential) competitors. For instance, a non-compete obligation that ties distributors to a supplier may have a significant foreclosing effect if setting up its own distributors will impose sunk costs on the potential entrant.

(270) The level of trade is linked to the distinction between intermediate and final goods or services. Intermediate goods or services are sold to undertakings for use as an input to produce other goods or services and are generally not recognisable in the final goods or services. The buyers of intermediate goods or services are usually well-informed customers, able to assess quality and therefore less reliant on brand and image. Final goods or sevices are, directly or indirectly, sold to final customers that often rely more on brand and image.

(271) The nature of the product plays a role in particular for final goods or services in assessing both the likely negative and the likely positive effects. When assessing the likely negative effects, it is important whether the goods or services sold on the relevant market are homogeneous or rather differentiated, whether the product is expensive, taking up a large part of the consumer's budget, or rather is inexpensive and whether the product is a one-off purchase or repeatedly purchased.

(272) The dynamics of the market have to be carefully assessed on a case-by-case basis. While in some dynamic markets potential negative effects of certain vertical restraints may be unproblematic as inter-brand competition from dynamic and innovative rivals acts as a sufficient constraint, in other cases vertical restraints may afford an incumbent in a dynamic market a lasting competitive advantage and hence result in long term effects on competition. This may be the case when a vertical restraint deprives rivals from benefiting from network effects or when a market is prone to tipping.

(273) When assessing a particular vertical restraint under Article 101, also other factors may have to be taken into account. These can include cumulative effects deriving from the coverage of the market by similar agreements of other suppliers, whether the agreement is ”imposed“ in the sense that mainly one party to the agreement is subject to the restrictions or obligations or “agreed” in the sense that both parties to

the agreement accept the restrictions or obligations, the regulatory environment and behaviour that may indicate or facilitate collusion like price leadership, pre-announced price changes and price discussions, price rigidity in response to excess capacity, price discrimination and past collusive behaviour.

8.1.2. Relevant factors for the assessment under Article 101(3)

(274) Restrictive vertical agreements may also produce pro-competitive effects in the form of efficiencies, which may outweigh their anti-competitive effects. Such an assessment takes place within the framework of Article 101(3), which contains an individual exception from the prohibition enshrined in Article 101(1). For that exception to be applicable, the vertical agreement must fulfil the following four conditions: (i) it must produce objective economic benefits, (ii) the restrictions on competition must be indispensable to attain these efficiencies, (iii) consumers must receive a fair share of the efficiency gains, and (iv) the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the goods or services concerned.[108]

(275) Under Article 101(3), the assessment of vertical agreements is made within the actual context in which they occur,[109] and on the basis of the facts existing at any given point in time. The assessment is sensitive to material changes in the facts. The individual exception enshrined in Article 101(3) applies as long as the four conditions are fulfilled and ceases to apply when that is no longer the case.[110] When applying Article 101(3) in accordance with these principles it is necessary to take into account the investments made by the parties to the agreement, as well as the time needed and the restraints required to commit and recoup an efficiency enhancing investment.

(276) The first condition of Article 101(3) requires an assessment of the objective benefits in terms of efficiencies produced by the vertical agreement. In this respect, vertical agreements often have the potential to help realise efficiencies, as explained in section 2.1. of these Guidelines, by improving the way in which the parties to the agreement conduct their complementary activities.

(277) When assessing the indispensability test contained in the second condition of Article 101(3), the Commission will in particular examine whether individual restrictions make it possible to perform the production, purchase and/or (re)sale of the contract products more efficiently than would have been the case in the absence of the restriction concerned. In making such an assessment, the market conditions and the realities faced by the parties to the agreement must be taken into account. Undertakings invoking the benefit of Article 101(3) are not required to consider hypothetical and theoretical alternatives. They must, however, explain and demonstrate why seemingly realistic and significantly less restrictive alternatives would not produce the same efficiencies. If the application of what appears to be a commercially realistic and less restrictive alternative would lead to a significant loss of efficiencies, the restriction in question is treated as indispensable.

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108 See Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97.

109 See Judgment in Joined Cases 25/84 and 26/84 *Ford* EU:C:1985:340 paragraphs 24 and 25 .

110 See in this respect for example Commission Decision 1999/242/EC (Case No IV/36.237 – *TPS*), OJ L 90, 2.4.1999, p. 6. Similarly, the prohibition enshrined in Article 101(1) only applies as long as the agreement has a restrictive object or restrictive effects.

(278) The third condition of Article 101(3) requires that consumers must receive a fair share of the benefits. This implies that consumers of the goods or services purchased and/or (re)sold under the vertical agreement must at least be compensated for the negative effects of the agreement.[111] In other words, the efficiency gains must fully off-set the likely negative impact on prices, output and other relevant factors caused by the vertical agreement.

(279) The fourth condition of Article 101(3) requires that the vertical agreement must not afford the parties to the agreement the possibility of eliminating competition in respect of a substantial part of the goods or services concerned. This presupposes an analysis of the remaining competitive pressure on the market and the impact of the agreement on such remaining sources of competition. When assessing this condition, the relationship between Article 101(3) and Article 102 must be taken into account. According to settled case law, the application of Article 101(3) cannot prevent the application of Article 102.[112] Moreover, since Articles 101 and 102 both pursue the aim of maintaining effective competition on the market, consistency requires that Article 101(3) be interpreted as precluding any application of this exception to restrictive vertical agreements that constitute an abuse of a dominant position.[113] This condition requires that vertical agreement must not eliminate effective competition by removing all or most existing sources of actual or potential competition. Rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the form of innovation. In its absence, the dominant undertaking will lack adequate incentives to continue to create and pass on efficiency gains. A restrictive agreement which maintains, creates or strengthens a market position approaching that of a monopoly can normally not be justified on the grounds that it also creates efficiency gains.

8.2. Analysis of specific vertical restraints

(280) While the previous parts of these Guidelines, notably the sixth part, include guidance on the assessment of vertical restraints that amount to hardcore restrictions pursuant to Article 4 VBER, excluded restrictions pursuant to Article 5 VBER, and related restrictions, the following paragraphs provide guidance on other specific vertical restraints. As regards vertical restraints that are not specifically addressed in these Guidelines, the Commission will treat these vertical restraints according to the same principles taking into account the relevant factors, as set out in this eight part of these Guidelines.

8.2.1. Single branding

(281) Under the heading of "single branding" fall those agreements which have as their main element the fact that the buyer is obliged or induced to concentrate its orders for a particular type of product with one supplier. That requirement can be found

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111 See paragraph 85 of Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97.

112 See Judgment in Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge* EU:C:2000:132, paragraph 130. Similarly, the application of Article 101(3) does not prevent the application of the Treaty rules on the free movement of goods, services, persons and capital. These provisions are in certain circumstances applicable to agreements, decisions and concerted practices within the meaning of Article 101(1), see to that effect Judgment in Case C-309/99 *Wouters* EU:C:2002:98, paragraph 120.

113 See in this respect Judgment in Case T-51/89 *Tetra Pak (I)* EU:T:1990:41. See also paragraph 106 of Communication from the Commission - Notice – Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97.

amongst others in non-compete and quantity-forcing clauses imposed on the buyer. A non-compete arrangement is based on an obligation or incentive scheme which results in the buyer purchasing more than 80% of its requirements on a particular market from only one supplier. It does not mean that the buyer can only buy directly from the supplier, but that the buyer will de facto not buy and resell or incorporate competing goods or services. Quantity-forcing on the buyer is a weaker form of non-compete, where incentives or obligations agreed between the supplier and the buyer result in the latter concentrating its purchases to a large extent with one supplier. Quantity-forcing may for example take the form of minimum purchase requirements, stocking requirements or non-linear pricing, such as conditional rebate schemes or a two-part tariff (fixed fee plus a price per unit). A so-called English clause, requiring the buyer to report any better offer and allowing him only to accept such an offer when the supplier does not match it, can be expected to have the same effect as a single branding obligation, especially when the buyer has to reveal who makes the better offer.

