

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

Fields marked with \* are mandatory.

### Introduction

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#### Objectives of the public consultation

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

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

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

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

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

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

## About you

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### \* 1 Language of my contribution

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

### \* 2 I am giving my contribution as

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

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

\* 3 First name

Marta

\* 4 Surname

Conti

\* 5 Email (this won't be published)

m.conti@etrma.org

\* 9 Organisation name

*255 character(s) maximum*

European Tyre and Rubber Manufacturers' Association (ETRMA)

\* 10 Organisation size

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

11 Transparency register number

*255 character(s) maximum*

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

6025320863-10

\* 12 Country of origin

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

- Afghanistan
- Åland Islands
- Albania
- Algeria
- American Samoa
- Andorra
- Angola
- Anguilla
- Antarctica
- Antigua and Barbuda
- Argentina
- Armenia
- Aruba
- Australia
- Austria
- Azerbaijan
- Bahamas
- Bahrain
- Bangladesh
- Barbados
- Belarus
- Belgium
- Djibouti
- Dominica
- Dominican Republic
- Ecuador
- Egypt
- El Salvador
- Equatorial Guinea
- Eritrea
- Estonia
- Eswatini
- Ethiopia
- Falkland Islands
- Faroe Islands
- Fiji
- Finland
- France
- French Guiana
- French Polynesia
- French Southern and Antarctic Lands
- Gabon
- Georgia
- Germany
- Libya
- Liechtenstein
- Lithuania
- Luxembourg
- Macau
- Madagascar
- Malawi
- Malaysia
- Maldives
- Mali
- Malta
- Marshall Islands
- Martinique
- Mauritania
- Mauritius
- Mayotte
- Mexico
- Micronesia
- Moldova
- Monaco
- Mongolia
- Montenegro
- Saint Martin
- Saint Pierre and Miquelon
- Saint Vincent and the Grenadines
- Samoa
- San Marino
- São Tomé and Príncipe
- Saudi Arabia
- Senegal
- Serbia
- Seychelles
- Sierra Leone
- Singapore
- Sint Maarten
- Slovakia
- Slovenia
- Solomon Islands
- Somalia
- South Africa
- South Georgia and the South Sandwich Islands
- South Korea
- South Sudan
- Spain

- Belize
- Benin
- Bermuda
- Bhutan
  
- Bolivia
- Bonaire Saint Eustatius and Saba
- Bosnia and Herzegovina
- Botswana
- Bouvet Island
- Brazil
- British Indian Ocean Territory
- British Virgin Islands
- Brunei
- Bulgaria
  
- Burkina Faso
- Burundi
  
- Cambodia
  
- Cameroon
  
- Canada
- Cape Verde
- Cayman Islands
  
- Central African Republic
  
- Ghana
- Gibraltar
- Greece
- Greenland
  
- Grenada
- Guadeloupe
  
- Guam
  
- Guatemala
- Guernsey
- Guinea
- Guinea-Bissau
  
- Guyana
  
- Haiti
- Heard Island and McDonald Islands
  
- Honduras
- Hong Kong
  
- Hungary
  
- Iceland
  
- India
- Indonesia
- Iran
  
- Iraq
  
- Montserrat
- Morocco
- Mozambique
- Myanmar /Burma
- Namibia
- Nauru
  
- Nepal
  
- Netherlands
- New Caledonia
- New Zealand
- Nicaragua
  
- Niger
  
- Nigeria
- Niue
  
- Norfolk Island
- Northern Mariana Islands
- North Korea
  
- North Macedonia
- Norway
- Oman
- Pakistan
  
- Palau
  
- Sri Lanka
- Sudan
- Suriname
- Svalbard and Jan Mayen
- Sweden
- Switzerland
  
- Syria
  
- Taiwan
- Tajikistan
- Tanzania
- Thailand
  
- The Gambia
  
- Timor-Leste
- Togo
  
- Tokelau
- Tonga
  
- Trinidad and Tobago
- Tunisia
  
- Turkey
- Turkmenistan
- Turks and Caicos Islands
- Tuvalu

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

The Commission will publish all contributions to this public consultation. You can choose whether you would prefer to have your details published or to remain anonymous when your contribution is published. **For the purpose of transparency, the type of respondent (for example, 'business association', 'consumer association', 'EU citizen') country of origin, organisation name and size, and its**

**transparency register number, are always published. Your e-mail address will never be published.**

Opt in to select the privacy option that best suits you. Privacy options default based on the type of respondent selected

#### \* 14 Contribution publication privacy settings

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

**Anonymous**

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

**Public**

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

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

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

*1000 character(s) maximum*

ETRMA represents the regulatory and related interests of the European tyre and rubber manufacturers at both the European and international level. We are involved in continuous dialogue with EU and international institutions, national agencies and other industry sectors.

