

**RESPONSE TO THE EUROPEAN COMMISSION'S CONSULTATION ON  
THE CURRENT REGIME FOR THE ASSESSMENT OF VERTICAL  
AGREEMENTS**

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# RESPONSE TO THE EUROPEAN COMMISSION'S CONSULTATION ON THE CURRENT REGIME FOR THE ASSESSMENT OF VERTICAL AGREEMENTS

## 1. INTRODUCTION

1.1 Freshfields Bruckhaus Deringer welcomes the opportunity to respond to the European Commission's public consultation on its current rules and policy on the assessment of vertical agreements, namely Commission Regulation 2790/1999 on the application of Article 81(3) to categories of vertical agreements and concerted practices ('VRBE'),<sup>1</sup> and the Commission Guidelines on Vertical Restraints ('Guidelines').<sup>2</sup> The 'draft VRBE' and 'draft Guidelines' referred to are those that were posted on the Commission's website on 28 July 2009.

1.2 Our comments are based on our significant experience and expertise in advising on issues raised by vertical agreements of many types, and in particular complex agency, and exclusive and selective distribution, arrangements.

1.3 The comments contained in this paper reflect the views of many in Freshfields Bruckhaus Deringer. They do not necessarily represent the views of every partner in the firm, nor do they represent the views of our individual clients.

## 2. EXECUTIVE SUMMARY

- The current rules have in general worked well and we therefore support the maintenance of the existing legal framework of a block exemption and detailed guidelines.
- Clarification of the application of the *de minimis* rule to hard core restrictions would be welcome.
- We do not support the introduction into the VRBE of an additional market threshold applicable to the buyer's downstream market. Past experience does not justify such a significant narrowing of the scope of the block exemption, and the application of such a rule would often raise practical difficulties. Where buyer power issues do arise, they can be dealt with by withdrawal or disapplication of the block exemption.

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<sup>1</sup> OJ 1999 L336/21.

<sup>2</sup> OJ 2000 C291/1.

- If there is to be such a new threshold, it should be defined consistently in the VRBE and the Guidelines. In addition, consideration should be given to applying the two thresholds as alternatives rather than cumulatively.
- The section of the Guidelines on agency introduce a third type of risk which is relevant in assessing whether a relationship is one of agency. We question whether this is appropriate, but if it is maintained then a clear definition is needed of the concept of a separate activity which is ‘indispensable’ to the main agency activity.
- Further clarification of the distinction between ‘unilateral conduct’ and ‘agreement’, and of some of the guidance relating to on-line sales and to ‘English clauses’, is needed.
- New guidance on upfront access payments and category management is welcome, but we suggest that more emphasis should be put both on the fact that they often do not infringe Art. 81, and that they frequently have pro-competitive effects.
- The new, expressly effects-based, approach to resale price maintenance is welcome, but additional guidance on establishing efficiencies is needed.

### **3. GENERAL COMMENTS**

#### **The current rules have worked well**

3.1 Our experience of applying the existing VRBE and Guidelines over the last ten years, though at times raising difficult issues of market share assessment, has been broadly positive. The legal certainty for business provided by block exemption under the VRBE has frequently been a helpful element of the competition rules. The advent in 2004 of ‘modernisation’, with the consequence that Art. 81(3) is now almost always applied through ‘self-assessment’, means that it, and the Guidelines, have become even more important than they were before in providing clear guidance on the rules. We believe in addition that the VRBE and Guidelines have made a considerable contribution to the consistent application of Art. 81 throughout the Community, whether by companies themselves or by national courts and competition authorities.

3.2 The ‘safe harbour’ provided by the VRBE also frees up resources in the Commission and in other enforcement authorities, because they are seldom called on to deal with arrangements that fall within its scope. We therefore strongly support the proposal of the Commission to maintain a revised VRBE alongside revised Guidelines. Furthermore, while we appreciate that there is a need to make certain

adjustments to the texts in the light of legal and economic developments over the last ten years, we strongly encourage the Commission to maintain the level of clarity and relative ease of application that characterise the existing texts.

