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Datum: Tue, 12 Mar 2019 18:11:11 +0200
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Onderwerp: FW: stukje agency voor review VBER
Bijlage(n): Feedback ACM ECN Working Group Verticals.docx

Ha [REDACTED] en [REDACTED],

De Commissie vraagt ons om input te leveren voor de review van de Groepsvrijstelling. In overleg met Michiel en Martijn willen we naast enkele algemene zinnen twee punten aan de Cie meegeven: (1) toestaan dual pricing en (2) verduidelijking agentuur in relatie tot online platforms. In de bijlage vinden jullie onze opzet.

Willen jullie je reactie op dit voorstel geven? Graag uiterlijk donderdagochtend.

Groet, [REDACTED]

Van: [REDACTED]
Verzonden: dinsdag 12 maart 2019 11:56
Aan: [REDACTED]
Onderwerp: RE: stukje agency voor review VBER

Hoi [REDACTED],

Hierbij de input voor evaluatie verticals. Kun jij dit afstemmen met de verantwoordelijk manager. Ik kijk nog even of Martijn het nog een keer wil zien.

Groet
[REDACTED]

Feedback ACM for evaluation EU completion rules on vertical agreements

The Vertical Block Exemption Regulation Block Exemption is effective

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 the VBER and the Guidelines on Vertical Restrictions (GVR) are very much used in practice and well regarded by undertakings and their advisors. However, the EU competition rules on vertical agreements could use an update, especially with regard to the use of vertical restrictions on online sales. We therefore recommend to renew the VBER and the GVR taking into account the points below.

Provide 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 agency agreements, this allows them to enter into various vertical restrictions on pricing and online sales. However, the ACM doubts whether these agency agreements between suppliers and online platforms are “true” agency agreements within the meaning of the Guidelines on Vertical Restrictions. During a preliminary investigation into such agency agreements by suppliers distributors and online platforms the ACM got the impression that these agreements were strategically used to bypass EU competition rules and implement vertical restrictions, specifically on resale price maintenance (RPM).

Since online platforms use agency model in a significant number of sectors and across the EU member states and the vertical restrictions they might well harm intra-brand price competition between platforms, the ACM considers that it would be good if the GVR provided clarity on when such agency agreements cannot be considered to be “true” agency agreements. For example, the following aspects could be taken into account in such guidance:

- Online platforms appear bear more than insignificant risks, especially in the area of market-specific investments, that are not necessarily covered by sales-based commissions. E.g. investments in developing their website for the sale of goods or services concerned.
- Traditionally agency models are used by large suppliers that act as principal and use various smaller sales agents to sell their goods or services. However, 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 market power instead of the principal. Platforms are often significantly bigger in size than the suppliers and have strong bargaining power. The preliminary investigation of ACM showed that the online platforms in that case actually had a strong influence on the commercial strategy of the principals. Online platforms also have very different business models than traditional agents.

Allow dual pricing to reduce the risk and effects of freeriding by online shops

There is much public concern about the effects of the strong increase of online shopping on brick and

mortar stores. 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 because they invest in services that online stores can freeride on. Suppliers often claim that is necessary to use vertical restrictions such as RPM and restrictions on online sales to protect brick and mortar stores from freeriding by online shops. The ACM thinks that it would be in the public interest to allow suppliers to use specific certain vertical restrictions for this purpose. It is important that these restrictions allow as much freedom as possible for online shops to determine their business strategy. The ACM thinks that allowing dual pricing could be an effective means to achieve this goal: if suppliers distributors can charge lower prices for products that distributors sell online than offline, they can effectively reduce the risk or effects of freeriding by online shops while at the same time all distributors are still free to determine their own business strategy. Since dual pricing is a hardcore restriction under the current the VBER, the VBER would need to be amended in order to allow dual pricing.