SUBMISSION OF JAVIER BERASATEGI IN RESPONSE TO THE PUBLIC CONSULTATION OF THE BUNDESKARTELLAMT ON THE "GUIDANCE NOTE ON THE PROHIBITION OF VERTICAL PRICE FIXING IN THE BRICK-AND-MORTAR FOOD RETAIL SECTOR"

I am a competition lawyer with substantial experience in the food supply chain (my bio and writings on this topic are available on www.supermarketpower.eu) and welcome the opportunity to comment on the "Guidance note on the prohibition of vertical price fixing in the brick-and-mortar food retail sector" prepared by the Bundeskartellamt ("**the Guidance Note**").

The Guidance Note, in line with the European Commission's Vertical Guidelines, considers Retail Price Maintenance ("**RPM**") a restriction of competition by object that is likely to be prohibited irrespective of the parties' market shares[1]. The Guidance Note refers to the par. 37 of the judgment of the European Court of Justice ("**ECJ**") of 13 December 2012 in case C-226/11, Expedia.

I respectfully submit that the Bundeskartellamt should reconsider the restrictive nature of RPM by suppliers of vertically integrated retailers in light of the evolution or clarification of the ECJ case-law on the concept of "objective restriction of competition"[2] and the economic context of modern food retailing.

The *cartes bancaires* judgment of the ECJ has clarified that, in order to determine whether an agreement restricts competition by object, it is necessary to look at its nature and the underlying legal and economic context:

> *"49 In that regard, it is apparent from the Court's case-law that certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects (see, to that effect, judgments in LTM, 56/65, EU:C:1966:38, paragraphs 359 and 360; BIDS, paragraph 15, and Allianz Hungária Biztosító and Others, C‑32/11, EU:C:2013:160, paragraph 34 and the case-law cited).*
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> *50 That case-law arises from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition (see, to that effect, in particular, judgment in Allianz Hungária Biztosító and Others (EU:C:2013:160) paragraph 35 and the case-law cited).*
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> *51 Consequently, it is established that certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article 81(1) EC, to prove that they have actual effects on the market (see, to that effect, in particular, judgment in Clair, 123/83, EU:C:1985:33, paragraph 22). Experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers.*

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[1] See pars. 10 and 14-16 of the Guidance Note. It is also recognised that RPM may be exempted in the three exceptional scenarios identified in the European Commission's Vertical Guidelines.

[2] See a rigorous systematisation of this case-law in Pablo Ibañez and Alfonso Lamadrid, "On the notion of restriction of competition: what we know and what we don't know we know", October 8, 2016, Forthcoming in Damien Gerard, Massimo Merola and Bernd Meyring (eds), *The Notion of Restriction of Competition: Revisiting the Foundations of Antitrust Enforcement in Europe* (Bruylant 2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2849831.

52 Where the analysis of a type of coordination between undertakings does not reveal a sufficient degree of harm to competition, the effects of the coordination should, on the other hand, be considered and, for it to be caught by the prohibition, it is necessary to find that factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent (judgment in Allianz Hungária Biztosító and Others (EU:C:2013:160), paragraph 34 and the case-law cited).

53 According to the case-law of the Court, in order to determine whether an agreement between undertakings or a decision by an association of undertakings reveals a sufficient degree of harm to competition that it may be considered a restriction of competition 'by object' within the meaning of Article 81(1) EC, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question (see, to that effect, judgment in Allianz Hungária Biztosító and Others (EU:C:2013:160), paragraph 36 and the case-law cited)."[3]

The ECJ followed the restrictive interpretation of the "objective restriction" advocated y the Advocate General. Indeed, the Advocate General recognised in his Opinion the need for a clarification of the previous case-law: "*the case-law of the Court and of the General Court, while pointing out the distinction between the two types of restrictions envisaged by Article 81(1) EC, could, to a certain extent, be a source of differing interpretations and even of confusion. Certain rulings seem to have made it difficult to draw the necessary distinction between the examination of the anticompetitive object and the analysis of the effects on competition of agreements between undertakings*"[4].

Therefore, the Advocate General went on to argue in favour of a restrictive interpretation of the concept of "objective restriction" confined to conduct that inherently reveals serious harm to competition:

"*52. None the less, and despite the fact that, to some extent, case-law has contributed to blurring the boundary between the concepts of restriction by object or restriction by effect, I take the view that recourse to that concept must be more clearly defined.*

53. Considering an agreement or a practice to restrict competition on account of its very object has significant consequences, at least two of which should be highlighted.

54. First of all, the method of identifying an 'anticompetitive object' is based on a formalist approach which is not without danger from the point of view of the protection of the general interests pursued by the rules on competition in the Treaty. Where it is established that an agreement has an object that is restrictive of competition, the ensuing prohibition has a very broad scope, that it is to say it can be imposed as a precautionary measure and thus jeopardise future contacts, (31) irrespective of the evaluation of the effects actually produced.