### **The application of the *de minimis* rule to ‘object’ and ‘hard core’ restrictions should be clarified**

3.3 As an initial specific comment we suggest that it would be helpful for the draft Guidelines to include additional wording on the treatment of restrictions ‘by object’ (a concept which appears in Art. 81 itself) and ‘hard core’ restrictions (used in the draft Guidelines to denote restrictions that take an agreement outside the scope of the draft VRBE). Such clarification should probably be inserted into para 47 of the draft Guidelines.

3.4 As an initial point it could be clarified whether the two concepts are indeed identical, and, if not, what the differences are. If it is the case that ‘hard core’ denotes restrictions mentioned in Art. 4 of the VRBE, whereas there is a wider category of potential ‘object’ restrictions, this could be stated explicitly. Also, where the Guidelines refer to ‘*restrictions of competition by object and in particular hardcore restrictions of competition*’ (para 92), ‘in particular’ might be replaced by ‘including’.

3.5 In addition, the draft Guidelines should make it clear that where there is no effect on inter-Member State trade, or no appreciable effect on competition, there is no infringement of Art. 81(1).

3.6 Hard core restrictions are expressly excluded from the benefit of the Commission’s *De Minimis* Notice.<sup>3</sup> Therefore they cannot benefit from the presumption set out there, which is that agreements between non-competitors, where no party has more than a 15% market share on any relevant market affected by the agreement, do not appreciably restrict competition.

3.7 However, the European Courts’ case law<sup>4</sup> does not in principle exclude hard core restrictions from the benefit of the general *de minimis* rule. In other words, where a hard core agreement has no appreciable effect on competition, or has no appreciable effect on cross-border trade, it does not infringe Art. 81(1). At present this general point about the application of the *de minimis* rule to hard core restrictions is included in the draft Guidelines but is expressed negatively rather than positively (‘*As regards hardcore restrictions...Article 81(1) may apply below the 15% threshold, provided that there is an appreciable effect on trade between Member States and on competition*’, para.10).

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<sup>3</sup> OJ 2001 C368/13, para 11.

<sup>4</sup> E.g. Case 5/69 *Völk v Vervaecke* [1969] ECR 295.

3.8 The Commission's own reference, in the draft Guidelines, to a situation in which very short-lived RPM might not infringe Art. 81(1) at all, appears to contemplate the application of the *de minimis* rule to a hard core restriction such as RPM (para 221). Similarly, absolute territorial protection seems to be treated as *de minimis* for two years where '*a distributor will be the first to sell a new brand or the first to sell an existing brand on a new market*' (para 56) and the other conditions set out there are satisfied.

3.9 Clarification on this point, apart from being useful as an aid to understanding of the revised Guidelines, could serve to diffuse certain criticisms of Commission policy that arise out of a misunderstanding of the implications of characterisation of a restriction as 'by object' or 'hard core'.

### **Very detailed guidance is needed**

3.10 In a number of places we have requested additional guidance, on top of what might already be considered fairly detailed existing explanations. Though the resulting revised Guidelines will be a lengthy document, we think this is justified in the light of the very many different enforcement bodies and courts, with their varying levels of experience and expertise in competition law, not to mention the undertakings themselves, that look to the Guidelines when making decisions in specific cases. It is vitally important that they be given as much assistance as possible in applying the rules in as uniform a way as possible across the Community.

3.11 Below we set out our comments on the VRBE market share threshold and on the Commission's proposal to apply that threshold to the buyer's, as well as the supplier's, market share. We then comment on the Commission's proposals to amend and add to its Guidelines in respect of various different types of vertical agreement. These latter comments are presented in the order in which the respective topics appear in the draft Guidelines.

