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MEMORANDUM

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De : Vogel & Vogel

Ref. : Submission Of The Law Firm Vogel & Vogel On The Draft Vertical Ber And Draft Vertical Guidelines

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SUBMISSION OF THE LAW FIRM VOGEL & VOGEL ON THE DRAFT VERTICAL BER AND DRAFT VERTICAL GUIDELINES

We wish to make comments on the draft BER and the draft Guidelines regarding their impact on the structure of EU distribution networks and on specific behaviors and to highlight the very positive developments of certain evolutions compared to the current state of the law but also the possible negative impacts of certain changes.

I. Observations regarding the impact of the draft VBER and guidelines on the structure of networks

A. Positive trends and ideas

Several changes made in the draft vertical BER and guidelines sound very positive and are to be welcomed by European practitioners handling issues of distribution and competition law.

1. The positive recognition of shared exclusivity

Up to now, most commentators of the current and past VBER considered that exclusive distribution could only be block exempted where only one distributor was appointed for a given territory or clientele.

The draft BER is changing the definition of exclusive distribution and admits the possibility of shared exclusivity between different distributors for a given territory or clientele: "*'exclusive distribution system' means a distribution system where the supplier allocates a territory or customer group exclusively to itself or to one or a limited number of buyers, 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, and restricts other buyers from actively selling into the exclusive territory or to the exclusive customer group".

This innovation of the draft BER is to be welcomed. It must be remembered that in the past, the old automotive BER n° 123/85 accepted shared exclusivity and that this distribution scheme has not been an issue. Certain brands would for example appoint two exclusive distributors in the same territory given the specificity of such territories, for example a city divided by a river with one dealer in the north and one in the south but with the allocation to them of a common zone of exclusive distribution for the whole city.

During the Brussels workshop and the various consultations organized by the Commission, we informed the Commission that shared exclusivity would also be very useful for the agricultural equipment sector. There are usually 4 or 5 exclusive distributors for tractors of different brands in one exclusive zone. There are other distributors for other agricultural machines dealing with these distributors and their clients, but it would be useful to be able to appoint 2 or 3 exclusive distributors of the same brand for that additional agricultural equipment in the same territory to meet the needs of the sector. Therefore shared exclusivity should be block exempted as envisaged in the draft BER.

However there is a limitation to the possibility of shared exclusivity. According to the restrictive conditions in the draft BER, such shared exclusivity would be allowed only for "*a limited number of buyers, 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".* This additional condition should be removed. It would create unnecessary legal uncertainty and authorize former unsatisfied distributors or third parties to find a ground to challenge each and every system of shared exclusivity claiming that the supplier has the burden of proof of the fact that the mapping of the territories and the number of distributors has not been made in a way to secure a certain volume of business that preserves their investment efforts. Such a condition is not in line with competition law as competition law is not made to protect a given type of competitors, but only to protect competition. It is a protective rule in favor of distributors that has no place as a rule of competition.

A similar question was raised for quantitative selective distribution. A former distributor argued before French courts and before the ECJ that quantitative criteria should be objective and non discriminatory and that the supplier had to justify that the quantitative criteria were well founded. The ECJ rejected firmly the claims of the former distributor and interpreted the conditions of validity of quantitative criteria as just having to be specified without the constraint for the supplier to have to justify that they are objective, non discriminatory or well founded. As exclusive distribution is a form of quantitative selection (with the allocation of a territory and a restriction on active sales, but very close to quantitative selective distribution notably in case of combination of exclusive and selective distribution with a freedom of active and passive sales), the same logic should be applied.

The reasoning of the ECJ in the landmark Jaguar Land Rover/Auto 24 decision can be found hereafter:

It follows from those provisions that, as regards both quantitative selective distribution systems and qualitative selective distribution systems, within the meaning of the Regulation, distributors must be selected on the basis of 'specified criteria', as provided for in Article 1(1)(f) of the Regulation.

30 In that context, the term ‘specified criteria’, within the meaning of that provision, must be interpreted as referring to criteria whose precise content may be verified.

31 On that point, it is worth noting that it is not necessary that, with a view to verification of their precise content, the selection criteria used for the purposes of a selective distribution system be published, at the risk, as the French government pointed out, of compromising business secrets, or even facilitating possible collusive behaviour.

