Submission by the Dutch Competition Law Association (*Nederlandse Vereniging voor Mededingingsrecht, VvM*)

To : European Commission
From : Dutch Competition Law Association (*Nederlandse Vereniging voor Mededingingsrecht*)
Re : Public consultation VBER and VG
Date : 16 September 2021

1 INTRODUCTION

1.1.1 The Dutch Competition Law Association (*Nederlandse Vereniging voor Mededingingsrecht*, "**VvM**") is grateful for the opportunity during this public consultation to provide the VvM's feedback on the new drafts of the Vertical Block Exemption Regulation ("**VBER**") and the Guidelines on Vertical Restraints ("**Guidelines**"). This will be the VvM's second submission, as the VvM has also provided input in May 2019 through its response to the public questionnaire for the 2018 Evaluation of the VBER and Guidelines (the "**First VvM Response**").

1.1.2 In the First VvM Response, the VvM explained that it is a Dutch association that has as its objective to study competition law in the broadest sense.

1.1.3 In this memorandum, the VvM limits itself to a number of topics to which it wishes to draw the European Commission's ("**Commission**") attention. These topics are: resale price maintenance ("**RPM**"), online restrictions, dual pricing, dual distribution (including information exchange), the interplay with the Geoblocking Regulation ("**GBR**"), exclusive distribution, alternative forms of distribution and intermediation, selective distribution and parity obligations.

2 THE VVM SUBMISSION

2.1 General observations

2.1.1 The VvM concludes that the Commission has not radically changed the VBER and the Guidelines. This seems to be in line with the evaluation of the VBER which showed that the vast majority of respondents were generally satisfied with the current VBER as well as the legal certainty that it provides. The VvM supports this choice. The VBER and Guidelines have shown their value for companies and their advisors, competition authorities and courts in the last decades and it would be unwise to drastically change the rules of the game.

2.1.2 Nevertheless, the VvM has observed that the draft VBER and Guidelines contain a number of important changes and additions compared to the current versions.

2.1.3 As already submitted in the First VvM Response, it was inevitable that the new VBER and Guidelines would be adapted to better suit the rise of online sales and the new players / ecosystems that have emerged from this, such as online

marketplaces, platforms and price comparison sites. The adjustments and additions in this area concern both the general applicability of the VBER to agreements with these relatively new players and specific restrictions on online sales that can be included in vertical agreements. As noted in the First VvM Response, the twelve year term of the VBER and Guidelines increases the risk that the framework does not keep pace with future market developments. The Commission is therefore advised to evaluate and, if necessary, revise the Guidelines mid-term (i.e. after six years).

2.1.4 In addition, the VvM appreciates that the Commission has tried to answer the call for more clarity regarding the distribution forms of exclusive and selective distribution by explicitly laying down a number of points on these distribution systems in the draft VBER and by including more guidance on these systems in the draft Guidelines. As such, the draft VBER and Guidelines offer more guidance than the current versions. This is helpful.

2.1.5 However, the VvM also believes that some improvements can be made. The VvM encourages the Commission to make certain adjustments to the draft VBER and Guidelines and/or provide more clarity on the below mentioned topics.

2.2 RPM

2.2.1 The VvM welcomes the additional guidance on and more nuanced approach towards RPM in the draft VBER and Guidelines.

2.2.2 The VvM reiterates its recommendation to distinguish between the different practices labelled as indirect RPM and to provide more clarity on what suppliers can and cannot do in discussions with suppliers.[1]

2.2.3 Furthermore, in the VvM's view the draft Guidelines could provide more clarity on the following two points.

2.2.4 Firstly, under the proposed wording of the draft Guidelines it is unclear whether the use of minimum advertised prices (also referred to as "**MAPs**") is in principle allowed, except when combined with the additional restrictions such as those mentioned in the draft Guidelines, or can in itself amount to RPM.[2]

2.2.5 Secondly, as regards the exception for fulfilment agreements in paragraph 178 of the draft Guidelines, it is unclear how and in which circumstances the end user must waive its right as regards the undertaking performing the agreement. Additional guidance on this would be very welcome. Moreover, it is unclear which agreement the Commission refers to in this paragraph and whether for example

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1 VvM submission in response to the public questionnaire for the 2018 Evaluation of the Vertical Block Exemption Regulation, paras. 2.1.2. and 2.1.3.

