EUROPEAN COMMISSION REVIEW OF THE VERTICAL BLOCK EXEMPTION REGULATION

RESPONSE TO PUBLIC CONSULTATION

BRANDS FOR EUROPE

This response is submitted by Brands for Europe, a group of leading brands across numerous industry sectors. The member companies of Brands for Europe are Adidas, Apple, Asics, Bose, Canon, Colgate Palmolive, HP, Levi Strauss & Co., L'Oréal, Mars, Nestlé, Nike, Panasonic, Philips, Pioneer, P&G, Puig, Shimano, Swatch Group, Unilever and Whirlpool. The group is represented by Baker McKenzie. The advice of RBB Economics has been incorporated throughout this response.

This response provides a cross-sectoral brand owner view on the key issues raised by the European Commission (**EC**) in the public consultation launched on 4 February 2019 (**Consultation**) as part of its review of Commission Regulation (EU) No 330/2010 of 20 April 2010[1] (**VBER**), and accompanying Guidelines on Vertical Restraints[2] (**VGL**), (**Response**). The Response follows the structure and questions raised by the EC in the Consultation and is accompanied by this supporting paper which forms an integral part of the Response.

1 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 (Text with EEA relevance) OJ L 102, 23.4.2010, p. 1 – 7

2 Guidelines on Vertical Restraints. OJ C 130, 19.5.2010, p. 1 – 46.

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1. INTRODUCTION – THE EVER-CHANGING RETAIL LANDSCAPE

1. Since the VBER and VGL were drafted, the retail landscape has changed beyond recognition and this trend will continue in the future, as brand owners and retailers continue to invest and innovate. The VBER and VGL should be updated to reflect these changes to the retail environment, and should offer the necessary flexibility to allow brand owners and retailers to continue to adapt to future changes and challenges, and to provide consumers with the seamless omni-channel experience which they expect.

2. The consumer journey now takes place in an omni-channel environment. It can start online, and then include a visit to a store, or start offline and then include confirming products and pricing online. The variety of possible consumer journey routes changes and expands continuously - for example:

   a. Buy online/return in store

   b. Reserve online/try in store/buy in store or online

   c. Browse online/locate a store/ buy in store

   d. Buy online/go to store to personalize

   e. Go to store/cannot find fit or size/buy online of store device/deliver in store or home/ return wherever

3. From a consumer perspective, there are no clear lines between online and offline anymore. The consumer demands an omni-channel approach. Recent examples of bankruptcy of traditional and conventional department stores demonstrate that the traditional purely bricks and mortar approach will not be successful going forward. The declining number of department stores focused on the offline channel has multiple causes, including high operating costs in prime locations, the failure to compete with specialist retailers, the inability to differentiate and meet consumers' experiential expectations, and the rise of online retailing over the past ten years[3].

4. Online retailing has created a fundamental shift in the way consumers shop[4]. In 2007 the proportion of EU-28 individuals who had used the internet to order goods or services stood at 30%. By 2018 that figure had increased to 60%[5]. The online channel generates consumer benefits that a bricks and mortar store does not have, and vice-versa. The online channel offers the consumer experiences that would not be available in a bricks and mortar environment such as scalable story-telling, video content and tutorials. Further, the possibility to receive instant rating of products and service assists with optimised products' placing which leads to improving the offering and service instantly.

5. However, physical retail is not dying, just the pure indistinctive transactional retailing is. This is demonstrated by the number of bricks and mortar stores that have opened in 2017[6]. Success behind those openings is to offer customers carefully selected items and experiences that satisfy their (individual) needs[7]. Consumers continue to value shopping at bricks and mortar stores, referencing the ability to touch and feel the merchandise (66%) or the option to get merchandise immediately (61%)

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3 Center for Retail Research, Department stores, (https://www.retailresearch.org/departmentstores.php).

4 *Forbes*, How Sneakerstuff is expanding its global footprint, 26 November 2018, (https://www.forbes.com/sites/barrysamaha/2018/11/26/sneakersnstuff-luxury-sneaker-store-nyc-erik-fagerlind-interview/).

5 Analysis of Eurostat data; see **Annex 2**.

6 *KPMG*, Global Retail Trends 2018, Global Consumer & retail, March 2018, (https://assets.kpmg/content/dam/kpmg/xx/pdf/2018/03/global-retail-trends-2018.pdf).

7 *Forbes*, How Sneakerstuff is expanding its global footprint, 26 November 2018.

in the US, Canada and the UK[8]. Consumers also value the knowledge and enthusiasm of sales persons in bricks and mortar stores.

6. These days, consumers demand more than a transaction in a store. A physical store must provide consumers with features that they cannot get online. Consumers will continue to shop in physical stores if they have a reason to return. 78% of millennials would choose to spend money on an experience or event globally[9]. Brand owners and retailers must take full advantage of the physical space to maximize the consumer experience and real-life interaction. The trend is to see successful transactional stores transforming into experience hubs with a point of sale. "*Put simply, stores that are doing well offer a customer experience that meets or exceeds customer expectations*"[10].

7. In this digital era, consumers expect the businesses to react to their needs immediately[11]. In retailers' consumer studies, it is noticeable how technological developments have drastically changed consumer behaviour and expectations. This shift has created a new retail world with new consumer expectations that brand owners and retailers have to understand and respond to in order to stay relevant[12].

8. Consumers are empowered by digital technology that allows them to share information, experiences, shop and be connected in real time. Smart phones will continue to be a key technology, with usage levels predicted to only increase in the future. Consumers demand mobile friendly experiences[13]. Brands invest significantly in their own sophisticated e-commerce offerings and apps in order to meet consumers' expectations. The growth of usage is fast. In 2017, 17.5 % of UK millennials' purchasing decisions were influenced by social media platforms such as Instagram, Facebook and others compared to only 2 % in 2016[14].

9. The increased usage of digital technology is closely linked to the increased power of data. Brand owners need to invest significantly to harness the power of data and drive the omni-channel digitalization[15]. It is important that brand owners are allowed to continue to access data collected by their retail partners in order to improve and optimise product marketing and placing as well as customer service. Access to data also enable brands to successfully identify gaps in the market and develop new products to meet consumer demand.

10. As a result of the rapid digital revolution over the past decade, consumers can now, better than ever, connect directly with brand owners and vice-versa. Brand owners have increasingly adapted their distribution models to adjust to this new reality, for example:

- Dual distribution as a distribution model in order to meet consumers' demands. This is not to the detriment of wholesale or retail partners. It is a complementary way to serve consumers better. Brand owners do not operate in isolation but work together with their wholesalers and retailers to continuously improve their offering to deliver a seamless brand and shopping experience. It is in the brand owners' express interest to have successful retailers. After all, the vast majority of consumers will always compare offerings from different brands in their search for products or services.

- Selective distribution continues to be an important tool for brand owners in the digital age, as consumers demand a seamless omni-channel brand and shopping experience across all

8 Salesforce, Connected Shopper Report, 2016; (https://a.sfdcstatic.com/content/dam/www/ocms/assets/pdf/industries/connected-shoppers-report-2016.pdf).

9 *KPMG*, Global Retail Trends 2019, Global Consumer & Retail February 2019, (https://assets.kpmg/content/dam/kpmg/xx/pdf/2019/02/global-retail-trends-2019-web.pdf).

10 *KPMG*, Global Retail Trends 2018, Global Consumer & retail, March 2018.

11 *Deloitte*, The Deloitte Consumer Review, Digital Predictions 2018, March 2018, (https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/consumer-business/deloitte-uk-consumer-review-digital-predictions-2018.pdf).

12 *KPMG*, Global Retail Trends 2018, Global Consumer & retail, March 2018.

13 *Deloitte*, The Deloitte Consumer Review, Digital Predictions 2018, March 2018.

14 *KPMG*, Annual Retail Survey (UK), January 2018.

15 Multichannel trends 2019, *Drapers Guide*, Chapter 1, see at http://guides.drapersonline.com/6003.guide.

channels: bricks and mortar and online. Selective distribution helps manufacturers incentivise retailers to invest in those seamless brand and shopping experiences and reduces the risk of free riding on the investments made by brand owners and authorised retailers. This increased retail quality benefits the consumers and allows the brand owner to continue to drive the success of its retailers by preserving the quality of their products, ensuring their optimal use, preventing counterfeiting and enhancing their brand image.

- In addition to the traditional buy & sell between a supplier and a retailer, online retailers are now also operating sometimes as agents. They buy inventory from the supplier for the core products and ask the supplier to tap into its own inventory of seasonal products. This is seamless for the consumer, who does not see the inner workings of this arrangement. For the latter products, the retailer gets a commission on that sale made from the supplier's inventory. The online retailer does not take any inventory risk, reduces its buying spend, and is able to offer a wide range of products to the consumer.

- In the context of franchising, we see increasingly that a brand's own e-commerce operations opens up to its franchisees and/or key accounts the possibility to fulfil consumers' online orders from their own inventory. Franchisees are typically not able to invest the capital required to deliver their own credible e-commerce offering, so it makes sense for them to use a brand's own e-commerce operations in this way. So, the order may be fulfilled from the brand's own online inventory or from another third party's inventory. The consumer will again not see the inner workings of this arrangement.

- Within physical stores, the use of the 'store within a store' model is increasingly common - enabling retailers to rent out part of their store space, personnel and/or related retailer facilities to another company to run a(n independent) shop within it.

11. To summarise: the retail landscape is in a constant state of flux, ever-changing, ever-fast. The VBER and VGL need to reflect this, and need to allow brand owners and retailers alike sufficient flexibility to adapt and to continue to invest and innovate. Please see Annex 2 for a selection of statistics informing this response some of which have been referenced in this submission.

2. EFFECTIVENESS (HAVE THE OBJECTIVES BEEN MET?)

2.1 Do you perceive that the VBER and the VGL have contributed to promote good market performance in the EU?

- ☐ ***Yes***
- ✓ ***Yes, but they contributed only to a certain extent or only in certain sectors***
- ☐ ***They were neutral***
- ☐ ***No, they negatively affected market performance***
- ☐ ***Do not know***

2.2 Please explain your reply, distinguishing between sectors where relevant (1000 character(s) maximum):

12. The VBER has generally contributed to good market performance. A broad safe harbour for vertical agreements brings an important degree of legal certainty which in turn facilitates market performance.

13. The VGL, however, has to some extent hindered market performance through an overly protective/interventionist approach (e.g., in relation to e-commerce and pricing), interfering with brands' efforts to provide consumers with a seamless omni-channel brand and shopping experience.

14. There is an implicit suspicion in the VGL that brand owner support for bricks and mortar stores somehow implies a restriction of online sales. This is not justified - particularly not in the current commercial reality, where bricks and mortar and online go hand in hand, and brand owners make considerable investments to ensure that both channels work well together, and that the consumer gets a consistent brand experience everywhere: in-store and online, seamless. The online channel is extremely important, because this is increasingly where the consumer's purchase journey begins. However, bricks and mortar stores remain an essential component of the omni-channel experience, and bricks and mortar stores increasingly need significant brand owner support to survive. We are no longer in an age where the online channel needs specific protection. Brand owners should have the flexibility in their efforts to provide vital support to bricks and mortar stores where this is necessary.

15. In relation to hardcore restrictions, the suspicion in the VGL (and in the current enforcement practice of some national competition authorities (**NCAs**)) against discussions about resale prices, resale price recommendations and resale price monitoring in particular, is unjustified and unnecessarily strict. As explained in more detail throughout the Response, these communications with retailers, and the fact that brand owners seek to obtain resale price information from retailers should not be considered tantamount to, or indicative of resale price maintenance. The overly strict approach of some national competition authorities on this point is unhelpful and unjustified and, as a result, hinders brand owners' ability to realise efficiencies in supply that would ultimately benefit consumers.

16. The VGL introduces a significant level of legal uncertainty. This is largely due to open definitions which has led to an inconsistent application or interpretation by the NCAs. The coherence and harmonisation between the VBER, the VGL, the EC decisional practice and the decisional practice at NCA level was partly lost due to the lack of engagement of the EC, and the resulting divergent enforcement by NCAs and national courts. This has hindered market performance.

17. The EC should also use its powers under Article 11 (*Cooperation between the Commission and the competition authorities of the Member States*) and Article 16 (*Uniform application of Community competition law*) of Council Regulation 1/2003 (**Regulation 1/2003**)[16] where necessary and

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16 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 (Text with EEA relevance) OJ L 1, 4.1.2003, p. 1–25.

appropriate to achieve its objective of a digital single market. The EC needs to honour its commitment made in the Final Report on the e-commerce sector inquiry (**Final Report**), where it noted that it will ensure consistent application of EU competition rules by broadening the dialogue within the European competition network on e-commerce-related enforcement[17].

2.3 ***Do you consider that the VBER and the related guidance in the VGL provide a sufficient level of legal certainty for the purpose of assessing whether vertical agreements and/or specific clauses are exempted from the application of Article 101 of the Treaty and thus compliant with this provision (i.e. are the rules clear and comprehensible, and do they allow you to understand and predict the legal consequences)?***

☐ ***Yes***

✓ ***No***

☐ ***Do not know***

2.4 ***Please explain your reply (1000 character(s) maximum):***

18. The VBER provides a sufficient level of legal certainty by block exempting vertical agreements that meet certain thresholds and do not contain hardcore restrictions. This framework is clear and comprehensible.

19. The VGL, however, introduces a significant level of legal uncertainty, which in turn has been exacerbated by an inconsistent application or interpretation by the NCAs. The relevant parts of the VGL that created this uncertainty are further detailed throughout the Response.

20. The coherence and harmonisation between the VBER, the VGL, the EC decisional practice and the decisional practice at NCA level was partly lost in some key areas (e.g., e-commerce, selective distribution, pricing) due to the lack of engagement of the EC, and the resulting divergent enforcement by NCAs and national courts.

21. Brand owners remain very concerned by the continued divergence in the interpretation and application of the VGL by NCAs and national courts (e.g., the numerous Bundeskartellamt communications on the "correct" interpretation of *Coty*[18] and the recent draft guidance published in Belgium on dual distribution[19]). We ask the EC to continue to strengthen its efforts to ensure a consistent application of the EU competition rules on vertical restraints through dialogue with the national competition authorities within the ECN, but also to make a more pro-active use of its existing powers under Regulation 1/2003 (e.g., amicus curiae briefs before national courts under Article 15(3), review of NCA decisions under Article 11(4), removing the competence of NCAs to apply Article 101 of the Treaty on the Functioning of the European Union (**TFEU**) in a specific case under Article 11(6)) and to intervene in national court cases and NCA investigations where the correct and uniform interpretation and application of the VBER and VGL is at stake). The EC needs to honour its commitment made in the Final Report, where it noted that it will ensure consistent application of EU

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17 See paragraph 75 of Brussels, 10.5.2017 COM(2017) 229 final. Final report on the E-commerce Sector Inquiry {SWD(2017) 154 final}.

18 See for example: Andreas Mundt, President of the Bundeskartellamt, 6 December 2017 https://www.wiwo.de/unternehmen/handel/eugh-urteil-zum-online-handel-luxus-muss-nicht-in-die-schmuddelecke/20677432.html; Bundeskartellamt publication (October 2018) https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Schriftenreihe_Digitales_IV.pdf?__blob=publicationFile&v=2. Kallfass, head of the Bundeskartellamt's German and European antitrust law policy unit (27 February 2019) https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1069305&siteid=190&rdir=1.

19 Available here: https://www.abc-bma.be/sites/default/files/content/download/files/20180912_projet_guide_echanges_informations.pdf.

competition rules by broadening the dialogue within the European competition network on e-commerce-related enforcement[20].

2.5 Please estimate the level of legal certainty provided by the VBER and the VGL for each of the following areas by providing a qualitative estimate using the following number coding: 1 (very low), 2 (slightly low), 3 (appropriate), or selecting "DN" if you do not know or "NA" if not applicable to your organisation:

Please reply only to rows not numbered. The numbered rows are titles to assist in identifying the relevant areas. For those rows where only the recitals of the VGL are mentioned, please reply only in the column of the VGL.

