17 SEPTEMBER 2021

STATEMENT

---

to the

EUROPEAN COMMISSION

CONSULTATION
ON THE
DRAFT REVISED VBER
AND
DRAFT REVISED VERTICAL GUIDELINES

A. ABOUT US

CMS is ranked as a Top 10 global law firm. With approximately 5,000 lawyers and 75 offices worldwide, we advise private and public clients in over 73 cities in 44 countries.

CMS is organized around industry sector groups and practice area groups. The CMS Competition & EU Group is one of the largest competition teams in Europe and offers a widespread pan-European coverage. With more than 225 competition lawyers based in 36 countries, we offer a one-stop solution for clients from a very wide range of industries across Europe and beyond, through our strong and growing teams in China, Latin America and Africa.

Many lawyers of our competition team are especially experienced in advising clients in distribution matters. We also published leading handbooks on competition law in the distribution sector.

For more information please refer to our website cms.law.

B. PROPOSALS

In the following submission we summarise our proposals for renewing the VBER and the Vertical Guidelines. Our response describes only our own ideas and views based on a long-standing practice of advising clients on related issues. We have not been instructed by any third party to prepare this document. In addition, we will focus on certain parts which we deem important and/or where our practical experience would suggest another approach.

We would be very happy to explain our contributions in more detail and/or contribute actively to the legal debate by other means in any format the Commission deems appropriate.

In detail we would like to provide the following comments:

1. Hardcore restrictions by category or by individual assessment?

We encourage the Commission to consequently apply the concept of hardcore restrictions throughout the VBER and the Vertical Guidelines. The VBER's great success to date is due to the fact that it allows undertakings to substitute the complex and error-prone assessment under Article 101(3) TFEU with a relatively simple and clear-cut assessment as to whether a given restriction corresponds to a category of hardcore restrictions, and avoid these to benefit from assurance of the safe-harbour protection. The Draft Guidelines instructively state at paragraph 163 that the "*finding of a <u>restriction by object</u> requires an <u>individual</u> assessment of the vertical agreement concerned. In contrast, <u>hardcore</u>*

<u>*restrictions*</u> *correspond to a* <u>*category*</u> *of restrictions under the VBER for which it is presumed that they generally result in harm to competition.*" (emphasised by us).

However, the Draft Guidelines unfortunately appear to depart from this principle on various occasions. Under the Draft Guidelines certain restrictions may constitute a hardcore restriction or be block exempted, depending on whether, in the individual case, the restriction in question has efficiency-enhancing effects or can otherwise be justified:

- One example is paragraph 102, where shared exclusivity is not block exempted as a category but appears to qualify as a hardcore restriction unless "*the number of appointed distributors [is] 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.*" (see also below under 3.1)
- Another example is paragraph 195, where the current drafting suggests that dual pricing for products intended to be sold online or offline may be block exempted but will be considered a hardcore restriction if "*the price difference makes the effective use of the internet for the purposes of selling online unprofitable or financially not sustainable.*" (see also below under 4.1)
- According to paragraph 234, non-compete obligations that are tacitly renewable beyond a period of five years are not block exempted as a category, but only permissible if "*the buyer can effectively renegotiate or terminate the vertical agreement containing the obligation with a reasonable notice period and at a reasonable cost.*"

In each of these cases undertakings can no longer reliably assess whether the restriction in question falls within a certain category of prohibited restrictions or not, in order to gain comfort in the knowledge whether it enjoys the safe harbour provided by the VBER. Parties now need to carry out an additional individual economic assessment which is in many ways similar to the complex assessment required under Article 101(3) TFEU. We are concerned that the VBER will lose much of its practical appeal if undertakings can no longer limit themselves to assessing whether the restriction in question corresponds to a certain category, but must engage in additional complex efficiency assessments in each individual case.

2. Dual distribution

We note that the Draft VBER provides for significant changes in the area of dual distribution. Currently, dual distribution is covered by the VBER safe harbour as an exception from the general rule that competitors cannot benefit from it. The draft revised rules would change this exception significantly, and our comments on the proposed amendments are as follows:

2.1 Regarding Article 2(4)(a) Draft VBER, we welcome the amendment by which the dual distribution exception has been expanded to cover not only manufacturers, but also wholesalers and importers. Indeed, there is no reason why those two additional groups of market participants should be deprived from the benefits of the exception. Given, however, that a wholesaler, an importer, and a distributor are not defined terms, it would be helpful if the Commission could explain – preferably in the Vertical Guidelines – how to interpret these terms for this specific context.