(282) The possible competition risks of single branding are foreclosure of the market to competing suppliers and potential suppliers, softening of competition and facilitation of collusion between suppliers in case of cumulative use and, where the buyer is a retailer selling to end-consumers, a loss of in-store inter-brand competition. Such restrictive effects have a direct impact on inter-brand competition.

(283) Single branding is exempted by the VBER where the supplier's and buyer's market share each do not exceed 30% and are subject to a limitation in time of five years for the non-compete obligation. Above the market share threshold or beyond the time limit of five years, single branding agreements are no longer covered by the block exemption and therefore must be individually assessed. The remainder of this section provides guidance for the assessment of individual cases above the market share threshold or beyond the time limit of five years.

(284) The capacity for single branding obligations of a specific supplier to result in anticompetitive foreclosure arises in particular where, without the obligations, an important competitive constraint would be exercised by competitors that either are not yet present on the market at the time the obligations are concluded, or that are not in a position to compete for the full supply of the customers. Competitors may not be able to compete for an individual customer's entire demand because the supplier in question is an unavoidable trading partner at least for part of the demand on the market, for instance because its brand is a "must stock item" preferred by many final consumers or because the capacity constraints on the other suppliers are such that a part of demand can only be provided for by the supplier in question.[114] The market position of the supplier is thus of main importance to assess possible anti-competitive effects of single branding obligations.

(285) If competitors can compete on equal terms for each individual customer's entire demand, single branding obligations of a specific supplier are generally unlikely to hamper effective competition unless the switching of supplier by customers is rendered difficult due to the duration and market coverage of the single branding obligations. The higher the part of its market share sold under a single branding obligation and/or the longer the duration of the single branding obligations, the more

[114] Judgment in Case T-65/98 *Van den Bergh Foods* v *Commission* EU:T:2003:281, paragraphs 104 and 156.

significant foreclosure is likely to be. Single branding obligations shorter than one year entered into by non-dominant companies are in general not considered to give rise to appreciable anti-competitive effects or net negative effects. Single branding obligations between one and five years entered into by non-dominant companies usually require a proper balancing of pro- and anti-competitive effects, while single branding obligations exceeding five years are for most types of investments not considered necessary to achieve the claimed efficiencies or the efficiencies are not sufficient to outweigh their foreclosure effect. Single branding obligations are more likely to result in anti-competitive foreclosure when entered into by dominant companies.

(286) When assessing the supplier's market power, the market position of its competitors is important. As long as the competitors are sufficiently numerous and strong, no appreciable anti-competitive effects can be expected. Foreclosure of competitors is not very likely where they hold similar market positions and can offer similarly attractive products. In such a case, foreclosure may, however, occur for potential entrants when a number of major suppliers enter into single branding contracts with a significant number of buyers on the relevant market (cumulative effect situation). This is also a situation where single branding agreements may facilitate collusion between competing suppliers. If those suppliers are individually covered by the VBER, a withdrawal of the block exemption may be necessary to deal with such a negative cumulative effect. A tied market share of less than 5% is not considered in general to contribute significantly to a cumulative foreclosure effect.

(287) In cases where the market share of the largest supplier is below 30% and the market share of the five largest suppliers is below 50%, there is unlikely to be a single or a cumulative anti-competitive effect situation. Where a potential entrant cannot penetrate the market profitably, it is likely to be due to factors other than single branding obligations, such as consumer preferences.

(288) Entry barriers are important to establish whether there is anticompetitive foreclosure. Wherever it is relatively easy for competing suppliers to create their own integrated distribution network or finding alternative distributors for their product, foreclosure is unlikely to be a real problem. However, there are often entry barriers, both at the manufacturing and at the distribution level.

(289) Countervailing power is relevant, as powerful buyers will not easily allow themselves to be cut off from the supply of competing goods or services. More generally, in order to convince customers to accept single branding, the supplier may have to compensate them, in whole or in part, for the loss in competition resulting from the exclusivity. Where such compensation is given, it may be in the individual interest of a customer to enter into a single branding obligation with the supplier. But it would be wrong to conclude from this that all single branding obligations, taken together, are overall beneficial for customers on that market and for the final consumers. It is in particular unlikely that consumers as a whole will benefit if there are many customers and the single branding obligations, taken together, have the effect of preventing the entry or expansion of competing undertakings.

(290) Lastly, "the level of trade" is relevant. Foreclosure is less likely in case of an intermediate product. When the supplier of an intermediate product is not dominant, the competing suppliers still have a substantial part of demand that is free. Below the level of dominance an anticompetitive foreclosure effect may however arise in a

cumulative effect situation. A cumulative anticompetitive effect is unlikely to arise as long as less than 50% of the market is tied.

(291) Where the agreement concerns the supply of a final product at the wholesale level, the question whether a competition problem is likely to arise depends in large part on the type of wholesaling and the entry barriers at the wholesale level. There is no real risk of foreclosure if competing manufacturers can easily establish their own wholesaling system. Whether entry barriers are low depends in part on the type of wholesaling system the supplier can efficiently establish. In a market where wholesaling can operate efficiently with only the product concerned by the agreement (for example ice cream), the manufacturer has an interest in setting up its own wholesaling system and is unlikely to be foreclosed from that market. On the contrary, In a market where it is more efficient to wholesale a whole range of products (for example frozen foodstuffs), it is not efficient for a manufacturer selling only one product to set up its own wholesaling operation. Without access to established wholesalers, the manufacturer is likely to be excluded from that market. In that case, anti-competitive effects may arise. In addition, cumulative effect problems may arise if several suppliers tie most of the available wholesalers.

(292) For final products, foreclosure is in general more likely to occur at the retail level, given the significant entry barriers for most manufacturers to start retail outlets just for their own products. In addition, it is at the retail level that single branding agreements may lead to reduced in-store inter-brand competition. It is for these reasons that for final products at the retail level, significant anti-competitive effects may arise, taking into account all other relevant factors, if a non-dominant supplier ties 30% or more of the relevant market. For a dominant company, even a modest tied market share may already lead to significant anti-competitive effects.

(293) At the retail level, a cumulative foreclosure effect may also arise. Where all suppliers have market shares below 30%, a cumulative anticompetitive foreclosure effect is unlikely if the total tied market share is less than 40% and withdrawal of the block exemption is therefore unlikely. That figure may be higher when other factors like the number of competitors, entry barriers etc. are taken into account. Where not all companies have market shares below the threshold of the VBER but none is dominant, a cumulative anticompetitive foreclosure effect is unlikely if the total tied market share is below 30%.

(294) Where the buyer operates from premises and land owned by the supplier or leased by the supplier from a third party not connected with the buyer, the possibility of imposing effective remedies for a possible foreclosure effect will be limited. In that case, intervention by the Commission below the level of dominance is unlikely.

(295) In certain sectors, the selling of more than one brand from a single site may be difficult, in which case a foreclosure problem can better be remedied by limiting the effective duration of contracts.

(296) Where appreciable anti-competitive effects are established, the question of a possible exemption under Article 101(3) arises. For non-compete obligations, the efficiencies described in points (b) (free riding between suppliers), (e), (f) (hold-up problems) and (i) (capital market imperfections) of paragraph (14) of these Guidelines, may be particularly relevant.

(297) In the case of an efficiency as described in paragraphs (14)(b), (14)(e) and (14)(i) of these Guidelines, quantity forcing on the buyer could possibly be a less restrictive

alternative. A non-compete obligation may be the only viable way to achieve an efficiency as described in paragraph (14)(f) of these Guidelines, (hold-up problem related to the transfer of know-how).