32 Furthermore, it does not follow from the definition of the concept of ‘quantitative selective distribution system’, in Article 1(1)(g) of the Regulation, that that concept must be interpreted as including a requirement that the criteria applied by the supplier in order to select the distributors must be not only ‘specified’, but also objectively justified and applied in a uniform and non-differentiated way with regard to all applicants for authorisation.

33 It is only in the context of qualitative selective distribution systems that the Regulation, by the definition set out in Article 1(1)(h), stipulates, inter alia, that the selection criteria used by the supplier should be ‘required by the nature of the contract goods or services, … laid down uniformly for all distributors or repairers applying to join the distribution system, [and] not applied in a discriminatory manner’.

34 Thus, it follows from the actual terms of the definitions set out in Article 1(1)(f) and (g) of the Regulation that, where a distribution system for the sale of new motor vehicles prohibits resale to unauthorised distributors and is based on specified criteria which directly limit the number of distributors, such a system may be classified as a ‘quantitative selective distribution system’, within the meaning of the Regulation. The fact that, in practice, distribution systems for new motor vehicles often include both quantitative and qualitative criteria is irrelevant in this respect, as JLR and the European Commission acknowledged, in essence, during the hearing.

35 In those circumstances, as JLR, the French Government and the European Commission essentially argue, if, in the context of the Regulation, quantitative selection criteria had to be objective and non-discriminatory, that would result in a conflation of the conditions required by the Regulation for the application of the exemption to qualitative selective distribution systems and those required for the application of the exemption to quantitative selective distribution systems.

36 It is not however apparent from the scheme of the Regulation that the legislature wished to impose the same conditions of exemption for the two systems of selective distribution. On the contrary, given that, as can be seen from, inter alia, paragraphs 26 and 27 of the present judgment, the Regulation envisages distinct exemption conditions according to whether the selective distribution in question is classified as ‘quantitative’ or ‘qualitative’, the elements set out only in Article 1(h) of the Regulation cannot also be applied to Article(1)(g) of that regulation, without conflating those two types of selective distribution.

37 Furthermore, contrary to what Auto 24 suggests, the fact that, in accordance with Article 5(2) of the Regulation, a supplier cannot prevent the opening of a secondary place of business by one of it authorised distributors, is irrelevant in this respect.

38 In addition, the case-law relied on by Auto 24 deriving from the judgment in Case 26/76 *Metro SB-Großmärkte* v *Commission* [1977] ECR 1875 is irrelevant in the present case. On that point, it is enough to note that, in the context of the Regulation, as is apparent from paragraphs 32 to 34 of the present judgment, a 'quantitative selective distribution system' may be distinguished, by definition, from the qualitative selection of distributors referred to in paragraph 20 of the judgment in *Metro SB-Großmärkte* v *Commission*.

39 In view of all of the foregoing, the answer to the question submitted must be that the term 'specified criteria', referred to in Article 1(1)(f) of the Regulation, means, as regards a quantitative or qualitative selective distribution system within the meaning of that regulation, criteria the precise content of which may be verified. In order to benefit from the exemption provided for by that regulation, it is not necessary for such a system to be based on criteria which are objectively justified and applied in a uniform and non-differentiated manner in respect of all candidates for the authorisation…

On those grounds, the Court (Second Chamber) hereby rules:

The term 'specified criteria', referred to in Article 1(1)(f) of Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, means, with respect to a quantitative selective distribution system within the meaning of that regulation, criteria the precise content of which may be verified. In order to benefit from the exemption provided for by that regulation, it is not necessary for such a system to be based on criteria that are objectively justified and applied in a uniform and non-differentiated manner in respect of all applicants for authorisation.

Following the ruling of the ECJ, the French *Cour de cassation* considered that in a quantitative distribution system, the supplier does not have to justify the reasons of the mapping of his quantitative limits:

« *qu'ayant, par motifs propres et adoptés, énoncé qu'aux termes de l'article 1, paragraphe 1, sous g) du règlement d'exemption n° 1400/2002, le système de distribution sélective quantitative est celui dans lequel le fournisseur applique, pour sélectionner les distributeurs et les réparateurs, des critères qui limitent directement le nombre de ceux-ci et retenu qu'aucune disposition législative ou réglementaire, de droit national ou communautaire, n'impose au concédant de justifier des raisons qui l'ont amené à arrêter le "numerus clausus" qui lui sert de critère quantitatif de sélection, fixant un nombre de 72 contrats pour 109 sites parmi lesquels celui de Périgueux ne figure pas, ce dont il résultait un critère précis qui a été vérifié, la cour d'appel a, par ces seuls motifs, légalement justifié sa décision* ».