## **4. VRBE: SHOULD THE 30% THRESHOLD APPLY TO THE BUYER'S AS WELL AS THE SUPPLIER'S MARKET SHARE?**

4.1 The Commission has stated its concern about the increasing prevalence of distributors with significant buyer power, but without setting out the justification for a change to the VRBE in this respect. In addition, we question whether the addition into the VRBE of a (cumulative) 30% threshold applicable to the distributor's downstream market share is the best way to deal with any such concerns, in the absence of clear evidence that they are sufficiently widespread to justify a severe narrowing of the scope of the VRBE. We also suggest that this proposal raises considerable practical problems of application for suppliers and distributors.

4.2 As a preliminary point we observe that the introduction of this additional threshold would significantly narrow the scope of application of the VRBE, raising compliance costs considerably for a great many businesses. Over its lifetime the VRBE has been experienced by many as achieving a good balance between providing legal certainty as widely as possible, while not permitting significant anti-competitive conduct. If that balance is to be changed so as to make the rules significantly more restrictive of commercial conduct, this should be done on the basis of clear evidence that a stricter approach is needed, which we would submit is not the case.

#### **Any new VRBE and new Guidelines need to be consistent**

4.3 As currently conceived the draft VRBE and draft Guidelines describe the new threshold in slightly different ways. While the draft VRBE itself, which would become a binding legal text, required to be applied by all competition enforcement authorities and courts, refers to the proposed threshold for exemption as being 30% of *'any of the relevant markets affected by the agreement'* (Art. 3) the draft Guidelines interpret the reference to a buyer's market share as referring to *'the market(s) where it resells the contract goods or services...'* (para 23).

4.4 If such a new threshold is to be introduced, we consider it crucial that the relevant market(s) for these purposes be clearly defined in the VRBE itself. Otherwise there is a risk that national authorities and courts may decide to interpret 'relevant markets' in a different way from the Commission, for example to mean the buyer's purchasing market, rather than its selling market. It is essential that this possibility for uncertainty is not left open, and that a precise rule is established in the VRBE itself. This is particularly important now that self-assessment of agreements by the parties themselves, or by national courts or authorities (which are not legally bound by the Guidelines), and not assessment by the Commission, is the rule.

#### **Should there be a new threshold applicable to the buyer's downstream market?**

4.5 We turn now to the question of principle, which is whether it is appropriate to introduce a new market share threshold, applicable to the buyer's downstream market. We agree that where there is buyer power it is very relevant whether or not the downstream market is competitive. This is because if it is competitive, then it can be presumed that the lower input prices extracted by a powerful buyer will benefit consumers. However, the application of a general 30% threshold applicable to the buyer's downstream market appears to assume the presence of buyer power. It would exclude many harmless agreements, where the buyer has no real power on its purchasing market, from the benefit of block exemption. In many cases the buyer's downstream (selling) market power is not relevant to its share of its upstream (purchasing) market, and to its potential buyer power on that market. To apply the 30% threshold to the downstream market, particularly where the buyer in question (e.g. specialty chemical producer) has a strong position on its downstream market, and

the supplier is providing an input (e.g. packaging materials for the chemicals) to a large number of buyers on a competitive market, risks unnecessarily excluding many innocuous contracts from the scope of block exemption.

4.6 The introduction of such a new threshold therefore does not appear to be appropriate in terms of efficient focusing of enforcement resources on agreements that are the most damaging to competition. This is particularly so, given that the options of withdrawal of the benefit of the VRBE from specific agreements (Art. 6) or its disapplication to a category of restraints in a specific market (Art. 7) are available where distribution arrangements do have significant anti-competitive effects. Indeed, if buyer power is raising major issues it is perhaps surprising that there do not appear to have been any instances of the use of either of these provisions to deal with such situations.

