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I. INTRODUCTION

Block Exemption Regulation 2790/1999¹ (also referred to as the “BER”), the single most important legislative instrument in European antitrust law in the field of mainstream vertical restraints, has been in force for more than nine years. The Regulation that provides for a safe harbor for distribution agreements and other types of vertical agreements involving firms with market shares not exceeding 30 percent will expire on May 31, 2010. The accompanying *EC Guidelines on Vertical Restraints* (the “Guidelines”)² setting out the methodology of analysis for vertical restraints including those that fall outside the safe harbor of the BER will share that fate.

The BER was adopted just shortly after the EC Commission had decided to explore ways to move away from the formalistic interpretation of Articles 81(1) and (3) EC that had characterized EC antitrust law for decades and give its policy a more solid economic foundation. When in 1997, after a long period of confidential and public consultation, it finally issued a draft of what would become Regulation 2790/1999, the views were mixed. Among many novelties, the draft Regulation included two market-

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¹Commission Regulation 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (1999 OJ L336/21).

²Commission Notice—Guidelines on Vertical Restraints (2000 OJ C291/1).

share caps, one of 20 percent that was to apply to vertical restraints that were deemed especially harmful and one of 40 percent relating to less harmful but still suspicious categories of vertical restraints.

While these thresholds would eventually be merged into the market share cap of 30 percent that is currently contained in Article 3 BER, criticism remained. Among those in favor of a more economic approach, there was some satisfaction that the Commission had decided to take the notion of market power as a benchmark for the scope of the new block exemption.³ But it was argued that the 30 percent threshold did not accurately reflect positions of market power that would be reason for concern and that, as a result, the scope of the “safe harbor” for vertical restraints was drawn too narrowly. Moreover, it was felt that the Commission had taken an overly cautious approach in blacklisting a number of vertical restraints that would take the agreement entirely outside the block exemption. It was argued that, as the Regulation reserved the benefit of the block exemption to agreements that did not involve parties with market power, it was to be assumed that interbrand competition would ensure that markets would remain competitive and that there was no additional need to blacklist a number of restraints that were, by their nature, only capable of restraining intrabrand competition.

In addition, as was to be expected, there was a widespread concern that despite the provisions of Article 9(c) and (d) BER it would be too difficult in practice to determine whether the supplier’s market share would be below 30%, which would detract

³Prior to 1999, European vertical restraints law exempted various types of vertical restraints regardless of the magnitude of market power that the parties to the agreement enjoyed. By limiting the scope of Regulation 2790/1999 to agreements not involving significant market power, the Commission attempted to put an end to the over-inclusive nature of the earlier generation block exemption regulations. It is fair to assume that the BER has indeed given rise to less Type 2 errors than its predecessors.

from the effectiveness of the block exemption. And when, several months after the adoption of the Regulation, the Guidelines were adopted, new criticism arose. In particular, it was held that while vertical restraints utilized by dominant companies would, under specific conditions, bring about efficiencies, the Guidelines effectively barred dominant companies from utilizing those restraints.

II. FACTORS TO BE TAKEN INTO ACCOUNT IN THE REFORM OF REGULATION 2790/1999

The time has come to consider whether these and other points of criticism voiced at the time have materialized, how the Regulation has functioned in practice, whether the Regulation and Guidelines are in need of modification, and, if so, what must be done. This contribution contains some modest suggestions for the issues that the Commission may want to consider before embarking on modification of the BER.

Our reflections must be viewed against the changes in the legislative case law and economic landscapes that have take place since implementation of the BER. Obviously, each of these changes may influence in various manners and degrees the future direction of the Commission in this important field of the law. We believe that the following five developments are particularly relevant with regard to the evaluation of the BER.

