Public questionnaire for the 2018 Evaluation of the Vertical Block Exemption Regulation – Submission by the Dutch Competition Law Association (*Nederlandse Vereniging voor Mededingingsrecht, VvM*)

To : European Commission
From : Dutch Competition Law Association (Nederlandse Vereniging voor Mededingingsrecht, "**VvM**")
Re : Annex A to the response of the VvM to the public questionnaire for the 2018 Evaluation of the Vertical Block Exemption Regulation.
Date : 27 May 2019

ANNEX A

1 INTRODUCTION

1.1.1 The Dutch Competition Law Association (*Nederlandse Vereniging voor Mededingingsrecht*, "**VvM**") objectives are to study competition law in the broadest sense. The Association focuses on the application of cartel law, merger control, the provisions on abuse of economic power, the application of competition law in (previously) regulated sectors, and state aid. The VvM furthermore focuses on intellectual property law and unlawful competition. The Association's activities relate to both Dutch and European law. Attention is regularly paid to WTO law and developments in other jurisdictions. The VvM favours a multidisciplinary approach and pays attention to competition law, administrative law and criminal law subjects, as well as economic subjects. The VvM aims to stimulate knowledge of competition law and to play an active part in the development of competition law. For that purpose the VvM organises "5-7 meetings", (afternoon) seminars and other meetings at an academic level. The VvM also regularly consults with the Netherlands Authority for Consumers and Markets (*Autoriteit Consument en Markt,* "**ACM**") on legislation initiatives and other relevant developments.

1.1.2 The VvM has more than 350 members. VvM's members are university graduates in the legal profession, the academic world, trade and industry, and other organisations. Its members include both lawyers and economists.

1.1.3 In its response to the Public questionnaire for the 2018 Evaluation of the Vertical Block Exemption Regulation (the "**questionnaire**"), the VvM has offered its contributions to the European Commission's questionnaire in a concise form, making reference to more elaborate explanations provided in Annex A. This Annex A contains those more elaborate submissions.

1.1.4 In this Annex, the VvM limits itself to ten topics to which it wishes to draw the European Commission's attention in which we will focus on the Dutch perspective and Dutch examples. These topics are (i) resale price maintenance, (ii) selective distribution, (iii) evolving forms of distribution, (iv) dual distribution, (v) information exchange, (vi) further clarification of hard-core restraints and the role of efficiencies, (vii) exclusive distribution, (viii) restrictions on passive selling, (ix)

the duration of the Guidelines, (x) guidance for e-commerce, and (xi) consistency between the EU and Member States.

1.1.5 Naturally, not all VvM members have the same opinion on the Vertical Block Exemption Regulation ("**VBER**") and the Guidelines on vertical restraints ("**Guidelines**"). However, to a large extent agreement has been found on the topics discussed in this Annex.

1.1.6 The VvM submits that, on balance, the VBER and the Guidelines have made a positive contribution, in particular by providing legal certainty. Therefore, the VvM is of the opinion that the VBER and the Guidelines should be maintained. However, the VvM suggests making certain revisions to the VBER and the Guidelines. The VvM sees the evaluation of the VBER and the Guidelines as a welcome opportunity for the Commission to further clarify the concepts mentioned in this Annex and the rules applicable to them. In particular, this opportunity should be taken to bring the VBER and the Guidelines up to date with developments in the market, particularly when considering the area of e-commerce and online distribution platforms.

2 THE RESPONSE OF THE VVM

2.1 Resale Price Maintenance

RPM: what is it exactly?

2.1.1 According to the Guidelines (at para 48), both direct and indirect practices which have the object of establishing a fixed or minimum resale price or price level to be observed by a buyer, are treated as hard-core restrictions. The Guidelines provide a series of examples of indirect RPM, *e.g.* an agreement fixing the distribution margin, fixing the maximum level of discount the distributor can grant from a prescribed price level, making the grant of rebates or reimbursement of promotional costs by the supplier subject to the observance of a given price level, linking the prescribed resale price to the resale prices of competitors, threats, intimidation, warnings, penalties, delay or suspension of deliveries or contract terminations in relation to observance of a given price level. The Guidelines add that direct and indirect RPM can be made more effective when combined with 'supportive measures' to identify price-cutting distributors or, for example, by introducing a 'most favoured customer' clause.

