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EU E-commerce Sector Inquiry

Response to the Commission's Preliminary Report

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Executive summary

The *Vereniging van Albert Heijn Franchisenemers (VAHFR)*, *Vereniging van Etos Franchisenemers (VEFR)* and *Vereniging van Gall & Gall Franchisenemers (VGGFR)* ("the Associations"), who represent the interests of their franchisees, welcome the Commission's words in the Report endorsing the importance of e-commerce and support to ban barriers to e-commerce.

Surprisingly, although franchise networks have great potential to stimulate economic activity within the EU, the Report does not seem to address franchise networks. This is a missed opportunity in the view of the Associations. The Associations, therefore, above all, request the Commission to clarify in the final report to what extent its findings apply to franchise networks. If those findings apply to franchise networks, the Commission should in the view of the Associations take into account the specific features of franchise networks compared to distribution networks.

Furthermore, in addition to confirming that the developments identified by the Commission in its Report are generally also experienced by the Associations, we seek to show the Commission in this response that e-commerce currently has a detrimental effect on franchisees as opposed to franchisors, because:

- Franchisors increasingly open their own web shops, shift profits from the franchisees to the franchisors, without providing the franchisees a fair share in the profits the franchisors make online by selling to customers exclusively designated to the franchisees;
- Franchisors often claim they do not have to provide franchisees a share of the profits, because e-commerce falls outside of the franchise agreement between the franchisees and franchisor;
- Franchisors, therefore, frequently also believe they do not have to provide any assistance to franchisees in developing their own web shop. In fact, when franchisees request assistance from the franchisors, franchisors often reject this assistance, thereby without any substance pointing to other laws and regulations like privacy (customer data), trademark regulations (logo's) etc.
- As a result, it is very difficult, if not impossible for franchisees to set up a web shop. However, even if a franchisee is able to set up a web shop, the franchisor has a major advantage, because it owns the systems, possesses (and claims ownership of) all data (like customer and meta data), has more means than the franchisee etc.

In short, it comes down to franchisors not stimulating e-commerce within its franchise networks, but rather keeping the potential e-commerce offers, largely for themselves. This contradicts the goals of the Commission to ban barriers to e-commerce and limits competition. The Associations urge the Commission to indicate in its final report that internet is just one of the channels of a formula, which should stimulate e-commerce and not one that can be placed outside of the scope of the franchise agreement simply because the parties did many years ago not foresee the upcoming of e-commerce. Placing internet within the existing agreements leads to the franchisor and franchisees proceeding alongside each other, which is in the end in the best interest of not only the franchisor and franchisees, but also the consumer.

The Commission should, therefore, also be very critical of restraints imposed by franchisors. Finally, the Associations respectfully submit that the final report should address in more detail when vertical restraints are considered anti-competitive taking into account the specific position of franchisees.

1. Introduction

- 1.1. This response is jointly provided by the *Vereniging van Albert Heijn Franchisenemers* ("VAHFR"), *Vereniging van Etos Franchisenemers* ("VEFR") and *Vereniging van Gall & Gall Franchisenemers* ("VGGFR") (hereinafter "**the Associations**").
- 1.2. All three "*verenigingen*" are representative associations of individual franchisees. VAHFR represents the interests of all franchisees of Albert Heijn ("AH"), a large supermarket in the Netherlands. VEFR represents the interests of all franchisees of Etos, a large drugstore in the Netherlands and VGGFR represents the interests of all franchisees of Gall & Gall, a large liquor store in the Netherlands. The franchisees represented by these Associations account for approximately one third of all stores of the Albert Heijn in the Netherlands and even almost half of all stores of Etos and the Gall & Gall formulas. All three formulas are owned by Ahold. Ahold who also owns for example the successful web shop Bol.com (leading website in the Netherlands and Belgium for e.g. books, toys, electronics, cosmetics and non-food groceries etc.) and has recently merged with the Delhaize Group.
- 1.3. The Associations welcome the opportunity to comment on the Commission's Preliminary Report of the E-commerce Sector Inquiry ("Report"), which was released on 15 September 2016.¹ The Associations fully support the Commission's goal to "gain more market knowledge in order to better understand the nature, prevalence and effects of these [contractual restrictions to supply cross-border] and similar barriers erected by companies that hinder cross-border e-commerce and to assess them in the light of EU antitrust rules"², and hopes that the Commission will consider the points outlined in this submission as a means of furthering that objective. The Associations will endeavor to respond to any queries which the Commission might have in relation to the issues raised.