**If there is to be a new threshold, should the supplier's and buyer's market shares be alternative rather than cumulative thresholds?**

4.7 In the draft VRBE as currently drafted, the supplier's and buyer's market share thresholds apply cumulatively. While we do not support the introduction of the additional threshold, if there is to be one then we suggest that the Commission consider applying the supplier's and buyer's market share thresholds as alternative rather than cumulative thresholds. This approach would take into account both the nature of the restrictive clauses in question, and which party enjoys the main benefit of the restriction. For example, the draft VRBE might be amended to apply the market share threshold to the buyer's downstream market only in the case of exclusivity or other restrictive clauses to the benefit of the buyer, such as the allocation of an exclusive territory or customer group. The threshold would apply to the supplier's market share in the case of exclusivity clauses to the benefit of the supplier, such as non-compete and exclusive purchasing clauses, and also where there was no exclusivity involved.

4.8 Alternatively, this new threshold, if it is to be introduced, should not apply in respect of agreements that only require the benefit of the VRBE in respect of non-compete clauses, as buyer power is not relevant here: one cannot imagine a powerful buyer requiring its supplier to limit it to purchasing it from that supplier.

**The buyer's downstream market is difficult to identify and assess**

4.9 We turn now to the practical difficulties of applying the proposed new threshold. While the VRBE, when it was adopted in 1999, pioneered the use of market share thresholds in block exemptions, it did so in the face of a considerable body of opinion against such thresholds. The objections mainly centred around the uncertainty inherent in assessing market share, and the difficulty in obtaining the relevant information. These objections were rejected essentially on the basis that no more

suitable proxy for market power than market share was available. While business and its advisers have to some extent learned to live with market share thresholds, the original objections to them subsist, and apply with much more force to this proposed change than they did to the proposals that were discussed in 1999.

4.10 Whereas it may be reasonable to expect a supplier to be aware of its share of any downstream market on which it operates, it represents entirely another level of difficulty for the supplier to ascertain the downstream market share of each of its distributors. A supplier cannot, for example, know what assortments of competing goods a buyer is carrying at any particular time, nor the volumes the buyer is purchasing from competing suppliers, and so will not normally be informed as to its buyers' downstream market shares, let alone how these are likely to develop in the future. The introduction of such a threshold would give distributors an incentive to downplay the level of their market share so as to make themselves appear attractive partners. The supplier, accepting the information in good faith, could later find itself party to illegal and unenforceable agreements. Moreover, in the case of dual distribution, where the supplier is also active on the buyer's downstream market, the sharing of such current and commercially sensitive data would represent serious anti-competitive conduct.

4.11 There will also be many situations in which the buyer's downstream market, to which the 30% threshold should be applied, will be difficult to identify. For example, an energy company may supply electricity to a supermarket, or fuel to a manufacturer to power machinery making a wide range of plastic items. It is hard to see why it makes sense to look at any of the possible buyer's downstream markets in attempting to avert any potential anti-competitive exercise of buyer power on the energy purchasing market. In addition, the supplier is likely to have no way of knowing what precise use the purchaser intends to put the energy to.

4.12 Nor are such issues confined to situations in which the agreement in question relates to the supply of an input rather than simply of goods for resale. For example, given that consumer retail geographic markets are often defined as being local or regional, it may be the case that the same contract terms will benefit from block exemption in respect of, say, Düsseldorf, but not in Köln, depending on the precise position of the buyer on each individual local market. However, the supplier may not know, when supplying specific goods, in which cities the buyer will choose to resell them. Indeed, this may be a decision that the buyer does not make until a later stage, depending on demand for the product in different places. In practice it will be virtually impossible for a supplier to assess and to keep track of all these different geographic markets over time. And it would be commercially unrealistic, and indeed very probably an infringement of Art. 81, for the supplier to restrict absolutely the resale of the goods by the buyer to a specific local area.

4.13 In markets such as food retail the assessment will have another layer of complexity and arguably will not serve its purpose of excluding the most anti-competitive arrangements from the scope of block exemption. At the retail level food markets tend to be defined as local or regional (geographic market) and as a typical mixed ‘basket’ of various food items (product market). At wholesale level the market is likely to be national and to be defined as a single product or group of related products (e.g. jams and other spreads). Wholesale contracts would need to be separate, or analysed separately, for each product (or group of related products), in the light of the 30% market share threshold applicable to the supplier’s market share. However, the buyer’s downstream market share in the context of such a contract would not be meaningful, as the market is not defined as consisting only of that product.

