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ANNEX

**ANNEX**

**to the**

**COMMUNICATION FROM THE COMMISSION**

**Approval of the content of a draft for a Commission Regulation 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**

## ANNEX

### COMMISSION REGULATION (EU) .../...

of **XXX**

**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**

**DRAFT**

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation No 19/65/EEC of the Council of 2 March 1965 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices<sup>1</sup>, and in particular Article 1 thereof,

Having published a draft of this Regulation,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

- (1) Regulation No 19/65/EEC empowers the Commission to apply Article 101(3) of the Treaty on the Functioning of the European Union\* (“the Treaty”) by regulation to certain categories of vertical agreements and corresponding concerted practices falling within Article 101(1) of the Treaty.
- (2) Commission Regulation (EU) No 330/2010 of 20 April 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<sup>2</sup> defines a category of vertical agreements which the Commission regarded as normally satisfying the conditions laid down in Article 101(3) of the Treaty. The experience with the application of that Regulation, which expires on 31 May 2022, has been overall positive, as identified in the evaluation of that Regulation. Taking into account the experience acquired since its adoption, including experience with new market developments, such as the growth of e-commerce, as well as new or more prevalent types of vertical agreements, it is appropriate to adopt a new block exemption regulation.
- (3) The category of agreements which can be regarded as normally satisfying the conditions laid down in Article 101(3) of the Treaty includes vertical agreements for the purchase or sale of goods or services where those agreements are concluded between non-competing undertakings, between certain competitors or by certain

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<sup>1</sup> OJ 36, 6.3.1965, p. 533, as amended by Council Regulation (EC) No 1215/1999 of 10 June 1999, OJ L 148, 15.6.1999, p. 1.

\* With effect from 1 December 2009, Article 81 of the EC Treaty has become Article 101 of the Treaty on the Functioning of the European Union. The two Articles are, in substance, identical. For the purposes of this Regulation, references to Article 101 of the Treaty on the Functioning of the European Union should be understood as references to Article 81 of the EC Treaty where appropriate.

<sup>2</sup> OJ L 102, 23.4.2010, p. 1.

associations of retailers of goods. It also includes vertical agreements containing ancillary provisions on the assignment or use of intellectual property rights. The term ‘vertical agreements’ should include the corresponding concerted practices.

- (4) For the application of Article 101(3) of the Treaty by regulation, it is not necessary to define those vertical agreements which are capable of falling within Article 101(1) of the Treaty. In the individual assessment of agreements under Article 101(1) of the Treaty, account has to be taken of several factors, in particular the market structure on the supply and purchase side.
- (5) The benefit of the block exemption established by this Regulation should be limited to vertical agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty.
- (6) Certain types of vertical agreements can improve economic efficiency within a chain of production or distribution by facilitating better coordination between the participating undertakings. In particular, they can lead to a reduction in the transaction and distribution costs of the parties and to an optimisation of their sales and investment levels.
- (7) The likelihood that such efficiency-enhancing effects will outweigh any anti-competitive effects due to restrictions contained in vertical agreements depends on the degree of market power of the parties to the agreement and, therefore, on the extent to which those undertakings face competition from other suppliers of goods or services regarded by their customers as interchangeable or substitutable for one another, by reason of the products’ characteristics, their prices and their intended use.
- (8) It can be presumed that, where the market share held by each of the undertakings party to the agreement on the relevant market does not exceed 30%, vertical agreements which do not contain certain types of severe restrictions of competition generally lead to an improvement in production or distribution and allow consumers a fair share of the resulting benefits.
- (9) Above the market share threshold of 30 %, there can be no presumption that vertical agreements falling within the scope of Article 101(1) of the Treaty will usually give rise to objective advantages of such a character and size as to compensate for the disadvantages which they create for competition. At the same time, there is no presumption that those vertical agreements are either caught by Article 101(1) of the Treaty or that they fail to satisfy the conditions of Article 101(3) of the Treaty.
- (10) The online platform economy plays an increasingly important role in the distribution of goods and services. The undertakings active in the online platform economy enable new ways of doing business, some of which are not easy to categorise using the concepts traditionally associated with vertical relationships between suppliers and distributors in the brick and mortar environment. However, where such undertakings are providers of online intermediation services, it is appropriate to categorise them as suppliers under this Regulation. Providers of online intermediation services allow undertakings to offer goods or services to other undertakings or to consumers with a view to facilitating direct transactions between such undertakings or between such undertakings and consumers, irrespective of whether and where those transactions are ultimately concluded. This categorisation also applies when the provider of online intermediation services provides multiple services or services at multiple levels in the distribution chain.