2 Draft Guidelines, para. 174.

retailers can also be considered 'end users'. Since in many sectors the end user is the consumer, end users are often not directly involved with fulfilment agreements. Rather the parties to a fulfilment agreement are a manufacturer, a wholesale distributor and a retailer. Can the exception provided by paragraph 178 of the draft Guidelines also apply to fulfilment agreements at this level?

2.2.6 The VvM encourages the Commission to provide more clarity on the above topics.

2.3 Online restrictions

2.3.1 The Commission has provided more clarity on a large number of topics in the draft VBER and Guidelines. With respect to certain topics, such as in relation to online restrictions, the draft Guidelines still leave room for uncertainty that could be removed.

2.3.2 First, the draft Guidelines seem to create a hierarchy between different price comparison tools and search engines, by providing that (only) prohibitions on the use of all most widely used advertising services (in the respective online advertising channel) could amount to a prevention of passive sales.[3] This causes legal uncertainty and, furthermore, could lead to a situation where it is problematic for suppliers to impose advertisement restrictions on the use of specific search engines but not on others.

2.3.3 Secondly, the draft Guidelines could provide more guidance on restrictions on keyword bidding by distributors. Only a total ban on the use of the suppliers' trademarks or brand name is discussed.[4] However, the draft Guidelines lack guidance on the many possible forms of partial bans on keyword bidding. For example, the draft Guidelines do not explain if, and under what circumstances, distributors may be prohibited from bidding on the first-placed search result, but not on the second or third-placed search results. Similarly, the draft Guidelines do not explain whether distributors may be prohibited from the singular use of brand names on search engines, but not from using the brand name in combination with other relevant search terms (e.g. 'store', 'shoes', etc.).

2.3.4 Further guidance on these topics would be welcomed. For example, to further increase clarity and legal certainty, the Commission could include in the VBER itself that only absolute prohibitions on online selling constitute hardcore restrictions.

2.3.5 Finally, the draft Guidelines do not explain whether and, if so, how the practice of using so-called location clauses can be transposed to online distribution.

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3 Draft Guidelines, para. 192, under (f).
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Whilst it is clear that the use of a distributor's own website cannot be considered as opening a new outlet,[5] and can therefore not be restricted, it is unclear if and under what circumstances the opening of additional online sales outlets could be considered comparable to the opening of a new outlet in a different physical location. An example that comes to mind is the widely used practice of launching additional websites under different brand names by distributors.

2.4 Dual pricing

2.4.1 In addition, the VvM notes the Commission's clear choice to stop labelling dual pricing as a hardcore restriction as well as the guidance in the draft Guidelines (paragraph 195) on the assessment of dual pricing.

2.4.2 To increase clarity and legal certainty, the VvM suggests to include in the VBER itself that only absolute prohibitions on online selling constitute hardcore restrictions.[6] This is only mentioned in the draft Guidelines and it could be considered to make this explicit in Article 4 VBER also.

2.4.3 In addition to para 195 of the proposed Guidelines, the VvM would welcome more concrete guidance on how online restraints can be justified under Article 101(3) TFEU and the criteria to be applied in determining the boundary between justified price differences for online and offline distribution one the one hand, and price differences with the sole aim of making effective use of the internet for online selling unprofitable or financially unsustainable.

2.5 Dual distribution (including information exchange)

2.5.1 In the draft VBER, the Commission amends the legal framework by limiting the scope of the safe harbour concerning dual distribution in relation to non-reciprocal vertical agreements between competing undertakings and a combined market share below [10%] at retail level. If the combined market share of the parties at retail level ranges between [10%] and 30% the safe harbour does not apply to vertical agreements relating to information exchange between the contract parties. The objective is to eliminate false positives which could otherwise occur.[7]

2.5.2 The Commission points to the fact that a [10%] threshold is consistent with the *de minimis* threshold for agreements between competitors.[8] The VvM however notes that a [10%] threshold is inconsistent with the 15% threshold that is applied

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5 Draft Guidelines, paras. 210, 217 and 223.
6 See Expert report on the review of the VBER by King's College, p. 41.
7 See the Explanatory Note to the revision of the VBER, p. 2.
8 Communication from the European Commission, Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice), *2014/C 291/01*.

to commercialization agreements between competitors and encourages the Commission to consider this alternative threshold to avoid confusion.