2. E-commerce sector inquiry and franchise networks

Unclear to what extent franchise networks were subject of the inquiry

¹ Commission Staff Working Document, *Preliminary Report on the E-commerce Sector Inquiry*, Brussels, 15 September 2016, SWD(2016) 312 final.

² European Commission, Fact Sheet *Antitrust: Commission launches e-commerce sector inquiry*, Brussels, 6 May 2016.

- 2.1. From the outset, the Associations note that it is not entirely clear to what extent franchise networks were included in the sector inquiry.³ Although franchise agreements are mentioned a few times in the Report, the number of references is very low.⁴ In any case, no specific attention seems to be paid to franchise agreements, while franchise is generally recognized as a distinct channel from other distribution agreements. The Associations believe this is a missed opportunity for the Commission. We believe the Report would have benefited from a (more) in-depth analysis of franchise networks, since franchise has great potential to stimulate economic activity within the EU⁵ and it is therefore worth investigating its role within the EU.

Findings can not necessarily be applied to franchise networks

- 2.2. Moreover, the findings in the preliminary report regarding distribution agreements cannot be (fully) applied to franchise agreements. First of all, because franchise is a distinct channel, but also because e-commerce has raised issues that are specific for franchise networks. Moreover, given its specific features the assessment of possible anti-competitive restrictions should be different for franchise networks than for other distribution agreements. The Associations therefore suggest the Commission to examine the specific aspects of franchise networks, take into account this submission and in any case clarify in the final report to what extent the findings apply to franchise agreements.

3. Specific features of franchise networks

- 3.1. Before going into what the specific features of franchise networks mean in practice in the view of the Associations, we believe it is important to recall what those specific features of franchise networks are.
- 3.2. Franchising is above all a symbiotic relationship between two legally independent businesses that is used in a wide range of sectors and on a broad spectrum of scale and value which can be differentiated from commercial agency and distribution.⁶ A franchise is the right to market or sell goods or services under a trademarked name, or patented process,

³ For example, paragraph 175 reads "The preliminary results of the sector inquiry indicate that a wide variety of distribution agreements are used. These range from general terms and conditions of sale or general framework agreements without any selection criteria (with simple purchase order forms and confirmations) to territorial exclusive distribution, selective distribution and *franchising agreements*. In some limited instances, agency agreements are also used." Paragraph 176 reads "In line with the focus of the sector inquiry being on contractual restrictions to e-commerce, this section reports on trends with regard to territorial exclusive distribution, selective distribution, and agency agreements, where the preliminary results of the sector inquiry show that restrictions on online sales are most prevalent." On the basis of paragraph 176 it appears that the report is focused on other agreements than franchising agreements (since franchising agreements are not listed as one of the agreements the section is focused on). On the other hand, paragraph 176 only refers to "this section", which also can imply that the other sections do include franchise agreements.

⁴ Franchise agreements are only three times referred to in the Report. Namely (i) in a footnote to paragraph 161 (as an example of operation of mono-brand stores by third parties; franchisees being an example of a third party), (ii) in paragraph 175 (as an example of a distribution agreement) and (iii) in a footnote to paragraph 254 (where it is indicated that 21% of the manufacturers that indicated that customer services are important have franchising agreements in place).

⁵ Dr. Mark Abell, *Legal perspective of the Regulatory Framework and Challenges for Franchising in the EU*, study for the IMCO Committee on behalf of DG Internal policies, September 2016, IP/A/IMCO/2016-08.

⁶ Idem, p. 10.

of an established business. It always involves six basic features: independence of the parties involved, economic interest, a business format, a brand, (compliance) control of the franchisee by the franchisor and the provision of assistance to the franchisee by the franchisor. Also, different financial structures exist, amongst which the payment of an entrance fee by the franchisee and ongoing royalties to the franchisor for the right to operate the business under the trademark name of the franchisor. Franchisees traditionally operate locally.