2.1.2 Hence, there are effectively three categories of practices in the Guidelines related to RPM, *i.e.* direct RPM, indirect RPM and supportive RPM measures. These categories are not in tune with the VBER which defines RPM as the (proven) restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum

sale price as a result of pressure from, or incentives offered by, any of the parties. Article 4(a) of the VBER clearly does not make a distinction between direct and indirect RPM. It also does not refer to supportive RPM measures. Article 4(a) makes a distinction between (proven) restrictions of the buyer's ability to determine its sale price on the one hand (which are unlawful) and recommended resale prices on the other hand (which are lawful unless they amount to a fixed or minimum sale prices as a result of pressure from, or incentives offered by, any of the parties). The VvM´s reason for pointing out this difference comes from the experience that suppliers active in the Netherlands generally maintain good relations with their distributors and can enter into all kind of discussions with them on *inter alia* (recommended) sales prices. In general, there is nothing wrong with engaging in discussions on margins and price levels according to the VBER. To be more precise, discussing recommended resale prices does not restrict the buyer´s ability to determine its sale price nor does it (automatically) amount to fixed or minimum sales prices.

2.1.3 Nonetheless, the description of indirect RPM and supportive RPM measures in the Guidelines cause uncertainty amongst suppliers and distributors, as this description leaves room for a different interpretation of the rules which focusses not so much on the ability to determine sales prices, but on the scope of discussions, for example on the supplier's discontent with certain resale prices. It is the VvM's position that the Commission should explicitly recognize that in a vertical relation there can be legitimate discussions on recommended resale prices. In addition, if the Commission wants to hold on to the distinction between direct and indirect RPM and supportive RPM measures, it should raise or at least clarify the evidential thresholds with regard to indirect RPM. Indirect RPM is now construed as a catchall box for clearly discernible practices in terms of object and effect. The Commission is advised to distinguish between these practices, thereby clarifying what suppliers can and cannot do in discussions with distributors.

2.1.4 Finally, the VvM notes that there is a need to provide further and more specific guidance on the practice of recommended resales prices. Just to mention two examples where there is currently uncertainty; when would the introduction of an internal price-monitoring system to achieve efficiencies (e.g. inventory management) in combination with recommended retail prices lead to a finding of RPM? To what extent are suppliers allowed to use personalised recommended sales prices for individual distributors?

RPM – call for more nuanced approach regarding the assessment of negative and positive effects

2.1.5 For years, there has been a continuous debate on whether RPM should be regarded as a hard-core restriction or as *prima facie* anti-competitive. Legal

scholars and economists have advocated for a more flexible regime towards RPM with more recognition for the neutral or even positive effects of RPM. This approach is similar to the one that the US Supreme Court adopted in the famous *Leegin* judgement. As RPM can have many different forms and thus many different effects, it is the VvM´s position that an effects-based approach to RPM would do more justice to the complexity of the assessment.

2.1.6 From a legal and economic point of view, an object or hard-core restriction is only justified if there is a very high probability that ´usually´ or ´very often´ the anti-competitive effects are larger than the pro-competitive effects of a restriction. This is not the case with RPM – there are known anti-competitive effects, but there are also compelling potential pro-competitive effects. In the current debate, the potential pro-competitive effects/efficiencies of (fixed or minimum) RPM include (i) preventing or reducing free-riding behaviour, (ii) inducing an efficient level of retail services by protecting retailers' margins and (iii) creating and protecting a high-quality reputation. These points are particularly important when considering markets where there is also sufficient inter-brand competition to keep the market competitive. The VvM kindly requests the Commission to review submissions and wider articles dealing with the economics of these issues.

2.1.7 Especially, in the current digital economy, the Commission needs to accept that free riding risks are greater, as there is more price transparency for consumers and due to the existence of lower cost online players. The VvM is aware that RPM can have potential anti-competitive effects, like reduction of intra-brand price competition, but questions whether - in view of the various forms of RPM and differences in market position of different players in any given scenario – there is enough hard evidence to make the statement that anti-competitive effects are 'often' or 'typically' larger than pro-competitive effects.