As the voice of tyre and rubber goods producers, our activities focus on representing, communicating and promoting the industry to policymakers, as well as providing technical advice for its members.

The European Tyre & Rubber Manufacturers Association (ETRMA) and its members count around 4.400 companies in the EU employing directly about 370.000 people. ETRMA tyre corporate companies represent globally 73% of world sales and 7 out of 10 world leaders are our Members. We have strong presence in the EU and candidate countries with 93 tyre-producing plants and 16 R&D centres.

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

*1000 character(s) maximum*

The tyre industry is present in the mobility sector both as tyre manufacturers and, increasingly, as mobility service providers.

With regards to the rubber goods, these are present in a wide variety of sectors: from mobility to machineries, from health to leisure, from aerospace to communication.

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

22.11 and 22.19

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

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



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

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

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

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

Proportion of online sales

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

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

Proportion of offline sales

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

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

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

*1000 character(s) maximum*

Not applicable (business association)

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

*1000 character(s) maximum*

The legal certainty provided by the VBER and the Vertical Guidelines are of paramount importance to the vertical agreements entered into by the companies that are represented by ETRMA, manufacturers of tyres and national general rubber goods. Perhaps more than in certain other industries, the tyre companies typically have a significant number of customer relationships and the legal certainty resulting from the possibility to benefit from a BER (and avoiding the need for self-assessments) is therefore crucial.

## A. How to answer?

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

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

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

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

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

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

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

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

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

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

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

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

## B. Policy options for revising the VBER and Vertical Guidelines

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

### B.1 Exception for dual distribution

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

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

**Option 1:** no policy change;

**Option 2:** limiting the scope of the exception to scenarios that are unlikely to raise horizontal concerns by, for example, introducing a threshold based either on the parties' market shares in the retail market or on

other metrics, and aligning the coverage of the exception with what is considered exemptible under the rules for horizontal agreements;

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

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

### 1 Do you or your suppliers engage in dual distribution?

- Yes
- No
- No opinion

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

*5000 character(s) maximum*

Certain manufacturers represented by ETRMA are integrated groups that not only sell products via independent resellers, but also to a certain extent via their own (integrated) resellers. Moreover, manufacturers represented by ETRMA typically sell the same product directly to OEM customers for initial instalment and via distribution channels for sale on the replacement market.

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

- Yes
- No
- No opinion

### \* 4 Please explain your answer above.

*5000 character(s) maximum*

Removing the benefit of the block exemption for dual distribution set-ups of manufacturers would result in the VBER becoming a non-block exemption regulation. This would significantly increase risk, costs and complexity, putting manufacturers that operate dual distribution at a competitive disadvantage compared to competing manufacturers that do not. It would also create a discrepancy in the rules applicable to the retail operations of manufacturers compared to retail chains that are not linked to a manufacture, but may have (significantly) more market power. Removing the existing exception may thus discourage or chill competition. Removing the existing exception would in particular be burdensome for the tyre manufacturers represented by ETRMA since they typically have, more than in certain other industries, numerous customer relationships. If these manufacturers would need to self-assess each and every of these agreements as a result of the loss of the benefit of the VBER on account of the dual distribution set-up, the increase in cost and reduced legal certainty would be very significant.

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

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

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

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

*5000 character(s) maximum*

See answer to question 4.

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

- Yes
- No
- No opinion

**9 Based on your experience/knowledge, do you consider that an additional threshold should be introduced to ensure that only dual distribution**

**situations that do not raise horizontal competition concerns are block-exempted?**

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

**14 Please explain your answer.**

*5000 character(s) maximum*

The global impact of adding an additional threshold is clearly negative. On the one hand, adding an additional threshold increases complexity, legal uncertainty and costs for businesses. On the other hand, there is no economic theory underpinning any negative impact on competition resulting from dual distribution operated by manufacturers that do not occupy a dominant position (and certainly not for manufacturers that have a market share that does not exceed the 30% market share threshold relevant for the availability of the VBER).

