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finalANNEX

ANNEX

to the

COMMUNICATION FROM THE COMMISSION

Approval of the content of a draft for a COMMUNICATION FROM THE COMMISSION

~~COMMUNICATION FROM THE COMMISSION~~
~~COMMISSION NOTICE~~
Guidelines on vertical restraints

ANNEX

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COMMUNICATION FROM THE COMMISSION
~~**COMMISSION NOTICE**~~

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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]~~Union[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~~X[2]. Unless stated otherwise~~ stated~~, in these Guidelines~~,~~ the term ~~"agreement"~~'agreement' also covers concerted ~~practices~~practices[3].

(2) By issuing these Guidelines, the Commission aims to help ~~companies~~undertakings conduct their own assessment of vertical agreements under the ~~EU~~Union's competition rules~~.~~ and to facilitate the enforcement of Article 101 of the Treaty. However, these Guidelines should not be applied mechanically, as each agreement must be evaluated in the light of its own ~~facts.~~~~[3]~~facts[4]. 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").~~'Court of Justice of the European Union').

(3) ~~(3)~~ Vertical agreements may be concluded for intermediate ~~and~~or final goods and services. Unless stated otherwise~~ stated~~, these Guidelines apply to all types of goods and services, and to all levels of trade. Furthermore, unless stated otherwise, the term 'end user' includes undertakings and final consumers, namely natural persons who are acting for purposes which are outside their trade, business, craft or profession.

(4) These Guidelines are structured as follows:

- ~~This~~this first introductory section ~~is an introduction, which includes explanations as to the reasons why and the extent to which~~explains why the Commission provides guidance on vertical agreements~~. The remainder~~ and the scope of ~~this introduction sets out the context in which~~ that guidance. It also explains the objectives of Article 101 of the Treaty, how Article 101 of the Treaty applies to vertical agreements~~.~~, and the main steps in the assessment of vertical agreements under Article 101 of the Treaty;

- ~~The~~the second section provides an overview of the positive and negative effects ~~created by~~of vertical agreements. ~~The VBER in its entirety~~Regulation (EU) X, these Guidelines, and the Commission's enforcement policy in individual cases are based on the consideration of ~~these~~those effects~~.~~;

- ~~The~~the third section deals with vertical agreements that generally fall outside Article 101(1~~).~~) of the Treaty. While ~~the VBER~~Regulation (EU) X does not apply to ~~these~~those agreements, it is necessary to provide guidance on the conditions under which vertical agreements may fall outside Article 101(1~~).~~) of the Treaty;

- ~~The~~the fourth section provides further guidance on the scope of ~~the VBER. It includes~~Regulation (EU) X, including explanations on the safe harbour established by the ~~VBER~~Regulation and the definition of a vertical agreement. ~~This~~That section also ~~deals more specificallywith~~contains guidance on 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~~Regulation (EU) X, as ~~stipulated in Article 2(2) to (4) VBER, and explains the relationship with other~~set

[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~~2] Commission Regulation (EU) XX of XX 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 (OJ L [X].

[3] See paragraph (51).

[4] The Commission will continue to monitor the operation of ~~the VBER~~Regulation (EU) X and these Guidelines andmay 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~~out in Article 2(2), (3) and (4) of the Regulation. This includes the specific limits that apply to the exchange of information between a supplier and a buyer in scenarios of dual distribution, pursuant to Article 2(5) of the Regulation, and those that apply to agreements relating to the provision of online intermediation services where the provider of those services has a hybrid function, pursuant to Article 2(6) of the Regulation. The fourth section also explains how Regulation (EU) X applies in cases where a vertical agreement falls within the scope of another block exemption regulation, as set out in Article 2(7) of the Regulation. Lastly, that section contains a description of certain common types of distribution system, in particular those which are the subject of specific provisions in Article 4 of the Regulation relating to hardcore restrictions;

- the fifth section addresses the definition of the relevant markets and the calculation of market shares, by reference to the Market Definition Notice[5]. This is relevant because vertical agreements may only benefit from the block exemption provided by Regulation (EU) X if the market shares of the undertakings that are party to ~~a vertical~~the agreement~~. It serves to assess whether the market share~~ do not exceed the thresholds ~~provided~~set out in Article 3 ~~VBER determining the applicability~~ of ~~the VBER are exceeded.~~Regulation (EU) X;

- ~~The~~the sixth section ~~deals with~~covers the hardcore restrictions set out in Article 4 ~~VBER~~of Regulation (EU) X and the excluded restrictions set out in Article 5 ~~VBER~~of the Regulation, including explanations as to why the qualification as ~~hardcore~~a 'hardcore' or ~~excluded~~'excluded' restriction is relevant~~.~~;

- ~~The~~the seventh section contains guidance on the ~~withdrawal of the benefit of the VBER~~powers of the Commission and the competition authorities of the Member States ('NCAs') to withdraw the benefit of Regulation (EU) X in individual cases, 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 "~~Treaty[6] and Article 6 of the Regulation ~~1/2003")[4] and~~ (EU) X, as well as guidance on the power of the Commission to adopt regulations declaring that ~~the VBER~~Regulation (EU) X does not apply, pursuant to Article ~~6 VBER.~~7 of Regulation (EU) X;

- ~~The~~the eighth section describes the Commission's enforcement policy in individual cases. To ~~this~~that end, it explains how vertical agreements that are not covered by Regulation (EU) X are assessed under Article 101(1) and ~~101~~(3) ~~outside the scope~~ of the ~~VBER~~Treaty, and provides guidance on ~~a non-exhaustive list~~various common types of ~~specific~~ vertical ~~agreements~~restraints.

1.2. Applicability of Article 101 of the Treaty to vertical agreements

(5) The objective of Article 101 of the Treaty is to ensure that undertakings do not use agreements, whether horizontal or ~~vertical,[5]~~vertical[7], to prevent, restrict or distort competition on the market to the ~~ultimate~~ detriment of ~~consumers~~consumers[8]. Article 101 of the Treaty also pursues

[5] Commission Notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5) or any future Commission guidance relating to the definition of relevant market for the purposes of Union competition law including any guidance that might replace the Market Definition Notice.

[6] OJ L 1, 4.1.2003, p. 1.

[7] Further guidance on the definition of 'vertical agreement' within the meaning of Article 1(1), point (a) of Regulation (EU) X is provided in section 4.2. of these Guidelines.

[8] See for example, the judgments of 21 February 1973, *Europemballage Corporation and Continental Can Company* v *Commission,* Case 6/72, EU:C:1973:22, paragraphs 25 and 26; 17 February 2011,

~~(5)~~ 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 beensuccessfully abolished.

(6) Article 101 of the Treaty 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~~competition[9]. It provides a legal framework for the assessment of vertical restraints[10], which takes into account the distinction between anti-competitive and pro-competitive effects. Article 101(1) of the Treaty prohibits agreements that appreciably restrict or distort competition. However, that prohibition does not apply to agreements that fulfil the conditions of Article 101(3) of the Treaty, notably where the agreement provides sufficient benefits to outweigh its anti-competitive effects, as indicated in the Article 101(3) Guidelines[11].

~~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~~the assessment generally involves the following steps:

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

- ~~(b)~~• ~~I~~if neither the ~~relevant~~ market share of the supplier ~~and~~nor that of the buyer ~~each do not exceed~~exceeds the 30% market threshold set out in Article 3 of Regulation (EU) X, the vertical agreement is covered by the safe harbour ~~created~~established by the ~~VBER~~Regulation, provided that ~~it contains neither any~~the agreement does not contain hardcore restrictions ~~nor~~ within the meaning of Article 4 of the Regulation or any excluded restrictions within the meaning of Article 5 of the Regulation that cannot be severed from the rest of the ~~vertical~~ agreement~~.~~;

- ~~(c)~~• ~~I~~if the relevant market share ~~is above~~of the supplier or the buyer exceeds the 30% threshold ~~for the supplier and/or the buyer~~or the agreement contains one or more hardcore restrictions or non- severable excluded restrictions, it is necessary to assess whether the vertical agreement falls within the scope of Article 101(1~~).~~) of the Treaty;

- • ~~I~~if the vertical agreement falls within the scope of Article 101(1~~),~~) of the Treaty, it is necessary to examine whether it fulfils the conditions of the exception provided by Article 101(3) of the Treaty.

Konkurrensverket v *TeliaSonera Sverige AB,* Case C-52/09, EU:C:2011:83, paragraphs 20 to 24; 27 March 2012,; and 18 November 2021, *SIA 'Visma Enterprise'* v *Konkurences padome,* Case C-306/20, EU:C:2021:935, paragraph 58 ('Case C-306/20 - *Visma Enterprise*').

[9] See for example, judgments of 13 July 1996, *Grundig-Consten and Grundig* v *Commission of the EEC,* Joined Cases C-56/64 and 58/64, EU:C:1966:41; *Société Technique Minière* v *Maschinenbau Ulm,* C-56/65, EU:C:1966:38 ('Case C-56/65 - *Société Technique Minière*'); and 14 July 1994, *Parker Pen* v *Commission,* Case T-77/92, EU:T:1994:85 ('Case T-77/92 - *Parker Pen*').

[10] For the application of Regulation (EU) X, Article 1(1), point (b) of Regulation (EU) X defines a 'vertical restraint as 'a restriction of competition in a vertical agreement falling *within* the scope of Article 101(1) of the Treaty [emphasis added]'. Further guidance on vertical agreements that generally fall *outside* the scope of Article 101(1) of the Treaty is provided in section 3 of these Guidelines.

[11] Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty (OJ C 101, 27.4.2004, p. 97), which sets out the Commission's general methodology and interpretation of the conditions for ~~an individual~~ applying Article 101 of the Treaty and in particular Article 101(3) thereof.

~~(d)~~(8) Sustainable development is a core principle of the Treaty and a priority objective for the policies of the Union[12], together with digitalisation and a resilient Single Market[13]. The notion of sustainability includes, but is not limited to, addressing climate change (for instance, through the reduction of greenhouse gas emissions), limiting the use of natural resources, reducing waste and promoting animal welfare[14]. The Union's sustainability, resilience and digital objectives are furthered by efficient supply and distribution agreements between undertakings. Vertical agreements which pursue sustainability objectives or which contribute to a digital and resilient Single Market are not a distinct category of vertical agreements under Union competition law. These agreements must therefore be assessed using the principles set out in these Guidelines, while taking into account the specific objective that they pursue. Accordingly, the exemption ~~under Article 101(3).~~provided by Article 2(1) of Regulation (EU) X applies to vertical agreements that pursue sustainability, resilience and digital objectives, provided that they meet the conditions of the Regulation. These Guidelines include examples to illustrate the assessment of vertical agreements that pursue sustainability objectives[15].

(9) Where a vertical agreement restricts competition within the meaning of Article 101(1) of the Treaty and Regulation (EU) X does not apply, the agreement may nonetheless fulfil the conditions of the Article 101(3) exception[16]. This also applies to vertical agreements which pursue sustainability objectives or which contribute to a digital and resilient Single Market. While section 8 includes guidance on the assessment of such vertical agreements in individual cases, other Commission guidelines may also be relevant. That includes the Article 101(3) Guidelines, the Horizontal Guidelines[17] and any guidance that may be provided in future versions of those Guidelines. Those Guidelines may, in particular, provide guidance on the circumstances under which sustainability, digital or resilience benefits can be taken into account as qualitative or quantitative efficiencies under Article 101(3) of the Treaty.

2. EFFECTS OF VERTICAL AGREEMENTS

~~2.1.~~ ~~EFFECTS OF VERTICAL AGREEMENTS~~

(10) ~~The assessment~~For the purpose of assessing vertical ~~restraints~~agreements under Article 101 ~~and the application~~ of the ~~VBER must~~Treaty and applying Regulation (EU) X, it is necessary to take into account all relevant parameters of competition, such as prices, output in terms of product quantities, product quality and variety, and innovation. ~~They~~The assessment 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~~ competing undertakings supplying substitutable goods or ~~services~~services[18]. In principle, this is due to the complementary nature of the activities carried

[12] See Article 3(3) of the Treaty on European Union.

[13] See Communication from the Commission of 5 May 2021 on Updating the 2020 New Industrial Strategy: Building a stronger Single Market for Europe's recovery (COM/2021/350 final).

[14] Where Union law includes definitions of sustainability, digitalisation or resilience, the assessment of vertical agreements may take such definitions into account.

[15] See paragraphs (144) and (316).

[16] These Guidelines do not apply to agreements of producers of agricultural products that fall within the scope of Article 210(a) of Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007.

[17] Guidelines on the applicability of Article 101 of the Treaty to horizontal cooperation agreements (OJ C 11, 14.1.2011, p. 1).

[18] See, for example, Case C-306/20 - *Visma Enterprise*, paragraph 78.

~~(8)~~ out by the parties to a vertical agreement, which ~~normally~~generally implies that pro-~~-~~competitiveactions by one ~~of~~party to the ~~undertakings~~agreement will benefit the other party to the agreement~~,~~ and will ultimately benefit consumers. ~~In~~By 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~~benefit consumers. ~~The~~Similarly, a party to a vertical agreement usually has an incentive to oppose actions by the other party that may harm consumers, as such actions will typically also reduce the demand for the goods or services supplied by the first party. Moreover, the complementary nature of the activities of the parties to a vertical agreement in ~~placing~~putting goods or services on the market also implies that vertical restraints ~~may~~ provide ~~substantial~~greater scope for efficiencies, for example by optimising manufacturing ~~or~~and distribution processes and services. Examples of such positive effects are set out in section 2.1.

~~(9)~~ ~~Undertakings~~Nevertheless, undertakings with market power may ~~try to~~, in certain cases, use verticalrestraints to pursue anti-~~-~~competitive purposes that ultimately harm consumers. As further explained in section 2.2., vertical restraints can notably lead to foreclosure, softening of competition or collusion. Market power is the ability to maintain prices above competitive levels or to maintain output in terms of product

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~~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).~~

(11) quantities, product quality and variety or innovation below competitive levels for a not insignificant period of ~~time~~time[19]. The degree of market power ~~normally~~ required ~~for~~to establish a ~~finding~~restriction of ~~an infringement under~~ competition within the meaning of Article 101(1) of the Treaty 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~~Treaty.

2.1. Positive effects

~~(10)~~(12) Vertical agreements may ~~have~~produce positive effects, ~~for example~~including lower prices, the promotion of non-price competition ~~or~~and improved quality of services. ~~Arm's length dealings~~Simple contractual arrangements 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~~levels 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)~~(13) Vertical externalities arise because the decisions and actions taken at different levels of the ~~supply and~~production or 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~~production or distribution chain. For instance, a distributor may not gain all the benefits of its efforts to increase sales, as some of ~~these~~those benefits may go to the supplier. This is because, for every extra unit that 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~~This represents a positive externality bestowed on the supplier by ~~such~~the distributor's sales-enhancing actions. Conversely, there may be situations where, from the supplier's perspective, the distributor may be pricing too ~~high,[10] and/or~~ high[20], making ~~too little~~insufficient sales efforts or both.

(14) Horizontal externalities may arise in particular between distributors of the same goods or services ~~when~~where a distributor is unable to fully appropriate the benefits of its sales efforts. For ~~instance,~~example, where demand-enhancing pre-~~sale~~sales services are provided by one distributor, such as personalised advice in relation to particular goods or services, this

[19] See paragraph 25 of the Article 101(3) Guidelines.
[20] This is sometimes referred to as the 'double marginalisation problem'.

~~(12)~~ 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 between the online and offline sales channels, and in both ~~directions.~~~~[11]~~directions[21]. 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,~~store and then visit a brick and mortar shop, ~~ask for~~use the information they have gathered online to select and test particular goods or services~~ based on~~, and ultimately 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 tofully appropriate the benefits, this may lead to sub-optimal provision of such pre-sales services in terms of quantity or quality.

~~[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)~~(15) In the presence of such externalities, suppliers may have an incentive to control certain aspects of their distributors' operations~~.~~ and *vice versa*. In particular, vertical agreements may ~~allow suppliers~~be used to internalise ~~the abovementioned external effects~~such externalities, increase the joint profit of the vertical supply and distribution chain, and, under certain circumstances, consumer welfare.

~~(14)~~(16) ~~While trying~~Although these Guidelines seek to give ~~a comprehensive~~an overview of the various justifications for vertical restraints, ~~these Guidelines~~ they do not claim to be complete or exhaustive. The reasons ~~set out below~~ that may justify the application of ~~certain~~particular vertical restraints~~.~~ include the following:

(a) ~~The~~ to address 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~~Similarly, to increase the distributor's sales efforts, the supplier may~~, for example,~~ use selective ~~distribution~~ or exclusive distribution~~.~~;

(b) ~~The~~to address 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~~can occur may be important, for example, ~~when~~where the goods or services are relatively new, technically complex or of ~~a~~ high value, or ~~when~~where the reputation of the goods or services is an important determinant of their ~~demand. Non-compete~~demand[22]. Restrictions in exclusive or selective distribution systems, or other restrictions ~~can help overcome~~may be helpful in avoiding or reducing such free~~-~~ riding. Free riding can also occur between suppliers~~.~~, for instance where one manufacturer invests in promotion at the buyer's premises that also attracts customers for the competitors of that

~~To~~

[21] See Commission Staff Working Document – Evaluation of the Vertical Block Exemption Regulation, document SWD (2020) 172 final of 10.5.2017, pages 31 to 42 and the referenced evaluation study; Report from the Commission to the Council and the European Parliament of 10 May 2017, Final report on the E-commerce Sector Inquiry, COM(2017) 229 final (hereinafter 'E-Commerce Sector Inquiry Final Report'), paragraph 11.

[22] Whether consumers actually benefit overall from extra promotional efforts depends on whether the extra promotion informs and convinces and thus benefits many new customers or mainly reaches customers who already know what they want to buy and for whom the extra promotion only or mainly implies a price increase.

manufacturer. Non-compete type restrictions can help to overcome free riding between suppliers[23];

(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 themarket. 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~~its investments. This may justify restricting distributors located in other geographic markets from selling on the new market (see also ~~paragraph~~paragraphs (118), (~~167) of these Guidelines).~~136) and (137)). This is a special case ~~of~~related to the free-rider problem set out in point (b~~) above.~~);

(d) ~~The~~to address 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”).~~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~~ ensure that the distribution of its ~~sales~~products is limited to such premium distributors, it runs the risk of not being ~~de-~~listed~~. There may, therefore, be justifications for allowing~~ by such distributors. In that scenario, the use of exclusive ~~distribution~~ or selective distribution~~.~~ may be justified;

~~(e) The~~ to address the hold-up problem~~: Sometimes there are client-specific investments to be made by either~~. Either the supplier or the buyer~~, such as~~ may need to make relationship-specific investments (for example in ~~special~~specific equipment or training~~.~~) which are sunk investments and have little or no value outside the specific vertical relationship. For instance, a component manufacturer may have to build ~~new~~specific machines ~~and tools in order~~ to satisfy ~~a particular requirement~~the requirements of one

(e) 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~~, but the ~~supplier and, once selected by the supplier, the buyer~~machines may ~~only engage in~~ be unsuitable for use with other customers and it may be impossible to resell them. In the absence of an agreement, the investing party will find itself in a weak bargaining position once it has made the relationship-specific investment, as it risks being "held up" during negotiations with its trading partner. The threat of such opportunistic hold-up may lead to sub-optimal investments~~.~~ by the investing party. Vertical agreements ~~may help remove~~can eliminate the scope for hold-up (in particular when the investment can be fully contracted and all future contingencies can be foreseen) or ~~alleviate such a commitment~~they can reduce the scope for hold-up. For example, non-compete obligations, quantity forcing, or exclusive sourcing can lessen the hold-up problem~~.~~ when the relationship-specific investment is made by the supplier, whereas exclusive distribution, exclusive customer allocation or exclusive supply can lessen the hold-up problem when the investment is made by the buyer;

(f) ~~The~~to address the specific hold-up problem that may arise ~~in the case of the~~ where there is a transfer of substantial know-how~~: The know-how, once provided, cannot be taken back and the~~ . The provider of know-how may not wish the know- how ~~may not want it~~ to be used by or for ~~or by~~ the benefit of its competitors~~. In as far~~, for example in franchising. Insofar 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.~~implementation of the agreement,

~~Economies~~

[23] See, in particular, the definition of 'non-compete obligation' in Article 1(1), point (f) of Regulation (EU) X, on which guidance is provided in section 6.2. of these Guidelines, and the guidance on 'single branding' provided in section 8.2. of these Guidelines.

such a transfer may justify a non-compete restriction, which would generally fall outside Article 101(1) of the Treaty in such cases;

(g) to achieve 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~~the manufacturer could use exclusive distribution, quantity forcing in the form of a minimum purchasing requirement, selective distribution containing ~~such a~~a minimum purchasing requirement or exclusive sourcing~~.~~;

(h) ~~Uniformity~~to ensure uniformity and quality standardisation~~:~~. A vertical restraint ~~may~~can help to create or promote a brand image, by imposing a certain measure of uniformity and quality standardisation on the distributors~~, thereby increasing~~. This can protect the reputation of the brand, increase the attractiveness of the goods or services concerned for ~~finals customer~~end users and ~~thereby~~increase sales. ~~This applies~~Such standardisation can, for instance, ~~in~~be achieved through selective distribution ~~and~~or franchising~~.~~;

(i) ~~Capital~~to address 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)~~(17) There is a large degree of substitutability between the ~~different~~various vertical restraints~~. This means~~, meaning that the same inefficiency problem can be ~~solved by~~addressed using 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~~. This is taken into account when indispensability is assessed under Article 101(3~~).~~) of the Treaty.

2.2. Negative effects

~~(17)~~(18) The negative effects on the market which ~~may~~can result from vertical restraints and which ~~EU~~Union competition law aims to prevent are~~ notably~~, in particular, the following:

(a) ~~Anti~~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~~ collusion between competing 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~~between competing buyers~~. However, a~~, often referred to as the reduction of intra-brand competition where it concerns distributors of the goods or services of the same supplier[24];

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

(19) Foreclosure, softening of competition and collusion at the supplier level may harm consumers, in particular by:

(a) increasing the prices charged to buyers of goods or services, which may in turn lead to higher retail prices;

(b) limiting the choice of goods or services;

(c) lowering the quality of goods or services;

(d) reducing innovation or service at the supplier level.

(20) Foreclosure, softening of competition and collusion at the distributor level may harm consumers, in particular by:

(a) increasing the retail prices of goods or services;

(b) limiting the choice of price-service combinations and distribution formats;

(c) lowering the availability and quality of retail services;

(d) reducing the level of innovation at the distribution level.

~~(c)~~ 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)~~(21) ~~In a market~~strong[25]. In particular, in markets 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.~~

(22) ~~(20) Possible~~The possible negative effects of vertical restraints are reinforced ~~when~~where several suppliers and their buyers organise their trade in a similar way, leading to so-called cumulative ~~effects.[13]~~effects[26].

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

3.1. ~~Lack of~~No effect on trade, agreements of minor importance and ~~SMEs~~small and mediumsized undertakings

~~(21)~~(23) Before addressing the scope of ~~the VBER~~Regulation (EU) X, its application, and more generallythe assessment of vertical agreements under Article 101(1) and 101(3~~),~~) of the Treaty, it ~~is important to~~

~~12~~

24 As regards the notions of explicit and tacit collusion, see judgment ~~in joined~~of 31 March 1993, *Ahlström Osakeyhtiö and Others* v *Commission,* 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~~25 See judgment in Case C-306/20 - *Visma Enterprise*, paragraph 78.

26 Cumulative anti-competitive effects can notably justify a withdrawal of the benefit of ~~the VBER~~Regulation (EU) X, see section 7.1. of these Guidelines.

is important to recall that ~~the VBER~~Regulation (EU) X applies only to agreements falling *within*~~-~~
the scope of ~~application of~~ Article 101(1~~).~~) of the Treaty.

~~(22)~~(24) Agreements that are not capable of appreciably affecting trade between Member States (~~lack of~~no effect on trade) or which do not appreciably restrict competition (agreements of minor importance) fall outside the scope of Article 101(1~~).~~[14]) of the Treaty[27]. 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]Guidelines[28], 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~~Notice[29]. The present Guidelines are without prejudice to the Effect on Trade Guidelines and the De Minimis Notice, ~~as well as~~or any future Commission guidance ~~in this respect~~.

(25) 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) of the Treaty, irrespective of the nature of the restrictions included in such agreements, thus also applying ~~also~~ to agreements containing hardcore ~~restrictions.~~[17]restrictions[30]. According to ~~this~~that presumption, vertical agreements are in principle not capable of appreciably affecting trade between Member States when ~~(i)~~ :

(a) the aggregate market share of the parties on any relevant market within the Union affected by the agreement does not exceed 5%, and ~~(ii)~~

~~(23)~~(b) the aggregate annual Union turnover of the supplier generated with the products covered by the agreement does not exceed EUR 40 million~~.~~[18] or, incases involving agreements concluded between a buyer and several suppliers, the buyer's combined purchases of the products covered by the agreements does not exceed EUR 40 million[31]. The Commission may rebut the presumption if an analysis of the characteristics of the agreement and its economic context demonstrates the contrary.

~~(24)~~(26) 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) of the Treaty 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]agreement[32]. This general rule is subject to two exceptions. ~~Firstly~~First, as regards ~~hardcore~~ restrictions of competition by object, Article 101(1) of the Treaty 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 mayby its nature and independently of any concrete effect constitute an appreciable restriction on competition.~~[21] ~~Secondly,~~even if the ~~15%~~ market share ~~thresholds are reduced to 5% where, in a relevant market, competition is restricted~~held by each of the ~~cumulative effect~~

~~14~~

27 See judgment ~~in Case C-226/11~~ of 13 December 2012, *Expedia Inc.* v *Autorité de la concurrence* *and*

Others, C-266/11, EU:C:2012:795, paragraphs 16 and 17 ~~with further references.~~(hereinafter 'Case C-226/11 - *Expedia*').

~~15~~ [28] Commission Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (OJC 101, 27.4.2004, p. 81~~.~~).

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

~~17 Effect on Trade Guidelines,~~ [29] Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (OJ C 291, 30.8.2014, p. 1). Further guidance is provided in Commission Staff Working Document – 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.

[30] See paragraph 50 of the Effect on Trade Guidelines.

~~18~~ [31] See paragraph 52 of the Effect on Trade Guidelines~~, paragraph 52~~.

~~19 De Minimis Notice,~~ [32] See paragraph 8 of the De Minimis Notice, 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) of the Treaty 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~~

parties does not exceed 15%[33]. This is because an agreement that may affect trade between Member States and ~~Case C-306/96 *Javico v Yves Saint Laurent* EU:C:1998:173, paragraphs 16~~which has an anti-competitive object may by its nature and ~~17.~~

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

independently of any concrete effect constitute an appreciable restriction on competition[34]. Second, the 15% market share threshold is reduced to 5% where, in a relevant market, competition is restricted by the cumulative effect of parallel networks of agreements. Paragraphs (~~241~~257) to (~~243) of these Guidelines~~261) deal with cumulative effects in the context of the withdrawal of the benefit of ~~the VBER~~Regulation (EU) X. 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~~]effect[35].

~~(25)~~(27) Furthermore, there is no presumption that vertical agreements concluded by undertakings~~ of which~~, one or more of which has an individual market share exceeding 15% automatically fall within the scope of Article 101(1~~).~~) of the Treaty. Such agreements may still ~~lack an~~have no appreciable effect on trade between Member States or ~~they~~ may not constitute an appreciable restriction of ~~competition.~~[~~23~~]competition[36]. They therefore need to be assessed in their legal and economic context. These Guidelines include criteria for the individual assessment of such agreements, as set out in section 8.

~~(26)~~(28) In addition, the Commission considers that vertical agreements between small and medium-sized undertakings ~~(hereinafter "SMEs")~~[~~24~~](‘SMEs’)[37] 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~~) of the Treaty, as interpreted by the Court of Justice of the European Union, unless they include restrictions of competition by object within the meaning of Article 101(1~~).~~) of the Treaty. Therefore, vertical agreements between SMEs generally fall outside the scope of Article 101(1~~).~~) of the Treaty. In cases where such agreements nonetheless meet the conditions for the application of Article 101(1~~),~~) of the Treaty, the Commission will ~~normally~~generally refrain from opening proceedings~~ for~~, due to a lack of sufficient interest for the Union, unless the undertakings individually or 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~~Agency agreements that fall outside the scope of Article 101(1) of the Treaty

~~(27)~~(29) An agent is a legal or ~~physical~~natural 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)~~(30) ~~In~~Article 101 of the Treaty applies to agreements between two or more undertakings. Under 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.~~

~~22 De Minimis Notice, paragraph 8.~~

~~23~~

33 See judgment in Case ~~T-7/93~~C-226/11 - *Expedia*, paragraphs 21 to 23 and 37, with reference to judgment of 9 July 1969, *Völk* v *Vervaecke,* C-5/69, EU:C:1969:35; see also judgments of 6 May 1971, *Cadillon* v *Höss,* C-1/71, EU:C:1971:47; and 28 April 1998, *Javico* v *Yves Saint Laurent Parfums,* C-306/96, EU:C:1998:173, paragraphs 16 and 17 (hereinafter 'Case C-306/96 - *Javico* v *Yves Saint Laurent Parfums*').

34 See Case C-226/11 - *Expedia*, paragraph 37.

35 See paragraph 8 of the De Minimis Notice.

36 See paragraph 3 of the De Minimis Notice. See judgment of 8 June 1995, *Langnese-Iglo* v *Commission*, Case T-7/93, EU:T:1995:98, paragraph 98.

~~24~~37 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~~.~~).

operator. ~~[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.~~

This applies where the agent bears no significant financial or commercial risks in relation to the contracts concluded or negotiated on behalf of the principal, as further explained in paragraphs (31) to (34)[38]. In that case, the agency agreement falls wholly or partially outside the scope of Article 101(1) of the Treaty[39]. As this constitutes an exception to the general applicability of Article 101 of the Treaty to agreements between undertakings, the conditions for categorising an agreement as an agency agreement that falls outside the scope of Article 101(1) of the Treaty should be interpreted narrowly. For example, it is less likely that an agency agreement will be categorised as falling outside the scope of Article 101(1) of the Treaty where the agent negotiates and/or concludes contracts on behalf of a large number of principals[40]. The qualification given to their agreement by the parties or by national law is not material for this categorisation.

~~(29)~~(31) There are three types of financial or commercial ~~risk~~risks that are material to the categorisation of an agreement as an agency agreement ~~for~~that falls outside the ~~purpose~~scope of ~~applying~~ Article 101(1~~).~~) of the Treaty:

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

– ~~Second, there are~~(b) risks related to market-specific investments. ~~These~~Those 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~~a specific 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~~(c) risks related to other activities undertaken on the same product market, to the extent that the principal requires ~~under~~, as part of the agency relationship ~~that~~, the agent ~~undertakes~~to undertake such activities not as an agent on behalf of the principal, but at ~~its~~the agent's own risk.

(32) ~~For the purposes of applying Article 101(1) TFEU, an~~ An agreement will be ~~qualified~~categorised as ~~a~~an agency agreement ~~if~~that falls outside the scope of Article 101(1) of the Treaty where the agent bears ~~no, or~~ none of the types of risk listed in paragraph (31) or where it bears such risks only to an insignificant~~, risks of the three aforementioned types.~~ extent. The significance of any such risks ~~undertaken~~assumed by the agent is generally to be assessed by reference to the ~~revenues generated~~remuneration earned by the agent ~~from~~for providing the agency services, for example its commission, 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

[38] See judgments of 15 September 2005, *DaimlerChrysler* v *Commission*, Case T-325/01, EU:T:2005:322 (hereinafter 'Case T-325/01 - *DaimlerChrysler* v *Commission*'); 14 December 2006, *Confederación Espanola de Empresarios de Estaciones de Servicio* v *CEPSA*, Case C-217/05, EU:C:2006:784; and 11 September 2008, *CEPSA Estaciones de Servicio SA* v *LV Tobar e Hijos SL*, Case C-279/06, EU:C:2008:485.

[39] See section 3.2.2. of these Guidelines as regards provisions of the agency agreement that may still fall within the scope of Article 101(1) of the Treaty.

[40] See judgment of 1 October 1987, *ASBL Vereniging van Vlaamse Reisbureaus contre ASBL Sociale*

Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten, Case 311/85, EU:C:1987:418, paragraph 20.

~~(30)~~ for instance premises or personnel that could be used for any type of activity, are not material to ~~this~~the assessment.

(33) In light of the above, ~~for~~an agreement will generally be categorised as an agency agreement that falls outside the ~~purpose~~scope of ~~applying~~ Article 101(1~~),~~) of the Treaty where all of the following ~~list provides examples of features generally found in agency agreements. This is the casewhere~~ conditions apply:

~~(31)~~ the agent~~:~~

(a) does not acquire the property ~~of~~in the goods bought or sold under the agency agreement and does not itself supply the ~~contract~~ services~~.~~ bought or sold under the agency agreement. The fact that the agent may temporarily, for a very brief period of time, acquire the property ~~of~~in the contract goods while selling them on behalf of the principal, does not preclude the existence of an agency agreement that falls outside the scope of Article 101(1) of the Treaty, provided that the agent does not incur any costs or risks ~~related~~in relation to ~~that~~the transfer of property;

(b) the agent does not contribute to the costs relating to the supply~~/~~ or 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) the agent does not maintain at its own cost or risk stocks of the contract goods, including the ~~costs~~cost of financing the ~~stocks~~stock and the ~~costs~~cost of ~~loss of stocks and can~~lost stock. The agent should be able to return unsold goods to the principal without charge, unless the agent is ~~liable~~at fault, for ~~fault (for~~ example, ~~by failing~~because it fails to comply with reasonable security or anti-theft measures to avoid ~~loss of stocks);~~stock losses;

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

(d) of the agent's commission, unless the agent is ~~liable for~~at 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 the police or to communicate to the principal all necessary information available to ~~him~~it on the customer's financial reliability);

(e) the agent 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~~ the agent~~, it~~ is ~~liable for~~at fault~~ in this respect~~;

(f) the agent 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, unless such costs are fully reimbursed by the principal;

(g) the agent 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~~such costs are fully reimbursed by the principal;

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

~~(32)~~ ~~Where~~While the list set out in paragraph (33) is non-exhaustive, where the agent incurs oneor more of the risks or costs mentioned in paragraphs

(34) ~~(28~~ (31) to (~~31) of these Guidelines,~~33), the agreement

between the agent and principal will not be ~~qualified~~categorised as an agency agreement~~.~~ that falls outside the scope of Article 101(1) of the Treaty[41]. 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 of the agreement. 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 relatingto 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~~as part of the agency relationship within the same product market may have to be considered.