## 5. AGENCY

5.1 The Commission quite correctly proposes updating the section of the Guidelines dealing with agency, in the light of subsequent case law of the European Court of Justice (ECJ) and Court of First Instance (CFI).<sup>5</sup> It also helpfully removes the concept of ‘genuine’ agency in favour of the simpler terminology of ‘agency’ as defined in the Guidelines. We also welcome the clarification, in the context of resale price maintenance, that a restriction on an agent sharing his commission with the customer is not prohibited (para 49), as this has given rise to some discussion in the past. Below we suggest a few amendments to the draft Guidelines to make them clearer, while still reflecting the case law.

5.2 As a preliminary point we observe that there are certain situations where, although the parties’ clear intention is that there should be an agency relationship, and the arrangements are set up in that way, in fact the agent takes on certain risks that do not fit with the standard interpretation of the agent/principal relationship. Other competition authorities, for example the Japan Fair Trade Commission, take a more flexible approach to resale price maintenance (RPM) in such situations, and acknowledge that there may be arrangements which are not anti-competitive, but which cannot be neatly categorised as agency or distributorship.

5.3 There may be, for example, situations where a third party facilitates ‘de facto direct sales’ between a manufacturer and an end user, i.e. where a manufacturer negotiates and agrees sales prices directly with an end user, and thereafter the third party is involved as an intermediary to purchase the products from the manufacturer

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<sup>5</sup> Case T-325/01 *DaimlerChrysler* [2005] ECR II-3319; Case C-217/05 *Confederación Espanola de Empresarios de Estaciones de Servicio* [2006] ECR I-11987; Case C-279/06 *CEPSA Estaciones de Servicio* [2008] ECR I-6681.

and resell them to the end user, solely for the purpose of facilitating the distribution logistics, customer communication and collection of payment in return for commission. Despite the superficial appearance that the third party is “re-selling” the products at a fixed price, the anti-competitive concerns typically raised in relation to RPM do not apply, as the end user is able to negotiate directly with the manufacturer to achieve the lowest possible purchase price, and the third party would not have been able to achieve a better price as an intermediary.

5.4 It can be seen that, in the circumstances described above, the practice would not lead to any of the anti-competitive effects of RPM set out in para 220 of the draft Guidelines, and indeed creates efficiencies by ensuring the end user can obtain the lowest possible price. Bringing a facilitator/logistics provider into the distribution chain also helps the manufacturer to balance its commercial risks and break into a new or foreign market. Under the rule of reason approach applied to RPM in the United States, the pro-competitive benefits of such a structure should be expected to outweigh any potential anti-competitive effects. As noted in our comments in relation to RPM (see Section 10 below), it would be very helpful to have further clarification of how in practice RPM efficiencies might be established, so as to give companies more guidance in self-assessing particular types of arrangements which may not fit neatly into the standard agent/distributor arrangements set out in the draft Guidelines.

#### **Risks related to activities in other markets**

5.5 The addition to the Guidelines of a third category of risk relevant to the assessment of agency, while not necessarily inconsistent with the case law, is expressed in broader terms than the case law itself. The new category is described as *‘risks related to other activities, such as after sales or repair services or activities undertaken in other product markets, to the extent that the principal requires the agent to undertake such activities – but not as an agent on behalf of the principal – and these activities are indispensable to engage in selling or purchasing the contract goods on behalf of the principal’* (para 14).

5.6 As the Commission recognises,<sup>6</sup> the case law in fact refers to the irrelevance of risks such as those related to after-sales service. The Commission justifies their inclusion in the draft Guidelines as being relevant where they are ‘indispensable’ to the main business which is the subject of the agency contract. However, given that the obligation to provide after-sales services apparently did not qualify as a relevant risk in *DaimlerChrysler*, the Commission must be interpreting the CFI as having considered that it was not indispensable to offer such services in order to act as a car dealer. This means that, for the CFI, the bar for showing ‘indispensability’ is very

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<sup>6</sup> Draft Guidelines, note 11.

high. It is therefore important that the Guidelines make it clear that the concept of ‘indispensability’ is a narrow one, and examples would be helpful.

