

**European Commission Evaluation of the Vertical Agreements Block Exemption Regulation
(VBER)**

**Response to the additional Public Consultation on Proposed Guidance relating to Information
Exchange in the context of Dual Distribution**

Euclid Law Ltd.

1. Euclid Law Ltd. (**Euclid Law**) is a boutique competition law firm, with offices in London and Brussels. We advise on all aspects of EU and UK competition law, and our lawyers advise on the compatibility of distribution agreements with EU competition law on a daily basis. We also have experience of representing clients in investigations of their distribution arrangements by the European Commission (**Commission**) and National Competition Authorities (**NCA**s).
2. As well as advising a wide range of brands, from globally established companies to start-ups, we have advised online retailers, marketplace operators, brick and mortar retailers, software companies, sporting rights companies, financial services companies, insurance companies, gaming companies and pharmaceutical companies on their distribution arrangements.
3. We are submitting this paper from the position of practitioners who see merit in having a rational, predictable and up to date legal regime for vertical agreements. The views stated are our own and do not necessarily represent the views of any client of our firm.
4. This paper supplements our initial response to the initial Public Consultation on the draft revised Regulation and Guidelines.
5. The proposed new section of the Verticals Guidelines dealing with information exchange in dual distribution provides much needed clarity, and the Commission should be given credit for responding to the concerns that had been raised in the initial consultation around this section of the draft text.
6. Consistent with other stakeholders, we had raised concerns that some of the Commission's proposed changes added complexity and uncertainty to the application of the dual distribution exception. We are therefore pleased to see that the Commission's proposed new draft section provides very valuable additional guidance on the circumstances in which information exchange in a dual distribution context will not raise concerns

7. We particularly welcome the Commission's acknowledgement that the exchange of information between a supplier and buyer can contribute to the pro-competitive effects of vertical agreements, and the optimisation of production and distribution processes. We also consider the inclusion of a non-exhaustive list of examples of information that can generally be considered "necessary" to improve the production or distribution of the goods or services a very helpful and valuable addition to the Guidelines.
8. The new wording, especially at paragraphs 7 and 8, also suggests that the Commission has dropped the proposed 10% market share threshold from Article 2(4)(a) or (b) of the new Regulation. If this is indeed the Commission's intention, that it also very welcome, as this would materially reduce complexity and uncertainty. Our assumption is based on the fact that there are no references to the 10% market share threshold in the draft new section. It would nevertheless be helpful for this important point to be clarified.
9. We welcome the Commission's clarification in paragraphs 7 and 8 of the new Guidelines that the dual distribution exception applies where the supplier sells goods or provides services at "several levels of trade" and that the exception will only be withdrawn where the parties compete at the upstream level where the goods or services are purchased, rather than "at the manufacturing, wholesale or import level", as the previous changes proposed. In practice, we understand this to mean that manufacturers and distributors competing at the wholesale *distribution* level will continue to benefit from the dual distribution exception, as well as those competing at the retail level. If this indeed the intention, this clarification is very helpful.
10. We also note the Commission's confirmation that further consultations are not planned. However, it appears that the Commission is not intending to publish the final texts until shortly before they enter into force. As we stated in our initial submission, we note that there is a transitional period provided by Article 9, so it would be helpful if the Commission could provide some further updates on its thinking between now and publication of the final texts (particularly concerning the status of the 10% market share threshold), to help undertakings prepare.

Euclid Law Ltd.

15 February 2022