~~(33)~~ A principal may use various methods to ~~reimburse~~cover the relevant risks and costs, as long as such methods ensure that the agent ~~bears no, or only insignificant,~~does not bear any significant risks of the types set out in paragraphs (~~28~~31) to (~~31) of these Guidelines.~~33). 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~~generated by the sale of goods or services ~~sold~~ under the agency agreement. To ensure that all relevant risks and costs are covered, ~~it~~the method used by the principal should allow the agent to easily distinguish between the amount(s) intended to cover the relevant risks and costs and any other amount(s) paid to the agent, for example intended to remunerate the agent for providing the agency services. Otherwise, the agent may not be able to verify whether the method chosen by the principal covers its costs. It may also 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 the fact that the agent may incurrelevant market-specific ~~investments~~investment costs even

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

~~(34)~~(36) An independent distributor of some goods or services of a supplier may also act as an agent for other goods or ~~service~~services of ~~that~~the 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~~with additional functionalities or new features~~)~~. For the agreement to be ~~considered~~categorised as an agency agreement ~~for~~that falls outside the ~~purpose~~scope of ~~applying~~ Article 101(1) of the Treaty, 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,~~). Similarly, the principal must not directly or indirectly impose on the agent an activity as an independent distributor, unless such activity is fully reimbursed by the principal, as set out in paragraph (33), point (h). Moreover, as mentioned in paragraphs (31) to (33), 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.

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[41] See also paragraph (192). In particular, under an agency agreement that falls within the scope of Article 101(1) of the Treaty, the agent must remain free to reduce the effective price paid by the customer, by sharing its remuneration with the customer.

~~(35)~~(37) Where an agent undertakes other activities for the same ~~or other suppliers~~supplier, not required by that supplier, at its own risk, there is a ~~risk~~possibility that the ~~conditions~~obligations imposed on the agent ~~for~~in relation to its agency activity will influence its incentives and limit its decision-making ~~freedom~~independence when it sells products as an independent activity. In particular, there is a ~~risk~~possibility 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~~creates difficulties in distinguishing between investments and costs that relate to the agency function, including market-specific investments, and those ~~only related~~that relate solely to the independent activity. In such cases, the assessment of whether an agency relationship meets the conditions set out in paragraphs (~~28~~30) to (~~31) of these Guidelines can~~33) may therefore be particularly ~~complex.[26]~~complex[42].

~~(36)~~(38) The ~~risks~~concerns described in ~~paragraphs (28) to (31) of these Guidelines~~paragraph (37) are ~~of particular concern if~~more likely to arise where the agent undertakes other activities as an independent distributor for the same principal in the same ~~product~~relevant market. Conversely, those ~~risks~~concerns are less likely to arise if the other activities undertaken by the agent ~~undertakes~~ as an independent distributor ~~concern~~relate to a different ~~product market.[27]~~relevant market[43]. More generally, the less interchangeable the products ~~are~~sold under the agency agreement and the products sold independently by the agent, the less likely ~~are~~it is that those ~~risks to occur. In product markets comprising products not presenting objectively distinct~~ concerns will arise. Where any objective differences between the characteristics~~, such as~~ of the products (for example, higher quality, novel features or additional functions~~, such delineation appears~~) are insignificant, it may be more difficult ~~and~~ to delineate the agent's two types of activity, in which case there may ~~therefore~~ be a significant risk of the agent being influenced by the terms of the agency agreement, ~~notably regarding the~~in particular as regards 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.~~

(39) investments are relevant to the type of activity for which the agent is appointed. The ~~only~~principal would have to cover market-specific investments that ~~the principal would~~ are required in order to operate in the relevant market, including where those investments also concern differentiated products distributed outside the scope of the agency agreement but are not exclusively related to the sale of such differentiated products. The only case in which the principal would not have to cover market-specific investments on the relevant market would be when those ~~that~~investments 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~~all market-specific costs ~~corresponding to~~to operate on the market, but would not incur the market-specific costs that relate exclusively to the sale of 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~~the agent can operate on the relevant market without selling the ~~former.~~differentiated products in question). To the extent that the relevant investments ~~have already been depreciated (e.g.~~(for example, investments in activity-specific ~~furniture),~~equipment) have already been depreciated, the reimbursement may be adjusted proportionately. Similarly, the reimbursement may also be adjusted if the market-specific investments made by the independent

[42] See judgment of 16 December 1975, *'Suiker Unie'* v *Commission*, Joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73, EU:C:1975:174., paragraphs 537 to 557.

[43] See Case T-325/01 - *DaimlerChrysler* v *Commission*, paragraphs 100 and 113.

distributor significantly exceed the market-specific investments that are necessary for an agent to start operating on the relevant market, as a result of its activity as independent distributor.

~~(38)~~(40) Example of how ~~the~~ costs can be allocated in the case of a distributor that also acts as agent for certain products for the same supplier.

~~An independent distributor sells products A~~Products A, B and C~~.~~ are generally sold by the same distributor(s). Products A and B belong to the same product and geographic market, ~~which comprises~~but are differentiated ~~products presenting~~and present objectively different characteristics. Product C belongs to a different product market.

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

For the agency agreement not to fall ~~in~~within the scope of Article 101(1) ~~TFEU~~of the Treaty and to meet the conditions ~~of~~set out in paragraphs (~~28~~30) to (~~31) of these Guidelines,~~33), the principal ~~has to~~must cover all ~~relevant~~ investments relating to the activity of selling each of products A and B (and not only product A) as the two products~~) as they~~ belong to the same product and geographic market. For example, ~~all~~the 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~~relating to specific storage equipment~~, which may be~~ needed for products A and B~~,~~ are also likely to be market-specific. ~~These~~Those relevant investments, which would ~~normally~~generally 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~~the relevant market as an independent distributor.

~~However, the~~The principal would however not have to cover investments ~~for~~relating to the sale of product C, which does not belong to the same product market as products A and B. Moreover, ~~in case~~where the sale of product B requires specific investments that are not necessary for the sale of product A ~~(e.g.~~, for example, investments in dedicated ~~furniture~~equipment 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~~, as opposed to advertising that is 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~~whereas 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 that 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 would however not be relevant and therefore would not have to be covered by the principal, provided that a distributor can operate on the relevant market by selling only product A.

~~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.~~

The same principles apply to investments in a website or online store, since part of those investments would not be relevant, as they would have to be made irrespective of the products sold under the agency agreement. Therefore, the principal would not have to reimburse general investments in the design of the agent's website, insofar as the website itself could be used to sell products other than those belonging to the relevant product market, for example, product C or, more generally, products other than A and B). However, investments relating to the activity of advertising or selling on the website products belonging to the relevant product market, that is to say both products A and B, would be relevant. Therefore, depending on the level of investment required to advertise and sell products A and B on the website, the principal would have to cover part of the costs of setting up and/or operating the website or online store. Any investments relating specifically to the advertising or sale of product B would not have to be covered, provided that a distributor can operate on the relevant market by selling only product A.

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

~~(39)~~(41) Where an agreement meets the conditions to be categorised as an agency agreement ~~for~~that falls outside the ~~purpose~~scope of ~~applying~~ Article 101(1~~),~~) of the Treaty, 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~~).~~) ofthe Treaty. The assumption by the agent of the obligations listed ~~at the end of~~in this paragraph ~~will be~~is considered to form an inherent part of an agency agreement, as ~~these~~those obligations relateto the ability of the principal to determine the scope of the agent's activity in relationto the contract goods or services. This is essential if the principal is to assume the risksin 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)~~ (a) limitations on the territory in which the agent may sell ~~these~~the contract goodsor services;

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

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

~~(40)~~(42) By contrast, where the agent bears one or more of the relevant risks described in paragraphs (~~28~~31) to (~~31) of these Guidelines,~~33), the agreement between agent and principal does not constitute an agency agreement ~~for~~that falls outside the ~~purpose~~scope of ~~applying~~ Article 101(1~~).~~) of the Treaty. 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~~),~~) of the Treaty, like any other vertical agreement. For that reason, Article 1(1~~)(~~), point (k) ~~VBER~~of Regulation (EU) X clarifies that an undertaking which, under an agreement falling within the scope of Article 101(1~~),~~) of the Treaty, sells goods or services on behalf of another undertaking~~,~~ is a buyer.

~~(41)~~ Even if the agent bears no~~, or only insignificant,~~ significant risks of the type described in paragraphs (~~28) to~~ ~~(~~31) ~~of these Guidelines,~~to (33), it remains a separate undertaking from the principal and therefore ~~the~~ provisions ~~concerning~~governing the relationship between the agent and the principal may ~~infringe~~fall within Article 101(1~~),~~) of the Treaty, irrespective of whether they form part of the

(43) agreement governing the sale or purchase of ~~the contract products~~goods or services or a separate agreement. Such provisions ~~may~~can benefit from the ~~VBER, in particular when the conditions~~ exemption provided ~~in~~by Article ~~5 VBER~~2(1) of Regulation(EU) X, provided that the conditions of the Regulation are fulfilled~~, or, outside the VBER, they may~~. Outside the scope of Regulation (EU) X, such provisions require an individual assessment under Article 101 of the Treaty, as described in section 8.1, in particular to determinewhether they produce restrictive effects within the meaning of Article 101(1) of the Treaty and, if so, whether they satisfy the conditions of Article 101(3) ~~in individual cases, as described in section~~of the Treaty.
~~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~~for undertakings ~~which~~that compete with the principal (single branding provisions). Exclusive agency provisions will, in general, not ~~lead to~~result in anti- competitive effects. However, single branding provisions and post-term non-compete provisions, which concern inter-brand competition, may ~~infringe~~restrict competition within themeaning of Article 101(1) ~~if they contribute to a (~~of the Treaty where, in isolation or by way of cumulative~~)~~ effects, they result in foreclosure ~~effect on~~of 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~~and 8.2.1).

~~(42)~~(44) An agency agreement may also fall within the scope of Article 101(1~~),~~,) of the Treaty even if the principal bears all the relevant financial and commercial risks, in cases where ~~it~~the agreement facilitates collusion. That could be the case, for instance, ~~be the case when~~where a number of principals use the same agents while collectively excluding ~~others~~other principals from using ~~these~~those agents, or ~~when they~~where principals use the agents to collude on marketing strategy or to exchange sensitive market information~~ between the principals~~.

~~(43)~~(45) In the case of an independent distributor that also acts as an agent for certain goods or ~~service~~services of the same supplier, compliance with the requirements set out in paragraphs (~~34~~36) to (~~37) of these Guidelines~~39) has to be assessed strictly. This is necessary to avoid ~~a~~ misuse ofthe agency ~~concept~~model in scenarios where the supplier does not actually become active at the retail level~~, taking~~ via the agency agreement and take all associated ~~distribution~~commercial decisions and ~~assuming~~assume all related risks, in accordance with the principles set out in paragraphs (~~28~~30) to (~~31),~~33) , but rather ~~establishes an easy way~~uses the agency model as a means to control retail prices for those products that allow high resale margins. Since resale price maintenance ('RPM') is a hardcore restriction under Article 4 ~~VBER~~of Regulation (EU) X,as set out in section 6.1.1, and a restriction by object under Article 101(1) of ~~these Guidelines~~the Treaty, the agency ~~concept~~relationship should not be misused by suppliers to circumvent the application of Article 101(1) ~~TFEU~~of the Treaty.

3.2.3. *Agency and the online platform economy*

~~(44)~~(46) ~~Undertakings providing~~ Agreements entered into by undertakings active in the online ~~intermediation services are~~platform economy generally do not meet the conditions to be categorised as ~~suppliers under the VBER (see also paragraphs (60) to (64)~~agency agreements that fall outside the scope 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~~) of the Treaty. Such undertakings generally act as independent economic operators and not as part of the undertakings ~~of the sellers to~~for which they provide ~~online intermediation services. Strong~~services. In particular, undertakings active in the online platform economy often serve a very large number of sellers, which prevents them from effectively becoming part of any of the sellers' undertakings. In addition, 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~~contracting parties~~ and~~. This can result in a situation where the conditions ~~of sale of the contract~~ under which goods or services are sold and the commercial strategy are determined by the ~~provider of~~ undertaking active in the online ~~intermediation services~~platform economy rather than by 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~~ active in the online ~~intermediation services~~platform economy typically make significant market-specific investments, for example, in software, advertising and after-sales services, indicating that ~~these~~those undertakings bear significant financial or commercial risks associated with the transactions that they intermediate.

~~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]~~

Subcontracting agreements are defined in the Subcontracting Notice[44]

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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(47) ~~[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 priororder 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. As a general rule, subcontracting agreements fall outside the scope of Article 101(1) of the Treaty. The Subcontracting Notice includes further guidance on the application of that general rule. In particular, the Subcontracting Notice states that Article 101(1) of the Treaty does not apply to clauses limiting the use of technology or equipment that the contractor provides to a subcontractor, on condition that the technology or equipment is necessary to enable the subcontractor to produce the products concerned[45]. The Subcontracting Notice also clarifies the scope of application of that general rule and in

particular, that other restrictions imposed on the subcontractor can fall within the scope of Article 101 of the Treaty, such as the obligation not to conduct or exploit the subcontractor's own research and development or not to produce in general for third parties[46].

4. SCOPE OF [29]REGULATION (EU) X

4.1. Safe harbour established by Regulation (EU) X

(48) The exemption provided by Article 2(1) of Regulation (EU) X establishes a safe harbour for vertical agreements within the meaning of the Regulation, provided that the market shares held by the supplier and the buyer on the relevant markets do not exceed the thresholds set out in Article 3 of the Regulation (see section 5.2.) and the agreement does not include any of the hardcore restrictions set out in Article 4 of the Regulation (see section 6.1.).[47] The safe harbour applies as long as the benefit of the block exemption has not been withdrawn in a particular case by the Commission or by an NCA pursuant to Article 29 of Regulation (EC) No 1/2003 (see section 7.1.). The fact that a vertical agreement falls outside the safe harbour does not mean that the agreement falls within the scope of Article 101(1) of the Treaty or that it does not fulfil the conditions of Article 101(3) of the Treaty.

(49) Where a supplier uses the same vertical agreement to distribute several types of goods or services, the application of the market share thresholds set out in Article 3(1) of Regulation (EU) X may result in the exemption provided by Article 2(1) of the Regulation applying in respect of some goods or services but not in respect of others. As regards the goods or services to which Article 2(1) of the Regulation does not apply, an individual assessment under Article 101 of the Treaty is necessary.

4.2. Definition of vertical agreements

(50) Article 101(1) of the Treaty refers to agreements between undertakings. It makes no distinction regarding whether the undertakings operate at the same level or at different

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44 Commission notice of 18 December 1978 concerning the assessment of certain subcontracting agreements in relation to Article 85(1) of the EEC Treaty (OJ C 1, 3.1.1979, p. 2).

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

~~30~~46 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~~47 As regards excluded restrictions and the meaning of Article 5 ~~VBER~~of Regulation (EU) X, see section 6.2. ofthese 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) of the Treaty thus applies to both horizontal ~~agreements~~ and ~~concerted practices, as well as~~ vertical ~~agreements and concerted practices.~~[33]agreements[48].

~~(49) Regulation No 19/65/EEC of 2 March 1965 of the Council~~Pursuant to the power conferred on ~~application of~~ the Commission by Article ~~85(3~~1 of Regulation No. 19/65/EEC to declare by regulation that Article 101(1) of the Treaty shall not apply 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~~ between undertakings, Article 1(1), point (a) of Regulation~~"), empowers the Commission, in accordance with Article 101(3), to block exempt by regulation vertical agreements and concerted practices.~~

~~(50)~~(51) ~~In accordance with Articles 1 and 3 Empowerment Regulation, Article 1(1)(a) VBER~~ (EU) X 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~~services'[49].

4.2.1. Unilateral conduct falls outside the scope of ~~the VBER~~Regulation (EU) X

(52) ~~The VBER applies to vertical agreements and concerted practices. It~~Regulation (EU) X does not apply to unilateral conduct by undertakings. ~~Such unilateral~~Unilateral conduct can, however, fall within the scope of Article 102 of the Treaty ~~on the Functioning of the European Union (hereinafter "Article 102"),~~ whichprohibits the abuse of a dominant ~~position.~~[37]position[50].

~~(51)~~(53) Regulation (EU) X applies to vertical agreements. For there to be an agreement within the meaning of Article 101 of the Treaty, it is sufficient that the parties have expressedtheir joint intention to conduct themselves on the market in a specific way (a 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~~intention[51].

~~(52)~~(54) If there is no explicit agreement expressing the parties' concurrence of wills, ~~the Commission has to prove for the purpose~~a party or authority that alleges an infringement of ~~applying~~ Article 101 of the Treaty must prove that the unilateral policy of one party receives the acquiescence of the other party. ~~For~~As regards vertical agreements, ~~there are two ways in which~~ acquiescence ~~with~~to a specific unilateral policy ~~can~~may be ~~established.~~either explicit or tacit:

~~(a)~~ ~~Firstly,~~(a) explicit acquiescence can be deduced from the powers conferred upon the parties in a general agreement drawn up in advance. If the ~~clauses~~terms of ~~such a general~~that agreement provide for or authorise ~~a~~one party to ~~adopt~~ subsequently adopt 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]basis[52].

[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.~~

~~Secondly,~~(b) for tacit acquiescence, it is necessary to show~~, firstly,~~ that one party ~~requires~~ explicitly or implicitly requires 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]practice[53]. For instance, if after a supplier's announcement of a unilateral reduction of supplies in order to prevent parallel trade, distributors ~~reduce~~ immediately reduce their orders and stop

[48] See judgment in Case C-56/65 - *Société Technique Minière* v *Maschinenbau Ulm*, page 249.

[49] In accordance with Article 1(1), point (a) of Regulation (EU) X, in these Guidelines the term 'vertical agreement' includes vertical concerted practices, unless stated otherwise.

[50] Conversely, where there exists a vertical agreement within the meaning of Article 101 of the Treaty, the application of Regulation (EU) X and these Guidelines is without prejudice to the possible parallel application of Article 102 of the Treaty to the vertical agreement.

[51] See judgment of 14 January 2021, Case C-450/19, *Kilpailu- ja kuluttajavirasto*, EU:C:2021:10, paragraph 21.

[52] See judgment of 13 July 2006, *Commission* v *Volkswagen AG*, Case C-74/04 P, EU:C:2006:460, paragraphs 39 to 42.

[53] See judgment of 26 October 2000, *Bayer AG* v *Commission*, Case T-41/96, EU:T:2000:242, paragraph 120.

~~(b)~~ engaging in parallel trade, ~~then~~it can be concluded that those distributors tacitly acquiesce to the supplier's unilateral policy. However, ~~this~~such a conclusion cannot be ~~concluded~~reached if the distributors continue to engage in parallel trade or tryto find new ways to engage in parallel trade.

~~(53)~~(55) In light of the above, the imposition of general ~~sales~~ terms and conditions~~, even if imposed~~ by one party ~~and accepted tacitly by the other party amount~~amounts to an agreement ~~for~~within the ~~purposes of the application~~meaning of Article 101(1) of the Treaty~~.[40]~~ where such terms and conditions have been explicitly or tacitly accepted by the other party[54].

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

~~(54)~~(56) ~~The VBER~~Regulation (EU) X 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~~The Regulation does not ~~cover vertical~~ apply to agreements ~~or concerted practices~~entered into with ~~consumers~~natural persons who are acting for purposes which are outside their trade, business, craft or profession, as such persons are not undertakings.

~~(55)~~(57) ~~Furthermore, to fall~~To qualify as a vertical agreement within the ~~definition~~meaning of Article 1(1~~)(a) VBER~~), point (a) of Regulation (EU) X, 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~~ undertaking 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,~~, or where a manufacturer sells a product to a wholesaler that resells it to a retailer. Likewise, a vertical agreement exists where one undertaking sells goods or services to another undertaking which is the end user of the goods or services.

~~(56)~~(58) As the definition in Article 1(1~~)~~(), point (a) ~~VBER~~of Regulation (EU) X 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~~production or distribution chain does not preclude the application of ~~the VBER.~~Regulation (EU) X. However, ~~in case agreements~~ where a vertical agreement is entered into between competing undertakings, Regulation (EU) X does not apply, unless the conditions of Article 2(4) ~~VBER must be taken into account. For guidance on Article 2(4) VBER,~~ of the Regulation are fulfilled (see ~~section~~sections 4.4.3. and4.4.4.). ~~4.4.3. of these Guidelines.~~

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

~~(57)~~(59) ~~Article 1(1)(~~To qualify as a~~) VBER provides that, to fall~~ vertical agreement within the ~~scope~~meaning of Article 1(1), point (a) of Regulation (EU) X, the ~~VBER, vertical agreements~~agreement must relate to the conditions under which the ~~supplier and the buyer "~~parties 'may purchase, sell or resell certain goods or ~~*services*". In accordance with the general~~ services'. Pursuant to the purpose of ~~a~~ block exemption ~~regulation, which is~~regulations to provide legal certainty, Article 1(1~~)~~(), point (a) ~~VBER~~of Regulation (EU) X must be interpreted broadly as applying to all vertical agreements, irrespective of whether they relate to intermediate or final goods or services. ~~Both~~For the purpose of applying the Regulation to a particular agreement, both the goods orservices 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~~by providers of online intermediation services, as referred to in Article 1(1~~)~~(), point (d)

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[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.~~

(60) ~~VBER~~ of Regulation (EU) X, are covered by Article 1(1~~)(~~), point (a) ~~VBER. Both~~of Regulation (EU) X. In the case of vertical agreements relating to the provision of online intermediation services, both the online intermediation services and the goods or services ~~subject to the transactions it facilitates~~ that are transacted

[54] See Commission Decision in AT.40428 - *Guess*, recital 97, with reference to judgment of 11 January 1990, *Sandoz Prodotti Farmaceutici* v *Commission*, Case C-277/87, EU:C:1990:6, paragraph 2, and judgment of 9 July 2009, *Peugeot and Peugeot Nederland* v *Commission*, Case T-450/05, EU:T:2009:262, paragraphs 168 to 209.

via the online intermediation services are considered as contract goods or services for the purpose of applying ~~the VBER~~Regulation (EU) X 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)~~(61) ~~The VBER~~Regulation (EU) X does not ~~cover~~apply to vertical restraints that do not relate to the conditions ~~of purchase, sale and resale of certain contract~~under which goods or services~~. These agreements have to~~ may be purchased, sold or resold. Such restraints must therefore be assessed individually, namely it is necessary to determine whether they~~, in the individual case~~ fall within the scope of Article 101(1) of the Treaty and, if so, whether they fulfil the conditions of Article 101(3) ~~are satisfied.~~of the Treaty. For example, ~~the VBER~~Regulation (EU) X does not apply to an obligation ~~preventing~~that prevents the parties from carrying out independent research and development, ~~which~~even though the parties may have included it in their vertical agreement. Another example concerns rent and lease agreements. ~~While the VBER~~Although Regulation (EU) X applies to ~~goods sold and purchased~~ agreements for ~~renting~~the sale and purchase of goods for the purpose of renting them 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~~by the Regulation, because in that case there is no sale or purchase of goods.

4.3. Vertical agreements in the online platform economy

~~(60)~~(62) ~~The~~Undertakings active in the online platform economy ~~plays~~play an increasingly important role ~~for~~in the distribution of goods and services. ~~Undertakings active in the online platform economy~~ They enable new ways of doing business, some of which are not easy to categorise ~~under~~using the concepts ~~traditionally associated with vertical relationships between suppliers and distributors~~ applied to vertical agreements 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.~~

(63) ~~The definition of supplier of online intermediation services in Article 1(1)(d) VBER is based on definitions in~~Undertakings active in the online platform economy are often qualified as agents in contract or commercial law. However, this qualification is not material for the categorisation of their agreements under Article 101(1) of the Treaty[55]. Vertical agreements entered into by undertakings active in the online platform economy will only be categorised as agency agreements that fall outside the scope of Article 101(1) of the Treaty where they fulfil the conditions set out in section 3.2. Due to the factors mentioned in section 3.2.3., those conditions will generally not be fulfilled in the case of agreements entered into by undertakings active in the online platform economy.

(64) Where a vertical agreement entered into by an undertaking active in the online platform economy does not meet the conditions to be categorised as an agency agreement falling outside the scope of Article 101(1) of the Treaty, it is necessary to consider whether the agreement relates to the provision of online intermediation services. Article 1(1), point (e) of Regulation (EU) X defines online intermediation services as information society services[56] which allow undertakings to offer goods or services to other undertakings or to final consumers, with a view to facilitating the initiating of direct transactions between undertakings or between an undertaking and a final consumer, irrespective of whether and where the transactions are ultimately concluded[57]. Examples of online intermediation services may include e-commerce marketplaces, app stores, price comparison tools and social media services used by undertakings.

[55] See also paragraph (30).

[56] See Article 1(1), point (b) of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ L 241, 17.9.2015, p. 1).

~~(64)~~ [57] See also Article 2(2) of 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.~~OJ L 186, 11.7.2019, p. 57).

(65) In order to qualify as a provider of online intermediation services, an undertaking must facilitate the initiating of direct transactions between two other parties. In principle, the functions performed by the undertaking must be assessed separately for each vertical agreement that the undertaking enters into, notably because undertakings active in the online platform economy often apply different business models in different sectors or even within the same sector. For example, in addition to providing online intermediation services, such undertakings may buy and resell goods or services, in some cases performing both functions vis-à-vis a single counterparty.

(66) The fact that an undertaking collects payments for transactions that it intermediates, or offers ancillary services in addition to its intermediation services, for example, advertising services, rating services, insurance or a guarantee against damage, does not preclude it from being categorised as a provider of online intermediation services[58].

(67) For the purpose of applying Regulation (EU) X, undertakings that are party to vertical agreements are categorised as either suppliers or buyers. Pursuant to Article 1(1), point (d) of the Regulation, an undertaking that provides online intermediation services within the meaning of Article 1(1), point (e) of the Regulation is categorised as a supplier in respect of those services and an undertaking that offers or sells goods or services via online intermediation services is categorised as a buyer in respect of those online intermediation services, irrespective of whether it pays to use the online intermediation services[59]. This has the following consequences for the application of Regulation (EU) X:

(a) the undertaking that provides the online intermediation services cannot be categorised as a buyer within the meaning of Article 1(1), point (k) of the Regulation in respect of goods or services offered by third parties using those online intermediation services;

(b) for the purpose of applying the market share thresholds set out in Article 3(1) of the Regulation, the market share of the undertaking that provides the online intermediation services is calculated on the relevant market for the supply of those services. The scope of the relevant market depends on the facts of the case, in particular the degree of substitutability between online and offline intermediation services, between intermediation services used for different categories of goods or services and between intermediation services and direct sales channels;

(c) restrictions imposed by the undertaking that provides the online intermediation services on buyers of those services relating to the price at which, the territories to which, or the customers to whom the intermediated goods or services may be sold, including restrictions relating to online advertising and online selling, are subject to the provisions of Article 4 of the Regulation (hardcore restrictions). For example, pursuant to Article 4, point (a) of the Regulation, the exemption provided by Article 2(1) of the Regulation does not apply to an agreement under which a provider of online intermediation services imposes a fixed or minimum sale price for a transaction that it facilitates;

58 See, for example, judgment of 19 December 2019, *Airbnb Ireland*, Case C-390/18, EU:C:2019:1112, paragraphs 58 to 69.

59 The guidance provided in this section 4 of these Guidelines is without prejudice to the categorisation of undertakings that are party to agreements that fall outside the scope of Regulation (EU) X.

(d) pursuant to Article 5(1), point (d) of the Regulation, the exemption provided by Article 2(1) of the Regulation does not apply to across-platform retail parity obligations imposed by the undertaking that provides the online intermediation services on buyers of those services;

(e) pursuant to Article 2(6) of the Regulation, the exemption provided by Article 2(1) of the Regulation does not apply to agreements relating to the provision of online intermediation services where the provider of the servicesis a competing undertaking on the relevant market for the sale of the intermediated goods or services (hybrid function). As set out in section 4.4.4., such agreements must be assessed under the Horizontal Guidelines as regards possible collusive effects and under section 8 of these Guidelines as regards any vertical restraints.

(68) Undertakings active in the online platform economy that do not provide online intermediation services within the meaning of Article 1(1), point (e) of Regulation (EU) X may be categorised as either suppliers or buyers for the purpose of applying the Regulation. For example, such undertakings may be categorised as suppliers of upstream input services or as (re)sellers of goods or services downstream. This categorisation may affect, in particular, the definition of the relevant market for the purpose of applying the market share thresholds set out in Article 3(1) of the Regulation, the applicability of Article 4 of the Regulation (hardcore restrictions), and the applicability of Article 5 of the Regulation (excluded restrictions).

4.4. Limits to the application of ~~the VBER~~Regulation (EU) X

4.4.1. Associations of retailers

~~(65)~~(69) Article 2(2) of ~~the VBER includes in the scope of application of the VBER~~Regulation (EU) X provides that vertical agreements entered into by an association of undertakings ~~which~~that fulfils certain conditions can benefit from the safe harbour, thereby excluding from the safe harbour vertical agreements entered into by all other associations. ~~This means that~~More specifically, vertical agreements entered into between an association and individual members, or between an association and individual suppliers, ~~are covered by the VBER~~fall within the scope of Regulation (EU) X 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]million[60]. 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~~those members together represent less than 15% of the collective turnover of all the members ~~combined~~, this will generally not ~~normally~~ change the assessment under Article 101 of the Treaty.

~~(66)~~(70) 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 the conclusion of that assessment ~~leads to the conclusion~~ is that a cooperation between undertakings in the area of purchasing or selling ~~is acceptable,~~does not raise concerns, in particular because it meets the ~~specific~~ conditions ~~laid down~~set out 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~~. That further assessment must be conducted in accordance with the rules of Regulation (EU) X, and in particular with

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

[42]

[60] The annual turnover ceiling of EUR 50 million is based on the turnover ceiling for SMEs in Article 2 ofthe 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~~2003/361/EC.

[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 conditions laid down in Articles 3, 4 and 5 thereof, and with these Guidelines. For instance, horizontal agreements concluded between the members of 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 or decision 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)~~(71) Article 2(3) ~~VBER~~of Regulation (EU) X 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,~~benefit from the exemption provided by Article 2(~~3) VBER excludes all~~1) of the Regulation, subject to certain conditions. Accordingly, Regulation (EU) X does not apply to other vertical agreements containing IPR provisions~~ from the scope of application of the VBER~~.

~~(68)~~(72) ~~The VBER~~Regulation (EU) X applies to vertical agreements containing IPR provisions where ~~five~~all of the following conditions are fulfilled:

- ~~(a)~~ ~~The~~(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~~(b) the IPRs must be assigned to or licensed for use by the buyer;
- ~~(c)~~ ~~The~~(c) the IPR provisions must not constitute the primary object of the agreement;
- ~~(d)~~ ~~The~~(d) the IPR provisions must be directly related to the use, sale or resale of goods orservices 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~~(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~~Regulation (EU) X.

~~(69)~~(73) ~~Such~~These conditions ensure that ~~the VBER~~Regulation (EU) X 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~~benefit from the exemption provided by Article 2(1) of the Regulation where the main object of the agreement is the purchase or distribution of goods or services.

~~(70)~~(74) The first condition, set out in paragraph (72)(a), makes clear that the ~~context in which the~~ IPRs ~~are~~must be provided ~~is~~in the context of 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~~Regulation (EU) X does not cover for instance:

- ~~(a)~~ (a) agreements where a party provides another party with a recipe and licenses the other party to produce a drink with ~~this~~that recipe;
- ~~(b) agreements under which one party provides another party with a mould ormaster copy and licenses the other party to produce and distribute copies;~~

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

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

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

~~(71)~~(75) ~~The~~ It follows from the second condition~~ makes clear~~, set out in paragraph (72)(b), that ~~the VBER~~Regulation (EU) X does not apply ~~when~~where the IPRs are provided by the buyer ~~provides the IPRs~~ to the supplier, ~~no matter~~regardless of 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~~Regulation (EU) X. This means~~ in particular~~ that subcontracting involving the transfer of know-how to a subcontractor ~~does~~is not ~~fall within the scope of application of the VBER~~covered by Regulation (EU) X (see also section 3.3~~ these Guidelines~~). However, vertical agreements under which the buyer merely provides ~~only~~ specifications to the supplier which describe the goods or services to be supplied ~~fall within the scope of application of the VBER~~are covered by Regulation (EU) X.