2.1.8 The VvM would welcome a more nuanced approach to the assessment of the various forms of RPM. The Commission should think twice before finding that agreements that may have a legitimate aim, such as preventing free riding, are a restriction by object or a hard-core restriction. The current approach of the Commission creates an imbalance, as it recognizes in the Guidelines that RPM can have pro-competitive effects but places a heavy burden on the parties to convincingly demonstrate those effects, while at the same time stating that, where an agreement includes RPM, that agreement is presumed to restrict competition and thus to fall within Article 101(1) TFEU. This presumption in combination with the high evidential standards for successfully upholding an efficiency defence provides companies a mere hypothetic option to go for an efficiency defence. In short, the risk of enforcement measures is too high for companies to even consider RPM as a tool to generate efficiencies. This type I error forces companies to act in a precautionary manner when facing the risk of being falsely accused of serious cartel violations. This may reflect negatively on

promoting businesses and incentivizing parties to compete more effectively within the context of inter-brand competition. Depending on the circumstances, it may also limit availability of products and services to consumers, and harm market integration overall.

2.1.9 Another concern is that in markets where consumer goods are distributed both through online channels and offline in (brick-and-mortar) shops, the downward pricing pressure by online reselling leads to marginal profits for more expensive offline sales and free-riding. Thereby the ability of physical retailers to compete with e-commerce rivals and of brands to encourage the sale of their goods in brick-and-mortar shops is limited. This leads to the risk that more and more physical shops close, leading to less consumer choice, quality of service and shopping comfort.

2.1.10 As regards dual pricing the chairman of the Dutch ACM recently said that there maybe should be "a more hands-off or liberal approach towards online-offline dual pricing" in order to protect the physical store infrastructure that many people appreciate.[1] The VvM encourages the Commission to consider the possibility of making a distinction between hard-core RPM and dual pricing.

2.2 Selective distribution

Selective distribution and Coty

2.2.1 The VBER exempts quantitative and qualitative selective distribution irrespective of the nature of the products and it is important that it will continue to do so.

2.2.2 Selective distribution is essential for brand owners to organize and control their distribution network. It allows them to impose selection criteria for retailers which guarantees high quality products and services. It also incentivises brand owners and retailers to invest, because selective distribution ensures a return on investments and prevents excessive free-riding. Not in the last place, selective distribution ensures that brand owners can maintain and strengthen their brand and image.

2.2.3 Selective distribution is also beneficial to consumers. It results in an improved shopping experience with high quality products and customer service.

2.2.4 It is therefore important that selective distribution continues to be exempted by the VBER, but it is also essential that the regulatory framework of the VBER and the Guidelines is interpreted and applied consistently by the Commission, National Competition Authorities ("**NCA**") and national courts. In recent years

[1] See http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1088419&siteid=190&rdir=1

NCAs and courts have applied the VBER and the Guidelines in a diverging manner.

2.2.5 The need of a consistent application of the VBER and the Guidelines became particularly apparent following the ruling of the Court of Justice of the European Union in *Coty*[2]. In the Coty ruling it was established that a supplier could prohibit authorized distributors to use third-party platforms for the online sale of contract goods. The Court upheld the earlier established position of the Commission that such marketplace bans do no amount to a hard-core restriction within the meaning of Article 4(b) and 4(c) of the VBER, irrespective of the product category concerned.[3]

2.2.6 At a national level and particularly in Germany, the ruling in Coty has been interpreted in different ways, for example by limiting the scope of the ruling to luxury goods – a view which the VvM rejects as being correct. In the Netherlands, on the other hand, the question raised in Coty was interpreted in a more expansive manner, whereby it essentially was accepted that Nike's brand image and the need to preserve it was sufficient or, put differently, 'luxury'.[4] In France, the French Competition Authority (*Autorité de la Concurrence*) in *Stihl* approved an interdiction against the sale of products on third party platforms.[5] This seems to be in line with the Commission's policy.[6] It is important that all NCAs and national courts interpret and apply the Coty ruling, and the underlying argumentation, in the same manner.