55. This formalist approach is thus conceivable only in the case of (i) conduct entailing an inherent risk of a particularly serious harmful effect or (ii) conduct in respect of which it can be concluded that the unfavourable effects on competition

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[3] Judgment of 11 September 2014, Case C-67/13 P, *Groupement des cartes bancaires (CB) v. Commission.*

[4] Opinion of the AG Walh, delivered on 27 March 2014, Case C-67/13 P, *Groupement des cartes bancaires (CB) v European Commission*, par. 46.

outweigh the pro-competitive effects. To hold otherwise would effectively deny that some actions of economic operators may produce beneficial externalities from the point of view of competition. In my view, it is only when experience based on economic analysis shows that a restriction is constantly prohibited that it seems reasonable to penalise it directly for the sake of procedural economy. (32)

56. Only conduct whose harmful nature is proven and easily identifiable, in the light of experience and economics, should therefore be regarded as a restriction of competition by object, and not agreements which, having regard to their context, have ambivalent effects on the market or which produce ancillary restrictive effects necessary for the pursuit of a main objective which does not restrict competition.

57. Second, such classification relieves the enforcement authority of the responsibility for proving the anticompetitive effects of the agreement or the practice in question. An uncontrolled extension of conduct covered by restrictions by object is dangerous having regard to the principles which must govern evidence and the burden of proof in relation to anticompetitive conduct.

58. Because of these consequences, classification as an agreement which is restrictive by object must necessarily be circumscribed and ultimately apply only to an agreement which inherently presents a degree of harm. This concept should relate only to agreements which inherently, that is to say without the need to evaluate their actual or potential effects, have a degree of seriousness or harm such that their negative impact on competition seems highly likely. Notwithstanding the open nature of the list of conduct which can be regarded as restrictive by virtue of its object, I propose that a relatively cautious attitude should be maintained in determining a restriction of competition by object.

59. Such caution is all the more necessary because the analytical framework that the Court is led to identify will be imposed both on the Commission and on the national competition authorities, whose awareness and level of expertise vary.

60. The advantage in terms of predictability and easing the burden of proof entailed by identifying agreements that are restrictive by object would appear to be undermined if that identification ultimately depends on a thorough examination of the consequences of that agreement for competition which goes well beyond a detailed examination of the agreement.

61. In any event, it should be noted that, despite the apparent extension of the conduct that is classified as restrictive by object, the Court has consistently held, from LTM to Allianz Hungária Biztosító and Others, that the analysis of the object must reveal 'a sufficient degree of harm'. (33)

62. Lastly, I would observe that such an interpretation does not effectively 'immunise' certain conduct by exempting it from the prohibition under Article 81(1) EC. Where it has not been established that a certain agreement is not specifically — that is to say in the light of its objectives and its legal and economic context — capable of preventing, restricting or distorting competition on the market, only recourse to the concept of restriction by object is ruled out. The competition authority will still be able to censure it after a more thorough examination of its actual and potential anticompetitive effects on the market."

The Expedia judgment cited in the Guidance Note does not support the consideration of RPM as an objective restriction of competition. The ECJ simply stated a general principle in par. 37: " It must therefore be held that an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition". Indeed, in par. 34, the ECJ found that the assessment of the objective of the agreement corresponded to the national court as a matter of fact: "*In so far as Expedia, the French Government and the Commission have, in their written observations or during the hearing, questioned the finding made by the national court that it is not disputed that the agreement at issue in the main proceedings had an anti-competitive object, it should be remembered that, in proceedings under Article 267 TFEU, which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the main proceedings is a matter for the national court (Case C‑409/06 Winner Wetten [2010] ECR I‑8015, paragraph 49 and the case‑law cited).*" In any event, the preliminary reference related to a Decision of the French Competition Authority that found that an agreement between the public French railways and Expedia that favoured a joint subsidiary of both undertakings in the online sale of train tickets constituted an objective restriction of competition contrary to Article 101 TFUE[5].

In the light of the ECJ most recent case-law on the concept of objective restriction, it appears that RPM by a non-dominant undertaking can no longer be an objective restriction of competition under article 101.1 TFUE. This conclusion is based on the following arguments:

1. Outdated case-law on RPM

The ECJ case-law on RPM fixing dates back to the time where the economic analysis of competition was underdeveloped and vertical non-price and price restrictions were considered as harmful as horizontal restrictions.

The Commission Staff working document "Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the *De Minimis* Notice" states that "restrictions of a buyer's ability to determine its minimum sale price generally constitute restrictions by object"[6] and quotes a single ECJ judgment from the eighties and a Commission Decision in support of this far-reaching conclusion.

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5 Conseil de la Concurrence, Décision du 5 février 2009 relative à des pratiques mises en œuvre par la SNCF et Expedia Inc. dans le secteur de la vente de voyages en ligne, available at: http://www.autoritedelaconcurrence.fr/user/avisdec.php?numero=09d06#recours

6 Commission Staff working document "Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice", accompanying the document *Communication from the Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)*, 25.6.2014, SWD(2014) 198 final, p, 16, available at: http://ec.europa.eu/competition/antitrust/legislation/de_minimis_notice_annex.pdf

Case 243/83 SA Binon Cie v SA Agence et Messageries de la Presse Provisions which fix the prices to be observed in contracts with third parties.	
Case 37975 Yamaha Imposition of minimum resale prices on distributors selling musical instruments either directly, by a prohibition on publishing, advertising or announcing prices different from the official price lists, or indirectly, by providing dealers with a formula for calculating their resale prices and with guidelines on recommended retail prices while making clear that advertising and promotion actions with more than 15% rebates would not be considered normal, which *de facto* amounted to an obligation to respect minimum prices.	