~~(72)~~(76) The third condition~~ makes clear~~, set out in paragraph (72)(c), requires that ~~in order to be covered by the VBER,~~ the primary object of the agreement ~~must~~is 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)~~(77) The fourth condition, set out in paragraph (72)(d), 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 they may also be purchased by the licensee from a third party supplier. The IPR provisions will ~~normally~~generally concern the marketing of goods or services. An example would be a franchise agreement where the franchisor sells ~~goods for resale~~ to the franchisee goods for resale and licenses the franchisee to use its ~~trade mark~~trademark 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)~~(78) The fifth condition~~ highlights the fact~~, set out in paragraph (72)(e), requires that the IPR provisions ~~should~~do not have the same object as any of the hardcore restrictions listed in Article 4 ~~VBER~~of Regulation (EU) X or any of the restrictions that are excluded from the ~~coverage~~benefit of the ~~VBER~~Regulation pursuant to Article 5 ~~VBER~~of the Regulation (see section 6~~ of these Guidelines~~).

~~(75)~~(79) IPRs relevant to the implementation of vertical agreements within the meaning of Article 2(3) ~~VBER~~of Regulation (EU) X generally concern three main areas: trademarks, copyright and know-how.

4.4.2.1. Trademarks

~~(76)~~(80) 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)~~(81) Resellers of goods or services covered by copyright (~~e.g.~~for example, 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~~does not infringe the copyright. ~~Such obligations on the reseller, to~~To the extent that they fall ~~under~~within the scope of Article 101(1) ~~at all,~~of the Treaty, such obligations on the reseller are covered by ~~the VBER~~Regulation (EU) X.

(82) ~~Agreements~~As mentioned in paragraph 62 of the Technology Transfer Guidelines[61], the licensing of software copyrights for the purpose of mere reproduction and distribution of the

[61] Communication from the Commission — Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements (OJ C 89, 28.3.2014, p. 3).

protected work is not covered by Commission Regulation (EU) No 316/2014 but is instead covered by analogy by Regulation (EU) X and these Guidelines.

~~(78)~~ Furthermore, agreements under which hard copies of software are supplied for resale and the reseller does not acquire a licence to any rights ~~over~~in the software but only has theright to resell the hard copies, are to be regarded as agreements for the supply of goodsfor resale for the purpose of ~~the VBER.~~Regulation (EU) X. Under that form of distribution, the licensing of the software only ~~occurs~~takes place between the copyright owner and the user ofthe

(83) software. It may take the form of a ~~"~~'shrink ~~wrap"~~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)~~(84) 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~~To the extent that they –fall –within the scope of Article 101(1) ~~at all,~~ of the Treaty, such restrictions on use are covered by ~~the VBER~~Regulation (EU) X.

4.4.2.3. Know-how

~~(80)~~(85) Franchise agreements, with the exception of industrial franchise agreements, are ~~the most obvious~~an example of know-how ~~for marketing purposes~~ being communicated to the buyer~~.~~[44] for marketing purposes[62]. 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 for the duration of the agreement, 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)~~(86) Licensing contained in franchise agreements is covered by ~~the VBER~~Regulation (EU) X where all five conditions listed in paragraph (~~70) of the Guidelines~~72) are ~~met. Those conditions are~~fulfilled. This is usually ~~fulfilled~~the case, as under most franchise agreements, including master franchise agreements, the franchisor provides goods and/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~~concerns solely or primarily ~~concerns~~the licensing of IPRs, it is not covered by ~~the VBER~~Regulation (EU) X, but the Commission will, as a general rule, apply the principles set out in ~~the VBER~~Regulation (EU) X and these Guidelines to such an agreement.

~~(82)~~(87) The following IPR-related obligations are generally considered necessary to protect the franchisor's IPRs and ~~are~~, where ~~these~~such obligations fall ~~under~~within the scope of Article 101(1~~),~~) of the Treaty, they are also covered by ~~the VBER~~Regulation (EU) X:

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

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

[62] Paragraphs (85) to (87) apply by analogy to other types of distribution agreement that involve the transfer of substantial know-how from the supplier to the buyer.

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

~~(d)~~ (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)~~ (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 franchisorin any legal actions against infringers;

~~(f)~~ (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)~~ (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~~As regards vertical agreements between competitors, it should first be noted that, pursuant to Article 2(~~8) VBER~~7) of Regulation (EU) X, on which guidance is provided in section 4.5~~ of these Guidelines,~~., the ~~VBER~~Regulation 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.~~

~~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.~~

~~4.5.1.1. 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)~~(88) ~~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~~other regulation.

(89) Article 2(4), first sentence, of Regulation (EU) X establishes the general rule that the exemption provided by Article 2(1) of the Regulation does not apply to vertical agreements between competing undertakings.

(90) Article 1(1), point (c) of Regulation (EU) X defines a competing undertaking as an actual or potential competitor. Two undertakings are treated as actual competitors if they are active on the same relevant (product and geographic) market. An undertaking is treated as a potential competitor of another undertaking if, absent the vertical agreement between the undertakings, it is likely that the former would, within a short period of time (normally not longer than one year), make the additional necessary investments or incur other necessary costs to enter the relevant market in which the latter undertaking is active. This assessment must be based on realistic grounds, having regard to the structure of the market and the economic and legal context. The mere theoretical possibility of entering a market is not sufficient. There must be real and concrete possibilities for the undertaking to enter the market and no insurmountable barriers to entry. Conversely, there is no need to demonstrate with certainty that the undertaking will in fact enter the relevant market and that it will be capable of retaining its place there[63].

(91) Vertical agreements between competing undertakings that do not fall within the exceptions set out in Article 2(4), second sentence, of Regulation (EU) X, on which guidance is provided in paragraphs (93) to (95), must be individually assessed under Article 101 of the Treaty. These Guidelines are relevant for the assessment of any

[63] See the judgments of 30 January 2020, *Generics (UK) and Others* v *Competition and Markets Authority*, Case C-307/18, EU:C:2020:52, paragraphs 36 to 45; 25 March 2021, *H. Lundbeck A/S and Lundbeck Ltd* v *European Commission*, Case C-591/16 P, EU:C:2021:243, paragraphs 54 to 57.

vertical restraints in such agreements. The Horizontal Guidelines may provide relevant guidance for the assessment of possible collusive effects.

(92) A wholesaler or retailer that provides specifications to a manufacturer to produce goods for sale under the brand name of that wholesaler or retailer is not considered a manufacturer of such own-brand goods and consequently not a competitor of the manufacturer for the purpose of applying Article 2(4), point (a) of Regulation (EU) X. Therefore, the exemption provided by Article 2(1) of the Regulation can apply to a vertical agreement entered into between, on the one hand, a wholesaler or retailer that sells own-brand goods that have been manufactured by a third party (and not in-house) and, on the other hand, a manufacturer of competing branded goods[64]. By contrast, wholesalers and retailers that manufacture goods in-house for sale under their own brand name are considered to be manufacturers and therefore the exemption provided by Article 2(1) of the Regulation does not apply to vertical agreements entered into by such wholesalers or retailers with manufacturers of competing branded goods.

(93) Article 2(4), second sentence, of Regulation (EU) X contains two exceptions to the general rule that the block exemption does not apply to agreements between competing undertakings. More specifically, the second sentence of Article 2(4) provides that the exemption provided by Article 2(1) of the Regulation applies to non-reciprocal vertical agreements between competing undertakings that fulfil the conditions of either Article 2(4), point (a) or point (b) of the Regulation. Non-reciprocal means in particular that the buyer of the contract goods or services does not also supply competing goods or services to the supplier.

(94) The two exceptions set out in the second sentence of Article 2(4) of Regulation (EU) X both concern scenarios of dual distribution, namely where a supplier of goods or services is also active at the downstream level, thereby competing with its independent distributors. Article 2(4), point (a) of the Regulation concerns the scenario where the supplier sells the contract goods at several levels of trade, namely at the upstream level as a manufacturer, importer or wholesaler and at the downstream level as an importer, wholesaler or retailer, whereas the buyer sells the contract goods at a downstream level, namely as an importer, wholesaler or retailer, and is not a competing undertaking at the upstream level where it buys the contract goods. Article 2(4), point (b) of the Regulation concerns the scenario where the supplier is a provider of services operating at several levels of trade, whereas the buyer provides services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services.

(95) The rationale for the exceptions set out in Article 2(4), points (a) and (b) of Regulation (EU) X is that, in a dual distribution scenario, the potential negative impact of the vertical agreement on the competitive relationship between the supplier and the buyer at the downstream level is considered to be less important than the potential positive impact of the vertical agreement on competition in general at the upstream or downstream levels. As Article 2(4), points (a) and (b) are exceptions to the general rule that Regulation (EU) X does not apply to agreements between competitors, those exceptions should be construed narrowly.

(96) If the conditions set out in Article 2(4), point (a) or (b) of Regulation (EU) X are fulfilled, the exemption provided by Article 2(1) of the Regulation applies to all

64 This is without prejudice to the application of the Subcontracting Notice, see paragraph (47) of these Guidelines.

aspects of the vertical agreement in question, including, in general, exchanges of information between the parties relating to the implementation of the agreement[65]. Information exchange can contribute to the pro-competitive effects of vertical agreements, including the optimisation of production and distribution processes. This also applies in scenarios of dual distribution. However, not all exchanges of information between a supplier and buyer in a dual distribution scenario are efficiency-enhancing. For this reason, Article 2(5) of Regulation (EU) X provides that the exceptions set out in Article 2(4), points (a) and (b) do not apply to the exchange of information between a supplier and buyer that is either not directly related to the implementation of the vertical agreement or is not necessary to improve the production or distribution of the contract goods or services, or which meets neither of those conditions. Article 2(5) of the Regulation and the guidance provided in paragraphs (96) to (103) only concern information exchange in the context of dual distribution, namely information exchange between the parties to a vertical agreement that fulfils the conditions of Article 2(4), points (a) or (b) of the Regulation.

(97) For the purpose of applying Article 2(5) of the Regulation and these Guidelines, information exchange includes any communication of information by one party to the vertical agreement to the other party, irrespective of the characteristics of the exchange, for instance whether the information is communicated by only one party or by both parties, or whether the information is exchanged in writing or orally. It is also immaterial whether the form and content of the information exchange is expressly agreed in the vertical agreement or if it takes place on an informal basis, including, for example, where one party to the vertical agreement communicates information without a request from the other party.

(98) Whether an exchange of information in a dual distribution scenario is directly related to the implementation of the vertical agreement and necessary to improve the production or distribution of the contract goods or services within the meaning of Article 2(5) of Regulation (EU) X may depend on the particular model of distribution. For example, under an exclusive distribution agreement, it may be necessary for the parties to exchange information relating to their respective sales activities in particular territories or in respect of particular customer groups. Under a franchise agreement, it may be necessary for the franchisor and franchisee to exchange information relating to the application of a uniform business model across the franchise network[66]. In a selective distribution system, it may be necessary for the distributor to share information with the supplier relating to its compliance with the selection criteria and with any restrictions on sales to unauthorised distributors.

(99) The following is a non-exhaustive list of examples of information that may, depending on the particular circumstances, be directly related to the implementation of the

[65] The guidance provided in these Guidelines is without prejudice to the application of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1) and other Union law applicable to the exchange of information within the meaning of paragraph (97) of these Guidelines.

[66] See paragraph 31 of the Article 101(3) Guidelines.

vertical agreement and necessary to improve the production or distribution of the contract goods or services[67]:

(a) technical information relating to the contract goods or services, including information relating to the registration, certification, handling, use, maintenance, repair, upgrading or recycling of the contract goods or services, notably where such information is required to comply with regulatory measures, and information that enables the supplier or buyer to adapt the contract goods or services to the requirements of the customer;

(b) logistical information relating to the production and distribution of the contract goods or services at the upstream or downstream levels, including information relating to production processes, inventory, stocks and, subject to paragraph (100), point (b), sales volumes and returns;

(c) subject to paragraph (100), point (b), information relating to customer purchases of the contract goods or services, customer preferences and customer feedback, provided that the exchange of such information is not used to restrict the territory into which or the customers to whom the buyer may sell the contract goods or services within the meaning of Article 4, points (b), (c) or (d) of Regulation (EU) X;

(d) information relating to the prices at which the contract goods or services are sold by the supplier to the buyer;

(e) subject to paragraph (100), point (a), information relating to the supplier's recommended or maximum resale prices for the contract goods or services and information relating to the prices at which the buyer resells the goods or services, provided that the exchange of such information is not used to restrict the buyer's ability to determine its sale price or to enforce a fixed or minimum sale price within the meaning of Article 4, point (a) of Regulation (EU) X[68];

(f) subject to paragraph (100) and point (e) of this paragraph, information relating to the marketing of the contract goods or services, including information on promotional campaigns and information on new goods or services to be supplied under the vertical agreement;

(g) performance-related information, including aggregated information communicated by the supplier to the buyer relating to the marketing and sales activities of other buyers of the contract goods or services, provided that this does not enable the buyer to identify the activities of particular competing buyers, as well as information relating to the volume or value of the buyer's sales of the contract goods or services relative to its sales of competing goods or services.

(100) The following are examples of information that is generally unlikely to fulfil the two conditions set out in Article 2(5) of Regulation (EU) X when exchanged between a supplier and a buyer in a dual distribution scenario:

[67] Unless indicated otherwise, the examples cover information communicated by the supplier or the buyer, irrespective of the frequency of the communication and irrespective of whether the information relates to past, present or future conduct.

[68] See Section 6.1.1. for further guidance on RPM, including on indirect means to apply RPM.

(a) information relating to the future prices at which the supplier or buyer intend to sell the contract goods or services downstream;

(b) information relating to identified end users of the contract goods or services, unless the exchange of such information is necessary:

(1) to enable the supplier or buyer to satisfy the requirements of a particular end user, for example to adapt the contract goods or services to the end user's requirements, to grant the end user special conditions, including under a customer loyalty scheme, or to provide pre- or after-sales services, including guarantee services,

(2) to implement or monitor compliance with a selective distribution agreement or an exclusive distribution agreement under which particular end users are allocated to the supplier or buyer;

(c) information relating to goods sold by a buyer under its own brand name exchanged between the buyer and a manufacturer of competing branded goods, unless the manufacturer is also the producer of those own-brand goods.

(101) The examples set out in paragraphs (99) and (100) are provided to assist undertakings with their self-assessment. However, the inclusion of a particular type of information in paragraph (99) does not imply that the exchange of such information will fulfil the two conditions set out in Article 2(5) of Regulation (EU) X in all cases. Likewise, the inclusion of a particular type of information in paragraph (100) does not imply that the exchange of such information will never fulfil those two conditions. Undertakings must therefore apply the conditions of Article 2(5) of the Regulation to the particular facts of their vertical agreement.

(102) Where the parties to a vertical agreement that fulfils the conditions of Article 2(4), points (a) or (b) of Regulation (EU) X exchange information that is either not directly related to the implementation of their vertical agreement or is not necessary to improve the production or distribution of the contract goods or services, or which fulfils neither of those two conditions, the information exchange must be assessed individually under Article 101 of the Treaty. Such exchanges do not necessarily infringe Article 101 of the Treaty. Furthermore, the other provisions of the vertical agreement can still benefit from the exemption provided by Article 2(1) of the Regulation, provided that the agreement otherwise complies with the conditions set out in the Regulation.

(103) Where competing undertakings enter into a vertical agreement and engage in exchanges of information that do not benefit from the exemption provided by Article 2(1) of the Regulation[69], they may take precautions to minimise the risk that the information exchange will raise competition concerns[70]. For example, they may exchange information only in aggregated form or ensure an appropriate delay between the generation of the information and the exchange. They may also use technical or administrative measures, such as firewalls, to ensure that information communicated by the buyer is accessible only to the personnel responsible for the supplier's upstream activities and not to the personnel responsible for the supplier's downstream direct

[69] For example, because the conditions of Article 2(4), Article 2(5) or Article 3(1) of the Regulation are not fulfilled.

[70] See the chapter on information exchange in the Horizontal Guidelines and any future version of those

Guidelines.

sales activity. However, the use of such precautions cannot bring within the scope of the exemption provided by Article 2(1) of Regulation (EU) X information exchanges that would otherwise fall outside the scope of that exemption.

4.4.4. *Vertical agreements with providers of online intermediation services that have a hybrid function*

(104) Pursuant to Article 2(6) of Regulation (EU) X, the dual distribution exceptions set out in Article 2(4), points (a) and (b) of the Regulation do not apply to vertical agreements relating to the provision of online intermediation services where the provider of the online intermediation services has a hybrid function, namely it is also a competing undertaking on the relevant market for the sale of the intermediated goods or services[71]. Article 2(6) of Regulation (EU) X applies to vertical agreements 'relating to' the provision of online intermediation services, irrespective of whether the agreement relates to the provision of those services to a party to the agreement or to third parties.

(105) Vertical agreements relating to the provision of online intermediation services entered into by providers of online intermediation services with such a hybrid function do not fulfil the rationale for the dual distribution exceptions, set out in Article 2(4), points (a) and (b) of Regulation (EU) X. Such providers may have an incentive to favour their own sales and the ability to influence the outcome of competition between undertakings that use their online intermediation services. Such vertical agreements may therefore raise concerns for competition in general on relevant markets for the sale of the intermediated goods or services.

(106) Article 2(6) of Regulation (EU) X applies to vertical agreements relating to the provision of online intermediation services where the provider of online intermediation services is an actual or potential competitor on the relevant market for the sale of the intermediated goods or services. In particular, it must be likely that the provider of online intermediation services would, within a short period of time (normally not longer than one year), make the additional necessary investments or incur other necessary costs to enter the relevant market for the sale of the intermediated goods or services[72].

(107) Agreements relating to the provision of online intermediation services that, pursuant to Article 2(6) of Regulation (EU) X, do not benefit from the exemption provided by Article 2(1) of the Regulation must be assessed individually under Article 101 of the Treaty. Such agreements do not necessarily restrict competition within the meaning of Article 101(1) of the Treaty, or they may fulfil the conditions of an individual exemption under Article 101(3) of the Treaty. The De Minimis Notice may apply where the parties hold low market shares on the relevant market for the provision of online intermediation services and the relevant market for the sale of the intermediated goods or services[73]. The Horizontal Guidelines may provide relevant guidance for the assessment of possible collusive effects. These Guidelines may provide guidance for the assessment of any vertical restraints.

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[71] The application of Article 2(6) of Regulation (EU) X presupposes that the vertical agreement entered into by the provider of online intermediation services with a hybrid function does not qualify as an agency agreement that falls outside the scope of Article 101(1) of the Treaty, see paragraphs (46) and (63).

[72] See paragraph (90).

[73] See paragraph (26).

(108) In the absence of restrictions of competition by object, appreciable anti-competitive effects are unlikely where the provider of online intermediation services does not enjoy market power in the relevant market for online intermediation services, for example because it has only recently entered such market (start-up phase). In the online platform economy, the revenue generated by a provider of online intermediation services (for example, commissions) may be only a first proxy for the extent of its market power and it may also be necessary to take into account alternative metrics, such as the number of transactions intermediated by the provider, the number of users of the online intermediation services (sellers and/or buyers) and the extent to which such users use the services of other providers. It is also unlikely that a provider of online intermediation services enjoys market power where it does not benefit from appreciable positive direct or indirect network effects.

(109) In the absence of restrictions by object or significant market power, it is unlikely that the Commission will prioritise enforcement action in respect of vertical agreements relating to the provision of online intermediation services where the provider has a hybrid function. This is in particular the case where, in a dual distribution scenario, a supplier allows buyers of its goods or services to use its website to distribute the goods or services, but does not allow the website to be used to offer competing brands of goods or services and is not otherwise active on the relevant market for the provision of online intermediation services in respect of such goods or services.

4.5. Relationship with other block exemption regulations

(110) ~~VBER~~As explained in sections 4.1. and 4.2., Regulation (EU) X applies to vertical agreements, which must be assessed exclusively under Regulation (EU) X and these Guidelines, unless specifically stated otherwise in these Guidelines. Such agreements can benefit from the safe harbour established by Regulation (EU) X.

(111) Pursuant to Article 2(7) of Regulation (EU) X, the Regulation does not apply to vertical agreements where their subject matter 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 whether a vertical agreement falls within the scope of any other block exemption regulation.

~~(95)~~(112) Regulation (EU) X 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~~referenced in this paragraph, unless otherwise provided for in the respective regulation:

- Commission Regulation (EU) No 316/2014[74];
- Commission Regulation (EU) No 1217/2010[75];
- Commission Regulation (EU) No 1218/2010[76].

– [74] 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]~~ (OJ L 93, 28.3.2014, p. 17).

– [75] 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]~~ (OJ L 335, 18.12.2010, p. 36).

– [76] 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]~~ (OJ L 335, 18.12.2010, p. 43).

~~(96)~~(113) Regulation (EU) X does ~~also~~ not apply to the types of agreements between competitors mentioned in the Horizontal Guidelines, unless otherwise provided ~~for in the relevantchapter of~~by the Horizontal Guidelines.

~~(97)~~(114) ~~The VBER applies~~Regulation (EU) X does apply 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~~safe harbour created by Regulation (EU) X if, in addition to the conditions ~~for exemption set out in the VBER~~of Regulation (EU) X, they comply with the ~~additional requirements~~conditions 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,~~2010[77] 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~~Specific types of distribution ~~systems~~system

~~(98)~~(115) A supplier is free to ~~set up its~~organise the distribution ~~system~~of its goods or services as it sees fit. The supplier ~~can~~may, for instance, choose vertical integration, ~~which implies~~namely 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~~ of Regulation (EU) X. This type of distribution system ~~only concerns the organisation inside one specific~~involves a single undertaking and thus falls outside the scope of Article 101(1~~).~~) of the Treaty.

~~(99)~~(116) The supplier ~~can~~may also decide to ~~appoint~~use independent distributors. To that end, the supplier may ~~set up~~use one or ~~a combination~~more types of ~~other~~ distribution ~~systems. The most common are exclusive~~system. Certain types of distribution~~,~~ system, namely selective distribution and ~~franchising. Since~~ exclusive distribution, are the ~~vertical agreements required to set up such distribution systems are concluded between independent undertakings, they can fall within the scope of~~ subject of specific definitions in Article ~~101(~~1(1), point (g) and ~~benefit from the VBER or an individual exemption under Article 101(3),~~point (h) of Regulation (EU) X. Guidance on exclusive distribution and selective distribution is provided ~~that the respective conditions are fulfilled~~in sections 4.6.1 and 4.6.2 respectively[78]. The supplier may also distribute its goods or services using neither selective distribution nor exclusive distribution. These other types of distribution are categorised as free distribution systems for the purpose of applying the Regulation[79].

4.6.1. Exclusive distribution systems

4.6.1.1. Definition of exclusive distribution systems

~~(100)~~(117) In an exclusive distribution system, as defined in Article 1(1), point (h) of Regulation (EU) X, the supplier allocates a territory or ~~customer~~a group of customers exclusively to one or a limited number of buyers~~ and/or reserves it to itself~~, while restricting all its other buyers within the Union fromactively selling into the exclusive territory or to the exclusive customer ~~group.~~~~[51]~~group[80].

~~(101)~~(118) Suppliers often use ~~this type of system~~exclusive distribution systems to incentivise distributors to make the financial and non-financial investments needed to develop ~~their~~ the supplier's brand in a territory where ~~it~~the brand is not well-known, or to sell a new product in a particular territory or to a particular customer group, or to ~~increase the~~ incentivise distributors to focus ~~of the distributors'~~their selling and promotional activities on a particular product ~~(e.g. special marketing or display efforts). As for distributors, through~~. For the ~~size of the territory or the customer group exclusively allocated and~~ distributors, the protection provided by exclusivity~~, they seek~~ may enable them 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~~

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77 Commission Regulation (EU) No 461/2010 f 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 (OJ L 129, 28.5.2010, p. 52).

78 See ~~Article~~ also sections 6.1~~(~~.2.3.1~~)(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 onthe 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~~6.1.2.3.2.

[79] See also section 6.1.2.3.3.

[80] See Article 1(1), point (h) of Regulation (EU) X.

4.6.1.2. Application of Article 101 of the Treaty to exclusive distribution systems

~~(106)~~(119) In a distribution system where the supplier ~~exclusively~~ allocates a territory or ~~a~~ customer group exclusively 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 all of the strongest ~~of the~~ suppliers active in a market operate an exclusive distribution system, this may also soften inter-brand competition and/or facilitate collusion, at both ~~at~~ the supplier and the ~~distribution level~~distributor levels. Lastly, exclusive distribution may lead to the foreclosure of other distributors and thereby reduce both inter-brand and intra-brand competition at the ~~distribution~~distributor level.

(120) Exclusive distribution agreements ~~are exempted by the VBER where both~~ can benefit from the exemption provided by Article 2(1) of Regulation (EU) X, provided that the supplier's and the buyer's market share ~~each~~ do not exceed 30~~% and where they do~~%, the agreement does not contain any hardcore restrictions~~.~~ within the meaning of Article 4 of Regulation (EU) X, and the number of distributors appointed per exclusive territory or customer group does not exceed five. An exclusive distribution agreement can still benefit from the safe harbour provided by ~~the VBER~~Regulation (EU) X if it is combined with other non-~~-~~hardcore vertical restraints, such as a non-compete obligation ~~limited to~~ not exceeding 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~~

~~(107)~~ The exemption provided by Article 2(1) of Regulation (EU) X 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.~~

(121) ~~The number~~limited to a maximum of five distributors ~~to which a~~ per exclusive territory or ~~a~~ customer ~~groups has been exclusively allocated is important for the assessment of the exclusive distribution system. The higher the number of~~ group, in order to preserve the incentive of the distributors~~, the lower the reduction of intra-brand competition is but also the lower the likelihood~~ to invest in promoting and selling the supplier's goods or services, while providing the supplier with sufficient flexibility to organise its distribution system. Above that number, there is an increased risk that the exclusive distributors ~~have an incentive to invest in order to develop that brand~~may free-ride on each other's investments, thereby eliminating the efficiency that exclusive distribution is intended to achieve.

~~(109)~~(122) For the exclusive distribution system to benefit from the exemption provided by Article 2(1) of Regulation (EU) X, the appointed distributors must be protected from active sales into the exclusive territory or to the exclusive customer group by all the supplier's other buyers. Where a supplier appoints more than one distributor for an exclusive territory or customer group, all these distributors must likewise be protected from active sales into the exclusive territory or to the exclusive customer group by all the supplier's other buyers, but active and ~~promote the product(s~~passive sales by these distributors within the exclusive territory or customer group cannot be restricted. Where, for practical reasons and not with the object of preventing parallel trade, the exclusive territory or customer group is not protected from active sales by certain buyers for a temporary period, for example where the supplier modifies the exclusive distribution system and requires time to re-negotiate active sales restrictions with certain buyers, the exclusive distribution system may still benefit from the exemption provided by Article 2(1) of ~~the supplier~~Regulation (EU) X.

(123) ~~The~~The vertical agreements used for exclusive distribution should define the scope of the territory or customer group that is exclusively allocated to the distributors. For example, the exclusive territory may correspond to the territory of a Member State or to a larger or smaller area. An exclusive customer group may be defined, for example, by using one or more criteria, such as the occupation or activity of the customers or by using a list of identified customers. Depending on the criteria used, the customer group may be limited to a single customer.

(124) Where a territory or customer group has not been exclusively allocated to one or more distributors, the supplier may reserve the territory or customer group for itself, in which case it must inform all its distributors. This does not require the supplier to be

commercially active in the reserved territory or in relation to the reserved customer group. For example, the supplier may wish to reserve the territory or customer group for the purpose of allocating it to other distributors in the future.

4.6.1.3. Guidance on the individual assessment of exclusive distribution agreements

~~(110)~~(125) Outside the scope of Regulation (EU) X, the market position of the supplier and its competitors is of major importance, as ~~the~~a loss of intra-brand competition will only be problematic if inter-brand competition is limited at the supplier or distributor level[81]. 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~~any 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~~indicates that any reduction in intra-

(126) brand competition~~, which can~~ will 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.

(127) 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 the 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~~ greater the reduction of inter-brand competition~~ will be reduced.~~. If one or more retailers are ~~the~~ exclusive ~~distributor~~distributors for a number of brands, there is a risk that ~~the~~a reduction of the wholesale price by one supplier for its brand will not be passed on by ~~any~~the exclusive retailers to the ~~final~~ consumer, as ~~it~~this would reduce the retailers' sales and profits made with the other brands. ~~Hence, compared~~Relative to ~~the~~a 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~~Where the market shares of the individual suppliers and buyers are below the 30% threshold~~ of the VBER~~, such cumulative effects may be a reason to withdraw the benefit of Regulation (EU) X.

~~(112)~~(128) 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~~The combination of exclusive distribution and single branding can make it more difficult for other suppliers to find alternative distributors, in particular when single branding is applied to a dense network of exclusive distributors with small territories or in the case of a cumulative anti-competitive effect. In such a scenario, the principles on single branding set out in section 8.2.1. should be applied.

[81] See Case C-306/20 - *Visma Enterprise*, paragraph 78.

(129) The combination of exclusive distribution with exclusive sourcing, which requires the exclusive distributors to buy the supplier's brand directly from the supplier, increases the risks of reduced intra-brand competition and market partitioning. Exclusive distribution already limits arbitrage by customers, as it limits the number of distributors per exclusive territory and implies that no other distributors may sell actively in that territory. Exclusive sourcing also eliminates possible arbitrage by the exclusive distributors, who are prevented from buying from other distributors in the exclusive distribution system. This increases the possibility for the supplier to limit intra-brand competition while applying dissimilar conditions of sale to the detriment of consumers, unless the combination of exclusive distribution with exclusive sourcinggenerates efficiencies that benefit consumers.

~~(113)~~(130) Foreclosure of other distributors is not ~~an issue~~problematic where the supplier operating the exclusive distribution system appoints a large number of exclusive distributors on the same relevant 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~~ that 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)~~(131) ~~Buyer~~Buying power may also increase the risk of collusion on the buyer side when the exclusive distribution arrangements are imposed by important buyers, possibly locatedin ~~the same or~~ different territories, on one or ~~several~~more suppliers.

~~(115)~~(132) Assessing the dynamics of the market is important, as growing demand, changing technologies and changing market positions may make the negative effects of exclusive distribution systems less likely than in mature markets.

(133) The nature of the product can also be relevant to the assessment of the possible anti-competitive effects of exclusive distribution. Those effects will be less acute in sectors where online sales are more prevalent, as online sales may facilitate purchases from distributors beyond the exclusive territory or customer group.

~~(116)~~(134) 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~~when the exclusive territories~~, since final~~ are large, as, in that case, consumers may ~~be confronted with~~have little possibility ~~of choosing~~to choose between a high price/high service distributor and a low price/low service distributor for ~~an important~~a leading brand.

~~(117)~~(135) 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 be outweighed by efficiencies obtained in logistics and promotion, especially when the manufacturer is based in a different Member State. ~~The possible~~However, multiple exclusive dealerships create greater risks for inter-brand competition ~~of multiple exclusive dealerships are however higher~~ at the wholesale level than at the retail level. Where one wholesaler becomes the exclusive distributor for a significant number of suppliers, there is ~~no~~not 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~~within the meaning of Article 101(1) of the Treaty may nevertheless create efficiencies that fulfil the conditions ~~set in~~of Article 101(3) ~~and thus be exempted from~~ of 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~~Treaty. For example, exclusivity may be necessary 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~~incentivise distributors ~~with small territories or in case of a cumulative effect.~~to invest in developing~~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.~~

(136) ~~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~~or in providing demand~~-~~-enhancing services. ~~In general, the case for efficiencies is strongest for~~ Outside the scope of Regulation (EU) X, the higher the number of exclusive distributors appointed for a particular territory, the lower the likelihood that they will have sufficient incentives to invest in the promotion of the supplier's products and the development of its brand, as the other exclusive distributors that share the territory may free-ride on their investment efforts.

~~(124)~~(137) The nature of the product is relevant for the assessment of efficiencies. Objective efficiencies are more likely in the case of 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. The combination of exclusive distribution and single branding may increase the incentives for the exclusive distributor(s) to focus their efforts on a particular brand.

~~(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.~~

(138) ~~Exclusive distribution systems based on the allocation of exclusive customer groups that restrict Article 101(1) may also fulfil~~The factors mentioned in paragraphs (125) to (137) remain relevant for the assessment of exclusive distribution systems under which the supplier allocates a customer group exclusively to one or more buyers. For the assessment of this type of exclusive distribution system, the additional factors listed in paragraphs (139) and (140) should also be taken into account.

(139) Similarly to the exclusive allocation of a territory, the exclusive allocation of a customer group generally makes arbitrage by buyers more difficult. In addition, as each appointed distributor has its own group of customers, buyers that do not fall within any such group may find it difficult to obtain the ~~conditions set out in Article 101(3) and thus~~supplier's products. Consequently, the scope for arbitrage by such buyers will be ~~exempted from~~reduced.

~~(126)~~(140) In addition to the ~~application~~types of ~~Article 101 on an individual basis. Exclusive~~efficiency mentioned in paragraph (136), exclusive customer allocation may ~~lead to~~generate efficiencies where ~~the investments of~~ it is necessary for 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~~meet the ~~requirements~~needs of ~~the exclusive customer group that has been allocated to them~~a particular category of customers, or ~~when these~~where such investments ~~to~~ lead to economies of scale or scope in ~~logistics (for instance,having a dedicated retailer dealing with public administrations' tenders for computers or office supplies).~~logistics[82]. The depreciation period for ~~these~~those investments is an indication of the duration for which ~~an exclusive distribution system based on the allocation of~~ exclusive customer ~~groups~~allocation may be justified. In general, the justification for exclusive customer allocation is strongest for new or complex products and for products ~~requiring~~that require adaptation to the needs of the ~~individual~~particular customer. Identifiable differentiated needs are more likely for intermediate products, namely products that are sold to ~~different~~various types of professional buyers. ~~Allocation~~By contrast, the allocation of ~~final~~ consumers is unlikely to lead to efficiencies.