2.2.7 For this reason, the VvM suggests that the Commission formalizes its position and clarifies in the VBER and the Guidelines that the nature of products is irrelevant for: (i) the application of the VBER to selective distribution systems; and (ii) the admissibility of a third-party platform or marketplace ban within selective distribution systems. For the latter, the Commission has already taken position.[7] However, since this position is not reflected in the VBER or the Guidelines, this creates a situation where there is room for NCAs and national courts to deviate from the Commission's position. Hence, the VvM suggests incorporating the Commission's position in the VBER and Guidelines. In general, the VBER and/or the Guidelines should further clarify to what extent a third-party platform or market place ban is permissible outside selective distribution systems and under what economic circumstances.

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[2] Court of Justice of the European Union, judgement of 6 December 2017 in Case C-230/16, *Coty*.
[3] EC, Final report on the E-commerce Sector Inquiry, 10 May 2017, COM(20017) 229 final, par. 42.
[4] Amsterdam District Court, judgement of 4 October 2017 in case number C/13/615474, *Nike*.
[5] Autorité de la Concurrence, decision number 18-D-23 of 24 October 2018, *Stihl*. For the decision, see http://www.autoritedelaconcurrence.fr/pdf/avis/18d23.pdf For the English press release, see http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=684&id_article=3290&lang=en
[6] European Commission, *Competition Policy Brief,* 2018-01, April 2018.
[7] European Commission, *Competition Policy Brief,* 2018-01, April 2018.

Selective distribution falling outside Article 101(1) TFEU

2.2.8 We note that the nature of the products is relevant to determine whether a selective distribution completely falls outside Article 101(1) TFEU for lack of anti-competitive effects. Paragraph 175 of the current Guidelines stipulates three conditions (based on the Metro[8] criteria). Under the first condition, the nature of the product in question must necessitate a selective distribution system, in the sense that such a system must constitute a legitimate requirement, having regard to the nature of the product concerned, to preserve its quality and ensure its proper use. However, it is in practice not only the nature of the products, but also the nature of the brand that can necessitate a selective distribution system. Preserving and building brand image and value is becoming more and more important for an economically viable distribution business, especially in a digital or omni-channel context. The image of a brand distinguishes it from its competitors and a customer not only buys a certain product but also a certain (brand) image. It is essential for many brand owners to protect their brand, irrespective of the nature of the products being sold. Therefore, not only the nature of the product, but also the nature of the brand can necessitate a selective distribution system. The Guidelines could further emphasize the nature of the brand as a relevant factor for fulfilling the first condition (of Metro and paragraph 175 of the Guidelines). The Guidelines could also further clarify to what extent a third-party platform or market place ban can be seen as a qualitative condition in itself, under the Metro criteria and the second condition mentioned in paragraph 175 of the Guidelines.

2.3 Evolving forms of distribution

2.3.1 The current framework falls short of addressing new business and distribution models where a third party undertakes dual roles. Whilst it may be more efficient to use one party to perform the roles of an agent and a distributor at the same time, companies are currently forced to avoid such combined relationships because of competition law concerns, such as RPM and exchange of competitively sensitive information. For instance, a third party may act as a logistics provider rather than as a pure sales agent and could – depending on the circumstances – therefore take some commercial or financial risk. Still, such a third party does not purchase or otherwise take ownership of the goods because it wants to act as a reseller and make profit in this way. Instead, it operates merely to facilitate the logistics process relating to the goods at the request of a customer or supplier in exchange for a service fee. In particular, this model may be adopted where a customer wants to deal with a supplier directly to negotiate a (pro-competitive) price but:

[8] Court of Justice of the European Union, judgement of 25 October 1977 in case 26/76, *Metro*.

- a given supplier does not have sufficient local or multi-national presence to serve customers (or a single customer in multiple-locations) directly;

- the sale of the product requires local support and expertise that only a distributor can provide; or

- the distributor may find it commercially ineffective to meet certain customer requirements where these are particularly complex, technical and/or linked to other supplier requirements.

2.3.2 As regards online sales, the logistics service provider may be a merchant platform operating under a “consignment” model whereby that party takes ''flash'' ownership of the supplier’s goods only momentarily before the goods are sold on to the customer who has ordered them through the website supported by that merchant platform. This occurs as an inherent part of the online sales process and the merchant platform will receive a fee (usually from the supplier) to set-up and manage sales through the platform.