IBAÑEZ and LAMADRID highlight that the *Binon* judgment is not coherent with the ECJ's general analysis of vertical restraints:

> "*In Binon, the Court ruled that vertical price-fixing agreements between a supplier and a distributor are restrictive of competition by object.127 This position has been repeated in subsequent judgments, including Erauw-Jacquery and Pronuptia.128 What makes Binon stand out from the case law on vertical restraints is that the parties claimed that resale price maintenance is a source of efficiency gains. Contrary to what it did in relation to franchising, exclusive dealing and selective distribution, the Court held that any arguments relating to the pro-competitive effects of vertical price-fixing could only be considered under Article 101(3) TFEU.129 Binon and subsequent judgments are not very explicit about the reasons why resale price maintenance is deemed restrictive by object. In any case, the ruling reflects the traditional suspicion of courts and authorities towards price-fixing in general, and resale price maintenance in particular.130 Competition tends to be associated, first and foremost, with lower prices.131*"[7]

Interestingly, the three judgments that reflect the ECJ's stance on RPM (Case 243/83 SA Binon & Cie v SA Agence et messageries de la presse, Case 161/84, Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis, Case 27/87 SPRL Louis Erauw-Jacquery v La Hesbignonne SC) date back to the eighties. Furthermore, the *Binon* case combined elements of horizontal and vertical coordination covering the whole market: the largest majority of editors appointed a single distributor in the Belgian market (Agence et messageries de la presse - AMP), which *de facto* monopolised the distribution of newspapers and periodicals in Belgium and fixed retail prices[8]. AMP and the intervener, the German Government, supported the legality of vertical price fixing in the newspaper and periodicals distribution sector in light of its specific features. The AG suggested that RPM is a restriction by object because price fixing is expressly mentioned in Article 101.1 TFUE and the ECJ took over this formalistic justification:

> *"44 It should be observed in the first place that provisions which fix the prices to be observed in contracts with third parties constitute, of themselves, a restriction on competition within the meaning of Article 85 (1) which refers to agreements which fix selling prices as an example of an agreement prohibited by the Treaty"*[9].

Consequently, the ECJ held that the arguments put forward in favour of the RPM had to be considered under Article 101.3 TFUE:

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7 Ibañez and Lamadrid (2), section *3.1.3. Explaining the outliers*.

8 See facts of the case exposed in the Opinion of AG SIR GORDON SLYNN delivered on 13 February 1985.

9 Judgment of 3 July 1985, Case 243/83 SA Binon & Cie v SA Agence et messageries de la presse, par. 44.

"46 If, in so far as the distribution of newspapers and periodicals is concerned, the fixing of the retail price by publishers constitutes the sole means of supporting the financial burden resulting from the taking back of unsold copies and if the latter practice constitutes the sole method by which a wide selection of newspapers and periodicals can be made available to readers, the Commission must take account of those factors when examining an agreement for the purposes of Article 85 (3)."[10]

Leaving aside the horizontal aspects of the *Binon* case, the negative stance of the ECJ towards vertical price fixing views exposed in these three cases is no longer aligned with the ECJ's recent case-law on the concept of "objective restriction" of competition. Furthermore, it goes against the most elementary common sense to categorise RPM as "price fixing" akin to an objective restriction of competition in the EU, whereas it is assessed under "the rule of reason" in several other jurisdictions, most notably in the US. In *Leegin Creative Leather Products, Inc. v. PSKS*, Inc., 551 U.S. 877 (2007), the United States Supreme Court overruled the almost century-old judgment in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). Dr Miles had ruled that vertical price restraints were illegal per se under Section 1 of the Sherman Antitrust Act. The Leegin judgment established that the legality of such restraints is to be judged according to the rule of reason.

The US Supreme Court's analysis of RPM and vertical competition is highly relevant in the retail grocery field: <u>First</u>, the pro-competitive justifications of RPM are similar to those of other vertical restraints: the promotion of inter-brand competition[11]. <u>Second</u>, RPM can also benefit new product introductions[12]. <u>Third</u>, consumer welfare is not necessarily reflected in lower prices but in a healthy inter-brand rivalry that takes care of quality and innovation[13]. <u>Fourth</u>, in general, the interests of manufacturers and consumers are aligned with respect to retailer profit margins[14].

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10 Case 243/83, *SA Binon & Cie v SA Agence et messageries de la presse*, par. 46.

11 The Leeing Judgment, p. 10: "Minimum resale price maintenance can stimulate interbrand competition—the competition among manufacturers selling different brands of the same type of product—by reducing intrabrand competition—the competition among retailers selling the same brand. See id., at 51–52. The promotion of interbrand competition is important because "the primary purpose of the antitrust laws is to protect [this type of] competition."

12 *Id.*, pp. 11-12: "Resale price maintenance, in addition, can increase interbrand competition by facilitating market entry for new firms and brands. "[N]ew manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer."…New products and new brands are essential to a dynamic economy, and if markets can be penetrated by using resale price maintenance there is a procompetitive effect."