- (11) The definition of provider of online intermediation services provided for in this Regulation is based on the definition used in Regulation 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.<sup>3</sup> However, the application of this definition has to take into account the context of this Regulation. In particular, taking into account the scope of Article 101 of the Treaty, only agreements between providers of online intermediation services and other undertakings fall within the scope of this Regulation. These agreements are considered to be vertical agreements within the meaning of this Regulation.
- (12) Providers of online intermediation services should not benefit from the block exemption established by this Regulation where they have a hybrid function, that is where they sell goods or services in competition with undertakings to which they provide online intermediation services. This is because the retail activities of providers of online intermediation services that have such a hybrid function typically affect inter-brand competition and may therefore raise non-negligible horizontal concerns.
- (13) This Regulation should not exempt vertical agreements containing restrictions which are likely to restrict competition and harm consumers or which are not indispensable to the attainment of the efficiency-enhancing effects. In particular, vertical agreements containing certain types of severe restrictions of competition such as minimum and fixed resale prices, certain types of territorial protection, or the prevention of the effective use of the Internet for the purposes of selling online or of the effective use of certain online advertising channels, should be excluded as a whole from the benefit of the block exemption established by this Regulation irrespective of the market share of the undertakings concerned. Therefore, online sales restrictions benefit from the block exemption established by this Regulation, provided that they do not have as their object to, directly or indirectly, prevent the effective use of the internet by the buyers or their customers for the purposes of selling their goods or services online, for instance because it is capable of significantly diminishing the overall amount of online sales in the market.
- (14) To ensure that this Regulation does not exempt restrictions for which it cannot be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty, in particular to ensure access to or to prevent collusion on the relevant market, certain conditions should be attached to the block exemption. To this end, the exemption of non-compete obligations should be limited to obligations which do not exceed a defined duration. For the same reason, any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers should be excluded from the benefit of this Regulation. Lastly, parity obligations causing buyers of online intermediation services not to offer, sell or resell goods or services to end users under more favourable conditions using competing online intermediation services should also be excluded from the benefit of this Regulation.
- (15) The market-share limitation, the non-exemption of certain vertical agreements and the conditions provided for in this Regulation normally ensure that the agreements to which the block exemption applies do not enable the participating undertakings to eliminate competition in respect of a substantial part of the goods or services in question.

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<sup>3</sup> OJ L 186, 11.7.2019, p. 57.

- (16) The Commission may withdraw the benefit of this Regulation, pursuant to Article 29(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty<sup>4</sup>, where it finds in a particular case that an agreement to which the exemption provided for in this Regulation applies nevertheless has effects which are incompatible with Article 101(3) of the Treaty. The competition authority of a Member State may withdraw the benefit of this Regulation in respect of the territory of that Member State, or a part thereof where the conditions of Article 29(2) of Regulation (EC) No 1/2003 are fulfilled.
- (17) Where the Commission or the competition authority of a Member State withdraws the benefits of this Regulation, it has the burden of proving that the vertical agreement in question falls within the scope of Article 101(1) of the Treaty, and that this agreement fails to fulfil at least one of the four conditions of Article 101(3) of the Treaty.
- (18) In determining whether the benefit of this Regulation should be withdrawn pursuant to Article 29 of Regulation (EC) No 1/2003, the anti-competitive effects that may derive from the existence of parallel networks of vertical agreements that have similar effects, which significantly restrict access to a relevant market or competition therein, are of particular importance. Such cumulative effects may for example arise in the case of shared exclusivity, exclusive supply, selective distribution, parity obligations or non-compete obligations.
- (19) In order to strengthen the supervision of parallel networks of vertical agreements which have similar anti-competitive effects and which cover more than 50% of a given market, the Commission may by regulation declare this Regulation inapplicable to vertical agreements containing specific restraints relating to the market concerned, thereby restoring the full application of Article 101 of the Treaty to such agreements.