20 Final Report, paragraph 75.

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	VBER	***VGL***
Vertical agreements (Article 1(1)(a) VBER and recitals 24-26 VGL)		
(1) ***Vertical agreements generally falling outside the scope of Article 101(1) of the Treaty***		
Agreements of minor importance (recitals 8-11 VGL)		3
Agency agreements (recitals 12-21 VGL)		2
Subcontracting agreements (recital 22 VGL)		3
(2) ***Additional conditions for the exemption of specific vertical agreements (Article 2 VBER)***		
Vertical agreements entered into between an association of undertakings and its members (Article 2(2) and Article 8 VBER, and recitals 29-30 VGL)	N/A	N/A
Non-reciprocal vertical agreements between competitors under certain circumstances (Article 2(4) VBER and recitals 27-28 VGL)	1	1
Vertical agreements containing provisions on IPR (Article 2(3) VBER and recitals 31-45 VGL)	3	3
Market share threshold for the supplier (Article 3 and Article 7 VBER, and recitals 86-95 VGL)	2	2
Market share threshold for the buyer (Article 3 and Article 7 VBER, and recitals 86-95 VGL)	2	2
(3) ***Hardcore restrictions (Article 4 VBER)***		
Resale price maintenance (Article 4(a) VBER and recitals 48-49 VGL)	2	1
Territorial/customer restrictions (Article 4(b) VBER and recital 50 VGL) and exceptions to these restrictions (Article 4(b) (i)-(iv) VBER and recitals 51,55 VGL)	2	2
Online sales restrictions (recitals 52-54 VGL)		2
Restrictions of active or passive sales to end users by members of a selective distribution system (Article 4(c) VBER and recitals 56-57 VGL)	3	2

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	VBER	***VGL***
Restrictions of cross supplies (Article 4(d) VBER and recital 58 VGL)	3	2
Agreements preventing or restricting the sourcing of spare-parts (Article 4 (e) VBER and recital 59 VGL)	N/A	N/A
(4) Excluded restrictions (Article 5 VBER)		
Non-compete obligations with indefinite duration or exceeding 5 years (Article 5(1)(a) VBER and recitals 66-67 VGL)	1	1
Post term non-compete obligations (Article 5(1)(b) VBER and recital 68 VGL)	1	1
Restrictions to sell brands of particular competing suppliers in a selective distribution system (Article 5(1)(c) VBER and recital 69 VGL)	1	1
Hardcore restrictions falling outside the scope of Article 101(1) of the Treaty or likely to fulfil the conditions of Article 101(3) of the Treaty (recitals 60-64 VGL)		1
Severability (recitals 70-71 VGL)		3
Conditions for the withdrawal and disapplication of the block exemption (Article 6 VBER and recitals 74-85 VGL)	3	3
(5) Enforcement policy in individual cases (Section VI VGL)		
The framework of analysis (recitals 96-127 VGL)		3
Analysis of specific vertical restraints (recitals 128-229 VGL)		N/A
Single branding (recitals 129-150 VGL)		3
Exclusive distribution (recitals 151-167 VGL)		3
Exclusive customer allocation (recitals 168-173 VGL)		3
Selective distribution (recitals 174-188 VGL)		2
Franchising (recitals 189-191 VGL)		3

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	VBER	*VGL*
Exclusive supply (recitals 192-202 VGL)		3
Upfront access payment (recitals 203-208 VGL)		3
Category management agreements (recitals 209-213 VGL)		3
Tying (recitals 214-222 VGL)		3
Resale price restrictions (recitals 223-229 VGL)		1

2.6 If you have rated one or several issues as "very low" or "slightly low", please explain the reasons for your rating. Please also explain whether the lack of legal certainty stems from (i) the definition of the particular area in the VBER or the related description in the VGL, (ii) their application in practice or (iii) the overall structure of the VBER and/or VGL (2000 character(s) maximum):

(a) Agency Agreements (Recitals 12-21 VGL)

22. The VGL provides very rigid conditions for an agreement to qualify as an agency agreement. Only agency agreements where the agent bears no, or only insignificant risks in relation to contracts concluded and negotiated fall outside the scope of application of Article 101 (1) TFEU. However, the conditions set out in **Recitals 14 to 17 VGL**, and in particular the condition that the distributor must not bear any contract risks and no transfer of title can take place, make these provisions very hard to apply and does not fit well with the economic reality for certain sectors/industries. The VBER and VGL should not drive brand owners to adopt artificial, economically sub-optimal distribution structures simply to remain within their framework.

23. Therefore, brand owners call upon the EC to consider to broaden the scope of the agency agreements to cover a distribution system applied in certain industries/sectors where manufacturers make use of so-called 'fulfilment wholesalers' for deliveries to certain retailers. Fulfilment wholesalers are wholesalers who deliver products to retailers with whom the brand owners have directly negotiated the price at which they can buy the brand owners' products. Such retailers are often the most important resellers of the brand owners' products (e.g., certain large retail chains) and brand owners' wish to compensate those retailers for specific investments made in the promotion of the brand owners' products. However, the brand owners do not sell these products directly to the particular retailer but instead rely on the 'fulfilment wholesalers', mainly for logistic reasons. In some cases the 'fulfilment wholesaler' may even be chosen by the retailer rather than the manufacturer. In such cases, the wholesaler who fulfils the sale, whilst formally taking title on the goods, does not bear any meaningful contractual risks, other than transport costs and warehousing, and has not made any marketing or relationship specific costs or investments for the relationship with that retailer. In certain cases, the realisation risk (i.e., the risk that the retailer would not pay the full price of the delivered products) is covered by the brand owner. Nevertheless the 'fulfilment wholesaler' will not qualify as an agent as title on the products has transferred[21] to the 'fulfilment wholesaler'. Therefore, the brand owner will not be able to impose on the 'fulfilment wholesaler' the resale price agreed with the retailer as this would fall within **Article 4(a) VBER**.

24. Although this type of arrangement does not have any adverse effect on competition and leads to an optimisation of the distribution of the brand owners' products to the benefit of both the brand owner and the retailer (and as a result, final consumers), under the current VGL framework it would not constitute an agency agreement and it would not fall outside the scope of Article 101 (1) TFEU, being in fact considered a hard core restriction of competition under **Article 4(a) VBER**. The EC should therefore broaden the agency concept to also apply to fulfilment wholesalers.

[21] Consignment in this case is not an option as the fulfilment wholesaler also delivers to other customers/retailers with whom the brand owner did not have separate and direct negotiations regarding special conditions. Therefore, the brand owner would need to invest in a control system (including IT-system integration with the wholesaler) to keep track on the products specifically destined to that particular retailer.

(b) Dual distribution (Non-reciprocal vertical agreements between competitors under certain circumstances (Article 2(4) VBER and recitals 27-28 VGL))

25. The VBER block exempts dual distribution, and it is very important that it continues to do so. More and more brand owners sell directly to consumers, because brand owners see this as an important way to develop and deliver a seamless omni-channel brand and shopping experience. Brand owners do not operate in isolation but work together with their wholesalers and retailers to continuously improve their offering to deliver a seamless brand and shopping experience. It is in the brand owners' express interest to have successful retailers. After all, the vast majority of consumers will always compare offerings from different brands in their search for products or services. From a vertical distribution perspective this is not new and not contentious. The change over the past decade has been that the digital revolution allows consumers better than ever to connect directly with the brands and vice-versa for the brand owners to connect directly with the consumers. Logically, this means brands have also started selling directly to consumers. Not to the detriment of their wholesale or retail partners, but as a complementary way to serve consumers better.

26. There is, however, quite a lot of confusion on whether these relationships should be treated as a purely vertical or a horizontal relationship, including at national competition authority level (as exemplified by the recent Belgian competition authority draft "guide" on information exchange[22]). This has brought uncertainty for brand owners operating a distribution network whilst also selling directly to consumers.

27. The EC should, therefore, confirm and clarify explicitly that the VBER applies in cases of dual distribution. In summary:

- **The VBER clearly covers dual distribution and does not need to be changed**[23]. Brand owners increasingly sell directly to consumers as they respond to the consumer demand for a seamless omni-channel brand and shopping experience. The rationale for block exempting dual distribution is explained in an article by Luc Peeperkorn[24]: "*…by limiting coverage [of the block exemption] to non-reciprocal dual distribution agreements, it is expected that the possible competition concerns are limited to vertical concerns such as foreclosure and not a possible loss of competition between the parties*". Peeperkorn acknowledges that, "*[t]he same is expressed somewhat more cautiously in the Guidelines: "In case of dual distribution it is considered that in general any potential impact on the competitive relationship between the manufacturer and retailer at the retail level is of lesser importance than the potential impact of the vertical supply agreement on competition in general at the manufacturing or retail level*".[25] Peeperkorn provides an example[26], explaining that a brewer's agreements to supply beer to independent pubs would fall within the scope of VBER if that brewer at the same time also operated its own pubs in the same market. According to Peeperkorn, "*the main competition concern, if any, is not the possible loss of competition between the brewers' pubs and the independent pubs supplied by the brewer, but is the possible foreclosure effects at the brewers' level or pubs' level and resulting loss of competition on those markets*". Peeperkorn goes on to say in the article that the same applies to a franchisor's agreements providing services to its franchisees while also operating its own shops.

- **The VGL should clarify that non-reciprocal agreements between suppliers and retailers/distributors are purely vertical relationships that are covered by the VBER**. As a result, a supplier can legitimately collect pricing and other data about its own products from

22 Available here: https://www.abc-bma.be/sites/default/files/content/download/files/20180912_projet_guide_echanges_informations.pdf.

23 **Article 2(4) VBER** and **Recitals 27-28 VGL.**

24 This is available on the EC's website: http://ec.europa.eu/competition/speeches/text/sp2011_10_en.pdf.

25 **Recital 28 VGL**: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52010XC0519%2804%29

26 See page 209 of the article available on EC's website: http://ec.europa.eu/competition/speeches/text/sp2011_10_en.pdf.

other resellers provided these data are not used to restrict the freedom of the reseller in a manner that would be considered hardcore under the VBER;

- **The collection of this information by the supplier will not give rise to any horizontal concerns**. This was confirmed in the judgment of the UK Court of Appeal in *Football Shirts*[27] which involved a 'hub and spoke' arrangement. In paragraph 106 of this judgment, the Court responded to the argument that the lower court's decision had caused uncertainty in commercial circles, by "*casting doubt on freedom of discussion on a vertical basis, above all between manufacturers and their principal customers, in relation to matters which both parties need reasonably to be able to discuss, including actual or likely retail prices, profit margins and wholesale prices or terms of sale*." Instead, the Court emphasised that it was wrong to see the decision in this way. The Court said it should not been regarded as "*…casting any cloud of illegality over such discussions, so long as they are conducted on a bilateral basis and limited to discussions of the nature described. As the Tribunal said, there is a risk that discussions about possible prices, or about historic prices, can tend towards discussion of future prices, and agreement as to what they should be. Any party to such discussions on a vertical basis needs to be aware of that risk and to avoid it. But this case is not about such discussions at all. Nor does it outlaw complaints by a wholesale customer to its supplier in general, especially if they are directed at getting better terms for the business between those two parties...*".

28. Our view is that the VBER does not need to be altered as regards dual distribution. However, the VGL should clarify that, since dual distribution is covered by the VBER, the agreement will be legal provided the relevant market share thresholds are not exceeded and there are no hardcore restrictions. The VGL should express the underlying policy position in a similar manner to that set out in Peeperkorn's article by explaining that "*by limiting coverage of the* [VBER] *to non-reciprocal dual distribution agreements, the possible competition concerns are limited to vertical concerns such as foreclosure and not a possible loss of competition between the parties*".

29. As such, the VGL should clarify that a supplier can collect pricing and other data – provided these data are not used to restrict the freedom of the reseller in a manner that would be considered hardcore under the VBER. The corollary of this is that information which is passed between the supplier and the distributor for the legitimate purposes of their vertical relationship is covered by the VBER.

30. There are a number of practical examples of why information collected from distributors/retailers is efficiency enhancing to the benefit of consumers.

- **Geographic spread**: It is necessary to collect this information from distributors/retailers because manufacturers typically do not themselves have a material presence in all downstream markets. Therefore, they cannot obtain a comprehensive view of the market from their own downstream operations.

- **Consumer profile**: Another reason for collecting information from distributors/retailers is that distributors/retailers are differentiated as regards the consumer segments they target. Hence, manufacturers require information from distributors/retailers to get a more complete view of the market or else their view is limited to only those consumers that purchase products from their own downstream operations. Accordingly, without detailed information on sales made by distributors/retailers, the manufacturer loses out on potential sales through those same retailers/distributors. This is because they cannot make well-informed decisions on the basis of actual consumer demand, for example, regarding overall production trends, prioritisation of delivery and inventory at different distributors/retailers. Overall, collecting such data on consumer behaviour in relation to the manufacturer's brand promotes stronger inter-brand competition by,

27 Case No: 2005/1071, 1074 and 1623 (*Argos Limited, Littlewoods Limited vs OFT and JJB Sports PLC vs OFT*) https://www.catribunal.org.uk/sites/default/files/Jdg_CoA_1014Argos_Little_JJB191006.pdf

among other things, allowing the manufacturer to better meet consumers' needs and better position its brand in the market.

- **Seasonal products**: Collecting information is also necessary for suppliers to efficiently plan their production processes to meet customers demand. This is particularly important for suppliers of products such as fashion and sporting goods, whose demand fluctuates seasonally and consumers expect immediate delivery of their purchases. It is crucial that suppliers have up-to-date information about the demand for particular products because consumer preferences for those products can change very quickly. This information allows suppliers to quickly shift stock from retailers where demand is low to retailers where demand is high. Importantly, it also allows for more efficient supply chain management and assortment planning with retailers because production lead times can be between 12 and 18 months and products are ordered by retailers up to 12 months in advance. Therefore, it is crucial to understand consumer preferences because if consumer preferences change, suppliers can quickly adjust their production planning and assortment planning and avoid the risk of holding substantially high levels of unwanted inventory.

31. In addition, manufacturers typically consider distributors/retailers as a complement to their brand building strategy. Manufactures and distributors/retailers complement each other in many aspects such as pre- and post-sales service and the speed of product delivery (in the event that stock is not readily available), which are very important for brands to build their reputation. A good example of the partnership between brand owners and internet resellers is Zalando's partner programme. Under this program, where a certain style, size or colour wave runs out on Zalando's site, the brand owner can 'open up' its warehouse in order to make the sale. This of course strengthens the appeal of the internet shopping platform and facilitates more intense competition between other brand owners that are also members of Zalando's partner program. In order to be able to provide this service, the brand owner needs to plan its own stock levels. Data on Zalando's sales including resale prices is therefore needed in order to enable the brand owner to know whether to make its inventory available.

(c) Market share threshold for the supplier and buyer (Article 3 and Article 7 VBER, and recitals 86-95 VGL)

32. The VBER framework based on market share thresholds for the supplier and buyer, respectively, brings legal certainty as such. Market power is a good benchmark to filter whether certain vertical restraints have the potential to restrict competition[28].

33. However, the current market share threshold is set at an unnecessarily low level, particularly given the fact that market power is not expected to arise if a firm has a market share lower than 40%. This position is reflected in the European Commission's Article 102 Guidance, which states that *"The Commission's experience suggests that dominance is not likely if the undertaking's market share is below 40 % in the relevant market."* [29] Indeed, there has been only one finding by the European Commission of dominance under Article 102 for a firm with a market share below 40%[30].

34. It follows that the 30% market share "safe harbour" threshold provided by the VBER represents an overly conservative approach. If firms are unlikely to be considered dominant below the 40% threshold, then it is unclear why a similar approach is not applied to the assessment of a vertical arrangement where the parties to the agreement have shares of less than 40%, especially in light of the

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28 Bishop, S and Walker, M (2010) *The Economics of EC Competition Law: Concepts, Application and Measurement*, 2nd Edition, page 205.

29 Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, paragraph 14.

30 Whish, R (2009) *Competition Law*, 6th Edition, page 46. In *British Airways v Commission*, the Commission found British Airways to hold a dominant position in the UK with a market share of just under 40 per cent (39.7 per cent). Despite the relatively low market share, dominance was established on the basis that British Airways' market share was more than twice as large as the combined shares of its four largest competitors, it held substantially more slots at Heathrow and Gatwick airports than other airlines, and it offered the largest range of flights into and out of the UK (Case T-219/99 British Airways v Commission EU:T:2003:343, paras. 175-226).

VBER's recognition that vertical arrangements are presumptively pro-competitive. In other words, if vertical arrangements are presumptively pro-competitive (absent hardcore restrictions), then it is unclear why firms entering into those arrangements should be subject to a materially stricter market share threshold than that applied to a finding of dominance.

35. Using market power as a benchmark, and yet setting the market share thresholds at 30% brings an unwelcome degree of legal uncertainty in instances where the relevant market shares are between 30% and 40% and have the effect of "chilling competition". This is because non-dominant firms with shares between 30% and 40% would not be willing to enter into pro-competitive vertical arrangements due to the uncertainties associated with the treatment of such agreements that do not qualify for exemption under the VBER and particularly in light of the divergent approaches taken by NCAs to the assessment of agreements in such circumstances.

36. An example of this chilling effect would be the introduction of quantitative criteria in a selective distribution network. Brands fear that by introducing quantitative criteria, their SDS would not be robust from an antitrust compliance perspective. In particular, in many instances, it can be difficult to predict how a relevant market will be defined by an antitrust authority. Brand owners have market share estimates, but these are not always aligned with market share definitions (an exercise that it and itself would add costs to the SDS). In addition, when setting up the European-wide selective distribution networks, brand owners need to take into account the fact that market shares may be over 30% in some but not all countries, and may change over time meaning that relevant markets and market shares need to be reviewed regularly. These aspects create a competition law risk which goes against the brands' approach to having a robust and compliant SDS, thereby rendering the VBER and VGL ineffective.

37. Increasing the market share thresholds to 40% would address this issue and reduce the uncertainty where the relevant market shares are between 30% and 40%.

(d) **Resale price maintenance (RPM) (Article 4(a) VBER and recitals 48-49 VGL; recitals 223-229 VGL)**

The VGL should include criteria for the application of Article 101 (3) TFEU to RPM

38. The EC should, as other competition authorities have done in the past, clearly acknowledge in the VGL that RPM might be an appropriate tool to address free-riding concerns which do not only arise in case of new product launches and short term promotions. The VGL should set out the criteria under which RPM implemented to combat free-riding will benefit from the Article 101 (3) TFEU exemption.

39. It is widely recognised that RPM can generate substantial efficiencies[31]. Indeed, these efficiencies are recognised in the VGL, for example in **Recital 225 VGL** which discusses the potential for RPM to allow distributors to engage in an optimal level of promotional effort. In the same paragraph, the VGL acknowledges that RPM can serve as an effective tool to allow retailers to provide an optimal level of customer services at the point of sale, by reducing free riding from retailers who do not provide such services and who would otherwise undercut high service retailers.

40. These efficiencies have in the past been accepted by NCAs, confirming that RPM is an appropriate means to combat free-rider concerns without causing a negative impact on overall competition[32].