13 *Id.*, pp. 15-16: "Respondent is mistaken in relying on pricing effects absent a further showing of anticompetitive conduct. Cf. id., at 106 (explaining that price surveys "do not necessarily tell us anything conclusive about the welfare effects of [resale price maintenance] because the results are generally consistent with both procompetitive and anticompetitive theories"). For, as has been indicated already, <u>the antitrust laws are designed primarily to protect interbrand competition, from which lower prices can later result</u>. See Khan, 522 U. S., at 15. The Court, moreover, has evaluated other vertical restraints under the rule of reason even though prices can be increased in the course of promoting procompetitive effects. See, e.g., Business Electronics, 485 U. S., at 728. And resale price maintenance may reduce prices if manufacturers have resorted to costlier alternatives of controlling resale prices that are not per se unlawful. See infra, at 22–25; see also Marvel 371."; and p. 17: "<u>Many decisions a manufacturer makes and carries out through concerted action can lead to higher prices. A manufacturer might, for example, contract with different suppliers to obtain better inputs that improve product quality. Or it might hire an advertising agency to promote awareness of its goods. Yet no one would think these actions violate the Sherman Act because they lead to higher prices. The antitrust laws do not require manufacturers to</u>

These considerations are particularly relevant in the modern food retail market, where vertically integrated retailers act as gatekeepers and competitors of manufacturer brands.

2. Outdated Commission Regulation and Guidelines on vertical agreements

The ECJ's case-law on RPM long predated the Commission's Commission Regulation No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices categorised vertical price fixing as a hardcore restriction of competition which lead to the exclusion of the whole vertical agreement from the scope of application of the Block Exemption Regulation and the accompanying Commission Guidelines on Vertical Restraints added that Individual exemption of vertical agreements containing such hardcore restrictions was also unlikely[15].

RPM was hotly debated in the consultation process leading to the adoption of the Commission Regulation No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices. However, the Commission refused to "modernise" its categorisation of RPM as a hardcore (objective) restriction of competition. The accompanying Commission Guidelines on Vertical Restraints emphasize that the hardcore restrictions are presumed to fall within Article 101.1 TFUE and not to fulfil the conditions of exemption under Article 101.3 TFUE:

> *"(223) As explained in section III.3, resale price maintenance (RPM), that is agreements or concerted practices having as their direct or indirect object the establishment of a fixed or minimum resale price or a fixed or minimum price level to be observed by the buyer, are treated as a hardcore restriction. Including RPM in an agreement gives rise to the presumption that the agreement restricts competition and thus falls within Article 101(1). It also gives rise to the presumption that the agreement is unlikely to fulfil the conditions of Article 101(3), for which reason the block exemption does not apply. However, undertakings have the possibility to plead an efficiency defence under Article 101(3) in an individual case. It is incumbent on the parties to substantiate that likely efficiencies result from including RPM in their agreement and demonstrate that all the conditions of Article 101(3) are fulfilled. It then falls to the Commission to effectively*

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produce generic goods that consumers do not know about or want. The manufacturer strives to improve its product quality or to promote its brand because it believes this conduct will lead to increased demand despite higher prices. The same can hold true for resale price maintenance." [emphasis added]

14 *Id.*, pp. 16-17: "Respondent's argument, furthermore, overlooks that, in general, the interests of manufacturers and consumers are aligned with respect to retailer profit margins. The difference between the price a manufacturer charges retailers and the price retailers charge consumers represents part of the manufacturer's cost of distribution, which, like any other cost, the manufacturer usually desires to minimize. See GTE Sylvania, 433 U. S., at 56, n. 24; see also id., at 56 ("Economists . . . have argued that manufacturers have an economic interest in maintaining as much intrabrand competition as is consistent with the efficient distribution of their products"). A manufacturer has no incentive to overcompensate retailers with unjustified margins. The retailers, not the manufacturer, gain from higher retail prices. The manufacturer often loses; interbrand competition reduces its competitiveness and market share because consumers will "substitute a different brand of the same product." Id., at 52, n. 19; see Business Electronics, supra, at 725. As a general matter, therefore, a single manufacturer will desire to set minimum resale prices only if the "increase in demand resulting from enhanced service . . . will more than offset a negative impact on demand of a higher retail price." [emphasis added]

15 OJ C 291, 13.10.2000, par. 46.

assess the likely negative effects on competition and consumers before deciding whether the conditions of Article 101(3) are fulfilled"[16].

The Guidelines consider that RPM may restrict competition in seven ways. RPM may (1) facilitate collusion between suppliers; (2) facilitate collusion between buyers; (3) soften competition between suppliers and/or between retailers; (4) increase the price of the particular brand; (5) lower the pressure on the margin of the manufacturer; (6) foreclosure smaller rivals, when it is enforced by a manufacturer with market power; and (7) reduce dynamism and innovation at the distribution level[17].

Despite its negative stance towards RPM, the Commission Guidelines identify three scenarios where vertical price fixing can be exempted under Article 101.3 TFUE:

"(225) However, RPM may not only restrict competition but may also, in particular where it is supplier driven, lead to efficiencies, which will be assessed under Article 101(3). Most notably, where a manufacturer introduces a new product, RPM may be helpful during the introductory period of expanding demand to induce distributors to better take into account the manufacturer's interest to promote the product. RPM may provide the distributors with the means to increase sales efforts and if the distributors in this market are under competitive pressure this may induce them to expand overall demand for the product and make the launch of the product a success, also for the benefit of consumers.59 Similarly, fixed resale prices, and not just maximum resale prices, may be necessary to organise in a franchise system or similar distribution system applying a uniform distribution format a coordinated short term low price campaign (2 to 6 weeks in most cases) which will also benefit the consumers. In some situations, the extra margin provided by RPM may allow retailers to provide (additional) presales services, in particular in case of experience or complex products. If enough customers take advantage from such services to make their choice but then purchase at a lower price with retailers that do not provide such services (and hence do not incur these costs), high service retailers may reduce or eliminate these services that enhance the demand for the supplier's product. RPM may help to prevent such free-riding at the distribution level. The parties will have to convincingly demonstrate that the RPM agreement can be expected to not only provide the means but also the incentive to overcome possible free riding between retailers on these services and that the pre-sales services overall benefit consumers as part of the demonstration that all the conditions of Article 101(3) are fulfilled."[18]