First, Regulation 1/2003⁴ (applicable on May 1, 2004) has, by replacing the system of prior notification of restrictive agreements by a system of “self- assessment,” radically changed the system of European antitrust law enforcement. Nowadays, the application of antitrust law in the area of vertical restraints is largely a matter for national

⁴Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (2003 OJ L1/1).

courts and competition agencies. Indeed, in the past nine years, the Commission itself has only occasionally taken up matters that touch upon the application of the BER and, when it has, its intervention is mostly related to resale price maintenance issues.⁵ At the same time however, the application of vertical restraints law in the national jurisdictions displays diverging outcomes and different policy objectives.⁶ All this suggests that the future regulation of vertical restraints must take account of the different functions that block exemptions have in the decentralized system of enforcement in the post 2004 world. This may imply that specific attention is given to those elements that are particularly important for the uniform application of Article 81 EC.

Second, compared to the state of affairs around 1998, over the past few years economic concepts and insights have gained a much stronger foothold in the interpretation and application of European antitrust law. For instance, the 2004 Notice on the application of Article 81(3) EC postulates the concept of consumer surplus as the central notion under Article 81 EC. It also explains how efficiency gains are evaluated and quantified under Article 81(3) EC.⁷ Similarly, the 2007 Guidelines on the assessment

⁵Case COMP F.1/35.918 *JCB*, 21 December 2000 (2002 OJ L69/01); Case COMP F./36.516 *Nathan-Bricolux*, 5 July 2000 (2001 OJ L54/01); case COMP F.2/36.693 *Volkswagen*, 26 June 2001 (2001 OJ L262/14); case COMP F.37.975 *PO/Yamaha* 16 July 2003 (not published). In 2002, the Commission approved a distribution network in *B&W Loudspeakers* only after the resale price maintenance clause was deleted from the agreements. The *JCB* decision was annulled by the European Court of First Instance because the retail sales prices were found not to be binding (case T-67/01, 13 January 2002). The *Volkswagen* decision was subsequently annulled by the European Court of First Instance because the Commission had failed to prove the existence of an agreement within the meaning of Article 81(1) EC (Case T-208/01 of 3 December 2003).

⁶For instance, the Greek competition authority recently found that the imposition of maximum (and minimum) discounts qualified as resale price maintenance (Decision of 29 November 2007, *Hyundai Hellas SA*). The view of the Commission and most other national competition authorities in Europe is that the imposition of a maximum resale price (or minimum discount) would not amount to resale price maintenance. The OECD organized a Roundtable on resale price maintenance on 21-23 October 2008.

⁷See Lugard and Hancher, *Honey, I Shrunk the Article! A Critical Assessment of the Commission's Notice on Article 81(3) of the EC Treaty*, ECLR 7, pp. 410-420 (2004).

of non-horizontal mergers are predicated on current post-Chicago economic insights into how vertical- and conglomerate- mergers may give rise to input—and customer foreclosure and other negative effects.⁸ And finally, while the recent Guidance Paper on Article 82 EC may be criticized for applying analytical shortcuts and a less-than-full economic approach, it does purport to inject economic thinking in the application of Article 82 EC to a much larger extent than in the past. It stands to reason that the BER is evaluated against this background and, wherever appropriate, is modified and brought in line with the economic insights as they have been infused in other legislative instruments that were adopted after the implementation of the BER.

A third factor to be taken into account is the development of the case law of the Community Courts. As will be discussed briefly below, during the lifetime of the BER the Community Courts have, in particular, commented on a number of elements incorporated in the Guidelines. Obviously, any future block exemption and guidelines should be consistent with the Courts' rulings.

Fourth, over time, the Commission has proved increasingly sensitive to U.S. precedents. For instance, the BER and the current set of Guidelines abandoned the black list approach that the Commission had applied prior to 1999 towards maximum resale price maintenance, a position that was largely, if not entirely, inspired by the U.S. Supreme Court *Khan* ruling of 1997.⁹ Obviously, in light of the U.S. Supreme Court's

⁸For an overview of the economic insights that underlie the Guidelines on non-horizontal mergers, see Church, *The Impact of Vertical and Conglomerate Mergers on Competition, Report for DG Competition, European Commission*; September 2004, available at http://ec.europa.eu/competition/mergers/studies_reports/studies_reports.html

⁹State Oil Co. v. Khan, 522 U.S. 3 (1997)

ruling in *Leegin*,¹⁰ the question arises whether the Commission is sufficiently confident that it can take a similar approach with respect to resale price maintenance.