2.3.3 In the specific (offline and online) circumstances outlined above, the platform acting as a (quasi) agent or logistics service provider cannot be seen to be in a traditional “vertical” relationship with the supplier (or customer) because they essentially perform a side function aimed at creating an efficient process. These parties do not make money by determining the margin that will be added to goods that are received into its possession and re-sold. Hence, the VvM invites the Commission to clarify that the usual concern relating to resale price maintenance or anti-competitive information exchange does not apply in this context because the price for the goods in question are determined between the supplier and the customer for logical reasons, with the third party handling the logistics being considered outside of this vertical relationship. It should therefore be possible for the supplier and the customer to determine the price at which the customer will receive goods, even if those goods are (temporarily) sold via the (quasi) agent / logistics service provider.

2.3.4 Accordingly, the European Commission should introduce a framework recognizing that there may be important commercial reasons that necessitate such third parties being placed in the middle of supplier-customer relationships. Under the current framework, companies find it difficult to understand and predict the competition law consequences of such business models. The VvM suggests that adjustments could be made to the scope of the VBER as reflected in Article 2(4) VBER, to accommodate new and evolving forms of distribution described above. Therefore, the VvM considers the VBER's potential renewal a welcome opportunity for the Commission to specify the extent of the safe harbour for these types of distribution formats.

2.4 Dual distribution

2.4.1 Article 2(4) of the VBER permits dual distribution arrangements, whereby a supplier is also active downstream at the distribution and/or retail level, alongside its customers. The increase in e-commerce is leading to an increase in the number and types of players that are distributing products via online platforms and web shops, alongside distributors that are supplied by that undertaking. For example, the supplier competing directly with its distributors, setting up separate online and offline channels and mixed distributors selling both online and offline. We continue to support an exemption for these types of dual distribution relationships. Indeed, it would be impossible to imagine an economy functioning without the freedom to access the market directly and indirectly in this manner.

2.4.2 The VvM notes that in the Commission's recent decision in *Guess*[9], the facts and evidence of the case apparently demonstrated a certain degree of anti-competitive intent on the part of Guess to promote its own direct sales to the detriment of its distributors. We believe that this case is very fact-specific and is not representative of the usual way in which suppliers deal with their distributors. In particular, building a strong distribution network and developing relationships with retailers is key to ensuring that resellers are focused on dealing with inter-brand competition, which is the most dynamic type of competition, particularly where several brands are competing in the market and market power is not present. Thus, competition concerns in such situations should be limited to possible foreclosure effects i.e. access to strong suppliers or retailers that hold market power, thus affecting access to products or to important distribution channels. Where such characteristics are not present, in the context of the safe harbor under the VBER, for example, dual distribution should not be subject to further review.

2.5 Information exchange

2.5.1 The VvM also points out that information exchange, particularly in dual but also in single distribution arrangements, is critical to ensuring healthy inter-brand competition. Reporting market dynamics and trends back to the supplier is vital in ensuring: (i) successful product innovation, (ii) product logistics (e.g. which brands, which quantities, support of promotions / end-of-line portfolios) and (iii) appropriate pricing.

2.5.2 In addition, the availability of real-time and publicly available information mean that the concept of illegal vs pro-competitive information exchange has moved considerably in the last five years and is re-shaping the parameters of competition. For example, the ability to scrape real-time pricing information from the web means that competition online is much more transparent and pricing can

[9] Commission Decision of 17 December 2018 in case AT.40428, *Guess*.

be adjusted within seconds through monitoring and algorithms. Given this environment, suppliers and retailers must find ways to differentiate their products in the right way, at the right time and at the right price in order to compete effectively. Reporting is an extremely important part of this in both single and dual distribution models.

2.5.3 The Guidelines should therefore clarify that a supplier can collect pricing and other data for pro-competitive reasons in a single or dual distribution arrangement. This assumption will not apply to information exchange which – due to its anti-competitive intent – clearly falls within a hard-core restriction under the VBER.

2.5.4 Similar considerations also apply when considering franchisor agreements (providing services to franchisees while also operating its own shops) and in the context of category management services where a supplier (who may have its own retail outlets) provides advice and recommendations in relation to store display, range, pricing and promotions.