**15 Based on your experience/knowledge, what would be the impact of introducing an additional threshold of 20% combined market share in the retail market (in line with the threshold in Article 3 of the Block Exemption Regulation for specialisation agreements) on the following aspects?**

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

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

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

*5000 character(s) maximum*

See answer to question 14.

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

*5000 character(s) maximum*

See answer to question 14.

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

- Yes
- No
- No opinion

**20 Please explain your answer.**

*5000 character(s) maximum*

ETRMA's members have no such experience.

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

- Yes
- No
- No opinion

**22 Please explain your answer**

*5000 character(s) maximum*

ETRMA's members have no such experience.

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

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

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

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

*5000 character(s) maximum*

There are no sound reasons not to extend the current exception for dual distribution set-ups of manufacturers to wholesalers. Such an extension would in particular increase legal certainty and reduce costs for businesses. It would also allow for distribution set-ups that are tailored to meet customer expectations.

**25 Based on your experience/knowledge, how would a potential extension of the scope of the exception for dual distribution to importers impact the following aspects?**

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

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



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

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

*5000 character(s) maximum*

There are no sound reasons not to extend the current exception for dual distribution set-ups of manufacturers to importers. Such an extension would in particular increase legal certainty and reduce costs for businesses. It would also allow for distribution set-ups that are tailored to meet customer expectations.

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

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

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

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

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## B.2 Active sales restrictions

Agreements or concerted practices aimed at restricting the territory into which, or the customers to whom, a buyer can sell the contract goods or services (“territorial and customer restrictions”) are considered

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

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

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

**Option 1:** no policy change

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

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

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

- Yes
- No

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

- Yes
- No
- No opinion

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

*5000 character(s) maximum*

The manufacturers represented by ETRMA would welcome any flexibility that the European Commission would deem appropriate and is therefore generally in favour of both policy options 2 and 3. They are of the view that this additional flexibility would spur both inter- and intra-brand competition.

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

- Yes
- No
- No opinion

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

- Yes
- No
- No opinion

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

- Yes
- No
- No opinion

**40 Please explain your answer above and give examples if possible.**

*5000 character(s) maximum*

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

- Yes
- No
- No opinion

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

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

**44 Please explain your answer**

*5000 character(s) maximum*

In addition to the exclusivity at wholesale level within a selective distribution system, it could also be considered to allow suppliers to grant protection against active sales to resellers (irrespective at what level of the supply chain) that are appointed on the basis of "shared exclusivity". A further action could be to allow a supplier to relax the requirement that the active sales restriction may "not limit sales by the customers of the buyer".

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

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

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

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

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

*5000 character(s) maximum*

Not applicable
----------------

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

- Yes
- No
- No opinion

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

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

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

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

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

*5000 character(s) maximum*

Not applicable.

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

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

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

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

### **B.3 Indirect restrictions of online sales**

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

selective distribution. A supplier may, for example, require delivery within specified timeframes in online stores as an equivalent to a requirement for immediate delivery in physical stores or require the creation of an online helpdesk for online stores as equivalent to the service provided in physical stores.

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

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

**Option 1:** no policy change;

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

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

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

- Yes
- No
- No opinion

## 56 Please explain your answer

*5000 character(s) maximum*

Dual pricing between online and offline sales can help to incentivise resellers to invest in sales via one channel by avoiding free-riding from other resellers through the other sales channel.

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

- Yes
- No
- No opinion

## 58 Please explain your answer

*5000 character(s) maximum*

The members of ETRMA have no such experience.

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

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

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

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

*5000 character(s) maximum*

See answer to question 56.

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

*5000 character(s) maximum*

No opinion



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

- Yes
- No
- No opinion

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

- Yes
- No
- No opinion

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

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

**68 Case law provides that prohibiting online sales is a hardcore restriction that cannot benefit from the safe harbour provided by the VBER. In your**

**view, what would be the appropriate safeguard to ensure that that the application of different criteria for online and offline sales in a selective distribution system would not result in a prohibition of online sales?**

*5000 character(s) maximum*

No opinion

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

You can select more than one of the following options:

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

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

*5000 character(s) maximum*

Providing additional flexibility will assist companies in tailoring their distribution network to fit the customer needs. It will spur both inter- and intrabrand competition.

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

*5000 character(s) maximum*

No opinion.

