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**The Commission's proposed amendments to the  
Vertical Restraints Block Exemption Regulation (*VRBER*) and Guidelines  
Submission from BP plc**

**BP plc  
1 St James's Square  
London  
SW1Y 4PD  
United Kingdom**

**User name:** [CONFIDENTIAL]

**ID number:** [CONFIDENTIAL]

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### Introduction

1. BP plc is a global energy company headquartered in the UK, and welcomes this opportunity to comment on the Commission's proposals for the VRBER and the accompanying Guidelines. Following the Commission's Modernisation agenda, the VRBER and the Guidelines are critical tools for national enforcement, so we believe it is critical that they are clear and unambiguous.
2. There are three key issues on which BP wishes to comment, namely:
  - a. applying the 30% market share threshold to the buyer in addition to the supplier;
  - b. the opportunity to revise existing problems with the rules regarding active sales restrictions; and
  - c. the types of risk that might disqualify parties from being treated as agents.

### Applying the 30% market share threshold to the buyer in addition to the supplier<sup>1</sup>

3. BP is concerned that this change will lead to significant problems in practice without improving market efficiency. It narrows the scope of the VRBER significantly, requiring parties to carry out costly, time consuming and legally uncertain Article 81(3) assessments for common supply situations. As well as eroding legal certainty, it is not clear what problem the new rules are trying to address.
4. This amendment appears to raise a number of issues, including the following:
  - a. the Commission's proposed wording of Article 3 requiring that the market share of each of the parties to the agreement does not exceed 30% "*on any of the relevant markets affected by the agreement*" would seem overly broad. Furthermore, the explanation in the draft Guidelines does not serve to elucidate the scope. For example, paragraph 23 of the draft Guidelines states that the market share of the buyer on the markets "where it sells its product produced with the help of the contract goods or services" must not exceed 30%. Would a factory owner's share of the widget market be relevant to the competition assessment of his agreements for fuel or lubricants for his factory?
  - b. there will be substantially less legal certainty for sellers. At present, a seller can rely on 5 year non-competes being enforceable on the buyer provided the seller's share does not exceed 30%. The seller is well placed to estimate its own market share, and the buyer may also have a fair idea of the seller's market share (since it is an active purchaser on the same market). However, it does not necessarily work the other way round. The seller may have little or no knowledge of the buyer's downstream markets (see paragraph 4a above), and yet must rely on

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<sup>1</sup> Recital 8 and Article 3 VRBER.

## NON-CONFIDENTIAL VERSION

the buyer's share not exceeding 30% in order to enforce a non-compete. Buyers will have no incentive to assist sellers in this due diligence since it is not in their interests for a non-compete to be enforceable – in fact, they have an incentive to overstate their share on some “affected market” to escape such contractual restraints. The new dual threshold may lead to a number of buyers challenging their existing contracts, and many sellers declining to enter into new arrangements that the current VRBER would regard as efficient (e.g. making customer-specific investments, or providing a trade loan in return for a 5 year non-compete);

- c. if the seller also competes with its distributor, competition law usually prevents the parties from exchanging competitively sensitive information such as market shares. How can parties reassure themselves of the other's market share without creating more competition law risk? and
  - d. there is insufficient explanation of what problem the new buyer threshold is trying to solve (which at the very least would assist individual assessments under Article 81(3)). The logic of the existing rules are clear: the 30% limit on the seller's market share protects other suppliers from being foreclosed from accessing customers, while the now-deleted 30% limit of the purchasing market on the buyer (regarding exclusive supply obligations) prevented competing buyers being foreclosed from sources of supply. The new rules do not follow the same logic: how is the buyer's share of a downstream sales market (in addition to its share of purchases on the upstream market and/or the seller's share of sales on the upstream market) relevant to foreclosure of the upstream market? Notwithstanding the presence of a purchaser with over 30% market share on a downstream market, if its downstream competitors are free to purchase inputs from any supplier upstream (i.e., when there are no exclusive supply obligations in place), it is hard to see how foreclosure on the downstream market could necessarily result?
5. We would respectfully submit that the extension in application of the market share thresholds is unnecessary and will lead to considerable inefficiencies and uncertainty as currently drafted. We would urge the Commission to engage in further dialogue on this new provision.