(298) In the case of a relationship-specific investment made by the supplier (see paragraph (14)(e) of these Guidelines), a non-compete or quantity forcing agreement for the period of depreciation of the investment will in general fulfil the conditions of Article 101(3). In the case of high relationship-specific investments, a non-compete obligation exceeding five years may be justified. A relationship-specific investment could, for instance, be the installation or adaptation of equipment by the supplier when this equipment can be used afterwards only to produce components for a particular buyer. General or market-specific investments in (extra) capacity are normally not relationship-specific investments. However, where a supplier creates new capacity specifically linked to the operations of a particular buyer, for instance a company producing metal cans which creates new capacity to produce cans on the premises of or next to the canning facility of a food producer, this new capacity may only be economically viable when producing for this particular customer, in which case the investment would be considered to be relationship-specific.

(299) Where the supplier provides the buyer with a loan or provides the buyer with equipment which is not relationship-specific, this in itself is normally not sufficient to justify the exemption of an anticompetitive foreclosure effect on the market. In case of capital market imperfection, it may be more efficient for the supplier of a product than for a bank to provide a loan (see paragraph (14)(i) of these Guidelines). However, in such a case the loan should be provided in the least restrictive way and the buyer should thus in general not be prevented from terminating the obligation and repaying the outstanding part of the loan at any point in time and without payment of any penalty.

(300) The transfer of substantial know-how (paragraph (14)(f) of these Guidelines) usually justifies a non-compete obligation for the whole duration of the supply agreement, as for example in the context of franchising.

(301) Example of non-compete obligation

The market leader in a national market for an impulse consumer product, with a market share of 40%, sells most of its products (90%) through tied retailers (tied market share 36%). The agreements oblige the retailers to purchase only from the market leader for at least four years. The market leader is especially strongly represented in the more densely populated areas like the capital. Its competitors, 10 in number, of which some are only locally available, all have much smaller market shares, the biggest having 12%. Those 10 competitors together supply another 10% of the market via tied outlets. There is strong brand and product differentiation in the market. The market leader has the strongest brands. It is the only one with regular national advertising campaigns. It provides its tied retailers with special stocking cabinets for its product.

The result on the market is that in total 46% (36% + 10%) of the market is foreclosed to potential entrants and to incumbents not having tied outlets. Potential entrants find entry even more difficult in the densely populated areas where foreclosure is even higher, although it is there that they would prefer to enter the market. In addition, owing to the strong brand and product differentiation and the high search costs relative to the price of the product, the absence of in-store inter-brand competition leads to an extra welfare loss for consumers. The possible efficiencies of the outlet

exclusivity, which the market leader claims result from reduced transport costs and a possible hold-up problem concerning the stocking cabinets, are limited and do not outweigh the negative effects on competition. The efficiencies are limited, as the transport costs are linked to quantity and not exclusivity and the stocking cabinets do not contain special know-how and are not brand specific. Accordingly, it is unlikely that the conditions of Article 101(3) are fulfilled.

(302) Example of quantity forcing

A producer X with a 40% market share sells 80% of its products through contracts which specify that the reseller is required to purchase at least 75% of its requirements for that type of product from X. In return X is offering financing and equipment at favourable rates. The contracts have a duration of five years in which repayment of the loan is foreseen in equal instalments. However, after the first two years buyers have the possibility to terminate the contract with a six-month notice period if they repay the outstanding loan and take over the equipment at its market asset value. At the end of the five-year period the equipment becomes the property of the buyer. Most of the competing producers are small, twelve in total with the biggest having a market share of 20%, and engage in similar contracts with different durations. The producers with market shares below 10% often have contracts with longer durations and with less generous termination clauses. The contracts of producer X leave 25% of requirements free to be supplied by competitors. In the last three years, two new producers have entered the market and gained a combined market share of around 8%, partly by taking over the loans of a number of resellers in return for contracts with these resellers.

Producer X's tied market share is 24% (0,75 × 0,80 × 40%). The other producers' tied market share is around 25%. Therefore, in total around 49% of the market is foreclosed to potential entrants and to incumbents not having tied outlets for at least the first two years of the supply contracts. The market shows that the resellers often have difficulty in obtaining loans from banks and are too small in general to obtain capital through other means like the issuing of shares. In addition, producer X is able to demonstrate that concentrating its sales on a limited number of resellers allows him to plan its sales better and to save transport costs. In the light of the efficiencies on the one hand and the 25% non-tied part in the contracts of producer X, the real possibility for early termination of the contract, the recent entry of new producers and the fact that around half the resellers are not tied on the other hand, the quantity forcing of 75% applied by producer X is likely to fulfil the conditions of Article 101(3).

8.2.2. Exclusive supply

(303) Exclusive supply refer to dispositions that oblige or induce the supplier to sell the contract products only or mainly to one buyer, in general or for a particular use. Such restrictions may take the form of an exclusive supply obligation, obliging the supplier to sell to only one buyer for the purposes of resale or a particular use, but may also for instance take the form of quantity forcing on the supplier, where incentives are agreed between a supplier and a buyer which make the former concentrate its sales mainly with this buyer. For intermediate goods or services, exclusive supply is often referred to as industrial supply.

(304) Exclusive supply is exempted by the VBER where both the supplier's and buyer's market share does not exceed 30%, even if combined with other non-hardcore vertical restraints such as non-compete. The remainder of this section provides

guidance for the assessment of exclusive supply in individual cases above the market share threshold.

(305) The main competition risk of exclusive supply is anticompetitive foreclosure of other buyers. There is a similarity with the possible effects of exclusive distribution, in particular when the exclusive distributor becomes the exclusive buyer for a whole market (see in particular paragraph (113) of these Guidelines). The market share of the buyer on the upstream purchase market is obviously important for assessing the ability of the buyer to impose exclusive supply which forecloses other buyers from access to supplies. The importance of the buyer on the downstream market is however the most significant factor to determine whether a competition problem may arise. If the buyer has no market power downstream, then no appreciable negative effects for consumers can be expected. Negative effects may arise when the market share of the buyer on the downstream supply market as well as the upstream purchase market exceeds 30%. Where the market share of the buyer on the upstream market does not exceed 30%, significant foreclosure effects may still arise, especially when the market share of the buyer on its downstream market exceeds 30% and the exclusive supply relates to a particular use of the contract products. Where a company is dominant on the downstream market, any obligation to supply the products only or mainly to the dominant buyer are likely to have significant anti-competitive effects.

(306) It is not only the market position of the buyer on the upstream and downstream market that is important but also the extent and the duration of the exclusive supply obligation. The higher the tied supply share, and the longer the duration of the exclusive supply obligation, the more significant the foreclosure effect is likely to be. Exclusive supply agreements shorter than five years entered into by non-dominant companies usually require a balancing of pro- and anti-competitive effects, while agreements lasting longer than five years are for most types of investments not considered necessary to achieve the claimed efficiencies or the efficiencies are not sufficient to outweigh the foreclosure effect of such long-term exclusive supply agreements.

(307) The market position of the competing buyers on the upstream market is also important as it is likely that exclusive supply agreement will foreclose competing buyers for anti-competitive reasons, such as increasing their costs, especially if they are significantly smaller than the foreclosing buyer. Foreclosure of competing buyers is not very likely where those competitors have similar buying power than the buyer party to the agreement and can offer the suppliers similar sales possibilities. In such a case, foreclosure could only occur for potential entrants, which may not be able to secure supplies when a number of major buyers all enter into exclusive supply contracts with the majority of suppliers on the market. Such a cumulative effect may lead to withdrawal of the benefit of the VBER.