Fifth and finally, the Commission faces the task to critically evaluate its own experiences with the operation of the BER and to define its policy objectives in the field of vertical restraints on a continuous forward basis. In doing so, however, it needs to be vigilant not to fall in the trap of over-regulation. For instance, in light of two recent French cases,¹¹ it may perhaps feel inclined to take a harsh stance towards restraints on internet selling, but it remains to be seen whether such an approach would not also create important disincentives that may harm more traditional methods of distribution. When evaluating the operation of the current BER, it would also be helpful to take into account recent empirical research into the effects of vertical restraints.

III. Ten Points to Consider When Reviewing Regulation 2790/1999 and the Guidelines

The suggestions below identify ten points that the Commission may want to consider when reviewing the BER and the Guidelines:

Point 1: Review whether the current structure of the BER and the Guidelines should be maintained.

As briefly set out above, the current regulation of “mainstream” vertical restraints is not devoid of criticism. We believe that the criticism is, at least in part, well-founded. In particular, there is an inherent tension between the objective of the current BER to only provide a safe harbor for vertical restraints that do not involve market power while,

¹⁰*Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S.Ct. 2705 (2007).

¹¹Tribunal de Commerce de Paris, *Parfums Christian Dior et al / eBay Inc, eBay International AG*, 30 June 2008. Conseil de la Concurrence, *Pierre Fabre SA*, Decision 08-D-25, 29 October 2008

in addition, blacklisting a number of intrabrand restraints. It seems undisputed that—for the very reason that the block exemption seeks to ensure that sufficient interbrand competition remains in the market and, as a consequence, is confined to agreements among parties that do not have significant market power—one must assume that those parties would wish to impose vertical restraints primarily for efficiency reasons, rather than anticompetitive motives. As a result, blacklisting those clauses may prevent firms from organizing their distribution network in the way they see fit, and lead to inefficiencies in a similar manner as the block exemptions preceding the BER did.¹²

While it may be argued that the current regime allows for an individual assessment of blacklisted clauses under the methodology of the Guidelines and the 2004 Notice on the application of Article 81(3) EC, we believe that, under the present regime, successfully arguing that resale price maintenance or any of the other blacklisted clauses solves a specific distribution inefficiency and is therefore permissible is, in practical terms, virtually impossible.

Given the importance of vertical agreements to competition in all economic sectors and the complexity of many related issues, the current BER should be replaced by a new set of rules that offers extensive and clear guidance. Whether those rules should take the form of a new block exemption regulation or merely guidelines is less obvious. Clearly, one benefit of a formal regulation over mere guidelines is that it will have a

¹²The earlier generation block exemption regulations in the area of vertical restraints contained a detailed overview of clauses that were allowed (“white clauses”) and not allowed (“black clauses”). This approach has been severely criticized as producing a “straightjacket effect.” See in this respect for instance Hawk, *System Failure, Vertical Restraints and EC Competition Law*, 32 COMMON MARKET L REV., 973 (1995).

direct legally binding effect in all EU Member States.¹³ This provides legal certainty and ensures, at least to some extent, uniformity among EU Member States in their treatment of vertical restraints.¹⁴ Moreover, in addition to listing restraints that fall outside the BER, the current BER includes provisions dealing with definitions of key concepts, the scope of the BER, the market share threshold and its calculation, the procedure for withdrawing the benefit of the BER, and the like. Maintaining a uniform set of rules on these points reduces the risk of diverging views and interpretations among the different EU Member States.