- 3.3. A distributor simply pays for the items it buys from the company that makes the products. A distributor is, moreover, not permitted to operate under the trademarked name of the company whose products it distributes. Instead, the distributor operates under its own business name. It functions as a reseller of the products but does not conduct business on behalf of the company that makes the items.
- 3.4. As a result, the relationship between the franchisee and franchisor is entirely different from a general distribution relationship. The franchisee is for example heavily dependent on the franchisor. Not only because of the information asymmetry (the franchisor has in principle more information)⁷, but also because the franchisee is dependent upon the franchisor for joint advertising, purchase prices and in many cases the rent of the building. It is generally agreed that the franchisor wields the most power. This does not necessarily mean that this is a problem, but the position of the franchisee should be carefully handled. The imbalance of power has already been the primary determinant for introducing specific franchise legislation in the franchising sector in the Netherlands⁸, as it was in many other European countries. Therefore, as set out above, franchise networks cannot be treated the same as distribution networks. The current legislative framework for vertical restraints already recognizes that to some extent.⁹

4. Developments in franchise networks as a result of e-commerce

Similar developments as identified in the Report

- 4.1. In its Report the Commission identifies four main developments in response to the rise of e-commerce. These developments are (i) more price transparency leading to an increase in price competition, (ii) free-riding increasingly playing an important role since it is easier for customers to switch between online and offline sales channels, (iii) more and more manufacturers opened their own online shops and (iv) more and more manufacturers introduced a selective distribution system or new criteria for the existing selective distribution system.

⁷ This is contrary to distributors, who generally have more information (of the specific country) than the supplier/manufacturer.

⁸ It was recently announced that Minister Kamp will codify the Dutch Franchise Code. This Code is a joint product of Dutch franchisors and franchisees. A legislative embedding is expected in 2017. See Lower House, 2016-2017, nr. 34550-XIII, nr. 10.

⁹ Regulation 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 [OJ 102/1 of 23 April 2010] and the accompanying guidelines on vertical restraints [2010/c 130/1].

- 4.2. These developments are also generally experienced by the Association's franchisees. Franchisors increasingly opened their own online shops, in competition with the franchisees' exclusively designated areas and customers. Franchisees are traditionally locally oriented, but are as a result of profits shifting towards the franchisor practically forced to also open online shops. However, this is hardly possible. Franchisors, for example, tend to argue that the internet as a sales channel is not covered by the franchise agreement. As a result, the franchisor would not be obliged to assist the franchisees in developing a web shop, thus the franchisor argues. Without the assistance of the franchisor, setting up a successful web shop becomes extremely difficult for franchisees, as will be set out below in more detail. Consequently, franchisors ensure that franchisees do not have the same chances online and limit competition. Free-riding, in the sense that customers visit the brick and mortar shops of the franchisees and buy the product online from the franchisor, therefore, also becomes an increasing problem for franchisees.

Developments specific for franchise networks not (fully) identified in the Report

- *The tension between the online shops of Franchisors and exclusivity*
- 4.3. A feature of these developments that is specific for franchise networks, and does not seem to be reflected in the Report, is that provisions granting a franchisee an exclusive territory *within a country* are very common amongst franchise networks.¹⁰ This means that the franchisee exclusively can exploit the franchise formula in that area or to a specific group. It provides franchisees the certainty that the competition is limited to "other" undertakings, not being the franchisor or other colleague franchisees. This is an important aspect in assessing whether or not to open a franchise branch, *i.e.* invest a lot of money in it.
- 4.4. The enforcement of exclusivity is relatively easy when it regards physical shops (brick and mortar). This is entirely different when it regards online sales (e-commerce). After all, a web shop is not a branch office. Sales via web shops can cross the borders of the exclusivity areas, because geo-blocking, whereby web sites are blocked for customers from other geographical areas, is not allowed under competition law rules. Therefore, customers from a franchisees' exclusive area can easily buy from the web shop of a competitor and *vice versa*. Thereby putting the exclusivity deal under pressure, which was intended to protect the investments made by the franchisee (since it provided a certain level of assurance of turnover).
- 4.5. This is a serious problem when other (competing) franchisees open web shops, but an even more serious problem when franchisors themselves open web shops. Franchisors currently tend to use the internet to exclude and compete with their own franchisees. Franchisors are able to do this because they usually have not made any explicit arrangements with the franchisees about e-commerce at the time of closing of the franchise agreement. Franchisors often argue that sales via the internet did in fact not form any part of this agreement. Meaning that (i) the franchisor can open up a web shop, without being held to