41. In addition, leading overseas authorities have similarly adopted an efficiency-based approach in assessing RPM, For example, in the Tooltechnic case the Australian Competition and Consumer

[31] Bishop, S and Walker, M (2010) *The Economics of EC Competition Law: Concepts, Application and Measurement*, 2nd Edition, page 202 – 204 and Goyder J (2008) "Is Nothing Sacred? Resale Price Maintenance and the EU Policy Review on Vertical Restraints" in Kronkurrensverket (ed.) *The Pros and Cons of Vertical Restraints*, page 167 – 193.

[32] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

Commission (ACCC) granted conditional authorisation to Tooltechnic to engage in minimum resale price maintenance in marketing its premium Festool brand of power tools[33]:

- The ACCC's market inquiries established that Festool products are complex and positioned at a high quality/high price point. They also confirmed that demand for Festool products clearly did benefit from services at the point of sale due to their complexity and the general lack of customer awareness regarding the potential uses and benefits of the products[34]. At the same time, the ACCC noted that full service retailers face material price competition from online and discount retailers, with some customers spending up to an hour in the full service retailer, only to purchase the product from an online or discount retailer.

- As a consequence, the ACCC accepted that full service retailers were increasingly crowded out by online or discount retailers, which had the potential to result in material consumer harm[35]. Specifically, this could mean that some customers would not purchase the product that best met their needs, and that the Festool brand reputation as a premium product could be discredited over time due to a lack of pre- and post-sales services. Ultimately this could result in a reduction in product variety for consumers if Festool were not able to maintain its market position as a premium product.

- The ACCC also examined alternatives to RPM, such as service provision contracts with retailers, and territorial restrictions / restrictions on online sales, and concluded that RPM was the most effective means of overcoming the free-rider problem[36]. Specifically, the ACCC accepted that there were likely to be inherent difficulties for Tooltechnic to monitor and enforce qualitative retail service standard agreements with retailers, both because the level of service required is difficult to specify in a contract, and because retailers are typically best placed to know what services are most valued by their customers. Regarding potential territorial restrictions and restrictions on online sales, the ACCC concluded that such measures would mean that customers would have fewer locations from which they could choose to purchase the Festool products, thereby reducing customer choice and increasing the risk that Festool would not be able to maintain a sufficient level of sales.

- Ultimately, the ACCC found that by setting minimum retail prices, Tooltechnic would induce retailers to compete on customer service, instead of price, thereby providing an efficient mechanism to increase the level of retail services. Since the Festool products had only a small market share, Tooltechnic would be constrained by inter-brand competition to set a retail price that achieved an efficient, competitive balance between the provision of customer services for its premium products, and competitive pricing. If Tooltechnic increased the retail price above competitive levels, it would risk losing market share to its competitors[37].

42. Given the clear rise of low-service retailers (both on and off-line), there is an increased risk that retailers, which do invest in qualitative pre- and post-sale services, are pushed out of the market due to a number of retailers which solely focus on price. Additionally, due to the increased price transparency and algorithmic pricing/price matching, the price cut of one (online) retailer can have a devastating effect on the value generated by a product for all retailers and the brand owner. This acts as a clear disincentive for retailers to invest in promotion of the product, as well as consumer experience and services. This in turn limits the possibility of brand owners to invest in product innovation and the ability to bring new products to the market. These issues do not only arise when a new product is launched but can exist over the lifetime of a product. A particular example is the case in which a consumer will have seen, experienced and been advised on the product at the bricks and mortar store but subsequently turns to (online) stores where no services are provided at all to buy all

[33] ACCC Determination, Tooltechnic Systems (Australia) Pty Ltd, authorisation number A91433, 5 December 2014.
[34] *Ibid.* , paragraph 109.
[35] *Ibid.*, paragraph 43, 125.
[36] *Ibid.*, paragraph 74 – 78.
[37] Ibid., paragraph 90.

"replenishment". Finally, the negative effects on the market are not outweighed by any increased market penetration or additional sales.

43. At the same time, as further set out in **Annex 1**, RPM, just like other vertical restraints, is unlikely to cause harm to competition, absent the existence of market power.

44. Finally, the VGL (and the enforcement practice) should acknowledge the shift in power from brand owners / suppliers to big retailers/e-tailers and platforms that often place huge pressure on suppliers to seek price / margin protection against competition from other retailers. **Article 4(a) VBER** explicitly calls out the fact that RPM may arise in instances where pressure is applied by "any of the parties". The VGL should recognise that retailers' threats of de-listing brands in instances where their prices are undercut by other retailers may also amount to RPM. Many brand owners are confronted with enormous pressure and demands from retailers for protection against competition by other retailers (price protection, margin protection, protection against parallel imports etc.). More often than not, such demands are accompanied with delisting threats, invoices for margin compensation, etc. The regulatory framework - and the enforcement practice of competition authorities in Europe - should reflect this market reality, and hold the instigators of problematic behaviour accountable. Currently, the enforcement tends to focus solely on suppliers, whereas the retailers or platforms who frequently instigated the behaviour are often not sanctioned at all.

Discussions on pricing, RRPs, and price monitoring

45. The current approach to resale prices, and the suspicion in the VGL (and in the current enforcement practice of some NCAs) against recommended retail prices (**RRPs**) and price monitoring in particular, is unjustified and unnecessarily strict. **Article 4(a) VBER** has a balanced approach in distinguishing between the unlawful "restriction of the buyer's ability to determine its sale price" on the one hand and the lawful provision of recommended prices on the other. It is important to recognize this and ensure the enforcement is also balanced in that respect.

46. It is a brand owner's goal to ensure that its retailers are successful. As such, RRPs are established by the suppliers following extensive cross-market research on the whole product assortment for the benefit of retailers and consumers. It is often essential for brand owners to communicate to retailers about their resale price recommendations, and to explain the underlying reasons for these recommendations (as further discussed below). It is also important for brand owners to understand why retailers have not followed the recommendation, particularly if retailers are reacting to market forces of which brand owners are not aware and which in turn would help brand owners to innovate and invest further to adjust to market conditions in a manner that is efficiency enhancing and ultimately benefits consumers. In addition, prices for retailers are in the large majority of cases negotiated with the RRPs in mind and the (expected) margins that the retailer can earn. Actual market performance is then obviously part of the discussion for the next sale season or year, without any intention or desire to engage in RPM. Therefore, the Commission should remove the language in **Recitals 48 and 226-229 VGL**, suggesting that RRPs can act as a focal point and thus can be used as (indirect) means to arrive at RPM. The VBER and VGL should make clear that RPM is limited to those cases in which there is an agreement or concerted practice between supplier and retailer to fix prices, and that RRPs, price monitoring and price discussions without pressure to stick to a price are in themselves always insufficient to constitute RPM, as they don't restrict the buyer's ability to determine its sale price.

47. Similarly, brand owners have to be able to collect data from retailers about their resale prices. The VGL have inspired some NCAs to treat resale price monitoring unnecessarily strictly. Resale data helps inform brand owners' future strategy, production, development, marketing strategies etc. Resale price data allows the brand owners to better position their products in the market and can help the brand owners to take a view on the RRP. Conversations with retailers about these data points as such should not be treated as interference with the commercial policy of the retailers which is indicative of

RPM, as their main purpose is to generate efficiencies in terms of optimal distribution of products across online and offline channels and offering the products the consumer wants at a fair price.

48. All of this makes it extremely important for brand owners to understand how the market responds to these price recommendations, to understand the actual resale prices that are applied for their products in the market, and to seek information from resellers on actual resale prices. These communications with retailers, and the fact that brand owners seek to obtain resale price information from retailers should not be interpreted as an attempt to limit reseller's liberty to define their own commercial policy and price. In fact, they strongly improve inter-brand competition on the merits.

New product launches and short term promotions

49. Regarding new product launches and short term promotions, the approach taken by the VBER and VGL is too strict and should be clarified.

50. Firstly, agreements on resale prices in the limited situations relating to new product launches and short term promotions should be block exempted, given the significant consumer benefits of RPM in expanding demand and promoting a product for a short time period. Particularly in case of the launch of a new product, the current absence of a block exemption for RPM leads to a situation where brand owners refrain from setting a fixed retail price, thereby negatively impacting the willingness of retailers to make investments in the marketing/promotion and customer services needed to make market entry a success. This, in turn, has a negative effect on the willingness of brand owners to invest in product innovation and launch in the first place. Aside from an inefficiently low level of customer services, this leads to long-term consumer harm by delaying or even preventing the entry of new products on the market thereby slowing product innovation.

51. Secondly, given the length in time it takes for a new product to successfully enter an already competitive market, the time period for which the block exemption should apply should be no less than 6 months.

52. Third, the theories of harm articulated in the VGL in respect of RPM (as discussed more in detail in **Annex 1**) are highly unlikely to be realistic in the context of an RPM agreement of limited duration. For example, since all parties are aware that the agreement will come to an end after a short period, this severely restricts the expected profits from collusion. In the absence of market power, an RPM agreement of fixed and limited duration is therefore even more unlikely to give rise to collusive outcomes than an indefinite RPM agreement[38].

53. For these reasons, the VBER should cover agreements on resale price in case of new product launches for a period of 6 months, and in case of short term price promotions for a period of 6 weeks. In both cases, the VGL should clarify that RPM agreements for product launches and short term promotions may exceed the period of respectively 6 months and 6 weeks provided such longer period is necessary (e.g., to recoup investments).

54. In the alternative, and at a minimum, the VGL should clarify:

- **Fixed resale prices for product launches** (**Recital 225 VGL**): given the obvious consumer benefits (introduction of new products on the market), the EC should clarify that this is likely to meet the requirements of Article 101(3) TFEU, and clarify what it will accept at least as an "introductory period" of 6 months. Footnote 59 of the VGL, stating that this exception is only

[38] This can be seen by considering the incentives of retailers to coordinate downstream. Each retailer weighs up the potential benefits of coordination (earning higher profits over the long term, provided none of the retailers engage in fierce competition) against the potential benefits of competing fiercely (earning higher profits in the short term by winning market share from rivals). An RPM agreement of a limited duration (such as six months) substantially reduces any confidence a retailer could have that its rivals will maintain the coordinated outcome over the long term. This, in turn, makes the short term gains of engaging in fierce competition (offering better complementary customer services, promotional effort, etc.) relatively more attractive.

available where "*it is not practical for a supplier to impose by contract effective promotion requirements*" should be removed, because RPM has clear efficiency benefits over contractual requirements, which are extremely difficult to specify for each individual retailer, and very costly to monitor and enforce.[39] It should be made clear that fixed resale prices for product launches are possible in any distribution system, including in case of selective and exclusive distribution networks, as well as for franchising. Due to the increased importance of omni-channel retailers and online retailers and the related difficulty to impose under a selective distribution system (**SDS**) qualitative criteria guaranteeing that online retailers invest significantly in effective promotion[40] and offering of customer services supporting new product launches (see discussion on **Recital 56 VGL**), fixed resale prices for product launches have become all the more relevant. In addition, the VGL should clearly indicate which criteria it will consider as being relevant to determine whether a product qualifies as a new product. In particular, any product which introduces substantial additional features to an existing product or required significant investments in terms of research and development or promotion/marketing should be considered as a new product.

- **Fixed resale prices for short term low price campaigns** (**Recital 225 VGL**): more flexibility is necessary here. There is no reason to limit this exemption to franchising/similar distribution systems only, given the obvious consumer benefits (low prices). In addition, the VGL should not limit the short term promotion period to a maximum of 6 weeks but should allow for more flexibility and longer term promotions, in particular when such campaigns are linked to considerable investments for the preparation and launch of the promotional campaigns.

RRPs and Maximum resale prices

55. **Recitals 226 – 229 VGL**: a distinction should be made, even in situations of market power, between RPM, RRPs and maximum resale prices. Brand owners are of the view that RRPs and maximum resale prices, in absence of any pressure exercised to fix the price, would, even in situations of market power, not amount to resale price maintenance and cannot be a breach of Article 101(1) of the Treaty. Therefore, the reference that RRPs and maximum resale prices could, even without any pressure to adopt a fixed price, act as a focal point and thus be considered as fixed resale prices or RPM should be removed from the VGL.

(e) Territorial/customer restrictions (Article 4(b), Article 4(c), Article 4(d) VBER and Recitals 50, 51, 55-58, 151-191)

56. The hardcore restrictions included **Article 4(b) VBER** overall provide a clear framework.

57. In particular, exclusive distribution and selective distribution remain very relevant for brand owners, to protect against free-riding from low service distributors. The current rules are clear and work well in practice. Brand owners see no need to adopt a different approach to territorial restrictions in light of the Geo-blocking Regulation[41].

Exclusive distribution (Article 4(b)(i) VBER and recitals 151-173 VGL)

58. The exception provided for in respect of active sales restrictions where an exclusive distribution system is operated provides sufficient certainty overall. However, the reference in **Article 4(b)(i)** to "*where such a restriction does not limit sales by the customers of the buyer*" leads to unnecessary

[39] See e.g. ACCC Determination, Tooltechnic Systems (Australia) Pty Ltd, authorisation number A91433, 5 December 2014, where the ACCC examined contractual requirements and found RPM to be the more effective solution.

[40] While online retailers are a good means to promote products, they are inclined to direct their promotional activities at those products that generate the most traffic and sales, which will hardly ever be products which are just launched on the market and are unknown to the large public.

[41] 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 (Text with EEA relevance.) OJ L 60I , 2.3.2018, p. 1–15 (**Geo Blocking Regulation**).

complexity in a multi-tier exclusive distribution system. The supplier should be allowed to require pass-on of active sales restrictions down the distribution chain.

Selective distribution (Art. 1(e), Art. 4(b)(iii)), Art. 4(c), and Art. 4(d) VBER recitals 55-58 and 174-188 VGL)

The importance of selective distribution systems

59. Selective distribution continues to be an important tool for brand owners as consumers demand a seamless omni-channel brand and shopping experience across all channels. Selective distribution helps manufacturers incentivise retailers to invest in those seamless shopping experiences and reduces the risk of free riding on the investments made by retailers and brand owners. This increased retail quality benefits the consumers, brand owners and retailers alike, by preserving the quality of their products, ensuring their optimal use, preventing counterfeiting and enhancing their brand image.

60. The current regulatory framework, which exempts quantitative and qualitative selective distribution, regardless of the nature of the products and regardless of the nature of the selection criteria, offers essential agility and flexibility. A stricter approach (e.g. on bricks and mortar requirements, transparency and objectivity of selective distribution criteria, etc.) would make selective distribution unworkable in practice and would undermine the benefits of a SDS.

61. A brand represents a combination of attributes valued by consumers such as quality (e.g. physical characteristics), range (e.g. choice of products), service (e.g. pre-sales advice, post-sales customer care), reputation and image[42]. The provision of these attributes is important in shaping the value that retailers obtain from the product, and, in the case of consumers, affecting their demand for the product as well as their desire, affinity and connection to the brand.

62. From an economics perspective, a branded product is simply a “differentiated product”. As such, a branded product faces competition from other products with (i) similar prices and attributes, or (ii) products with slightly different attributes but a similar value proposition (i.e., in terms of the overall combination of price and attributes offered) [43]. In fact, customer loyalty and product differentiation are achieved through offering better attributes (e.g. higher quality, improved service and/or greater innovation and brand experience): if end customers / consumers were not offered better non-price factors, it is hard to see why they would want to pay more for the product in question.

63. Brand positioning therefore is critical to incentivise brand owners to deliver quality and service. If brands cannot be presented in a way which consistently expresses a given level of quality and service, the brand owner will have less reason to deliver that level of quality and service in the first place. In addition, brand owners need to retain the flexibility and adaptability to continuously meet the ever-changing and ever-increasing consumer demands.

64. SDS selection criteria are designed to protect the brand and its authorised resellers from being harmed by low service retailers' actions, thereby ensuring that the brand owner’s products are sold on in a way that is consistent with the brand owner’s requirements. For example, SDS allows the brand owner to ensure that its retailers (i) have the necessary expertise to add value to the branded product without harming the brand, and/or (ii) offer the appropriate levels of quality, range, service and brand presentation to enhance the value of the branded product.

65. Indeed, without vertical restraints (i.e., the need to comply with the SDS criteria), retailers cannot be relied upon to always maintain and build brand value. This is not only a matter of free-riding on investments made by authorised retailers but also reflects the point that, unless kept in check, retailers will sometimes take actions that promote their own profit at the expense of the brand owner (e.g. the under-provision of service, quality, range, and presentational effort). This is because the retailer

42 Desai, D. R and Waller, S (2010) “Brands, Competition, and the Law”, *Brigham Young University Law Review*, 5, 1425 – 1499.

43 Tirole, J (1988) *The Theory of Industrial Organisation,* page 96 – 99.

would care only about its own profit and would not take into account the broader impact of its actions in harming the brand owner's interests and the consumer's interest.

Challenges with the current enforcement climate

66. Many brand owners are struggling to maintain a consistent and workable selective distribution network at the moment. On the one hand, they are faced with a hostile enforcement climate in some Member States, where national authorities and/or courts subject SDSs to a level of scrutiny which goes against the current regulatory framework and competition economics standpoint. On the other hand, the ever higher consumer demands require flexibility and adaptability throughout the network. The sentiment communicated by some national authorities that SDS is "anti e-commerce" or "a cover for RPM" is unjustified and unhelpful. As selective distribution is typically applied across several Member States, and often across the entire European Economic Area, the divergent approach by national authorities/courts in some Member States does not only have an impact on the selective distribution system in their respective jurisdictions, but across the entire selective distribution network. Such divergent enforcement goes against the concept of one single (digital) market.

67. The VGL needs to address such inconsistencies and explicitly provide for more flexibility, allowing brand owners to operate SDS in accordance with their brand positions without unnecessarily restricting their freedom to contract whilst preserving their brand positioning.