(308) The existence of entry barriers at the supplier level as well as their size are relevant to assessing whether there is real foreclosure. In as far as it is efficient for competing buyers to provide the goods or services themselves via upstream vertical integration, foreclosure is unlikely to be a real problem. However, there are often significant entry barriers.

(309) Countervailing power of suppliers should also be taken into account as important suppliers will not easily let one buyer cut them off from alternative buyers. Foreclosure is therefore mainly a risk in the case of weak suppliers and strong

buyers. In the case of strong suppliers, the exclusive supply may be found in combination with non-compete obligations. Such a combination brings in the rules developed for single branding. Where there are relationship-specific investments involved on both sides (hold-up problem) the combination of exclusive supply and non-compete obligations that is, reciprocal exclusivity in industrial supply agreements may often be justified, in particular below the level of dominance.

(310) Lastly, the level of trade and the nature of the product are relevant to assess possible foreclosure effect. Anticompetitive foreclosure is less likely in the case of an intermediate product or where the product is homogeneous. Firstly, a foreclosed manufacturer that uses a certain input usually has more flexibility to respond to the demand of its customers than the wholesaler or retailer has in responding to the demand of the final consumer for whom brands may play an important role. Secondly, the loss of a possible source of supply matters less for the foreclosed buyers in the case of homogeneous products than in the case of a heterogeneous product with different grades and qualities. For final branded products or differentiated intermediate products where there are entry barriers, exclusive supply may have appreciable anti-competitive effects where the competing buyers are relatively small compared to the foreclosing buyer, even if the latter is not dominant on the downstream market.

(311) Efficiencies can be expected in the case of a hold-up problem (paragraphs (14)(e) and (14)(f) of these Guidelines), and such efficiencies are more likely for intermediate products than for final products. Other efficiencies are less likely. Possible economies of scale in distribution (paragraph (14)(g) of these Guidelines) do not seem likely to justify exclusive supply.

(312) In the case of a hold-up problem and even more so in the case of economies of scale in distribution, quantity forcing on the supplier, such as minimum supply requirements, could well be a less restrictive alternative.

Example of exclusive supply

On a market for a certain type of components (intermediate product market) supplier A agrees with buyer B to develop a different version of the component, with its own know-how and considerable investment in new machines and with the help of specifications supplied by buyer B. B will have to make considerable investments to incorporate the new component. It is agreed that A will supply the new product only to buyer B for a period of five years from the date of first entry on the market. B is obliged to buy the new product only from A for the same period of five years. Both A and B can continue to sell and buy respectively other versions of the component elsewhere. The market share of buyer B on the upstream component market and on the downstream final goods market is 40%. The market share of the component supplier is 35%. There are two other component suppliers with around 20-25% market share and a number of small suppliers.

Given the considerable investments, the agreement is likely to fulfil the conditions of Article 101(3) in view of the efficiencies and the limited foreclosure effect. Other buyers are foreclosed from a particular version of a product of a supplier with 35% market share, but other component suppliers could develop similar new products. The foreclosure of part of buyer B's demand to other suppliers is limited to maximum 40% of the market.

8.2.3. Restrictions on the use of online marketplaces

(313) Online marketplaces are online platforms which connect merchants and potential customers with a view to enabling direct purchases. Online platforms that offer no direct purchasing functionality, but re-direct customers to other websites where goods and services can be purchased, are not considered online marketplaces for the purpose of these Guidelines, but advertising platforms.

(314) Online marketplaces have become an important sales channel for suppliers and retailers, providing them with access to a large number of customers, as well as for end users. Online marketplaces may allow retailers to start selling online with lower initial investments. They may also facilitate cross-border sales and increase the visibility of, notably small and medium-sized, retailers that do not operate their own online shop or are not well known to end users.

(315) Suppliers may wish to restrict the use of online marketplaces by their buyers,[115] for instance to protect the image and positioning of their brand, to discourage the sale of counterfeit products, to ensure sufficient pre- and post-sale services or to ensure that the retailer maintains direct a relationship with customers. The restrictions may range from a total ban on the use of online marketplaces to the imposition of certain qualitative requirements which the marketplaces must meet. For instance, suppliers may prohibit the use of marketplaces on which products are sold by auction, or they may require buyers to use specialised marketplaces, in order to ensure certain quality standards regarding the environment and parameters of the sale of their goods or services. Some qualitative requirements may *de facto* ban the use of online marketplaces, because no online marketplace is capable of meeting the requirement, for example, where the supplier requires that the logo of the online marketplace is not visible or requires that the domain name of any website used by the retailer contains the name of the retailer's business.

(316) A restriction of sales on online marketplaces in a vertical agreement is exempted by the VBER where the market shares of each of the supplier and the buyer do not exceed 30% and the vertical agreement does not include any hardcore restriction under the VBER or any excluded restriction under the VBER that cannot be severed from the rest of the vertical agreement. As set out in Article 1 VBER and section 6.1.2. of these Guidelines, a restriction or ban of sales on online marketplaces concerns the modalities of the buyer's online sales and does not limit sales into a specific territory or to a specific customer group. While it restricts the use of a specific online channel, other online channels remain available to the buyer.[116] For example, despite a restriction or a ban of sales on online market places, the buyer may still sell the contract goods or services via its own website and use online advertising channels to attract customers to its website.[117]

(317) While any restriction of online sales that directly or indirectly has as its object to prevent the buyer or its customers from effectively using the internet for the purposes of selling their goods or services online is a hardcore restriction within the meaning of Article 4(b) to (d) VBER and a restriction of Article 101(1) by object, a restriction

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115 Final report on the E-commerce Sector Inquiry, COM(2017) 229 final, 10 May 2017; Section 4.4.

116 Judgement in Case *C-230/16 Coty Germany GmbH v Parfümerie Akzente GmbH* ECLI:EU:C:2017:941, paragraphs 64-69.

117 Judgment in Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* ECLI:EU:C:2017:941, paragraphs 52-54.

on the use of online marketplaces can generally benefit from the safe harbour of the VBER. As set out in paragraph (194), a restriction in the use of online marketplaces generally does not affect a group of online users which can be circumscribed within the group of online purchasers, and does not limit the buyer from selling the contract goods or services via its own website or from advertising under certain circumstances via the internet on third-party platforms and from using online search engines to attract customers to its website, and, therefore, does not constitute a hardcore restriction under Article 4(b) to (d) VBER, to the extent that it does not de facto prevent the effective use of the internet by the buyers or their customers to sell online.

(318) The remainder of this section provides guidance for the assessment of restrictions on the use of online marketplaces in individual cases where the 30% market share thresholds are exceeded. The general principles set out in Section 8.1 provide the relevant framework for this assessment. Restrictions on the use of online marketplaces for sales into territories or to customer groups that are reserved exclusively to the supplier or allocated exclusively to other distributors form part of an exclusive distribution system and should be assessed together with that system.

(319) Restrictions on the use of online marketplaces are often imposed in selective distribution systems. Section 4.6.2 sets out the criteria under which a selective distribution system falls outside the scope of Article 101(1), namely when (i) resellers are chosen on the basis of objective criteria of a qualitative nature that are laid down uniformly for all potential resellers and not applied in a discriminatory fashion, (ii) the characteristics of the contract goods or services necessitate a selective distribution network in order to preserve their quality and ensure their proper use and (iii) the criteria laid down do not go beyond what is necessary.[118] Especially in instances where the supplier does not enter into an agreement with the online marketplace and is thus unable to ensure that the marketplace meets its selection criteria, a restriction or ban on the use of online marketplaces may fulfil the above criteria and thus be appropriate and not go beyond what is necessary to preserve the quality and ensure the proper use of the contract goods or services. However, in cases where a supplier includes the operator of an online marketplace as an authorised distributor in its selective distribution system, or, where it restricts the use of online marketplaces by some authorised distributors but not others, or where it restricts the use of an online marketplace, but uses that marketplace itself to distribute the contract goods or services, restrictions on the use of such online marketplaces would appear unlikely to fulfil the requirements of appropriateness and necessity.