2.5.3 The VvM suggests the Commission to consider ways to potentially simplify this section so it is clear that the 30% threshold can be relied on except to the extent that there could be information exchange between competitors.

Information exchange in relation to dual distribution

2.5.4 With respect to the assessment of information exchange, the Commission refers to the Horizontal Guidelines, which are currently under review. The proposed [10%] threshold changes the way in which vertical information exchange would be assessed under the VBER. It could for example significantly impact retailers who operate a franchise concept in combination with their own stores.

2.5.5 The VvM points out that, particularly in dual distribution arrangements, information exchange could lead to efficiencies and healthy inter-brand competition.

2.5.6 The VvM encourages the Commission to either ensure that the Horizontal Guidelines cover information exchange in the context of vertical agreements within the meaning of Article 2(4) and (5) or to supplement the Vertical Guidelines with detailed guidance on this topic.[9]

2.5.7 The Guidelines could, for example, clarify when a supplier can lawfully collect certain data from his resellers in a dual distribution arrangement. The VvM would furthermore welcome more guidance in the Guidelines on possible safeguards to be put in place to avoid potential anti-competitive effects of information exchange in dual distribution, such as Chinese walls, separate information flows, limitation on categories of information, etc. This would not only reduce legal uncertainty for manufacturers and distributors in relation to dual distribution, but could also be a practical solution to address potential competition concerns whilst maintaining the competition benefits of dual distribution models. These principles would also be helpful in the context of category management.

Providers of online intermediation services

2.5.8 Should the Commission decide to exclude hybrid platforms from the safe harbour provided for in Article 2(4a/b) draft VBER (see Article 2(7)), the VvM would welcome more guidance about the possibility for platforms – particularly those which are not designated as gatekeepers under the (future) Digital Markets Act – to impose any restrictions on the resellers active on its platform.

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9 See draft Guidelines, para. 83.

2.5.9 Particularly, the VvM would welcome guidance on the individual assessment of vertical agreements concluded by hybrid platforms; e.g. how should these agreements be assessed, what are bottlenecks, what is generally allowed, what are safeguards to be put in place?

Wholesalers and importers

2.5.10 The VvM notes that the terms 'wholesaler' and 'importer' (introduced in Article 2(4) draft VBER) are not defined in the draft VBER or Guidelines. It would enhance legal certainty and clarity if these terms are defined and furthermore if the difference between a wholesaler and a distributor is explained for the purpose of Article 2(4).

2.6 Interplay with GBR

2.6.1 The VvM welcomes the fact that the draft Guidelines clarify the interplay between Article 101(3) TFEU and the GBR,[10] *i.e.* that an assessment under Article 101(3) TFEU is without prejudice to the fact that a specific restriction may nevertheless be automatically void if it amounts to a violation of the prohibitions regarding passive sales set out in Article 6(2) GBR.

2.6.2 However, the draft Guidelines do not address the situation where a restriction would be covered by the safe harbour of the VBER, but would also be automatically void pursuant to Article 6(2) GBR. For example, the restriction of passive sales laid down in Article 4(b), (c) and (d) draft VBER that also would fall within the scope of the prohibitions laid down in Articles 3, 4 and 5 GBR or in the situation of restricting passive sales in order to ensure a genuine entry.[11] Consequently, there seems to be a regulatory gap in the legislation.

2.6.3 The VvM invites the Commission to provide more detailed guidance on the interplay between the safe harbours in the VBER/Guidelines and the GBR. Inspiration could be drawn from recent Commission decisions such as Guess,[12] Nike,[13] Sanrio,[14] Meliá,[15] NBCUniversal[16] and Valve.[17] The VvM encourages the Commission to specify what is generally permissible or prohibited when it comes

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10 Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, *L 60 I/1*.