68. **Article 1(e) VBER**: the definition of "selective distribution systems" is clear and provides good legal certainty. Following the judgement in *Auto 24*[44], paragraph 259 of the Final Report and in its recent Competition Policy Brief[45] (**Competition Policy Brief**), it would be helpful if this definition in the VBER, or if not possible at least a related recital in the VGL, would explicitly state that the SDS criteria (irrespective of whether it is qualitative or quantitative in nature) do not need to be published by manufacturers and that manufacturers are under no obligation to provide the criteria to customers interested in entering the SDS.

69. **Recital 56 VGL**: the VGL requires suppliers to have criteria for online sales that are overall equivalent to the criteria imposed for sales from bricks and mortar store. This equivalence test has led to overly strict enforcement by some NCAs who have used this as a straitjacket on brand owners to re-write SDS agreements and make wholesale changes to the service requirements which brand owners can impose on retailers online and in-store. The VGL should recognise that the online and offline retail spaces are two very different sales environments, and that the set of criteria needs to reflect that distinction.

70. **Recital 57 VGL**: the VGL take an unnecessarily strict approach to the combination of SDS and exclusive distribution in different Member States. Brand owners should be free to operate different distribution systems in different territories effectively, for example because of differences in consumer preferences, market structures or available infrastructures. It should be permissible to require distributors and retailers in non-SDS countries, to sell only to end users or authorised resellers in territories where an SDS is operated, in the same way as it is possible to require authorised resellers in SDS countries not to sell actively in territories where exclusive distribution is operated. Distributors in territories where an SDS is operated would have incurred significant investments and there is no reason not to protect those investments from free riders, merely because the manufacturer chose to operate different distribution models which cater better for local consumers.

71. **Recital 63 VGL**: active sales restrictions in the specific circumstances of an SDS set out in **Recital 63 VGL** (i.e., where appointed wholesalers located in different territories are obliged to invest in promotional activities in 'their' territories) should be block exempted.

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44 Judgement of CJEU of 14 June 2012 in *Case* C-158/11 *Auto 24 v Jaguar Land Rover France.*

45 Competition policy brief, April 2018, ISBN 978-92-79-81339-9, ISSN: 2315-3113.

72. **Recital 175 VGL**: the VGL should clarify that brand owners can tailor the application of their selective criteria in accordance with local environments where the SDS is operated and that manufacturers are under no obligation to apply identical criteria across the EEA. This is because it is inherently difficult to apply the same terms to all the different territories as each territory will vary in terms of retailers' and customers' financial abilities, economy, legislation (e.g., minimum wages) or the overall development of the markets. The VGL should also provide for more flexibility in relation to limited stock or end of season products. For example, brands would typically look to clear out stock before a new product launch. That stock may not contain sufficient product to be distributed to all authorised dealers, and therefore a supplier would have to be allowed to select the distributors it wishes to sell these products to without falling within the scope of Article 101(1) TFEU (provided, of course, that the distributors do meet the usual SDS criteria). Naturally if this was not the case, a manufacturer would face issues of capabilities, potentially shortage in supply, and costs (selective distribution is costly and requires resources from the manufacturer) that it might not be willing to face.

73. **Recital 176 VGL**: the sentence included in this Recital stating that "*However, where the characteristics of the product do not require selective distribution or do not require the applied criteria, such as for instance the requirement for distributors to have one or more brick and mortar shops or to provide specific services, such a distribution system does not generally bring about sufficient efficiency enhancing effects to counterbalance a significant reduction in intra-brand competition*" has been taken out of context by national authorities and courts to challenge whether certain products "deserve" a SDS even where those agreements are covered by the VBER. This Recital should be removed, and the VGL should simply state, in line with the Competition Policy Brief, that it is permissible to use a SDS (including one based on qualitative criteria only) for any products (and not just for those where the characteristics of the products justify it).

74. **Recital 182 VGL**: the exclusion from the VBER of an obligation prohibiting authorized distributors to sell the brands of specific competitors is artificial. This is rarely if ever used in practice. In any event, there is no reason why this restriction should not be covered by the VBER in the absence of supplier market power. See also additional comments included in the Response in relation to excluded restrictions.

(f) **Online sales restrictions (Recitals 52-54 and 64 VGL)**

75. The VGL needs to be updated in line with the current omni-channel commercial reality. Consumers expect a seamless brand and shopping experience throughout their journey, whether offline, online or both. Brand owners should have the freedom to incentivise retailers to invest in those seamless brand and shopping experiences across all channels, whilst minimising the risk of free-riding. The VGL ought to reflect this.

76. **Recitals 52(d) and 64 VGL**: the current framework approach is overly protective of e-commerce and unnecessarily suspicious of the support provided to bricks and mortar stores. In the current economic reality, e-commerce players are powerful and no longer need protection over the bricks and mortar channel. The current framework puts at risk the future of the high street. Online sales have shown strong growth in the last five years and now represent a substantial proportion of total sales, with continuous growth expected in the future. In addition, major online retailers have increased in size and strength.

77. The current rules force brand owners to treat omni-channel/hybrid retailers which have a very different cost structure for the online and offline part of their operations in the exact same way for all of their purchases. Such an approach can actually dis-incentivise high-service retailers to keep investing in the service offering provided in their bricks and mortar stores. Brand owners should have the flexibility to offer hybrid retailers a specific discount off products that are sold in-store to support the retailer's in-store efforts. The in-store environment can be key to establishing a product. It is important for consumers to experience their products physically rather than virtually. It is often necessary to receive advice and services from well trained staff at bricks and mortar stores.

78. Furthermore, absent a dominant position, differential pricing is and should remain block exempted which means that brand owners can charge different prices for pure online stores and pure bricks and mortar stores (although some NCAs apply a different approach, see e.g., the German Competition Authority in *LEGO*[46] and *Gardena*[47]). From the moment a retailer also engages in online sales, brand owners are precluded from rewarding those retailers for the investments made in their bricks and mortar stores by offering a specific discount off products that are sold in bricks and mortar stores. However, where the producer and retailer both meet the safe harbour market share thresholds, it is highly unlikely that such a strategy could serve to limit competition. Since there remains strong inter-brand competition, dual pricing would not allow the producer to increase the price for its product above competitive levels.

79. The exclusion from the prohibition of a "fixed fee" to support offline or online sales, or the setting of a minimum in-store turnover target for bricks and mortar stores, is not workable or useful in practice. Brand owners and bricks and mortar stores find it very difficult to rely on this exception, particularly in European wide distribution networks. It requires a lot of resources and bureaucracy to be introduced in order to make it effective, which in turns renders the system inefficient. In order to support in-store sales appropriately and in line with the VGL, manufacturers need to engage in a case by case analysis to determine a reasonable fixed fee or amount of in-store sales for each individual bricks and mortar store. For some brands that work with hundreds and thousands of retailers across the EEA, this is an impossible task. In addition, it is not a measure which can incentivize bricks and mortar stores to increase sales through the bricks and mortar channel, as the fixed fee cannot vary based on number of products sold or the growth realized in the offline channel alone. Therefore, the investment made by the brand owners might prove to be ineffective and favour the more inefficient retailers.

80. Thus, in times where online sales have experienced significant growth and bricks and mortar stores currently need support and protection to survive, a more flexible approach to this topic is essential. This has recently be recognized by Martijn Snoep, head of the Dutch Competition Authority, which called on the EC to use the review of the VBER and VGL to adopt a more lenient approach towards dual pricing[48]. The EC has stated in the Final Report that it is prepared to consider specific cases where dual pricing may be justified, but this is not sufficient. Clear guidance should be given on the situations where the EC would be prepared to accept that dual pricing will meet the conditions for exemption under Article 101(3) TFEU. For example, the current rules should be amended to allow brand owners to offer hybrid retailers a specific discount off products that are sold in bricks and mortar stores to support the retailer's in-store efforts and costs.

81. In addition, **Recital 64 VGL** seems to imply that dual pricing can only be justified when online sales lead to substantially higher costs for the manufacturer. However, this does not address the issue that hybrid retailers face considerable higher costs in operating their bricks and mortar stores due to costs related to rental rates, training of staff, investments in store attractiveness, etc. To incentivize hybrid retailers to keep investing in customer experience and services, while maintaining an attractive price level, brand owners must be able to remunerate those hybrid retailers who do invest in offering in-store customer services, while at the same time offering a broad product range through their online channel.

82. **Recital 54 VGL**: Brand owners remain concerned by the divergence in the interpretation and application of the VBER and VGL by NCAs and national courts (e.g., the numerous communications

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46 See press release of the Bundeskartellamt on https://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2016/18_07_2016_Lego.html?nn=3591568

47 See press release of the Bundeskartellamt on https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2013/B05-144-13.pdf?__blob=publicationFile&v=3

48 See Mlex interview with Martijn Snoep reported by Mlex on 8 May 2019 - http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1088419&siteid=190&rdir=1.

from the German competition authority on the "correct" interpretation of *Coty*[49]). The EC's interpretation of the VGL as far as third party platforms are concerned was endorsed by the CJEU in *Coty* and the position should be restated in the VGL to avoid any future mis-interpretation. For example, following the Competition Policy Brief, the VGL should restate the EC's views that: "F*irst, it has to be established whether a marketplace ban escapes the application of Article 101(1) TFEU by fulfilling the Metro-criteria. If this is not the case it has to be established whether a marketplace ban restricts competition under Article 101 TFEU. In practice, this question will however only arise where market shares of the parties are above the 30 % market share threshold of Article 3 VBER. Otherwise marketplace bans are block-exempted as the Court has clarified that marketplace bans do not constitute hardcore restrictions under Article 4(b) or 4(c) VBER*."

83. Further still, the VGL should clarify that restrictions relating to price comparison websites should not be treated differently to those relating to third party platforms.

84. Brand owners are also of the view that the possibility to require members of a distribution network to have one or more bricks and mortar shops or showrooms should be applied consistently and effectively. The EC should clarify that it is permissible for the brand owners to require those stores to be effective stores that comply with the overall criteria of the distribution network and are easily accessible to the targeted consumers.

85. Moreover, the VGL should clarify when restrictions on the use of brand names or trademarks in search engines (e.g. Google AdWords) are likely to be hardcore restrictions of EU competition law. Whilst the EC decision in *Guess* treated a ban on the use of the Guess brand name and trademark in Google AdWords as a "by object" infringement, in the e-commerce Staff Working Paper[50] the EC also stated that such restrictions could help avoid confusion with the manufacturer's website. The brands are of the view that it benefits consumers to be shown the link to the brand owners page at the top of the results. Therefore, further clarity on this point is needed and, in particular, the EC should clarify that restrictions on bidding for a particular positioning in the list of results rendered by search engines such as Google AdWords (as opposed to a ban on bidding for Google AdWords) are block exempted.

(g) Excluded restrictions (Article 5 VBER and Recitals 66-69 VGL)

86. The exclusion from the VBER of non-compete obligations which are of indefinite duration or exceed a duration of 5 years is artificial and leads to a lot of frustration and unnecessary practical problems (artificial termination/renegotiation of contracts or non-compete clauses every 5 years). There is no reason why these obligations should not be covered by the block exemption in the absence of supplier market power.

87. The exclusion from the VBER of an obligation prohibiting authorized dealers to sell the brands of specific competitors is also artificial. This is rarely if ever used in practice. In any event, there is no reason why this restriction should not be covered by the block exemption in the absence of supplier market power.

(h) **Hardcore restrictions falling outside the scope of Article 101(1) of the Treaty or likely to fulfil the conditions of Article 101(3) of the Treaty (Recitals 60-64 VGL)**

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49 See for example: Andreas Mundt, President of the Bundeskartellamt, 6 December 2017 https://www.wiwo.de/unternehmen/handel/eugh-urteil-zum-online-handel-luxus-muss-nicht-in-die-schmuddelecke/20677432.html; Bundeskartellamt publication (October 2018) https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Schriftenreihe_Digitales_IV.pdf?__blob=publicationFile&v=2. Kallfass, head of the Bundeskartellamt's German and European antitrust law policy unit (27 February 2019) https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1069305&siteid=190&rdir=1.

50 Staff Working Paper, paragraphs 632 and 997, available here http://ec.europa.eu/competition/antitrust/sector_inquiry_swd_en.pdf.

88. The wording included in **Recitals 60-64 VGL** is overly strict, meaning that in practice Article 101(3) of the Treaty is hardly ever relied upon.

89. There are some restrictions, currently labelled as "hardcore", which absent market power are likely to fulfil the conditions of Article 101(3) of the Treaty and should therefore be block exempted, as detailed throughout this Response. This includes:

- **Recitals 61-62 VGL**: these exceptions should be replaced by a broader exception which covers the launch of new brands and new products (under an existing brand). The EC should not only take into account the investments made by the distributor, but also the R&D&I and other investments made by the supplier which have allowed the development and launch of this new brand / new product. A protection against active / passive sales, as well as a prohibition against cross-sales between dealers (or at least cross-sales to dealers who are not part of the brand owner's dealer network) should be allowed during the launch period.

- **Recital 63 VGL**: as explained in paragraphs 71 and 104 of this Response, active sales restrictions in these specific circumstances of an SDS (i.e., where appointed wholesalers located in different territories are obliged to invest in promotional activities in 'their' territories) should be block exempted.

- **Recital 64 VGL**: as described in more detail in paragraph 107 of this Response, dual pricing should not be characterised as a hardcore restriction in all cases, and sufficient flexibility should be allowed to recognise the level of investment needed to run a bricks and mortar store in line with the brand image, and provide the level of customer service that is expected to preserve the brand image. See further comments provided in relation to **Recital 52 (d) VGL**.

2.7 Are there other areas for which you consider that the VBER and/or the VGL provide insufficient legal certainty?

✓ ***Yes***

☐ ***No***

☐ ***Do not know***

2.8 Please list the areas for which you consider that the VBER and/or the VGL provide insufficient legal certainty (1000 character(s) maximum):

90. Brand owners are of the view that the VGL does not provide sufficient legal certainty in the context of aftermarkets and this may be discouraging suppliers from entering into pro-competitive agreements.

91. In cases such as *Pelikan/Kyocera*[51], separate markets were defined by the EC for the primary and the secondary products and yet no dominance was found in the secondary market, despite high market shares on that market. The EC's position was founded on (i) the interdependence between the primary and the secondary markets, and (ii) the competitive conditions in the primary market.

92. Where no dominance is found on the secondary market, vertical agreements should not lead to anti-competitive concerns. Yet, due to high shares in the secondary market, suppliers would not benefit from the VBER. This brings an unnecessary degree of legal uncertainty which may be deterring pro-competitive agreements that fall outside the VBER due to narrowly defined markets which fail to take account of the links between primary and secondary markets.

93. The same factors that determined the EC's approach to dominance in these previous cases are also relevant to market definition. Indeed, **Recital 91 VGL** acknowledges that *"The relevant market for application of the Block Exemption Regulation may be the original equipment market including spare*

[51] Case No IV/34.330 - Pelikan / Kyocera.

parts". However, in a contribution to the OECD's Competition Committee entitled Competition Issues in Aftermarkets, dated 13 June 2017, the EC explains that *"it would define aftermarkets (...) without regards to sales of the primary product to which they relate. The effects of the 'overall system' (i.e. whether markets are interdependent) would (...) be taken into account in the dominance analysis"*.[52]

94. Brand owners call upon the EC to provide greater clarity on this issue. In particular, as acknowledged by the EC in this note to the OECD on Competition Issues in Aftermarkets, *"It is true that a possible interdependence (or sufficiently strong links) between primary and secondary markets is relevant both at the stage of market definition and at the stage of dominance"*. As such, to the extent that (i) there is a high degree of interdependence between the primary and secondary markets[53], and (ii) there is sufficient reaction of customers in the primary market to potential exploitation on the secondary market[54], this would lead to a market definition comprising the primary product and the secondary product as part of the *same* market.

2.9 Leaving aside the appropriateness of the scope of the current list of hardcore restrictions (Article 4 VBER) and excluded restrictions (Article 5 VBER) (see the last three questions in this section), do you consider that the additional conditions defined in the VBER (i.e. Article 2 and 3 VBER) lead to the exemption of types of vertical agreements that do not generate efficiencies in line with Article 101(3) of the Treaty?

☐ ***Yes***

✓ ***No***

☐ ***Do not know***

2.10 Please mark the conditions responsible for the exemption of those vertical agreements by ticking "Yes". Otherwise, tick "No":

	Yes	***No***
Vertical agreements entered into between an association of undertakings and its members (Article 2(2) and Article 8 VBER, and recitals 29-30 VGL)		✓
Non-reciprocal vertical agreements between competitors under certain conditions (Article 2 (4) VBER and recitals 27-28 VGL)		✓
Vertical agreements containing provisions on IPR (Article 2(3) VBER and recitals 31-45 VGL)		✓
Market share threshold for the supplier (Article 3 and Article 7 VBER, and recitals 86-95 VGL)		✓
Market share threshold for the buyer (Article 3 and Article 7 VBER, and recitals 86-95 VGL)		✓

2.11 Please explain your selection by providing examples and explain how prevalent they are in the industry (1000 character(s) maximum):

N/A

52 "Competition Issues in Aftermarkets – Note from the European Union", available at https://one.oecd.org/document/DAF/COMP/WD(2017)3/en/pdf

53 For example, most consumers can and do obtain information on secondary product prices, and obtain information on how much of the secondary product is likely to be required over the life-cycle of the primary product, without substantial difficulty *(life-cycle costing)*.

54 For example, there is strong competition on the primary market and low switching costs such that behavior on the secondary market would be competitively constrained by customers' ability to switch suppliers in the primary market within a reasonable time.