### **Existing problems with the rules regarding active sales restrictions<sup>2</sup>**

6. The existing rules on active sales restrictions are overly formulistic and create perverse outcomes, and we would urge the Commission to take this opportunity to improve them. The problems stem from the hardcore language in Article 4b VRBER and its interpretation at paragraph 50 (now 51) of the Guidelines, which states:

*“The first exception [from the hardcore prohibition] allows a supplier to restrict active sales by a buyer party to the agreement to a territory or a*

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<sup>2</sup> Article 4 VRBER and paragraph 50 (now 51) of the Guidelines.

## NON-CONFIDENTIAL VERSION

*customer group which has been allocated exclusively to another buyer or which the supplier has reserved to itself. A territory or customer group is exclusively allocated when the supplier agrees to sell his product only to one distributor for distribution in a particular territory or to a particular customer group and the exclusive distributor is protected against active selling into his territory or to his customer group by the supplier and all the other buyers of the supplier inside the Community*" [Emphasis added].

7. The difficulties are best illustrated with an example. Suppose a supplier has many existing distributors across the EU with no territorial restraints (an "open" system), but wishes to appoint an exclusive distributor in Ireland in order to penetrate that market more effectively. Until now, a distributor in the UK has made some modest active sales into Ireland, but the supplier now wishes to protect the Irish distributor from active sales by others to encourage investment.
8. According to the VRBER and the Guidelines, the supplier cannot simply re-negotiate its agreement with the UK distributor to include an active sales restriction preventing it from selling actively into Ireland. Such a restriction would apparently be hardcore unless a similar restriction were imposed on "*all the other buyers of the supplier inside the Community*" – of which there could be hundreds – granting the Irish distributor European-wide territorial protection. This has the following results:
  - a. restricting a single UK distributor from selling actively into Ireland is apparently a highly damaging hardcore restriction on competition. However, if the supplier also prohibits hundreds of other distributors in the EU from selling actively into Ireland ("*all the other buyers of the supplier inside the Community*"), they are all considered block exempted and perfectly acceptable;
  - b. under the current text, the failure to impose an active sale restriction on just one distributor, for example in Poland, renders all other active sales restrictions regarding sales into Ireland as hardcore restraints; and
  - c. on a practical level, it would be impossible for the supplier to re-negotiate hundreds of distribution agreements to ensure that one active restriction is not hardcore. Moreover, it is surely unnecessary – in our example, the Irish distributor only really wanted protection from the UK distributor, and is indifferent to whether distributors in Romania or Poland (who were unlikely to market actively in Ireland) agreed on active sales restrictions to Ireland.
9. Therefore, the overall outcome is that if a supplier has an open system of distribution, it cannot easily move to an exclusive distribution model in particular areas, even if this would be the most pro-competitive outcome. To do so would risk hardcore infringements of Article 81, and although the Commission itself may not regard such a technical infringement as an enforcement priority, parties that operate within such a "mixed" distribution system can have no guarantee as to the enforceability of pro-competitive commercial contracts as national authorities and

## NON-CONFIDENTIAL VERSION

courts across the EU are bound by the definition of hardcore exemptions in the VRBER<sup>3</sup>.

10. BP has previously made submissions to the Commission on this issue on an anonymous basis through its legal adviser, Linklaters LLP. A copy of that letter is attached in annex to this submission.
11. We understand that the Commission considered deleting the text regarding active sales restrictions in an intermediate draft of the VRBER, while maintaining the rules on passive sales restrictions. We would have supported this change wholeheartedly, and would respectfully request that the Commission reconsiders this issue.