2.2 We also welcome at paragraph 87 of the Draft Guidelines the clarification that the dual distribution exception applies to all aspects of a dual distribution system, and any horizontal restrictions by effect, including those resulting from the exchange of information between competing undertakings. However, the proposal limits the dual distribution exception in Article 2(4) and (5) Draft VBER in such a way that

- it will be available only if the aggregate market share of the competing supplier and the buyer in the relevant market at a retail level does not exceed [10 %]; and
- if the competing supplier and buyer have an aggregate market share that exceeds [10 %] and is below 30 %, the exception will apply, but not for any exchange of information between the parties (which then must be assessed under the rules applicable to horizontal agreements)

raises significant concerns and should be given additional consideration.

In Article 2(4) Draft VBER, the proposed 10 % market share threshold is very low and this will practically limit the possibility for many businesses operating in a dual distribution model to benefit from the safe harbour exemption. The draft also specifically cuts out all hybrid online platforms from benefitting from the VBER. As the Commission noted itself, dual distribution has grown significantly in recent years (due to the rapid development of direct-to-consumer online sales), we do not see convincing reasons why this limitation is required by competition policy. We would also propose that the Commission provides guidance on how the use of carefully applied Chinese wall systems would render dual distribution systems more competition compliant, since this has been a necessary requirement for all market players engaged in dual distribution models, as a necessity.

In Article 2(5) Draft VBER, the additional, more limited safe harbour (provided for the scenarios where market shares are between 10 % and 30 %) may further prove to be difficult to use, as it excludes most types of exchange of information between the parties. Indeed, it must be recognised that exchange of information between a supplier and a distributor (regarding sales, marketing and promotional campaigns, products and consumer preferences, market trends, etc.) is crucial and necessary for the success of their cooperation. The Commission should at least provide guidance on what information is allowed to be exchanged, and what not, and as above, acceptable Chinese wall internal mechanisms. This is essential for the consistent application of the VBER.

2.3 In this context we note that Article 2(5) Draft VBER proposes that such exchange of information should be assessed under the rules applicable to horizontal agreements. This does not represent the best practical solution. Even if the supplier and the distributor are competing entities, the exchange of information in question is part of their vertical relationship and takes place exclusively in the vertical context. The rules on horizonal exchange are accordingly not suitable here. Thus, any guidelines in this respect should, in our view, be rather placed in the Draft Guidelines and should properly recognise the vertical nature of potential restraints.

2.4 Also, Article 2(6) Draft VBER provides that "*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*". This terminology is very vague and general which is not helpful for market players trying to gain comfort that their applied model safely falls within the VBER safe harbour. The principal goal of the Draft VBER should be to increase the legal certainty for market participants, and to lower the costs of applying the legal provisions. Thus, it would be advisable to provide here for a more precise list of restraints that result in the loss of the safe harbour benefit.

2.5 Finally, the above proposal on the limitation of the dual distribution exception seems radical while at the same time the reasons for such a radical change are not entirely clear. When making its justification the Commission states – very briefly – that the Draft VBER "*excludes from the existing safe harbour scenarios of dual distribution that may give rise to horizontal concerns*" (explanatory note, p. 2). We would welcome a much more detailed explanation regarding such horizontal concerns, along with examples of real market situations and references to supporting evidence within the Draft VBER and Guidelines directly.

3. Sales restrictions

3.1 With Article 1(g), the Draft VBER introduces shared exclusivity as a result of which the supplier can 'exclusively' allocate a territory or customer group not only to one but to multiple buyers, which we regard as a very useful and practical development of the current rules. However, at paragraphs 98 – 100 the Draft Guidelines also state that while shared exclusivity is exempted, the number of appointed distributors within a territory or for a customer group should remain 'limited'. According to the Draft Guidelines, the limitation applied to the number of appointed distributors is to be 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. The exact number to which such an appointment is to be limited will likely prove challenging to assess in practice for market players.