2.12 ***Are there other types of vertical agreements for which it can be assumed with sufficient certainty that they generate efficiencies in line with Article 101(3) of the Treaty but which are not covered by the current scope of the exemption?***

- ☐ ***Yes***
- ✓ ***No***
- ☐ ***Do not know***

2.13 ***Please list those types of agreements and explain your reasons (1000 character(s) maximum):***

N/A

2.14 ***Are there any types of vertical restrictions that the VBER considers as hardcore (Article 4 VBER), but for which it can be assumed with sufficient certainty that they generate efficiencies in line with Article 101(3) of the Treaty?***

- ✓ ***Yes***
- ☐ ***No***
- ☐ ***Do not know***

2.15 ***Please select these types of vertical restrictions by ticking "Yes". Otherwise, please tick "No":***

	Yes	***No***
Resale price maintenance (Article 4(a) VBER and recitals 48-49 VGL)	✓	
Territorial/customer restrictions (Article 4(b) VBER and recital 50 VGL) and exceptions to these restrictions (Article 4(b) (i)-(iv) VBER and recitals 51,55 VGL)	✓	
Online sales restrictions (recitals 52-54 VGL)	✓	
Restrictions of active or passive sales by members of a selective distribution system (Article 4(c) VBER and recitals 56-57 VGL)	✓	
Restrictions of cross supplies (Article 4(d) VBER and recital 58 VGL)	✓	
Agreements preventing or restricting the sourcing of spare-parts (Article 4(e)VBER and recital 59 VGL)		✓

2.16 ***Please explain your selection by providing examples and explain how prevalent these restrictions are in your industry (1000 character(s) maximum)***

95. There are some restrictions, currently labelled as "hardcore", which absent market power are likely to fulfil the conditions of Article 101(3) TFEU and should therefore be block exempted. These are detailed in paragraphs 22 - 88 of the Response, and include:

    (a) Resale price maintenance:

96. The EC should, as other competition authorities have done in the past, clearly acknowledge in the VGL that RPM might be an appropriate tool to address free-riding concerns which do not only arise in case of new product launches and short term promotions. The VGL should set out the criteria under which RPM implemented to combat free-riding will benefit from the Article 101(3) TFEU exemption.

97. In addition, not all discussions with retailers about resale prices should be treated as indicative of RPM. The VGL should set out clearly that requesting resale price data from retailers and engaging in

discussions on the recommended resale price, should not in itself be considered as an indication of RPM. Such discussions, absent the exercise of any pressure on the retailers to apply a fixed price, and thereby restricting their ability to determine their sale price, are merely a means to optimize product assortment, product availability and development, while at the same time offering advice on how retailers can best position the products to generate sufficient returns to invest in consumer experience and customer services.

98. Since price monitoring and recommended resale prices do not involve any binding constraints on retailers, any concern that these vertical practices could give rise to collusive outcomes is even weaker than in the case of RPM. In short, the absence of binding constraints means it is uncertain to both competing retailers and producers whether or not a specific retailer will actually charge a given price.

99. In addition, agreements on resale prices in limited situations relating to new product launches and short term promotions should be covered by the VBER for respectively 6 months (product launch) and 6 weeks (short term promotion) from their introduction, irrespective of the distribution model that is being adopted, given the significant consumer benefits of RPM in expanding demand and promoting a product for a short time period. The VGL should further clarify that longer periods for product launch or short term promotions, could benefit from the Article 101 (3) TFEU exemption if duly justified (e.g., to recoup investments). The absence of a block exemption for this kind of situations leads to consumer harm by slowing product innovation, delaying or even preventing the entry of new products on the market, and less customer services being offered, as neither the brand owner nor the retailer is sure that it will recoup at least part of its investments due to increased opportunity to free-ride on these investments by (pure) - online retailers.

100. The VGL should make clear that imposing maximum resale prices or providing RRPs (without any pressure exercised on the retailers), will not be considered indicative of RPM, even in cases where the supplier has market power.

(b) Territorial/customer restrictions and selective distribution systems:

101. **Article 1(e) VBER**: as described in paragraph 68 of this Response, following the judgement in *Auto 24*[55], paragraph 259 of the Final Report and in its recent Competition Policy Brief[56] (**Competition Policy Brief**), it would be helpful if this definition in the VBER, or if not possible at least a related recital in the VGL, would explicitly state that the SDS criteria (irrespective of whether it is qualitative or quantitative in nature) do not need to be published by manufacturers and that manufacturers are under no obligation to provide the criteria to customers interested in entering the SDS.

102. **Article 4(b)(i) VBER**: as described in paragraph 58 of this Response, a supplier operating an exclusive distribution network should be allowed to require pass-on of active sales restrictions down the distribution chain.

103. **Recital 56 VGL**: as described in paragraph 69 of this Response, the VGL requires suppliers to have criteria for online sales that are overall equivalent to the criteria imposed for sales from bricks and mortar store. This equivalence test has led to overly strict enforcement by some NCAs who have used this as a straitjacket on brand owners to re-write SDS agreements and make wholesale changes to the service requirements which brand owners can impose on retailers online and in-store. The VGL should recognise that the online and offline retail spaces are two very different sales environment, and that the set of criteria needs to reflect that distinction.

104. **Recital 57 VGL**: as described in more detail in paragraph 70 of this Response, brand owners should be free to operate different distribution systems in different territories effectively. It should be permissible to require distributors in non-SDS countries, to sell only to end users/authorised resellers in territories where an SDS is operated.

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55 Judgement of CJEU of 14 June 2012 in *Case* C-158/11 *Auto 24 v Jaguar Land Rover France*.

56 Competition policy brief, April 2018, ISBN 978-92-79-81339-9, ISSN: 2315-3113.

105. **Recital 63 VGL**: as described in paragraphs 71 and 89 of this Response, active sales restrictions in these specific circumstances of an SDS (i.e., where appointed wholesalers located in different territories are obliged to invest in promotional activities in 'their' territories) should be block exempted.

106. **Recital 175 VGL**: as described in paragraph 72 of this Response he VGL should clarify that brand owners can tailor the application of their selective criteria in accordance with local environments where the SDS is operated and that manufacturers are under no obligation to apply identical criteria across the EEA.

107. **Recital 176 VGL**: as described in paragraph 73 of this Response, the VGL should clarify that where the market share thresholds are met it is permissible to use a SDS for any products (and not just for those where the characteristics of the products justify it).

108. **Recital 182 VGL**: as described in paragraph 74 of this Response, there is no reason why this restriction should not be covered by the VBER in the absence of supplier market power. See also additional comments included in the Response in relation to excluded restrictions.

(c) Online sales:

109. **Recital 52 (d) VGL and 64 VGL**: the current framework approach is overly protective of e-commerce and unnecessarily suspicious of the support provided to bricks and mortar store. In times where online sales have experienced significant growth and bricks and mortar stores need support and protection to survive, a more flexible approach to this topic is essential. The EC has stated in the Final Report that it is prepared to consider specific cases where dual pricing may be justified, but this is not sufficient. Clear guidance should be given on the situations where the EC would be prepared to accept that dual pricing will meet the conditions for exemption under Article 101(3) TFEU.

110. The VGL should recognise that dual pricing can be a legitimate way of compensating hybrid retailers for the considerable higher costs in operating their bricks and mortar stores due to costs related to rental rates, training of staff, investments in store attractiveness, etc. This has recently been confirmed by Martijn Snoep, head of the Dutch Competition Authority. To incentivize hybrid retailers to keep investing in customer experience and services, while maintaining an attractive price level, brand owners must be able to remunerate those hybrid retailers who do invest in offering in-store customer services, while at the same time offering a broad product range through their online stores. The exemption on the provisions of "fixed fees" under **Recital 52 (d) VGL** is not workable in practice and brand owners and bricks and mortar stores rarely find themselves able to effectively rely on that. Therefore, brand owners should be allowed to provide for a different volume related discount for sales realized in bricks and mortar stores.

111. **Recital 54 VGL**: as described in more detail in paragraph 82 of this Response, the EC's interpretation of the VGL as far as third party platforms are concerned was endorsed by the CJEU in *Coty* and the position should be restated in the VGL to avoid any future mis-interpretation.

112. The VGL should also clarify that restrictions relating to price comparison websites should not be treated differently to those relating to third party platforms.

113. Moreover, the VGL should clarify when restrictions on the use of brand names or trademarks in search engines (e.g. Google AdWords) are likely to be hardcore restrictions of EU competition law. Whilst the EC decision in *Guess* treated a ban on the use of the Guess brand name and trademark in Google AdWords as a "by object" infringement, in the e-commerce Staff Working Paper[57] the EC also stated that such restrictions could help avoid confusion with the manufacturer's website. The brands are of the view that it benefits consumers to be shown the link to the brand owners page at the

[57] Staff Working Paper, paragraphs 632 and 997, available here http://ec.europa.eu/competition/antitrust/sector_inquiry_swd_en.pdf.

top of the results. Therefore, further clarity on this point is needed and, in particular, the EC should clarify that restrictions on bidding for a particular positioning in the list of results rendered by search engines such as Google AdWords (as opposed to a ban on bidding for Google AdWords) are block exempted.

2.17 Does the list of excluded vertical restrictions (Article 5 VBER) exclude types of vertical restrictions for which it can be assumed with sufficient certainty that they generate efficiencies in line with Article 101(3) of the Treaty?

✓ ***Yes***

☐ ***No***

☐ ***Do not know***

2.18 Please select these types of vertical restrictions by ticking "Yes". Otherwise please tick "No":

	Yes	*No*
Non-compete obligations with indefinite duration or exceeding 5 years (Article 5(1)(a) VBER and recitals 66-67 VGL)	✓	
Post term non-compete obligations (Article 5(1)(b) VBER and recital 68 VGL)	✓	
Restrictions to sell brands of particular competing supplier in a selective distribution system (Article 5(1)(c) VBER and recital 69 VGL)	✓	

2.19 Please explain your selection by providing examples and explain how prevalent they are in the industry (1000 character(s) maximum):

114. There is no reason why any of the current excluded restrictions should not be block exempted.

115. The exclusion from the VBER of non-compete obligations which are of indefinite duration or exceed a duration of 5 years is artificial and leads to a lot of frustration and unnecessary practical problems (artificial termination/renegotiation of contracts or non-compete clauses every 5 years). There is no reason why these obligations should not be covered by the VBER in the absence of supplier market power.

116. The exclusion from the VBER of an obligation prohibiting authorized dealers to sell the brands of specific competitors is artificial. This is rarely if ever used in practice. In any event, there is no reason why this restriction should not be covered by the block exemption in the absence of supplier market power.

2.20 Are there other types of vertical restrictions for which it cannot be assumed with sufficient certainty that they generate efficiencies in line with Article 101(3) of the Treaty but which are not captured by the current list of hardcore restrictions (Article 4 VBER) or excluded restrictions (Article 5 VBER)?

☐ ***Yes***

✓ ***No***

☐ ***Do not know***

2.21 Please list these types of restrictions and explain your reasons (1000 character(s) maximum):

N/A

3. EFFICIENCY (WERE THE COSTS INVOLVED PROPORTIONATE TO THE BENEFITS?)

3.1 Does the assessment of whether the VBER, together with the VGL, is applicable to certain vertical agreements generate costs for you (or, in the case of a business association, for the members you are representing)?

✓ ***Yes***

☐ ***No***

☐ ***Do not know***

☐ ***Not applicable***

3.2 Please provide an estimate both in terms of value (in EUR) and as a percentage of your annual turnover (or, in the case of a business association, of the annual turnover of the members you are representing) and explain the methodology of calculation (1000 character(s) maximum):

Brand owners are not in a position to provide this estimate at this stage.

3.3 Please explain your reply (1000 character(s) maximum):

117. The VBER has generally reduced costs for businesses. However, it did not reach its full potential given inconsistent enforcement at national level and the lack of engagement of the EC in the interpretation of the VGL. Costs incurred by businesses have been triggered by:

(a) Unnecessary challenges by NCAs for agreements that are covered by VBER; and

(b) Artificial changes to distribution systems following an inconsistent application of the VBER and the VGL at national level, which have an impact on brand image, customer service levels and overall sales (e.g., an obligation to sell products openly on third party platforms absent market power has a significant impact on the value of a brand).

(c) Litigation costs incurred at national Court level as a result of the inconsistent application by NCAs allowing claimants to 'have a go' in civil law cases where the dispute in essence has nothing to do with the competition laws.

Businesses fail to meet projected targets and returns due to unexpected inconsistent application of the VGL, which in turn generates costs and hinders future strategic planning and investment into new and better product lines.

3.4 Does the assessment of whether the VBER, together with the VGL, is applicable to certain vertical agreements generate costs proportionate to the benefits they bring for you (or, in the case of a business association, for the members you are representing)?

✓ ***Yes***

☐ ***No***

☐ ***Do not know***

☐ ***Not applicable***

3.5 Please explain your reply (1000 character(s) maximum):

118. The VBER generally does keep compliance costs to a level that is proportionate to the benefits that it renders. As mentioned above, however, the inconsistent and stricter application of the VGL at national level has made it difficult for the efficiencies envisaged by the VBER to reach their full potential.

3.6 Would the costs of ensuring compliance of your vertical agreements (or, in the case of a business association, the vertical agreements of the members you are representing) with Article 101 of the Treaty increase if the VBER were not prolonged?

✓ ***Yes***

□ ***No***

□ ***Do not know***

3.7 Please explain your reply (1000 character(s) maximum):

119. If the VBER were to be allowed to expire and the VGL were to be withdrawn, the costs of compliance for brand owner would increase significantly, which would ultimately be to the detriment of the consumers.

120. This is because in the absence of the VBER and the VGL, every aspect of a supplier's distribution strategy and policy would be subject to scrutiny by every NCA and national court in the EEA. Experience shows that with the current VBER and VGL in place there is already significant divergent interpretation on key points (pricing, e-commerce etc.) and withdrawing the framework of analysis introduced by the VBER would only exacerbate the issue. Having no harmonised application of Article 101 TFEU to vertical agreements would make it impossible to maintain a consistent distribution system across the EEA and would go against the essence of a digital single market.

3.8 Please explain and provide an estimate of the possible change in compliance costs (1000 character(s) maximum):

Brand owners are not in a position to provide this estimate at this stage.

3.9 Have the costs generated by the application of the VBER and the VGL increased as compared to the previous legislative framework (Reg. 2790/1999 and related Guidelines)?

✓ ***Yes***

□ ***No***

□ ***Do not know***

3.10 Please explain your reply (1000 character(s) maximum):

121. The costs generated by the application of the VBER and the VGL have increased as compared to the previous legislative framework (Regulation 2790/1999[58] and related guidelines[59]). However, the reason for this has not been the framework of the VBER as such, but rather the uncertainty introduced by the VGL on specific points (e.g., e-commerce, selective distribution, pricing) and the inconsistent application of the VGL at national level, as described in more detail throughout this response. Costs have also increased due to the further development and growth of the markets.

3.11 Please explain your reply and provide an estimate of the possible change in costs (1000 character(s) maximum):

Brand owners are not in a position to provide this estimate at this stage.

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[58] Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (Text with EEA relevance) OJ L 336, 29.12.1999, p. 21–25.

[59] Guidelines on Vertical Restraints (Text with EEA relevance.) OJ C 291, 13.10.2000, p. 1–44.

4. RELEVANCE (IS EU ACTION STILL NECESSARY?)

4.1 Would you expect any effect in case the VBER were to be prolonged and the VGL maintained without any change? (multiple answers are allowed)

- ☐ ***Yes, positive for my organisation (in case of business associations, for your members)***
- ✓ ***Yes, negative for my organisation (in case of business associations, for your members)***
- ☐ ***Yes, positive for the industry***
- ✓ ***Yes, negative for the industry***
- ☐ ***Yes, positive for consumers***
- ✓ ***Yes, negative for consumers***
- ☐ ***No***
- ☐ ***Do not know***

4.2 Please explain your reply and illustrate with concrete examples (1000 character(s) maximum):

122. VBER as a framework remains relevant and helpful but it needs to be adapted to reflect the new market reality. Whilst brand owners do not think that a substantive overhaul of the VBER or VGL is needed, as further detailed throughout the Response, our view is that more clarity and flexibility is needed on specific points particularly given inconsistent enforcement at national level and the lack of engagement of the EC in the interpretation of the VGL.

(a) Protection of e-commerce/online sales

123. The retail landscape has changed significantly since the VBER and the VGL were drafted. Key consumer trends which have impacted upon the changing retail landscape include (i) the rise of omni-channel distribution and the growth of online retail; (ii) consumer demands for differentiated and experience-driven retail; (iii) the importance of access to data in reacting to consumer needs and expectations; and (iv) the shift in power from brand owners / suppliers to big retailers/e-tailers and platforms.

124. Since the VBER and VGL were drafted, the retail landscape has changed beyond recognition and this trend will continue in the future, as brand owners and retailers continue to invest and innovate. The VBER and VGL should be updated to reflect these changes to the retail environment, and should offer the necessary flexibility to allow brand owners and retailers to continue to adapt to future changes and challenges, and to provide consumers with the seamless omni-channel experience which they expect.

(b) Pricing

125. The VGL sees pricing as the only or at least the most important element of competition. We welcome and agree with the EC's view stated during the e-commerce sector inquiry that price is not the only parameter of competition. This position should be clarified in the VGL. Price competition can also have a negative impact on quality, innovation, consumer experience, service, brand image, etc., which are also important parameters of competition. This is sometimes overlooked in the analysis of antitrust regulators, who tend to focus solely on price competition. Brand owners should have the freedom to incentivize retailers to invest in those seamless shopping experiences across all channels, whilst minimising the risk of free-riding.

126. In particular, the current framework approach is overly protective of e-commerce and unnecessarily suspicious of the support provided to bricks and mortar stores. Given the new current economic reality, e-commerce players are powerful and no longer need protection, whilst the bricks and mortar channel needs brand owner support if there is to be a future to the high street shops.