¹⁰ If exclusivity is granted to a distributor, this is generally for a whole country. In case exclusivity is granted to a distributor for different regions within a country the same might apply as for franchise networks.

the exclusivity clauses and, as a result, without the need to share the profits of its online sales with its franchisees. Even if those profits are made by selling to customers that were initially exclusively assigned to the franchisee. And, in our experience, franchisors often argue that, (ii) franchisors do not have to provide any assistance to franchisees when they want to develop their own web shop. This is problematic because assistance is required in order to be able to develop a web shop. As explained in the beginning, one of the basic features of franchise networks is the assistance from the franchisor to the franchisee in order to exploit the formula in the best possible way. After all, the franchisor owns the trademarks and possesses all (customer and meta) data etc. Without access to it, it is very difficult, if not impossible for franchisees to open their own web shops.

- 4.6. This all comes in addition to franchisors already having a disproportionate large head start compared to franchisees when it comes to e-commerce, because franchisors generally (i) are not bound to any (anti-competitive) restraints, (ii) have more resources to unroll a web shop and (iii) possess more data than the franchisees, be it that these data often are directly and/or indirectly collected by franchisees during their sales and contacts with customers and others. Especially the latter aspect (iii) is an increasing problem. Franchisors have (a) the advantage of interconnected information systems – e.g. regarding products and product-information - and centralized customer databases within their own franchise networks, while (b) they can also make use of all data (like customer and meta) of other (franchise) networks owned by affiliates. This data e.g. expands their circle of (potential) customers and enables franchisors to target those customers better. For instance, by sending those customers online-only discounts; discounts only available on the franchisors' website. This is a powerful business function, franchisors tend not to share with their franchisees.¹¹ The chances of success of a web shop from the franchisor are therefore way higher than those of a web shop of a franchisee - if the franchisee is at all enabled to set up a web shop. Besides, franchisors tend to sell the customer data to suppliers and/or manufacturers, without sharing the profits with the franchisees (while the franchisees are the ones who provided the information to the franchisors in the first place).
- 4.7. One of the few examples where franchisees were able to set up their own web shop is the web site www.ah-boodschappen.nl. This is the web shop of several franchisees of Albert Heijn ("AH"), as said a large supermarket in the Netherlands. It was built as a response to the omnichannel strategy of Ahold, the mother company of AH, with which the franchisees disagreed, while no solution or alternative was discussed or provided to the franchisees. In Albert Heijn's strategy the franchisees do *not* get a share of the profits AH (the franchisor) makes with its online sales (www.ah.nl). If the groceries are not delivered at home but picked up by the customer at so-called stand alone "pick-up points", the franchisee generally also does not get a (fair) share of the profits. A pick-up point is either (linked to) a local AH supermarket or a separate distribution centre. If a customer chooses to pick its groceries up at a pick-up point, this could also be an AH owned by a franchisee. In that case two

¹¹ Franchisors often point to privacy protection laws as a reason why they refuse to provide franchisees the (customer) data.