If the Commission should decide to maintain the current structure of the BER, it would be well-advised to critically reconsider the operation of the market share cap of 30 percent. Indeed, there appears consensus among leading economists that vertical restraints are most likely to produce negative effects when they are applied by firms that hold significant market power.¹⁵ It would be consistent with this approach to limit the list of black clauses to those restraints that are particularly likely to reduce interbrand competition. For instance, if the Commission is concerned that resale price maintenance would, under specific circumstances, facilitate horizontal collusion between suppliers or

¹³National competition law in the various EU Member States generally respects European BERs. Regulation 1/2003 provides for cooperation mechanisms between the Commission and EU national competition authorities and courts with respect to the application of EC and national competition law. National competition authorities and courts can (and must) directly apply Article 81 EC and BERs. This seems to have been misunderstood by a court in the Czech Republic, which recently annulled a finding of resale price maintenance by the Czech competition authority on the ground that national competition law can only be applied to infringements having an exclusively domestic effect, while EU law (Article 81 EC) may only be applied to conduct affecting EU trade. Regional Court of Brno, *Tupperware*, 1 November 2007.

¹⁴This may be particularly relevant in relation to new(er) Member States that may not have the same legacy in terms of competition law policy and application.

¹⁵See for instance Verouden, *Vertical Agreements: Motivation and Impact*, 3 ISSUES IN COMPETITION L & POL. 1813 (ABA Section of Antitrust Law 2008).

retailers, it may decide to only blacklist resale price maintenance in those circumstances.¹⁶

Point 2: Reconsider the significance of restraints on intrabrand competition that do not in addition negatively affect interbrand competition.

Much of what has been said in relation to Point 1 above applies to the treatment of intrabrand restraints under the BER and the Guidelines in general. The BER and the Guidelines are predicated on the assumption that restraints on intrabrand competition may in and of themselves constitute a restriction of competition within the meaning of Article 81(1) EC. For instance, Guidelines paragraph 103 specifically identifies restraints on intrabrand competition as one of the negative effects of vertical restraints.¹⁷

However, over time this position has somewhat changed. In particular, the 2004 Notice on the application of Article 81(3) EC takes a more nuanced and narrower view. Under that Notice, to be held nonrestrictive the agreement should not have any negative effects on interbrand competition and, also, it should not contain any intrabrand restrictions which go beyond what is objectively necessary for the existence of the agreement of that type or nature within the meaning of paragraph 18(2). The rationale is that intrabrand restraints, such as territorial restraints, which are objectively necessary to induce the parties to enter into the agreement do not, in themselves, trigger the

¹⁶Hence, we believe that, if the Commission wishes to maintain the current black list approach, it should consider in which circumstances those clauses are particularly likely to bring about negative effects and seek to define those circumstances, either in the future regulation itself or the Guidelines.

¹⁷See for instance also paragraph 161 that lists reduced intrabrand competition as one of the possible competition risks of exclusive distribution agreements.

applicability of Article 81(1) EC.¹⁸ While the test for the applicability of Article 81(1) EC under the 2004 Notice on the application of Article 81(3) Notice leaves much to be desired and may still produce economically irrational outcomes, the Notice does acknowledge the principle that necessary vertical restraints that do not affect interbrand competition are outside the scope of Article 81(1) EC. In contrast, in the Guidelines this concept of necessary, nonrestrictive vertical restraints appears to be a mere afterthought. It is hoped that the Commission will generalize this approach and, more generally, bring the Guidelines in line with the 2004 Notice on the application of Article 81(3).¹⁹

Point 3: Consider loosening the assumption that downstream markets are competitive.

Next, the BER and the Guidelines take a, perhaps, overly simplistic view of the conditions of competition in upstream and downstream markets. They essentially concentrate on the structure of competition on upstream markets and treat downstream markets as always being competitive.²⁰ However, many markets today are characterized by positions of market power downstream. For instance, powerful retailers in consumer markets nowadays market private label brands that tend to compete with the manufacturers' (branded) products. This may complicate the analysis of the effects of the restraints at hand. It seems that any future regulation of vertical restraints should allow for a nuanced view on these and other matters.