It is unclear what the Commission deems "*a limited*" number and what it considers as "*a large*" number of distributors. In addition, it is unclear what qualifies as "*a certain volume of business*". As a consequence, different interpretations may be likely to arise across different Member States as to exactly what is a permissible number of distributors in proportion to the volume of business in a particular territory or for a particular customer group. Clarification on this point is of material importance as it follows from paragraph 107 of the Draft Guidelines that the protection of the VBER is likely to be withdrawn where the number of exclusive distributors is not limited and 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. Conversely, the Draft Guidelines also indicate that the higher the number of distributors, the lower the reduction of intra-brand competition, which would actually support a higher number/multiple distributors being appointed within the relevant territory (para. 109). Such a high(er) number of distributors only seems to raise a particular concern when these distributors are also appointed exclusively by other competing brands. It is therefore unclear from the current draft whether the circumstances that a distributor has multiple (exclusive) dealerships should decisively be taken into account when assessing the permissibility of the number of distributors in proportion to the volume of business. We would therefore suggest that the circumstances under which the Commission considers the number of distributors to be a restraint of competition to be explained in more detail.

3.2 With Article 1(l) and (m), the Draft VBER has usefully included detailed definitions for active and passive sales, as well as the restriction thereof. However, the definition used in Article 1(n) of the VBER for the restriction of active or passive sales appears to be overly complex and impractical, particularly when read in conjunction with Article 4. If understood correctly, the definition applies to any direct or indirect restriction with the object of preventing buyers from using the internet or one or more online advertising channels effectively if the object of the restriction is to restrict the territory into which or the customer group to whom the buyers may sell the contract goods. We think that the definition would benefit from further clarification. For example, a clarification as to whether the mere object of restricting effective use of one or more online advertising channels would – in itself – result in a restriction of active or passive sales – which would go too far in our view -, or whether this is only the case when the restriction has the object to actually restrict the <u>territory</u> into which or the <u>customer group</u> to whom the buyers may sell the contract goods – which seems to us more adequate. In addition, the use of "*effectively*" adds a level of uncertainty and subjectiveness to the definition.

Finally, if a restriction on active or passive sales would specifically include the restriction of the effective use of one or more online advertising channels, it is not entirely clear how to interpret the Commission's view in light of the judgement of the Court of Justice in the *Coty*-case, in which it was ruled that it is, *a priori*, <u>not possible</u> to differentiate between a group of online purchasers (C-230/16, para. 66). The same applies to the reference made in the Draft Guidelines concerning active online sales and how customers within an exclusive customer group are reached (Draft Guidelines, para. 197).

3.3 In paragraph 212 of the Draft Guidelines, the first exception to the hardcore restriction in Article 4(c)(i) is provided, from which it follows that the supplier may restrict active sales by authorised distributors into other territories or to customer groups exclusively allocated to one or more distributors or reserved to the supplier. Paragraph 212 specifies that the restriction also applies to online advertising. It is unclear whether this is meant to encompass more than the targeted online advertising that already falls within the meaning of active sales, as set out in paragraph 197 of the Draft Guidelines. The same applies to paragraph 222, in which the Commission again uses the phrase "*active sales, including online advertising*".

3.4 Concerning Article 4(c)(i) first bullet and (d)(i) Draft VBER, it is appreciated that the Commission has also now taken a clear stance which permits suppliers to require their buyers to pass on active sales restrictions to their direct downstream distributors/customers, in cases where the customer of the buyer has entered into a distribution agreement with the supplier or with a party that was given distribution rights by the supplier. In other words, this allows for active sales restrictions to be passed on to the next level of the distribution system in agreements with sub-distributors. This is likely to result in increased effectiveness and attractiveness of the exclusive distribution system model, enhance the protection of the supplier's and distributors' investments and of selective distribution networks operated in other territories.

3.5 At paragraph 189, the Draft Guidelines refer to certain indirect measures which, according to the text, may qualify as customer or territorial sales restrictions. However, while the general concept is certainly acceptable we note that the list of measures provided at paragraph 189 includes a few measures which qualify as exclusively unilateral conduct and, hence, should be deleted or rephrased given that unilateral conduct is not covered by Article 101 TFEU. This especially applies to sub-paragraph (c) concerning the termination of supply, sub-paragraph (d) concerning the limitation or reduction of supplied volumes and sub-paragraph (i) concerning the limitation of the languages to be used on the packaging or for the promotion of the product.