HAS ADOPTED THIS REGULATION:

#### *Article 1*

#### **Definitions**

1. For the purposes of this Regulation, the following definitions shall apply:
  - (a) ‘vertical agreement’ means an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services;
  - (b) ‘vertical restraint’ means a restriction of competition in a vertical agreement falling within the scope of Article 101(1) of the Treaty;
  - (c) ‘competing undertaking’ means an actual or potential competitor; ‘actual competitor’ means an undertaking that is active on the same relevant market; ‘potential competitor’ means an undertaking that, in the absence of the vertical agreement, would, on realistic grounds and not just as a mere theoretical possibility, in case of a small but permanent increase in relative prices be likely

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<sup>4</sup> OJ L 1, 4.1.2003, p. 1.

to undertake, within a short period of time, the necessary additional investments or other necessary switching costs to enter the relevant market;

- (d) ‘supplier’ includes an undertaking that provides online intermediation services irrespective of whether it is a party to the transaction it facilitates; ‘online intermediation services’ means services that allow undertakings to offer goods or services to other undertakings or to end users with a view to facilitating direct transactions between such undertakings or between such undertakings and end users, irrespective of whether and where those transactions are ultimately concluded, and that constitute information society services within the meaning of point (b) of Article 1(1) of Directive (EU) 2015/1535 of the European Parliament and of the Council;
- (e) ‘non-compete obligation’ means any direct or indirect obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services, or any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80% of the buyer’s total purchases of the contract goods or services and their substitutes on the relevant market, calculated on the basis of the value or, where such is standard industry practice, the volume of its purchases in the preceding calendar year;
- (f) ‘selective distribution system’ means a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system;
- (g) ‘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;
- (h) ‘intellectual property rights’ includes industrial property rights, know-how, copyright and neighbouring rights;
- (i) ‘know-how’ means a package of non-patented practical information, resulting from experience and testing by the supplier, which is secret, substantial and identified; ‘secret’ means that the know-how is not generally known or easily accessible; ‘substantial’ means that the know-how is significant and useful to the buyer for the use, sale or resale of the contract goods or services; ‘identified’ means that the know-how is described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality;
- (j) ‘buyer’ includes an undertaking which, under an agreement falling within Article 101(1) of the Treaty, sells goods or services on behalf of another undertaking;
- (k) ‘customer of the buyer’ means an undertaking not party to the agreement which purchases the contract goods or services from a buyer which is party to the agreement;

- (l) ‘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;
- (m) ‘passive’ sales mean sales in response to unsolicited requests from individual customers, including delivery of goods or services to such customers without having initiated the sale through advertising actively targeting the particular customer group or territory, and participating in public procurement;
- (n) ‘restriction of active or passive’ sales means a restriction of active sales within the meaning of Article 1(l) or passive sales within the meaning of Article 1(m). As regards selling of goods and services online, a restriction that, directly or indirectly, in isolation or combination with other factors, has as its object to prevent the buyers or their customers from effectively using the Internet for the purposes of selling their goods or services online or from effectively using one or more online advertising channels is a restriction of active or passive sales, which, directly or indirectly, in isolation or in combination with other factors controlled by either party, has as its object to restrict the territory into which or the customer group to whom the buyers may sell the contract goods or services or, in the case of selective distribution, to restrict active or passive sales to end users by members of the selective distribution system operating at the retail level of trade.

2. For the purposes of this Regulation, the terms ‘undertaking’, ‘supplier’ and ‘buyer’ shall include their respective connected undertakings.

‘Connected undertakings’ means:

- (a) undertakings in which a party to the agreement, directly or indirectly:
  - (i) has the power to exercise more than half the voting rights, or
  - (ii) has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking, or
  - (iii) has the right to manage the undertaking’s affairs;
- (b) undertakings which directly or indirectly have, over a party to the agreement, the rights or powers listed in point (a);
- (c) undertakings in which an undertaking referred to in point (b) has, directly or indirectly, the rights or powers listed in point (a);
- (d) undertakings in which a party to the agreement together with one or more of the undertakings referred to in points (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in point (a);
- (e) undertakings in which the rights or the powers listed in point (a) are jointly held by:

- (i) parties to the agreement or their respective connected undertakings referred to in points (a) to (d), or
- (ii) one or more of the parties to the agreement or one or more of their connected undertakings referred to in points (a) to (d) and one or more third parties.