(320) The possible risks to competition arising from restrictions on the use of online marketplaces are a reduction of intra-brand competition at the distribution level and the foreclosure of distributors, notably small and medium ones, to the extent that distributors are deprived of a potentially important sales channel.

(321) To assess the possible anti-competitive effects of restrictions on the use of online marketplaces, it is first necessary to assess the degree of inter-brand competition. As set out in section 8.1.1. of these Guidelines, sufficient inter-brand competition can in principle mitigate any loss of intra-brand competition. For this purpose, the market

[118] Judgment in Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* ECLI:EU:C:2017:941, paragraphs 24 to 36.

position of the supplier and of its competitors should be taken into account. Second, it is necessary to take into account the type and scope of the restrictions on the use of online marketplaces. For instance, a ban on all sales through online marketplaces is more restrictive than a restriction on the use of particular online marketplaces or a resquirement to only use marketplaces that meet certain qualitative criteria. Third, the relative importance of the restricted online marketplaces as a sales channel in the relevant product and geographic markets should be taken into account. Lastly, it is necessary to take into account the cumulative effect of any other restrictions on online sales or advertising imposed by the supplier.

(322) As set out in paragraph (314) of these Guidelines, restrictions on the use of online marketplaces may lead to efficiencies, in particular linked to ensuring brand protection or a certain level of service quality or reducing opportunities for counterfeiting. To the extent that the restrictions do not already fall outside the scope of Article 101(1), the assessment must consider whether such efficiencies may be achieved through less restrictive means, in line with the conditions of Article 101(3). This could be the case where the online marketplace allows retailers to create their own brand shop within the marketplace. Any quality-related justifications brought forward by the supplier will be unlikely to meet the conditions of Article 101(3) where the supplier itself uses the online marketplaces that are covered by the restrictions, or where the supplier imposes the restriction only on some distributors but not on others, or where the operator of the online marketplace is itself an authorised member of the selective distribution system.

8.2.4. Restrictions on the use of price comparison tools

(323) Price comparison tools, for instance price comparison websites or apps, enable retailers to increase their visibility and generate traffic for their website and they enable potential customers to find retailers, compare different products and compare offers for the same product. Price comparison tools increase price transparency and intensify intra-brand and potentially inter-brand price competition between retailers.

(324) Unlike online marketplaces, price comparison tools typically do not offer sale and purchase functionality, but rather re-direct customers to the website of the retailer, enabling a direct transaction between the customer and the retailer.[119] Price comparison tools are therefore not a distinct online sales channel, but rather an online advertising channel.

(325) Suppliers may wish to restrict the use of price comparisons tools,[120] for instance to protect their brand image, as price comparison tools typically focus on price and may not allow retailers to differentiate themselves through other features, such as the range or quality of the contract goods or services. Other reasons for restricting the use of price comparison tools may be to reduce opportunities for counterfeiting, or to protect business models that rely on, for instance, specialisation or quality rather than price.

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[119] For the purpose of these Guidelines, price comparison tools refer to online platforms that do not enable users to conclude purchase transactions on the platform. Platforms that allow users to conclude purchase transactions on the platform are considered to be online marketplaces for the purposes of these Guidelines. Restrictions on the use of online marketplaces are dealt with in section 8.2.3. of these Guidelines.

[120] Final report on the E-commerce Sector Inquiry, COM(2017) 229 final, 10 May 2017; Section B.4.5.

(326) Restrictions on the use of price comparison tools may range from a direct or indirect ban to restrictions based on quality requirements or requirements to include specific content in the offers advertised on the price comparison tool. For example, a restriction on providing price information to price comparison tools, or a requirement to obtain the supplier's authorisation before using price comparison tools, or a restriction on the use of the supplier's brand on price comparison tools may amount to an indirect prevention in the use of price comparison tools.

(327) Restrictions on the use of price comparison tools may increase consumer search costs and thereby soften retail price competition. As with other online advertising restrictions, restrictions on the ability of the buyer to use price comparison tools may restrict the buyer from selling to customers that are located outside its physical trading area and who wish to purchase online. Preventing the use of price comparison tools in a vertical agreement restricts the buyer's ability to target potential customers, inform them about its offering and direct them to its website. As long as the use of price comparison tools is not, as such, a targeted form of advertising, as set out in paragraph (200) of these Guidelines, preventing the use of price comparison tools as an online advertising channel is capable of restricting passive sales to customers wishing to purchase online and located outside the physical trading area of the distributor and constitutes a hardcore restriction under Article 4(b) to (d) VBER. The main possible competition risks in such case are market partitioning, which may facilitate price discrimination, and reduced intra-brand competition. Conversely, if the restriction is limited to the use of price comparison tools to target customers in a territory or customer group that is reserved exclusively to the supplier or allocated exclusively to other distributors (exclusive distribution), for instance because the price comparison tool is in a language not commonly used in the territory in which the buyer is established or has a domain name not used in the territory in which the buyer is established, the restriction would be covered by the exception of Article 4(b)(i) VBER.

(328) Restrictions on the use of price comparison tools which fall short of directly or indirectly preventing their use, for instance requirements that price comparison tools must meet certain quality standards, do not restrict sales to customers in a specific territory or customer group, but rather determine the methods of sale and therefore benefit from the block exemption provided by the VBER. The following guidance is provided for the assessment of such restrictions where the VBER does not apply.

(329) Restrictions on the use of price comparison tools are often imposed in selective distribution systems. Section 4.6.2. of these Guidelines sets out the criteria under which a selective distribution system falls outside the scope of Article 101(1). However, it is unlikely that preventing the use of price comparison tools will be appropriate or necessary to preserve the quality or ensure the proper use of contract goods or services, because these tools typically re-direct potential customers to the website of the authorised distributor to make the purchase. The supplier is able to exert control over the distributor's website through its selection criteria and by imposing requirements in its vertical agreement with the distributor.

(330) Restrictions on the use of price comparison tools which fall short of directly or indirectly preventing their use, for instance, a requirement to only use price comparison tools meeting certain quality standards, may, when not covered by the VBER, significantly limit the ability of the buyer to use price comparison tools. In those instances, it may have to be assessed if the restriction leads to effects similar to those of preventing the use of price comparison tools, namely to consumer harm

consisting in an increase of consumers' search costs and the softening of price competition or to market partitioning, which may facilitate price discrimination, ultimately impacting inter-brand, and possibly also intra-brand competition. Such restrictions may also limit intra-brand competition, for example, where a supplier does not impose the restrictions on all its distributors or where the supplier itself uses the price comparison tools covered by the restriction. To the extent that distributors are prevented from relying on a potentially significant online advertising channel, they would only exercise limited competitive pressure on the supplier or any other distributors not facing this restriction.

(331) Relevant factors for the assessment under Article 101(1) include the market position of the supplier and its competitors; the importance of price comparison tools as an advertising channel in the product and geographic markets of the contract goods or services; the type and scope of the restrictions and the relative importance of any specific price comparison tools whose use is restricted or banned, as well as whether the supplier also imposes restrictions on the distributor's ability to use other forms of online advertising. The cumulative effect of any such other restrictions with the restriction on the use of price comparison tools should be taken into account.