127. As described in more detail throughout the Response, the current approach on dual pricing is unworkable and unnecessarily strict. The VGL requires manufacturers to equally treat retailers which are not in an equal position, and can actually disadvantage high-service retailers. The exemption on the provisions of "fixed fees" under **Recital 52 (d) VGL** is not workable in practice and brand owners and bricks and mortar stores rarely find themselves able to effectively rely on that. Similarly the exception provided in para. 64 of the VGL is rarely relevant. Brand owners should have the flexibility to offer retailers a specific discount off products that are sold in-store to support the retailer's in-store efforts. The EC should at the very least give further guidance on the situations in which dual pricing could be justified under Article 101(3) TFEU.

4.3 Would you expect any effect in case the VBER were not to be prolonged and the VGL were to be withdrawn? (multiple answers are allowed)

- ☐ ***Yes, positive for my organisation (in case of business associations, for your members)***
- ✓ ***Yes, negative for my organisation (in case of business associations, for your members)***
- ☐ ***Yes, positive for the industry***
- ✓ ***Yes, negative for the industry***
- ☐ ***Yes, positive for consumers***
- ✓ ***Yes, negative for consumers***
- ☐ ***No***
- ☐ ***Do not know***

4.4 Please explain your reply and illustrate with concrete examples (1000 character(s) maximum):

128. If the VBER were to be allowed to expire and the VGL were to be withdrawn, the effects would be primarily negative for brand owners, the industries in which they operate, and ultimately for the consumers.

129. This is because in the absence of the VBER and VGL, every aspect of a supplier's distribution strategy and policy would be subject to scrutiny by every NCA and national court in the EEA. Experience shows that there is already little consistency of application of Article 101 TFEU at national level, so withdrawing the framework of analysis introduced by the VBER would exacerbate the issue. Having no harmonised application of Article 101 TFEU to vertical agreements would make it impossible to maintain a consistent distribution system across the EEA and would go against the essence of a digital single market.

4.5 Do you see the need for a revision of the VBER in light of major trends and/or changes during the past 5 years (e.g. the increased importance of online sales and the emergence of new market players)?

- ✓ ***Yes***
- ☐ ***No***

☐ ***Do not know***

4.6 Please explain your reply (1000 character(s) maximum):

130. The retail landscape has changed significantly since the VBER was drafted. Key consumer trends which have impacted upon the changing retail landscape include (i) the rise of omni-channel distribution and the growth of online retail; (ii) consumer demands for differentiated and experience-driven retail; (iii) the importance of access to data in reacting to consumer needs and expectations; and (iv) the shift in power from brand owners / suppliers to big retailers/e-tailers and platforms.

131. Since the VBER was drafted, the retail landscape has changed beyond recognition and this trend will continue in the future, as brand owners and retailers continue to invest and innovate. The VBER should be updated to reflect these changes to the retail environment, and should offer the necessary flexibility to allow brand owners and retailers to continue to adapt to future changes and challenges, and to provide consumers with the seamless omni-channel experience which they expect.

4.7 Do you see the need for a revision of the VGL (including Section VI) in light of major trends and/or changes during the past 5 years (e.g. the increased importance of online sales and the emergence of new market players)?

✓ ***Yes***

☐ ***No***

☐ ***Do not know***

4.8 Please explain your reply (1000 character(s) maximum):

132. The retail landscape has changed significantly since the VGL was drafted. Key consumer trends which have impacted upon the changing retail landscape include (i) the rise of omni-channel distribution and the growth of online retail; (ii) consumer demands for differentiated and experience-driven retail; (iii) the importance of access to data in reacting to consumer needs and expectations; and (iv) the shift in power from brand owners / suppliers to big retailers/e-tailers and platforms.

133. Since the VGL was drafted, the retail landscape has changed beyond recognition and this trend will continue in the future, as brand owners and retailers continue to invest and innovate. The VGL should be updated to reflect these changes to the retail environment, and should offer the necessary flexibility to allow brand owners and retailers to continue to adapt to future changes and challenges, and to provide consumers with the seamless omni-channel experience which they expect

4.9 Please (i) list the paragraphs of the VBER and/or the VGL that would require a revision, (ii) identify the major trends and/or changes motivating the need for such revision and (iii) provide a short explanation with concrete examples:

BRANDS FOR EUROPE

	Articles of the VBER and/or recitals of the VGL	*Major trends/changes*	*Short explanation/concrete examples*
1 Dual-distribution	Recitals 27-28 VGL.	See paragraphs 25-31 of the Response	See paragraphs 25-31 of the Response
2. Market Share Threshold	Article 3 and Article 7 VBER, and recitals 86-95 VGL)	See paragraphs 32 -44 of the Response	See paragraphs 32 -44 of the Response
3 Agency agreements	Recitals 12-21 VGL	See paragraphs 22-24 of the Response	See paragraphs 22-24 of the Response
4 RPM, RRPs and price monitoring	Article 4 (a) VBER/ Recitals 48-49 and 223-229 VGL	See paragraphs 38-55, 96-100 and 125 of the Response	See paragraphs 38-55, 96-100 and 125 of the Response
5 Dual pricing	Article 4 (a) VBER/ Recital 52 (d) and 64 VGL	See paragraphs 75-81, 109-110 and 126-127 of the Response	See paragraphs 75-81, 109-110 and 126-127 of the Response
6 Territorial and customer restrictions	Article 1(a) VBER	See paragraphs 68 and 101 of the Response	See paragraphs 68 and 101 of the Response
	Article 4(b)(i) VBER	See paragraphs 58 and 102 of the Response	See paragraphs 58 and 102 of the Response
	Recital 54 VGL	See paragraphs 82 -83 and 111 - 112 of the Response	See paragraphs 82 -83 and 111 - 112 of the Response
	Recital 56 VGL	See paragraphs 69 and 103 of the Response	See paragraphs 69 and 103 of the Response
	Recital 57 VGL	See paragraphs 70 and 104 of the Response	See paragraphs 70 and 104 of the Response
	Recitals 60, 61, 62 and 64 VGL	See paragraphs 88 and 89 of the Response	See paragraphs 88 and 89 of the Response
	Recital 63 VGL	See paragraphs 71, 89 and 105 of the Response	See paragraphs 71, 89 and 105 of the Response
	Recital 175 VGL	See paragraphs 72 and 106 of the Response	See paragraphs 72 and 106 of the Response
	Recital 176 VGL	See paragraphs 73 and 107 of the Response	See paragraphs 73 and 107 of the Response
	Recital 182 VGL	See paragraphs 74 and 108 of the Response	See paragraphs 74 and 108 of the Response

	Articles of the VBER and/or recitals of the VGL	*Major trends/changes*	*Short explanation/concrete examples*
7. Excluded restrictions	Article 5 VBER and recitals 66-69 VGL	See paragraphs 86-87 and 114-116 of the Response	See paragraphs 86-87 and 114-116 of the Response

4.10 Is there any area for which the VBER and/or the VGL currently do not provide any guidance while it would be desirable?

✓ ***Yes***

☐ ***No***

☐ ***Do not know***

4.11 Please identify the area concerned and explain the reasons (1000 character(s) maximum):

134. The VBER and the VGL do not address at all and should provide further guidance on the use of: (i) price comparison websites, and (ii) restrictions placed on resellers regarding the use of brand names and trademarks for search engines (e.g., Google AdWords). For instance:

a. The VGL should clarify that restrictions relating to price comparison websites should not be treated differently to those relating to third party platforms.

b. The VGL should clarify when restrictions on the use of brand names or trademarks in search engines (e.g. Google AdWords) are likely to be hardcore restrictions of EU competition law. Whilst the EC decision in *Guess* treated a ban on the use of the Guess brand name and trademark in Google AdWords as a "by object" infringement, in the e-commerce Staff Working Paper[60] the EC also stated that such restrictions could help avoid confusion with the manufacturer's website. The brands are of the view that it benefits consumers to be shown the link to the brand owners page at the top of the results. Therefore, further clarity on this point is needed and, in particular, the EC should clarify that restrictions on bidding for a particular positioning in the list of results rendered by search engines such as Google AdWords (as opposed to a ban on bidding for Google AdWords) are block exempted.

135. In addition, there are other areas in the VBER and the VGL where the current guidance needs to be further clarified, as described in detail throughout the Response.

60 Staff Working Paper, paragraphs 632 and 997, available here http://ec.europa.eu/competition/antitrust/sector_inquiry_swd_en.pdf.

5. COHERENCE (DOES THE POLICY COMPLEMENT OTHER ACTIONS OR ARE THERE CONTRADICTIONS?)

5.1 Based on your experience, are the VBER and the VGL coherent with other instruments that provide guidance on the interpretation of Article 101 of the Treaty (e.g., other Block Exemption Regulations, the Horizontal Guidelines and the Article 101(3) Guidelines)?

✓ ***Yes***

☐ ***No***

☐ ***Do not know***

5.2 Please explain your reply (1000 character(s) maximum):

136. There is no major incoherence between the VBER and the VGL and other instruments that provide guidance on the interpretation of Article 101(1) TFEU.

5.3 Based on your experience, do the VBER and the VGL contradict other existing and/or upcoming legislation and/or policies at EU or national level?

✓ ***Yes***

☐ ***No***

☐ ***Do not know***

5.4 Please explain your reply (1000 character(s) maximum):

137. The Geo-blocking Regulation provides that agreements which require traders to restrict passive sales are void. However, this is contrary to the exception provided for in **Recital 61 VGL** which states that in some limited cases a ban on passive sales may fall outside the scope of Article 101(1) of the Treaty, if for example an exclusive distributor has invested significantly to start up or develop a new market. In this case, the VGL state that restrictions on passive sales by other distributors into the exclusive territory may generally not be a breach of competition law if they are necessary for the exclusive distributor to recoup its investment. **Recital 61 VGL** should therefore clarify that the exception continues to apply irrespective of the application of the Geo-blocking Regulation.

6. EU ADDED VALUE (DID EU ACTION PROVIDE CLEAR ADDED VALUE?)

6.1 Do the VBER and the VGL add value in the assessment of the compatibility of vertical agreements with Article 101 of the Treaty compared to, in their absence, a self-assessment by undertakings based on other instruments that provide guidance on the interpretation of Article 101 of the Treaty (e.g., the Article 101 (3) Guidelines, the enforcement practice of the Commission and national competition authorities, as well as relevant case-law at EU and national level)?

✓ ***Yes***

☐ ***No***

☐ ***Do not know***

6.2 Please explain your reply (1000 character(s) maximum):

138. The VBER adds significant value in the assessment of the compatibility of vertical agreements with Article 101 TFEU compared to, in their absence, a self-assessment exercise. The framework is clear and provides legal certainty, which in itself adds value.

139. The VGL has, however, limited the full potential of the VBER to add value, particular in areas such as e-commerce where the VGL is particularly unclear and/or fails to recognise the current commercial reality. This in turn has been exacerbated by an inconsistent application or interpretation of the VGL by the NCAs. The coherence and harmonisation between the VBER, the VGL, the EC decisional practice and the decisional practice at NCA level was partly lost due to the lack of engagement of the EC, and the resulting divergent enforcement by the NCAs and national courts.

140. In order for the VBER and VGL framework to provide further added value, the EC should also use its powers under Article 11 (*Cooperation between the Commission and the competition authorities of the Member States*) and Article 16 (*Uniform application of Community competition law*) of Regulation 1/2003 where necessary and appropriate to achieve its objective of a digital single market. The EC needs to honour its commitment made in the Final Report, where it noted that it will ensure consistent application of EU competition rules by broadening the dialogue within the European competition network on e-commerce-related enforcement[61].

7. Final comments and document upload

7.1 Is there anything else you would like to add which may be relevant for the evaluation of the VBER and/or the VGL (1000 character(s) maximum)?

141. No

[61] Final Report, paragraph 75.

ANNEX 1

THEORIES OF HARM ASSOCIATED WITH RPM DO NOT JUSTIFY HARDCORE RESTRICTION STATUS

1. INTRODUCTION

1.1 RPM is usually viewed by competition authorities as causing greater harm than other types of vertical restraint simply because of the restrictions placed on the resale pricing behaviour of the buyer. However, and in light of economic theory which views RPM not to be presumptively more harmful than other vertical restraints,[62] it is informative to set out the precise mechanisms by which RPM may cause competitive harm and then assess the extent to which a presumption of harm would be justified.

1.2 According to the VGL, vertical agreements which involve RPM may restrict competition as they are[63]:

(a) facilitating supplier collusion via increased pricing transparency;

(b) facilitating buyer collusion by eliminating intra-brand competition;

(c) generally softening competition among suppliers and/or buyers;

(d) preventing buyers from lowering prices to their customers;

(e) increasing the ability to extract monopoly or higher prices;

(f) raising foreclosure concerns; and

(g) reducing innovation.

1.3 We discuss the preceding theories of harm in more detail below, explaining the key assumptions on which they are based. This in turn allows us to assess the extent to which any of the preceding theories justify a presumption of harm.

2. Facilitating supplier collusion via increased pricing transparency

2.1 The VGL states: "*RPM may facilitate collusion between suppliers by enhancing price transparency in the market, thereby making it easier to detect whether a supplier deviates from the collusive equilibrium by cutting its price. RPM also undermines the incentive for the supplier to cut its price to its distributors, as the fixed resale price will prevent it from benefiting from expanded sales. This negative effect is in particular plausible if the market is prone to collusive outcomes, for instance if the manufacturers form a tight oligopoly and a significant part of the market is covered by RPM agreements*"[64].

2.2 It should be noted up front that this theory of harm relies on suppliers' ability to coordinate on a single dimension of competition, namely price. However, suppliers often compete on multiple dimensions, especially in the case of branded consumer goods. For example, in addition to price, producers compete on product quality, product characteristics and marketing effort. It is therefore by no means clear that increased transparency in respect of only price would facilitate coordination between suppliers, since competitors can be expected to impose a competitive constraint on each other through, for example, improved product quality and/or marketing effort.

2.3 Notwithstanding the above, even under the strong assumption that competition takes place on price only, RPM still needs to be evaluated on a case-by-case basis. The underlying theory can be explained by the following example. Consider a situation where two manufacturers, A and B, sell to distributors which in turn sell to end consumers. Suppose that the manufacturers wish to collude; they agree that

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62 See Motta, M. (2004) "Competition Policy: Theory and Practice", Cambridge University Press, page 377.
63 VGL, paragraph 224.
64 VGL, paragraph 224.

each should charge a wholesale price of EUR 10. However, if the manufacturers cannot observe each other's wholesale prices then they cannot check appropriately whether or not the collusive agreement is being adhered to. Collusion is not stable where one party can cheat (i.e., undercut the collusive price and gain greater profit) without being detected.

2.4 One possible way to infer the wholesale price charged to a distributor is via the distributor's prices. If, for example, Manufacturer A's product was sold at a relatively low price by a distributor, this might be a sign that Manufacturer A had "cheated" on the collusive agreement and lowered its wholesale price. However, a distributor may reduce its price for a number of reasons, other than because its wholesale price has been lowered. For instance, the distributor's lower price might reflect a fall in its demand or other costs unrelated to manufacturer A's product. This means that the distributor's pricing behaviour does not permit collusion to be monitored effectively.

2.5 If both manufacturers engage in RPM then the situation may change. If a manufacturer wishes to "cheat" (i.e., to undercut the collusive wholesale price so as to sell more units) then there is no point in lowering the wholesale price and leaving the maintained price unchanged. That would give additional margin to the distributor but without making additional sales (since the distributor's price would be unchanged). In order to cheat, the manufacturer would therefore have to lower both the wholesale price and the level of resale prices. In this way, cheating becomes observable and collusion can be monitored by both manufacturers making it more likely to be stable.

2.6 In short, this theory of harm requires the following conditions:

(a) more than one manufacturer engages in RPM;

(b) each manufacturer's maintained price is clearly observable to the other manufacturer (but there is not sufficient price transparency without RPM);

(c) all other conditions in the upstream market are "just right" for collusion such that once the monitoring of manufacturer behaviour via the maintained price becomes possible, there are no other barriers to collusion.[65]

2.7 The above suggests that a number of conditions have to be met for this theory of harm to apply. Indeed, the VGL themselves refer to a significant part of the market being covered by RPM agreements and the existence of a tight oligopoly among suppliers. Accordingly, a presumption of harm without an assessment of the facts of the case is not justified.

3. Facilitating buyer collusion by eliminating intra-brand competition

3.1 The VGL states: "*by eliminating intra-brand price competition, RPM may also facilitate collusion between the buyers, i.e. at the distribution level. Strong or well organised distributors may be able to force/convince one or more suppliers to fix their resale price above the competitive level and thereby help them to reach or stabilise a collusive equilibrium. This loss of price competition seems especially problematic when the RPM is inspired by the buyers, whose collective horizontal interests can be expected to work out negatively for consumers*"[66].

3.2 Put differently, the theory of harm is that if distributors are sufficiently strong, they may be able to persuade one or more suppliers to set the resale price above the competitive level, enabling the distributors to reach or maintain a collusive agreement. This scenario is akin to a stark form of hub-and-spoke cartel where the facilitator of downstream collusion is one (or more) upstream firms. In effect, distributors ask their suppliers to set the collusive price for them. As such, in order for RPM to facilitate collusion, the market structure should be such that absent RPM it is difficult to sustain

65 For a discussion of the characteristics that would make an industry more susceptible to collusive behaviour, see e.g. Bishop, S. and Walker, M. (2010) The Economics of EC Competition Law: Concepts, Application and Measurement, 2nd Edition, chapter 5.