Basically, the Commission Guidelines identify both potential anticompetitive effects and pro-competitive effects. This duality fundamentally questions the categorisation of RPM as an objective restriction of competition. Furthermore, neither the anticompetitive effects nor the pro-competitive effects identified by the Commission take into account the two most important features of the structure and operation of the food retail market. First, leading retailers have effectively become gatekeepers that control access of manufacturer brands to their stores and competition within them. Second, all retailers and, most notably, the leading ones, have integrated upstream and their retailer brands now compete head on with manufacturer brands. This omission contrasts with the fact that the Commission claimed, when it launched the consultation leading to the current EU rules on vertical restraints, that buyer power of big retailers

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[16] Commission Guidelines on Vertical Restraints, SEC(2010) 411, par. 223. See also the general statement on hardcore restrictions in par. 47.

[17] Commission Guidelines on Vertical Restraints, par. 224.

[18] Idem, par. 223.

and on-line sales were the most important market developments that needed to be addressed[19]. Furthermore, the Vertical Guidelines address discriminatory category management practices by retailers against manufacturer brands:

> " *(210) While in most cases category management agreements will not be problematic, they may sometimes distort competition between suppliers, and finally result in anticompetitive foreclosure of other suppliers, where the category captain is able, due to its influence over the marketing decisions of the distributor, to limit or disadvantage the distribution of products of competing suppliers. <u>While in most cases the distributor may not have an interest in limiting its choice of products, when the distributor also sells competing products under its own brand (private labels), the distributor may also have incentives to exclude certain suppliers, in particular intermediate range products. The assessment of such upstream foreclosure effect is made by analogy to the assessment of single branding obligations (in particular paragraphs (132) to (141)) by addressing issues like the market coverage of these agreements, the market position of competing suppliers and the possible cumulative use of such agreements.</u>*"[20]

Retail pricing of each brand is a critical element of category management. A vertically integrated retailer may resort to strategic retail pricing to favour its own brand at the expense of manufacturer brands. CHAKRABORTY, DOBSON and SEATON identified several pricing strategies that retailers applied in the UK market aimed at favouring their own brands over premium manufacturer brands: "Rip-off Brand" Tactic, "Value Champion PL" Tactic, "Equal-Quality-But-Better-Value PL" Tactic and "Dubious Brand Value" Tactic[21]. They reached the following conclusions (in bullet points):

> *"Conclusion*
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> *§ Retailers in "double agent" position as customer and competitor for branded goods producers for branded goods producers*
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> *§ Scope for favouring private label over brands through switch marketing and strategic retail pricing*
>
> *§ Concerns about distorted competition leading to consumer harm*
>
> *§ Empirical work required to determine the extent of the Empirical work required to determine the extent of the problem and its effects on the market*

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[19] European Commission press release IP/09/1197, "Antitrust: Commission launches public consultation on review of competition rules for distribution sector", 28.07.2009: "The main suggestions for amendments intend to take account of recent market developments, in particular the increased buyer power of big retailers and the evolution of on-line sales on the Internet…Competition Commissioner Neelie Kroes stated: "Competitive and efficient distribution are essential for consumer welfare and for our economy. The review launched today aims to ensure that the assessment of supply and distribution agreements under the competition rules takes account of recent market developments, namely further increased market power at the level of buyers and new forms of distribution including the opportunities brought by the Internet"."

[20] Commission Guidelines on Vertical Restraints, par. 210.

[21] Ratula Chakraborty, Paul W. Dobson, Jonathan S. Seaton, "Switch Marketing and the Retail Pricing of Brands and Private Label Products", Strategies in the Retailing Industry, INRA-IDEI Seminar, Toulouse, 16 May 2011, available at: http://idei.fr/sites/default/files/medias/doc/conf/inra/2011/dobson2%20table%20ronde.pdf

§ Consideration of policy measures to protect competition?"[22]

Long before the adoption of the current Vertical Guidelines, German authors had also identified retailers' pricing strategies against manufacturer brands as a source of competition and consumer harm: OLBRICH and BUHR identified a causal link between the prohibition of vertical price fixing, retailers' control of retail pricing of manufacturer brands and the high growth of retailer brands in Germany[23]. More recently, BERASATEGI has reviewed the existing literature on retailers' strategic pricing with an exclusionary intent and the available empirical evidence, often collected by competition authorities themselves, identifying the following foreclosure pricing strategies: "The main strategic pricing weapons in the hands of supermarkets in order to foreclose rival independent grocery brands are the following: (1) an artificial price gap with the leading independent grocery brand; (2) price-dumping of the independent brand in order to destroy its brand value; (3) pocketing of promotional wholesale prices; and (4) prohibition of on-packaging promotions"[24].