## *Article 2*

### **Exemption**

1. Pursuant to Article 101(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 101(1) of the Treaty shall not apply to vertical agreements.

This exemption shall apply to the extent that such agreements contain vertical restraints.

2. The exemption provided for in paragraph 1 shall apply to vertical agreements entered into between an association of undertakings and an individual member, or between such an association and an individual supplier, only if all its members are retailers of goods and if no individual member of the association, together with its connected undertakings, has a total annual turnover exceeding EUR 50 million. Vertical agreements entered into by such associations shall be covered by this Regulation without prejudice to the application of Article 101 of the Treaty to horizontal agreements concluded between the members of the association or decisions adopted by the association.
3. The exemption provided for in paragraph 1 shall apply to vertical agreements containing provisions which relate to the assignment to the buyer or use by the buyer of intellectual property rights, provided that those provisions do not constitute the primary object of such agreements and are directly related to the use, sale or resale of goods or services by the buyer or its customers. The exemption applies on condition that, in relation to the contract goods or services, those provisions do not contain restrictions of competition having the same object as vertical restraints which are not exempted under this Regulation.
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-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.

### *Article 3*

#### **Market share threshold**

1. The exemption provided for in Article 2 shall apply on condition that the market share held by the supplier does not exceed 30% of the relevant market on which it sells the contract goods or services and the market share held by the buyer does not exceed 30% of the relevant market on which it purchases the contract goods or services.
2. For the purposes of paragraph 1, where in a multi-party agreement an undertaking buys the contract goods or services from one undertaking that is a party to the agreement and sells the contract goods or services to another undertaking that is also a party to the agreement, the market share of the first undertaking must respect the market share threshold provided for in that paragraph both as a buyer and a supplier in order for the exemption provided for in Article 2 to apply.

### *Article 4*

#### **Restrictions that remove the benefit of the block exemption - hardcore restrictions**

The exemption provided for in Article 2 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:

- (a) the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;
- (b) where the supplier operates an exclusive distribution system, the restriction of the territory into which, or of the customer groups to whom, one or a limited number of buyers, to which an exclusive territory or customer group has been allocated, may actively or passively sell the contract goods or services, except:
  - (i) 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

- 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,
- (ii) 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,
  - (iii) the restriction of the exclusive distributor's place of establishment,
  - (iv) the restriction of active or passive sales to end users by an exclusive distributor operating at the wholesale level of trade,
  - (v) the restriction of the exclusive distributor's ability to actively or passively sell components, supplied for the purposes of incorporation to a product, to customers who would use them to manufacture the same type of goods as those produced by the supplier.
- (c) where the supplier operates a selective distribution system,
- (i) the restriction of the territory into which, or of the customer groups to whom, the members of the selective distribution system may actively or passively sell the contract goods or services, except:
    - 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,
    - 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,
    - the restriction of the place of establishment of the members of the selective distribution system,
    - the restriction of active or passive sales to end users by members of the selective distribution system operating at the wholesale level of trade,
    - the restriction of the ability to actively or passively sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier.
  - (ii) the restriction of cross-supplies between the members of the selective distribution system operating at the same or different levels of trade;
  - (iii) the restriction of active or passive sales to end users by members of the selective distribution system operating at the retail level of trade, except in the situation set out in the first hyphen of Article 4(c)(i).

- (d) where the supplier operates neither an exclusive nor a selective distribution system, the restriction of the territory into which, or of the customer group to whom, a buyer may actively or passively sell the contract goods or services, except:
  - (i) the restriction of active sales by the buyer, or the buyer and its customers that have entered into a distribution agreement with the supplier or with a party that was given distribution 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 buyers,
  - (ii) the restriction of active or passive sales by the buyer or its customers to unauthorised distributors located in a territory where the supplier operates a selective distribution system for the contract goods or services,
  - (iii) the restriction of the buyer's place of establishment,
  - (iv) the restriction of active or passive sales to end users by a buyer operating at the wholesale level of trade,
  - (v) the restriction of the buyer's ability to actively or passively sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier;
- (e) the restriction, agreed between a supplier of components and a buyer who incorporates those components, of the supplier's ability to sell the components as spare parts to end-users or to repairers, wholesalers or other service providers not entrusted by the buyer with the repair or servicing of its goods.