11 See draft Guidelines, para. 167.

12 https://ec.europa.eu/commission/presscorner/detail/en/IP_18_6844 (AT40428).

13 https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1828 (AT40436).

14 https://ec.europa.eu/commission/presscorner/detail/en/IP_19_3950 (AT.40432).

15 https://ec.europa.eu/commission/presscorner/detail/en/ip_20_302 (AT40528, AT40527, AT40526, AT40525, AT40524, AT40308).

16 https://ec.europa.eu/commission/presscorner/detail/en/ip_20_157 (AT40433).

17 https://ec.europa.eu/commission/presscorner/detail/en/ip_21_170 (AT.40413, AT.40414, AT.40420, AT.40422, AT.40424).

to vertically imposed online passive sales restrictions, and then, more specifically, in relation to the conduct laid down in the GBR. This may also benefit national authorities responsible for enforcing the GBR and uniformity of enforcement across the Union.

2.7 Exclusive distribution

2.7.1 As a general observation, it is considered a welcome development that the VBER and the Guidelines now recognise more explicitly the economic efficiencies that can – and do – arise from exclusive distribution, including shared exclusive distribution.

2.7.2 The VvM welcomes the possibility for businesses to appoint more than one exclusive distributor in a territory or for a particular customer group. The previous approach, where exclusive distribution had to be set up with just one distributor, led to inefficiencies; there are many markets in which customers can expect to be better served by a few distributors who are able to focus on a particular territory or group without being concerned about uncontrolled amounts of intra-brand competition.

2.7.3 The VvM similarly welcomes the change in the VBER allowing a supplier to pass on 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, to customers of the buyer. This approach ensures that an active sales restriction can be effectively enforced also where there are multiple levels of distribution. As distribution models become ever more complex in order to cater for a broader range of needs, flexibility in setting up such arrangements to compete more effectively with competitor brands is likely to be pro-competitive, subject to the usual considerations regarding market position of the parties involved and avoidance of hardcore restrictions.

2.8 Alternative Forms of Distribution and Intermediation

2.8.1 The VvM also welcomes the acknowledgment of the VBER safe harbour and the applicability of Article 101(3) TFEU for more complex distribution arrangements which are designed to service customers more effectively. For example, it is helpful to obtain confirmation that certain tri-partite agreements are acceptable and will not lead to a finding of RPM. It can frequently be the case that a customer and supplier wish to negotiate price and other terms directly (thereby ensuring a competitive deal) whilst bringing in a specific third party to support that relationship, whether that be a distributor, an agent, a logistics provider, an intermediary (such as a web shop host or online intermediation services provider) or a sub-contractor. In many instances, these third parties sit alongside the direct relationship to provide specific support but are not involved in the transaction in

the same way as a traditional distributor because the supplier and customer have chosen to deal directly.

2.8.2 As regards the relationship between an (exclusive) distributor relationship and an agency relationship with the same supplier, it is useful that the Commission has provided more guidance on the associated risks. However, while the Guidelines for instance indicate that the Commission considers there to be an increased risk of resale prices of a distributor being influenced if the distributor also acts as an agent for the same supplier on the same product market, it is not entirely clear if – and when – the Commission would consider there to be a case of resale price maintenance in the absence of any other factors that put direct or indirect pressure on the distributor's resale price. Such a finding appears to be difficult to conceive and is not in line with many enforcement cases by NCA's of Member States, where pressure from the supplier on the distributor always forms a part of a prohibited RPM practice (see for example the French Nintendo-case where the French Conseil de la Concurrence dropped charges due to lack of pressure). In relation to online intermediation service (OIS) providers specifically, we understand that the term "supplier" in Article 1(1)(d) relates to the supply of intermediation services by the OIS provider – presumably both to the supplier of the relevant goods/services being placed on the platform and to the consumers accessing the platform – and not to the supply of the goods (or services) themselves. This must be the case since OIS providers inherently allow suppliers of goods (or services) to make available their offerings on their platforms without the OIS provider buying and on-selling them. Thus, OIS providers supply online intermediation services but do not supply the goods themselves.