To add insult to injury, the Vertical Guidelines consider that RPM may hinder dynamism and innovation at the retail level25 but do not consider for a moment the effects of the (vertically integrated) retailers' control of consumer prices of manufacturer brands on their capacity to innovate and upgrade their products. There is no analysis of the business model of manufacturer brands, which relies on four "P"s: product, publicity, points of sale and pricing. Independent brands must constantly develop products that meet human beings' evolving and often latent needs. These products must be brought to the consumers' attention through publicity and they must be available in the widest possible set of distribution points in order to reach as many consumers as possible. Finally, the pricing must be such as to create the appropriate value for consumers. Once the right product, publicity, distribution and pricing are in place, the independent brand will be in a position to achieve the necessary wide-scale demand that generates a virtuous growth circle. The expenditure on R&D leads to more innovation that meets or induces changes in consumer needs. As described by BELL,

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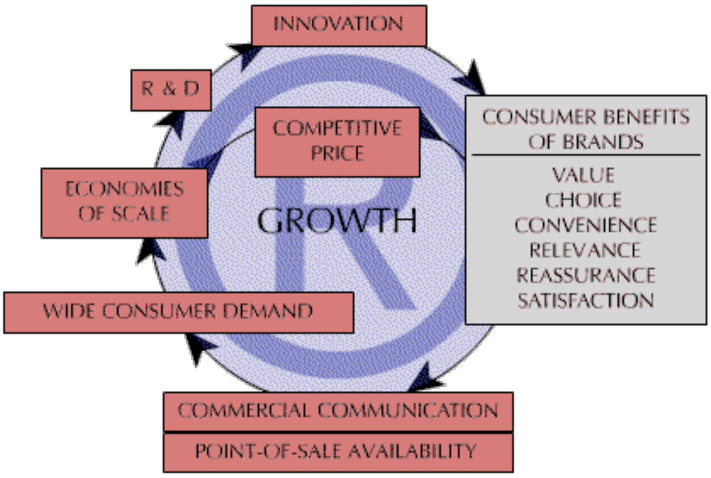
22 Idem.

23 R. Olbrich and C.-C. Buhr, "The impact of private labels on welfare and competition - how retailers take advantage of the prohibition of retail price maintenance in European competition law", Department of Business Administration and Economics, FernUniversität Hagen, Research Paper 1, 2004, available at: https://www.fernuni-hagen.de/marketing/download/no1-web.pdf, Abstract: "*Contracts stipulating consumer prices between retailers and suppliers are illegal under European competition law. Without control of prices, the branded goods industry cannot communicate coherent marketing strategies. Retailers, though, control prices, promotions and presentations for industry's brands and for private labels. These unequal conditions help to explain the recent surge of private labels that has regionally reached more than 40% of food turnover and for new ways in which private labels are used against brands. Issues of competition and welfare are discussed in the context of private labels to support the argument against the prohibition of retail price maintenance*".

24 Javier Berasategi, "Supermarket Power: Serving Consumers or Harming Competition" (February 26, 2014), p. 201, available at SSRN: https://ssrn.com/abstract=2401723 or http://dx.doi.org/10.2139/ssrn.2401723

25 Commission Guidelines on Vertical Restraints, par. 224: "*(...).Lastly, RPM may reduce dynamism and innovation at the distribution level. By preventing price competition between different distributors, RPM may prevent more efficient retailers from entering the market or acquiring sufficient scale with low prices. It also may prevent or hinder the entry and expansion of distribution formats based on low prices, such as price discounters"*.

each turn of this virtuous circle leads to economic growth for the business and for the economy as a whole[26].



Source: Bell, "The Business Model for Manufacturers' Brands", in Private Labels, Brands, and Competition Policy: The Changing Landscape of Retail Competition, ed. By Ariel Ezrachi and Ulf Bernitz, Oxford, 2009, p. 29.

Successful innovation is the lifeblood of independent grocery brands[27]. It is unquestionable that only new product developments can allow trading up in order to avoid a deflationary trend that would undermine the virtuous cycle and set off a downward spiral of prices, R&D and sales[28]. According to the Mintel Global New Products Database ("**GNPD**"), covering 62 of the world's major economies, 33,000 new product launches take place every month in the consumer packaged goods/fast moving consumer goods sector (food, beverages, beauty & personal care, household items and petfood)[29]. WEIS and WITTKOPP mentioned that "32,478 new products have been introduced into the German food market in year 2000, whereas innovative activity is heterogeneously among food industry sectors", based on Madakom's Innovations report 2001[30].

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26 Bell, "The Business Model for Manufacturers' Brands", in *Private Labels, Brands, and Competition Policy: The Changing Landscape of Retail Competition*, ed. by Ariel Ezrachi and Ulf Bernitz, Oxford, 2009, pp. 21-44, p. 29.

27 IRI, "New Product Success in Europe", White Paper, February 2007, p. 4: "*It has long been accepted that successful new products are the lifeblood of a dynamic fmcg category*".

28 Trading up stands for increasing the number of features (and their associated benefits) of a product, improving its quality, or backing it with a superior level of service to justify a higher price. Therefore, the business model of independent grocery brands follows closely the competitive rivalry model proposed by Michael Porter.

29 See Mintel's presentation of the GNPD at http://www.mintel.com/global-new-products-database.

30 C. Weiss and A. Wittkopp, "Buyer Power and Product Innovation: Empirical Evidence from the German Food Sector", Working Paper FE 0303, University of Kiel, June 2003, available at https://www.econstor.eu/bitstream/10419/23595/1/Fe0303.pdf, p. 3: "Finally, the food sector is particularly interesting because of the large number of innovations per year. According to Madakom (2001) 32.478 new products have been introduced into the German food market in year 2000, whereas innovative activity is heterogeneously among food industry sectors."