#### *Article 5*

#### **Excluded restrictions**

1. The exemption provided for in Article 2 shall not apply to the following obligations contained in vertical agreements:
  - (a) any direct or indirect non-compete obligation, the duration of which is indefinite or exceeds five years;
  - (b) any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services;
  - (c) any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers;
  - (d) any direct or indirect obligation causing a buyer of online intermediation services not to offer, sell or resell goods or services to end users under more favourable conditions using competing online intermediation services.
2. By way of derogation from paragraph 1(a), the time limitation of five years shall not apply where the contract goods or services are sold by the buyer from premises and land owned by the supplier or leased by the supplier from third parties not connected with the buyer, provided that the duration of the non-compete obligation does not exceed the period of occupancy of the premises and land by the buyer.
3. By way of derogation from paragraph 1(b), the exemption provided for in Article 2 shall apply to any direct or indirect obligation causing the buyer, after termination of

the agreement, not to manufacture, purchase, sell or resell goods or services where the following conditions are fulfilled:

- (a) the obligation relates to goods or services which compete with the contract goods or services;
- (b) the obligation is limited to the premises and land from which the buyer has operated during the contract period;
- (c) the obligation is indispensable to protect know-how transferred by the supplier to the buyer;
- (d) the duration of the obligation is limited to a period of one year after termination of the agreement.

Paragraph 1(b) is without prejudice to the possibility of imposing a restriction which is unlimited in time on the use and disclosure of know-how which has not entered the public domain.

#### *Article 6*

#### **Non-application of this Regulation**

Pursuant to Article 1a of Regulation No 19/65/EEC, the Commission may by regulation declare that, where parallel networks of similar vertical restraints cover more than 50% of a relevant market, this Regulation shall not apply to vertical agreements containing specific restraints relating to that market.

#### *Article 7*

#### **Application of the market share threshold**

For the purposes of applying the market share thresholds provided for in Article 3 the following rules shall apply:

- (a) the market share of the supplier shall be calculated on the basis of market sales value data and the market share of the buyer shall be calculated on the basis of market purchase value data. If market sales value or market purchase value data are not available, estimates based on other reliable market information, including market sales and purchase volumes, may be used to establish the market share of the undertaking concerned;
- (b) the market shares shall be calculated on the basis of data relating to the preceding calendar year;
- (c) the market share of the supplier shall include any goods or services supplied to vertically integrated distributors for the purposes of sale;
- (d) if a market share is initially not more than 30 %, but subsequently rises above that level, the exemption provided for in Article 2 shall continue to apply for a period of two consecutive calendar years following the year in which the 30 % threshold was first exceeded;
- (e) the market share held by the undertakings referred to in point (e) of the second subparagraph of Article 1(2) shall be apportioned equally to each undertaking having the rights or the powers listed in point (a) of the second subparagraph of Article 1(2).

## *Article 8*

### **Application of the turnover threshold**

1. For the purpose of calculating total annual turnover within the meaning of Article 2(2), the turnover achieved during the previous financial year by the relevant party to the vertical agreement and the turnover achieved by its connected undertakings in respect of all goods and services, excluding all taxes and other duties, shall be added together. For this purpose, no account shall be taken of dealings between the party to the vertical agreement and its connected undertakings or between its connected undertakings.
2. The exemption provided for in Article 2 shall remain applicable where, for any period of two consecutive financial years, the total annual turnover threshold is exceeded by no more than 10%.

## *Article 9*

### **Transitional period**

The prohibition laid down in Article 101(1) of the Treaty shall not apply during the period from 1 June 2022 to 31 May 2023 in respect of agreements already in force on 31 May 2022 which do not satisfy the conditions for exemption provided for in this Regulation but which, on 31 May 2022, satisfied the conditions for exemption provided for in Regulation (EC) No 330/2010.

## *Article 10*

### **Period of validity**

This Regulation shall enter into force on 1 June 2022.

It shall expire on 31 May 2034.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, [...]

*For the Commission*

*The President*

[...]