Sub-paragraph (c) appears to give the wrong impression that suppliers are obliged under Article 101 TFEU to satisfy any demand or order by customers, while any such obligation might only result from Article 102 TFEU. For sub-paragraph (d) it seems necessary to apply the standard developed by the EU Courts in the *Bayer/Adalat* case (e.g. ECLI:EU:C:2004:2). For sub-paragraph (i) it at least appears necessary to clarify that any such measure could only be relevant if it forms part of an agreement between the supplier and its buyer obliging or inducing the buyer to limit the use of languages in its promotional activities, unless any such obligation is in line with mandatory regulatory laws and/or only reflects admissible obligations to refrain from active selling into other territories and/or customer groups.

4. Indirect measures restricting online sales

4.1 In the explanatory note the Commission states that online sales have developed into a well-functioning sales channel and therefore no longer needs special protection by qualifying certain indirect measures restricting online sales as hardcore restrictions. Our experience in consulting practice confirms this finding, from which the Commission rightly derives changes in the assessment of dual pricing systems and the equivalence principle.

In particular, dual pricing shall no longer be qualified as a hardcore restriction pursuant to Article 4[1]. In paragraph 195 of the Draft Guidelines the assessment of dual pricing systems as a block exempted restriction of competition is made subject to the condition that the price differences have as their object to incentivise the appropriate level of investment, and should be related to the differences in the costs incurred in each channel by the distributors at retail level. This may be possible/appropriate at first glance, but practically speaking any requirement for a detailed price and investment calculation would materially reduce any desired liberalisation effect. It should be clearly stated that such a requirement is unnecessary.

4.2 Pursuant to Article 1(n) sentence 2 Draft VBER – for both dual pricing systems and also for any restrictions on online sales – it is also proposed that such restrictions are hardcore restrictions if they have as their object, to prevent the buyers or their customers from effectively using the internet to sell their goods online (see also Draft Guidelines, para. 188). This creates an additional exemption requirement for restrictions on online sales, which is not compatible with the VBER concept of the safe harbour. Strictly speaking, it would have to be examined in each individual case whether the online restriction in question (even if it meets the other criteria) does not have such an objective which could then be debated. This is unsatisfactory from a competition policy point of view. In addition, it also contradicts the systematic approach of Article 4, which defines hardcore restrictions as having certain restrictions as object, whereas the assessment of whether the exceptions listed does not depend on the parties' aims, but on facts. In accordance with this system, it should not be the purpose of online restrictions that matters, but whether or not they fulfil certain defined parameters.

Irrespective of competition policy, sentence 2 in Article 1(1)(n) Draft VBER (beginning with "*As regards selling of goods and services online, ...* ") requires further review. In our

[1] Such a qualification indeed corresponds to the previous practice of the competition authorities, although the question was raised and not finally clarified by the courts as to whether this assessment is actually in compliance with the VBER.

opinion it is both too long and difficult to understand (for further details see above under 3.2).

4.3 The Draft Guidelines list examples of indirect restrictions on online sales. In our opinion, the following points in the Draft Guidelines also require further review in this respect:

- Concerning paragraph 192(e) it seems questionable to us whether a requirement that the distributor shall not use the supplier's trademarks or brand names on its website should be a hardcore restriction. After all, according to general principles of trademark law, it is within the power of the trademark owner to determine the nature and extent of the use of his trademark and to enter into agreements with the licensee in this respect.

- The use of search engine optimization techniques appears to be an example of active sales activity, so that the classification of this marketing measure as a form of passive selling (para. 198 et seq.) does not appear to be adequate.

- Practically speaking, consideration should also be given to the statements on participation in tenders (para. 200). Participation in public tenders can hardly be qualified as a genuine form of passive selling. After all, the submission of a promising bid requires a considerable amount of processing, and no one has ever won a tender through mere passivity. Why the promotion of intra-brand competition requires a different qualification is also difficult to understand. The decisive factor for the functioning of competition in tenders is that the participants do not coordinate, and this prohibition is simply not affected by the VBER.

5. Platform parity clauses

So-called most-favoured-nation clauses require a supplier of goods or services to offer them to another party on conditions that are no less favourable than the conditions offered by the supplier to certain other parties or on certain other channels. Such clauses restrict the supplier's ability to determine its sale price, but because Article 4(a) VBER only relates to restrictions of the buyer, it is generally accepted that such clauses are covered by the VBER.