The reasons behind these decisions are clear. Under competition law, distribution systems limiting the number of distributors in a quantitative manner must be defined and specified but the decision to use such a system and the limits of the number and location of the distributors do not have to be justified. When we pleaded the Jaguar Land Rover case before the ECJ, we insisted on the fact that a supplier was

responsible for the number of the distributors of the brand, because he was in charge of the image of the brand and the mapping of the network and the ECJ shared that view.

Adding the necessity of a justification of the number of dealers in a shared exclusivity system would create a legal uncertainty that would prevent suppliers from implementing such a system due to the fear of possible litigation arising from the wording of the draft BER.

2. The better protection of exclusive distribution

Several provisions of the draft BER are in favor of a better protection of exclusive distribution and have to be welcomed.

- **The extension of the definition of active sales**

Under the draft BER, there would be an extension of the definition of active sales:

"'active' sales mean all forms of selling other than passive sales, including actively targeting customers by visits, letters, emails, calls or other means of direct communication or through targeted advertising and promotion, offline or online, for instance by means of print or digital media, including online media, price comparison tools or advertising on search engines targeting customers in specific territories or customer groups; offering on a website language options different than the ones commonly used on the territory in which the distributor is established is normally active selling; similarly, offering a website with a domain name corresponding to a territory other than the one in which the distributor is established constitutes active selling".

This extension is positive. Given the development of internet sales, the exclusivity rights given to exclusive distributors having to invest to develop sales in a given territory have shrunk and it was absolutely necessary to restore such rights in order to restore substance to the exclusivity.

- **The extension of the restriction of active sales to sub active sales**

Under the draft BER, the restriction on active sales has also been extended to sub active sales:

" the restriction of active sales by the exclusive distributor, or the exclusive distributor and its customers that have entered into a distribution agreement with the supplier or with a party that was given distribution EN 9 EN rights by the supplier, into a territory or to a customer group reserved to the supplier or allocated by the supplier exclusively to one or a limited number of other buyers".

This extension is positive as it is necessary in order to protect exclusive distributors not to allow a circumvention of the restriction on active sales through subcontracts.

- **The protection of exclusive distributors against sales coming from selective territories**

Under the draft BER, there is a possibility for the supplier to protect the exclusive dealers against active sales coming from selective territories:

"the restriction of active sales by the members of the selective distribution system, or the members of the selective distribution system and their customers that have entered into a distribution agreement with the supplier or with a party that was given distribution rights by the supplier, into another territory or to a customer group reserved to the supplier or allocated by the supplier exclusively to one or a limited number of buyers".

This extension is positive as it is necessary in order to protect exclusive distributors against such sales in cases of different options to selective or exclusive distribution depending on the Member State.

3. The better protection of selective distribution

- **The protection of selective distributors against sales coming from exclusive territories**

In order to protect selective distributors from sales to unauthorized resellers in selective territories, the draft BER authorizes "*the restriction of active or passive sales by the exclusive distributor, or the exclusive distributor and its customers to unauthorised distributors located in another territory where the supplier operates a selective distribution system for the contract goods or services*".

This change in the current state of law is positive.

But it should be supplemented by the possibility to also restrict such sales from exclusive distributors or their customers to authorized selective distributors in territories where the supplier operates a selective distribution system.

- **The extension of the prohibition of sales by selective distributors to non members of the network**

In order to avoid the circumvention of the prohibition of sales outside the network by members of a selective distribution network, the draft BER foresees the possibility of *"the restriction of active or passive sales by the members of the selective distribution system or their customers to unauthorised distributors located within the territory where the selective distribution system is operated".*

This is a positive evolution of the state of law. Under the current rules, there was a loophole in the protection of selective distribution. It was forbidden to a member of a selective distribution network to resell to non members of the network but it was not forbidden to the buyer to resell to a third party who in turn could sell to end customers. To avoid any fraud, it would be useful to specify that such restriction can be made against "direct or indirect" active or passive sales as the methods resellers outside the network could develop to circumvent such legitimate restrictions is without any limit and they could set up a whole parade of resales in order to circumvent the rule.