¹⁸However, according to the Notice, Article 81(1) EC does apply to "excessive" intrabrand restraints, i.e. restraints that go beyond what the parties need to enter into the agreement, despite the fact that those agreements do not reduce consumer surplus. To the extent those restraints are not necessary and proportionate to the achievement of the efficiencies under Article 81(3) and are thus not permitted, the test under the 2004 Notice produces outcomes that are not in line with a strict economic approach.

¹⁹See Lugard and Hancher, *supra*, note 7. It is noted that the Guidelines acknowledge that vertical restraints may in some cases be necessary and thus do not restrict competition. See ¶ 119 (10).

²⁰Note that pursuant to Article 3(2) BER, in the case of exclusive supply agreements, the market share of the buyer is decisive for the applicability of the exemption.

Point 4: Reconsider Article 4(e) BER.

Article 4(e) BER seeks to safeguard the sale of components by subcontractors and other parties that are involved by manufacturers of final products and other products in which the components are integrated. Under this provision, the sales restriction of those components to end-users, repairers, or other service providers is blacklisted. The provision, however, allows blocking the sale of components by subcontractors to service providers that are entrusted with the repair and servicing of the manufacturers' final goods.

While there may be good industrial policy considerations for ensuring that independent service providers continue to have access to original components and parts, we doubt whether that consideration should be decisive for reincluding Article 4(e) in a future block exemption. Before doing so, it would be helpful to know the nature and the magnitude of the problem that Article 4(e) seeks to address and, second, the reasons why specific legislation—such as the block exemption for the motor vehicle sector or Article 82 EC—would not be effective to tackle those problems. In any event, the reasons for including a black clause to the benefit of a specific industrial sector at the time remain somewhat opaque. It is therefore hoped that a possible renewal of this provision is critically considered.

Point 5: Bring the wording of the regulation in line with the notion of “agreement” as defined by the Community Courts.

Pursuant to Article 4, the BER is centered on a broad definition of “hard core” restrictions. This notion includes vertical agreements which, “directly or indirectly, in

isolation or in combination with other factors under the control of the parties, have as their object” the fixing of resale prices and certain resale restrictions. However, neither the BER nor the Guidelines define the notion of an “agreement,” which suggests that the Commission intended to apply the broadest possible definition, thereby coming dangerously close to including mere unilateral conduct in the heading of Article 4. Since the BER was introduced, along with the adoption of the Guidelines, the Community Courts, however, have more clearly articulated what the constituent elements of an agreement are in vertical relationships. It would be appropriate if any future regulation or guidelines would integrate those insights and more clearly spell out under which circumstances the Commission will find an agreement within the meaning of Article 81(1) EC.

In *Bayer*,²¹ the European Courts concluded that since there was no “concurrence of wills” between Bayer and its wholesalers, there was no agreement, and therefore Article 81 EC did not apply. The Commission had argued that there was a tacit agreement between the parties as the wholesalers acquiesced in Bayer’s policy. The European Courts ruled that “acquiescence” could only result in an agreement if it could be proven that there was some form of “concurrence of wills.” Given that the interests of Bayer and its wholesalers were diametrically opposed, the Courts concluded that there was no concurrence of wills and consequently no agreement. In the absence of a concurrence of wills, a practice will be considered unilateral behavior and outside the scope of Article 81

²¹Joined Cases C-2/01 P and C-3/01 P, *Bayer v Commission*, 6 January 2004, upholding the CFI judgment of 26 October 2000, Case T-41/96.

EC. In *Volkswagen*,²² the European Courts confirmed that the Commission must establish a concurrence of wills in order to find an agreement that may fall within the scope of Article 81 EC.

