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List of areas for which we consider that the VBER and/or the VGL provide insufficient legal certainty:

The VBER does not contain any regulation regarding the retailer sale via the internet. Only the VGL refer to certain internet related issues. However, the VGL are not binding for national courts and competition authorities. In addition to that the wording of the VGL is not always precise enough, which causes legal uncertainty. In order to ensure the implementation of the European single market, the uniform Europe-wide legal framework and its application for this distribution channel should be guaranteed. At least the following issues should be addressed in the framework of the VBER and the VGL:

The VGL state that operating a website is considered passive sale. This does not reflect sufficiently that operating a website needs activities by their owner such as online-marketing activities in order to be found by the end consumers. Therefore, the classification of the operation of a website seems doubtful and leads to unnecessary discussions regarding the possibility of ensuring quality criteria in selective distribution systems also for the operation of a website. The active and passive sales scenario addresses historically the effects of absolute territorial protection and territorial exclusivity. In the ECJ decision Consten and Grundig (OJ 194 2545/4) the concession of exclusivity was combined with absolute territorial protection. This scenario would harm the internal market. However, the selective distribution systems based on brick and mortar stores and - if the defined quality criteria are fulfilled - on the retailers own website do not protect the retailers exclusivity. Therefore, selective distribution systems do not inherently lead to vertical restraints via territorial restrictions and therefore the active/passive sales scenario for the online world should be reviewed.

There is a long-standing case law of the German Federal Cartel Office regarding restrictions vis-à-vis offline and online sales by retailers by dual pricing systems. This does not reflect in a sufficient way the fact that retailers make much more effort by installing and keeping alive bricks-and-mortar stores than by installing and maintaining a website for online sales. The brick and mortar stores require traditionally a much more intensive customer service via trained personnel and representation of the brands via the good location and excellent representation of the products on the shelves, which is also more cost intensive for the retailer operating brick and mortar stores. In contrast to this the quality of the products and the power of innovation of the products of our members are not sufficiently supported in a pure online world. In this context it should also be ensured that language regarding the requirement of a minimum number of brick and mortar stores is further clarified and that a certain quota of products being sold via bricks-and-mortar stores compared to the sale via the internet can be established.

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Only by such a quota it could be ensured that retailers who have no real interest in promoting the brand via the brick-and-mortar stores cannot fulfil the quality criteria by establishing only an alibi bricks-and-mortar store.

Furthermore, the legal framework should reflect the recent developments in the ECJ Case in particular in Coty/Akzente: The ECJ (and the Advocate General in his opinion) confirm the positive economic aspects of the establishment of selective distribution systems for quality products irrespective of a certain product category: The advocate General correctly emphasises that the European Competition Law does not see price competition as the only possible model (para 32 of his opinion). Following this starting point, he correctly states that the ECJ has implicitly but necessarily acknowledged that the reduction of intra-brand competition as a result of the establishment of selective distribution systems might be accepted, when it is essential to the stimulation of inter-brand competition (para 38 of his opinion). In so far as selective distribution systems tend to approve distributors of certain products on the basis of qualitative criteria required by the nature of the goods, selective distribution systems favour and protect the development of the brand image. They constitute a factor that stimulates competition between suppliers of branded goods, namely inter-brand competition, in that they allow manufacturers to organise efficiently the distribution of their goods and satisfy consumers (para 42 of his opinion). Furthermore, it should be borne in mind that the compatibility of selective distribution systems with article 101 (1) TFEU ultimately rests on the notion that it may be permissible to focus not on competition in price but rather on other factors of a qualitative nature. Recognition of such compatibility with article 101 (1) TFEU cannot therefore be confined to goods which have particular physical qualities. What matters for the purpose of identifying whether there is a restriction of competition, are not so much the intrinsic properties of the goods in question, but rather the fact that it seems necessary in order to preserve the proper functioning of the distribution system which is specifically intended to preserve the brand image or the quality image of the contractual goods (para 46 of the opinion). From this, one can conclude that the establishment of a selective distribution system is not only justified for luxury products but, due to the lack of a restriction of product categories stated in the VBER, is rather open for other product categories, as long as they seem necessary in order to preserve the proper functioning of the distribution system.

In the aftermath of this decision, the Higher Regional Court of Hamburg clearly positioned itself in this direction and decided that selective distributions and platform bans shall be possible for various industry sectors (decision of 22.03.2018 – 3 U 250/16 – Forever Living).

Furthermore, the Coty/Akzente decision proves that the manufacturer needs to have instruments in order to properly install the qualitative criteria set out in his selective distribution system. This is per se not ensured in the case of third-party platforms where there are only contractual relationships between the market-place retailer and the platform itself. The absence of a contractual relationship between the manufacturer and third-party platforms is, however, an obstacle which prevents the manufacturer from ensuring the fulfilment of the quality criteria set out for all retailers irrespective of the product category in question.

Apart from the specific Internet framework the following issues should be addressed:

There is no legitimate reason why in the catalogue of hardcore restrictions in Art. 4, selective distribution systems are considered more harmful than other distribution regimes (see the specific provisions in Art 4 c and 4 d). This does not sufficiently take into account the positive economic effects of selective distribution systems and makes them per se more harmful than other vertical agreements without an economic justification.

Given the increased market power of retailers, the 30 % market share which excludes the application of the VBER does not seem appropriate. This is also because the definition of the relevant market can be difficult and could lead to a strange scenario whereby the relevant markets are rather distinguished by prices than by the product-function, meaning the producers of high-end products, might end up with a market share which is "too" high, resulting in the non-applicability of the VBER.

Regarding the term *restriction by object*, it should be reconsidered that the fulfilment of a hardcore restriction mentioned in article 4 would automatically lead to the fulfilment of the restriction by object requirement, given the specific case law on restriction by object. This does not reflect sufficiently that in particular in the case of economically positive selective distribution systems only a certain degree of harm to competition would render an examination of their effects unnecessary. It should therefore be assessed whether the applicability of the hardcore restrictions catalogue should be restricted to contractual provions restricting the territory into which or the customers to whom the retailer may sell. On the other hand, those provisions should not be interpreted as excluding from the benefit of the block exemption restrictions that determine the methods whereby the products can be sold (i.e. allowing qualitative criteria leading to platform bans as in the Coty/Akzente case; see also the advocate General Opinion, para 137). This would also take into account the case law developed in connection with trademark law, which owing to its specific competitive function, interacts with the prohibition of agreements and concerted practices.

The prohibition of agreements and concerted practices should not apply in cases where measures taken by the trademark owner vis-à-vis the authorised retailer ultimately constitute only the exercise of the right to put the relevant product into circulation for the first time (see the advocate General's opinion, paras 71 and 89).

Finally, it should be noted that the translation of the original English version of the VBER is not in all cases well-crafted. One example is the translation of "customer group" in art. 4 lit. b which lead to unnecessary discussions about the correct understanding.