B. Negative trends and ideas

1. A huge mistake: the combined limitations to the block exemption of all forms of dual distribution

The draft BER foresees so many limitations to dual distribution that in many cases, as nearly all networks are using certain forms of dual distribution, it is to be expected that many networks, although pro competitive, will no longer be block exempted.

First of all, there seem to be several false premises in the reasoning adopted against all forms of dual distribution. These false premises and assumptions seem to be that:
- dual distribution is a new trend of distribution, limited to certain sectors, favored by the development of internet sales,
- that it automatically has anticompetitive effects,
- is developing without any possibility to come back to the previous situation,
- and should be limited by all means and that such limitations are not harmful at all.

All these premises are completely incorrect and cannot be followed if the Commission wishes to avoid making a serious mistake.

Dual distribution is not at all a new form of distribution. It does exist in most sectors and has always existed. Franchising is, for example, dual by nature as the supplier first tests a concept that will be duplicated by franchisees and usually the franchisor runs several outlets by himself for many reasons: to continue to test and improve the concept or to establish branches in the locations where the real estate prices are too high for franchisees or where the clientele is not stable. Dual distribution exists in nearly all distribution networks because the supplier or the distributors have to respond to the different needs of the clientele. Certain clients prefer to have a direct relationship with the supplier: big buyers who do not wish to negotiate with hundreds of dealers or those needing a technical support directly from the supplier; or small clients who wish to buy online directly from the supplier's website. Local clients may prefer to have a direct link with the dealers.

Dual distribution is pro-competitive in essence and the exceptional anticompetitive effects of such distribution are very easy to control without any change of the current framework.
Dual distribution is not a choice, it is a response to the demands of the market. It has always been practiced as it is a response to specific needs. All distribution networks try to find the best and most efficient ways to meet the requirements of customers. Sometimes the supplier is better placed to satisfy these requests, sometimes it is the reseller. On the other hand, the websites of the suppliers are generally more qualitative than those of the dealers and clients may prefer to buy on the website of the supplier. The customer decides what is best for him or her. Dual distribution has been recognized as lawful and not infringing the exclusive rights granted to the distributors in a number of decisions of the French *Cour de cassation*, the French courts of appeal or the French commercial courts. Up to now, although dual distribution has been block exempted for years, there have been only limited cases in which an anticompetitive infringement has been found by competition authorities. The only known example is the Danish Hugo Boss case regarding a horizontal exchange of information between Hugo Boss and two distributors of the brand. But the Danish Competition Authority was perfectly able to handle this

situation with the current BER. The vertical relation remined block exempted and this vertical block exemption was not applied to the horizontal additional restriction of competition. There is absolutely no need to change anything to the current block exemption of dual distribution (except to extend it to importers and wholesalers), as the current tools are perfectly sufficient to handle all issues linked to dual distribution.

Dual distribution is today often the only way for dependent suppliers to try to reduce their economic dependency from large distribution groups active at retail level. It is a known fact by Competition authorities that suppliers are today very dependent from large distribution groups. In France, the administration in charge of competition has to launch regularly investigations and law suits in order to protect suppliers against the restrictive and abusive practices of important distribution groups. One of the limited ways for such often small or medium suppliers to try to become less dependent is to establish a direct sales channel to end consumers. The draft BER and guidelines would restrict such initiatives and would therefore have a perverse effect that should be avoided.

The recourse to dual distribution is dictated by the market and is changing and reversible. For example, today, several automotive brands have stopped operating a part of their own branches or subsidiaries and have decided to sell these businesses to dealers (recently the automotive media published articles about the decision of RRG to sell several branches to independent dealers).

The limitations of dual distribution contained in the draft BER would lead to a top-heavy, unnecessary and complicated system, a real white elephant legal regulation that cannot work and would lead to deprive from the block exemption many efficient and pro competitive distribution networks.