~~(127)~~(141) ~~Example~~The following is an example of multiple exclusive dealerships in an oligopolistic market:

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

On a national market for a final product, there are four market leaders, each having 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 that corresponds to the town, or a district of the town, in which they are located. In most

~~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 exclusiveterritory which corresponds to the town in which they are located or a district of the town for large towns. In most~~

[82] An example of this is where the supplier appoints a dedicated distributor to respond to invitations to tender from public authorities relating to IT equipment or office supplies.

territories, the four market leaders happen to appoint the same exclusive retailer ~~("~~('multiple ~~dealership"),~~dealership'), often centrally located and rather specialised in the relevant product. The remaining 20% of the national market is composed of small local producers, the largest of ~~these~~those producers having a market share of 5% on the national market. Those local producers sell their products, in general, through other retailers, ~~in particular~~mainly 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~~branding 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~~that 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~~between 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) of the Treaty 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)~~(142) ~~Example~~The following is an 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.~~

An undertaking has developed a sophisticated sprinkler installation. The undertaking currently has 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 (for example, office, chemical plant or hospital). The undertaking 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 customer. To ensure that the distributors would specialise, the undertaking assigned an exclusive class of customers to each distributor and prohibited active sales to the others' exclusive customer classes. After 5 years, all of the exclusive distributors will be allowed to actively sell 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 5% and 25% and are also upgrading their products.

As the exclusivity is of limited duration and helps to ensure that the distributors may

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recoup their investments and concentrate their initial sales efforts on a certain class of customer 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) of the Treaty are likely to be fulfilled.

4.6.2. *Selective distribution systems*

4.6.2.1. Definition of selective distribution systems

~~(129)~~(143) ~~As set out in Article 1(1)(h) VBER, in~~In a selective distribution system, as defined in Article 1(1), point (g) of Regulation (EU) X, 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~~. Those distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate ~~that~~the system.

~~(130)~~(144) The criteria used by the supplier to select distributors ~~can~~may be qualitative ~~and/~~or quantitative~~ in nature.~~, or both. Quantitative criteria limit the number of distributors directly by, for instance, imposing a fixed number of distributors. Qualitative criteria ~~are objective criteria required by the nature of~~limit the ~~product, such as the~~ number of distributors indirectly, by imposing conditions that cannot be met by all distributors, for instance, relating to the product range to be sold, the training of sales personnel, the service to be provided at the point of sale~~, and the product range being sold.[52] Quantitative criteria limit thepotential 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~~ or the advertising and presentation of the products. Qualitative criteria may refer to the achievement of sustainability objectives, such as climate change, protection of the ~~selective distribution agreement~~environment or limiting the use of natural resources. For example, suppliers could require distributors to provide recharging services or recycling facilities in their outlets or to ensure that goods are delivered via sustainable means, such as cargo bike instead of by motor vehicle.

~~(131)~~(145) Selective distribution systems are comparable to exclusive distribution systems in that they restrict the number of authorised distributors and the possibilities of resale. The main difference ~~with exclusive distribution is~~ between the ~~restriction~~two types of distribution system lies in the ~~number~~nature of ~~dealers based on specific selection criteria. Another difference with exclusive distribution is that~~ the ~~restriction on resale associated with~~ protection granted to the distributor. In an exclusive distribution system, the distributoris protected against active selling from outside its exclusive territory, whereas in a selective distribution ~~is not a restriction on active sales into an exclusive territory or to an exclusive customer group, but a restriction on~~system, the distributor is protected against active and passive sales ~~to non-authorised~~by unauthorised distributors~~, leaving only authorised distributors and final customers as possible buyers~~.

4.6.2.2. Application of Article 101 of the Treaty to selective distribution systems

~~(132)~~(146) The possible competition risks of selective distribution systems ~~are~~include a reduction in intra-brand competition and, especially in the case of a cumulative effect, the foreclosure of certain ~~type(s)~~types of distributors, as well as the softening of competition and ~~potentially~~ the facilitation of collusion between suppliers or between buyers, due to ~~limiting their~~the limitation of the number of buyers.

~~(133)~~(147) ~~The assessment~~To assess the compatibility of ~~the possible anti-competitive effects of selective distribution should focus first on the compliance of the~~a selective distribution system with Article 101 of the Treaty, it is first necessary to determine whether the system falls within the scope of Article 101(1). To that end, a distinction needs to be drawn between purely qualitative selective distribution and quantitative selective distribution.

~~(134)~~(148) Purely qualitative selective distribution ~~where dealers are selected only on~~may fall outside the ~~basis objective criteria required by the nature~~scope of ~~the product does not put a direct limit on the number~~Article 101(1) of ~~dealers. Provided~~the Treaty provided that the three conditions laid down by the ~~European~~Court of Justice of the

~~[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~~

European Union in the *Metro* ~~judgment[53] (so-called "~~judgment[83] ('*Metro* ~~criteria")~~criteria') are fulfilled~~, purely qualitative selective distribution~~. This is ~~generally considered to fall outside Article 101(1), as~~because, if these criteria are fulfilled, 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~~competition[84].

(149) The three *Metro* criteria can be summarised as follows: 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~~the use of selective distribution ~~system that falls outside Article 101(1) can~~ may be ~~operated~~legitimate for high-quality or high-technology ~~products.[55] Operating a selective distribution system may also be necessary~~products[85] or for luxury ~~goods~~goods[86]. The quality of such goods may result not ~~just~~only from their material characteristics, but also from the aura of luxury surrounding them. Therefore, establishing a selective distribution system ~~which~~that seeks to ensure that the goods are displayed in a manner that contributes to sustaining ~~this~~that aura of luxury may be necessary to preserve their ~~quality.[56]~~quality[87]. Secondly, resellers must be chosen on the basis of objective ~~criteria of a~~ qualitative ~~nature~~criteria, 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~~Third, the criteria laid down must not go beyond what is ~~necessary.[58]~~necessary[88].

~~(135)~~(150) The assessment of whether the *Metro* criteria are met requires not only an overall assessment of the selective distribution ~~under Article 101(1)~~agreement in question, but also ~~requires~~ a separate analysis of each potentially restrictive clause of the ~~agreement under the Metro criteria.[59]~~agreement[89]. This implies, in particular, ~~determining~~assessing whether the restrictive clause in question is ~~proportionate~~ appropriate in the light of the objective pursued by the selective distribution system and whether ~~it~~the clause goes beyond what is necessary to achieve ~~this objective.[60] Such requirements are unlikely~~ that objective[90]. Hardcore restrictions do not meet this proportionality test. Conversely, for instance, it may be proportionate for a supplier of luxury goods to ~~be met~~ prohibit its authorised distributors from using online marketplaces, as long as this does not indirectly prevent the effective use of the internet by ~~hardcore restrictions. Conversely, for~~the authorised distributor to sell the goods to particular territories or customers[91]. In particular, such a prohibition on the use of online marketplaces would not restrict sales to particular territories or customers where the authorised distributor remains free to operate its own online store and to advertise online in order to raise

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83 See judgments ~~in Case 31/80 *NV*~~of 25 October 1977, *Metro* v *Commission*, Case 26/76, EU:C:1977:167, paragraphs 20 and 21 (hereinafter 'Case C-26/76 - *Metro* v *Commission*'); 11 December 1980, *L'Oréal* ~~*and SA L'Oréal v PVBA*~~*v De Nieuwe AMCK*, C-31/80, 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~~ and 16 (hereinafter 'Case C-31/80 - *L'Oréal v De Nieuwe AMCK*'); 13 October 2011, *Pierre Fabre Dermo-~~Cosmetique~~Cosmétique SAS* v *Président de l'Autorité de la concurrence*, Case C-439/09, EU:C:2011:649, paragraph 41~~; Case C-230/16~~ (hereinafter 'Case C-439/09 - *Pierre Fabre Dermo-Cosmétique*'); 6 December 2017, *Coty Germany GmbH* v *Parfümerie Akzente GmbH*, Case C-230/16, EU:C:2017:941, paragraph 24~~.~~ (hereinafter 'Case C-230/16 - *Coty Germany*').

~~54~~84 See ~~judgments~~in Case C-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*~~ to 22; judgments of 25 October 1983, *AEG*~~*-Telefunken AG*~~ v *Commission*, Case C-107/82, EU:C:1983:293, paragraphs 33, 34 and 73~~; Case~~ (hereinafter 'Case C-107/82 -*AEG* v *Commission*'); 22 October 1986, *Metro* v *Commission*, C-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*~~12 December 1996, *Leclerc* v *Commission*, Case T-88/92, EU:T:1996:192, paragraph 106.

~~55 Judgments~~85 See Case C-26/76 - *Metro* ~~*SB-Großmärkte GmbH & Co. KG*~~ v *Commission* ~~("Metro I") EU:C:1977:167;~~; and Case C-107/82 ~~*Allgemeine Elektrizitäts-Gesellschaft*~~- *AEG*~~*-Telefunken AG*~~ v *Commission* ~~EU:C:1983:293~~.

~~56~~86 See ~~judgment~~ Case C-230/16 - *Coty Germany* ~~*GmbH v Parfümerie Akzente GmbH* EU:C:2017:941~~.

87 See Case C-230/16 - *Coty Germany*, paragraphs 25 to 29.

~~57~~88 See ~~also by analogy judgement~~ Case C-~~158/11 *Auto 24 SARL*~~26/76 - *Metro* v ~~*Jaguar Land Rover France SAS* EU:C:2012:351.~~

~~58 See judgments in~~*Commission*, paragraphs 20 and 21; Case C-31/80 ~~*NV*~~- *L'Oréal* ~~*and SA L'Oréal v PVBA* EU:C:1980:289~~*v De Nieuwe AMCK*, 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*~~ and 16; Case C-107/82 - *AEG* v *Commission* ~~EU:C:1983:293~~, paragraph 35; ~~Case T-19/91 *Société d'Hygiène Dermatologique de*~~27 February 1992, *Vichy* v *Commission*, Case T-19/91, EU:T:1992:28, paragraph 65.

~~59~~89 See paragraph (~~134~~149).

90 See Case C-230/16 - *Coty*, paragraphs 43 to 58.

91 See Case C-230/16 - *Coty*, in particular paragraph 67; see also paragraph (208) 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~~

awareness 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~~online activities and ~~to use online search engines, with the result that~~ attract potential 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~~ .[92] In that case, ~~it~~the restrictive clause, if proportionate, falls outside the scope of Article 101(1) of the Treaty and no further analysis is required~~.~~.

(151) ~~Even if~~ Irrespective of whether they ~~do not meet~~fulfil the *Metro* criteria, qualitative and/or quantitative selective distribution ~~systems~~agreements can benefit from the ~~safe harbour,~~exemption provided by Article 2(1) of Regulation (EU) X, provided that the market shares of both the supplierand the buyer ~~each~~ do not exceed 30% and the agreement does not contain any hardcore ~~restriction.[62]~~restrictions[93]. 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.~~obligationsas defined in Article 1(1), point (f) of Regulation (EU) X. The ~~block~~ exemption provided by Article 2(1) of the Regulation applies regardless of the nature of the product concernedand the nature of the selection criteria. ~~However, where the~~Moreover, the supplier is not obliged to publishits selection criteria[94].

~~(136)~~(152) Where in a particular case a selective distribution agreement that benefits from the block exemption restricts competition appreciably at the supplier or distributor level and does not generate efficiencies that outweigh the effects of the restriction, for example because the selection criteria are not linked to 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 brickand 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~~or are not necessary to improve the distribution of the product, the benefit of the ~~VBER is likely to~~block exemption may be withdrawn.

~~(137)~~4.6.2.3. ~~The remainder of this section provides guidance for~~Guidance on 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.~~agreements

~~(138)~~(153) ~~The~~Outside the scope of Regulation (EU) X, 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~~is, in principle, only ~~be~~ problematic ~~if~~where inter-brand competition is ~~limited~~limited[95]. 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 relevant market. Where selective distribution is applied by only one supplier in the market, quantitative selective distribution generally does not ~~normally create net negative~~lead to anti-competitive effects. In practice, however, selective distribution is oftenapplied by several suppliers in a particular market~~.~~ (cumulative effect).

~~(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,~~

[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.~~In

[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.~~

(154) ~~in~~ the case of a cumulative effect, ~~when~~it is necessary to take into account the market position of the suppliers that apply selective distribution: where selective distribution is used by a majority of the leading suppliers in a market ~~apply selective distribution, there could be~~, this may lead to foreclosure of certain types of distributors ~~(i.e.~~, for instance price discounters~~)~~.. The risk of foreclosure of more efficient distributors is greater ~~with~~in the case of selective distribution than ~~with~~for exclusive distribution, given ~~the restriction on~~that under a selective distribution system sales to non-_authorised ~~dealers in selective distribution~~distributors are restricted. 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~~distributors 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~~-~~

92 See also paragraph (208).

93 See Case C-439/09 - *Pierre Fabre Dermo-Cosmétique*, paragraph 54. See also section 6.1.2.3.2.

94 See also by analogy judgment of 14 June 2012, *Auto 24 SARL* v *Jaguar Land Rover France SAS*, Case C-158/11, EU:C:2012:351, paragraph 31.

95 See Case C-306/20 - *Visma Enterprise*, paragraph 78.

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~~those distribution formats, such as lower prices, more transparency and wider access to the product.

(155) Where ~~the VBER applies to~~ individual selective distribution networks benefit from the exemption provided by Regulation (EU) X, the withdrawal of the block exemption or the disapplication of ~~the VBER~~Regulation (EU) X may be considered ~~in the case of~~where such networks create cumulative anti- competitive effects. However, ~~a~~such cumulative anti-competitive effects ~~problem is~~are unlikely ~~to arise when~~where the total share of the market covered by selective distribution does not exceed 50%. ~~Also, competition~~Competition concerns are also 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 of the 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~~where all five of the largest suppliers apply selective distribution. ~~Such would particularly~~This is likely to be the case ~~if~~, in particular, where the agreements ~~concluded~~entered into by the largest suppliers contain quantitative selection criteria ~~which~~that directly limit the number of authorised ~~dealers~~distributors, or ~~when~~where 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.

~~(140)~~(156) The conditions of Article 101(3) of the Treaty are, in general, unlikely to be fulfilled if the selective distribution systems that contribute to the cumulative effect ~~prevent access to~~ exclude from 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~~, especially price discounters or ~~pure~~ online-only distributors ~~which offer~~offering lower prices to consumers, thereby limiting distribution, to the advantage of certain existing channels and to the detriment of final 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~~distributors to achieve a minimum amount of annual purchases, are less likely to produce net negative effects, in particular if the minimum amount in question does not represent a significant proportion of the ~~dealer's~~distributor's total turnover ~~achieved with~~from 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~~where selective

(157) 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.

(158) Buying power may increase the risk of collusion between distributors. Distributors ~~holding~~that hold a strong market position may induce the suppliers to apply ~~selective~~selection criteria that ~~would~~ foreclose market access to new and more efficient distributors. Consequently, buying power may appreciably change the analysis of the possible anti-competitive

~~(142)~~ effects of selective distribution. Foreclosure of more efficient distributors from the market may ~~especially~~ arise where a strong ~~dealer~~distributor organisation imposes selection criteria on the supplier aimed at limiting distribution to the advantage of its members.

~~(143)~~(159) Pursuant to Article 5(1~~)~~(), point (c) of ~~the VBER provides that~~Regulation (EU) X, the supplier may not impose an obligation causing the authorised distributors, either directly or indirectly, not tosell the brands of particular competing suppliers. This provision ~~aims specifically at avoiding~~is intended to discourage 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 combined 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)~~(160) Competition concerns relating to the foreclosure of other suppliers will ~~normally~~generally not arise as long as other suppliers are not prevented from using the same distributors, as may occur where, 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~~ guidance relating to single branding set out in section 8.2.1. ~~of these Guidelines on single branding apply~~applies. Where selective distribution is not combined with a non-compete obligation, foreclosure of competing suppliers from the market may still be a concern. This is the case 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~~that coverage ratio is exceeded, if the market share of the five largest suppliers does not exceed 50%.

~~(145)~~(161) Assessing the dynamics of the market is important, as growing demand, changing technologies and changing market positions may make negative effects less likely thanwould be the case in mature markets~~.~~.

~~(146)~~ Selective distribution may be efficient when it leads to savings in logistical costs dueto economies of scale in transport, which may occur irrespective of the nature of the product (see paragraph (~~14~~16)(g~~) of these Guidelines).~~)). However, ~~such an~~this type of 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~~16)(b~~) of these Guidelines)~~)) or to help create or maintain a brand image (see paragraph (~~14~~16)(h~~) of these Guidelines),~~)), the nature of the product is important. In general, the use of ~~e for~~ selective distribution to achieve ~~these~~those types of efficiencies is more likely to be justified for new products, complex products or products whose

(162) 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~~for the purpose of protecting 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) of the Treaty if the combination is indispensable to protect substantial and relationship-specific investments made by the authorised distributor (see paragraph (~~14~~16)(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, imposing service requirements alone.

~~Example~~

~~(147)~~(163) The following is an 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~~system is 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~~six competitors in that market. Brand manufacturers B, C and D are its largest competitors with market shares of ~~respectively~~ 25%, 15% and 10~~%,~~% respectively, 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~~In 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 comparable 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~~generate and the limited effect on intra-brand competition, the conditions of Article 101(3) of the Treaty are likely to be fulfilled.

~~(148)~~(164) ~~Example~~The following is an 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~~

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 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 systems are 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 that area is specified. In addition, 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 that type of 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 manufacturers which do not use selective distribution usually sell through less specialised retailers

~~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 productin 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.~~

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~~In 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 benefit of the block exemption will have to be withdrawn, due to the presence of cumulative ~~restrictive~~anti-competitive effects resulting in less choice and higher prices for consumers.

4.6.3. Franchising

~~(149)~~(165) Franchise agreements contain licences of ~~intellectual property rights~~IPRs 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 during the lifetime of the agreement. 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~~various vertical restraints concerning the products being distributed, ~~in particular~~for instance selective distribution~~,~~ and/or non-compete obligations~~, exclusive distribution or weaker forms thereof~~.

(166) Franchising (with the exception of industrial franchise agreements) ~~presents~~has 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~~characteristics, provisions that are strictly necessary for the functioning of ~~such distribution~~franchising systems can be considered as falling outside the scope of Article 101(1~~).~~) of the Treaty. This concerns, for instance, restrictions that prevent the franchisee from using the know-how and assistance provided by the franchisor ~~from benefiting his competitors~~[64]for the

~~(150)~~ benefit of the franchisor's competitors[96] and ~~a~~ non-compete ~~obligation with regard~~obligations relating to the goods or services purchased by the franchisee that ~~is~~are necessary to maintain the common identity and reputation of the franchise network. In the latter case, theduration of the non-compete obligation is irrelevant ~~as long as~~, provided that it does not exceed the duration of the franchise agreement ~~itself~~.

~~(151)~~(167) Franchise agreements ~~are covered by~~ can benefit from the ~~VBER~~exemption provided by Article 2(1) of Regulation (EU) X where ~~both~~neither the supplier's ~~and~~nor the buyer's market shares ~~do not~~ exceed 30%.~~[65]~~ Specific guidance on the calculation of market shares in the context of franchising is provided in paragraph (174). The licensing of IPRs contained in franchise agreements is ~~dealt with~~addressed in paragraphs (~~67~~71) to (~~82) of these Guidelines.~~87). Vertical restraints contained in franchise agreements will be assessed ~~under~~using the ~~rules~~principles applicable to the distribution system that most closely ~~relates~~corresponds to the ~~nature of the specific~~particular franchise agreement. For instance, a franchise agreement that ~~gives rise to~~results in a closed network ~~since members~~, where the franchisees are ~~forbidden~~prohibited from selling to non-~~members shall~~franchisees, must be assessed under the ~~rules~~principles applicable to selective distribution. ~~In~~By contrast, a franchise agreement that does not create a closed network but which grants territorial exclusivity and protection from active sales by other franchisees ~~shall~~must be assessed under the ~~rules~~principles applicable to exclusive distribution.

~~(152)~~(168) ~~Franchising~~Franchise agreements that ~~include hardcore restrictions, including RPM,~~ ~~[66]~~ ~~shall~~ are not ~~be~~ covered by ~~the VBER. The Agreements that are not covered by the VBER~~Regulation (EU) X require an individual assessment under Article 101~~. This~~ of the Treaty. That 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 thusfulfil the conditions of Article 101(3~~).~~) of the Treaty.

~~(153)~~(169) ~~Example~~The following is an 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~~

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 (for example, 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 franchisees. They are not allowed to sell other sweets in their shops. The franchisor undertakes not to appoint another franchisee or operate a retail outlet in a given contract territory. The franchisor is also under an obligation to update and further develop its products, business outlook and operating manual and to make those 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

~~64~~

[96] See judgment ~~in Case 161/84~~of 28 January 1986, *Pronuptia de Paris GmbH* v *Pronuptia de Paris Irmgard Schillgallis*,
C-161/84, 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 fora 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 colouringmachine 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).~~

that cater for national tastes or from wholesalers that import sweets from foreign producers in addition to selling sweets from national producers. In 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 that colour 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 the scope of Article 101(1) of the Treaty. The restrictions on selling (that is to say, the allocation 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 sweet producers, it does not lead to any serious foreclosure. Consequently, to the extent that they fall within the scope of Article 101(1) of the Treaty, the franchise agreements are likely to fulfil the conditions of Article 101(3).

5. MARKET DEFINITION AND MARKET SHARE CALCULATION

5.1. Market Definition Notice

~~(154)~~(170) 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 of the Treaty to vertical agreements should therefore be defined on the basis of that guidance ~~and~~, respectively any future guidance relating to the definition of relevant market for the purposes of ~~EU~~Union competition law~~.~~ including any guidance that might replace the Market Definition Notice. These Guidelines only deal with specific issues that arise in the context of the application of ~~the VBER~~Regulation (EU) X, and that are not covered by the Market Definition Notice.

5.2. The calculation of market shares under ~~the VBER~~Regulation (EU) X

~~(155)~~ ~~Under~~Pursuant to Article 3 ~~VBER~~of Regulation (EU) X, the market share of both the supplier and the buyer are decisive ~~to determine~~in determining if the block exemption applies. In order for ~~the VBER~~Regulation (EU) X 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.~~

(171) 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).~~28)).

(172) At the distribution level, the vertical restraints usually concern not only the sale of ~~products~~goods or services between supplier and buyer, but also their resale. As differentdistribution formats usually compete, markets are in general not defined by the formof distribution that is applied, namely exclusive, selective or free distribution. ~~Where~~In sectors where suppliers generally sell a portfolio of ~~products~~goods or services, the entire~~-~~

~~(156)~~ portfolio may determine the ~~product~~ market definition~~ when~~, if the ~~portfolio~~portfolios, and not the individual ~~products~~goods or services contained in the portfolio, are regarded as substitutes by the buyers.

~~(157)~~(173) Where a vertical agreement involves three parties, each operating at a different level of trade, each ~~party's~~party’s market share must not exceed 30 % in order for ~~the VBER~~Regulation (EU) X to apply. As specified in Article 3(2) ~~VBER~~of Regulation (EU) X, where in a multi-party agreement an undertaking (the first 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~~Regulation (EU) X only applies if ~~its~~the first undertaking’s market share does not exceed the 30% threshold both as a buyer and as 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~~exemption provided by Article 2(1) of Regulation (EU) X.

~~(158)~~(174) 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.~~Regulation (EU) X. Where a franchisor does not supply goods or services ~~for the resale of these goods or services~~to be resold, but provides a bundle of ~~goods or~~ services and goods 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~~, namely the market where the franchisees exploit the business method to ~~provide~~supply 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~~that market. On such a market, the franchisor’s competitors may ~~be~~include providers of other franchised business methods, but also suppliers of substitutable goods or services that do not ~~applying~~apply franchising. For instance, without prejudice to the definition of such a market, if there was a market for fast-foodservices, 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~~that market.

5.3. Calculation of market shares under ~~the VBER~~Regulation (EU) X

~~(159)~~(175) As set out in Article ~~7~~8, point (a) ~~VBER~~of Regulation (EU) X, the market shares of the supplier and the buyer should in principle be calculated on the basis of value data~~.~~, taking into account all sources of revenue generated by the sale of the goods or services. Where value data are not available, substantiated estimates can be made, based on ~~the basis of~~ other reliable market information, such as volume figures.

(176) ~~The in~~In-house production, namely the production or 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~~is not ~~be~~ taken into account for the purposes of market definition or for the calculation of market shares under ~~the VBER. By contrast~~Regulation (EU) X. However, pursuant to Article ~~7~~8, point (c) ~~VBER~~of Regulation (EU) X, 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~~scenarios, the market~~), the market~~

~~(160)~~ definition and market share calculation should include the supplier's sales of its own goods made through its vertically integrated distributors and ~~agents~~agents[97]. Integrated distributors are connected undertakings within the meaning of Article 1(2) ~~VBER.~~[68]of Regulation (EU) X.

6. APPLICATION OF ~~THE VBER~~REGULATION (EU) X

6.1. Hardcore restrictions under ~~the VBER~~Regulation (EU) X

~~(161)~~(177) Article 4 ~~VBER~~of Regulation (EU) X contains a list of hardcore restrictions~~, which~~. These are ~~considered~~ serious restrictions of competition ~~that~~which should in most cases be prohibited because of the harm that they cause to consumers. ~~Vertical agreements that include~~Where a vertical agreement contains one or more hardcore restrictions~~ are~~, the whole agreement is excluded ~~as a whole~~ from the scope of application of ~~the VBER~~Regulation (EU) X.

~~(162)~~(178) The hardcore restrictions listed in Article 4 ~~VBER~~of Regulation (EU) X apply to vertical agreements concerning trade within the Union. Therefore, in so far as a vertical ~~agreements concern~~agreement concerns exports outside the Union or imports/re-imports from outside the Union ~~the case law of the CJEU suggests that such agreements~~, it 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]States[98].

~~(163)~~(179) Hardcore restrictions ~~pursuant to~~within the meaning of Article 4 ~~VBER~~of Regulation (EU) X are generally restrictions of competition by object within the meaning of Article 101(1~~).~~[70]) of the Treaty[99]. Restrictions of competition by object ~~within the meaning of Article 101(1) are agreements~~ are types of coordination between undertakings which~~,~~ can be regarded as being harmful by their very nature~~, have the potential to restrict competition.~~[71] ~~In that regard, it is apparent from the Court's case-law~~ to the proper functioning of normal competition[100]. The Court of Justice of the European Union has held that certain types of coordination between undertakings reveal a sufficient degree of harm to competition ~~that~~for it ~~may~~to be ~~found that there is no need~~considered unnecessary to ~~examine~~assess their ~~effects.~~[72]effects[101]. A finding of a restriction by object requires an individual assessment of the vertical agreement concerned. ~~In~~By contrast, hardcore restrictions ~~correspond to~~are a category of restrictions ~~under the VBER~~set out in Regulation (EU) X, for which it is presumed that they generally result in a net harm to competition~~ so that a~~. Therefore, vertical ~~agreement containing~~agreements that contain such ~~a~~ hardcore ~~restriction~~restrictions cannot ~~be block exempted pursuant to~~benefit from the exemption provided by Article 2(1) ~~VBER~~of Regulation (EU) X.

~~(164)~~(180) However, hardcore restrictions do not necessarily fall within the scope of Article 101(1~~).~~) of the Treaty. If a hardcore restriction ~~under the VBER~~listed in Article 4 of Regulation (EU) X is objectively necessary for ~~a~~ the implementation of a particular 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~~that agreement ~~falls~~ exceptionally falls outside the scope of Article 101(1) of the Treaty. It follows from

~~68~~

97 For ~~these market definition and market share calculation purposes, it is not relevant whether~~ this purpose, any sales by the integrated distributor ~~sells in addition~~ of the goods or services of

~~competitors~~competing suppliers are not taken into account.

~~69~~98 See ~~judgment in~~ Case C-306/96 - *Javico* v *Yves Saint Laurent* ~~EU:C:1998:173~~*Parfums*, paragraph 20.

~~70~~99 See Commission Staff Working Document, Guidance on restrictions of competition ~~"~~'by ~~object"~~object' for the purpose of defining which agreements may benefit from the De Minimis Notice, 25 June 2014, SWD(2014) 198 final, p. 4.

~~71~~100 See judgment of 20 January 2016, *Toshiba Corporation* v *Commission*, C-373/14 P, EU:C:2016:26, paragraph 26.

101 See judgment ~~in~~of 2 April 2020, *Budapest Bank and Others*, Case C-~~8/08 *T-Mobile Netherlands*~~228/18, EU:C:~~2009:343, paragraph 31~~2020:265, paragraphs 35 to 37 and case law cited.

~~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,~~ that the Commission will apply the following principles when assessing a vertical agreement:

~~(a)~~ ~~Where~~(a) where a hardcore restriction within the meaning of Article 4 ~~VBER~~of Regulation (EU) X is included in a vertical agreement, ~~this~~that agreement is likely to fall within the scope of Article 101(1~~).~~) of the Treaty.

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

~~(165)~~(181) An undertaking may demonstrate pro-competitive effects under Article 101(3) of the Treaty in an individual ~~case.~~[74]case[102]. For ~~this~~that purpose, the undertaking ~~has to~~must substantiate that efficiencies are likely and that ~~these~~the efficiencies are likely to result from including the hardcore restriction in the agreement, ~~when~~as well as demonstrating that ~~all~~ the other conditions of Article 101(3) of the Treaty 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~~a final assessment of whether the conditions of Article 101(3) of the Treaty are fulfilled.~~[75]~~

~~(166)~~ The examples in ~~the following three~~ paragraphs ~~of these Guidelines~~(183) and (184) are ~~meant~~intended 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.~~

(182) ~~[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~~how the Commission ~~– Notice – Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97~~will apply the principles mentioned above.

~~[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).~~

(183) ~~Example~~The following is an example of cross-supplies between authorised distributors:

In the case of a selective distribution system, cross-supplies between authorised distributors must generally remain free (see paragraph (237). However, restrictions on active sales may, under certain circumstances, fulfil the conditions of Article 101(3) of the Treaty. This may be the case, for example, if it is necessary for authorised wholesalers located in different territories to invest in promotional activities in the territory in which they distribute the contract goods or services in order to support sales by authorised retailers and it is not practical to specify the required promotional activities as a contractual obligation in the agreement.

~~(169)~~(184) The following is an 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.~~

In the case of genuine testing of a new product in a limited territory or with a limited group of customers, or in the case of a staggered introduction of a new product, the distributors that are appointed to sell the new product on the test market, or those that participate in the first round(s) of the staggered introduction may be restricted from making active sales outside the test market or to market(s) or customer groups where the product has not yet been introduced. Such restrictions may fall outside the scope of Article 101(1) of the Treaty for the period necessary for the testing or introduction of the product.

6.1.1. Resale price maintenance

(185) The hardcore restriction set out in Article 4, point (a) ~~VBER~~of Regulation (EU) X concerns resale price maintenance ~~(hereafter "RPM"),~~('RPM'), that is, agreements which, directly or ~~concerted practices having as their direct or indirect~~ indirectly, have the object of restricting the ~~establishment of a fixed or minimum resale~~buyer's ability to determine its sale price ~~or~~, including

102 See in particular paragraph (16), points (a) to (i) of these Guidelines describing types of efficiency that are generally associated with vertical restraints and section 6.1.1. of these Guidelines on RPM. For general guidance on the assessment of efficiencies, see also the Article 101(3) Guidelines.

~~(170)~~ those which establish a fixed or minimum sale price ~~level~~ to be observed by the buyer[103]. A requirement for the buyer~~.[76] A vertical agreement or concerted practice that relates to~~ to set its sale price within a certain range ~~within which the buyer has to price~~ is ~~therefore not in line with~~ RPM within the meaning of Article 4, point (a) ~~VBER~~of the Regulation.

~~(171)~~(186) RPM can be ~~established~~applied through direct means. This is the case for contractual provisions or ~~concerned~~concerted practices that directly ~~establish the retail price and therefore result in clear-cut restrictions.[77] Such restrictions include contractual provisions allowing~~set the price that the buyer must charge to its customers[104], or which allow the supplier to set the resale price~~ that~~, or which prohibit the buyer ~~has to charge its customer or prohibiting the buyer to sell~~from selling below a certain price level. The restriction is also clear-~~-~~cut where ~~a~~the supplier requests a price increase and the buyer complies with ~~such a~~the request.

~~(172)~~(187) RPM can also be ~~achieved~~applied 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~~(a) fixing the resale margin;

– (b) fixing the maximum level of ~~a~~ discount that the distributor can grant from a prescribed price level;

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

~~Linking~~(d) imposing minimum advertised prices ('MAPs'), which prohibit the distributor from advertising prices below a level set by the supplier;

– (e) linking the prescribed resale price to the resale prices of competitors; ~~and~~

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

~~(173)~~(188) ~~However, as set out in~~ Pursuant to Article 4, point (a) ~~VBER~~of Regulation (EU) X, the imposition by the supplier of a maximum ~~retail~~resale price or the ~~determination~~ recommendation of a resale price ~~recommendation by the supplier does~~is not ~~in itself amount to RPM~~a hardcore restriction. 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~~sale price, this can amount to RPM. ~~An example of incentives to apply a certain price level~~This would be the ~~reimbursement of~~case, for example, where the supplier reimburses promotional costs ~~in case of compliance with~~incurred by the buyer subject to the condition the buyer does not deviate from the maximum resale price or the recommended resale price. An example of ~~disincentives~~a disincentive to lower the ~~sales~~sale price would be ~~an intervention of~~where the supplier threatens to cut further supplies in ~~case~~response to a deviation by 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.~~

(189) Although in principle MAPs leave the distributor free to sell at a price that is lower than the advertised price, they disincentivise the distributor from setting a lower sale price by restricting its ability to inform potential customers about available discounts. A key parameter for price competition between retailers is thereby removed. For the purpose of applying Article 4, point (a) of Regulation (EU) X, MAPs will therefore be treated as an indirect means of applying RPM.