5.7 We do question the desirability of including this third category of risk at all in the draft Guidelines. However, if it is to stay, then the draft Guidelines should include a clear and narrowly circumscribed definition of ‘indispensable’.

5.8 Finally, we note that if this third category of risk is to remain, then, for consistency with earlier paragraphs, the last indent of para 16 of the draft Guidelines needs to be amended. These earlier paragraphs refer to ‘*risks related to other activities...to the extent that the principal requires the agent to undertake such activities – but not as an agent on behalf of the principal – and these activities are indispensable to engage in selling or purchasing the contract goods or services on behalf of the principal*’ (para 14) and to ‘*risks...in relation to other activities required by the principal to be undertaken and indispensable to act as an agent in relation to the contract goods and services*’ (para15). The last indent of para 16 only refers to a requirement that the agent ‘*does not operate in other (product) markets unless this is not indispensable to engage in selling or purchasing the contract goods or services on behalf of the principal*’ and does not mention any requirement imposed by the principal. That indent should start with the additional words ‘is not required by the principal to operate, not as an agent, in...’.

## **6. DEFINITIONS OF ‘AGREEMENT’ AND ‘VERTICAL’**

### **Definition of ‘agreement’**

6.1 The Commission proposes new guidance in the draft Guidelines (para 25) on the definition of ‘agreement’ in Art. 81, to deal with the question of whether a given situation will be treated as unilateral conduct or as an agreement. While we agree that it is useful to provide such guidance in the light of recent case law from the European Courts, we do question whether the proposed wording is correct as a statement of law, and desirable as a matter of policy.

6.2 Firstly, the new wording suggests that if, following a supplier’s announcement that reduced volumes will be supplied, buyers place reduced orders, this is evidence of tacit acquiescence sufficient to constitute ‘agreement’ for these purposes. This is not justified by the case law, and may represent not acquiescence, but simply a belief on the part of the buyer that there is no point in continuing to request larger volumes, which he has already been informed will not be forthcoming.

6.3 Similarly, the fact that in such circumstances a buyer stops engaging in parallel trade may simply indicate that he does not have sufficient supplies to continue

to do so. This is particularly likely to be the case for markets such as pharmaceuticals where there may be a legal obligation to supply the domestic market.

6.4 It would also be helpful to have a fuller explanation of the way in which the presence of monitoring and coercive measures may prove acquiescence in anti-competitive restrictions, since normally such measures will be entirely unilateral. For example, it could be made explicit that there will be an agreement only where the existence of such measures indicates that supply is made conditional on the buyer not exporting the goods in question.

### **Definition of ‘vertical’**

6.5 The Guidelines could usefully include further guidance on the meaning of ‘vertical agreement’. In particular, a question sometimes raised is whether the developer of an interface to a competitor’s software programme is in a horizontal or vertical relationship with that competitor.

## **7. ON-LINE SALES**

7.1 The Commission proposes changes and additions to the existing Guidelines in respect of the restrictions that a supplier may place on on-line sales by the buyer without these restrictions taking the agreement outside the scope of the draft VRBE. In other words, the draft Guidelines give new guidance on the limits that have to be respected in this area if an agreement is to remain within the scope of the draft VRBE.

7.2 The changes proposed would provide more certainty to suppliers and distributors, but would reduce suppliers’ freedom to restrict internet sales. Overall we welcome the proposed revisions to the Guidelines, as we think that they strike a reasonable balance between allowing full use of internet to the benefit of consumers, and avoiding free riding between distributors and between different distribution formats. They also provide fuller guidance than before. However, we do suggest some additional guidance on some specific points.