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

- Yes
- No
-

No opinion

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

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

#### **B.4 Parity obligations**

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

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

All types of parity obligations are currently block-exempted by the VBER. The evaluation showed an increase in the use of parity obligations across sectors, notably by online platforms. National competition authorities and courts have identified anti-competitive effects of obligations that require parity with other indirect sales or marketing channels (e.g. other platforms or other online or offline intermediaries).

Regarding parity obligations, the following policy options are proposed:

**Option 1:** no policy change;

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

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

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

- Yes
- No

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

- Yes
- No

79 Please explain your answer.

*5000 character(s) maximum*

No opinion

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

- Yes
- No

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

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

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

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

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

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

**B.5 Other aspects**

**B.5.1.** Resale price maintenance (“RPM”) refers to restrictions that set a fixed or minimum resale price to

be observed by the buyer. Given that RPM eliminates price competition between a supplier's distributors and, based on enforcement experience, is generally unlikely to lead to efficiency gains, it is considered a hardcore restriction under the VBER (i.e. it cannot benefit from the safe harbour) and a by object restriction under Article 101 of the Treaty. However, the Vertical Guidelines recognise that supplier-driven RPM may, in certain circumstances, lead to efficiencies, e.g. to achieve an expansion of demand during the launch of a new product or to avoid the undercutting of a coordinated short-term low price campaign in a franchising system. The evaluation has identified a lack of clarity and guidance as regards the conditions under which such efficiencies can be argued and the evidence needed to meet the threshold for an individual exemption under Article 101(3) of the Treaty. Stakeholders pointed out that, as a result, companies prefer not to run the financial and reputational risk of including RPM restrictions in their vertical agreements.

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

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

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

Please substantiate your reply.

*5000 character(s) maximum*

1. Permissible RPM. In view of the qualification of RPM as hardcore under the VBER and the drastic consequences this has on legal certainty by removing the benefit of the VBER for the entire agreement, the companies represented by ETRMA call upon the Commission to provide clarity to the maximum extent possible on the situations in which RPM would nevertheless pass the Article 101(3) TFEU test. Paragraph 225 of the Vertical Guidelines is a start, but leaves businesses, NCAs and national courts with too much questions and uncertainties.

It is widely recognized by economists that RPM can be an efficient pricing practice that benefits consumers with pro-competitive effects on inter-brand competition (at manufacturer and retailer level) that may often be well outweighing any negative impact on intra-brand competition. While the Vertical Guidelines recognize RPM's benefits in helping manufacturers and retailers in overcoming free-riding, they place the burden on the parties to "convincingly demonstrate" that RPM's pro-competitive effects outweigh anti-competitive effects, without providing a framework for this analysis. ETRMA encourages the Commission to elaborate on the circumstances in which RPM may have a positive impact on inter-brand competition – in situations where RPM may lead to lower prices, but also where it may lead to higher prices to consumers. For example, RPM that may lead to higher resale prices (such as by establishing a minimum price) will often incentivize retailers (across the full spectrum of differentiated products, not merely "complex" products) to invest in customer service and support, including pre- and after-sale demonstrations, assembly (or

mounting) and service; focus sufficient efforts on the advertising and marketing of the products, including detailing the products qualities; keep up to date any certifications or training needed to effectively sell the products; maintain a sufficient stock of a manufacturer's full product range; develop a sufficiently robust distribution and delivery network for the products; and maintain attractive retail outlets commensurate with the quality of the products being acquired. The incentives for retailers to provide these services, and best position the products vis-à-vis competing brands, fall away when retailers price at such low levels that they cannot afford the required level of service.

ETRMA encourages the Commission to further develop these circumstances in which RPM is procompetitive and to clarify when their pro-competitive effects under Article 101(3) TFEU might not be sufficient to counter any intra-brand restrictions on competition.

Additional clarifications that are necessary relate to (i) the notion "new products" (this should include upgrades of existing products with new technology, or presenting new features or enabling additional use cases); (ii) the inclusion of the scenario whereby the manufacture enters a new market (with an existing product); (iii) reference to the level of investment necessary to enable the manufacture to introduce the new product / enter the new market; (iv) confirmation that, in the circumstances described, there is a rebuttable presumption that RPM meets the requirement of 101(3) TFEU and that there is no need to self-assess restrictions that would, but for the RPM, be covered by the VBER; (v) the period in which RPM may be justified (which may be linked to the time needed to recoup certain investments and/or to the time needed by buyers to take a purchase decision, whereby other products than FMCG need to be duly taken into account).