financial models are currently being used: (i) the franchisor pays a very small compensation to the franchisee, while the profits are for the franchisor, or (ii) the franchisee pays higher (logistical) costs to the franchisor, because the groceries have been collected at a different point (e.g. distribution centre of the franchisor) and transported to the franchisee. In the latter case the franchisee receives the turnover, but only a very narrow margin, or even a negative margin remains. In other words, the franchisee helps AH to generate profits without actually benefiting from it. Franchisees felt the need to open their own web shop www.ah-boodschappen.nl. As described above, franchisees are, however, less well positioned in developing a web shop than the franchisor. In addition to the disadvantages named above, the franchisees are, for example, not able to provide the same assortment as the franchisor, cannot make use of the specialized distribution centre of the franchisor nor of the automatic pricing system. Moreover, in food retail, where every penny counts, it is very undesirable to have an expensive web site. Furthermore, and most importantly, AH can make use of the customer data of all franchisees¹², but also of the data of its affiliates. As described in the beginning, AH's mother company, Ahold, owns several different (franchise) networks, amongst which Etos (drugstore), Gall & Gall (liquor) and Bol.com (books, toys, electronics, cosmetics and non-food groceries etc.). As a result, AH possesses an enormous amount of data. Consequently, it is almost impossible to successfully compete against the web shop of AH and the profits of the franchisees come under more and more scrutiny.¹³

- 4.8. The interface between e-commerce and exclusivity has led to tensions in many franchise networks these last years, not only within AH. The franchisees of HEMA (generic housewares), for example, also complained about *inter alia* the allocation of profits earned by internet sales. Moreover, the Dutch Court of Appeal of The Hague ruled in 2013 that an exclusivity clause in a franchise agreement between drugstore Kruidvat and a franchisee had to be read narrowly and should be seen in the context when the clause was agreed upon, i.e. at a moment e-commerce was not even considered an option. As a result, the exclusivity clause was limited to physical stores and did not prohibit Kruidvat to open a web shop.¹⁴ Judgments like these worry the Associations, because it allows franchisors to keep e-commerce exclusively to themselves.
- 4.9. There are also examples of how e-commerce and exclusivity obligations can get along. However, the number of those examples is relatively low. One example is the franchise network of coffee- and teashop Simon Levelt. Simon Levelt decided to award part of the online sales profits to the franchisees based on their postal code. The other part of the profits is simply divided amongst all franchisees.¹⁵ This seems to be a workable arrangement in practice, especially since it leads to less confusion for the customers.

¹² Franchisees can for example only provide a discount if the customer uses a loyalty card. This loyalty card is issued by the franchisor, who as a result receives the customer data. In other words, the franchisee pays the discount, while the franchisor receives the data.

¹³ See for example ABN AMRO, *Branche update: Groei van online retail biedt franchisenemers kansen*, 4 December 2015.

¹⁴ Court of Appeal of The Hague, 16 July 2013, ECLI:NL:GHDHA:2013:3720.

¹⁵ Business insider, *Webwinkel blij met franchisers: zo tackelt koffiezaak Simon Levelt dat probleem*, 5 February 2016.

- 4.10. Such a solution is currently, however, largely dependent on the willingness of the franchisor. Too many franchisors still argue that the internet is not caught by the existing franchise agreement, while refusing to present an alternative. Franchisees in turn see their franchisor selling to and thereby taking away (the profit of) “their” customers. It erodes the exclusivity that has been agreed upon and, in the end, these developments can discourage some (potential) franchisees from entering into or continuing franchise agreements.
- *Vertical restraints would make the position of the franchisee even more vulnerable*
- 4.11. The Associations emphasize that the position of their franchisees would come under even more pressure if the franchisor would impose (online) vertical restraints on the franchisees. For example, if the franchisor imposes bans like the prohibition to use market places, price comparison tools or certain AdWords, the possibilities for franchisees to expand their business online become even more limited. One could even question the added value of franchise networks, and therefore its existence in that case. As explained above one of the main features of franchise networks is the independence of the parties involved. Currently, in the physical world, franchisees have sufficient means to distinguish themselves from other franchisees and the franchisor. If franchisees become obliged to follow the exact same (online) path as the franchisor, not only the possibilities for franchisees to expand their business online become limited, it also leads to the diversity being vanished. Franchise then loses its added value compared to a (simple) subsidiary of the franchisor.
- 4.12. Therefore, the Associations fully endorse the Commissions’ preliminary findings that vertical restraints, like absolute market place and price comparison tools restrictions “may exclude an effective method for retailers [franchisees] to generate traffic to their website” and those restrictions should in any case be viewed critically.¹⁶
- 4.13. The same goes for limitations to use or bid on the trademarks of the franchisor in order to get a preferential listing on the search engines paid referencing service (such as Google AdWords) or to bid only on certain positions. As the Commission rightly notices such restrictions would most probably prevent franchisee’s websites from appearing prominently in the case of usage of specific keywords. In the Associations’ views such restrictions indeed raise concerns under Article 101 TFEU as they restrict the ability of franchisees to attract online customers. The Associations submit that this is even more so the case for franchise networks than for general distributions networks, since in franchise networks all stores have the same name. For example, if franchisees were not allowed to use “AH” as an Ad-Word, setting up the web site ah-boodschappen.nl would not make any sense, since the franchisees could probably not ensure any presence on search engines like Google. After all, customers that want to buy groceries from AH online, likely search on the word “AH”.
- *Allowing pricing restraints like RPM is not the right solution*