### **Types of risks accepted by agents**

12. With respect to the types of risks that might disqualify parties from being treated as genuine “agents”, paragraph 14 of the draft Guidelines introduces a new type of risk related to “*other activities*” that are required by the principal and which are “*indispensable to engage in the selling or purchasing of the contract goods or services.*” We cannot support this change. This change would appear to contradict the judgment of the Court of First Instance of the European Court of Justice (CFI) in Case T-325/01 *DaimlerChrysler v Commission*. The CFI finds at paragraph 113 that an agent may be subject to certain limited risks as a result of obligations (or “other activities”, to use the wording of the draft Guidelines) agreed with the principal in a market other than that in respect of which the principal and agent have an agency relationship, without such other activities affecting “the relationship between the [principal] and its agents under competition law as regards the market at issue”. Similarly, the determination of agency status by the European Court of Justice in both Case C-217/05 *CEEES* and Case C-279/06 *CEPSA*, focuses on financial and commercial risk linked to the “sale of the products” under consideration (and which are sold on a contractual principal-agency basis) rather than the risk related to the sale of other products which are not tied to the sale of those products (see, for example, operative part of decision, paragraph 1 in both cases). BP would respectfully urge the Commission to reconsider the introduction of this new third category of risk.

**28 September, 2009**

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<sup>3</sup> Here we note that Recital 14 – which deals with the uniform application of Community Competition Law – of the Block Exemption has been amended to remove reference to the obligation upon the Member States to ensure that the Block Exemption is applied in a uniform and consistent manner throughout the Community. BP believes that it is important for the Commission to stress in the Block Exemption the Member States’ obligations under Articles 3 and 11 of Regulation 1/2003 in respect of both withdrawal decisions and enforcement decisions where the benefit of the Block Exemption is not available. BP therefore recommends reinserting such reference into the draft Regulation.

**NON-CONFIDENTIAL VERSION**

**ANNEX**

Mr E. Paulis  
Director  
Directorate A: Policy and Strategic Support  
Competition DG  
European Commission  
B-1049 Brussels

28 August 2006

Dear Sir,

## **Request for guidance as regards Article 4 (b) of Commission Regulation (EC) No 2790/1999**

Over the last couple of months, we have been contacted by a number of our clients regarding an issue of interpretation of Article 4 (b) of Commission Regulation (EC) No 2790/1999 (the "Vertical Restraints Block Exemption" or "VRBE") - read in conjunction with para. 50 of the Vertical Restraints Guidelines<sup>1</sup>. The issue is of a general nature and does not - as such - require knowledge of any factual background.

### **1 Issue**

Article 4 (b), first indent VRBE states that the exemption does not apply to agreements that have as their object the restriction of the territory into which the buyer may sell the contract goods or services, except for: *"the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer."*

Thus, in our reading, a restriction of active sales by an exclusive distributor is permissible into the territories that are reserved to the supplier or allocated to another buyer. It is our understanding that active sales cannot be restricted into territories that are not reserved to the supplier or to any other buyer.

What it means for a territory to be exclusively allocated to a distributor is set out in paragraph 50 of the Vertical Restraints Guidelines (VRG)<sup>2</sup>. It states that a territory is exclusively allocated to a distributor: *"...when the supplier agrees to sell his product only to one distributor for distribution in a particular territory... and the exclusive distributor is protected against active selling into his territory ... by the supplier and all the other buyers of the supplier inside the Community"* (underlining added).

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<sup>1</sup> Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81 (3) of the Treaty to categories of vertical agreements and concerted practices, O.J. of 29 December 1999, L336/21.

<sup>2</sup> Commission Notice, Guidelines on Vertical Restraints, O.J. of 13 October 2000, C291/1.

Linklaters and Linklaters De Bandt are denominations of the same partnership under English law. The lawyers listed overleaf practise in Belgium under the name Linklaters De Bandt, except for the European law group which practises as Linklaters. A list of the names of the partners and their professional qualifications is available on [www.linklaters.com](http://www.linklaters.com) or on request from the above address. The enterprise number with the Crossroads Bank for Enterprises is 0557.363.978.