2.5.5 Apart from information exchanges in the context of collecting pricing and other data described above, there are further opportunities to clarify the rules on information exchange.

2.5.6 As a corollary of the function of EU competition rules, direct or indirect information exchange between non-competitors is, in principle, not covered by Article 101(1) TFEU. Direct and indirect information exchanges between actual or potential competitors are of interest to the ambit of protecting competition on the internal market and this is generally achieved in the framework of the rules on horizontal behaviour and not vertical behaviour.

2.5.7 The current rules are opaque as to whether, and if so in what circumstances, information exchanges between parties to vertical agreements are to be treated purely as vertical restraints. The Guidelines seem to indicate that information exchanges might fall foul of the vertical rules either as a pre-cursor to, or facilitating mechanism for, other vertical restraints[10] or as a means of proving the existence of one or more of the conditions necessary to sanction vertical restraints.[11]

2.5.8 The VvM would recommend that the issues described above related to information exchange are included and clarified in any future version of the VBER. In addition, the VvM recommends that the Commission consults extensively on the role of information exchange as part of a separate e-

[10] See for example suggestions in para 48 of the Vertical Guidelines 2010 on the role of information exchange in monitoring resale price maintenance, para 129 on the role of reporting in single branding.
[11] See for example suggestions in para 24 of the Vertical Guidelines 2010 on the role of information exchange in proving acquiescence to unilateral behaviour.

Commerce consultation and/or as part of the Horizontal Guidelines consultation next year.

2.6 Further clarification of hard-core restraints and the role of efficiencies

2.6.1 The competitive assessment of a vertical agreement necessitates an assessment of the counterfactual, namely the competition that would materialize in the absence of the agreement from an economic based perspective. Empirical and theoretical studies have shown that vertical agreements are predominantly used to align the interests of the buyer and the seller, expand sales to end customers, and increase efficiency in the distribution of goods. In this context, antitrust scrutiny may be warranted only if sufficient inter-brand competition is lacking. Hence, the importance of an economic approach in the analysis of the vertical restraints and the recognition of overriding efficiencies cannot be overstated.

2.6.2 Although the efficiency enhancing effects of the vertical restraints are recognized in the VBER and Guidelines[12], it remains unclear how the difference between the definition of market power in the context of vertical restraints and abuse of dominance should be interpreted as currently the same definition seems to be applied.[13] Whilst the former concerns an agreement between two parties and the latter concerns unilateral behaviour, the ultimate effect on the market (i.e. foreclosure) would be the same. From an economics perspective, there is therefore no clarity as to why a different legal standard is applied in the case of vertical restraints.

2.6.3 Since online markets have grown to become an alternative to traditional sales channels, digitalization brings new questions and challenges for the stakeholders. For instance, protection of the producer's brand and reputation has become a more prominent concern in online retailing. Nevertheless, online markets give rise to similar concerns as traditional (offline) markets, such as preventing free-riding of the customer service offered in brick and mortar shops or solving hold-up problems in launching a new online product. Hence the appetite for investment in brick-and-mortar shops and the maintenance of a physical retail channel will likely decrease. Therefore, adopting a stricter approach against online vertical restraints may lead companies to structure their business models in a way that is not necessarily the most efficient or most beneficial to consumers.[14] Companies may simply decide to integrate vertically and supply through its own traditional and online retail shops in order to have control on prices, brand image and customer service, but perhaps even more

[12] VBER, Article 6 and 7.
[13] Guidelines on Vertical Restraints, para. 97.
[14] OECD Vertical Restraints for On-line Sales (2013) at page 181.

important there is a risk that more and more physical shops close, leading to less consumer choice, quality of service and shopping comfort.

2.6.4 On balance, we invite the Commission to provide more legal certainty regarding legitimate efficiency justifications, particularly in the context of online vertical restraints and multi-sided platforms. In this context, there should not be a blanket presumption of competitive harm when it comes to restraints relating to price or complete bans. In the Commission's view, marketplace bans do not amount to a hard-core restriction under the VBER irrespective of the product category concerned.[15] Notably, even for the vertical restraints qualified as hard-core restraints, unless the company has significant dominance in the market, it should not bear the burden of providing a full-fledged efficiency defence. Instead, the Commission should explicitly acknowledge less tangible benefits to consumers who enjoy a higher quality of retail service as a result of a vertical business practice and enable the possibility to distinguish between online and offline distributors.