2.8.3 That said, we note that paragraph 58 of the Guidelines states: "*Both the provision of online intermediation services and the goods or services subject to the transactions it facilitates are considered contract goods or services for the purpose of applying the VBER to the agreement on the basis of which online intermediation services are provided and the agreement on the basis of which the intermediated goods or services are supplied*". Thus, here the suggestion is that both are relevant, which suggests a wider market for the purposes of the 30% safe harbour and the applicability of Article 101(3) (including considerations relating to market power).

2.8.4 However, the suggestion that the supplier's goods or services are relevant to an OIS provider when applying the VBER makes, in turn, the definition of an OIS provider as a supplier less logical. For these goods/services, they are a facilitator of the direct supplier-customer transaction (an intermediary or logistics/fulfilment provider) and not a supplier. We would urge the Commission to provide further insight on: (i) supplier vs intermediary role definition; (ii) market definition; (iii) applicability of this to the safe harbour and Article 101(3) considerations; and (iv)

the way in which OIS providers should apply the VBER and Guidelines in this context.

2.8.5 In addition, the VBER clearly indicates that OIS providers are not agents because they take significant economic and financial risk. The VvM agrees that this is generally the case when considering the investments made in relation to the online intermediation services themselves (for which, in line with the position outlined above, they are classed as a supplier). However, we believe that an OIS provider could potentially still be considered as an agent in relation to the goods (or services) that are being placed for sale on the platform. This may not be the case where the OIS alters certain aspects of the commercial offer towards the customer. For example, if the OIS provider provides discounts off the price of the supplier's product when offering it for sale on the platform to the customer (e.g. paid for out of the OIS provider's commission) or if the OIS provider becomes involved in the (partial or full) receipt of payments from the customer rather than the supplier directly. However, if the OIS provider does not touch the commercial offer put on the platform by the supplier nor does it involve itself in the commercial order process (except through the facilitation of both parties dealing directly through the platform's interface), it remains unclear why such an OIS provider could not be an agent in relation to the sale of those goods (whilst also being a supplier of the online intermediation services themselves).

2.8.6 Further clarification could be helpful in relation to these areas given the uncertainty many platforms face as a result of different approaches to market definition, market power, competitive constraints etc. by a number of national competition authorities both within and outside of the EU.

2.9 Selective distribution

2.9.1 The VvM welcomes the additional guidance on the application on the *Metro*-criteria and the admissibility of third-party platform bans in the draft Guidelines. However, the current wording of the draft Guidelines may not help solve all differences in interpretation of the ruling in *Coty* at national level. Specifically mentioning that platform bans imposed by suppliers of *luxury* goods fall outside the scope of Article 101 TFEU[18] may encourage (incorrect) restrictive interpretations of the ruling in *Coty* at a national level.

2.10 Parity obligations

2.10.1 The VvM acknowledges that the Commission has taken some steps to provide additional clarity on parity obligations and these are welcome. For example, the position of the Commission in relation to wide parity clauses is now clearer as a result of their exclusion from the safe harbour of the VBER (adding them to the

[18] Draft Guidelines, para. 135.

list of excluded restrictions under Article 5(1)(d)) and this provides greater legal certainty.

2.10.2 There is considerable debate about both wide and narrow parity obligations in recent years and the approach across Member States has been divergent. Against this background, it would be welcome if the Commission could provide further guidance to assist many business in the self-assessment process that will need to be undertaken (particularly by platforms) in this area.

2.10.3 Before considering the different types of parity obligations below, the VvM notes that no consideration seems to have been given to the notion (as supported by certain competition authorities and courts) that parity clauses may – in certain instances – be essential to the commercial agreement that is being entered into and therefore should be considered as an ancillary restraint that falls outside of Article 101 TFEU altogether. In relation to selective distribution, the *Coty* judgment clarifies that restrictions may fall outside the scope of Article 101(1) TFEU if the *Metro* criteria are met. Similarly, for parity clauses, if the restriction is essential to supporting the viability of the business model that has been adopted (for example by the platform in question), the restriction could be ancillary. Whilst we understand that the Guidelines focus on the operation of Article 101(1) and 101(3) TFEU, it would nonetheless be useful for the Commission to acknowledge this possibility.