(332) As set out in paragraph (323) of these Guidelines, restrictions on the use of price comparison tools may lead to efficiencies, in particular linked to ensuring brand protection or a certain level of service quality or reducing opportunities for counterfeiting. In line with the conditions of Article 101(3), the assessment must consider whether such efficiencies may also be achieved through less restrictive means. This could be the case where the price comparison tool also provides for comparisons or reviews linked to the quality of the goods or services concerned, the customer service, the trustworthiness of the distributor or other features of the distributors' offerings. Any assessment of quality-related justifications under Article 101(3) should take into account that the sale does not occur on the price comparison tool itself, but on the website of the distributor, which, on the basis of the distribution agreement entered into with the supplier, should meet the supplier's quality requirements.

8.2.5. Parity obligations

(333) Parity obligations, also called Most Favoured Nation clauses (MFNs) or Across Platform Parity Agreements (APPAs), require a supplier of goods or services to offer them to another party on conditions that are no less favourable than the conditions offered by the supplier to certain other parties or on certain other channels. The conditions may concern prices, inventory, availability or any other terms or conditions of offer or sale. The obligation may be express or it may be applied by other direct or indirect means, such as differential pricing or other incentives or measures whose application depends on the conditions under which the supplier offers its goods or services to particular parties or on particular channels.

(334) Parity obligations imposed by suppliers of online intermediation services (for example, marketplaces or price comparison tools) relating to the conditions under which goods or services are offered to end users (final consumers or other undertakings) are generally referred to as retail parity obligations. For this type of obligation to be effective, the supplier of goods or services that accepts the obligation must generally be able to control the price and other conditions under which its goods or services are offered on the retail channels to which the obligation refers. Similar parity obligations may be used by upstream suppliers of online

intermediation services relating to the conditions under which goods or services are offered to undertakings that are not end users (for example, to retailers). As regards parity obligations used by buyers, these include obligations imposed by manufacturers, wholesalers or retailers relating to the conditions under which they purchase inputs from suppliers.

(335) A further distinction concerns the channels covered by the parity obligation. The obligation may refer to sales channels operated by a supplier of goods or services (direct channels); to channels operated by third parties (indirect channels), or to all channels. Parity obligations which refer only to direct channels are often called 'narrow', whereas those that refer to all channels are often called 'wide'.

(336) With the exception of the across-platform retail parity obligations defined in Article 5(1)(d) VBER, the block exemption applies to all types of parity obligation in vertical agreements, provided the market shares of the supplier and the buyer do not exceed 30%. The following guidance is provided for the assessment of the across-platform retail parity obligations defined in Article 5(1)(d) VBER and for other types of parity obligations in individual cases above the market share threshold.

8.2.5.1. Across-platform retail parity obligations

(337) Retail parity obligations which cause a buyer of online intermediation services not to offer, sell or resell goods or services to end users under more favourable conditions using competing online intermediation services, as defined in Article 5(1)(d) VBER, are more likely than other types of parity obligation to produce net anti-competitive effects. Across-platform retail parity obligations may restrict competition as follows:

(a) They may soften competition and facilitate collusion between suppliers of online intermediation services. In particular, it is more likely that a supplier which imposes this type of parity obligation will be able to raise the price or reduce the quality of its intermediation services without losing market share. Irrespective of the price or quality of its services, sellers of goods or services which choose to use its platform are obliged to offer conditions on the platform that are at least as good as the conditions they offer on competing platforms.

(b) They may foreclose entry or expansion by new or smaller suppliers of online intermediation services, by restricting their ability to offer buyers and end users differentiated price-service combinations.

(338) For the assessment of this type of parity obligation, key factors are the share of buyers of the online intermediation services that are covered by the obligations; the homing behaviour of buyers of the online intermediation services and of end users (how many intermediary platforms they use); the market position of the supplier that imposes the obligation and of its competitors; the existence of barriers to entry to the relevant market for online intermediation services, and the impact of direct sales by buyers of the services.

(339) The share of buyers of the online intermediation services that are subject to the parity obligations and the homing behaviour of those buyers are important, as they may indicate that a supplier's parity obligations restrict competition in respect of a share of demand that exceeds the supplier's market share. For example, a supplier of online intermediation services may hold a share of 20 % of total transactions made using such services, but the buyers upon which it imposes across-platform parity obligations may – because they use multiple platforms – account for more than 50 %

of total platform transactions. In that case, the supplier's parity obligations restrict competition in respect of more than half of total relevant demand.

(340) Buyers of online intermediation services often multi-home in order to reach customers that single-home (use only one platform) and do not switch between platforms. Buyer multi-homing is incentivised by platform business models under which the buyer only has to pay for using the intermediation service when it generates a transaction. As explained above, multi-homing by buyers of online intermediation services can increase the share of total demand for such services that is affected by a supplier's parity obligations. Second, single homing by end users may mean that each supplier of intermediation services controls access to a distinct group of end users. This may increase the supplier's bargaining power and its ability to impose parity obligations.

(341) The restrictive effects of across-platform retail parity obligations will generally be most severe where they are used by one or more leading suppliers of online intermediation services. Where such suppliers have a similar business model, the parity obligations are likely to reduce the scope for disruption of the model. This type of obligation may also enable a market leader to maintain its position against smaller suppliers.

(342) Markets for the supply of online intermediation services are often characterised by significant barriers to entry and expansion, which can aggravate the negative effects of parity obligations. These markets often feature positive indirect network effects: new or smaller suppliers of such services find it difficult to attract buyers because their platforms provide access to insufficient numbers of end users. Where the end users are final consumers, brand loyalty, single-homing and the lock-in strategies of incumbent intermediation services suppliers can also create barriers.

(343) Buyers of online intermediation services may also sell their goods or services to end users directly. Such direct sales may constrain the ability of the suppliers of online intermediation services to raise the price of their services. It is therefore necessary to assess the share of sales of the intermediated goods or services that are made through the direct and indirect channels, and the substitutability of these channels, from the perspective of the suppliers of goods or services and of end users.

(344) Across-platform retail parity obligations may produce appreciable restrictive effects where they are imposed on buyers representing a significant share of total demand for the relevant online intermediation services . In the case of a cumulative effect, restrictive effects will generally only be attributed to the parity obligations of suppliers whose market share exceeds 5%.

(345) In principle, retail parity obligations may also be imposed by retailers in relation to the conditions under which a supplier's goods or services are offered to end users by competing retailers. However, where this type of parity obligation relates to price, it generally requires the supplier of goods or services that accepts the obligation to impose minimum RPM on the competing retailers that are covered by the obligation. RPM is a hardcore restriction under the VBER and a restriction by object under Article 101(1). In cases where undertakings are able to implement such retail parity obligations in compliance with the rules relating to minimum RPM, the obligations are covered by the block exemption. Above the block exemption market share threshold, the guidance provided in paragraphs (337) to (344) of these Guidelines applies mutatis mutandis.

8.2.5.2. Retail parity obligations relating to direct sales channels

(346) Retail parity obligations imposed by suppliers of online intermediation services relating to the conditions under which buyers of the services may offer goods or services to end users on their direct sales channels ('narrow' parity) prevent such buyers from inducing end users to switch to the direct channel by offering more favourable conditions (undercutting). Under certain conditions, in particular where competition for the supply of online intermediation services is limited, narrow parity obligations may allow the suppliers of online intermediation services to maintain a higher price for their services, leading to higher retail prices for the intermediated goods or services on all sales channels. For the assessment of this type of restriction, relevant factors include the market position of the supplier that imposes the parity obligation, the relative size of the direct sales channels covered by the obligation, the substitutability of the direct and indirect channels from the perspective of the suppliers of the goods or services and of end users, and whether the restrictions are imposed by multiple suppliers of intermediation services (cumulative effects).