### **Exclusive distribution**

7.3 In the context of exclusive distribution, the VRBE allows a distributor to be prohibited from making active (but not passive) sales into other distributors’ exclusive territories or customer groups. The issue here is the circumstances in which on-line sales, which are in principle treated as passive, may be regarded as active. We suggest that the Commission consider including additional guidance on the following points:

- Whether a requirement to sell ‘*at least a certain absolute amount (in value or volume)*’ off-line (regarded as not being a restriction on passive sales) refers to the

value calculated on the basis of the supplier's price or of the resale price charged by the buyer (para 52);

- Whether this same permitted requirement should relate only to the products being supplied under the agreement in question, or whether it can or should include sales of competing goods being sold by the buyer;
- Clearer rules on when an on-line advertisement is '*specifically targeted at*' or '*specifically addressed to*' certain customers, and therefore regarded as active selling (para 53);

### **Selective distribution**

7.4 In the context of selective distribution, the VRBE allows a supplier to ensure that its supplies go only to distributors meeting certain specified criteria, provided, amongst other things, that there is no restriction on either active or passive sales to other authorised distributors or to end-users. The issue here is the extent to which criteria relating to on-line sales may be regarded as creating such restrictions. We suggest that the Commission consider including additional guidance on the following points:

- We consider it an acceptable compromise in principle to allow a supplier to require a distributor to have a brick and mortar shop or showroom before engaging in on-line distribution (para 54); however, we see difficulties in applying such a rule in practice. For example, it should be clarified whether one physical shop within the EU is the most that can be required, or whether it is acceptable to require, say one physical outlet in any Member State (or smaller geographic area?) where on-line sales are to be made;
- Further explanation on the concept of '*criteria for on-line sales which are not equivalent to the criteria imposed for the sales from the brick and mortar shop*' (para 57) would be helpful; given the inherent differences between the two modes of distribution it would be useful to have specific guidance, for example, on what would be permitted in terms of requirements for the provision of after-sales service, product return and payment security. For example, it might be provided in the draft Guidelines that in the case of on-line sales it would be acceptable to provide that the product could be returned or sent for servicing to one of the seller's physical outlets, if there was one within a given distance of the purchaser's home or business, and that otherwise the seller would bear the cost of postage or transport. It might also be provided that the seller could specify the type and provider of any secure payment system to be used in on-line sales. It would also be useful to have a clear statement of which party the burden of proof of 'equivalence' falls on.

## 8. SINGLE BRANDING

8.1 With regard to single branding, the draft Guidelines, like the existing Guidelines, mention the so-called ‘English clause’ as important factor to be considered in assessing the anti-competitive effects of non-compete or single branding obligations. However, while the existing Guidelines explain to what extent and why English clauses could be anti-competitive, the draft Guidelines simply state that “...[a] so called English Clause, requiring the buyer to report any better offer and allowing him only to accept such an offer when the supplier does not match it, can be expected to have the same effect as a single branding obligation, especially when the buyer has to reveal who makes the better offer” (para 125).

8.2 While this is true in some cases, it should also be noted that English clauses in distribution contracts can be also been seen as a more pro-competitive alternative to single-branding clauses, to the extent that distributors under an English clause can at least indirectly benefit from alternative suppliers’ offers. In other words the main supplier is affected by the competitive pressure from other suppliers or new entrants – which does not happen at all under single branding contracts. Moreover, the existing Guidelines explain that, while an English clause may also work as quantity forcing, this “will have similar but weaker foreclosure effects than a non-compete obligation. The assessment of all these different forms will depend on their effect on the market” (para 152).

8.3 A paradoxical result might be that since the draft Guidelines only state that English clauses “can be expected to have the same effect as a single branding obligation”, and provide no further explanation, parties – especially those above the 30% market share thresholds – might see this statement as an incentive to conclude pure single-branding clauses rather than English clauses, given that the risk of being found anti-competitive would appear to be the same. Therefore the draft Guidelines should further explain to what extent English clauses can be deemed anti-competitive and provide practical examples. Alternatively, the wording in the existing Guidelines on this point (para 152, see above) should be retained.