(190) Direct or indirect means of ~~achieving price fixing~~applying RPM can be made more effective when combined with measures aimed at identifying price-cutting distributors, such as implementing a

[103] It should be noted that RPM can be linked to other restrictions, including horizontal collusion in the ~~implementation~~form of ~~a~~ hub-and-spoke arrangements. These are addressed in paragraph 55 of the Horizontal Guidelines.

[104] See, for example, Commission Decision in AT.40182 - *Guess*, recitals 84, 86 and 137.

~~(175)~~ price monitoring system, or ~~the obligation on~~obliging 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 RPMsince 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.~~

(191) Price monitoring is increasingly used in e-commerce, where both ~~manufacturers~~suppliers and retailers often use ~~specific~~ price monitoring software[105]. This software~~.[78] Such price monitoring does not constitute RPM as such. It however~~ increases price transparency in the market~~, which~~ and allows manufacturers to effectively track the resale prices in their distribution ~~network and to intervene swiftly in case of price decreases.~~network[106]. It also allows retailers to ~~effectively~~ track the prices of their competitors~~ and report price decreases~~. However, on their own, price monitoring and price reporting are not RPM.

~~(176)~~(192) Under an agency agreement, the principal generally sets the sale price, as it bears the commercial and financial risks relating to the sale. However, where the agreement does not meet the conditions to ~~the manufacturer, together with a request to intervene against such price decreases.[79]~~be categorised as an agency agreement that falls outside the scope of Article 101(1) of the Treaty (see in particular paragraphs (30) to

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[78](34) of these Guidelines), any direct or indirect obligation preventing or restricting the agent from sharing its remuneration with the customer, irrespective of whether the remuneration is fixed or variable, is a hardcore restriction within the meaning of Article 4, point (a) of Regulation (EU) X[107]. The agent should therefore be left free to reduce the effective price paid by the customer without reducing the income due to theprincipal[108].

(193) Under a fulfilment contract, the supplier enters into a vertical agreement with a buyer for the purpose of executing (fulfilling) a supply agreement concluded previously between the supplier and a specific customer. Where the supplier selects the undertaking that will provide the fulfilment services, the imposition of a resale price by the supplier is not RPM. In that case, the resale price imposed in the fulfilment contract does not restrict competition for the supply of the goods or services to the customer or competition for the supply of the fulfilment services. For example, this applies where customers purchase goods from an undertaking active in the online platform economy which is operated by a group of independent retailers under a common brand and that undertaking determines the price for the sale of the goods and forwards orders to the retailers for fulfilment[109]. By contrast, where the undertaking that will provide the fulfilment services is selected by the customer, the imposition ofa resale price by the supplier may restrict competition for the provision of the fulfilment services. In that case, the imposition of a resale price may amount to RPM.

(194) Article 4, point (a) of Regulation (EU) X is fully applicable in the online platform economy. In particular, where an undertaking provides online intermediation services within the meaning of Article 1(1), point (e) of the Regulation, it is a supplier in respect of those services and therefore Article 4, point (a) of the Regulation applies to restrictions imposed by the undertaking on buyers of the online intermediation

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

~~[79]~~[106] See Commission Decisions in AT.40182 - *Pioneer*, ~~paragraphs~~recitals 136 and 155; AT.40182 - *Denon & Marantz*, ~~paragraph~~recital 95; AT.40181 - *Philips*, ~~paragraph~~recital 64; AT.40465 - *Asus*, recital 27.

[107] Restrictions of the ability of providers of online intermediation services within the meaning of Article 1(1), point (e) of the Regulation to share their remuneration relating to the provision of the online intermediation services are not hardcore restrictions within the meaning of Article 4, point (a) of the Regulation, as they do not restrict the ability of a buyer to determine its sale price. See ~~Commission Decisions in AT.40182 *Pioneer*,~~ paragraphs ~~136; AT.40465 *Asus*,~~(64) to (67), in particular paragraph ~~27.~~(67)(a).

~~(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.~~

~~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~~

108 See, for instance, Commission Decision in Case No IV/32.737 - *Eirpage*, in particular recital 6.

109 This guidance is without prejudice to the assessment of the horizontal agreements between the retailers that set up and operate such a fulfilment model under Article 101 of the Treaty, taking into account the guidance provided by the Horizontal Guidelines.

~~(179)~~ services relating to the sale price of goods or services~~.~~ that are sold via the online intermediation services. While this does not prevent ~~an~~a provider of online intermediation services ~~provider~~ from incentivising ~~the~~ users of the ~~online intermediation~~ services to sell their goods or services at a competitive ~~level~~price or to reduce their prices, ~~Article 4(a) VBER prohibits~~ the imposition by the provider of online intermediation services ~~provider from imposing~~of a fixed or minimum ~~sales~~sale price for the ~~transaction~~transactions that it ~~facilitates~~intermediates is a hardcore restriction within the meaning of Article 4, point (a) of Regulation (EU) X.

~~(180)~~ The ~~CJEU~~Court of Justice of the European Union 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~~ RPM is a restriction of competition by object within the meaning of Article 101(1~~).~~[81]) of the Treaty[110]. However, as ~~mentioned~~stated in paragraphs (~~163~~179) to (~~165) of these Guidelines,~~181), the qualification of arestriction as a hardcore restriction~~, and~~ or as a by object restriction~~,~~ does not mean that ~~agreements that amount to RPM are~~ it is a *per se* ~~infringements~~infringement of Article

(195) 101 of the Treaty. Where undertakings consider ~~that~~ RPM ~~is~~to be efficiency~~-~~-enhancing in an individual case, they may ~~bring forward~~rely on efficiency justifications under Article 101(3~~).~~) of the Treaty.

~~(181)~~(196) ~~RPM is generally considered a serious restriction of competition, as it~~RPM can restrict intra-brand and/or inter-brand competition in ~~different~~various ways:

~~[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.~~

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~~(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)~~ (a) RPM may facilitate collusion between suppliers, ~~notably~~by enhancing price transparency in the market, thereby making it easier to detect whether a supplier is deviating from the collusive equilibrium by cutting its price. This negative effect is more likely in markets prone to collusive outcomes, for ~~instance~~example, where suppliers form a tight oligopoly and a significant ~~part~~share 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)~~ (b) RPM may facilitate collusion between buyers at the distribution level~~. The resulting loss of price competition seems particularly problematic when RPM is inspired~~, in particular where it is driven 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~~.~~;

(c) in some cases, RPM may also soften competition between manufacturers and/or between retailers, in particular when manufacturers use the same distributors to distribute their products and RPM is applied by all or many of them;

~~(d)~~ (d) RPM may reduce the pressure on the supplier's margin, in particular where ~~the~~a manufacturer has a commitment problem, that is, where it has an interest in lowering the price charged to subsequent distributors. In ~~such a~~that 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~~(e) by preventing price competition between distributors, RPM may prevent or hinder the entry and expansion of new or 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~~

110 See the judgments of 3 July 1985, *Binon* v *AMP*, C-243/83, EU:C:1985:284, paragraph 44; 1 October 1987, *VVR* v *Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten*, C-311/85, EU:C:1987:418, paragraph 17; 19 April 1988, *Erauw-Jacquery* v *La Hesbignonne*, C-27/87, EU:C:1988:183, paragraph 15.

~~(f)~~ incentivise them to favour the supplier's brand over rival brands when advising customers, even where such advice is not in the customer's interest ~~of these customers~~, or not to sell ~~these~~the rival brands at all~~.~~;

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

~~(182)~~(197) However, RPM may also lead to efficiencies, in particular where it is supplier driven. ~~If~~Where undertakings ~~invoke Article 101(3) claiming that RPM may lead to efficiencies, it is for them to put forward concrete evidence~~ rely on an efficiency defence for RPM, they must be able to substantiate this ~~claim~~ with concrete evidence and ~~to~~ show that all the conditions of Article 101(3) are ~~indeed~~ fulfilled in the individual ~~case. Three~~case[111]. Four examples of such ~~an efficiency defence~~ efficiencies are set out below.

~~(a)~~ (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~~ in promoting that 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) of the Treaty also requires that there are no realistic and less restrictive alternative means ~~do not exist.~~of incentivising the distributors to promote the product. To meet ~~this~~that requirement, suppliers may, for example, demonstrate that it

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

~~(b)~~ (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~~in particular~~, they may be necessary to organise such a campaign~~ in a distribution system ~~in which~~where the supplier applies a uniform distribution format, such as a franchise system. ~~Given~~In such a case, given its temporary character, the imposition of fixed retail prices may be considered on balance pro-competitive.

(c) A minimum resale price or MAP can be used to prevent a particular distributor from using the product of a supplier as a loss leader. Where a distributor regularly resells a product below the wholesale price, this can damage the brand image of the product and, over time, reduce overall demand for the product and undermine the supplier's incentives to invest in quality and brand image. In that case, preventing that distributor from selling below the wholesale price, by imposing on it a targeted minimum resale price or MAP may be considered on balance pro-competitive.

(d) In some situations, the extra margin provided by RPM may allow retailers to provide ~~(~~additional~~)~~ pre-sales services, in particular in the case of ~~experience or~~ complex products. If enough customers take advantage of such services ~~to make their choice~~in order to choose a product but subsequently purchase at a lower price with retailers that do not provide such services (and hence do not incur ~~these~~those costs), high-service retailers may reduce or ~~eliminate these~~stop providing pre-sales services~~ that~~, which enhance the demand for the ~~supplier's~~supplier's product. ~~RPM may help to prevent such free-riding at the distribution level.~~ The supplier ~~will have to convincingly~~must demonstrate that there is a risk of free riding at the distribution level, that fixed or minimum resale

[111] Pursuant to Article 2 of Regulation (EC) No 1/2003, the ~~RPM agreement is necessary~~undertaking claiming the benefit of Article 101(3) of the Treaty bears the burden of proving that the conditions of that paragraph of the Treaty are fulfilled.

~~(c)~~ prices provide sufficient incentives for investments in ~~order to overcome free riding between retailers on these~~pre-sale services~~.~~ and that there is no realistic and less restrictive alternative means of overcoming such free riding. In this ~~case~~situation, the likelihood that RPM ~~is found~~will be considered as 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~~ use of recommended resale ~~price to a reseller~~ prices or ~~requiring the reseller to respect a~~ maximum resale ~~price when~~prices can benefit from the exemption provided by Article 2(1) of Regulation (EU) X where the market share of each of the parties to the agreement does not exceed the 30% threshold~~,~~ and provided ~~it~~that this does not amount to the imposition of a minimum or fixed ~~sales~~sale price as a resultof pressure ~~from,~~ or incentives ~~offered by,~~from any of the parties, as set out in paragraphs (~~172) to~~

(198) ~~(173) of these Guidelines. The remainder of this section provides~~187) and (188). Paragraphs (199) to (201) provide guidance for the assessment of recommended or maximum resale prices above the market share threshold.

~~(184)~~(199) The ~~possible~~risks to competition ~~risk of~~associated with recommended and maximum resale prices~~is~~are, first, that they ~~will work~~may act as a focal point for ~~the~~ resellers and ~~might~~may be followed by most or all of them. ~~Moreover, recommended and maximum prices~~Second, they may soften competition or facilitate collusion between suppliers.

~~(185)~~(200) 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~~will lead 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 thepreferred resale price proposed by such an important supplier ~~on the market~~.

~~(186)~~(201) Where recommended or maximum resale prices produce appreciable anti-competitive effects ~~are established for recommended or maximum resale prices,~~, it is necessary to assess whether they fulfil the ~~question~~conditions of ~~a possible exemption under~~ the exception provided by Article 101(3) ~~arises. For~~of the Treaty. As regards maximum resale prices, ~~avoiding~~ the avoidance of ‘double ~~marginalisation,~~marginalisation’[112] may be particularly relevant. A maximum resale price may also help to ensure that the supplier’s brand ~~in question~~ competes more ~~forcefully~~fiercely with other brands~~, including own label products,~~ distributed by the same distributor, including private label products.

6.1.2. Hardcore restrictions pursuant to Article 4, points (b~~) to~~), (c), (d) ~~VBER~~and (e) of Regulation (EU) X

6.1.2.1. ~~General principles~~ Qualification as a hardcore restriction pursuant to Article 4, points (b~~) to~~), (c), (d)~~VBER~~and (e) of Regulation (EU) X

~~(187)~~(202) Article 4, points (b~~) to~~), (c) and (d) ~~VBER provides~~of Regulation (EU) X contain a list of hardcore restrictions and exceptions that apply ~~depending on the~~ to various types of distribution system~~ operated by the supplier~~, respectively: exclusive distribution, selective distribution ~~or~~and free distribution. The hardcore restrictions set out in Article 4, points (b), 4(c)(i) and (d) of ~~the VBER~~Regulation (EU) X concern agreements ~~or concerted practices~~ that, directly or indirectly, in isolation or in combination with other factors ~~under the control of~~ controlled by the parties, have ~~as their~~the object ~~the restriction of sales by a buyer or its customers, in as far as those restrictions relate to~~of restricting the territory into which or the ~~customer groups~~customers to whom the buyer or its customers may sell the contract goods or services. Article 4, points (c)(ii) and (iii) of ~~the VBER~~Regulation (EU) X provide that, in a selective distribution system, ~~the restriction~~restrictions 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~~and restrictions of active or passive sales to end users by members of the selective distribution system operating at the retail level of trade ~~constitute~~are hardcore restrictions.

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[112] See in this respect paragraphs (13) and (16).

Article 4, points (b~~) to~~), (c) and (d) ~~VBER applies~~ of the Regulation apply irrespective of the sales channel used~~. Vertical agreements~~ , for example, whether sales are made offline or online.

(203) Article 4, point (e) of Regulation (EU) X provides that a vertical agreement which, directly or indirectly, in isolation or in combination with other factors~~, have as their~~ controlled by the parties, has the object~~, to prevent the buyers or their customers from effectivelyusing~~ of preventing the effective use of 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~~ by the buyer orits customers to sell the contract goods or services~~, as they restrict sales to~~ to particular territories or customers is a hardcore restriction. A vertical agreement containing one or more restrictions of online sales or online advertising[113] which *de facto* prohibit the buyer from using the internet to sell the contract goods or services has at the very least the object of restricting passive sales to end users wishing to purchase online and located outside the buyer's physical trading area[114]. Therefore such agreements fall within the scope of Article 4, point (e) of Regulation (EU) X. The same applies to vertical agreements which do not directly prohibit, but have the object of preventing the effective use of the internet by a buyer or its 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~~to sell the contract goods or services ~~online,~~to particular territories or customers. For instance, this is the case for vertical agreements which 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~~the object 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.~~aggregate volume of online sales of the contract goods or services or the possibility for end users to buy the contract goods or services online. Similarly, this is the case for vertical agreementsthat have the object of preventing the use of one or more entire online advertising channels by the buyer, such as search engines[115] or price comparison services, or of preventing the buyer from establishing or using its own online store[116]. The assessment of whether a restriction is hardcore within the meaning of Article 4, point
~~(188)~~ (e) of Regulation (EU) X may take into account the content and context of the restriction, but it 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~~ characteristics of the parties to ~~prevent the buyers or their customers from effectively using the internet to sell their goods or services onlineand thus restrict sales to customers wishing to purchase online and located outsidethe 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~~the vertical agreement.

~~(189)~~(204) ~~These~~The hardcore restrictions referred to in paragraph (202) may ~~be the~~ result ~~of~~from direct obligations, such as the obligation not to sell to ~~certain customers or to customers in certain~~particular territories or customers, or the obligation to refer orders from ~~these~~such customers to other distributors. ~~It~~They may also result from the supplier applying indirect measures ~~aimed at inducing~~to induce the ~~distributor~~buyer not to sell to such customers, such as:

[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)~~ (a) requiring the ~~requirement~~buyer to request the supplier's prior approval~~;~~~~[84]~~ for sales to such customers[117];

~~(b)~~ ~~the refusal~~(b) refusing or ~~reduction of~~reducing bonuses or discounts~~,~~~~[85]~~ ~~and~~ if the buyer sells to such customers[118] or making compensatory payments ~~by~~to the ~~supplier~~buyer if ~~the distributor~~it stops ~~sales~~selling to such customers;

~~(c)~~ (c) terminating 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~~ of products if the buyer sells to ~~be sold to certain customer groups or to~~such customers ~~in certain territories~~;

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[113] See also paragraphs (204), (206) and (210) relating to various types of online sales and online advertising restrictions.

[114] See also Case C-439/09 - *Pierre Fabre Dermo-Cosmétique*, paragraph 54.

[115] See also Commission Decision in AT.40182 - *Guess*, recitals 118 to 126.

[116] See Case C-439/09 - *Pierre Fabre Dermo-Cosmétique*, paragraphs 56 and 57 and paragraph (224) of these Guidelines.

[117] See, for example, Case T-77/92 - *Parker Pen* v *Commission*, paragraph 37.

[118] See, for example, judgment of 9 July 2009, *Peugeot and Peugeot Nederland* v *Commission*, Case T-450/05, EU:T:2009:262, paragraph 47.

(d) limiting or reducing the volumes supplied, for instance, so that the volumes correspond to the demand from customers in certain territories or the demand from certain customer groups;

(e) threatening to terminate the vertical agreement[119] or not to renew it if the buyer sells to such customers;

(f) charging a higher price to the distributor for products that are to be sold to suchcustomers[120];

~~(h)~~(g) limiting the proportion of sales made by the buyer to ~~certain customer groups or to~~such customers~~ incertain territories~~;

~~(i)~~ ~~limiting the~~(h) preventing the buyer from using additional languages ~~to be used~~ on the packaging or forthe promotion of the ~~products~~products[121];

~~(j)~~ ~~the supply of~~(i) supplying another product in return for the buyer stopping its sales to such~~sales~~customers;

~~(k)~~ ~~payments~~(j) paying the buyer to stop selling to such ~~sales~~customers;

~~(l)~~ (k) obliging the ~~obligation~~buyer to pass-on to the supplier profits from such ~~sales.~~customers[122];

~~(190)~~ ~~It may further result from the supplier not providing~~(l) excluding from a Union-wide guarantee service~~, whereby the supplier normally reimburses all distributors for providing a mandatory guarantee service, even in relation to~~ reimbursed by the supplier products that are resold outside the buyer's territory or products that are sold ~~by other distributors into their~~in the buyer's territory~~.~~[87] by buyers located in other territories[123].

~~(191)~~(205) ~~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~~Measures that allow a manufacturer to verify the destination of the supplied goods, such as the use of differentiated labels, specific language clusters or serial numbers~~.~~, or the threat or performance of audits to verify the buyer's compliance with other restrictions[124] are not in themselves restrictions of competition. However, they may be considered to form part of a hardcore restriction of the buyer's sales when used by the supplier to control the destination of the supplied goods, for instance when used in conjunction with one or more of the practices mentioned in paragraphs (203) and (204).

~~(192)~~(206) In addition to the direct and indirect ~~obligations laid down in (187)~~restrictions referred to ~~(190) of these Guidelines,~~in paragraphs (202) to (204), hardcore restrictions specifically ~~related~~relating to online sales may similarly be the result of direct or indirect obligations. Besides a direct prohibition ~~to~~of the use of the internet ~~as a sales channel~~to sell the contract goods or services, the following are ~~further~~ examples of obligations~~, directly or~~ that indirectly~~, having~~ have the object of preventing the effective use of the internet by the buyer to ~~prevent distributors from effectively using the~~sell the contract goods or services to particular territories or customers within the meaning of Article 4, point (e) of Regulation (EU) X:

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[119] 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:~~of 6 July 2009~~:262, paragraph 47.~~

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

87 ~~If~~ 120 See, for example, Commission Decision in AT.40433 - *Film merchandise*, recital 54.

121 See, for example, Commission Decision in AT.40433 - *Film merchandise*, recitals 52 and 53.

122 See, for example, Commission Decision in AT.40436 - *Nike*, recital 57; Commission Decision in AT.40433 - *Film merchandise*, recitals 61 to 63.

123 See, for example, Commission Decision in AT.37975 - *PO/Yamaha*, recitals 111 and 112. Conversely, an arrangement under which the supplier ~~decides not to reimburse~~ agrees with its distributors ~~for services rendered under the Union-wide guarantee, it may be agreed with these distributors~~ that ~~a~~where one distributor ~~which~~ makes a sale ~~outside its~~to a territory that has been allocated ~~territory will have to~~ to another distributor, the first distributor must pay the second 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~~ does not have the object of restricting sales by the distributors outside their ~~territory~~ allocated territories (see judgment of ~~the Court of First Instance in Case T-67/01~~13 January 2004, *JCB Service* v *Commission* ~~[~~, Case T-67/01, EU:T:2004~~] ECR II-49~~:3, paragraphs 136 to 145).

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

~~a requirement that the distributor, irrespective of the distribution system it operates, shall~~[124]

[124] See, for example, Commission Decision in AT.40436 - *Nike*, recitals 71 and 72; Commission Decision in AT.40433 - *Film merchandise*, recitals 65 and 66.

~~(a)~~ (a) requiring the buyer to prevent customers located in another territory fromviewing its website or ~~shall automatically~~ online store or to re-route ~~its~~ customers to the ~~manufacturer's or other distributors' websites. This does not exclude an obligation on the distributor~~ online storeof the manufacturer or of another seller. However, obliging the buyer to offer ~~on its website~~ links to ~~websites~~ the online stores of the supplier or of other ~~distributors and/or the supplier;~~[88]sellers is not a hardcore restriction[125];

~~(b) a requirement that the distributor, irrespective of the distribution system it operates, shall~~(b) requiring the buyer to terminate consumers' online transactions ~~once~~where their credit card data reveal an address that is not within the ~~distributor's territory;~~[89]buyer's territory[126];

~~(c) a requirement that~~(c) requiring the ~~distributor shall~~buyer to sell the contract goods or services only ~~sell~~ in a physical space or in the physical presence of specialised ~~personnel;~~[90]personnel[127];

~~(d) a requirement that the distributor shall~~(d) requiring the buyer to seek the supplier's prior authorisation ~~for selling~~before making individual online sales transactions;

~~(e) a requirement that~~(e) prohibiting the ~~distributor shall not use~~buyer from using the supplier's trademarks or brand names on its website or in its online store;

~~a direct~~(f) prohibiting the buyer from establishing or ~~indirect prohibition to use a specific~~operating one or more online stores, irrespective of whether the online store is hosted on the buyer's own server or on a third party server[128];

~~(f)~~ (g) prohibiting the buyer from using an entire online advertising channel, such as search engines[129] or price comparison ~~tools or advertising on search engines, or other online advertising~~services, or restrictions which indirectly ~~prohibiting~~prohibit the use of ~~a specific~~an entire online advertising channel, such as an obligation ~~on the distributor~~ not to use the ~~suppliers'~~supplier's trademarks or brand names for bidding to be referenced in search engines, or a restriction ~~to provide~~on providing 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 comparisontools 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 goodsor services online or from effectively using one or more online advertising channels, as explained in paragraph (188) above. These~~ services. Such 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~~have the 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~~by the buyer to sell the contract goods or services to particular 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:~~or customers, as they limit the buyer'sability to target customers beyond its physical trading area, inform them about its offers and attract them to its online store or other sales channels. Prohibiting the use of particular price comparison services or search engines is generally not a hardcore restriction, as the buyer may use other online advertising services to raise awareness of its online sales activities. However, prohibiting the use of the most widely used advertising services in the particular online advertising channel may amount to a hardcore restriction, if the remaining services in that advertising channel are *de facto* not capable of attracting customers to the buyer's online store.

(207) Contrary to the restrictions referred to in paragraph (204), requirements imposed by the supplier on the buyer relating to the manner in which the contract goods or services are to be sold can benefit from the exemption provided by Article 2(1) of Regulation (EU) X, irrespective of the type of distribution system. In particular, the supplier may impose requirements relating to quality. For example, in a selective distribution system, the supplier may impose requirements relating to the minimum size and appearance of the buyer's shop (for example, relating to fixtures, furnishings, design, lighting and floor coverings) or the presentation of the product (for example,

[125] Article 3 of Regulation (EU) 2018/302.
[126] Article 5 of Regulation (EU) 2018/302.
[127] See Case C-439/09 - *Pierre Fabre Dermo-Cosmétique*, paragraphs 36 and 37.
[128] See also paragraph (200).
[129] See also Commission Decision in AT.40182 - *Guess*, recitals 118 to 126.

the minimum number of products of the brand to be displayed, the minimum space between products)[130].

(208) Similarly, the supplier may impose requirements on the buyer relating to the manner in which the contract goods or services are to be sold online. Restrictions relating to the use of particular online sales channels, such as online marketplaces, or the imposition of quality standards for online sales can generally benefit from the exemption provided by Article 2(1) of Regulation (EU) X, irrespective of the type of distribution system, provided that they do not indirectly have the object of preventing the effective use of the internet by the buyer to sell the contract goods or services to particular territories or customers. Online sales restrictions generally do not have such an object where the buyer remains free to operate its own online store[131] and to advertise online[132]. In such cases, the buyer is not prevented from making effective use of the internet to sell the contract goods or services. The following are examples of requirements relating to online sales that can benefit from the exemption provided by Article 2(1) of the Regulation:

(a) requirements intended to ensure the quality or a particular appearance of the buyer's online store;

(b) requirements regarding the display of the contract goods or services in the online store (such as the minimum number of items displayed, the way the supplier's trademarks or brands are displayed);

~~(a)~~ (c) a direct or indirect ban on ~~sales on~~ the use of online ~~marketplaces;~~[92] marketplaces[133];

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

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

~~(195)~~ A requirement that the ~~same~~ buyer pays a different wholesale price for products ~~intended to be resold~~sold online than for products ~~intended to be resold~~sold offline (dual pricing) can benefit from the ~~safe harbour~~exemption provided by Article 2(1) of ~~the VBER, in so far~~Regulation (EU) X, as it ~~has as its object to~~may incentivise or reward ~~the~~an appropriate level of investments ~~respectively made~~ in online ~~and~~or offline~~. Such~~ sales channels, provided that it does not have the object of restricting sales to particular territories or customers, as provided for in Article 4, points (b), (c) and (d) of Regulation (EU) X[134]. However, where the 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.~~

(209) ~~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~~the object ~~to prevent~~of preventing the effective use of the internet ~~for the purposes of selling online it amounts to~~ by the buyer to sell the contract goods or services to particular territories or customers, it is a hardcore restriction~~, as set out in paragraph (188~~ within the meaning of Article 4, point (e) of ~~these Guidelines~~Regulation (EU) X. This would, in particular, be the case where the ~~price~~ difference in the

[130] For other examples, see E-commerce Sector Inquiry Final Report, paragraph 241.

[131] See Case C-439/09 - *Pierre Fabre Dermo-Cosmétique*, paragraphs 56 and 57, and paragraph (224) of these Guidelines.

[132] See also Commission Decision in AT.40182 - *Guess*, recitals 118 to 126, and paragraph 200 of these Guidelines.

[133] Case C-230/16 - *Coty Germany*, paragraphs 64 to 69; see also section 8.2.3. of these Guidelines.

[134] See also paragraph (206)(g).

wholesale price makes ~~the effective use of the internet for the purposes of~~ selling online unprofitable or financially ~~not sustainable~~unsustainable[135], or where dual pricing is used to limit the quantity of products made available to the buyer for sale online[136]. Conversely, dual pricing can benefit from the exemption provided by Article 2(1) of Regulation (EU) X where the difference in the wholesale price is reasonably related to differences in the investments and costs incurred by the buyer to make sales in each channel. Similarly, the supplier may charge a different wholesale price for products that are to be sold through a combination of offline and online channels, where the price difference takes into account investments or costs related to that type of distribution. The parties may agree an appropriate method to implement dual pricing, including, for example, an ex post balancing of accounts on the basis of actual sales.

(210) Online advertising restrictions ~~in vertical agreements~~can benefit from the ~~block~~ exemption ~~as long as~~provided by Article 2(1) of Regulation (EU) X, provided that they do not~~, directly or indirectly,~~ have ~~as their~~the 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~~of preventing the use of an entire advertising ~~channels~~channel by the buyer. Examples of online advertising restrictions ~~benefitting~~that can benefit from the ~~safe harbour of the VBER~~exemption include:

(a) a requirement that online advertising meets certain quality standards or includes specific content or information~~, or~~;

~~(196)~~(b) a requirement that the buyer does not use the services of ~~individual~~particular onlineadvertising providers that do not ~~meeting~~meet certain quality standards~~.~~;

(c) a requirement that the buyer does not use the brand name of the supplier in the domain name of its online store.

6.1.2.2. Distinction between 'active sales' and 'passive ~~sales~~sales'

~~(197)~~(211) ~~A restriction~~Article 4 of ~~the territory or customer group into which a buyer or its customers can sell the contract goods or services can concern active or~~Regulation X (EU) distinguishes between restrictions of active sales and restrictions of passive sales ~~into that territory or to those customers.~~in the context of exclusive distribution systems. Article 1(1), points (l) and (m) ~~VBER provides the~~of Regulation (EU) X provide definitions of active and passive sales.

~~(198)~~ Article 1(1), point (m) ~~VBER provides that selling~~of Regulation (EU) X sets out that, in the case of sales to customers in an exclusively allocated territory or customer group, sales 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~~ the seller are passive sales. For instance,setting up an online store is a form of passive selling, as it is a ~~way~~means to allow potential customers to reach ~~a particular distributor.~~the seller. The ~~use~~operation of ~~a website~~an online store may have effects that extend beyond the ~~distributor's own territory and customer group, for instance,~~ seller's physical trading area, including by enabling online purchases by customers located ~~outside~~ in other territories or customer groups. Nonetheless, such purchases (including the ~~physical trading area~~delivery of the ~~distributor. If, absent any active targeting by~~ products) are passive sales, provided that the ~~distributor of a~~ seller does not actively target the specific customer or the specific territory or customer group~~, a customer from that territoryor 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~~which the customer belongs. The same applies ~~if~~where a customer opts to be kept automatically informed by the ~~distributor~~seller and such information leads to a sale. Similarly, ~~using~~the use of search engine optimisation ~~techniques on a website~~, namely ~~using~~ tools or techniques intended to improve the visibility or ranking of ~~that website on~~the online store in search ~~engines, is a form of passive selling.~~

(212) ~~Conversely,~~engine results, or offering ~~on a website~~an app in an app store, are, in principle, means to enable potential customers to reach the seller and are therefore forms of passive selling.

(213) Conversely, Article 1(1), point (l) of Regulation (EU) X sets out that in the case of sales to customers in an exclusively allocated territory or ~~online shop,~~ customer group, offering a

135 See also paragraph 203.

136 See also paragraph 208(e).

~~(199)~~ language ~~options~~option in an online store that is different ~~than~~from the ~~ones~~languages commonly used in the territory in which the ~~distributor~~seller is established ~~normally~~generally indicates that the ~~distributor's activities are directed at~~ seller is targeting the territory in which ~~that~~the 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~~selling[137]. However, offering an English language option ~~is~~ in an online store does not ~~considered~~ as ~~indicating~~such indicate that the ~~distributor's activities are directed at~~seller is targeting English-speaking territories, as English ~~are commonly~~is widely understood and used ~~in EU Member States.~~throughout the Union. Similarly, ~~setting up one's own website or~~establishing an online ~~shop~~store with a top-level domain ~~name~~ corresponding to a territory other than the one in which the ~~distributor~~seller is established is a form of active selling into that territory, ~~while~~whereas offering ~~a website or~~an online ~~shop~~store with a generic and non-country specific domain name is ~~considered~~ a form of passive selling.

(214) ~~Targeted online advertising or promotion is~~Pursuant to Article 1(1), point (l) of Regulation (EU) X, active sales mean sales resulting from actively targeting customers by visits, letters, emails, calls or other means of direct communication. Targeted advertising or promotions are a form of active selling. In particular, ~~in many instances,~~ online advertising ~~allows~~services often allow the ~~distributor to determine in advance the audience that will be seeing its online advertising and thus~~seller to select the territories or ~~customer groups that would be targeted by its~~customers for which the online 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~~ will be displayed. This is the case, for example, for 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~~advertising and other online advertising, for instance on websites, app stores, social media, provided that the advertising service allows the advertiser to target customers according to their particular characteristics, including their geographic location or personal profile. By contrast, where the seller addresses online advertising to customers in its own territory or customer group and it is not possible to prevent such advertising from being seen by customers in ~~exclusive~~other territories or customer groups~~. By contrast, online advertising or promotion which~~, this 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~~include sponsored content on ~~a~~the website of a local or national newspaper that may be accessed by any visitor ~~of~~to that website, or the use of price comparison ~~tools~~services with generic and ~~not~~ non-country-specific domain names. Conversely, if such general advertising is made in languages not commonly used inthe seller's territory ~~in which the distributor is established~~ or on websites with a top-level domain~~ names~~ corresponding to ~~a territory other than the one in which the distributor is established, it is a form of~~ territories outside the seller's territory, this amounts to active selling into ~~that territory, as it would no longer be meant to reach customers in the distributor's own territory. The participation~~those other territories.