Across-platform retail parity obligations

2.10.4 Removing across-platform retail parity obligations from the benefit of the block exemption (but not from the benefit of Article 101(3) TFEU in the Guidelines) could create additional ambiguity for business. In the absence of a case-by-case assessment by the Commission, there may be significant room for businesses, national courts and competition authorities to continue to have divergent approaches to these clauses. For example, it is likely that the specific exclusion of wide parity from the VBER will already make many businesses consider these clauses to be wholly off-limits whereas the fact that these clauses are covered in the draft Guidelines indicates that it is possible to have situations where wide parity can be efficiency enhancing under an Article 101(3) assessment.

2.10.5 The VvM observes that placing across-platform parity restrictions into the hardcore category is quite strict compared to e.g. the US where strictly vertical price parity clauses are commonplace and have been of concern only when they involve a party with market or monopoly power. The US approach reflects recent decisions by the Commission and NCAs that looked at wide parity clauses

through the lens of Article 102 TFEU as a potential abuse by a company with a dominant position.

2.10.6 An additional consequence of the removal of across-platform parity obligations from the benefit of the VBER is that it could impose a (significant) burden on small and medium online intermediaries as well as new entrants to the market. In order to stay on the right side of the rules, online intermediaries are required to monitor not only their market share on the market in which they are active, but also their likely share of total demand, which depends on the multi-homing behaviour of consumers. This does not easily lend itself to monitoring by the online intermediation service. It is actually the buyer of online intermediation services who has the tools necessary to assess the multi-homing behaviour of end buyers.

Narrow retail parity obligations

2.10.7 The VvM welcomes the clarity provided that narrow retail parity obligations relating to direct sales channels retain the benefit of the block exemption for parties with a market share below 30%.

2.10.8 As regards the use of narrow retail parity obligations above the 30% market share threshold, the VvM notes that the guidance provided in relation to narrow retail parity obligations seeks to address much the same concerns as those which arise from across-platform parity obligations, for example as regards cumulative effects. It does not appear to be the Commission's intention to prevent all such narrow retail parity obligations, as it recognises in paragraphs (351) – (353) that such obligations may have a positive effect on competition. However, the Commission may want to consider whether the current guidance may have a chilling effect on the use of such clauses due to practical challenges that businesses face.

2.10.9 One of the aims of the new rules is to provide certainty through harmonisation and curtailing divergent approaches by national authorities. However, a significant challenge that is likely to limit the degree of harmonious application relates to market definition, which has proven particularly challenging in the digital sector.

2.10.10 Paragraph 346 of the draft Guidelines clarify that in order to assess narrow retail parity obligations, "*relevant factors include the market position of the supplier that imposes the parity obligation, the relative size of the direct sales channels covered by the obligation, the substitutability of the direct and indirect channels from the perspective of the suppliers of the goods or services and of end users*." However, it is not clear whether the market share referred to is (a) the market share of the supplier of online intermediation services that imposes the retail parity obligation on the general market for online intermediation services, or (b)

the market share of said supplier on a narrower market for online intermediation services that includes a specific category of goods or services, (c) the share of supply of the good or service that the buyer of online intermediation services seeks to commercialise that is put on the market through the supplier of online intermediation services out of the total share of supply of those goods or services to end users. In the absence of appropriate guidance on market definition, for many businesses the benefit of the VBER or of Article 101(3) may remain arbitrary.

2.10.11 We suggest the Commission to consider distinguishing between parity obligations that have the potential of having both a vertical and a horizontal effect and purely vertical parity obligations which are incapable of having horizontal effects.

2.10.12 The Commission could also consider providing clearer guidance in the Guidelines as to the appropriate product and geographic markets on which effects are to be analysed and ensure that further and consistent guidance is included in the Horizontal Guidelines and the Market Definition Notice.

2.10.13 In paragraphs 351 – 353, the Commission recognises that parity obligations can lead to net positive effects. However, neither the draft VBER nor the Guidelines provide significant guidance on how to carry out a reliable assessment (or an assessment that will be acceptable in the eyes of all competition authorities in the EU) of these effects, leaving a degree of discretion among enforcers that is likely to lead to divergent applications.

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