## 9. UPFRONT ACCESS PAYMENTS AND CATEGORY MANAGEMENT

9.1 The Commission’s concern over powerful retailers, reflected in its proposal to introduce a buyer’s market share threshold into the VRBE, is also manifested in new sections in the draft Guidelines dealing with upfront access payments and category management (paras 199-209).

## **Upfront access payments**

9.2 While confirmation that the VRBE can cover provisions for upfront access payments is welcome, it does not seem appropriate to state that outside the VRBE they may infringe Art. 81. Such payments are pro-competitive, in particular in markets such as food retail where both wholesale and retail prices are widely known. In these markets such payments encourages competition for the supply of services such as access to shelf space, and involvement in the buyer's promotional activities, thus providing an element of competition between buyers that would otherwise be absent from the market.

9.3 Furthermore, such payments often simply involve straightforward remuneration for services provided, which the supplier is free to decide to pay for or not. Where the supplier cannot refuse to pay because the buyer's distribution network is essential to his business, then this is rather an issue of a possible (constructive) refusal to supply on the part of the distributor, contrary to Art. 82 (or national equivalent). The supply agreement itself should not be liable to be held an infringement of Art. 81.

## **Category management**

9.4 We have similar concerns about the guidance on category management. While again welcoming confirmation that the draft VRBE can cover such arrangements, it does not seem appropriate to apply Art. 81 to them to the extent that they do not benefit from the draft VRBE. Category management offers a number of benefits not mentioned in the Commission's draft Guidelines, which could usefully be added: for example, they give distributors access to expertise and information held by suppliers, and also reduce costs by enabling more efficient use of shelf space.

9.5 Category management arrangements normally involve simply the provision of a service, consisting of recommendations and advice that the buyer may or may not follow. Category management may be compared with recommended resale prices, which the buyer is free to apply or not, and which the Commission recognises do not normally infringe Art. 81(1). Even if such an arrangement involves some commitment by the buyer to follow certain instructions, the proposed Guidelines should make clear that this raises issues under Art. 81 only if the category captain has sufficient market power to foreclose competing suppliers.

9.6 The draft Guidelines envisage possible infringements of Art. 81(1) where a category captain discriminates between suppliers, or a retailer gives preference to his own-label product over a competitor's product, but there is no legal basis for this. Discrimination of this sort may be covered by Art. 82 if the company is dominant, but it should not be dealt with under Art. 81.

## 10. RESALE PRICE MAINTENANCE

10.1 The Commission's proposed changes to the Guidelines in respect of resale price maintenance (RPM) are welcome. We say this taking into consideration (i) the difficulty of justifying as a matter of economic theory the different treatment of price and non-price vertical restrictions,(ii) the higher degree of flexibility that such a 'case by case' approach to RPM would give to undertakings, and (iii) the desirability of convergence between the EU and United States in this area.

10.2 The proposals represent an appropriate effects-based compromise between a more or less absolute prohibition of RPM and too generous acceptance of it. The former would fail to recognise that RPM, like other vertical restraints, may in some circumstances result in efficiencies, whereas the latter would go against the limited economic evidence available on the frequency and importance of any potential economic benefits flowing from RPM.

10.3 The Commission first lists potential anti-competitive effects of RPM (para 220). In this context, further explanation of what is meant by the statement that RPM may '*soften competition between manufacturers and/or between retailers*' would be useful.

10.4 There then follows a list of three possible efficiencies arising out of RPM which might justify exemption under Art. 81(3), and this is welcome. However, this new guidance would be very much more useful if it went on to indicate specifically how in practice RPM efficiencies might be established. The Commission's Art. 81(3) Guidelines<sup>7</sup> provide almost no guidance on how undertakings may provide evidence of non-price efficiencies, so such guidance is very necessary here.

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<sup>7</sup> OJ 2004 C101/97.