(215) 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 or other). This qualification is coherent with the purposes of 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~~, which include facilitating intra-brand competition. As a result, ~~restricting~~a vertical

agreement which restricts the ~~participation~~ability of a buyer to participate in public procurement is ~~be~~ a hardcore restriction ~~under~~within the meaning of Article 4, points (b~~) to~~), (c) and (d) ~~VBER~~of Regulation (EU)

~~(200)~~ X. Similarly, responding to ~~private tenders~~invitations to tender issued by non-public entities is a form of passive selling. ~~A private~~Such invitations to tender ~~is~~are a form of unsolicited ~~sales~~customer request addressed to multiple potential ~~suppliers~~sellers and therefore the submission of a bid in response to ~~a private~~an invitation to tender ~~is therefore~~by a non-public entity is a form of 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~~

6.1.2.3. ~~Article 4(b) to (d) VBER provides~~ Hardcore restrictions relating to specific distribution systems

(216) Article 4, points (b), (c) and (d) of Regulation (EU) X contain a list of hardcore restrictions and exceptions that apply depending on the type of distribution system

[137] See judgment of 7 December 2010, *Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v Oliver Heller*, Joined Cases C-585/08 and C-144/09, EU:C:2010:740, paragraph 93.

~~(202)~~ operated by the supplier: exclusive distribution, selective distribution or free distribution.

~~6.1.2.4.~~6.1.2.3.1. Where the supplier operates an exclusive distribution system

~~(203)~~(217) The hardcore restriction set out in Article 4, point (b) ~~VBER~~of Regulation (EU) X 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~~customers 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)~~(218) There are five exceptions to the hardcore restriction laid down in Article 4, point (b) ~~VBER~~ofRegulation (EU) X.

~~(205)~~(219) First, Article 4, point (b)(i) ~~VBER~~of Regulation (EU) X allows the supplier to restrict active sales by ~~an~~the exclusive distributor into a territory or to a customer group exclusively allocated to ~~other~~a maximum of five buyers, or reserved to the supplier. In order to preserve their investment incentives, the ~~exclusively appointed~~ supplier must protect its exclusive distributors ~~should be appropriately protected~~ against active sales, including targeted online advertising, into ~~the~~ their exclusive territory or to ~~the~~ their exclusive customer group ~~exclusively allocated to them~~ by all the supplier's 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)~~(220) ~~Sales by an exclusive distributor's customers into a territory or to a customer group~~ The investment incentives of exclusive distributors could also be undermined byactive selling by customers of the supplier's others buyers. Therefore, Article 4, point (b)(i) of Regulation (EU) X also allows the supplier to require its other buyers to restrict their direct customers from actively selling into territories or to customer groups that the supplier has exclusively allocated to other distributors ~~can also underminethe latter distributors' incentives to invest in quality or demand-enhancing services. To protect the investment incentives of exclusively appointed distributors~~or reserved to itself. However, the supplier may not require ~~that~~ such other ~~distributors, and their customers that haveentered 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 intothe exclusively allocated territory or to the exclusively allocated customer group (i.e.~~ buyers to pass on the active sales ~~restriction~~restrictions to ~~the buyer's~~ customers~~).~~[94] further down the distribution chain.

~~(207)~~(221) The supplier ~~is allowed to~~may 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)~~(222) 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~~may not be ~~prohibited. However,~~restricted. Article 4, point (b) ~~VBER~~of Regulation (EU) X applies only ~~concerns~~to restrictions ~~of sales by~~imposed on the buyer ~~or its customers, which means that the supplier is not prevented from accepting a total or partial restriction~~. The supplier may therefore accept restrictions on sales by itself, both online and offline, ~~on both active and passive sales~~ into the exclusive territory or to ~~(all or~~ some or all of~~)~~ the customers

~~constituting~~belonging to an exclusive customer group. However, restrictions of passive sales to end users may, in certain circumstances, be void pursuant to Article 6(2) of Regulation (EU) 2018/302 of the European Parliament and of the Council[138].

~~[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%.~~

(223) Second, Article 4, point (b)(ii) ~~VBER~~of Regulation (EU) X allows ~~the~~a supplier that ~~combines the application of~~operates an exclusive distribution system in a certain territory and a selective distribution system in ~~different territories~~ another territory to restrict ~~an~~its exclusive ~~buyer~~distributors from selling actively or passively to unauthorised distributors located in ~~a~~the territory where the supplier already operates a selective distribution system ~~which means that the~~ or which it has reserved for the operation of such a system. The supplier may also require its exclusive distributors to similarly restrict their customers from making active and passive sales to unauthorised

[138] 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).

~~(209)~~ distributors in territories where the supplier ~~has either appointed selected distributors or has reserved the territory for the application of such a~~ operates a selective distribution system~~. The protection of the~~ or which it has reserved for that purpose. The ability to pass on active and passive sales restrictions further down the distribution chain in this scenario is intended to protect the closed nature of 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~~systems.

~~(210)~~(224) Third, Article 4, point (b)(iii) ~~VBER~~of Regulation (EU) X allows a supplier to restrict the place of establishment of the buyer to which it has allocated an exclusive territory or customer group ~~is allocated (“~~(‘location ~~clause”).~~clause’). This ~~implies~~means that the ~~benefit of the VBER is not lost if it is agreed that~~supplier may require the buyer ~~will~~to restrict its distribution ~~outlet(s)~~outlets and ~~warehouse(s)~~warehouses to a particular address, place or territory. ~~For a~~As regards mobile distribution ~~outlet,~~outlets, the agreement may specify an area ~~may be defined~~ outside which ~~it~~the outlet cannot be operated. ~~The~~However, the establishment and use of an online store by ~~a~~the distributor ~~of an own website cannot be considered comparable~~is not equivalent to the opening of a ~~new~~physical outlet ~~in a different location~~ and thus cannot be ~~restricted.[95]~~restricted[139].

~~(211)~~(225) Fourth, Article 4, point (b)(~~vi) VBER~~iv) of Regulation (EU) X allows a supplier to restrict active and passive sales by an exclusive wholesaler to end users, ~~as~~thus allowing the supplier ~~can~~to keep the wholesale and retail levels of trade separate. ~~However, this~~ This exception ~~does not preclude the possibility of~~includes allowing the wholesaler to sell to certain end users (~~e.g.~~for example, a few large ones), while ~~not allowing~~prohibiting sales to ~~(~~all~~)~~ other end ~~users~~users[140].

~~(212)~~(226) Fifth, Article 4, point (b)(v) ~~VBER~~of Regulation (EU) X 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.~~6.1.2.3.2. Where the supplier operates a selective distribution system

~~(213)~~(227) The hardcore restriction set out in Article 4, point (c)(i) ~~VBER~~of Regulation (EU) X concerns agreements ~~or concerted practices~~ that, directly or indirectly, have as their object the restriction of the territory into which or the ~~customer groups~~ customers to whom the members of a selective ~~distributor~~distribution system (‘authorised distributors’) may actively or passively sell the contract goods or services. This includes restrictions of active or passive sales to end users imposed by a supplier on authorised distributors operating at the retail level.

~~(214)~~(228) There are five exceptions to the hardcore restriction ~~laid down~~set out in Article 4, point (c)(i) ~~VBER~~of Regulation (EU) X.

~~(215)~~(229) The first exception concerns restrictions of the ~~restriction of active sales by~~ability of authorised distributors to sell outside the selective distribution system. It allows the supplier to restrict active sales, including targeted online advertising, by authorised distributors into other territories or to customer groups that are exclusively allocated to ~~one or more~~other distributors or reserved ~~exclusively~~ to the supplier. The supplier ~~can~~may also require ~~that the restriction~~the authorised distributors to impose such permitted restrictions of active sales on their direct customers. However, the protection of such exclusively allocated territories or customer groups is not absolute, as the supplier may not restrict passive sales into ~~an exclusive territory~~such territories or to ~~an exclusive~~such 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~~groups.

~~[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)~~(230) The second exception allows ~~a~~the supplier to restrict its authorised distributors and their customers ~~of these distributors~~ from ~~selling~~making active or passive sales 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~~.

[139] See Case C-439/09 - *Pierre Fabre Dermo-Cosmétique*, paragraphs 56 and 57.

[140] See also paragraph (222) concerning Regulation (EU) 2018/302 of the European Parliament and of the Council.

~~(217)~~(231) The third exception allows the supplier to ~~prevent~~ impose a location clause on its authorised distributors, to prevent them 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~~Regulation (EU) X is not lost if ~~it is agreed that~~ the ~~buyer will~~distributor agrees to restrict its distribution ~~outlet(s)~~outlets and ~~warehouse(s)~~warehouses to a particular address, place or territory. ~~For a~~As regards mobile distribution ~~outlet,~~outlets, the agreement may specify an area ~~may be defined~~ outside which ~~it~~the outlet cannot be operated. ~~The~~ However, the establishment and use by ~~a~~the distributor of an ~~own website cannot be considered comparable~~online store is not equivalent to the opening of a ~~new~~physical outlet ~~in a different location~~ and thus cannot be ~~restricted~~restricted[141].

~~(218)~~(232) The fourth exception allows ~~a~~the supplier to restrict active and passive sales by an authorised wholesaler to end users, ~~as~~thus allowing the supplier ~~can~~to keep the wholesale and retail levels of trade separate. ~~However, this~~This exception ~~does not preclude the possibility of~~includes allowing the wholesaler to sell to certain end users (~~e.g.~~for example, a few large ones), while ~~not allowing~~prohibiting sales to ~~(~~all~~)~~ other end ~~users~~users[142].

~~(219)~~(233) The fifth exception allows ~~a~~the 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.

(234) The hardcore restriction set out in Article 4, point (c)(iii) ~~VBER excludes~~of Regulation (EU) Xconcerns the restriction of active or passive sales to end users by members of a selective distribution ~~network to end users, whether professional~~ system operating at the retail level. This means that the supplier may not restrict its authorised distributors from selling to end users, or ~~consumers, without prejudice to~~ to purchasing agents acting on behalf of end users, except where such end users are located in a territory or belong to a customer group that has been exclusively allocated to another distributor or reserved to the supplier in a territory where the supplier operates an exclusive distribution system (see Article 4, point (c)(i)(1) of the Regulation and paragraph (229). This also does not exclude the possibility of prohibiting ~~a member of~~ the ~~network~~authorised distributors 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, point (c)(i~~)~~)(3) of the Regulation and paragraph (~~215) of these Guidelines). Within~~231)).

~~(220)~~ A supplier operating a selective distribution system~~, the~~ may select its authorised distributors ~~should be free~~on the basis of qualitative and/or quantitative criteria. Any qualitative criteria generally have to ~~sell to all end users,~~ be set for both ~~actively and passively.~~

~~(221)~~(235) ~~Considering~~online and offline channels. However, 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~~equivalent to those imposed for sales in brick and mortar shops, ~~in as far as~~provided that the ~~criteria~~requirements imposed for online sales do not~~, directly or~~ indirectly~~, in isolation or combination with other factors,~~have ~~as their~~the object~~, to prevent the buyers or their customers from effectively using~~ of preventing the effective use of the internet ~~for~~by the ~~purposes of selling their~~buyer to sell the contract goods or services ~~online.~~to particular territories or customers. For example, a supplier may ~~establish specific~~impose requirements to ensure ~~certain service~~ quality standards for ~~users purchasing~~ online sales, such as ~~the~~ a requirement to set-up and ~~operation of~~operate an online after-sales ~~help desk,~~helpdesk; a requirement to cover the costs of customers returning ~~the product~~purchased products, 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~~Similarly, a supplier may define different criteria relating to sustainable development for online and offline sales channels. For example, a supplier

~~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.~~

~~A~~

[141] See Case C-439/09 - *Pierre Fabre Dermo-Cosmétique*, paragraphs 55 to 58.

[142] See also paragraph (222) concerning Regulation (EU) 2018/302 of the European Parliament and of the Council.

could require eco-responsible sales outlets or the use of delivery services using green bicycles.

~~(222)~~(236) The combination of 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~~ cannot benefit from the exemption provided by Article 2(1) of Regulation (EU) X, including where the supplier applies exclusive distribution at the wholesale level and selective distribution at the retail level. This is because such a combination would require the authorised distributors ~~pursuant to~~to accept hardcore restrictions within the meaning of Article 4~~(c)(i) VBER.~~, point (b) or (c) of Regulation (EU) X, for example, restrictions of active sales to territories or customers that have not been exclusively allocated, restrictions of active or passive sales to end users[143], or restrictions of cross-supplies between authorised distributors[144]. However, the supplier may commit to ~~supplying~~supply only ~~one or a limited number of~~ certain authorised distributors, for example, in ~~a specific part~~certain parts of the territory where the selective distribution system is operated~~. The supplier~~, or it may ~~also~~ commit not to make any direct sales ~~itself into~~in that territory~~. In addition, as allowed by~~ itself[145]. Pursuant to the ~~second~~third exception to Article 4, point (c)(i) ~~VBER~~of Regulation (EU) X, the supplier may also impose a location clause on its authorised distributors.

~~(223)~~(237) The hardcore restriction set out in Article 4, point (c)(ii) ~~VBER~~of Regulation (EU) X 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]~~trade[146]. 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~~, in a selective distribution ~~network, no restrictions can be imposed on~~system, the supplier cannot restrict sales by authorised wholesalers ~~as regards their sales~~ to authorised distributors.

~~6.1.2.6.~~6.1.2.3.3. Where the supplier operates a free distribution system

~~(224)~~(238) The hardcore restriction set out in Article 4, point (d) ~~VBER~~of Regulation (EU) X concerns agreements or ~~concerned~~concerted practices that, directly or indirectly, have as their object the restriction of the territory into which or the ~~customer groups~~ customers to whom a buyer in a free distribution system may actively or passively sell the contract goods or ~~services~~services[147].

~~(225)~~(239) There are five exceptions to the hardcore restriction ~~laid down~~set out in Article 4, point (d) ~~VBER~~of Regulation (EU) X.

~~(226)~~(240) First, Article 4, point (d)(i) ~~VBER~~of Regulation (EU) X allows the supplier to restrict active sales, including targeted online advertising, by ~~a~~the buyer into ~~a territory~~territories or to ~~a~~ customer ~~group reserved exclusively to the supplier or~~groups that are allocated exclusively to other buyers~~.~~ or reserved to the supplier. The supplier ~~can~~may also require ~~that the restriction~~the buyer to impose such permitted restrictions of activesales ~~into an exclusive territory or to an exclusivecustomer 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.~~buyer's direct customers. However, the protection of such exclusively allocated territories or customer groups is not absolute, as the supplier may not restrict passive sales into such territories or ~~to such~~ customer groups ~~cannot be prohibited~~.

~~Second~~

[143] See paragraph (227).

[144] See paragraph (237).

[145] See also paragraph (222) concerning Regulation (EU) 2018/302 of the European Parliament and of the Council.

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

[147] See also paragraph (116).

~~(227)~~(241) Secondly, Article 4, point (d)(ii) ~~VBER~~of Regulation (EU) X allows the supplier to restrict ~~a~~the buyer and to require the buyer to restrict 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, point (d)(iii) ~~VBER~~of Regulation (EU) X allows ~~a~~the supplier to impose a location clause on the buyer, to restrict ~~the~~its place of establishment ~~of a buyer ("location clause").~~. This ~~implies~~means 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.~~

(242) ~~it is agreed that~~supplier may require the buyer ~~will~~to restrict its distribution ~~outlet(s)~~outlets and ~~warehouse(s)~~warehouses to a particular address, place or territory. ~~For a~~As regards mobile distribution ~~outlet,~~outlets, the agreement may specify an area ~~may be defined~~ outside which ~~it~~the outlet cannot be operated. ~~The~~However, the establishment and use by ~~a distributor~~the buyer of ~~its own website cannot be considered comparable~~an online store is not equivalent to the opening of a ~~new~~physical outlet ~~in a different location~~ and thus cannot be ~~restricted.~~[97]restricted[148].

~~(229)~~(243) Fourth, Article 4, point (d)(~~vi) VBER~~iv) of Regulation (EU) X allows ~~a~~the supplier to restrict active and passive sales by a wholesaler to end users, ~~as~~thus allowing the supplier ~~may~~to keep the wholesale and retail levels of trade separate. ~~However, this~~This exception ~~does not exclude the possibility of~~includes allowing the wholesaler to sell to certain end users (~~e.g. a few~~for example, certain large ones), while prohibiting it from selling to other end ~~users~~users[149].

~~(230)~~(244) Fifth, Article 4, point (d)(v) ~~VBER~~of Regulation (EU) X allows ~~a~~the 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.*~~ *6.1.3. Restrictions of the sales of spare parts*

~~(231)~~(245) The hardcore restriction set out in Article 4~~(e) VBER~~, point (f) of Regulation (EU) X 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~~(‘OEMs’), may not, either directly or indirectly, prevent or restrict sales by the ~~OEM~~manufacturer of those spare parts to end users, independent repairers, wholesalers or service providers. Indirect restrictions may arise particularly when the ~~supplier~~manufacturer of the spare parts is restricted in supplying technical information and special equipment, which are necessary for the use of spare parts by end 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 also 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~~Regulation (EU) X

(246) Article 5 ~~VBER~~of Regulation (EU) X excludes certain obligations ~~found~~contained in vertical agreements from the ~~coverage~~benefit of the ~~VBER~~block exemption, irrespective of whether the

148 See Case C-439/09 - *Pierre Fabre Dermo-Cosmétique*, paragraphs 55 to 58.
149 See also paragraph (222) concerning Regulation (EU) 2018/302 of the European Parliament and of the Council.

~~(232)~~ market share ~~threshold~~thresholds set out in Article 3(1) ~~VBER is~~of the Regulation are exceeded or not.In particular, Article 5 ~~VBER defines~~of the Regulation sets out obligations for which it cannot be assumed with sufficient certainty that they fulfil the conditions of Article 101(3~~).~~) of the Treaty. There is nonetheless no presumption that the —obligations ~~specified~~ listed in Article 5 ~~VBER~~of the Regulation fall within the scope of Article 101(1) of the Treaty or fail to satisfy theconditions of Article 101(3~~).~~) of the Treaty. The exclusion of these obligations from the ~~VBER~~ block exemption means only that they are subject to an individual assessment under Article 101~~.~~ of the Treaty. Moreover, unlike Article 4 ~~VBER~~of Regulation (EU) X, the exclusion of an obligation from the block exemption ~~provided by~~pursuant to Article 5 ~~VBER~~of the Regulation is limited to the specific obligation, ~~if~~provided that the obligation in questioncan 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~~In that case, 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)~~(247) Pursuant to Article 5(1~~)~~(), point (a) ~~VBER~~of Regulation (EU) X, non-compete obligations exceeding a duration of five years are excluded from the ~~benefit of the VBER.~~block exemption. Non-compete obligations, as defined in Article 1(1), point (f) of Regulation (EU) X, are arrangements that cause the buyer ~~purchasing from the supplier or from another undertaking designated by the supplier~~to purchase 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.~~ from the supplier or from another undertaking designated by the supplier. 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)~~(248) Non-compete obligations ~~are not covered by~~cannot benefit from 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~~can benefit from the block exemption, provided that the buyer can effectively renegotiate or terminate the vertical agreement containing the obligation with a reasonable period of notice~~ period~~ and at a reasonable cost, thus allowing the buyer to effectively switch its supplier after the expiry of the ~~five~~5-year period. If, for instance, the vertical agreement ~~provides for~~contains a ~~five~~5-year non-compete obligation and the supplier provides a loan to the buyer, the repayment of that loan ~~should~~must not hinder the buyer from effectively terminating the non-compete obligation at the end of the ~~five~~5-year period. Similarly, ~~when~~where the supplier provides equipment to the buyer ~~with equipment which~~that 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.

(249) Pursuant to Article 5(2) ~~VBER~~of Regulation (EU) X, the ~~five-year~~limitation of non-compete obligations to a duration ~~limit~~of 5 years does not apply ~~when~~where 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~~imposed for a longer duration~~ as~~, provided this does not exceed the period of occupancy of the point of sale by the buyer. The reason for this exception is that it is ~~normally~~generally unreasonable to expect a supplier to allow competing products to be sold from premises and land ~~owned by the supplier~~that it owns 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-

~~(235)~~ proprietary rights over the land and premises to the supplier for only a limited period, intended to avoid the ~~five~~5-year ~~limit~~limitation, cannot benefit from this exception.

6.2.2. Post-~~-~~term non-compete obligations

(250) Pursuant to Article 5(1~~)(~~), point (b) in conjunction with Article 5(3) ~~VBER~~of Regulation (EU) X, post-term non-~~-~~compete obligations imposed on the buyer are excluded from the ~~VBER, unless~~benefit of the block exemption, unless all of the following conditions are fulfilled:

(a) the obligation is indispensable to protect know-how transferred by the supplier to the buyer~~, and~~;

(b) it is limited to the point of sale from which the buyer has operated during thecontract period~~, and~~;

(c) it is limited to a maximum period of ~~one~~1 year. ~~This is only the case where the~~

~~(236)~~(251) The know-how ~~is~~concerned must be secret, substantial and identified within the meaning of Article 1(1~~)(h) VBER. This means that the know-how~~), point (j) of Regulation (EU) X, in particular it 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)~~(252) Article 5(1~~)~~(), point (c) ~~VBER~~of Regulation (EU) X concerns the sale of competing goods or services in a selective distribution system. ~~The VBER covers~~The exemption provided by Article 2(1) of the Regulation applies to 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~~ excluded from the block exemption. The ~~objective of excluding~~rationale for this ~~type of obligation~~exclusion 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~~those outlets to distribute their products. Such a scenario ~~would amount~~could lead to foreclosure of a competing supplier through a form of collective boycott.

6.2.4. ~~Parity~~Across-platform retail parity obligations

~~(238)~~(253) The fourth exclusion from the block exemption, which is set out in Article 5(1~~)~~(), point (d) ~~VBER~~of Regulation (EU) X, concerns across-platform retail parity obligations imposed by suppliers of online intermediation services, namely direct or indirect obligations which cause buyers of ~~those~~such services not to offer, sell or resell goods or services to end users under more favourable conditions ~~using~~via 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 retail parity obligation may ~~be express~~result from a contractual clause or ~~it may be applied by~~from other direct or indirect ~~means~~measures, 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~~via competing ~~suppliers of~~ online intermediation services. For example, ~~a supplier~~where the provider of online intermediation services ~~may incentivise buyers to grant it parity relative to competing suppliers of such services by~~makes the offering of better visibility for the buyer's goods or services on ~~its~~the provider's website or ~~by charging~~the application of a lower commission ~~rates~~rate dependent on the buyer granting it parity of conditions relative to competing providers of such services, this amounts to an across-platform retail parity obligation.

(254) All other types of parity obligation ~~are covered by~~ can benefit from the ~~block~~ exemption provided by Article 2(1) of ~~the VBER.~~Regulation (EU) X. This includes, for example~~,~~:

(a) retail parity obligations relating to the direct sales ~~or marketing~~ channels of ~~suppliers~~buyers of ~~goods or~~online intermediation services (so-called 'narrow' retail parity~~);~~ obligations);

(b) parity obligations relating to the conditions under which goods or services are offered to undertakings that are not end users~~, and~~;

~~(239)~~ (c) 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~~('most favoured customer' obligations).

(255) Section 8.2.5. provides guidance for the assessment of parity obligations in individual cases where Regulation (EU) X does not apply.

7. WITHDRAWAL AND ~~NON-APPLICATION~~DISAPPLICATION

7.1. Withdrawal of the benefit of ~~the VBER (~~Regulation (EU) X

~~7.1.~~ **As stated in** Article ~~29~~**6(1) of** Regulation ~~1/2003)~~

~~(240)~~ ~~The~~(EU) X, the Commission may withdraw the benefit of ~~the VBER~~Regulation (EU) X pursuant to Article 29(1) of Regulation (EC) No 1/2003, if it finds that, in a particular case, a vertical agreement to which ~~the VBER~~Regulation (EU) X applies has certain effects that are incompatible with Article 101~~(3).~~ of the Treaty. Moreover, if, as stated in Article 6(2) of Regulation (EU) X, in a particular case, ~~such an~~a vertical agreement has effects that are incompatible with Article 101(3) of the Treaty 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~~Regulation (EU) X, pursuant to Article 29(2) of Regulation

(256) (EC) No 1/2003.Article 29 of Regulation (EC) No 1/2003 does not mention the courts of the Member States, ~~who~~which therefore have no power to withdraw the benefit of ~~the VBER,~~[98]Regulation (EU) X[150], unless the court concerned is a designated competition authority of a Member State pursuant to Article 35 of Regulation (EC) No 1/2003.

~~(241)~~(257) The Commission and the NCAs may withdraw the benefit of ~~the VBER~~Regulation (EU) X intwo scenarios. ~~Firstly~~First, they may withdraw the benefit of ~~the VBER~~Regulation (EU) X if a vertical agreement falling within the scope of Article 101(1) of the Treaty has *in isolation* effects on the relevant market which are incompatible with Article 101(3~~).~~) of the Treaty. Secondly, as referred to in recital ~~18~~20 of ~~the VBER~~Regulation (EU) X, they may also withdraw the benefit of ~~the VBER~~Regulation (EU) X if the vertical agreement has ~~these~~those 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 anti-competitive effects that are incompatible with Article 101(3~~).~~) of the Treaty. The restriction of access to the relevant market and the restriction of competition therein are examples of such cumulative effects that can justify ~~a~~the withdrawal of the benefit of ~~the VBER.~~[99]Regulation (EU) X[151].

(258) 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

[150] Nor may the courts of the Member States modify the scope of Regulation (EU) X by extending its sphere of application to agreements not covered by Regulation (EU) X. Any such extension, whatever its scope, would affect the manner in which the Commission exercises its legislative competence (judgment of 28 Feburary 1991, *Stergios Delimitis* v *Henninger Bräu AG*, C-234/89, EU:C:1991:91, paragraph 46 ('Case C-234/89 - *Delimitis*').

[151] However, a cumulative foreclosure effect is unlikely to arise where the parallel networks of vertical agreements cover less than 30% of the relevant market, see paragraph 10 of the De Minimis Notice.

effects may arise, for example, in the case of ~~shared exclusivity or~~retail parity obligations, selective distribution~~, from parity obligations~~ or non-compete obligations.

(259) As regards retail parity obligations relating to direct sales channels (narrow retail parity obligations), Article 6 of Regulation (EU) X provides that the Regulation may be withdrawn pursuant to Article 29 of Regulation (EC) No 1/2003, in particular where the relevant market for the supply of online intermediation services is highly concentrated and competition between the providers of such services is restricted by the cumulative effect of parallel networks of similar agreements restricting buyers of the online intermediation services from offering, selling or reselling goods or services to end users under more favourable conditions on their direct sales channels. Further guidance on that scenario is provided in section 8.2.5.2.

~~(242)~~(260) 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 similareffects 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~~those 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~~Regulation (EU) X may be limited to particular qualitative criteria or particular quantitative criteria which, for example, ~~limits~~limit the number of authorised distributors.

~~(243)~~(261) 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~~within the ~~prohibition~~scope of Article 101(1~~).~~[100]) of the Treaty[152]. They are therefore not subject to the withdrawal ~~mechanism.~~[101]mechanism[153].

~~(244)~~ Pursuant to Article 29(1) of Regulation (EC) No 1/2003, the Commission may withdraw the benefit of ~~the VBER~~Regulation (EU) X 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.~~

(262) ~~the VBER~~ Regulation (EU) X in a particular case, without prejudice to the application of the rules on case allocation and assistance within the European Competition Network~~,~~ ~~[102]~~ ('ECN')[154], and without prejudice to their own power of withdrawal ~~power~~ pursuant to Article 29(2) of Regulation (EC) No 1/2003. If at least three NCAs ask the Commission to apply Article 29(1) of Regulation (EC) No 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~~that 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~~Regulation (EU) X to reach a timely conclusion on whether the conditions for a withdrawal in the specificcase are fulfilled.

(263) It follows from Article 29(1) and (2) of Regulation (EC) No 1/2003 that the Commission has the exclusive competence to withdraw the benefit of Regulation (EU)

[152] 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 paragraph 10 of the De Minimis Notice; and Case C-234/89 - *Delimitis* v *Henninger Bräu*, paragraphs 24 to 27.

[153] The assessment of such a contribution will be made in accordance with the criteria set out in section 8 relating to enforcement policy in individual cases.

[154] See Chapter IV of Regulation (EC) No 1/2003.

~~(245)~~ X Union-wide, in that it may withdraw the benefit of ~~the VBER~~Regulation (EU) X in respect of vertical agreements ~~restricting~~that restrict competition on a relevant geographic market which is wider than the territory of a single Member State, whereas ~~NCAs~~an NCA may only withdraw ~~such benefits~~the benefit of the Regulation in relation to the territory of ~~their respective~~its Member State.

~~(246)~~(264) 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~~one Member State~~.~~, or part thereof. In such a case, the NCA of that Member State has the competence to withdraw the benefit of ~~the VBER~~Regulation (EU) X in relation to ~~the~~a vertical agreement that has effects that are incompatible with Article 101(3) of the Treaty on ~~this~~that national or regional market. This is a concurrent competence~~ in that~~, as Article 29(1) ~~VBER~~of Regulation (EC) No 1/2003 also empowers the Commission to withdraw the benefit of ~~the VBER~~Regulation (EU) X in relation to a national or regional market, provided the vertical agreement ~~at hand~~concerned may affect trade between Member States.

~~(247)~~(265) Where several separate national or regional markets are concerned, several competent NCAs can withdraw the benefit of ~~the VBER~~Regulation (EU) X in parallel.

~~(248)~~(266) It follows from the wording of Article 29(1) of Regulation (EC) No 1/2003 that, where the Commission withdraws the benefit of Regulation (EU) X, the ~~VBER, it~~Commission has the burden of proving~~ firstly~~, first, that the ~~VBER applies to the respective~~ vertical agreement~~, which means that it must fall~~ concerned restricts competition within the ~~scope~~meaning of Article 101(1~~),~~[103] ~~and secondly that this~~) of the Treaty[155]. Secondly, the Commission must prove that the agreement has effects that are incompatible with Article 101(3~~),~~) of the Treaty, which means that ~~it~~the agreement fails to fulfil at least one of the four conditions of Article 101(3~~).~~[104]) of the Treaty[156]. Pursuant to Article 29(2) of Regulation (EC) No 1/2003, the same requirements apply where a NCA withdraws the benefit of ~~the VBER~~Regulation (EU) X in ~~relation to~~ respect of the territory of its Member State. In particular, as regards the burden of proving that the second requirement is fulfilled, Article 29 requires the competent competition authority to substantiate that at least one of the four conditions of Article 101(3) of the Treaty is not fulfilled.[157]

~~[102] See Chapter IV of Regulation 1/2003.~~

(267) ~~[103]~~If the requirements of Article 29(1) of Regulation (EC) No 1/2003 are fulfilled, the Commission may withdraw the benefit of Regulation (EU) X in an individual case. Such a withdrawal, and its requirements as set out in this section, must be distinguished from the findings of a Commission infringement decision pursuant to Chapter III of Regulation (EC) No 1/2003. However, a withdrawal can be combined,

[155] If a vertical agreement falls outside the scope of Article 101(1~~)~~,) of the Treaty, as set out in section 3~~. Of~~ of these Guidelines, the question of the application of ~~the VBER~~Regulation (EU) X does not arise, because ~~the VBER is meant to define~~Regulation (EU) X defines categories of vertical agreements that

normally ~~satisfying~~satisfy the conditions ~~laid down in~~of Article 101(3~~),~~) of the Treaty, which presupposes that ~~a~~the 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).~~) of the Treaty.

~~104~~156 It is sufficient for the Commission to substantiate that one of the four conditions of Article 101(3) of theTreaty is not fulfilled. This is because, in order for the Article 101(3) ~~exemption~~exception to apply, 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]

~~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,~~ [157] The requirement under Article 29 of Regulation (EC) No 1/2003 regarding the burden of proof of the competent competition authority follows from the situation in which Regulation (EU) X does not apply and an undertaking invokes Article 101(3) of the Treaty in an individual case. In that situation, pursuant to Article 2 of Regulation (EC) No 1/2003, the undertaking has the burden of proving that all four conditions of Article 101(3) of the Treaty are met. To this end, it must substantiate its claims, see for example, Commission Decision in AT.39226 - *Lundbeck*, upheld in judgments of 8 September 2016, *Lundbeck* v *Commission,* T-472/13, EU:T:2016:449; and of 25 March 2021, *Lundbeck* v *Commission,* Case C-591/16 P, EU:C:2021:243.

~~(249)~~ 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]~~measures[158].

~~(250)~~(268) If the Commission withdraws the benefit of ~~the VBER~~Regulation (EU) X pursuant to Article 29(1) of Regulation (EC) No 1/2003, ~~it has to take into account that~~ the withdrawal ~~can~~ only ~~have ex nunc~~produces effects~~, i.e.~~ ex nunc, that is to say the exempted status of the agreements concerned ~~will remain~~remains unaffected for the period preceding the date ~~at~~on which the withdrawal becomes effective. In the case of a withdrawal pursuant to Article 29(2) of Regulation (EC) No 1/2003, the ~~NCAs~~NCA concerned must also take into account its obligations under Article 11(4) of Regulation (EC) No 1/2003, in particular its obligation to provide the Commission with any relevant envisaged decision.