The mere reading of the draft about dual distribution shows that it is a too complicated system that will never work in practice and would lead to detrimental consequences for all European networks:

4. The exemption provided for in paragraph 1 shall not apply to vertical agreements entered into between competing undertakings. However, the exemption provided for in paragraph 1 shall apply to all aspects of a non-reciprocal vertical agreement between competing undertakings where:
(a) the supplier is a manufacturer, wholesaler, or importer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing, wholesale or import level, and their aggregate market share in the relevant market at retail level does not exceed [10]%; or
(b) the supplier is a provider of services at several levels of trade, while the buyer provides its services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services, and their aggregate market share in the relevant market at retail level does not exceed [10]%.

5. If the competing supplier and buyer referred to in Article 2(4)(a) or (b) have an aggregate market share that exceeds [10]% in the relevant market at retail level but that does not exceed the market share thresholds of Article 3, the exemption provided for in paragraph 1 shall apply, except for any exchange of information between the parties, which has to be assessed under the rules applicable to horizontal agreements.

6. The exceptions of Article 2(4)(a) and (b) and Article 2(5) shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object to restrict competition between the competing supplier and buyer.

*7. The exceptions of Article 2(4)(a) and (b) shall not apply where a provider of online intermediation services that also sells goods or services in competition with undertakings to which it provides online intermediation services enters into a non**[1]**reciprocal vertical agreement with such a competing undertaking.*

8. This Regulation shall 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.

Lets take the first limb of the system of the draft regulation of dual distribution.
It makes the block exemption subject to an aggregate market share of the supplier and the retailer on the relevant market at retail level of no more than 10%.
This reference to a threshold that would be calculated at the retail level is impossible to implement in practice for many reasons:

- in most cases, there are no data available regarding market shares in the local downstream distribution markets. Merger control decisions rendered regarding mergers of distributors show that in one single Member State like France there are between 100 and 500 local markets for the distribution of goods according to the different products or services distributed. These local markets at retail level correspond to the catchment area of each local distributor. It is already a huge ordeal having to calculate such local market shares in a merger case. It would be impossible for many networks to calculate hundreds or thousands of market shares at retail level, simply because these market shares are unknown. When a national competition authority has to review a merger in a distribution sector, it usually needs several months to gather the local market shares and can eventually calculate them only because the authority has the power to ask competitors to give their data, which would be impossible and even forbidden for one brand to do in respect of the other brands.

- it would not only be extremely complicated if the market shares had to be calculated at retail level, but also an impossibility to opt for a common kind of network if such a calculation could be made, as the result of the market shares in the different areas would most certainly be different, less than 10% here, more than 10% but less than 30% elsewhere: there would be several legal situations according to different local market shares that would not permit to adopt one uniform system in a given country.

For those reasons the drafters of the previous vertical block exemption regulations chose to calculate the exemption thresholds for distributors in the upstream market in which contractual products are purchased. In a nutshell, the 10% threshold on the local market at retail level is impractical because it would require the calculation of hundreds or thousands of market shares within each important European network with enormous transaction costs, with the data often not even being available.

In addition, this 10% threshold would nearly never be applicable and remain theoretical as most retailers have already a market share which is higher than10%. In many sectors, retailers are multibrand and distribute the products of several competing brands. Their market share in this case is higher than 10%. any case would deprive almost all networks of the block exemption, which is not the aim of a block exemption regulation.

Introducing a market share threshold on the downstream local markets for distribution to final consumers of 10% would lead to the first block exemption to be nearly never applicable as one must be aware of the fact that there are forms of dual distribution by suppliers and distributors to end consumers in almost all networks active in the economy and that the market share of distributors in their local catchment area alone is often higher than 10%. This is usual for the distribution of perfumes and cars, but also common in other sectors.
Therefore, for technical reasons, the idea of a market share threshold calculated on the local markets at retail level, is not practicable and should be abandoned.