(347) In addition, under certain conditions, retail parity obligations relating to direct sales channels may indirectly produce restrictive effects equivalent to those produced by across-platform retail parity obligations. In principle, a buyer of online intermediation services that is subject to a narrow retail parity obligation may differentiate its offers across the intermediary platforms that it uses ('multi-homing'). However, in order to do so, it must offer conditions on its direct channels that are not more favourable than the conditions that it offers on the 'most expensive' intermediary platform with which it has a direct channels parity agreement. Depending on factors such as the share of sales made through each channel, the costs of using each channel and the elasticity of demand for the intermediated goods or services across sales channels, there may be insufficient incentives for buyers and suppliers of online intermediation services to engage in trade-offs relating to the price of those services and the conditions under which goods or services are intermediated via the service. This outcome is generally more likely where a significant share of sales takes place through the direct channel and where retail parity obligations relating to direct channels are imposed by multiple suppliers.

(348) Retail parity obligations imposed by suppliers of online intermediation services relating to direct sales channels may produce appreciable restrictive effects where buyers representing a significant share of total demand for the online intermediation services are subject to such obligations or to across-platform retail parity obligations. A similar assessment, following an assessment of the withdrawal of the VBER, may have to be conducted by the Commission or a national competition authority, where the market shares of the relevant suppliers are below the 30% threshold.

8.2.5.3. Parity obligations relating to non-retail conditions

(349) Parity obligations imposed by upstream suppliers of online intermediation services relating to the conditions under which goods or services are offered to undertakings that are not end users are covered by the block exemption. This type of obligation is capable of disincentivising competition between suppliers of online intermediation services in the same way as retail parity obligations, and therefore the guidance provided in paragraphs (337) to (348) of these Guidelines remains relevant. This applies in particular where there is no significant difference between the prices or other conditions under which the intermediated goods or services are offered at the upstream and retail levels, as may be the case where the intermediation concerns

final goods or services.[121] However, for the assessment of this type of parity obligation, it is also necessary to take into account the conditions of competition downstream, that is, between the undertakings which buy the intermediated goods or services.

(350) By contrast, parity obligations relating to the conditions under which goods or services are purchased as inputs by manufacturers, wholesalers or retailers do not directly affect the conditions under which these undertakings compete downstream. The guidance provided for the assessment of retail parity obligations is therefore less likely to be relevant. The main concern associated with parity obligations relating to the conditions under which goods or services are purchased as inputs is that they may reduce the incentives of input suppliers to compete and thereby raise input prices. Relevant factors for the assessment include the relative size and market power of the supplier and buyer that agree the parity obligation, the share of the relevant market covered by similar obligations, and the cost of the input in question relative to buyers' total costs.

8.2.5.4. Assessment under Article 101(3)

(351) Where parity obligations produce appreciable restrictive effects, possible efficiency justifications need to be assessed under Article 101(3). The most common justification for the use of these obligations by suppliers of online intermediation services is to address a free-rider problem. For example, the suppliers may not have an incentive to invest in the development of their platform, in pre-sales services or demand-enhancing promotion if the benefits of such investments in terms of increased sales go to competing platforms or direct sales channels which can offer the same goods or services on more favourable conditions.

(352) Relevant factors include whether the investments by the supplier of online intermediation services provide objective benefits, that is, whether they add value for consumers; whether the risk of free-riding is real and substantial, and whether the particular type and scope of parity obligation is indispensable for the objective benfits to be achieved. The likely level of free-riding must be sufficient to significantly impact the incentives to invest in the online intermediation service. Evidence of the extent to which users of the intermediation services multi-home is particularly relevant, though it is also necessary to consider whether their behaviour is influenced by the effects of the parity obligations. If the supplier of online intermediation services or its competitors operate in other comparable markets using less restrictive or no parity obligations, this may indicate that the obligations are not indispensable. Where the supply of online intermediation services is highly concentrated and features significant entry barriers, the need to protect residual competition may outweigh possible efficiency gains. Other justifications relating to the general benefits provided by transaction platforms, such as the pooling of suppliers' promotional expenditure, increased price transparency or reduced transaction costs will only fulfil the conditions of Article 101(3) if the supplier of online intermediation services can show a direct causal link between the benefit claimed and the use of the particular type of parity obligation.

(353) In general, retail parity obligations relating to direct sales channels are more likely to fulfil the conditions of Article 101(3). This is primarily because their restrictive

[121] In some cases, the parity obligation may refer to conditions offered at both the upstream and retail levels.

effects are generally less severe than those of across-platform parity obligations and therefore more likely to be outweighed by efficiencies. Moreover, the risk of free riding by suppliers of goods or services via their direct sales channels may be higher, as these suppliers generally earn a higher per unit margin on sales in their direct channel than on indirect sales.

8.2.6. Upfront access payments

(354) Upfront access payments are fixed fees that suppliers pay to distributors in the framework of a vertical relationship at the beginning of a relevant period, in order to get access to their distribution network and remunerate services provided to the suppliers by the retailers. This category includes various practices such as slotting allowances,[122] the so called pay-to-stay fees,[123] payments to have access to a distributor's promotion campaigns etc. This section provides guidance for the assessment of upfront access payments in individual cases above the market share threshold stipulated in Article 3 VBER.

(355) Upfront access payments may sometimes result in anticompetitive foreclosure of other distributors. For example, a high fee may incentivise a supplier to channel a substantial volume of its sales through one or a limited number of distributors in order to cover the costs of the fee. In such a case, upfront access payments may have the same downstream foreclosure effect as an exclusive supply type of obligation. To assess the likelihood of this type of negative effect, the guidance relating to exclusive supply obligations may be applied by analogy (in particular paragraphs (305) to 310)).

(356) Exceptionally, upfront access payments may result in anticompetitive upstream foreclosure effects. For example, if the distributor has a strong bargaining position, or where the use of upfront access payments is widespread, such payments may increase barriers to entry for small suppliers. To assess the likelihood of this type of negative effect, the guidance relating to single branding obligations may be applied by analogy (in particular paragraphs (284) to (293) of these Guidelines). The assessment must also take into account whether the distributor in question sells competing products under its own brand. In that case, horizontal concerns may also arise, with the consequence that the block exemption does not apply, pursuant to Article 2(4) VBER (see section 4.4.3. of these Guidelines).

(357) In addition to possible foreclosure effects, upfront access payments may soften competition and facilitate collusion between distributors. Upfront access payments are likely to increase the price charged by the supplier for the contract products since the supplier must cover the expense of such payments. Higher supply prices may reduce the incentive of the retailers to compete on price on the downstream market, while the profits of distributors are increased as a result of the access payments. Such reduction of competition between distributors through the cumulative use of upfront access payments normally requires the distribution market to be highly concentrated.

(358) However, the use of upfront access payments may in many cases contribute to an efficient allocation of shelf space for new products. When suppliers launch new products, distributors often have less information than the supplier about whether the

[122] Fixed fees that manufacturers pay to retailers in order to get access to their shelf space.

[123] Lump sum payments made to ensure the continued presence of an existing product on the shelf for some further period.

new product is likely to be successful and, as a result, they may stock sub-optimal quantities of the product. Upfront access payments may be used to reduce this asymmetry in information between suppliers and distributors, by explicitly allowing suppliers to compete for shelf space. The distributor may thus receive advance warning about which products are most likely to be successful since a supplier will normally only agree to pay an upfront access fee if it considers there is a low probability that the product launch will fail.

(359) Furthermore, due to the asymmetry in information mentioned in the previous paragraph, suppliers may have incentives to free-ride on distributors' promotional efforts in order to introduce sub-optimal products. If a product is not successful, the distributors will pay part of the costs of the product failure. The use of upfront access payments may prevent such free riding by shifting the risk of product failure back to the suppliers, thereby contributing to an optimal rate of product launches.