66 VGL, paragraph 224.

collusive outcomes. In other words, RPM is the key "missing ingredient" required for downstream collusion and no further market features would prevent a collusive outcome.

3.3 It is therefore critical that the specific features of the market in questions be considered when assessing whether this theory of harm might be valid. Indeed, the reference to "*Strong or well organised distributors*" in the VGL confirms the importance of investigating the facts of the case before reaching "by object" conclusions.

4. Generally softening competition among suppliers and/or buyers

4.1 The VGL states: "*RPM may more in general soften competition between manufacturers and/or between retailers, in particular when manufacturers use the same distributors to distribute their products and RPM is applied by all or many of them*"[67].

4.2 The critical features required to generate the harmful results in theory are that (i) all (or many) suppliers engage in RPM and (ii) suppliers sell through the same distributors.[68] While with this pervasive structure of RPM in place, it can be shown (in theory) that monopoly pricing may be sustainable, it is critical that the facts of the case are taken into account and therefore a presumption of harm cannot be justified.

5. Preventing buyers from lowering prices to their customers

5.1 The VGL states: "*the immediate effect of RPM will be that all or certain distributors are prevented from lowering their sales price for that particular brand. In other words, the direct effect of RPM is a price increase*"[69].

5.2 First, the allegation that the direct effect of RPM is to increase prices is not correct. It is possible but it ought not be presumed since the counterfactual may be a price that is not materially different. If inter-brand competition is strong, a supplier cannot use RPM to implement a supracompetitive price at the retail level.[70] Put simply, if the brand owner has no market power and it faces competition from other manufacturers, any maintained price would have to be set at the competitive level otherwise distributors and their customers would switch to other manufacturers' products. This particular theory of harm of lost intra-brand competition can therefore be ruled out in the absence of market power at the manufacturer level.[71]

5.3 Second, the statement that the direct effect of RPM is to increase prices is also unnecessary inflammatory. It suggests that RPM is necessarily harmful. A price increase *in and of itself* cannot be considered anticompetitive. For example, a supplier could have procompetitive reasons for switching to better quality, higher cost input for its product. Such a cost increase could ultimately result in a downstream price increase, but in and of itself this is clearly not anticompetitive. Similarly, there could be procompetitive reasons why a supplier might want its retailers to invest in increased marketing effort and customer service, and implementing a downstream price increase by means of RPM can be an efficient means to achieve this outcome.[72]

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67 VGL, paragraph 224.

68 Rey, P. and Vergé, T. (2010). "Resale Price Maintenance and Interlocking Relationships", Journal of Industrial Economics, vol. 58, pp. 928-961.

69 VGL, paragraph 224.

70 OECD (2008) "Resale Price Maintenance", page 33.

71 Market power refers to the ability of a companyto profitably raise price above the competitive level. A firm with a high market share that faces limited competition from other firms (e.g. because their products are highly differentiated, or they face capacity constraints) and weak buyers (e.g. with limited negotiation strength) could be deemed to have market power.

72 Rey, P. and Verge, T. (2008) "Economics of vertical restraints", in Buccirossi, P (ed.) *Handbook of Antitrust Economics*, pages 353 – 390.

6. Increased ability to extract monopoly or higher prices

6.1 The VGL states: "*RPM may lower the pressure on the margin of the manufacturer, in particular where the manufacturer has a commitment problem, that is, where it has an interest in lowering the price charged to subsequent distributors. In such a situation, the manufacturer may prefer to agree to RPM, so as to help it to commit not to lower the price for subsequent distributors and to reduce the pressure on its own margin*."[73]

6.2 This theory of harm refers to ways that a monopolist RPM may allow (i.e., a firm that is the only manufacturer of a product for which there are no substitutes) to extract greater monopoly profit from its distributors[74]. In particular, if there is scope for the monopolist to offer different prices to different retailers[75],once the monopolist manufacturer has offered one price to one distributor, its profit maximising behaviour is to offer a lower price to the next distributor[76]. However, since all distributors anticipate that the monopolist will behave this way, this deters each distributor from paying a high wholesale price in the first place[77]. Therefore, unless a monopolist can commit to a common price for all distributors, the monopoly price will not be credible.

6.3 In theory, RPM solves this commitment problem by allowing the monopolist manufacturer to guarantee that no distributor will be undercut. In other words, all distributors would be aware that a maintained price (i) exists and (ii) applies to all distributors; each distributor would then not fear that paying a higher wholesale price than other distributors would mean lost sales at the distribution level (since the distribution price is maintained).

6.4 However, this concern is not valid when there is inter-brand competition. In that case, if a manufacturer sought to impose RPM so as to permit it to set higher wholesale prices, that manufacturer's retail prices would be undercut by competing products from other manufacturers. In short, with effective competition among manufacturers, an individual manufacturer would be constrained by competition to set its price at the competitive level. Therefore this theory of harm does not provide a justification for a presumption of harm.

7. Foreclosure concerns

7.1 The VGL states: "*RPM may be implemented by a manufacturer with market power to foreclose smaller rivals. The increased margin that RPM may offer distributors, may entice the latter to favour the particular brand over rival brands when advising customers, even where such advice is not in the interest of these customers, or not to sell these rival brands at all*."[78]

7.2 As stated explicitly in the VGL, in order for this theory of harm to be relevant, inter-brand competition must be ineffective and the firm imposing the RPM must have market power. Further, the products in question should be differentiated products (given the above refers to branded products) and the threat of delisting by a distributor should be a legitimate concern, e.g. because the distributor has limited capacity to carry the products of rival firms. Further, rival manufacturers must be unable to match the terms of supply offered by the supplier using RPM to encourage customers to favour their brand. Finally, end-customers must not be sophisticated; they must be liable to being duped by distributors into buying a product that is not well suited for them.

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73 VGL, paragraph 224.

74 Rey, P. and Verge, T. (2008) "Economics of vertical restraints", in Buccirossi, P (ed.) Handbook of Antitrust Economics, pages 353 – 390.

75 For example, contractual terms are negotiated in secret between the manufacturer and its distributors and are not signed simultaneously.

76 The intuition behind this outcome is similar to the problem of the durable good monopolist. See Rey, P. and Tirole, J. (2007) "A Primer on Foreclosure", in Armstrong, M. and Porter, R. (ed.) *Handbook of Industrial Organization*, Volume 3.

77 Because each distributor fears that if it pays a high wholesale price, other distributors might receive a lower wholesale price and in turn undercut the distributor that pays the high wholesale price.

78 VGL, paragraph 224.

8. Reduction in innovation at the distributor level

8.1 The VGL states: "*RPM may reduce dynamism and innovation at the distribution level. By preventing price competition between different distributors, RPM may prevent more efficient retailers from entering the market and/or acquiring sufficient scale with low prices. It also may prevent or hinder the entry and expansion of distribution formats based on low prices, such as price discounters*"[79].

8.2 For this theory to have relevance, RPM must be employed by all (or at least the large majority of) manufacturers. If not, distributors can establish themselves by selling products of manufacturers which do not employ RPM.

9. Concluding remarks

9.1 The preceding paragraphs have described the many theories of harm associated with RPM, as set out in the VGL. To the extent that market realities do not match the assumptions of the economic models on which these theories of harm rely, anti-competitive concerns would not be valid. It follows that a presumption of harm is not justified, in particular where market power is absent.

[79] VGL, paragraph 224.

ANNEX 2

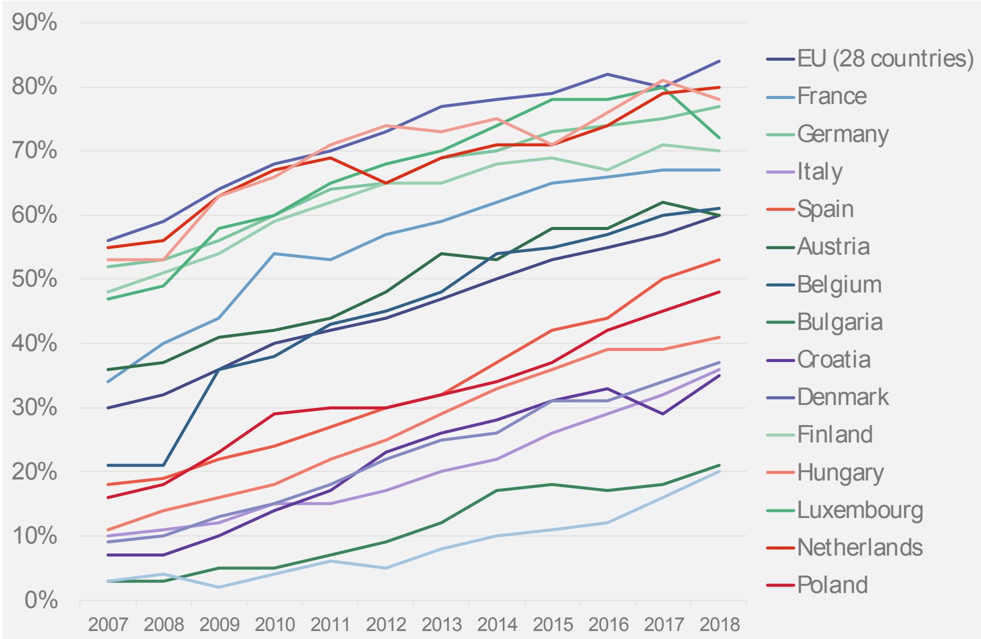
VBER CONSULTATION SUPPORT FOR BRANDS FOR EUROPE

May 2019

THERE HAS BEEN A RISE IN THE NUMBER OF PEOPLE WHO SHOP ONLINE IN THE EU-28 BETWEEN 2007 AND 2018.

- In 2007 the proportion of EU-28 individuals who had used the internet to order goods or services stood at 30%. By 2018 that figure had increased to 60%. The countries with the highest concentrations of online shoppers were:
  - Denmark with 84% of individuals engaging in online shopping; the UK with 83%; and the Netherlands with 80%.
- While there was strong growth across most countries, some grew faster than others:
  - Eastern European nations grew rapidly once again, closing the gap with other nations. The proportion of Lithuanians who used the internet for ordering goods grew at an average annual rate of 19.6% between 2007 and 2018.
  - Bulgaria grew at an average annual rate of 19.4%; followed by Romania with 18.8%; and Croatia with 15.4%.
- Italy and Spain lag behind the other members of the big 5 on this metric. Their proportions grew at a faster rate than those of the other big 5, as might be expected from conditional convergence, though there remains somewhat of a gulf between them.

Figure: % of individuals using the internet for ordering goods or services, 2007-2018



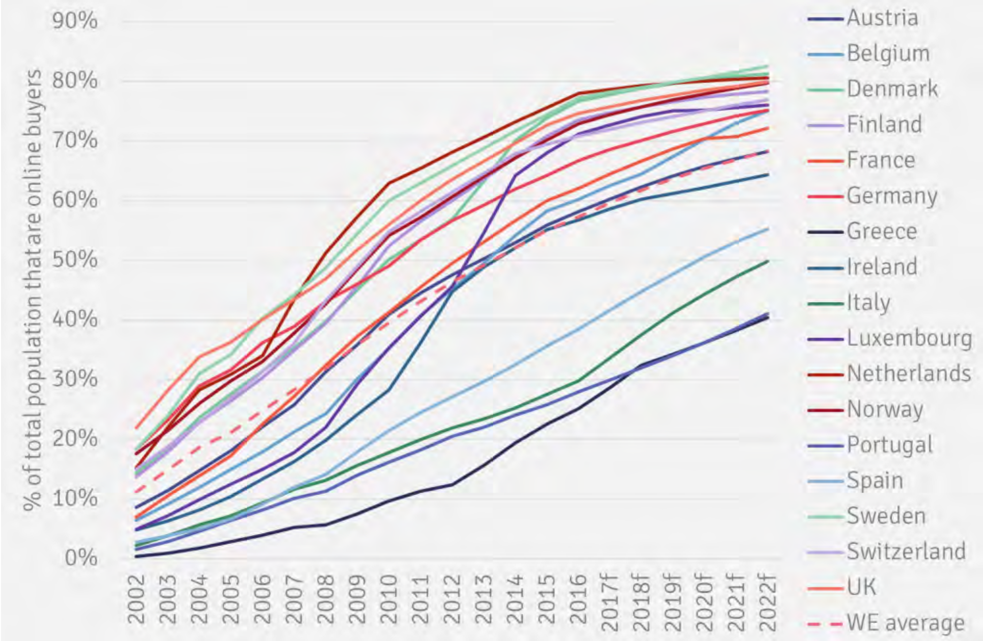
Source: Analysis of Eurostat data (tin00096).

Source(s):
Eurostat

FORRESTER DATA PROVIDES SIMILAR ESTIMATES, IN RELATION TO THE PROPORTION OF THE TOTAL POPULATION THAT ARE ONLINE BUYERS IN WESTERN EUROPE.

- The chart below shows the actual (2002-2016) and forecast (2017-2022) proportion of the total population that are online buyers in Western Europe.

Figure: % of total Western Europe population that are online buyers, 2002-2022f

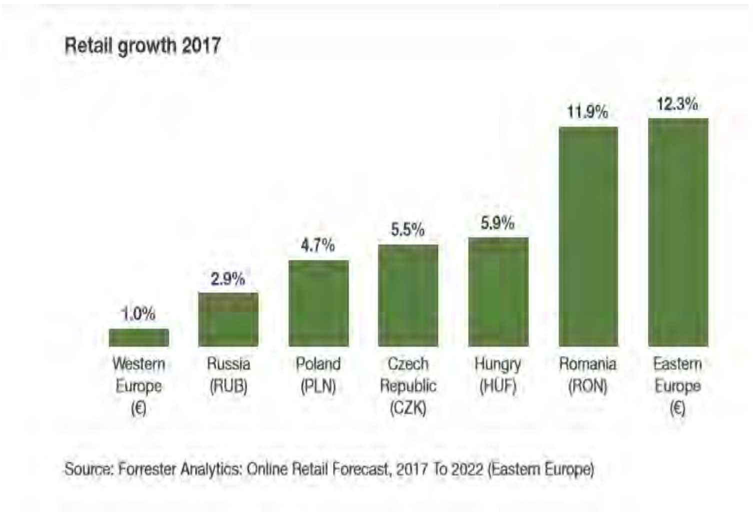


Source: Analysis of Forrester Data, Online Retail Forecast, 2017 to 2022 (Western Europe), Q4 2017 update.

FORRESTER CONSIDERS THAT EASTERN EUROPE IS ONE OF THE FASTEST GROWING (ONLINE) RETAIL MARKETS.

- Income growth is a factor helping Eastern Europe's retail industry to grow at a faster rate than Western Europe: real GDP per capita in Romania, Poland, Hungary, and the Czech Republic grew significantly faster than in France, Germany, and the UK in 2017. (Forrester Analytics, 2018)

- Eastern Europe is forecast to see annual retail sales growth of 4.2% over the next five years, significantly faster than the 2.9% growth of Western Europe. Romanian retail sales grew by 11.9% in 2017, outpacing the 11.2% and 10.4% retail growth of China and India, respectively.



- eCommerce grew in 2017 across Eastern Europe thanks to:
  - **More people being online.** Online populations in Romania, Poland, and Hungary grew by 4%, 3%, and 2%, respectively, significantly faster than the 1% growth of Europe.
  - **More online buyers.** Across Eastern Europe, online buyers grew fastest in Romania, with 12% growth, in 2017.
  - **More spend per online buyer.** The average value of Romanian online card transactions increased by 20% in 2017.
  - **More retail sales online.** The largest fashion retailer in Poland, more than doubled its online sales in 2017.

- Cross border ecommerce is also forecast to grow in Eastern Europe, with Eastern European online buyers becoming more sophisticated and more likely to purchase goods across borders, and becoming be less reliant on cash to pay for purchases.

Source(s):
Forrester Analytics, Online Retail Forecast, 2017 to 2022 (Eastern Europe), 2018.

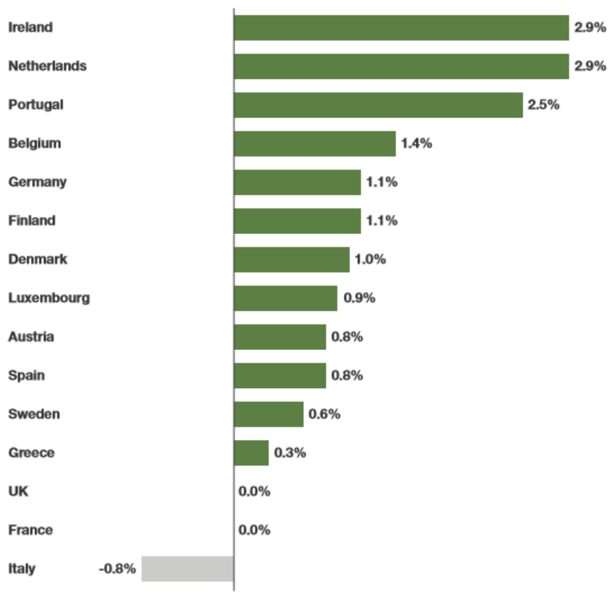
FORRESTER CONSIDERS THAT WESTERN EUROPE'S RETAIL GROWTH IS VARIED AND THAT ONLINE SALES GREW 10 TIMES FASTER THAN THE RETAIL MARKET IN 2017.

Retail growth varies across Western Europe

- Consumer confidence in Eurozone is at an eight-year high, and consumers are more optimistic about employment, savings and the economy. However, retail sales growth and economic activity growth vary considerably across Europe.

- Retail sales growth is strong in Ireland, the Netherlands and Portugal and subdued in France, the UK and Italy.