The second limb seems unnecessary and problematic. Between 10 and 30%, the BER would remain applicable "*except for any exchange of information between the parties, which has to be assessed under the rules applicable to horizontal agreements".*
A first issue is that, as the matter is complicated, the current drafting contains legal uncertainties which show that one should remain to the current state of law which is far much clearer. Two examples of this complication: the draft BER refers to the fact that all exchanges of information would not be block exempted and would be assessed under the horizontal guidelines. But in a distribution agreement, there are many vertical exchanges of information that are necessary for the implementation of the distribution agreement. They are absolutely not anti-competitive and never considered as such by any competition authority and as they are vertical, they surely do not to have assessed under the horizontal guidelines. Another example of the difficulty to over regulate dual distribution is the contradiction between the draft regulation and the guidelines. According to the guidelines, the whole agreement looses the benefit of the BER in case of an exchange of information. But this is not the regime foreseen by the draft BER: under Article 2.5. of the draft BER, the agreement remains block exempted and only the anticompetitive exchange of information is not block exempted.

But article 2, paragraphs 4 and 5 are not the most worrying rules regarding dual distribution even if Article 2, par. 4, would impossible to implement in practice and useless.

The most problematic rules are contained in the exceptions to the BER for dual distribution that would lead to great legal uncertainty and to the loss of the BER for most European distribution networks in practice, a consequence that has surely not be the will of the Commission.

Under Article 2(6), the block exemption does not apply at all to vertical agreements in case of a restriction by object between the supplier and the buyer. The problem here is that it has always be foreseen in all vertical BERs until now that the black clauses, the hardcore restrictions that remove the benefit of the vertical block exemption have to be precisely and narrowly defined. This is the purpose of Article 4. Here, any kind of restriction by object will remove the benefit of the block exemption. The problem is that there is no limited definition of the possible restrictions by object, there is no consensus among all authorities of Member Sates about such a definition. Certain authorities see restrictions by object very easily, others are more cautious and there are numerous cases before the courts in which it was necessary to remind a competition authority that restrictions by object had to be narrowly defined. This rule will lead very easily to litigation initiated by contractors claiming that any behavior of the supplier to their detriment is such a restriction by object and removes the benefit of the BER, as well as litigation by resellers outside the network challenging the validity of each and every distribution network trying to act against resales outside the selective distribution network. For example, it will be claimed that the decision to appoint a distributor in one zone and a branch in another catchment area in an exclusive or quantitative distribution network is a restriction by object as a distributor could have been

appointed in both zones and that such appointments are made with the tacit acceptance of the members of the network.

As nearly all distribution networks in nearly all sectors practice a form of dual distribution (by selling to distributors bit also directly through branches, subsidiaries, direct sales to important or specific clients and by internet sales), this means that anyone will be able to ask for the removal of the block exemption for many behaviors that he will interpret as restrictions by object, with no safeguard of the networks as the notion of restriction by object is not clearly defined.

The exception of Article 2, par. 7 is also quite problematic and would endanger very pro-competitive innovations of several distribution networks in favor of their distributors.
According to this Article 2, par. 7. , "*the exceptions of Article 2(4)(a) and (b) shall not apply where a provider of online intermediation services that also sells goods or services in competition with undertakings to which it provides online intermediation services enters into a non reciprocal vertical agreement with such a competing undertaking".*
The idea behind this rule could be that huge platforms could gather confidential information from the small suppliers selling goods in the platform in order to change their own selling terms and to compete unfairly against those small undertakings. The problem is that under competition law, one should never, ever, implement a general rule applicable to all undertakings in general, to try to solve a specific limited issue. The consequence in general is that you do not handle the limited issue narrowly enough and instead you create a huge problem in the economy in general. This is exactly what would happen if such a rule were to be adopted. Many suppliers of selective products are creating internet platforms on which their distributors can sell the contractual products. Sometimes the branches or subsidiaries can also sell on these platforms or they are dedicated only to the distributors who are members of the network. This is a great help for distributors as they would not be able to build up a platform that has the visibility and resources of the platform created by the supplier, head of their network. But if Article 2(7) is to become applicable, such a pro-competitive initiative by the supplier would immediately lead to the loss of the block exemption, which is a complete nonsense.
It would be necessary to provide that Art. 2(7) is not applicable to the platforms created by the heads of exclusive or selective networks and to limit such non benefit of the BER to huge platforms making billions of euros through their platforms and having access to the confidential data of suppliers selling on their platforms.