The *Bayer* and *Volkswagen* judgments have clearly put a halt to the Commission's attempt to extend the boundaries of what constitutes an "agreement." This is confirmed by the European Court of First Instance in *DaimlerChrysler v Commission*,²³ where it held that "the concept of an agreement within the meaning of Article 81(1) EC [...] centers around the existence of a joint intention between at least two parties."

Point 6: The treatment of efficiencies under the guidelines should be widened.

The Guidelines, and in particular paragraphs 115-118, contain a catalogue of efficiencies commonly associated with vertical restraints. In addition, the Guidelines provide some guidance with regard to the methodology that should be applied under Article 81(3) EC. However, in many respects the Guidelines fail to provide a clear overarching analytical framework for the evaluation of efficiency claims. That framework is, however, to a large extent provided by the Commission's Notice on the application of Article 81(3) EC. While the proposed evidentiary burden under this Notice is high, it does streamline the evaluation of efficiency claims.

It seems logical that any future guidelines are amended to integrate both the vertical restraints-specific efficiency catalogue, as well as a refined methodology for the evaluation of those efficiencies along the lines of the Notice on the application of Article 81(3) EC.

²²Case C-74/04 P, *Volkswagen v Commission*, 13 July 2006, upholding the CFI judgment of 3 December 2003, Case T-208/01.

²³Case T-325/01, *DaimlerChrysler v Commission*, 15 September 2005.

There are at least three specific efficiency-related matters that require attention. First, the current Guidelines do not include the elimination of double-marginalization as a possible efficiency. This should be corrected. Indeed, the fact that this specific efficiency may only occur in particular circumstances—as is the case with other efficiencies—is, in our view, insufficient reason for not including this efficiency.

Second, the analysis of efficiencies under the Guidelines is too much skewed towards the evaluation of static efficiencies. It would be appropriate to specifically include dynamic efficiencies in a future catalogue of efficiencies associated with vertical restraints.

Third, as stated above, the Guidelines are somewhat hostile toward vertical restraints applied by dominant firms. In its guidance with respect to Article 82 EC, the Commission acknowledges, however, that vertical restraints applied by dominant firms may also result in efficiencies. We believe that the same approach should be adopted in any future guidelines.

Point 7: The Commission should consider taking resale price maintenance off the black list.

The BER defines resale price maintenance as agreements or concerted practices having—as their direct or indirect object—the establishment of a fixed or minimum price or a fixed or minimum price level to be observed by the buyer.

In practice it seems that obtaining an exemption for resale price maintenance is only a theoretical option and recently, at an OECD Roundtable specifically dedicated to resale price maintenance, the Commission made clear that it finds it difficult to identify

situations where resale price maintenance would, overall, bring about efficiencies and therefore be allowed.²⁴ This is underscored by the fact that, since the entry into force of the current BER, and most recently in 2003, the Commission has dealt with five cases on resale price maintenance and decided in all cases that the resale price arrangements did not meet the conditions under Article 81(3) EC.²⁵

The Commission is at times heavily criticized for its *per se* approach with regard to resale price maintenance. This criticism became even stronger following the U.S. Supreme Court's ruling in *Leegin*.²⁶ In *Leegin*, the U.S. Supreme Court held that resale price maintenance should no longer be analyzed under the *per se* standard and instead be reviewed under the rule of reason standard of analysis. It stated that "vertical agreements establishing minimum resale prices can have either pro-competitive or anti-competitive effects, depending upon the circumstances in which they are formed."

While the Commission recognizes the relevance of economic analysis with respect to the application of competition law in other areas such as merger control, the abuse of dominance, and other vertical restraints (such as single branding, exclusive distribution, exclusive supply, and tying), it is reluctant to fully embrace those same insights with regard to resale price maintenance. While the majority decision in *Leegin* acknowledged that resale price maintenance may give rise to distributional efficiencies, it also took note of its potential to restrict inter-brand competition, for instance by facilitating collusion at various levels in the distribution chain. The U.S. Supreme Court

²⁴Roundtable on Resale Price Maintenance, OECD Competition Committee, Paris (France), 21-23 October 2008.

