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**Datum:** Mon, 18 Mar 2019 17:24:43 +0200  
**Aan:** "[REDACTED]" <[REDACTED]@acm.nl>  
**CC:** "[REDACTED]" <[REDACTED]@acm.nl>; "[REDACTED]" <[REDACTED]@acm.nl>  
**Onderwerp:** RE: ECN verticalen  
**Bijlage(n):** Feedback ACM ECN Working Group Verticals\_2.docx

Ha [REDACTED],

Dat klopt, input voor de evaluatie van de Groepsvrijstelling en de Verticale Richtsnoeren. Morgen in de loop van de dag willen we een stuk opsturen naar de EC (zie de bijlage). [REDACTED]  
[REDACTED] Ik ben hierbij aanwezig.

Groet, [REDACTED]

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**Van:** [REDACTED]  
**Verzonden:** maandag 18 maart 2019 16:06  
**Aan:** [REDACTED]  
**CC:** [REDACTED]; [REDACTED]  
**Onderwerp:** ECN verticalen

Hi [REDACTED], begrijp ik goed dat we morgen iets moeten aanleveren ivm verticalen? If zo hoe laat?

Met vriendelijke groet,

[REDACTED]  
Senior adviseur strategie  
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## Kansen & keuzes voor bedrijven en consumenten

## Feedback ACM for evaluation EU completion rules on vertical agreements

### The Vertical Block Exemption Regulation is useful and effective

From a Dutch perspective, the ACM considers the Vertical Block Exemption Regulation Block Exemption (VBER) to be an effective instrument that provides legal certainty on the legality of vertical agreements for undertakings. The ACM has the impression that both the VBER and the Guidelines on Vertical Restrictions (GVR) are widely used in practice and considered useful by undertakings and their advisors. The ACM considers that the EU competition rules on vertical agreements may require an update, especially with regard to the use of vertical restrictions in the area of online sales. We therefore recommend to renew the VBER and the GVR after due consideration of the points below.

### Guidance on agency agreements between suppliers and online platforms in the GVR

Online platforms play an important role in the distribution of goods and services. The ACM has seen a trend where powerful online platforms act as agents for various suppliers. Since article 101(1) TFEU does not apply in case of genuine agency agreements, this allows online platforms to enter into various vertical restrictions on pricing and online sales with their suppliers. However, the ACM doubts whether these agency agreements between suppliers and online platforms are genuine agency agreements within the meaning of the GVR. During a preliminary investigation of the ACM into such agency agreements as applied by ~~publishers distributors~~ and online platforms in the e-books sector, the ACM got the impression that these agreements were strategically used to circumvent EU competition rules and implement vertical restrictions, specifically on resale price maintenance.

The ACM has the impression that online platforms use agency models in a significant number of sectors across many EU member states. Vertical restrictions contained in such agreements may consequently harm intra-brand price competition between platforms to a significant extent. The ACM suggests that the Commission could attempt to provide more clarity in the GVR on the circumstances under which such agency agreements may be considered genuine or non-genuine agency agreements. The following aspects could specifically be taken into account in providing such guidance:

- Online platforms appear to bear more than insignificant risks, especially in the area of market-specific investments, that are not necessarily covered by sales-based commissions. Examples of such investments include those in developing their website for the sale of goods or services concerned.
- Traditionally, agency models were used by large suppliers that act as a principal and use various smaller sales agents to sell their goods or services. The nature of the agency relation between suppliers and online platforms is often very different. The online platform that acts as an agent is often the undertaking with the a relatively larger market power in relation to the principal. Platforms are often significantly larger than the suppliers and have strong bargaining power. The preliminary investigation of ACM referred to above, showed that the online platforms in that case had a strong influence on the commercial strategy of the principals. Online platforms also have

very different business models than traditional agents.

#### Guidance on the relation between platforms and distributors in the GVR

In addition to guidance on the use of agency agreements by platforms, the Commission could provide more guidance on other vertical aspects of the relation between platforms and distributors in the context of article 101 TFEU. For example, this could include guidance on vertical restrictions relating to exclusivity, most favored nation and price parity clauses, resale price maintenance, non-brand bidding, the role platforms in price coordination, data portability.

#### Allow dual pricing to reduce the risk and effects of free riding by online shops

There is considerable public concern in The Netherlands about the effects of the strong increase of online shopping on brick and mortar stores and on society in general. More and more brick and mortar stores are closing, leaving behind abandoned shops in city centers that are becoming less attractive for consumers. Brick and mortar stores often find it difficult to compete with online stores in view of the free ride of the latter on the significant investments of brick and mortar shops. The ACM considers that there can be good reasons of economic and public interest to allow suppliers and distributors to use certain vertical restrictions to prevent freeriding on offline investments. However, not all vertical restrictions are appropriate for this purpose. For example, resale price maintenance is not proportionate because it prevents -intra-brand competition within offline and online sales channels. On the other hand, lump sum subsidies might not be a very effective incentive for offline investments because it is difficult to monitor if the subsidies are actually used for this purpose. Dual pricing for offline and online sales might provide a feasible means to prevent free riding on offline investments because it is more easy to monitor and enforce and it does not restrict intra-brand competition within online and offline sales channels, so the restriction on competition would be limited. In order to allow dual pricing its current characterization under the VBER as a hardcore restriction would need to be amended.

~~The ACM considers that the current characterization of dual pricing as a hardcore restriction under the VBER may be an impediment to find the appropriate balance that could allow dual pricing practices that preserve competition. Suppliers often claim that they need to use vertical restrictions such as resale price maintenance and restrictions on online sales in order to protect brick and mortar stores from such free riding by online shops. The ACM considers that it may be in the public interest to allow suppliers to use specific vertical restrictions for this purpose. In finding the appropriate balance to allow such restrictions, it is important that the restrictions allow as much freedom as possible for online shops to determine their own business strategy.~~

#### Use the term “restrictions by object” instead of “hardcore restrictions”

Article 4 of the VBER currently qualifies certain vertical restrictions as “hardcore restrictions”. There is sometimes confusion about the meaning of this specific category and its relation to the concept of restrictions by object. The ACM therefore suggest to use the term “restrictions by object” instead of “hardcore restrictions”. This would make the system more simple and better applicable, for example for civil courts that can often struggle with this.