8.2.7. Category Management Agreements

(360) Category management agreements are agreements by which, within a distribution agreement, the distributor entrusts the supplier (the 'category captain') with the marketing of a category of products including in general not only the supplier's products, but also the products of its competitors. The category captain may thus have an influence on for instance the product placement and product promotion in the shop and product selection for the shop. Category management agreements are covered by the block exemption when neither the category captain's nor the distributor's market shares exceed 30%, and provided that such an agreement does not include hardcore restrictions, for example restrictions of the distributor's ability to determine its sale price within the meaning of Article 4(a) VBER.

(361) In most cases, category management agreements do not raise concerns under Article 101. However, they may sometimes distort competition between suppliers, and result in anticompetitive foreclosure of other suppliers, where the category captain is able, due to its influence over the marketing decisions of the distributor, to limit or disadvantage the distribution of products of competing suppliers.

(362) In general, distributors will not have an interest in limiting their choice of products. However, they may have incentives to exclude certain suppliers, in particular when the distributor also sells competing products under its own brand. To assess the likelihood of such an upstream foreclosure effect, the guidance relating to single branding obligations may be applied by analogy (in particular paragraphs (284) to (293) of these Guidelines). In particular, this assessment must take into account, on the one hand, the market coverage of the category management agreements and the possible cumulative use of such agreements and, on the other hand, the market position of competing suppliers and the distributor.

(363) In addition, category management agreements may facilitate collusion between distributors when the same supplier serves as a category captain for all or most of the competing distributors on a market and provides these distributors with a common point of reference for their marketing decisions.

(364) Category management may also facilitate collusion between suppliers through increased opportunities to exchange sensitive market information via retailers, such as for instance information related to future pricing, promotional plans or advertising campaigns. The VBER does not cover such direct information exchanges between competitors, see paragraph (83) of these Guidelines.

(365) However, the use of category management agreements may also lead to efficiencies. Category management agreements may allow distributors to have access to the supplier's marketing expertise for a certain group of products and to achieve economies of scale, as they ensure that the optimal quantity of products is presented timely and directly on the shelves. In general, the higher the inter-brand competition and the lower consumers' switching costs, the greater the economic benefits achieved through category management.

8.2.8. Tying

(366) Tying refers to situations where customers that purchase one product (the tying product) are required also to purchase another distinct product (the tied product) from the same supplier or someone designated by the latter. Tying may constitute an abuse within the meaning of Article 102.[124] Tying may also constitute a vertical restraint within the meaning of Article 101 where it results in a single branding type of obligation (see paragraphs (281) to (302) of these Guidelines) for the tied product. Only the latter situation is dealt with in these Guidelines.

(367) Whether products will be considered as distinct depends on customer demand. Two products are distinct where, in the absence of the tying, a substantial number of customers would purchase or would have purchased the tying product without also buying the tied product from the same supplier, thereby allowing stand-alone production for both the tying and the tied product.[125] Evidence that two products are distinct could include direct evidence that, when given a choice, customers purchase the tying and the tied products separately from different sources of supply, or indirect evidence, such as the presence on the market of undertakings specialised in the manufacture or sale of the tied product without the tying product,[126] or evidence indicating that undertakings with little market power, particularly on competitive markets, tend not to tie or not to bundle such products. For instance, since customers want to buy shoes with laces and it is not practicable for distributors to lace new shoes with the laces of their choice, it has become commercial usage for shoe manufacturers to supply shoes with laces. Therefore, the sale of shoes with laces is not a tying practice.

(368) Tying may lead to anticompetitive foreclosure effects on the tied market, the tying market, or both at the same time. The foreclosure effect depends on the tied percentage of total sales on the market of the tied product. On the question of what can be considered appreciable foreclosure under Article 101(1), the analysis for single branding can be applied. Tying means that there is at least a form of quantity-forcing on the buyer in respect of the tied product. Where in addition a non-compete obligation is agreed in respect of the tied product, this increases the possible foreclosure effect on the market of the tied product. The tying may lead to less competition for customers interested in buying the tied product, but not the tying product. If there is not a sufficient number of customers that will buy the tied product alone to sustain competitors of the supplier on the tied market, the tying can lead to those customers facing higher prices. If the tied product is an important

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124 Judgment in Case C-333/94 *P Tetrapak* v *Commission* EU:C:1996:436, paragraph 37. See also Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7.

125 Judgment in Case T-201/04 *Microsoft* v *Commission* EU:T:2007:289, paragraphs 917, 921 and 922.

126 Judgment in Case T-30/89 *Hilti* v *Commission* EU:T:1991:70, paragraph 67.

complementary product for customers of the tying product, a reduction of alternative suppliers of the tied product and hence a reduced availability of that product can make entry onto the tying market alone more difficult.

(369) Tying may also directly lead to prices that are above the competitive level, especially in three situations. First, if the tying and the tied product can be used in variable proportions as inputs to a production process, customers may react to an increase in price for the tying product by increasing their demand for the tied product while decreasing their demand for the tying product. By tying the two products the supplier may seek to avoid this substitution and as a result be able to raise its prices. Second, when the tying allows price discrimination according to the use the customer makes of the tying product, for example the tying of ink cartridges to the sale of photocopying machines (metering). Third, when in the case of long-term contracts or in the case of after-markets with original equipment with a long replacement time, it becomes difficult for the customers to calculate the consequences of the tying.

(370) Tying is exempted under the Block Exemption Regulation when the market share of the supplier, on both the market of the tied product and the market of the tying product, and the market share of the buyer, on the relevant upstream markets, do not exceed 30%. It may be combined with other vertical restraints, which are not hardcore restrictions under that Regulation, such as non-compete obligations or quantity forcing in respect of the tying product, or exclusive sourcing. The remainder of this section provides guidance for the assessment of tying in individual cases above the market share threshold.

(371) The market position of the supplier on the market of the tying product is obviously of central importance to assess possible anti-competitive effects. In general, this type of agreement is imposed by the supplier. The importance of the supplier on the market of the tying product is the main reason why a buyer may find it difficult to refuse a tying obligation.

(372) The market position of the supplier's competitors on the market of the tying product is important in assessing the supplier's market power. As long as its competitors are sufficiently numerous and strong, no anti-competitive effects can be expected, as buyers have sufficient alternatives to purchase the tying product without the tied product, unless other suppliers are applying similar tying. In addition, entry barriers on the market of the tying product are relevant to establish the market position of the supplier. When tying is combined with a non-compete obligation in respect of the tying product, this considerably strengthens the position of the supplier.

(373) Buying power is relevant, as important buyers will not easily be forced to accept tying without obtaining at least part of the possible efficiencies. Tying not based on efficiency is therefore mainly a risk where buyers do not have significant buying power.

(374) Where appreciable anti-competitive effects are established, the question whether the conditions of Article 101(3) are fulfilled arises. Tying obligations may help to produce efficiencies arising from joint production or joint distribution. Where the tied product is not produced by the supplier, an efficiency may also arise from the supplier buying large quantities of the tied product. For tying to fulfil the conditions of Article 101(3), it must, however, be shown that at least part of these cost reductions are passed on to the consumer, which is normally not the case when the retailer is able to obtain, on a regular basis, supplies of the same or equivalent products on the same or better conditions than those offered by the supplier which

applies the tying practice. Another efficiency may exist where tying helps to ensure a certain uniformity and quality standardisation (see paragraph (14)(h)). However, it needs to be demonstrated that the positive effects cannot be realised equally efficiently by requiring the buyer to use or resell products satisfying minimum quality standards, without requiring the buyer to purchase these from the supplier or someone designated by the latter. The requirements concerning minimum quality standards would not normally fall within the scope of Article 101(1). Where the supplier of the tying product imposes on the buyer the suppliers from which the buyer must purchase the tied product, for instance because the formulation of minimum quality standards is not possible, this may also fall outside the scope of Article 101(1), especially where the supplier of the tying product does not derive a direct (financial) benefit from designating the suppliers of the tied product.