Given the multiple anticompetitive effects that the adoption of Art. 2(6) and (7) would have and the fact that Art. 2(4) and (5) raise also many practical and legal issues and bring no substantial improvement to the current legal regime that is *already* able to handle dual distribution, dual distribution should be block exempted if the supplier's market share does not exceed 30% and the distributor has no more than 30% market share on the upstream market as it is block exempted under the current block exemption regulation.

2. The excessive limits to the appointment of commercial agents

The draft guidelines make the status of a genuine agents subject to so many cumulative and strict conditions that is becomes nearly impossible to appoint agents although the recourse to agents is necessary to respond to the evolution of the demand of customers. The contribution of the International

Distribution Institute has demonstrated that such conditions would have the effect of considering normal agency agreements as non genuine.

The recourse to agents is already made difficult by the cost of such intermediaries (for example, an automatic indemnity of two years commissions under French commercial law except in case of severe contractual breach). Adding so many restrictions would lead to discourage definitively suppliers to use agents even if their role is economically justified.

3. The necessity to admit in case of fierce competition quantitative selective distribution above the 30% market share threshold in the Guidelines

The vertical block exemption is subject to a market share threshold of 30%. But under the current guidelines for automotive distribution, given the fierce competition in this sector, the Commission has admitted that quantitative selection would normally not reveal concerns under competition law. As the adoption of the automotive BER and its guidelines is postponed with one year difference compared to the entry in force of the new VBER, this tolerance should be recalled in the vertical guidelines as the automotive suppliers have to build and imagine their future networks in the light of the vertical BER applicable to their distribution contracts for new cars. This analysis regarding the competition on the market for the distribution for new cars has been confirmed by the evaluation report in this sector and is also confirmed by the fact that the market shares of the automobile groups tend to underestimate the intensity of the competition on this market as the different brands of the same group are in competition one with the other.

4. Lack of possibility to combine in an efficient way exclusive and selective distribution at the wholesale level

Although it has been envisaged at the level of the previous consultation, the Commission has not incorporated the idea of an exclusive wholesaler in charge of the management of a selective distribution network at retail level.

However, it is a commonly used solution within selective distribution systems to appoint one importer in a Member State at wholesale level in order to implement and organize a selective distribution system at retail level. This importer has to invest in the creation of the selective retail distribution network and he should be protected therefore against active sales from other distributors. Such an importer does not have the function or the role of a mere reseller. He is not selected on the basis of specific criteria for the sale in an outlet, but for his capacity to invest, to organize and manage a distribution network. The possibility of active sales coming from other territories should not apply to such importers active at the wholesale level. The draft BER should therefore be completed by the possibility to appoint importers or wholesalers in charge of the organization of a selective retail network with a restriction on active sales at wholesale level.

II. Observations regarding the regulation of specific behaviors

A. Positive trends and ideas

1. The updated evaluation of Internet sales

The Commission has updated the market power of Internet sales. The draft BER and the draft guidelines take into consideration the fact that there is no reason today to believe that Internet sales should be protected in an irrational way. The Internet has long since won the battle, so it is no longer necessary to overprotect it with rules that disadvantage physical stores. Physical stores are undergoing an unprecedented crisis and have to face important and increasing costs that do not usually affect websites or not at the same degree. The preferential treatment granted to online sales by the old guidelines has become obsolete.

All the changes made in the new guidelines in this respect are very positive, especially:

- the possibility to restrict sales on online platforms in the line of the Coty judgment of the ECJ (The EU Commission and the FCA have recognized the possibility to ban or restrict sales on platforms and decided that this possibility is not limited to luxury products. The BKA has interpreted the Coty judgment *a contrario* as limited to luxury products, which is inaccurate. The Coty judgment also considers that selective distribution is possible for luxury products. It is not possible to make an a contrario interpretation saying that selective distribution is possible only for luxury products. This error of law of the BKA has now been rectified),
- the end of the strict equivalence of conditions theory,
- and the admission of dual pricing.