2.6.5 The recent *Guess* case[16] appears to illustrate the pitfalls of the current approach towards ''by object'' restrictions where no clear findings as to the likely or actual effects have been made. Single word restrictions on a brand name may be agreed in order to ensure consumers can find the brand (the company behind it), and not the product. Therefore, these restrictions can be pro-competitive and pro-consumer. On the other hand, wider AdWords restrictions could have an anti-competitive effect, particularly in dual distribution arrangements where there is an indication that the supplier wants to attract more business to its own site than to the sites of its resellers. Such an intention is, in the VvM's view, an exception to the general rule that suppliers want to support resellers because a supplier cannot survive if its interest are not aligned with the interest of its resellers.

2.6.6 Moreover, by characterising this as a "by object" restriction, companies are not granted sufficient opportunity to rebut such presumptive classification by bringing presenting overriding efficiencies resulting from their business choices.

2.7 Exclusive distribution

2.7.1 While generally, the VBER and the Guidelines offer sufficient legal certainty regarding exclusive distribution, some issues remain. First, Article 4(b)(i) VBER currently allows the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, only where such a restriction does not limit sales by the customers of the buyer. However, there could be legitimate reasons for suppliers to pass-on sales restrictions to its distributors, especially when there are multiple levels

[15] See http://ec.europa.eu/competition/publications/cpb/2018/kdak18001enn.pdf
[16] Commission Decision of 17 December 2018 in case AT.40428, *Guess*.

in the distribution chain. Therefore, the Commission could consider removing the last condition in Article 4(b)(i) VBER.

2.7.2 Second, the VBER and the Guidelines could further clarify the conditions for allocating exclusive territories or customer groups. For example, when territories or customer groups are exclusively allocated to a distributor or reserved by the supplier, it is unclear whether this should be explicitly included in the contracts of all the other (exclusive) distributor. Furthermore, there is a lack of clarity on whether a supplier can reserve a territory or customer group where the supplier has no intention in the near future to supply that territory or customer group.

2.8 Restrictions on passive selling

The interplay between the VBER and the GBR

2.8.1 Under EU competition law, the prohibition on the restriction of passive sales is not absolute. Such a restriction can be exempted under Article 101(3) TFEU if the supplier can demonstrate that the restriction is necessary to generate economic efficiencies benefiting consumers (for example the prohibition to sell outside the selective distribution system, and the recoupment of investments after market entry of a new brand or an existing brand on a new market[17]).

2.8.2 However, Article 6 of the Geo-Blocking Regulation[18] ("**GBR**") declares clauses in distribution agreements restricting passive sales on the grounds of the customer's nationality, place of residence or place of establishment to be automatically and – as it seems absolutely – void. It is not possible under the GBR to rely on any exemption or efficiency claim for such types of restriction. The VvM understands that this may be in order to prevent the risk that the Article 101(3) TFEU exemption under competition law could be used to circumvent the prohibition under the GBR (see recital 34 GBR).

2.8.3 This interplay between the GBR and/or the Guidelines raises questions in practice, like whether this implies that no exemption is possible anymore under Article 101(3) TFEU if it regards a situation that (also) falls under the GBR and/or whether an exemption under Article 101(3) TFEU is still possible in situations that do not fall under the GBR.

2.8.4 The recently published guidelines on vertical restraints from the Dutch ACM also do not address this issue. The VvM, therefore, kindly requests the Commission

[17] See also Vertical Guidelines, para. 61 and 62,
[18] 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.

to clarify the interplay between the GBR and the VBER and/or the Guidelines, particularly in relation to passive sales.