2. Online advertising restrictions. ETRMA would furthermore appreciate a clear position from the Commission on online advertising restrictions such as Minimum Advertised Pricing policies. Businesses (that are now investing heavily in digital tools and services and are thus contributing to the realisation of the digital agenda of the Commission) are currently failing to understand why these policies fall under the rule of reason in the US, whereas there is currently no clear guidance on this from the Commission and, therefore, faced with a possible qualification as hardcore restriction, they are advised not to use MAP in the EU. The Commission should explain under what circumstances MAP can or cannot be permissible in the EU (and, if a different position than that applicable in the US would be maintained, provide further insight into the Commission's theory of harm).

**B.5.2.** Non-compete obligations of an indefinite duration or exceeding 5 years are excluded from the benefit of the VBER and therefore require an individual effects-based assessment under Article 101 of the Treaty. Non-compete obligations that are tacitly renewable beyond a period of 5 years are deemed to have been concluded for an indefinite duration. The evaluation has indicated that this broad exclusion of non-compete clauses from the benefit of the block exemption may result in false negatives, by covering non-compete obligations that satisfy the conditions of Article 101(3) of the Treaty. In particular, the exclusion of tacitly renewable non-compete obligations could be considered unjustified, to the extent that the buyer is able to terminate or renegotiate the agreement at any time with a reasonable notice period and at reasonable cost. Moreover, the overly broad scope of the exclusion is considered to create an unnecessary administrative burden and additional transaction costs for businesses, since it forces them to periodically renegotiate their contracts despite there being a willingness on both sides to continue the contractual relationship beyond five years.

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

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

- Yes
- No
- No opinion

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

*5000 character(s) maximum*

There is no such experience or knowledge.

### **B.5.3 Sustainability agreements**

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

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

- Yes
- No
- No opinion

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

*5000 character(s) maximum*

Article 101(3) TFEU requires that at least part of the efficiencies brought about by the restrictive agreement are passed on to consumers. Proof that consumers benefit from the sustainability objectives of an agreement may not always be easy to provide.

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

*5000 character(s) maximum*



ETRMA sees a need for the Commission to provide comfort in the new Vertical Guidelines that there is a presumption that (certain) sustainability objectives benefit consumers (just as price reductions or quality improvements would).

#### B.5.4. Impact of the Covid crisis

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

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

- Yes
- No
- No opinion

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

The maximum file size is 1 MB

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

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

*3000 character(s) maximum*

1. Price comparison websites.

ETRMA requests the Commission to include clarifications in the Vertical Guidelines on the permissible use of price-comparison websites by suppliers. The increased use of price comparison websites has resulted in increased inter-brand and intra-brand price competition, as manufacturers and resellers have been able to more quickly learn of, match and beat discounts and lower prices offered by competitors. As these price comparison websites are expected to develop further and include elements such as value added services or after-sales service, this will only further strengthen their pro-competitive nature, as consumers are better

able to compare the true value of products/services and competitors are able to compete more effectively also on services. Suppliers' collection of data from such websites and the collected data's use in their own price-setting, should be treated as explicitly pro-competitive provided that the websites contain publicly available information, and that the data is not used by suppliers for inappropriate purposes, such as to influence their resellers' prices.

## 2. Platforms as (genuine) agents.

Under the current Guidelines, online platforms may qualify as (genuine) agents (and therefore be considered as an integral part of the manufacturer's undertaking for the sale of the products, so that the provisions in the agreement between the manufacturer and the platform that relate to the sale of the products of the manufacturer fall outside the scope of Article 101(1) TFEU) provided that such online platforms do not buy and resell the products and, moreover, do not take more than insignificant risks in the sale of the principal's products or services. NCA's have however expressed diverging views (including in contributions to the evaluation of the VBER) as to how these rules are to be applied to online platforms. These divergences relate to the notion of "market specific" investments, as well as the impact of the transfer of the title or possession of the goods concerned from the principal to the agent. Industry therefore requests the Commission to supplement the section on agency in its Guidelines with an indication as to what constitutes a (genuine) principal-agent relationship in an online setting, accompanied by specific examples. Given the fact the (genuine) agency relationship falls outside the scope of the 101(1) TFEU prohibition, it is of importance to online participants to have clear rules in this regard and enable them to efficiently structure their commercial relations in a competition law compliant manner.

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

- Yes
- No

## Contact

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