2. A more neutral definition of unilateral conduct

The current supplementary automotive Guidelines consider that a refusal to accept a candidate in a selective distribution network although the candidate fulfills the selection criteria is automatically an agreement with the other members of the network subject to competition law or restrictive agreements. This seems to be a mistake. A refusal to approve a candidate into a selective distribution system can be an agreement with one or several members of the network, for example if the supplier has agreed on a quantitative selection with his distributors and refuses an additional candidate. But if a supplier refuses to deal with a candidate for personal reasons (for ex.: previous misconduct, previous bad results, previous non performance of contractual obligations, previous failure to pay invoices in due time, lack of confidence, many unsuccessful and unfounded lawsuits brought by the former distributor, etc.), this is clearly a legitimate unilateral conduct and not an agreement subject to competition law, even if the candidate meets the qualitative criteria. Even if they remain rather general, the developments of the draft vertical guidelines on the distinction between an agreement and unilateral conduct seem to be more neutral and this is positive.

3. A more practical regulation of contractual non-compete obligations

Many contributors have made the point that the absolute and rigid 5-year limit for benefiting from the block exemption for contractual non-compete clauses is too strict and that it should be possible to provide for renewable 5-year clauses where the contracting party has an option not to renew, or to terminate the contract, also to avoid the transaction costs associated with the renegotiation. Paragraph 234 of the draft guidelines accepts that non-compete obligations that are tacitly renewable beyond a period of 5 years are covered by the block exemption, provided that the buyer can effectively renegotiate or terminate the vertical agreement containing the obligation with a reasonable notice period and at a reasonable cost, thus allowing the buyer to effectively switch its supplier after the expiry of the five year period. This change is positive but should be implemented in the BER and not only in the guidelines.

B. Negative trends and ideas

1. The absence of an efficient and reasonable analysis of RPM

As long as inter-brand competition is fierce, RPM has more advantages than it raises concerns. RPM is first an incentive of the distributor to focus on the quality of the service. It has to offer pre-sale, sale and after sale services in order to develop the clientele. Consumers often demand that prices be the same in the same network. They do not understand why the same product has a different price in the same network and have the impression that they have been cheated if the same product is offered at a different price level by certain distributors. RPM is also a way to protect customers against excessive prices by certain members of the network, for example for spare parts needed by the clients. In addition, if the products are sold at a market price, according to the competition of other brands, the distributors will not claim additional rebates from the supplier who will be able to invest in research, development of new products, innovation, etc. which would not be possible if he had to constantly reduce the resale price by the granting of additional rebates as requested by the distributors in order to compete with low prices of distributors of the same brand.

The draft BER and guidelines present two major problems regarding RPM: they are still extremely reluctant to accept the legality of RPM even in case of fierce inter-brand competition, which is not in line with the consensus of economists worldwide and in any case, these drafts do not provide enough legal certainty regarding the definition of RPM and the conditions that should be met by competition authorities to demonstrate RPM.

2. The overly strict limitation of the qualification of fulfillment contracts

According to the draft guidelines, a fulfillment contract does nor constitute a RPM conduct only when a buyer executes the prior agreement between the supplier and a specific end user and when this end user has waived the right to choose the undertaking that should execute the agreement. The reason put forward by the draft guidelines is that the resale price is no longer subject to competition in relation to the end user consumer.
But this reason applies in any case, as soon as the buyer has consulted several suppliers, negotiated strongly with them to get the best price and has finally selected the most competitive supplier, this

supplier being charged in return to have the contract executed locally and the goods delivered by the different members of his network. Competition has been fully exercised. The buyer is satisfied with the price negotiated by the supplier and does not expect more. Therefore the exclusion of fulfillment contracts from RPM should be extended to all executions by all members of the network in case of an agreement between a supplier and a buyer leaving the execution of the agreement to the members of the network of the supplier.

In a nutshell:

- the recognition of shared exclusivity is positive but should not be restricted by additional conditions;
- the better protection of exclusive distribution is positive;
- the better protection of selective distribution is to be welcomed;
- the combined limitations to the block exemption of all forms of dual distribution are a huge mistake;
- the limits to the appointment of commercial agents are quite excessive;
- quantitative selective distribution should be admitted in case of fierce competition above the 30% market share threshold in the Guidelines;
- the possibility to combine in an efficient way exclusive and selective distribution should be recognized at the wholesale level;
- the updated evaluation of Internet sales is very positive;
- the more neutral definition of unilateral conduct is to be welcomed;
- the more practical regulation of contractual non-compete obligations is positive;
- the drafts should be completed by a more efficient and reasonable analysis of RPM;
- the qualification of fulfillment contracts should be extended.