²⁵*Supra*, note 5.

²⁶*Supra*, note 10.

held that the ambiguous nature of resale price maintenance warranted review under the rule of reason standard of analysis. However, it appears that the Commission is at present more inclined to follow the dissenting opinion of Justice Breyer *c.s* and believes that the decision of the Supreme Court does not fully appreciate the various horizontal theories of harm associated with resale price maintenance, while the efficiencies often claimed may not materialize.²⁷ The Commission also attempted to counter some of the criticism by arguing that a party can always analyze whether the conditions under Article 81(3) EC are met, but, as mentioned, this will provide very little comfort if the Commission itself shows no willingness to alter its strict approach in this area.

Some national competition authorities, including from within the European Union, have indicated that it may be appropriate for the Commission to reconsider its *per se* approach. While many agencies recognize that resale price maintenance may—or according to some commentators, is likely to—restrict competition, it is also recognized that in certain circumstances resale price maintenance may produce pro-competitive effects.²⁸

For instance, the Dutch competition authority takes the view that, while resale price maintenance may have the object of restricting competition, it must still be established that the agreement has the potential to appreciably restrict competition. So if the concrete factual and economic circumstances, such as the intensity of inter-brand

²⁷See Peeperkorn, *Resale Price Maintenance and its Alleged Efficiencies*, 1 EUR. COMPETITION J. 4, 201.

²⁸In its decision of May 14, 2008, the Hungarian competition authority concluded that resale price maintenance clauses in agreements between Buki Asvanyiz (a wholesaler of energy drinks) and its retailers did not infringe EC and Hungarian competition law, because (i) the resale prices were set at different levels considering the circumstances of the local market, and (ii) not all contracts contained a resale price maintenance clause.

competition, are such that a restriction is unlikely to appreciably affect competition, the Dutch competition authority may not find a violation and, in any case, is not likely to consider pursuing such a case as a matter of priority. This is quite different from the Commission's virtual *per se* approach.

Consequently, the application of Article 81(3) EC should, perhaps under well-defined circumstances, both in theory and in practice, be available to resale price maintenance.

At the recent OECD Roundtable specifically dedicated to resale price maintenance, the Commission reiterated that it is well-established case law that resale price maintenance amounts to a restriction of competition by object. However, it did conclude that the current BER represents the Commission's view as it stood when it adopted the BER and Guidelines in 1999 and that, as a consequence, it does not preclude the possibility that further analysis may be needed "to achieve again a balanced opinion, useful for policy formulation towards resale price maintenance."

The *Leegin* decision has been an important catalyst in the European debate for a more economics-based rule of reason approach with regard to resale price maintenance and the U.S. position on this topic remains crucial in this debate. Therefore, the future of *Leegin* in the United States and how the U.S. authorities (in particular the newly appointed head of the DoJ Antitrust Division, Christine Varney) will approach resale price maintenance is followed with great interest in Europe as it may have considerable impact on the European debate and how the Commission will choose to deal with resale price maintenance going forward.

Point 8: Restraints on internet selling should be treated cautiously.

When the BER and the Guidelines were adopted in 1999 / 2000, internet selling was a relatively new phenomenon and in the absence of a significant body of practical experience the Commission applied its general rule: all competition benefits consumers. An additional form of distribution through the internet creates more competition and therefore benefits consumers. Also, the Commission considers the internet as an important tool to stimulate the creation of one single European market, and therefore restrictions on internet selling may easily be viewed as anticompetitive resale restrictions.

Since then, internet selling has become a common means of distributing products and a number of competition authorities have recognized the need to more closely analyze internet selling from a competition law perspective. For instance, in October 2008, the Dutch competition authority initiated a general inquiry into how manufacturers of white good products, e.g. refrigerators, vacuum cleaners, microwave ovens, and the like, deal with internet resellers and particularly whether manufacturers treat such resellers different from “brick and mortar” distributors.