According to paragraph 336 of the Draft Guidelines, the Draft VBER not only covers most-favoured-nation clauses but also platform parity obligations, with the exception of the 'across-platform' retail parity obligations defined in Article 5(1)(d) Draft VBER and Guidelines. While we support that such platform parity obligations should be covered by and benefit from the VBER, we note that the wider text of the Draft VBER does not necessarily support such a finding, and may inadvertently even be interpreted to suggest that platform parity obligations could amount to resale price maintenance (RPM) – which represents a significant risk to relevant market players:

Under Article 1(1)(d) Draft VBER, a provider of online intermediation services is a "supplier", irrespective of whether it is a party to the transaction it facilitates. From this it would follow that the undertaking using such online intermediation services when selling its goods/services to undertakings or end users is a "buyer". As a result, by means of a platform parity obligation, a "supplier" (i.e. the provider of intermediary services) would prohibit a "buyer" (i.e. the retailer) from selling its goods/services on the platform below a certain price level (i.e. the level the retailer offers when using other intermediary services). A restriction by which a supplier prohibits a buyer from selling goods below a certain price level is typically considered as a minimum price restriction and thereby a form of prohibited retail prince maintenance/a hardcore restriction under Article 4(a) VBER (see also Draft Guidelines, para. 171).

Arguably, a platform parity obligation can be worded in two ways: (i) the retailer may not sell below the price level agreed with the intermediary imposing the parity clause or (ii) the retailer may sell at any price but must always offer the lowest price when selling the same goods via the platform of the intermediary imposing the parity clause. While in practice the results will likely be the same, scenario (i) has the typical elements of RPM whereas scenario (ii) would technically not amount to RPM, as the supplier does not set a certain price level or minimum price.

Further clarifications or amendments to the text of the Draft VBER may prove helpful to avoid legal uncertainty, especially if the Draft VBER is only meant to cover scenario (ii).

6. Pricing (RPM and RRP)

On RPM and recommended resale price (RRP) the Draft Guidelines mainly promote the existing principles, provide some clarifications but also suggest some new elements. We believe that the Draft Guidelines are still overly conservative concerning RPM and in particular RRP. In addition, the Draft Guidelines retain a concept concerning RRP which seems to contradict the legal approach applied by certain NCAs. Some further clarifications would therefore be welcomed.

At paragraph 173, the Draft Guidelines correctly point out that the determination of a RRP does not in itself amount to RPM. It would be useful to add that this also applies if the RRP is subsequently applied by the reseller. Moreover, it seems useful to add that RRP may (if at all) only come under the scrutiny of Article 101(1) TFEU if the reseller actually applies the RRP and if this based on the recommendation. This would be a necessary first step to clarify the legal application of the RRP rules.

At paragraph 174, the Draft Guidelines acknowledge the admissibility of minimum advertised prices (MAPs) policies. This is to be welcomed given that it reflects the efficiencies generated by MAPs. However, it would be useful to clarify the distinction between 'advertisement' (where suppliers may set a minimum price level) and 'sale' (where the Draft Guidelines prohibit any conduct that would result in RPM), e.g. with regard to the promotion of products on retailer's websites and/or sales platforms.

At paragraph 175, the Draft Guidelines clarify that price monitoring systems do not in themselves result in RPM. This clarification is to be welcomed given that the current wording created some uncertainties among suppliers who, e.g. for being able to give realistic RRPs to their customers/resellers, need to monitor the development of the market including prices applied by resellers. The same logic applies in the context of e-commerce, as the Draft Guidelines rightfully point out at paragraph 176. It is, however, unclear why the Draft Guidelines at paragraph 176 then refer to a risk of price transparency. Transparency as such does not seem to be an issue under the terms of vertical restraints.

In addition, at paragraph 175, the Draft Guidelines rightfully deleted the former reference to printing the RRP on the packaging (as a potential indirect measure). Any such printing measure might in reality only result in maximum price setting effects.

At paragraph 178, the Draft Guidelines point out that the fixing of the resale price in a vertical agreement between a supplier and a buyer that executes a prior agreement between the supplier and a specific end user does not constitute RPM where the end user has waived its right to choose the undertaking that should execute the agreement. This clarification is to be welcomed. It should, however, be extended to further scenarios where the same logic applies, including cases where a supplier and its reseller participate jointly in negotiations with the final customer and in cases where buyers establish joint procurement entities that operate merely as a procurement authority for them or fulfils even less wholesale functions (e.g. cases where the joint procurement entity negotiates only certain on-top conditions while all orders and supplies plus certain additional conditions are executed or negotiated between the supplier and the final buyer).