¹⁶ See *inter alia* paragraph 502 of the Report.

- 4.14. Furthermore, the Associations want to draw the Commission's attention to a recently published paper on the legal perspective of the regulatory framework and challenges for franchising in the EU.¹⁷ It was conducted on behalf of DG Internal Policies and considers how the regulatory environment of the EU impacts upon franchising. The Associations emphasize that the paper does not necessarily represent the official position of the European Parliament. The author of the paper suggests that the failure of franchising to fulfill its full potential in the EU is due, at least in part, to the dysfunctionality of the EU's regulatory environment. With regard to pricing restraints the author suggests that the Commission should "allow[s] franchisors to use retail price maintenance in certain circumstances [...]". According to the author, this should be possible in situations where the franchise network faces strong market competition and collusion. The underlying reason for this would be that EU competition law currently places franchise chains at a disadvantage compared to corporate chains, thereby preventing franchisors and franchisees, which are mostly SME's and individuals, competing effectively with big businesses because corporate chains can impose resale price maintenance ("RPM").¹⁸
- 4.15. The Associations find it quite surprising that it is even suggested to introduce RPM for franchise networks. Before such a massive policy change would be made, really good reasons must be presented that require this change of a long-standing policy.¹⁹ The Associations can in any case comment that allowing RPM would put the position of franchisees under even more scrutiny. As the Commission notices in its Report, price is the most important parameter of competition online. By taking away price as a competition parameter, franchisees can no longer effectively compete online with the franchisor. Especially since it is already hard, if not impossible, to compete with the franchisor, as described above in more detail.

5. Conclusions and requests for improvement in final report

More justice to the position of franchisees

- 5.1. As indicated above, the Associations confirm the developments identified by the Commission in its Report, also for franchise networks. The Associations submit that these developments, especially the increased number of franchisors opening their own web shops (without involving franchisees), lead to severe tensions in franchise networks since the interests of franchisees seem to be lost out of sight. In short, franchisors keep e-commerce exclusively for themselves, thereby limiting competition. As a result, the balance between the

¹⁷ Dr. Mark Abell, *Legal perspective of the Regulatory Framework and Challenges for Franchising in the EU*, study for the IMCO Committee on behalf of DG Internal policies, September 2016, IP/A/IMCO/2016-08.

¹⁸ Please note that this is just one aspect of the proposals included in the paper of M. Abell. The Associations indicate that their response in this submission should not be read as their full views. We just addressed one of the aspects to emphasize the importance of not introducing the possibility of imposing (more) vertical restraints on franchisees.

¹⁹ It was not without reason that the Commission has qualified RPM as anti-competitive in its current vertical restraints legislative package (Article 4(a) Regulation No 330/2010) notwithstanding discussion on this point. Price maintenance is seen as a serious infringement of competition law.

rights and obligations of parties, which is an essential part of the franchise formula, is distorted. This causes serious concerns for the Associations.