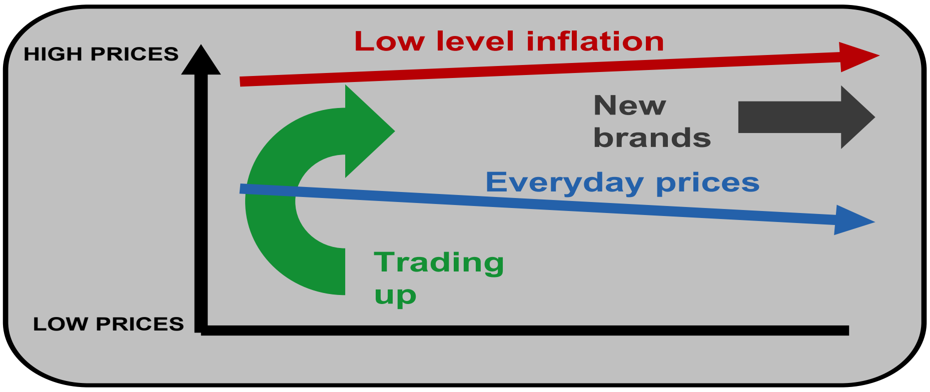

FIGURE ONE: NEW PRODUCTS HELP TO BALANCE TOP LINE PRICING

Source: IRI, "New Product Success in Europe", White Paper, February 2007, p. 4.

Manufacturer brands strive to innovate as a matter of survival and, accordingly, the number of product innovations is extraordinarily high. However, many of these innovations fail on one or more of the "P"s and, ultimate, on the market. IRI reported, based on 2004-2006 data, that 80% of the new products launched in France, Germany, Great Britain, Greece, Italy, The Netherlands and Spain had failed[31].

Pricing is one of the magic four "P"s that explain the success of the manufacturer brand. Identifying the right retail price is critical not only for the product concerned but for the business model of the company, which must ensure that its successful products finance its R&D efforts and all the failed products.

Leaving price control in the hands of a vertically integrated retailer means that this brand may be subject to pricing strategies that destroy the product positioning, the brand value associated with it and even the manufacturer's business model. Vertically integrated retailers have all the incentives to depart from the ideal price positioning identified by the manufacturer because pricing above and below the ideal price positioning favours the competing retailer brand: overpricing serves a "Rip-off Brand" tactic), yo-yo or Edweworth cycle pricing serves a "Dubious Brand Value" tactic and loss-leading pricing destroys the brand value. KUIPERS describes how this loss-leading pricing benefits not only retailers but their own brands as well (cross-selling): "*First and foremost, branded firms develop differentiated assortments of products, each with their own 'positioning', including price-point positioning. In terms of price positioning: budget, standard and premium-positionings are common. Branded firms develop assortments along these and other criteria. Via advertising and other means they communicate their product positionings directly to the consumer. Branded firms have a legitimate interest that carefully developed positionings are not destroyed and that a premium positioning does not, because of the retailer's in-store pricing, change into a de facto budget image. (…). Traffic building by loss-leading is in fact another way to free-ride on goodwill and investments of brands. Retailers make use of the name and fame of brands to attract shoppers. The losses on those products are earned back on other products (including PLs). By offering brands at below-value prices, goodwill*

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31 IRI, note 27, p. 6: "*Actually, on average across Europe, only a relatively small number of new products are successful. Just two out of ten succeed, with the other 80%, in effect, failing.*"

value is affected both in terms of brand positioning and because of delisting by other retailers”[32].

However, only two years after the publication of the Vertical Guidelines, the Commission commissioned an economic study into the effects of retailer concentration and retailer brands on choice and innovation, on the basis of complaints about retailers' exploitative and exclusionary practices against manufacturer brands[33]. Despite the notorious flaws and limitations in the methodology used (the most critical ones being the exclusion of some highly concentrated markets, including Germany, from the sample of Member States, the unduly inclusion of follow-up/copycat innovations in the innovation category alongside first-to-market innovations and the exclusion of retailer brands' market share from the supplier concentration analysis)[34], the study econometrically confirmed that a high market share of retailer brands undermined innovation in the market. The Commission asked the authors of the study to refine their initial analysis and informed stakeholders of the outcome:

“In the conference on the report in October, it was highlighted that the relationship between private label penetration and the measures of choice and innovation appeared to be non-linear. Specifically, graphical analysis of the relationship (see section 9.6 the report) suggested that after a certain "tipping point", private label penetration is associated with a decrease in innovation. This relationship would have been inadequately captured in the initial analysis however, which tested for a linear relationship.

In order to refine the analysis, the Consortium has now tested for a non-linear relationship between private label penetration and our measures of choice and innovation. Under the refined analysis, the results suggest that there is a ***statistically and economically significant negative relationship between private label penetration and innovation****. Moreover as the relationship is non-linear, the higher the level of private label penetration, the steeper the decline in innovation. The refined analysis suggests however that the impact of private label penetration on choice was not economically significant.”*[35]

The increased power of retailers and the growth of their own brands is penalising competition and real innovation in the market, mostly sustained by manufacturer brands. However, manufacturer brands' legitimate strategy to price position their products at the exact level where consumer demand will generate the returns needed to support their R&D, new/improved product launches and accompanying marketing

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32 P. Kuiper, “Retailer and private labels: asymmetry of information, in-store competition and the control of shelf-space”, in Private Labels, Brands, and Competition Policy: The Changing Landscape of Retail Competition, ed. By Ariel Ezrachi and Ulf Bernitz, Oxford, 2009retailers can uipers 2009, pp. 212-213.