Whether the outcome of this inquiry and findings by the Commission and other competition authorities throughout the EU will change competition policy with regard to internet selling is at present unclear. However, it appears that the simplified view represented in the Guidelines can no longer be maintained.

Point 9: Reconsider the treatment of exclusionary vertical restraints.

Since the BER entered into force and the Guidelines were adopted, the Commission has issued guidance with regard to exclusionary conduct in the recent

Commission Notice with Guidance in relation to Article 82 EC, but also with its Guidelines on the assessment of non-horizontal mergers. There is a divergence in the level of detail and sophistication between the Guidelines and more recent guidance.

For instance, when analyzing noncompete obligations, the Guidelines briefly discuss other factors that should be considered. This analysis should be in line with the more detailed and economics-based analysis developed in the Commission's Guidance on Article 82. By way of example, it is stated in the Guidelines that it is only likely that competitors are foreclosed if "they are significantly smaller than the supplier applying the non-compete obligation." When assessing the risks of foreclosure, the Commission states in its Guidance on Article 82 that:

a specific competitor may play a significant competitive role even if it only holds a small market share compared to other competitors. It may, for example, be the closest competitor to the dominant undertaking, be a particularly innovative competitor, or have the reputation of systematically cutting prices. In its assessment, the Commission may also consider in appropriate cases, on the basis of information available, whether there are realistic, effective and timely counterstrategies that competitors would be likely to deploy.

Similarly, the Guidance on Article 82 gives a more detailed and developed account of what may constitute buyer power. While the Guidelines merely mention "powerful buyers," the Guidance on Article 82 concludes that "such countervailing buying power may result from the customers' size or their commercial significance for the dominant undertaking, and their ability to switch quickly to competing suppliers, to promote new entry or to vertically integrate, and to credibly threaten to do so."

The Commission's most recent guidance shows that its thinking on exclusionary conduct has evolved over the past years, and the Guidelines are therefore no longer up to

date and new guidance should reflect this latest thinking. This applies more generally also to other guidance that the Commission has given in relation to Article 82 EC since the adoption of the Guidelines.

Point 10: The concept of “agency” should be modified.

In two recent judgments,²⁹ the European Court of Justice has clarified the conditions that a party must satisfy in order to qualify as an agent in the context of Article 81 EC. While the Guidelines seek to draw a sharp distinction between (genuine and non-genuine) “agents” and independent resellers, these judgments make clear that the Commission’s approach—based on whether or not the “agent” bears any “risk”—is too crude. These judgments should be reflected in the Commission’s new guidance.

The Court considered that there are two types of risk to consider, namely the risks linked to the sale of the contract goods and the risks linked to investments specific to the market. The Court considered that a genuine agency relationship will exist when the agent bears only negligible commercial or financial risks. More generally, the Court specified that this analysis is highly fact-specific.

In *CEEES*, the Court found that an arrangement where the fuel service station must pay the fuel supplier nine days after delivery, regardless of whether the service station has sold the fuel, will not disqualify the service station as an agent if, in practice, the fuel is always sold within that nine day period. In that case, the service station does not in practice bears any financial risk in relation to the fuel and, therefore, is not ruled out as an agent.

The Court further clarifies that genuine agents operate on two separate markets;

²⁹Case C-217/05, *CEEES*, 14 December 2006; and Case C-279/06, *CEPSA*, 11 September 2008.

namely the market for the provision of agency services, and the market for the sale of the contract goods. Only the obligations imposed on the agent in the context of the sale of goods to third parties on behalf of the principal fall outside the scope of Article 81 EC. However, an agency contract may contain clauses concerning the relationship between the agent and the principal that are covered by Article 81 EC, such as exclusivity- and non-compete clauses. In that regard, agents are independent economic operators contracting with the principal.