2.9 The duration of the VBER and the Guidelines

2.9.1 The current VBER and the Guidelines entered into force on 1 June 2010 and have a period of validity of twelve years. It is already foreseeable that ongoing and upcoming technological developments (such as the Internet of Things, block chain, artificial intelligence and algorithms) and online sales continue to affect markets to an even greater extent in the upcoming years. At the same time, the exact impact of those developments is still unpredictable. Therefore, the Commission may want to consider shortening the duration of the VBER. At the same time, the VvM acknowledges that from a legal certainty perspective, the duration of the VBER should not be too short either. The VvM considers a period of validity for the updated VBER and Guidelines of seven to (maximum) ten years to be an appropriate balance, as such period of validity better allows for the regulatory framework to keep pace with market developments. It should be noted in this regard that previous versions of the VBER were also in force for ten years.[19] An alternative could be for the Commission to consider a mid-term review option if market circumstances so require.

2.10 Guidance for e-commerce

2.10.1 As acknowledged by the Commission in its 2017 report on the e-commerce sector inquiry, problematic business practices specifically related to e-commerce may negatively impact competition and cross-border trade and hence the functioning of the (Digital) Single Market. Currently, the Guidelines do not always adequately account for certain particularities of the e-commerce sector, for example in relation to online sales restrictions like marketplace (platform) bans, restrictions on the use of price comparison tools, use of AdWords and exclusion of pure online players from distribution networks.

2.10.2 In light of the above, and given the specificities of e-commerce and the latter's increasing importance, there have been suggestions that separate guidance may be needed for e-commerce. Hence, the VvM would be interested to understand whether the Commission is planning to issue separate guidance for e-commerce (with specific examples for this sector). This could further clarify the rules applicable to businesses (also) operating online, as such contributing to legal certainty across the Single Market. However, the VvM also recognizes that many suppliers adopt a channel-neutral approach, so that online and offline sales are treated in an equivalent manner. Therefore, if general guidance were to be

[19] For example Commission Regulation 4087/88 and Commission Regulation 2790/1999.

published they should not undermine the current framework but seek to enhance legal certainty by dealing with examples specific to this sector or parts thereof.

2.11 Consistency: ensuring sufficient clarity so as to avoid different interpretations/approaches at national level

2.11.1 The VvM submits that there is a need to apply a more consistent competition law regime for vertical agreements in the EU. One of the great benefits of the internal market is that companies are able to access the internal market and compete on a pan-European basis. Many companies apply European wide distribution systems. This requires an increased level of legal certainty when it comes to the application and enforcement of the competition rules by the Commission, NCAs and national courts. It is an all-too-frequent occurrence that competition rules, including those relating to vertical restraints, are interpreted differently by various NCAs and national courts. Vertical agreements in particular are more often debated in civil law proceedings in national courts, rather than being at issue in enforcement cases by NCAs. At least in the Netherlands this has been the case for years. This increases the risk of divergence.

2.11.2 A recent national example of the scope for divergent applications, is the new guidelines on agreements between suppliers and distributors from the ACM, which contains a clear change of course with regard to verticals moving away from an effects based to a more form based approach.[20] This shift shows that there can be different views within one and the same NCA over time on how to enforce vertical restraints. This has occurred despite there being no change in the EU legislation that forms the underlying framework on which the Dutch rules are based. Another example of possible divergence between NCAs and other NCAs and the Commission is in the area of dual pricing, where the German Federal Competition Office seems to be taking a stricter approach than the ACM or the Commission.[21] The VvM notes that there is an excellent opportunity for the Commission to ensure clarity and increase legal certainty with the new VBER and the Guidelines, thereby avoiding different interpretations/approaches at the national level. The VvM notes that this idea of avoiding divergence is already prevalent in the EU legal framework, for example in the context of cooperation between NCAs and the European Commission.[22]

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[20] For the now-retracted ACM strategy and enforcement priorities with regard to vertical agreements from 2015, see https://www.acm.nl/sites/default/files/old_publication/publicaties/14226_acm-strategy-and-enforcement-priorities-with-regard-to-vertical-agreements.pdf The new version of the ACM guidelines on vertical agreements can be found here: https://www.acm.nl/sites/default/files/documents/leidraad-afspraken-tussen-leveranciers-en-afnemers.pdf

[21] See e.g. the 2016 decision of the German Federal Competition Office in *Lego*: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/12_01_2016_Lego.html

[22] See e.g. Article 11 and 16 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.