At paragraph 183 onwards, the Draft Guidelines still promote the idea that RRPs qualify as an agreement or concerted practice which outside the safe harbour of the VBER requires an individual exemption. We think this is based on an incorrect understanding of Article 101 TFEU and its application to RRPs. According to our understanding Article 101 TFEU would not cover RRPs as long as the recommendation is genuinely 'non-binding'. This also seems to be the approach applied by NCAs in the EU, including the German Bundeskartellamt and the Austrian Bundeswettbewerbsbehörde. Both authorities published specific guidelines for RRPs and RPMs (Bundeskartellamt, "*Hinweise zum Preisbindungsverbot im Bereich des stationären Lebensmitteleinzelhandel*"; Bundeswettbewerbsbehörde, "*Standpunkt zur vertikalen Preisbindung*") which according to our reading are based on the understanding that RRP applied by suppliers whose market share exceed the threshold of 30% do not require an individual exemption as long as the RRP is 'non-binding' (and/or not applied, see above). We find this approach by NCAs to be more convincing and suggest this should be adopted in the Vertical Guidelines accordingly. It should also be noted that we are not aware of any case where RRPs applied by suppliers outside the safe harbour of the VBER ever triggered any investigation by an authority, while at the same time RRPs are an established business practice in many Member States.

7. Agency agreements

The Commission's clarifications on agency under 3.2 of the Draft Guidelines are to be welcomed – the concept of 'genuine agency' based on risk allocation between the parties is useful in theory but can be difficult to apply in practice, particularly as regards the grey area cases. While the Commission's proposed additions in the agency section are helpful, we would request for even further detail on the additional paragraphs provided. Indeed, this would be helpful to enable businesses to thoroughly assess what level of risk and investment their agents can undertake, without being considered non-genuine agents.

Where agents act for the same supplier but for different products, i.e. in a hybrid role, we would highlight that the requirement at paragraph 34 of the Draft Guidelines that all common costs incurred for the agency and the independent distribution of the relevant products to be allocated to the agency function to be problematic. In many cases applying such a cost application renders the hybrid role unworkable in practice and prevents efficient development – whereas pro-rata allocation of the common costs to the two functions would appear to be more practical and effective.

We further note a potential issue with the new rules on agency as applied to the online platform economy at paragraph 44 of the Draft Guidelines, with significantly increased risks of inadvertent resale price maintenance issues. We would like to raise this simply to ensure that the Commission has considered all possibilities and outcomes as a result of placing such a blanket ban on all platform models being recognised as agents.

The recognition that undertakings providing online intermediation services are no longer able to qualify as agents raises potential problems for specific types of online sales platform models. Essentially, we understand that a number of online platforms sell goods under their own name and conclude the contract with the customer directly, but behind the scenes it is the supplier that supplies the goods, retains the risk, makes the delivery, and deals with the customer billing. The proposed new rules would appear to prohibit any such online platforms from being considered an agent going forward and therefore protected from Article 101 TFEU, which results in significant resale price maintenance risk on their part. In order to avoid resale price maintenance infringements, this will require a significant re-work of e-commerce platforms which are modelled on the above, since the platform will now be forced to set the prices themselves (assuming the supplier contract survives such a model change). This is despite the fact that they would ordinarily be recognised as a genuine agent under the classic rules, given the fact that they are only the online 'face' of the relevant supplier. Alternatively, in order to ensure compliance by having the supplier sell under its own name, such platforms would also be forced to completely re-work their back office models in order to be able to deal with processing mixed baskets and payments themselves from a technical perspective. This may have the effect of decreasing competition on the market if they find such a change too cumbersome, or the suppliers do not wish to agree to such material changes, and are ultimately forced to leave.

8. Category management agreements

The Draft Guidelines’ section on category management agreements still seems to be based on an incorrect understanding in that it refers to 'agreements', while in practice any action by category captains that could be relevant under Article 101 TFEU are only based on recommendations. In reality, category captains strictly limit themselves to only recommend certain category measures to their customers and any such recommendations are non-binding, of course. Hence, it appears highly questionable to assess the likelihood of negative effects (such as an upstream foreclosure effect) based on the same principles that apply to single branding obligations, as the Draft Guidelines suggest at paragraph 306. Instead it seems essential to establish how category recommendations could result in agreements or concerted practices in the first place. We also believe that the same principles need to be applied to category measures/recommendations as are applied to RRP (see above under 6.).

***