- 5.2. These concerns are strengthened by the fact that the Commission has also not seem to take into account the interests of franchisees in its Report. The Associations, therefore, urge the Commission to consider the vulnerable position of franchisees, as described above, when drafting the final report. In the view of the Associations, this implies that the Commission should be alert on franchisors inventing solutions in response to the increase in e-commerce that potentially hinder the interests of franchisees and those of customers (e.g. by not exploiting the know-how and economies of scale of the formula to the full extent). Essentially, franchisors should be urged to include internet as a valid channel under the existing franchise agreements. One should realize that the internet is just one channel to exploit the formula and not an entirely different channel that should be placed outside the existing franchise agreements and be kept exclusively for the franchisor. Internet sales should be considered as being part of existing agreements so that the franchisor and franchisees proceed alongside each other and together, which is the essence of the franchise formula and in the end the best interest of not only the franchisor and franchisees, but also the consumer.
- 5.3. Furthermore, as already indicated at the beginning of this response, it is important for the Associations to have clarity about to what extent certain findings of the Report apply to franchise networks. If those findings were intended to apply to franchise networks as well, the Associations request the Commission to either conduct additional research into franchise networks and/or ensure that the specifics of franchise networks, especially the position of franchisees as (partly) indicated in this submission, are reflected in the final report.

Create more legal certainty

- 5.4. Finally, the Associations want to point out that the Report is presented as a set of factual findings, and does not purport to reach any (final) conclusions about whether particular conduct in the e-commerce sector is incompatible with EU competition law. However, at the same time "the report should be a reason for companies to review their current distribution contracts and bring them in line with EU competition rules if they are not" and "the Commission may open case specific investigations to ensure compliance with EU rules on restrictive business practices and abuse of dominant market positions".²⁰ This implies that the findings in the final report are crucial and, consequently, conclusions that certain practices might be anti-competitive should not easily be reached. The difficulty for industry stakeholders in responding to the Report – and in assessing any action that the Commission may take on the basis of the Report – is, however, that the Commission's findings are presented in such a manner that no clear conclusions can be drawn. The Report is clear on some points (like the ban on restrictions of active sales in non-exclusive agreements) and the Associations agree with the Commission's position – noted in various places in the Re-

²⁰ European Commission, Press release, *Antitrust: Commission publishes initial findings of e-commerce sector inquiry*, Brussels, 15 September 2016.

port – that it cannot reach a view on whether particular conduct is compatible or incompatible with EU competition law without an in-depth analysis of individual conduct. However, the lack of guidelines as to when certain practices may infringe competition laws creates significant uncertainty for not only franchisors and franchisees, but to all industry stakeholders. In the interim, pro-competitive, innovative conduct will be chilled by the legal uncertainty. The uncertainty created by the lack of a clearly articulated legal framework in the Report is heightened by the fact that the practices discussed in the Report have not been the subject of many infringement decisions by the Commission yet. More so than for other forms of distribution, there are very few precedents in the Commissions practice and in the EU case-law on franchise from a competition perspective. This means that there are hardly any legal benchmarks that franchisees can rely on to assess their contractual relationship with franchisors. This makes it even easier for franchisors to draft the franchise agreement in their advantage²¹, like excluding e-commerce from the licensed franchise formula, thereby restricting competition.

- 5.5. The Associations would welcome that the final report delineates the types of conduct that the Commission considers may be incompatible with EU competition law, the specific factual circumstances under which such types of conduct would be unlawful, and the legal principles that guarantee that the right balance is maintained between franchisees and franchisors, thereby safeguarding the formula of franchise as a valuable way of organizing distribution. These "guidelines" should of course be within the boundaries of the law as laid down in the vertical restraints legislative package and would enable undertakings to both analyze their past practices and determine their future conduct, in accordance with the Commission's proposed position.
- 5.6. The Associations further submit that any such guidelines should be subject to a further period of review and consultation with stakeholders in the e-commerce sector. Failure to do so is likely to result in lengthy and costly litigation to clarify the relevant principles. In the interim, pro-competitive, innovative conduct will be chilled by the legal uncertainty and/or over-enforcement. Subjecting a potential framework to public consultation, consideration and critique will inevitably result in a more coherent and legally sound set of guidelines, and one that is more likely to be accepted.

We thank you in advance for taking our views into consideration in your further deliberations.

Yours sincerely,



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²¹ Franchisors usually draft the franchise agreements.