7.2. Disapplication of Regulation ~~declaring that the VBER does not apply (Article 6 VBER)~~(EU) X

~~(251)~~(269) In accordance with Article 1a ~~Empowerment~~of Regulation No 19/65/EEC, Article ~~6 VBER~~7 of Regulation (EU) X enables the Commission to exclude from the scope of ~~the VBER~~Regulation (EU) X, by means of regulation, parallel networks of similar vertical restraints where ~~these~~such networks cover more than 50% of a relevant market. Such a ~~measure~~regulation is not addressed to individual undertakings but concerns all undertakings whose agreements fulfil the conditions set out in a regulation ~~referred~~made pursuant to ~~in~~ Article ~~6~~7 of ~~the VBER~~Regulation (EU) X. 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 relevant market and the number of affected geographic markets within the Union are two aspects that are particularly relevant ~~in this~~to that assessment.

~~(252)~~ The Commission will consider the adoption of a regulation pursuant to Article ~~6 VBER~~7 of Regulation (EU) X if similar restraints that cover more than 50% of the relevant market are likely to appreciably restrict access to ~~this~~that market or competition therein. This may in particular be the case ~~when~~where 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~~that are not required by the nature of the relevant goods or servicesor

~~[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*.~~

(270) ~~which~~ which discriminate against certain ~~forms~~types 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~~ that produce similar effects on the market. However, Article ~~6 VBER~~7 of Regulation (EU) X does not require the Commission to ~~act~~adopt such a regulation where the 50% market~~-~~ coverage ratio is exceeded.

~~(253)~~(271) The effect of a regulation adopted pursuant to Article ~~6 VBER~~7 of Regulation (EU) X is that ~~the VBER~~Regulation (EU) X becomes inapplicable in respect of the restraints and the markets concerned, and ~~that~~threrefore Article 101(1) and (3) ~~therefore~~of the Treaty apply fully.

(272) Any regulation ~~referred~~adopted pursuant to ~~in~~ Article ~~6 VBER~~7 of Regulation (EU) X must clearly setout its scope. Therefore, the Commission must ~~firstly~~first define the relevant product and geographic market(s~~),~~) and, secondly, the type of vertical restraint(s) in respect of which~~the VBER~~Regulation (EU) X will no longer apply. As regards the latter aspect, the Commission~~-~~

[158] The Commission used its power to withdraw the benefit of previously applicable block exemption regulations in its decision of 25 March 1992 (interim measures) relating to a proceeding under Article 85 of the EEC Treaty in Case IV/34.072 – *Mars/Langnese and Schöller*, upheld by the judgment of 1 October 1998, *Langnese-Iglo* v *Commission,* C-279/95 P, EU:C:1998:447 and in its decision of 4 December 1991 (interim measures) relating to a proceeding under Article 85 of the EEC Treaty in Case IV/33.157 – *Eco System/Peugeot*.

~~(254)~~ 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~~when determining the 50% market coverage ratio, the Commission may nevertheless restrict the scope of ~~a~~the regulation ~~adopted~~that it adopts pursuant to Article ~~6 VBER~~7 of Regulation (EU) X to non-compete obligations ~~exceeding~~that exceed a certain duration. Thus, agreements of a shorter duration or of a less restrictive nature ~~might~~may be left unaffected, in ~~consideration~~view of the lesser degree of foreclosure attributable to such restraints. Similarly, if, on a particular market, undertakings ~~practice~~use selective distribution in combination with additional restraints, such as non-compete obligations or quantity-~~-~~forcing, a regulation adopted pursuant to Article ~~6 VBER may~~7 of Regulation (EU) X might concern only such additional restraints. Where appropriate, the Commission may also specify the level of market share ~~level~~ which, in the specific market context, may be regarded as insufficient ~~to bring about~~for an individual undertaking to make a significant contribution ~~by an individual undertaking~~ to the cumulative effect.

~~(255)~~(273) In accordance with Article 1a of ~~the Empowerment~~ Regulation ~~requires that~~No 19/65/EEC, a regulation adopted pursuant to Article ~~6 VBER foresees~~7 of Regulation (EU) X must fix a transitional period of not less than six months before it becomes applicable. ~~This~~That period is ~~meant~~intended to enable the undertakings concerned to adapt their vertical agreements accordingly.

~~(256)~~(274) A regulation adopted pursuant to Article ~~6 VBER~~7 of Regulation (EU) X will not affect the exempted status of the agreements concerned for the period preceding the date of application of ~~this~~that regulation.

8. Enforcement policy in individual cases

8.1. The framework of analysis

~~(257)~~(275) Where the ~~safe harbour~~block exemption provided by ~~the VBER~~Regulation (EU) X does not apply to a vertical agreement, it is ~~relevant~~necessary to ~~examine~~assess whether, in the individual case, the vertical agreement falls within the scope of Article 101(1) of the Treaty and, if so, whether the conditions of Article 101(3) of the Treaty are ~~satisfied~~fulfilled. Provided that they do not contain restrictions of competition by object and in particular hardcore restrictions ~~of competition~~within the meaning of Article 4 of Regulation (EU) X, there is no presumption that vertical agreements ~~falling~~that fall outside the ~~VBER due to the market share thresholds being exceeded~~scope of Regulation (EU) X fall within the scope of Article 101(1) of the Treaty or fail to satisfy the conditions of Article 101(3~~).~~) of the Treaty. Such agreements require an individual assessment. Agreements that either do not restrict competition within the meaning of Article 101(1) of the Treaty or which fulfil the conditions of Article 101(3) of the Treaty are valid and enforceable.

~~(258)~~(276) Pursuant to Article 1(2) of Regulation (EC) No 1/2003, undertakings do not need to notify ~~a~~their vertical ~~agreement~~agreements to benefit from an individual exemption under Article 101(3~~).~~) of the Treaty. 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~~restricts competition within the meaning of Article 101(1~~). The undertakings claiming~~) of the Treaty. Undertakings which claim the benefit of Article 101(3) of the Treaty bear the burden of proving that the conditions of that provision are fulfilled. ~~When~~Where likely anti-~~-~~competitive effects are demonstrated, undertakings may substantiate efficiency claims and explain why a ~~certain~~particular distribution ~~system~~arrangement is indispensable to bring likely benefits to consumers without eliminating competition~~ before the~~. The Commission ~~decides~~will then decide whether the agreement satisfies the conditions of Article 101(3~~).~~) of the Treaty.

~~(259)~~(277) The assessment of whether a vertical agreement has the effect of restricting competition ~~will be~~is made by comparing the situation on the relevant market with thevertical 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~~may 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[159]. Appreciable ~~anticompetitive~~anti-competitive 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~~generally required for a finding of ~~an infringement under~~ a restriction of competition within the meaning of Article 101(1) of the Treaty is less than the degree of market power required for a finding of dominance under Article 102 of the Treaty.

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

~~(260)~~(278) 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~~within the meaning of Article 101(1~~):~~) of the Treaty:

(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) entry barriers;

~~(e)~~(f) the level of ~~trade~~the production or distribution chain that is affected;

~~(f)~~(g) the nature of the product;~~ and~~

~~(g)~~(h) the dynamics of the market.

~~[107] See section 3.1. of these Guidelines.~~

~~(261)~~(279) Other relevant factors may also be taken into account ~~depending on their relevance for the assessment of the vertical agreement concerned~~.

~~(262)~~(280) 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~~. However, 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.

(281) 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~~share of total sales on the (downstream) market~~-~~

[159] See section 3.1.

~~(263)~~ 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~~deduced from the way in which the agreement is implemented by the parties and the incentives that they face.

~~(264)~~(282) The market position of the parties provides an indication of the degree of market power, if any, ~~possessed~~held 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, or 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. Branding tends to increase product differentiation and reduce the substitutability of the product, leading to reduced elasticity of demand and an increased possibility to raise price.

~~(265)~~(283) 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.~~, for example, 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)~~(284) The market position of the downstream customers of the parties to the vertical 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 market share reflects the importance of ~~its~~the customer's demand for possible suppliers. Other indicators ~~focus on~~are 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.~~end users. 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~~ability and incentive to bring new sources of supply ~~onto~~onto 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 effective entry, capable of preventing or eroding the exercise of market power by ~~incumbents can be expected to be prevented or eroded by effective and~~the incumbent firms, is likely ~~entry~~to occur within ~~one~~1 or ~~two~~2 years. Entry barriers may be present at the supplier level or the buyer level or at both levels. Entry barriers may result from a broad range of factors such

(285) as economies of scale and scope (including network effects of multi-sided businesses), government regulations (especially where they establish exclusive rights), ~~state~~State aid, import tariffs, ~~intellectual property rights~~IPRs, ownership of resources where the supply is limited (for example, 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 of whether ~~certain~~some of those factors should be ~~described~~considered as entry barriers depends ~~particularly~~, in particular, on whether they entail sunk costs. Sunk costs are costs that have to be incurred to enter or be active on a market but which 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~~Where 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)~~(286) 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)~~(287) The level of ~~trade~~the production or distribution chain 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~~services are, directly or indirectly, sold to ~~final customers that~~end users, which often rely more on brand and image.

~~(271)~~(288) 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~~.~~ of vertical restraints, in particular for final goods or services. When assessing the likely negative effects, it is important to determine whether the goods or services sold on the relevant market are homogeneous or rather ~~differentiated~~differentiated[160], whether the product is expensive, taking up a large part of the ~~consumer's~~consumer's budget, or rather ~~is~~ inexpensive and whether the product is a one-off purchase or purchased repeatedly ~~purchased~~.

~~(272)~~(289) The dynamics of the relevant market have to be carefully assessed~~ on a case-by-case basis. While in~~. In some dynamic markets the potential negative effects of ~~certain~~particular vertical restraints may be unproblematic, as inter-brand competition from dynamic and innovative rivals ~~acts~~may act as a sufficient constraint. However, in other cases, vertical restraints may afford an incumbent in a dynamic market a lasting competitive advantage and hence result in long-~~-~~term negative effects ~~on~~for competition. This may be the case ~~when~~where a vertical restraint ~~deprives~~prevents rivals from benefiting from network effects, or ~~when~~where a market is prone to tipping.

(290) ~~When assessing a particular vertical restraint under Article 101, also other~~Other factors may ~~have~~also be relevant to ~~be taken into account. These~~the assessment. Those factors can include in particular:

(a) the presence of cumulative effects, deriving from the ~~coverage of~~fact that the market is covered by similar ~~agreements of~~ vertical restraints imposed by other suppliers~~,~~ or buyers;

~~(273)~~ whether the agreement is ~~"imposed" in the sense that mainly one party to the agreement is subject to~~ 'imposed' (namely, most of the restrictions or obligations ~~or "agreed" in the sense that~~ apply only to one party to the agreement) or 'agreed' (both parties ~~to~~

(b) ~~the agreement~~ accept ~~the~~ restrictions or obligations~~,~~);

(c) the regulatory environment ~~and~~;

(d) behaviour that may indicate or facilitate collusion ~~like~~, such as price leadership, pre-~~-~~announced price changes and price discussions, price rigidity in response to excess capacity, price discrimination and past collusive behaviour.

160 See also paragraph (282).

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

(291) ~~Restrictive vertical agreements~~Vertical agreements which restrict competition within the meaning of Article 101(1)of the Treaty may also produce pro-competitive effects in the form of efficiencies, which may outweigh their anti-competitive effects. ~~Such an~~The assessment of efficiencies against anti-competitive effects takes place within the framework of Article 101(3~~),~~) of the Treaty, which contains an ~~individual~~ exception from the prohibition ~~enshrined~~set out in Article 101(1~~).~~) of the Treaty. For that exception to be applicable, the vertical agreement must fulfil the following four cumulative conditions: ~~(i)~~

(a) it must produce objective economic benefits, ~~(ii)~~

(b) consumers must receive a fair share of the resulting benefit[161],

(c) the restrictions ~~on~~of competition must be indispensable to attain ~~these efficiencies, (iii) consumers must receive a fair share of the efficiency gains~~those benefits, and ~~(iv)~~

~~(274)~~(d) 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]~~concerned[162].

~~(275)~~(292) Under Article 101(3~~),~~) of the Treaty, the assessment of vertical agreements is made within the actual context in which they ~~occur,~~~~[109]~~occur[163] 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~~provided by Article 101(3) of the Treaty applies as long as the four conditions are fulfilled and ceases to apply when that is no longer the ~~case.~~~~[110]~~case[164]. When applying Article 101(3) of the Treaty 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)~~(293) The first condition of Article 101(3) of the Treaty 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.

(294) ~~When assessing~~The second condition of Article 101(3) of the Treaty 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[165]. In other words, the efficiency gains must fully offset the likely negative impact on prices, output and other relevant factors caused by the vertical agreement.

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[161] As set out in paragraph 84 of the Article 101(3) Guidelines, the concept of 'consumers' within the meaning of Article 101(3) of the Treaty encompasses all direct or indirect users of the products covered by the agreement, including producers that use the product as an input, wholesalers, retailers and final consumers, i.e. natural persons who are acting for purposes which are outside their trade or profession.

[162] See Article 101(3) Guidelines.

[163] See judgment of *Ford* v *Commission,* Joined Cases 25/84 and 26/84, EU:C:1985:340 paragraphs 24 and 25; Article 101(3) Guidelines, paragraph 44.

[164] See, 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) of the Treaty only applies as long as the agreement has a restrictive object or restrictive effects; Article 101(3) Guidelines, paragraph 44.

[165] See paragraph 85 of the Article 101(3) Guidelines.

~~(277)~~(295) Third, when applying the indispensability test contained in ~~the second condition of~~ Article 101(3~~),~~) of the Treaty, 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~~goods or services more efficiently than would have been the case in the absence of the restriction concerned. In making ~~such an~~this 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) of the Treaty 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.

~~[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)~~(296) The fourth condition of Article 101(3) of the Treaty 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~~pressures on the market and the impact of the agreement on such remaining sources of competition. When ~~assessing~~applying this condition, it is necessary to take into account the relationship between Article 101(3) of the Treaty and Article 102 ~~must be taken into account.~~of the Treaty. According to settled case law, the application of Article 101(3) of the Treaty cannot prevent the application of Article 102~~.~~[112] of the Treaty[166]. Moreover, since Articles 101 and 102 of the Treaty 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~~the exception rule to restrictive vertical agreements that constitute an abuse of a dominant ~~position.[113] This condition requires that~~position[167]. The 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)~~(297) ~~While the previous parts of these Guidelines, notably the sixth part, include~~Whereas section 6 includes guidance on the assessment of vertical restraints that amount to hardcore restrictions ~~pursuant to~~ within the meaning of Article 4 ~~VBER,~~ of Regulation (EU) X, or to excluded restrictions ~~pursuant to~~ within the meaning of Article 5 ~~VBER, and related restrictions~~of Regulation (EU) X, 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~~assess them vertical restraints ~~according to~~in accordance with the same principlestaking into account the relevant factors, as set out in this ~~eight part of theseGuidelines~~section 8.

166 See judgment of 16 March 2000, *Compagnie Maritime Belge,* Joined Cases C-395/96 P and C-396/96 P, EU:C:2000:132, paragraph 130. Similarly, the application of Article 101(3) of the Treaty 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) of the Treaty, see to that effect the judgment of 19 February 2002, *Wouters and Others,* C-309/99, EU:C:2002:98, paragraph 120.

167 See judgment of 10 July 1990, *Tetra Pak* v *Commission,* Case T-51/89, EU:T:1990:41. See also paragraph 106 of the Article 101(3) Guidelines.

8.2.1. Single branding

~~(281)~~ Under the heading of ~~"~~'single ~~branding"~~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

~~[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.~~

(298) amongst others in non-compete and quantity-forcing clauses ~~imposed on~~agreed with the buyer. A non-compete arrangement is based on an obligation or incentive scheme which ~~results in~~causes the buyer ~~purchasing~~to purchase more than 80% of its requirements on a particular market from only one supplier. ~~It~~This does not mean that the buyer ~~can only~~must buy directly from the supplier, but that the buyer ~~will~~must *de facto* not buy ~~and resell~~, sell 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~~the buyer to accept such an offer ~~when~~only if 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)~~(299) 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 the 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 directimpact on inter-brand competition.

(300) Single branding ~~is exempted by~~ agreements can benefit from the ~~VBER~~exemption provided by Article 2(1) of Regulation (EU) X where neither the ~~supplier's and~~ supplier's nor the buyer's market share ~~each do not exceed~~ exceeds 30% and ~~are subject to a limitation in time of five years for the~~ the non-compete obligation~~. Above the market share threshold or beyond the time limit of~~ does not exceed five years~~,~~. As set out in paragraph (248), single branding agreements ~~are no longer covered by~~ that are tacitly renewable beyond a period of five years can benefit from the block exemption ~~and therefore~~, provided that the buyer can effectively renegotiate or terminate the single branding agreement by giving a reasonable period of notice and at a reasonable cost, thus allowing the buyer to effectively switch its supplier after the expiry of the 5-year period. If those conditions are not satisfied, the single branding agreement must be individually assessed.

~~(283) 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)~~(301) ~~The capacity~~potential for single branding obligations ~~of a specific supplier~~ to result in ~~anticompetitive~~anti-competitive foreclosure arises in particular where, without the obligations, an important competitive constraint would be exercised by competitors that are 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 for at least ~~for~~ part of the demand on the market, for instance because its brand is a ~~"~~'must stock ~~item"~~item' preferred by many ~~final~~ consumers, or because the capacity constraints on the other suppliers are such that a part of the demand can only be provided ~~for~~ by the supplier in ~~question.[114]~~question[168]. The market position of the supplier is thus of ~~main~~primary importance ~~to assess~~when assessing the possible anti-competitive effects of single branding obligations.

[168] See judgment of 23 October 2003, *Van den Bergh Foods* v *Commission*, Case T-65/98, EU:T:2003:281,

paragraphs 104 and 156.

~~(285)~~(302) If competitors can compete on equal terms for each individual customer's entire demand, single branding obligations ~~of~~imposed by a ~~specific~~single supplier are generally unlikely to ~~hamper effective~~restrict competition appreciably unless the ~~switching~~ability of ~~supplier by~~ customers to switch between suppliers is rendered difficult ~~due to~~by the duration and market coverage of the single branding obligations. The higher the ~~part~~proportion of its market share ~~sold~~that asupplier sells under a single branding obligation and~~/or~~ the longer the duration of the single branding obligations, the more significant foreclosure is likely to be. Single branding obligations are more likely to result in anti-competitive foreclosure when entered into by dominant undertakings.

~~[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)~~(303) 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 notvery likely where they hold similar market positions and can offer similarly attractive products. ~~In~~However, in such a case, foreclosure may~~, however,~~ occur for potential entrants ~~when~~wherea number of major suppliers enter into single branding ~~contracts~~agreements 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~~Where those ~~suppliers are~~agreements individually ~~covered~~benefit from the exemptionprovided by ~~the VBER~~Regulation (EU) X, a withdrawal of the benefit of the block exemption may be necessary to deal with such a negative cumulative anti-competitive effect. A tied market share of less than 5% is generally not considered ~~in general~~ to contribute significantly to such a cumulative ~~foreclosure~~ effect.

~~(287)~~(304) In cases where the market share of the largest supplier is below 30% and the combinedmarket share of the five largest suppliers is below 50%, there is unlikely to be a single or a cumulative anti-competitive effect~~ situation. Where~~. In such cases, where a potential entrant cannotpenetrate the market profitably, it is likely to be due to factors other than single branding obligations, such as consumer preferences.

~~(288)~~(305) ~~Entry barriers are important to establish~~To determine whether ~~there is anticompetitive~~anti-competitive foreclosure~~. Wherever~~ is likely, it is necessary to assess the scale of entry barriers. Where it is relatively easy for competing suppliers to create their own integrated distribution network or ~~finding~~find alternative distributors for theirproduct, foreclosure is unlikely to be a real problem~~. However, there are often entry barriers, both at the manufacturing and at the distribution level~~.

~~(289)~~(306) Countervailing buyer 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~~However, it would be wrong to conclude from this that all single branding obligations,taken together, are overall beneficial for customers ~~on~~in 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"~~in the production or distribution chain is relevant. Foreclosure is less likely in the case of an intermediate product. ~~When~~Where the supplier of an intermediate product is not dominant, the competing suppliers still have a substantial ~~part~~share of demand that is free. ~~Below~~However, single branding may lead to anti-competitive foreclosure effects below the level of dominance ~~an anticompetitive foreclosure effect may however arise in~~in cases where there is a

(307) cumulative

effect situation. A cumulative ~~anticompetitive~~anti-competitive effect is unlikely to arise as long as lessthan 50% of the market is tied.

~~(291)~~(308) Where the agreement concerns the supply of a final product at the wholesale level, the ~~question whether~~likelihood of a competition problem ~~is likely to arise~~arising depends ~~in~~to a large ~~part~~extent 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~~may have the ability and incentive, if necessary, to set up its own wholesaling system~~ and~~, in which case it is unlikely to be foreclosed from that market. ~~On the contrary, In~~By contrast, 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~~the market. In that case, anti-competitive effects may arise. In addition, a cumulative anti- competitive effect~~ problems~~ may arise if several suppliers tie most of the available wholesalers.

~~(292)~~(309) ~~For~~As regards 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~~solely 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~~those reasons that~~ for~~, as regards final products at the retail level, significant anti-competitive effects may arise, taking into account all other relevant factors, ~~if~~where a non-dominant supplier ties 30% or more of the relevant market. For a dominant ~~company~~undertaking, even a modest tied market share may~~ already~~ lead to significant anti-competitive effects.

~~(293)~~(310) ~~At the retail level, a~~A cumulative foreclosure effect may also arise~~.~~ at the retail level. Where all suppliers have market shares below 30%, a cumulative ~~anticompetitive~~ foreclosure effect is unlikely ~~if~~where the total tied market share is less than 40~~% and~~%, in which case withdrawal of the block exemption is therefore unlikely. That figure may be higher when other factors ~~like~~such as the number of competitors~~,~~ or entry barriers ~~etc.~~ are taken into account. Where ~~not all companies~~some of the undertakings have market shares ~~below~~above the threshold ~~of the VBER~~set out in Article 3 of Regulation (EU) X but ~~none~~no undertaking is dominant, a cumulative~~ anticompetitive~~ foreclosure effect is unlikely if the total tied market share is below 30%.

~~(294)~~(311) 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~~to address a possible foreclosure effect resulting from a single branding agreement will be limited. In that case, intervention by the Commission below the level of dominance is unlikely.

~~(295)~~(312) 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)~~(313) Where single branding produces appreciable ~~anti-competitive~~restrictive effects ~~are established,~~, it is necessary to asses whether the ~~question~~agreement generates efficiencies that fulfil the conditions of ~~a possible~~~~exemption under~~ Article 101(3) ~~arises.~~of the Treaty. For non-compete obligations, the efficiencies described in ~~points~~

~~(~~paragraph (16), point (b) (free riding between suppliers), points (e~~),~~) and (f) (hold-up problems) and point (i) (capital market imperfections~~) of paragraph (14) of these Guidelines,~~), may be particularly relevant.

~~In~~

~~(297)~~ As regards the ~~case of an efficiency as~~efficiencies described in ~~paragraphs (14)(~~paragraph (16), points (b), (~~14)(~~e) and (~~14)(~~i~~) of these Guidelines,~~), it is possible that quantity forcing on the buyer ~~could possibly~~may be a less restrictive

(314) alternative. ~~A~~Conversely, a non-compete obligation may be the only viable ~~way~~means to achieve ~~an~~the efficiency ~~as~~ described in paragraph (~~14)~~(16), point (f) ~~of these Guidelines,~~ (hold-up problem related to the transfer of know-how).

~~(298)~~(315) In the case of a relationship-specific investment made by the supplier ~~(see~~ , as described in paragraph (~~14)~~(16), point (e~~) of these Guidelines~~), a non-compete or quantity forcing ~~agreement~~obligation for the period of depreciation of the investment will, in general, fulfil the conditions of Article 101(3~~).~~) of the Treaty. 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~~that equipment can be used afterwards only to produce components for a particular buyer. General or market-specific investments in (extra) capacity are ~~normally~~generally 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~~in or next to the canning ~~facility~~factory of a food producer, ~~this~~that new capacity may only be economically viable when producing for ~~this~~that particular customer, in which case the investment would be considered to be relationship-specific.

(316) Non-compete obligations may also be used to address a hold-up problem for investments pursuing sustainability objectives. For example, a hold-up problem could arise where an energy supplier facing increased demand for renewable energy[169] wishes to invest in a hydropower plant or wind farm. The supplier may only be willingto take that long-term investment risk if a sufficient number of buyers are willing to commit to purchase renewable energy for a longer period. Such vertical agreements with buyers may be pro-competitive, as the long-term non-compete obligation may be necessary for the investment to take place at all, or for it to take place on the foreseen scale or within the foreseen time. Therefore, such non-compete obligations may fulfil the conditions of Article 101(3) of the Treaty if the supplier's investment has a long depreciation period, exceeding the 5 years set out in Article 5(1), point (a) of Regulation (EU) X.[170]

~~(299)~~(317) Where the supplier provides the buyer with a loan or ~~provides the buyer~~ with equipment ~~which~~that is not relationship-specific, this is generally unlikely in itself ~~is normally not sufficient to justify the exemption of an anticompetitive~~to constitute an efficiency that fulfils the conditions of Article 101(3) of the Treaty where the agreement produces anti-competitive foreclosure ~~effect on the market.~~effects. In ~~case~~the event of capital market ~~imperfection~~imperfections, it may be more efficient for ~~the supplier of~~ a product ~~than for a bank~~ supplier to provide a loan~~.~~, rather than a bank (see paragraph (~~14)~~(16), point (i~~) of these Guidelines).~~)). However, in ~~such a~~that case, the loan should be provided in the least restrictive way possible, and the buyer should ~~thus in general~~generally not be prevented from terminating the obligation and repaying the outstanding ~~part~~amount of the loan at any point in time and without ~~payment of any~~ paying a penalty.

~~(300)~~(318) The transfer of substantial know-how ~~(~~, as referred to in paragraph (~~14)~~(16), point (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.~~

~~Example~~

[169] See Article 2(1) of Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources, OJ L 328, 21.12.2018, p. 82.

[170] Other EU rules may also apply to such investments in renewable energy, including those flowing from Article 106(1) TFEU, the State aid and internal market rules.

(319) The following is an example of a 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 vertical agreements oblige the retailers to purchase only from the market leader for at least four years. The market leader is especially strongly represented in more densely populated areas, such as the capital. It has 10 competitors, but the products of some of them are only available in certain locations and they all have much smaller market shares, the largest having 12%. These 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 and it provides its tied retailers with special stocking cabinets for its product.
>
> This results in a situation where, 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, even though it is in those areas that they would prefer to enter the market. In addition, owing to the strong brand and product differentiation and 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 to 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 involve special know-how and are not brand specific. Accordingly, it is unlikely that the conditions of Article 101(3) of the Treaty are fulfilled.

~~(302)~~(320) The following is an 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).~~

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 and the loan is to be repaid in equal instalments. However, after the first two years, buyers have the possibility to terminate the contract with a 6-month notice period if they repay the outstanding amount of the loan and take over the equipment at its market asset value. At the end of the 5-year period the equipment becomes the property of the buyer. There are 12 competing producers, most of which are small, the biggest having a market share of 20%, and they use similar contracts with different durations. The producers with market shares below 10% often have contracts with longer durations and 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 those 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. It appears that the resellers often have difficulty in obtaining loans from banks and they are generally too small to raise capital through other means, such as by issuing shares. In addition, producer X is able to demonstrate that concentrating its sales on a limited number of resellers allows it to plan its sales better and to save transport costs. In view of the efficiencies generated by the purchasing obligation, on the one hand, and the 25% non-tied share in the contracts of producer X, the real possibility for early termination of the contracts, 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) of the Treaty.

8.2.2. Exclusive supply

~~(303)~~(321) Exclusive supply ~~refer~~refers to ~~dispositions~~restrictions 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~~. They 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~~that buyer. For intermediate goods or services, exclusive supply is often referred to as industrial supply.

~~(304)~~ Exclusive supply ~~is exempted~~agreement can benefit from the block exemption provided by ~~the VBER~~Regulation (EU) X where ~~both~~neither the supplier's ~~and~~nor the buyer's market share ~~does not exceed~~exceeds 30%, even if combined with other non-hardcore vertical restraints, such as non-compete obligations. The remainder of this section 8.2.2. provides

(322) guidance for the assessment of exclusive supply agreements in individual cases above the market share threshold.

~~(305)~~(323) The main competition risk of exclusive supply is ~~anticompetitive~~anti-competitive foreclosure of other buyers. There is a similarity with the possible effects of exclusive distribution, in particular ~~when~~where the exclusive distributor becomes the exclusive buyer for a whole market (see in particular paragraph (~~113) of these Guidelines~~130). 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~~However, the importance of the ~~buyer~~buyer's position on the downstream market is ~~however~~ the most significant factor to determine whether a competition problem may arise. If the buyer ~~has no~~does not have 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~~where 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~~buyer is dominant on the downstream market, any obligation to supply the products only or mainly to the dominant buyer ~~are likely to~~may easily have significant anti-~~-~~competitive effects.

~~(306)~~(324) ~~It is not only~~As well as the market position of the buyer on the upstream and downstream market ~~that, it~~is also important ~~but also~~ to take into account 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 5 years entered into by non-dominant ~~companies~~undertakings 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 supplyagreements.~~

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)~~(325) The market position of ~~the~~ competing buyers on the upstream purchase market is also important, as it is likely that exclusive supply ~~agreement~~agreements 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~~these competitors have similar buying power ~~than~~to that of 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~~where a number of major buyers all enter into exclusive supply contracts with the majority of suppliers on the market. Such a cumulative foreclosure effect may lead to withdrawal of the benefit of ~~the VBER~~Regulation (EU) X.

~~(308)~~(326) 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~~problem.

~~(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

(327) buyers. In the case of strong suppliers, the exclusive supply obligation may be found in combination with non-compete obligations. ~~Such a combination brings in~~For such combinations, it also necessary to refer to the ~~rules developed for~~guidance on 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~~will often be justified, in particular below thelevel of dominance.

~~(310)~~(328) Lastly, the level ~~of trade~~in the production or distribution chain and the nature of the product are relevant to ~~assess~~ the assessment of possible foreclosure ~~effect. Anticompetitive~~effects. Anti-competitive foreclosure is less likely in the case of an intermediate product, or where the product ishomogeneous. ~~Firstly~~First, a foreclosed manufacturer that uses a certain input ~~usually~~generally has more flexibility to respond to the demand of its customers than ~~the~~a wholesaler or retailer ~~has in responding~~that needs to respond to the demand of ~~the~~ final ~~consumer~~consumers, for whom brands may play an important role. ~~Secondly~~Second, 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 dominanton the downstream market.

~~(311)~~(329) Efficiencies can be expected in the case of a hold-up problem (~~paragraphs (14)~~(paragraph (16), points (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)~~(16), point (g~~) of these Guidelines)~~)) do not seem likely to justify exclusive supply.

~~(312)~~(330) 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.

(331) ~~Example~~The following is an 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.~~

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

Given the considerable investments by both parties, the agreement is likely to fulfil the conditions of Article 101(3) of the Treaty, 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 a maximum of 40% of the market.

8.2.3. Restrictions on the use of online marketplaces

~~(313)~~(332) Online marketplaces ~~are online platforms which~~ connect merchants and potential customers with a view to enabling direct purchases~~.~~ and are generally providers of online intermediation services. Online ~~platforms~~services 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~~as advertising services for the purpose of these Guidelines, ~~but advertising platforms~~not as online marketplaces[171].

~~(314)~~(333) 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~~in particular small and medium-sized~~, retailers~~ sellers that do not ~~operate~~have their own online ~~shop~~store or are not well known to end users.

(334) Suppliers may wish to restrict the use of online marketplaces by their ~~buyers,~~[~~115~~]buyers[172], 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~~buyer maintains a direct ~~a~~ relationship with customers. ~~The~~Such restrictions may range from a total ban on the use of online marketplaces to restrictions on the ~~imposition~~use of online marketplaces that do not meet 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~~in which their goods or services~~. Some~~ may be sold. The imposition of certain qualitative requirements may *de facto* ban the use of online marketplaces, because no online marketplace is capable of meeting the ~~requirement~~requirements. This may be the case, for example, where the supplier requires that the logo of the

[171] See also paragraph (343).

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[172] E-commerce Sector Inquiry Final Report, section 4.4.

~~(315)~~ online marketplace is not visible, or it requires that the domain name of any website used by the retailer contains the name of the retailer's business.

(335) ~~A restriction~~Vertical agreements which restrict the use of ~~sales on~~ online marketplaces ~~in a vertical agreement is exempted~~can benefit from the exemption provided by ~~the VBER where~~ Article 2(1) of Regulation (EU) X, provided that the agreement does not, directly or indirectly, have the object of preventing the effective use of the internet by the buyer to sell the contract goods or services to particular territories or customers, within the meaning of Article 4, point (e) of the Regulation and that the market shares of ~~each of~~both 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.~~ the thresholds set out in Article 3 of Regulation (EU) X.

~~(316)~~ 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~~manner in which the ~~buyer's~~buyer may sell online ~~sales~~ and does not ~~limit~~restrict sales ~~into~~to a ~~specific~~particular territory or ~~to a specific~~ customer group. While ~~it~~such a restriction or ban restricts the use of a specific online sales channel, other online sales channels remain available to the ~~buyer.[116] For example~~buyer[173]. In particular, despite a restriction or a ban of sales on online ~~market places~~marketplaces, the buyer may still sell the contract goods or services via its own ~~website and use~~ online ~~advertising~~ store and other online 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~~and it may use search engine optimisation techniques or advertise online ~~is a hardcore restriction within the meaningof Article 4(b) to (d) VBER and a restriction of Article 101(1) by object, a restriction~~

~~[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.~~

(336) ~~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~~, including on third-party platforms ~~and from using online search engines~~, to ~~attract customers to~~increase the visibility of its ~~website, and, therefore, does not constitute~~online store or other sales channels. Therefore, such a ~~hardcore~~ restriction ~~under~~can, in principle, benefit from the exemption provided by 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~~2(1) of Regulation (EU) X.