2017 retail growth excluding inflation



Source: "European Economic Forecast: Autumn 2017," European Union, November 2017

Online sales grew 10 times faster than the retail market in 2017

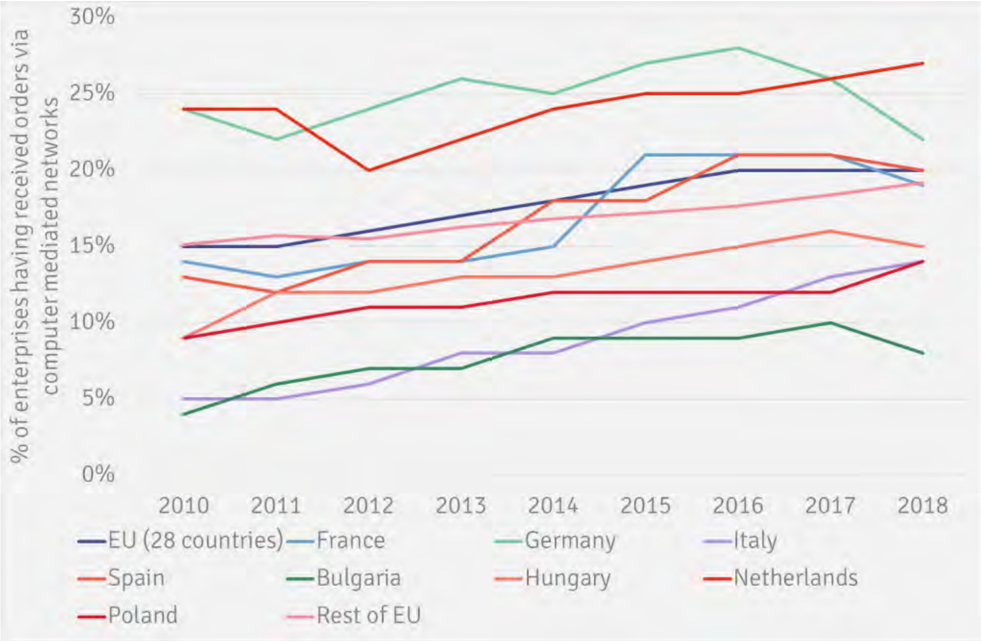
- *Online retail sales* will grow at an average of 11.9% per year over the next five years in Western Europe and Italy and Spain will see the fastest online sales growth.
- *Online grocery sales* growth is strong in France and the Netherlands. In the Netherlands, online grocery sales grew to €1 billion in 2017, and 5% of supermarket sales are online. Ocado and supermarket retailer Groupe Casino have developed a strategic alliance to further accelerate online grocery sales in France. Carrefour, one of the largest supermarket retailers in France, plans to triple its online grocery sales by 2020. Although grocery will be one of the fastest-growing online retail categories, just 4.5% of grocery sales will occur online in 2022.
- Online sales growth is strong in beauty, DIY, and jewellery. In Germany, beauty and cosmetics sales grew by 14% in 2017, faster than the overall German online retail market. The UK drives online DIY sales in Western Europe, with 14% of its sales online, which is twice the Western European average.
- eCommerce growth is strong in Italy, Spain, and Ireland. eCommerce growth in Italy and Spain reached 24% and 19%, respectively, in 2017. Irish eCommerce grew six times faster than brick-and-mortar store sales.

Source(s):
Forrester Data, Online Retail Forecast, 2017 to 2022 (Western Europe), Q4 2017 Update 2018.

A HIGHER PROPORTION OF ENTERPRISES NOW OFFER ONLINE ORDERING CAPABILITIES.

- The proportion of enterprises who received orders via computer mediated networks increased from 15% in 2010 to 20% in 2018.
- The countries with the highest proportion of firms offering online purchasing were:
  - Ireland (35%)
  - Denmark and Sweden (32%)
  - Belgium (30%)
- The fastest growing countries, contributing to this upward trend, were:
  - Italy, recording an average annual growth rate in the proportion of firms offering online ordering of 14% between 2010 and 2018.
  - Slovenia grew at a rate of 10%; Slovakia, Bulgaria, and Cyprus all grew at an annual rate 9%.

Figure: % of enterprises having received orders via computer mediated networks, 2010-2018



Source: Analysis of Eurostat data (isoc_ec_eseln2).

Note that for some indicators very good comparability over time is achieved (e.g. internet access) since 2003 while for others it is satisfactory (e.g. e-commerce). Restricted comparability over time is also a consequence of necessary changes in definitions in order to measure the development of ICT.
https://ec.europa.eu/eurostat/cache/metadata/en/isoc_e_esms.htm

Source(s):
Eurostat

THE SHARE OF FIRMS' TURNOVER THAT STEMS FROM E-COMMERCE HAS ALSO INCREASED.

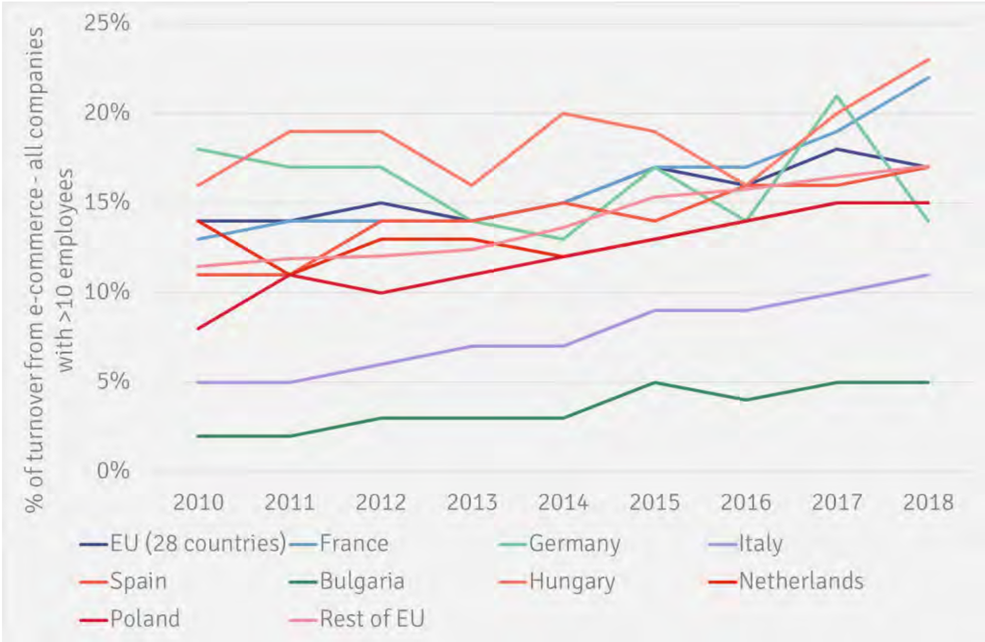
- The proportion of firms' turnover that stems from e-commerce activities also trended upwards over this time period. For the EU-28 the share of turnover grew from 14% in 2010 to 17% in 2018.

- The countries with the highest proportion of turnover derived from e-commerce related activities were:
  - Ireland (35%)
  - Belgium (32%)
  - Czech Republic (29%)
  - Sweden (24%)

- This metric was much more varied in performance. Many countries' shares fluctuated and even regressed slightly over the time period. As can be seen from the chart, the UK's trend dips downwards between 2015 and 2017. It should be noted that data on e-commerce may be less consistent across time-periods due to changes in ICT technologies, as well as changes in definitions (Eurostat).

- Many of the countries with the fastest growing shares are as such because of the small shares that they have started with.

Figure: % of turnover from e-commerce - all companies with >10 employees, 2010-2018



Source: Analysis of Eurostat data (isoc_ec_evaln2).

Source(s):
Eurostat

MOBILE PHONES ARE INCREASINGLY BEING USED FOR PURCHASING.

Purchasing

- Frequency of purchasing via mobile/smart phone is increasing over time globally (PWC Total Retail Survey, 2016):
  - In the 2012 global survey: 2% daily, 5% weekly, 9% monthly, 14% a few times a year, 70% never.
  - In the 2015 global survey: 3% daily, 9% weekly, 16% monthly, 7% once a year, 19% a few times a year, 46% never.

Source(s):
- *PwC,* Total Retail Survey, 2016.

CONSUMERS DESIRE MORE PERSONALISATION IN THEIR SHOPPING ‘EXPERIENCE’.

Desire for a more personalised shopping experience

- More than three out of four shoppers (79%) in the US, Canada and the UK like it when they receive complementary product offers or promotions based on their purchasing histories from a retailer, indicating a desire for more personalised shopping experiences. (Salesforce, 2016)

Desire for ‘experiences’

- Consumers are looking for ‘experiences’ - ‘experiential’ retail as a bridge between online and physical stores.
- Millennials driving trend of move away from strictly shopping for products towards a more engaging experience (e.g. applications, pop up features…). 78% of millennials would choose to spend money on an experience or event globally (KPMG, 2019).

Source(s):
- *Salesforce,* Connected Shopper Report, 2016.
- *KPMG,* Retail Trends 2019, 2019.

TECHNOLOGICAL CHANGES HAVE AFFECTED RETAIL DIFFERENTIATION AND 'EXPERIENCE'.

Use of AI

- The percentage of retailers deploying AI globally is rising (CapGemini, 2018):
  - 28% of retailers used AI in 2018; compared to
  - 17% in 2017; and
  - 4% in 2016.

- Brands are increasingly using AI to personalise the consumer experience globally (Deloitte, 2018). Among retailers that have adopted AI for at least one application:
  - 40% tailor pricing and promotions in real-time;
  - 40% provide relevant search results;
  - 39% personalise content across all channels;
  - 34% curate products that consumers are mostly looking for;
  - 32% enable visual search based on images;
  - 31% anticipate questions that consumers will ask; and
  - 26% utilise voice recognition for search, discovery and ordering.

Augmented reality

- In collaboration with Google, a German-based online retailer has developed an augmented reality app for its furniture specialty shop yourhome.de that lets customers place a sofa, table or shelf in their own home virtually so they can see for themselves if the item is suitable. The technology makes buying the right furniture easier and lessens the risk of returns. (Mintel, 2018)

- In April 2018, multichannel fashion retailer Zara rolled out an augmented reality experience across 120 stores worldwide. The app allows users to superimpose the garments that they are interested in on store window display models without having to try them on themselves. The item can then be purchased directly via smartphone. (Mintel, 2018)

Source(s):
- *CapGemini*, AI in Retail Report, 2018.
- *Deloitte*, Consumer Experience in the Retail Renaissance, 2018.
- *Mintel*, Online Retailing - Europe, July 2018.

CONSUMERS' USE OF SOCIAL MEDIA IS CHANGING HOW THEY RESEARCH AND SHOP FOR PRODUCTS.

The rise of social media influence

- Social media is an information source and a shopping channel globally (PWC, 2016).

- 45% of respondents across the globe said that reading reviews, comments and feedback influences their online shopping behaviour. In emerging markets, this share is 56%, while it is 36% in established markets. There are big differences between countries. For example, in Denmark only 22% of respondents are influenced by reading review, comments, and feedback, while in Malaysia that figure is 69%. (PWC, 2016)

- In Belgium, Denmark and Canada just 4%, 5% and 6% of online shoppers, respectively, said that purchasing directly via a social media channel was part of their shopping behaviour, while in Thailand more than half (51%) of respondents said they did this. Numbers were also high in India (32%), Malaysia (31%), China (27%) and Middle East (26%). (PWC, 2016)

- Social media drives sales, especially for millennials in the US (EY, 2015).

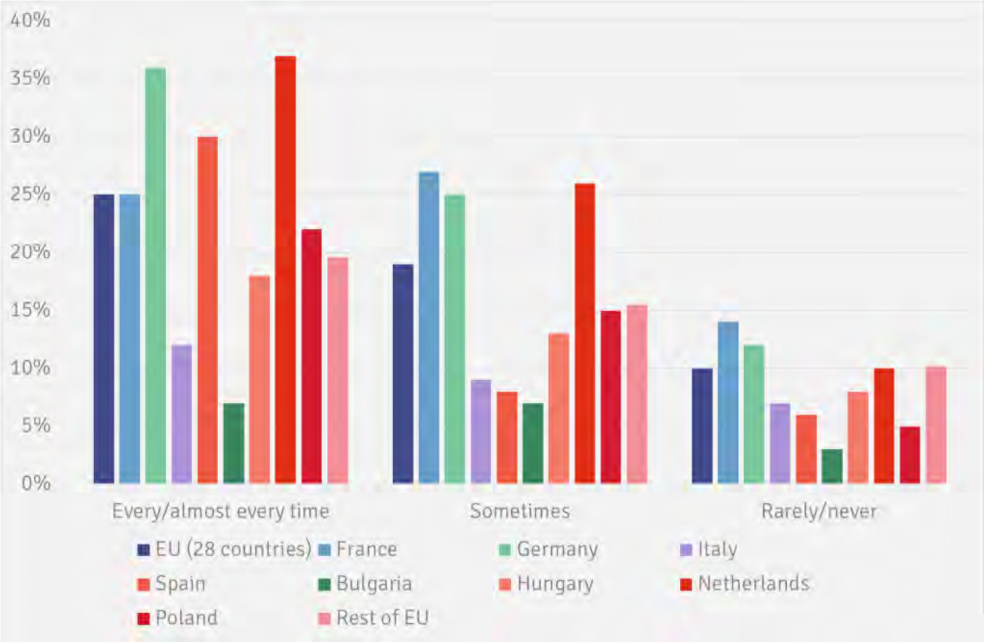
- PWC (2016) found that the following aspects of social media influence consumers' shopping behaviour globally:
  - 45% reading reviews, comments and feedback;
  - 44% receiving promotional offerings;
  - 30% viewing advertisements;
  - 25% staying on top of current fashion and product trends;
  - 22% writing reviews, comments and feedback;
  - 20% associating with particular brands or retailers; and
  - 16% purchasing products directly via a social media channel.

Source(s):
- *PwC,* Total Retail Survey, 2016.
- *EY*, The Impact of Digital Technology on Consumer Purchase Behaviour, 2015.

CUSTOMER REVIEWS – NOT ONLY ON SOCIAL MEDIA – ARE AN INCREASINGLY IMPORTANT ELEMENT IN A CONSUMERS' SEARCH AND SHOPPING JOURNEY.

- This data shows how individuals' behaviour with regards to pre-purchase product checks varies between countries.
- As can be seen, across the EU-28, 25% of individuals used customer reviews on websites or blogs every time or almost every time they made a purchase. 19% did so sometimes, and 10% did so rarely or never.
- 39% of UK and 36% of German individuals look at price or customer reviews every/almost every time they made a purchase.
- Italy has the lowest proportion of individuals making these checks of the big 5 every/almost every time they make a purchase.
- Other top performers are:
  - Luxembourg (39%)
  - Netherlands (37%%)
  - Malta (31%)

Figure: % of individuals that used customer reviews on websites or blogs before making a purchase, 2016



Source: Analysis of Eurostat data (isoc_ec_ibhv).

Source(s):
Eurostat

BRICKS AND MORTAR IS STILL IMPORTANT – IT JUST HAS TO ‘REINVENT’ ITSELF…

The rise of showrooms

- Growth of e-commerce sales is forecast to fall over the next few years across Europe, as illustrated in the following figure.

Figure: EU-28 + Norway and Switzerland retail sales: growth rates, 2016 – 2021f

Source: Colliers International, 2017

- To support future sales, online retailers are opening physical ‘showrooms’ to generate online sales and raise awareness of their brand. Examples of showrooms include brand flagship stores, pure-play physical stores and collaborations, for example:

  - **Brand flagship stores** give brands control in how their products are seen by the customer. Some brands are willing to make a loss on a physical store due to the halo effect to other divisions, such as wholesale or online.

  - **Pure-play physical store** allows customers to see, touch and feel what would be an otherwise online purchase. It grows brand presence and allows for instant gratification through immediate purchases.

  - **Collaborations** are a platform which showcases a range of brands and are often used by high-end fashion, high value tech and premium cosmetics. Showrooms offer an edge over the fiercely competitive markets of premium fashion, design and beauty.

Source(s):
- *Colliers International*, Fancy Seeing You Here! Online retailers and the growth of showrooming, 2017.

… AS CONSUMERS VALUE BEING ABLE TO GO INTO PHYSICAL RETAIL STORES.

- Despite the rapid growth of ecommerce, consumers still enjoy shopping at brick and mortar stores, referencing the ability to touch and feel the merchandise (66%) or the option to get merchandise immediately (61%) in the US, Canada and the UK. (Salesforce, 2016)

- In 2017, most of retail spending still takes place in physical stores (Colliers, 2019):
  - 82% in the UK;
  - almost 85% in Germany;
  - around 90% in France; and
  - more than 95% in Poland.

- Brick and mortar is predicted to grow between 2017 and 2021 in the EU-28 + Norway and Switzerland (Colliers, 2017)

- Forrester Data (2018) consider that e-commerce growth will force retailers to reconfigure their physical stores as footfall continues to fall. In particular:
  - In the UK, shopping centre footfall declined by 2.7% in the first nine months of 2017.
  - In-store pickup of an online order moderately increases store footfall and can provide additional sale opportunities. In 2017, only 20% of online orders were picked up in-store at Dixons PC World, whereas at Ceconomy, the largest consumer electronics retailer in Europe, consumers picked up more than 40% of their online orders in-store in 2017.

Source(s):
- *Salesforce,* Connected Shopper Report, 2016.
- *Colliers International*, City Retail, 2019.
- *Colliers International,* Fancy Seeing You Here! Online retailers and the growth of showrooming, 2017.
- *Deloitte*, Consumer Experience in the Retail Renaissance, 2018.
- *Forrester Data*, Online Retail Forecast, 2017 to 2022 (Western Europe), Q4 2017 Update, 2018.