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## Linklaters

Thus, our reading of paragraph 50 is that, in order for a territory to be exclusively allocated to a distributor, a relevant active sales restriction needs to be imposed on each and every buyer of the supplier's product in the European Community. Taken to its extreme if there are just two buyers in the Community, one of whom is not subject to the active sales restriction, then it follows that:

- the territory which is the subject of the active sales restriction has not been exclusively allocated as defined in paragraph 50 VRG;
- the active sales restriction imposed on the one buyer in the Community does not fall within the exception provided for in Article 4 (b), first indent VRBE;

In order to fall within the exception in Article 4(b) first indent, therefore, a supplier needs to ensure that each and every supply agreement with buyers inside the Community has an active sales restriction preventing the buyer selling to customers in each and every territory which has been exclusively allocated to a buyer.

This interpretation of the VRBE and VRG gives rise to the following issue. Several of our clients have existing distribution networks which are currently organised on an "open" basis – in other words the distributors are not exclusively appointed to a particular territory and/or customer class. The clients now wish to reorganise their respective distribution networks so that distributors are appointed on an exclusive basis. This reorganisation will have to be done on a piecemeal basis as existing supply agreements come up for renewal. It is possible, therefore, that some distributors will be restricted from actively selling in territories reserved to the supplier and to other exclusive distributors – but others will not.

The issue therefore is whether an exclusive distributor can be protected from active sales into his territory by certain, e.g. newly appointed, exclusive distributors even though that distributor is not protected from sales into his territory by other, third distributors, who are historically not bound by an active sales prohibition.

## 2 Possible approaches

In the reasoning below:

A and B are the exclusive distributors restricted from actively selling into each other's territory.

C is a third distributor who, for historic reasons, is not restricted from actively selling into the territories allocated to A and B.

You will note that our clients may have more than 2 exclusive distributors and more than 1 non-exclusive distributor in their respective networks. However, for the purpose of this illustration, we have used only 3 distributors.

### 2.1 The strictly economic approach

A very strict economic reasoning in this context would be that, since A is not protected from active sales into his territory from C, there is no reason to protect him from sales into his territory by B either. It would not matter whether or not B has a restrictive clause in his distribution contract since A's territory can no longer be considered as exclusive within the meaning of para. 50 of the Vertical Guidelines.

The rationale to protect A from sales into this territory by B (i.e., incentives to invest in promoting the contract goods, protection against free-riding, etc.) would not apply, since A is, in any event, not protected from active sales into his territory by C.

Although this reasoning may be the correct one from a purely economic point of view, it can, in most cases, not be implemented in practice - other than through a big bang scenario where, within a very short period, all distribution agreements within one system are amended so as to consistently include active sales prohibitions.

**2.2 The practical approach**

The above approach may have harsh consequences for a distribution system where the fact that C can freely sell into the exclusive territory is merely the result of the organic growth of a distribution system or the distribution system currently being in transition from open to exclusive

In such a case, not only that clause would become unenforceable, but, following the above strictly economic approach, the entire structure of the exclusive distribution system could be jeopardised - simply because one distributor is not bound by an active sales ban. Indeed, C would be allowed to sell actively into A's territory. As a result, A's territory can no longer be considered as exclusive. Accordingly, B should also be allowed to sell actively into A's territory and *vice versa*.

In that respect, the solution may be that the clause restricting C from actively selling outside its territory would only be invalid to the extent that it prohibits active sales into territories that are not reserved to the supplier or allocated to another exclusive distributor. However, it could still be relied upon to prohibit active sales by C into A and B's exclusive territories. This would also be in line with the wording of Article 4 (b) VRBE.

**3 Question**

On the basis of the above, on behalf of our clients, we would appreciate it if the Commission could consider providing guidance on the following issue:

Can an exclusive distributor A be protected from active sales into his territory by another exclusive distributor B - who is bound by a contract restricting him to do so - even though A is not protected from sales into his territory by another distributor C, who is not bound by such a contract?

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If the question - or its implications - are unclear, I would be very happy to have the opportunity to discuss this with your services in a face-to-face meeting.

Please do not hesitate to contact me if the above is unclear or if the Commission requires further clarification in order to issue guidance.

Yours sincerely,

Johan Ysewyn  
Partner  
Linklaters, Brussels