

Ms. Margrethe Vestager

Executive Vice-President for a Europe Fit for the Digital Age and Commissioner for Competition
Rue de la Loi / Wetstraat 200
1049 Brussels – Belgium

Cc: **Mr. Thierry Breton**, Commissioner for Internal Market
Mr. Didier Reynders, Commissioner for Justice

Wednesday 30 June 2021

Subject: Reform of the block exemption on dual distribution

Dear Executive Vice-President Vestager,

We are writing in connection with the European Commission's ("EC") work to reform the Vertical Block Exemption Regulation ("VBER"), a crucial instrument to promote well-functioning markets in Europe. If applied, some of the rule changes suggested for dual distribution would have serious adverse consequences for the competitiveness of the European industry and markets, both digital and physical, which in turn would negatively impact consumers.

Currently exempted under the VBER, dual distribution relationships correspond to situations where a manufacturer distributes its goods directly to consumers as well as via independent retailers. Brands may distribute their products either 100% directly, 100% multi-brand or through a dual distribution combination.

Dual distribution brings significant pro-competitive benefits through consumer efficiencies. By providing them with complementary channels, experiences, and product value, dual distribution empowers consumers, whose direct feedback enables brand owners to understand and serve them better and to innovate more, better, and faster. As the Covid-19 pandemic has increased direct-to-consumer and e-commerce sales, brand owners and retailers have cooperated to implement omni-channel capabilities such as *click-and-collect* or *call-and-collect*. Without the current block exemption on dual distribution, such cooperation would have simply been impossible – to the detriment of brands, retailers and consumers alike.

Any restriction of the block exemption on dual distribution would immediately trigger a massive disruption of distribution networks across the continent, greatly slowing down brand manufacturers' capacities to invest, innovate, create consumer efficiencies, and make the economy greener and more digital.

Representing a number of sectors and industries across Europe, the signatories of this letter are therefore deeply concerned about the following three policy options considered by the EC:

1. The introduction of an additional market share threshold for dual distribution of 15-20% (combined market share, at retail level).
2. All information exchanged in the frame of a dual distribution relationship may have to be assessed under the Guidelines on "horizontal co-operation agreements" ("Horizontal Guidelines").
3. The benefit of the block exemption for dual distribution may be removed altogether.

We call upon the EC to take into account the following considerations:

- This reform would impair the omni-channel reality and ultimately reduce consumers' purchasing power and the competitiveness of European markets: dual distribution lies at the heart of the omni-

channel reality, which increases competition among market players and consumer satisfaction. If manufacturers and distributors could no longer cooperate and create efficiencies, the ensuing reduction of product competition, innovation and choice would lead to an increase in retail prices.

- This reform would have a serious adverse impact on legal certainty, market dynamics and business models, and it would create substantial new costs related to complex risk- and self-assessment (to determine the relevant retail market shares, overlaps and market definitions) and the management of information flows under the Horizontal Guidelines (distinguishing direct sales to consumers from B2B sales). Although difficult to quantify, the magnitude of this impact on the European markets and its operators, particularly SMEs, should not be underestimated, all the less in the light of its lack of proper justification, both from a legal and economic perspective. Jobs could also be put at risk.
- The current framework is adequate to address the risks surrounding dual distribution, as case law illustrates.¹ Regulation 19/65 does not distinguish between vertical and horizontal agreements or between competitors and non-competitors and should have no bearing on this policy change.²
- In its recent proposed recommendation,³ the UK CMA considered similar policy options and found that the dual distribution exemption is still fit for purpose and does not need to be reformed.
- The situation of “dual role”/hybrid platforms acting as competitors of their partner retailers does not involve dual distribution: these platforms are not manufacturers competing with independent distributors of their own goods. Accordingly, concerns about such platforms’ practices should not have any bearing on the treatment of dual distribution under the VBER.
- It is time for more, not less, cooperation and trust among European market operators, as the EU’s revised Industrial Strategy intends to *“support the twin transition to a green and digital economy, make EU industry more competitive globally, and enhance Europe’s open strategic autonomy”*. Retailers and brands more than ever need flexibility to continuously keep adapting to the digitalisation serving today’s fused online and offline consumer reality through growing online sales while making sure that high streets remain alive and well.

While we welcome the EC’s intentions to improve the VBER framework, we also believe that it should limit itself to addressing clearly-identified issues by using a nuanced approach, all while ensuring proportionality and providing crucial European-wide legal certainty. The EC should refrain from reforming the block exemption for dual distribution absent any articulated and credible theory of harm relating thereto.

Provided that its behaviour is not considered “hardcore” under the VBER, a manufacturer must remain able to communicate and work freely with its retail partners, whether it sells directly to consumers or not. Manufacturers and retail partners have a legitimate need to discuss and share information concerning market opportunities, marketing strategies and the sales and performances of the manufacturer’s goods or services. Accordingly, the baseline scenario should be maintained for dual distribution.

Yours sincerely,

¹ See, e.g., AT.40428 *Guess* of 17 December 2018.

² Case 32/65 *Italy v Council* (challenging Regulation 19/65/EEC).

³ See pages 16-19 of Competition & Markets Authority, 17 June 2021, [“The retained Vertical Agreements Block Exemption Regulation - Consultation document”](#).



with Brands for Europe

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