~~(318)~~(337) The remainder of this section 8.2.3. 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~~market share thresholds set out in Article 3 of Regulation (EU) X are exceeded.

~~(319)~~(338) Restrictions on the use of online marketplaces are often ~~imposed~~agreed in selective distribution systems. Section 4.6.2 sets out the criteria ~~under~~according to which a selective distribution system ~~falls~~may fall 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~~the Treaty[174]. In instances where the supplier does not enter into an agreement with the online marketplace ~~and is thus~~, the supplier may be unable to ~~ensure~~verify that the online marketplace meets the conditions that its ~~selection criteria~~authorised distributors must fulfil for the sale of the contract goods or services. In that case, a restriction or ban on the use of online marketplaces may ~~fulfil the above criteria and thus~~ be appropriateand 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~~appoints the operator of an online marketplace as ~~an authorised distributor in~~ a member of 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 online marketplace itself to ~~distribute~~sell the contract goods or services, restrictions on the use of ~~such~~those online marketplaces ~~would appear~~are unlikely to fulfil the ~~requirements~~conditions of appropriateness and ~~necessity~~proportionality[175].

(339) Where a selective distribution falls within the scope of Article 101(1) of the Treaty, the vertical agreement and any restrictions on the use of online marketplaces must be assessed under Article 101 of the Treaty.

(340) The ~~possible risks~~main risk to competition arising from restrictions on the use of online marketplaces ~~are~~is a reduction of intra-brand competition at the distribution level ~~and the foreclosure of~~. For instance, certain authorised distributors, ~~notably~~such as small ~~and~~or medium ~~ones,~~-sized buyers, may

[173] See Case C-230/16 - *Coty Germany*, paragraphs 64 to 69.

[174] See Case C-230/16 - *Coty Germany*, paragraphs 24 to 36.

[175] See paragraphs (147) to (150) of these Guidelines; and Case C-230/16 - *Coty*, paragraphs 43 to 58.

~~(320)~~ rely on online marketplaces to attract customers. Restrictions on the ~~extent that distributors are deprived~~use of online marketplaces may deprive those buyers of a potentially important sales channel and reduce the competitive constraint they exert on other authorised distributors.

~~(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~~, as a reduction of intra-brand competition~~.~~ is by itself unlikely to lead to negative effects for consumers if inter-brand competition is strong at the supplier and distributor levels[176]. 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.~~

(341) position of the supplier and of its competitors should be taken into account. ~~Second~~Secondly, 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~~requirement to only use online 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 should be taken into account.

(342) As set out in paragraph (~~314) of these Guidelines,~~334), 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~~within the scope of Article 101(1~~),~~) of the Treaty, the assessment must consider whether such efficiencies ~~may~~could be achieved through less restrictive means, in ~~line~~accordance with the conditions of Article 101(3~~).~~) of the Treaty. This could, for instance, be the case where the online marketplace allows retailers to create their own brand shop within the marketplace~~.~~ and thus exert more control over the manner in which their goods or services are sold. Any quality-related justifications ~~brought forward~~relied on by the supplier will be unlikely to meet the conditions of Article 101(3) ~~where~~ of the Treaty in the following situations:

(a) the supplier itself uses the online ~~marketplaces~~marketplace that ~~are covered by the restrictions, or where~~ the buyer is prevented from using;

(b) the supplier imposes the restriction ~~only~~ on some distributors but not on others~~, or where~~ ;

~~(322)~~(c) 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~~services

~~(323)~~(343) Price comparison ~~tools, for instance~~services[177], such as price comparison websites or apps, enable ~~retailers~~sellers to increase their visibility and generate traffic for their ~~website~~online store and ~~they~~ enable potential customers to find retailers, compare different products and compare offers for the same product. Price comparison ~~tools~~services increase price transparency and have the potential to intensify intra-brand and ~~potentially~~ inter-brand price competition ~~between retailers~~at the retail level.

(344) Unlike online marketplaces, price comparison ~~tools~~services typically do not offer sale and purchase functionality, but rather re-direct customers to the ~~website~~online store of the retailer,

[176] See Case C-306/20 - *Visma Enterprise*, paragraph 78.

[177] For the purpose of these Guidelines, price comparison services refer to services that do not provide a direct purchasing functionality. Services enabling users to conclude purchase transactions by providing sale and purchase functionality are classified as online marketplaces for the purposes of these Guidelines. Restrictions on the use of online marketplaces are dealt with in section 8.2.3.

~~(324)~~ enabling the initiation of a direct transaction between the customer and the retailer~~.~~~~[119]~~ outside the price comparison service. Price comparison ~~tools~~services are therefore not a distinct online sales channel, but rather an online advertising channel.

~~(325)~~(345) Suppliers may wish to restrict the use of price ~~comparisons tools,~~~~[120]~~comparison services[178], for instance to protect their brand image, as price comparison ~~tools~~services 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~~services may be to reduce opportunities for counterfeiting, or to protect the supplier's business ~~models that rely on~~model, for instance, when that model relies on elements such as specialisation or quality rather than price.

~~[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)~~(346) ~~Restrictions on the use of price comparison tools~~Restrictions on the use of price comparison services 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~~service. For example, a restriction on providing price information to price comparison ~~tools, or~~services, a requirement to obtain the supplier's authorisation before using price comparison ~~tools~~services, or a restriction on the use of the supplier's brand on price comparison ~~tools~~services may amount to ~~an indirect prevention in~~a ban on the use of price comparison ~~tools~~services.

(347) Restrictions on the use of price comparison ~~tools~~services 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~~They may also 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~~reach 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~~ online store. As set out in paragraph (~~200) of these Guidelines, preventing~~203), a ban on the use of price comparison ~~tools as~~services prevents the buyer from using an entire 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~~ , which is a hardcore restriction ~~under~~ within the meaning of Article 4~~(b) to (d) VBER. The main possible competition risks in such case are~~ , point (e) of Regulation (EU) X. Banning the use of price comparison services hinders the buyer from selling to customers who are located outside its area of activity and who wish to purchaseonline. It could therefore lead to market partitioning~~, which may facilitate price discrimination,~~ and reduced intra-~~-~~brand competition.

~~(327)~~(348) Conversely, ~~if~~where the ~~restriction is limited to~~vertical agreement prevents the use of price comparison ~~tools to~~services that target customers in a territory or customer group that is ~~reserved exclusively to the supplier or~~ allocated exclusively to other ~~distributors (~~buyers or reserved exclusively to the supplier, it can benefit from the exemption provided by Article 2(1) of Regulation (EU) X, pursuant to the exceptions set out in Article 4, points (b)(i), (c)(i)(1) and d(i) of the Regulation relating to exclusive distribution~~), for instance because the~~ . For example, a price comparison ~~tool is in~~ service may be considered to target an exclusive territory where the service uses a language ~~not~~ commonly used in ~~the~~that territory and not in ~~which~~the territory of the buyer ~~is established,~~ or ~~has~~where the service uses a top-level 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~~corresponding to the exclusive territory.

(349) ~~Restrictions on~~ Vertical agreements which restrict the use of price comparison ~~tools~~services, but which ~~fall short of~~do not directly or indirectly ~~preventing their use~~prevent the use of all price comparison services, for instance ~~requirements~~a requirement that the price comparison ~~tools must meet~~service meets 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~~can benefit from the ~~block~~ exemption provided by ~~the VBER.~~ Article 2(1) of Regulation (EU) X.

~~(328)~~(350) The following guidance is provided for the assessment of ~~such restrictions where~~vertical agreements restricting the ~~VBER does~~use of price comparison services that do not ~~apply~~benefit from the exemption provided by Article 2(1) of Regulation

(EU) X, for instance because the market share thresholds set out in Article 3 of the Regulation are exceeded.

[178] E-commerce Sector Inquiry Final Report, Section B.4.5.

~~(329)~~(351) Restrictions on the use of price comparison ~~tools~~services 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~~) of the Treaty. Therefore, where restrictions on the use of price comparison ~~tools will be appropriate or~~services are used in a selective distribution agreement, it is first necessary to assess whether the restrictions are an appropriate and proportionate means to preserve the quality or ensure the proper use of the contract goods or services~~, because these tools typically~~. In this respect, it should be noted that price comparison services re-direct potential customers to the ~~website~~online store of the authorised distributor ~~to make the purchase. The~~for the conclusion of the sales transaction and that the supplier is typically able to exert control over the authorised distributor's ~~website~~online store through ~~its~~the selection criteria and by imposing requirements in ~~its vertical~~the selective distribution agreement ~~with the distributor~~.

~~(330)~~ Where restrictions on the use of price comparison services are used in a selective distribution agreement that falls within the scope of Article 101(1) of the Treaty or in other types of distribution agreement, it is necessary to assess whether the restriction has an appreciable restrictive effect on competition within the meaning of Article 101(1) of the Treaty. 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,~~services that do not benefit from the exemption provided by Article 2(1) of Regulation (EU) X 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~~

(352) ~~consisting in an increase of consumers' search costs and the softening of~~in particular, soften price competition or ~~to market partitioning, which may facilitate price discrimination~~partition markets, ultimately impacting inter-brand~~,~~ and ~~possibly also~~ intra-brand competition. ~~Such~~For example, such restrictions may ~~also limit intra~~reduce price competition, by restricting the possibility for the buyer to inform potential customers about lower prices. Intra-brand competition~~, for example,~~ may be particularly affected where a supplier ~~does not impose~~ imposes the restrictions on ~~all~~only some of its distributors, or where the supplier itself uses the price comparison ~~tools~~services covered by the ~~restriction~~restrictions. To the extent that ~~distributors are prevented from relying~~buyers are limited in their ability to rely on a potentially significant online advertising channel, they ~~would~~may only be able to exercise limited competitive pressure on the supplier or any other distributors not facing ~~this~~that restriction.

(353) Relevant factors for the assessment under Article 101(1) of the Treaty include~~-~~:

(a) the market position of the supplier and its competitors;~~-~~

(b) the importance of price comparison ~~tools~~services as an advertising channel in the ~~product and geographic markets~~ relevant market for the sale of the contract goods or services;~~-~~

(c) the type and scope of the restrictions and the relative importance of ~~any specific~~the particular price comparison ~~tools~~service whose use is restricted or banned~~, as well as~~ ;

(d) whether the supplier also imposes restrictions on the ~~distributor's~~buyer's ability to useother forms of online advertising.~~-~~

~~(331)~~(354) The ~~cumulative~~combined restrictive effect of the restriction on the use of price comparison services and any ~~such~~ other restrictions ~~with the restriction on the use of price comparison tools~~on online advertising imposed by the supplier should be taken into account.

(355) As set out in paragraph (~~323) of these Guidelines,~~345), restrictions on the use of price comparison ~~tools~~services 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~~Pursuant to the conditions of Article 101(3~~),~~) of the ~~assessment must consider~~Treaty, it is necessary to assess whether any such efficiencies ~~may also~~could be achieved through less restrictive means. This ~~could~~may be the case where, for example, the use of price comparison ~~tool~~services is made conditional on the service also ~~provides~~providing for comparisons or reviews ~~linked~~relating to the quality of the goods or services concerned, the level of customer service~~,~~ provided by the ~~trustworthiness of the distributor~~buyer, or other features of the ~~distributors'~~buyer's offerings. Any assessment of quality-related justifications under Article 101(3) of the Treaty should also take into account that the sale ~~does~~is not ~~occur~~

~~(332)~~ concluded on the website of the price comparison ~~tool itself~~service, 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~~in the buyer's online store.

8.2.5. Parity obligations

~~(333)~~(356) Parity obligations, ~~also~~sometimes called Most Favoured Nation clauses ~~(MFNs~~('MFNs') or Across Platform Parity Agreements ~~(APPAs~~('APPAs'), require a ~~supplier~~seller of goods or services to offer ~~them~~the goods or services to another party on conditions that are no less favourable than the conditions offered by the ~~supplier~~seller to certain other parties or ~~on~~via certain other channels. The conditions may concern prices, inventory, availability or any other terms or conditions of offer or sale. The parity obligation may ~~be express~~take the form of a contractual clause or it may be ~~applied by~~the result of other direct or indirect ~~means~~measures, such as differential pricing or other incentives ~~or measures~~ whose application depends on the conditions under which the ~~supplier~~seller offers its goods or services to ~~particular~~other parties or ~~on particular~~ via other channels.

~~(334) Parity obligations imposed by suppliers of online intermediation services (for example, marketplaces or price comparison tools) relating to~~ Retail parity obligations relate 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~~. These 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~~

(357) are often imposed by providers of online intermediation services (for example, online marketplaces or price comparison services) on the buyers of their 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.~~(for example, undertakings that sell via the intermediary platform).

~~(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'.~~

(358) Retail parity obligations refer to various other sales or advertising channels. For example, across-platform retail parity obligations refer to the conditions offered via competing online intermediation services (competing platforms). So-called narrow retail parity obligations refer to the conditions offered on the direct sales channels of sellers of goods or services. Some retail parity obligations refer to the conditions offered on all other sales channels (sometimes called 'wide' retail parity obligations).

~~(336)~~(359) With the exception of ~~the~~ across-platform retail parity obligations ~~defined in~~within the meaning of Article 5(1~~)~~(), point (d) ~~VBER, the block exemption applies to~~of Regulation (EU) X, all types of parity obligation in vertical agreements~~,~~ can benefit from the exemption provided ~~the market shares~~by Article 2(1) of the ~~supplier and the buyer do not exceed 30%.~~Regulation. The following guidance is provided for the assessment of the across-~~-~~platform retail parity obligations ~~defined~~referred to in Article 5 (1~~)~~(), point (d) ~~VBER~~of Regulation (EU) X and for other types of parity obligations in ~~individual~~ cases ~~above the market share threshold~~where the block exemption does not apply.

8.2.5.1. Across-platform retail parity obligations

~~(337)~~(360) 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~~via competing online intermediation services, ~~as defined in~~ within the meaning of Article 5(1~~)~~(), point (d)~~VBER~~of Regulation (EU) X, are more likely than other types of parity obligation to produce ~~net~~ anti-competitive effects. ~~Across-platform~~This type of retail parity ~~obligations~~obligation may restrict competition ~~as follows~~in the following ways:

(a) ~~They~~it may soften competition and facilitate collusion between ~~suppliers~~providers of online intermediation services. In particular, it is more likely that a ~~supplier~~provider 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~~the provider's services, sellers of goods or services which choose to use ~~its~~the provider's platform are obliged to offer conditions on the platform that are at least as good as the conditions they offer on competing platforms~~.~~;

~~They~~

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

(361) For the assessment of this type of parity obligation, ~~key~~the following factors ~~are~~ should be taken into account:

(a) the market position of the provider of online intermediation services that imposes the obligation and of its competitors;

(b) the share of buyers of the relevant online intermediation services that are covered by the obligations;

(c) the homing behaviour of the buyers of the online intermediation services and of end users (how many ~~intermediary platforms~~ competing online intermediation services they use);~~ the market position of the supplier that imposes the obligation and of its competitors;~~

(d) the existence of barriers to entry to the relevant market for the supply of online intermediation services~~, and~~ ;

(e) the ~~impact~~significance of the direct sales channels of buyers of the online intermediation services and the extent to which those buyers are able to remove their products from the platforms of the providers of online intermediation services (de-listing).

~~(338)~~(362) The restrictive effects of across-platform retail parity obligations are generally more severe where they are used by ~~buyers of the services~~one or more leading providers of online intermediation services. Where such providers 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 providers.

~~(339)~~ The share of buyers of the relevant online intermediation services that are subject to the retail parity obligations and the homing behaviour of those buyers are important, as they may indicate that ~~a supplier's~~the provider's parity obligations restrict competition in respect of a share of demand that exceeds the ~~supplier's~~provider's market share. For example, a ~~supplier~~provider 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 retail parity obligations may – because they use multiple platforms – account for more than 50 %

(363) % of total platform transactions. In that case, the ~~supplier's~~provider's parity obligations may restrict competition in respect of more than half of total relevant demand.

~~(340)~~(364) 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 online intermediation service when ~~it~~the service generates a transaction. As explained ~~above,~~in paragraph (363), 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~~provider's parity obligations. ~~Second, single~~Single homing by end users may mean that each ~~supplier~~provider of online intermediation services controls access to a distinct group of end users. This may increase the ~~supplier's~~provider's bargaining power and its ability to impose retail 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.~~

(365) Markets for the ~~supply~~provision of online intermediation services are often characterised by significant barriers to entry and expansion, which can aggravate the negative effects of retail parity obligations. These markets often feature positive indirect network effects: new or smaller ~~suppliers~~providers of such services may find it difficult to attract buyers

~~(342)~~ because their platforms provide access to insufficient numbers of end users. Where theend users are final consumers, brand loyalty, single-homing and the lock-in strategies of incumbent intermediation services ~~suppliers~~providers can also create barriers to entry.

~~(343)~~(366) 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~~providers of online intermediation services to raise the price of their services. It is therefore necessary to assess whether such direct sales channels are also covered by the retail parity obligation, the share of sales of ~~the intermediated~~relevant goods or services that are made ~~through~~via the direct ~~and indirect~~sales channels and via the online intermediation services, and the substitutability of ~~these channels,~~thetwo types of channel from the perspective of ~~the suppliers of goods or services~~sellers and ~~of end users~~buyers of the intermediated goods or services.

~~(344)~~(367) 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 anti- competitive effect, restrictive effects will generally only be attributed to the parity obligations of ~~suppliers~~providers whose market share exceeds 5%.

~~(345)~~(368) In principle, retail parity obligations may also be imposed by retailers in relation to theconditions under which ~~a supplier's~~the seller's goods or services are offered to ~~end users~~final consumers bycompeting retailers. However, where this type of parity obligation relates to price, it will generally ~~requires~~require the ~~supplier~~seller of goods or services that accepts the obligation to~~impose~~agree a minimum sale price (RPM ~~on~~) with the competing retailers ~~that are covered by the obligation.~~with which it deals. RPM is a hardcore restriction ~~under~~within the ~~VBER and~~ meaning of Article 4, point (a ~~restriction by object under Article 101(1).~~) of Regulation (EU) X. In cases where undertakings are able to implement such retail parity obligations in compliance with the rules relating to ~~minimum RPM~~RPM, including where the parity obligation relates to conditions other than price, the obligations ~~are covered by~~can benefit from the block exemption. Above the ~~block exemption~~ market share threshold set out in Article 3(1) of the Regulation, the guidance provided in paragraphs (~~337~~360) to (~~344) of these Guidelines~~367) applies ~~mutatis mutandis~~by analogy.

8.2.5.2. Retail parity obligations relating to direct sales channels

(369) Retail parity obligations imposed by ~~suppliers~~providers of online intermediation services relating to ~~the conditions under which~~ direct sales channels prevent buyers of the services ~~may offer goods or services to end users~~ from offering prices and conditions on their direct sales channels ~~('narrow' parity) prevent such buyers from inducing end users to switch to the direct channel by offering~~ that are more favourable ~~conditions (undercutting). Under certain conditions, in particular where~~ than the conditions that they offer on the platform of the provider of online intermediation services that imposes the obligation. These obligations are often called 'narrow' retail parity obligations. In principle, narrow retail parity obligations do not restrict the ability of a buyer of online intermediation services to offer more favourable prices or conditions via other online intermediation services. However, where the buyer uses multiple providers of online intermediation services that apply narrow retail parity obligations, these obligations prevent it from offering on its direct channels conditions that are more favourable than the conditions that it offers on the most expensive intermediary platform.

(370) Narrow retail parity obligations eliminate the constraint exerted by the buyer's direct sales channels. Where competition for the supply of online intermediation services is limited, ~~narrow parity~~these obligations may allow ~~the suppliers~~a provider of online intermediation services to maintain a higher price for ~~their~~its services, ~~leading to~~possibly resulting in 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~~.

~~(346)~~(371) Under certain conditions, in particular where the number of ~~end users, and whether the restrictions are imposed by multiple suppliers~~providers of online intermediation services ~~(cumulative effects).~~is limited, narrow retail parity obligations may affect the

~~(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.~~

incentives of buyers of the online intermediation services to pass on changes in the price of the intermediation services in their retail prices. This may lead to a softening of competition between the providers of online intermediation services which is similar to the effect of across-platform retail parity obligations.

~~8.2.5.4.~~8.2.5.3. Assessment of retail parity obligations under Article 101(3) of the Treaty

~~(351)~~(372) Where retail parity obligations produce appreciable restrictive effects, possible efficiency justifications need to be assessed under Article 101(3~~).~~) of the Treaty. The most common justification for the use of ~~these~~retail parity obligations by ~~suppliers~~providers of online intermediation services is to address a free-rider problem. For example, the ~~suppliers~~provider may not have an incentive to invest in the development of ~~their~~its 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 to direct sales channels which can offer the same goods or services on more favourable conditions.

~~(352)~~(373) Relevant factors for the assessment under Article 101(3) of the Treaty include whether the investments made by the ~~supplier~~provider of online intermediation services ~~provide~~create objective benefits, that is, whether they add value for ~~consumers~~end users; whether the risk of free~~-~~ riding on the provider's investments is real and substantial, and whether the particular type and scope of parity obligation is indispensable for the achievement of the objective ~~benfits to be achieved.~~benefits. The likely level of free~~-~~ riding must be sufficient to significantly impact the incentives to invest in the online intermediation ~~service~~services. Evidence of the extent to which users of the intermediation services (sellers and buyers) 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~~provider of online intermediation services or its competitors operate in other comparable markets without using retail parity obligations or 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~~there are significant entry barriers, the need to protect residual competition may outweigh possible efficiency gains. Other justifications relating to the general benefits provided by ~~transaction~~intermediary platforms, such as the pooling of ~~suppliers'~~users' promotional expenditure, increased price transparency or reduced transaction costs ~~will~~can only fulfil the conditions of Article 101(3) of the Treaty if the ~~supplier~~provider 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, narrow retail parity obligations ~~relating to direct sales channels~~ are more likely to fulfil the conditions of Article 101(3~~). This is~~) of the Treaty than across-platform retail parity obligations. 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.~~

(374) 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~~sellers of goods or services via their direct sales channels may be higher, ~~as these suppliers generally earn a higher per unit margin~~in particular because the seller incurs no platform commission costs on ~~sales in their direct channel than on indirect sales.~~its direct sales. However, where the narrow retail parity obligations do not generate efficiencies within the meaning of Article 101(3) of the Treaty, the benefit of the block exemption may be withdrawn. This may be the case, in particular, where the risk of free riding is limited or where the narrow retail parity obligations are not indispensable to achieve the efficiencies. In the absence of efficiencies, withdrawal is particularly likely where narrow retail parity obligations are applied by the three largest providers of online intermediation services in the relevant market and those providers hold a combined market share exceeding 50%. In the absence of efficiencies, the block exemption may also be withdrawn, depending on the particular circumstances, where buyers representing a significant share of the total relevant demand for online intermediation services are

subject to narrow retail parity obligations. The block exemption may be withdrawn in respect of the agreements of all providers of online intermediation services whose narrow retail parity obligations make a significant contribution to the cumulative anti-competitive effect, namely providers with market shares exceeding 5%.

(375) The following is an example of the use of narrow retail parity obligations:

> In a certain Member State, two thirds of restaurant meals that are delivered for home consumption are ordered via online platforms and one third is ordered directly from restaurants. Platforms A, B, C and D generate respectively 25%, 20%, 20% and 15% of the orders made via platforms. Platforms A, B and C have operated in the Member State for between three and five years and the share of total orders made via platforms has grown during that period. Platform D entered the market more recently. The platforms charge the restaurants 15-20% commission per order. Most consumers that use platforms use either one or two platforms, whereas most restaurants that use platforms use two or more platforms.
>
> During the last twelve months, all the platforms have introduced a narrow retail parity clause, which prevents the restaurants from offering lower prices for direct online or telephone orders. In the same period, three of the platforms have increased their standard commission rate. The platforms claim that the narrow parity clause is necessary to prevent restaurants from free riding on their investments, in particular in the development of user-friendly search and comparison functions and secure payment services.
>
> None of the three largest platforms have added new features or services or made significant improvements to their services in the past twelve months. There is no concrete evidence of an appreciable risk of free riding, notably that a significant share of consumers use the platforms to search for and compare restaurant offers, but then order directly from the restaurant. Nor is there evidence that the alleged threat of free riding has negatively affected the platforms' past investments in developing their services.
>
> If it is concluded that the relevant product market consists of the supply of platform services to restaurants, the supply of these services appears to be concentrated. In view of the recent increases in platform commission rates and the lack of evidence that the parity clauses produce efficiencies, it is likely that the benefit of the block exemption will be withdrawn in respect of the restaurant agreements of all four platforms.

8.2.5.4. Upstream parity obligations

(376) Across-platform and narrow parity obligations may also be imposed by providers of online intermediation services relating to the conditions under which goods or services are offered to undertakings other than end users (for example, to retailers). This type of parity obligation can benefit from the exemption provided by Article 2(1) of Regulation (EU) X. In principle, this type of upstream parity obligation is capable of restricting competition for the provision of online intermediation services in similar ways to retail parity obligations. However, to assess this type of upstream parity obligation, it is also necessary to take into account the conditions of competition downstream, that is, between the undertakings which buy goods or services via the online intermediation service. In cases where the block exemption does not apply, the guidance provided in paragraphs (360) to (374) may be applied by analogy.

8.2.5.5. Most favoured customer obligations

(377) Parity obligations may also be imposed by manufacturers, wholesalers or retailers relating to the conditions under which they purchase goods or services as inputs from suppliers. This type of traditional most favoured customer obligation does not directly affect the conditions under which the purchasing undertakings compete downstream. 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 of these obligations 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.

(378) Traditional most favoured customer obligations may create efficiencies that fulfil the conditions of Article 101(3) of the Treaty. In particular, they may enable the parties to a long-term supply agreement to minimize transaction costs. They may also prevent opportunistic behaviour by the supplier and address a hold-up problem for the buyer, whereby, for example, the buyer might refrain from investing in or launching a new product due to fears that the supplier of the input may lower its price for subsequent buyers. This type of efficiency is more likely in long-term relationships involving sunk investments.

8.2.6. Upfront access payments

~~(354)~~(379) 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~~allowances[179], so-~~-~~called pay-to-stay ~~fees,[123]~~fees[180], and payments to have access to a distributor's promotion campaigns~~ etc~~. This section 8.2.6. provides guidance for the assessment of upfront access payments in individual cases above the market share threshold stipulated in Article 3 ~~VBER~~of Regulation (EU) X.

~~(355)~~(380) Upfront access payments ~~may sometimes~~can result in ~~anticompetitive~~anti-competitive foreclosure of otherdistributors. 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~~321) to ~~310)).~~(330).

(381) Exceptionally, upfront access payments may result in ~~anticompetitive~~anti-competitive upstream foreclosure effects. For example, ~~if~~where 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~~298) to (~~293) of these Guidelines).~~318)). The assessment must also take into account whether the distributor in question sells competing products under its own-

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

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

~~(356)~~ 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~~of Regulation (EU) X (see section 4.4.3~~. of these Guidelines).~~.).

~~(357)~~(382) 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~~generally only arises where the distribution market ~~to be~~is 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

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~~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.~~

(383) 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~~generally only agree to pay an upfront access fee if it considers there is a low probability that the product launch will fail.

~~(359)~~(384) 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~~incur 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~~supplier, thereby contributing to an optimal rate of product launches.

8.2.7. Category ~~Management Agreements~~management agreements

~~(360)~~(385) Category management agreements are ~~agreements by~~agreements[181] under which~~,~~ ~~within a distribution agreement,~~ the distributor entrusts the supplier (the 'category captain') with the marketing of a category of products~~ including in general~~. This may include not only the supplier's products, but also the products of ~~its~~the supplier's 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~~ can benefit from the ~~block~~ exemption ~~when~~provided by Article 2(1) of Regulation (EU) X where neither the category captain's nor the distributor's market shares exceed 30~~%,~~% and provided that ~~such an~~the 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, point (a) ~~VBER~~of Regulation (EU) X.

~~(361) In most cases,~~While category management agreements ~~do~~will generally not raise concerns~~ under Article 101. However~~, they may ~~sometimes~~ distort competition between suppliers~~,~~ and result in ~~anticompetitive~~anti-competitive foreclosure of other suppliers~~,~~ in cases 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.

(386) In general, ~~distributors~~the distributor will not have an interest in limiting ~~their~~its choice of products. ~~However, they may have incentives to exclude certain suppliers, in particular when~~However, where the distributor also

181 An agreement within the meaning of Article 101 of the Treaty may also arise where the category captain issues non-binding recommendations which are systematically implemented by the distributor.

~~(362)~~ sells competing products under its own brand, it may also have incentives to exclude certain suppliers. 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~~298) to (318)). In particular, this assessment should take into account the market coverage of the category management agreements, the possible cumulative use of such agreements and the market position of competing suppliers andthe distributor.

~~(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~~Category management agreements may~~ ~~, in addition, facilitate collusion between distributors ~~when~~where 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~~ . Such agreements may also facilitate collusion between suppliers, through increased opportunities to exchange sensitive market information via retailers, ~~such as~~ for instance information ~~related~~relating to future pricing, promotional plans or advertising ~~campaigns. The VBER~~campaigns[182]. Regulation (EU) X does not cover such ~~direct~~ information exchanges between competitors~~, see~~ . In particular, the guidance on information exchange provided in paragraphs (95) to (103) applies only to information exchange in the context of the dual distribution scenarios set out in Article 2(4) of the Regulation. However, paragraph (~~83) of these Guidelines.~~

(387) ~~However, the use of category management agreements~~103), which describes precautions that undertakings may ~~also~~ take to minimise the risk of collusion arising from information exchange in the context of dual distribution, may be relevant by analogy.

~~(365)~~(388) The use of category management agreements may lead to efficiencies. ~~Category management~~Such agreements may allow distributors to ~~have~~gain 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~~at the ~~shelves~~right time. In general, the higher the degree of inter-brand competition and the lower consumers' switching costs, the greater the economic benefits achieved through category management.

8.2.8. Tying

~~(366)~~(389) 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~~] of the Treaty[183]. Tying may also constitute a vertical restraint within the meaning of Article 101 of the Treaty where it results in a single branding type of obligation for the tied product (see paragraphs (~~281~~298) to (~~302) of these Guidelines) for the tied product.~~318). Only the latter situation is dealt with in these Guidelines.

(390) 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~~-~~

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[182] See the case law of the Union Courts relating to the exchange of information between competitors, for example, the judgments of 10 November 2017, *ICAP* v *Commission*, Case T-180/15, EU:T:2017:795, paragraph 57, 4 June 2009, *T-Mobile Netherlands and Others*, Case C-8/08, EU:C:2009:343, paragraph 51, 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission*, Case C-286/13 P, EU:C:2015:184, paragraph 127, 21 January 2016, *Eturas UAB and Others*, Case C-74/14 ECLI:EU:C:2016:42, paragraphs 40-44; 10 November 2017, *ICAP* v *Commission*, Case T-180/15, EU:T:2017:795, paragraph 57.

[183] See judgment of 14 November 1996, *Tetra Pak* v *Commission,* C-333/94 P, 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).

~~(367)~~ production for both the tying and the tied ~~product.[125]~~product[184]. 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]~~product[185], 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~~anti-competitive 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~~As regards the question of what can be considered appreciable foreclosure under Article 101(1~~),~~) of the Treaty, the analysis for single branding can be applied. Tying means that there is at least a form ofquantity- 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

~~[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.~~

(391) 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)~~(392) 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~~may allow 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~~may be difficult for ~~the~~ customers to calculate the consequences of the tying.

~~(370)~~(393) Tying ~~is exempted under~~can benefit from the ~~Block Exemption~~exemption provided by Article 2(1) of Regulation ~~when~~(EU) X where 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~~ that are not hardcore restrictions ~~under that~~within the meaning of the Regulation, such as non-compete obligations or quantity forcing in respect of the tying product, or exclusive sourcing. The remainder of this section (388) provides guidance for the assessment of tying in individual cases above the market share threshold.

184 See judgment of 17 September 2007, *Microsoft* v *Commission*, T-201/04, EU:T:2007:289, paragraphs 917, 921 and 922.

185 See judgment of 12 December 1991, *Hilti* v *Commission*, T-30/89, EU:T:1991:70, paragraph 67.

~~(371)~~(394) The market position of the supplier on the market of the tying product is obviously of central importance ~~to assess~~for the assessment of 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)~~(395) 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)~~(396) 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~~it is necessary to assess whether the conditions of Article 101(3) of the Treaty 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~~),~~) of the Treaty, it must, however, be shown that at least partof ~~these~~those cost reductions are passed on to the consumer, which is normally not the case ~~when~~where the retailer is able to obtain, on a regular basis, supplies of the same orequivalent products on the same or better conditions than those offered by the supplier which

~~(397)~~ applies the tying practice. Another efficiency may exist where tying helps to ensure a certain uniformity and quality standardisation (see paragraph (~~14)~~(16), point (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~~them 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~~).~~) of the Treaty. Where the supplier of the tying product ~~imposes on~~requires the buyer ~~the suppliers from which the buyer must~~to purchase the tied productfrom designated suppliers, for instance because the formulation of minimum quality standards is not possible, this may also fall outside the scope of Article 101(1~~),~~) of the Treaty, especially where the supplier of the tying product does not derive a direct (financial) benefit from designating the suppliers of the tied product.