33 DG COMP website, Agriculture and Food Overview: “*The Commission has received complaints from operators in the food supply chain, as well as requests from the Parliament to investigate the impact of concentration in the chain. The complainants alleged that large operators, in particular large modern retailers, often impose detrimental conditions on their suppliers and as a result these suppliers are not able to invest in new products. They alleged that this had reduced choice and innovation in food products for European consumers. In December 2012, the Commission launched a comprehensive study on the modern retail sector, (the "modern retail study") to measure how choice and innovation have evolved over the last decade for consumers on the shop shelves. The study also measured the evolution of a number of factors affecting the market and identifies which of these has driven choice and innovation in the EU food supply chain over the past 10 years.*

34 The flaws and limitations of the methodology used in the study were exposed by the submissions of AIM and PROMARCA in the public consultation carried out by the Commission, available at: http://ec.europa.eu/competition/sectors/agriculture/overview_en.html

35 Email from DG COMP's Food Task Force to stakeholders dated 16.12.2014.

efforts was entirely overlooked in the Vertical Guidelines. Instead, the Commission gave retailers control of the manufacturer brands' consumer pricing, thereby facilitating pricing strategies aimed at benefiting their own brands at the expense of the manufacturer brands.

3. The economic context of modern retail distribution in Germany (and the EU)

Section B.II.3 of the Guidance Note identifies the relevant criteria for the assessment of vertical price fixing in practice: the structure of the market and the nature of the product concerned. Section B.III deals with the German food retail sector, including the current market structure and distribution of power (B.III.1) and the preliminary assessment of vertical price fixing in this sector (B.III.2).

Pars. 39 to 41 of the Guidance Note revisit the main findings of the Bundeskartellamt report on the food retail sector and present a market structure mostly dominated by retailers:

> *"39 Both the sales and the procurement markets exhibit a high level of concentration that is still increasing.22 At the retail level, competition is dominated by a leading group of four retailers that are active nation-wide and together account for about 85% of all food retail sales in Germany. These leading retailers act as "gatekeepers" as regards access to the end consumer, because they decide on the listing and the shelf placement of the manufacturers' products and their own (competing) private labels. In the case of branded products, which are mainly listed by full-range retailers (such as Edeka and Rewe) and only occasionally listed by discounters (such as Aldi), the leading group consists of even less companies, namely the three leading full-range retailers Edeka, Rewe and Kaufland. Conversely, there are only a few leading suppliers on the procurement markets, who generate most of their turnover with the top-level customers from the retail sector.*
>
> *40 On account of this high level of concentration on the upstream and downstream markets, most of the suppliers maintain a comprehensive web of purchase and supply links with almost all of the retailers. Within these stable supply relations, the major retailers are largely able to use their strong market position to their advantage in negotiations with the food industry.23 The supplier's negotiating position can improve if the negotiations concern a strong, or even indispensable brand. However, only a few branded products in Germany have such superior brand strength.*
>
> *41 In addition to portfolio depth and breadth, other important competition parameters include: prices (including campaign prices), the geographic position of the outlet and the service level provided by the respective distribution channel. The individual food retailers in Germany differ (sometimes significantly) with regard to these parameters. Another characteristic of the German food retail sector is the high price sensitivity of end consumers, at least with regard to well-known basic products. Here, the pricing policy of the discounter Aldi plays a significant role because its competitors (discounters as well as full-range retailers) regard Aldi's prices as a benchmark, at least with regard to branded products in the entry-level price segment and branded products that are also listed by Aldi."*

This leads the Guidance Note to conclude in par. 42 that vertical price fixing in the food retail sector is anticompetitive:

> *"42. On account of the structural conditions described under 1., vertical price fixing in the German food retail sector is in almost all cases harmful to competition. There is little evidence of efficiencies generated by vertical price fixing in the sector."*

The Guidance Note further argues in par. 43 that food retailing does not require any pre-sale advice and the scope for the launch of new products:

> *"43 Food is a standard product that usually does not require any pre-sale advice. There is limited scope for the development and launch of new, innovative products. Accordingly, new products only concern a small proportion of the retailer's total turnover, which in turn means that the uncertainty of demand linked to the launch of a new product has little effect on the sales policies of the retailer.24"*

The Guidance Note closes this section by making reference to the most salient features of the recent cases decided by the Bundeskartellamt. In particular, it is noted that retailers induced or even forced vertical price fixing, falling short of horizontal coordination among them[36].

The German food retail market structure and its operation do not support the economic and legal conclusions of the Guidance Note.

The Guidance Note rightly points out that the leading retailers are able to dictate commercial terms to their suppliers and the status of "must stock" brands is confined to a handful of products. It also rightly mentions that retailers act as vertically integrated "gatekeepers": "*These leading retailers act as "gatekeepers" as regards access to the end consumer, because they decide on the listing and the shelf placement of the manufacturers' products and their own (competing) private labels*".

However, the Guidance Note commits two fatal mistakes.

First, it inexplicably negates the role of innovation in this sector. This basic misunderstanding of the FMCG sector vitiates any further analysis of the role of RPM in promoting innovation and, more generally, undermines the analysis of the potential negative effects of retailers' category management practices on innovation.

Back in 2003, WEIS and WITTKOPP argued, on the basis of a formal model and data from German FMCG manufacturers, that retailer market power undermined the innovative efforts of manufacturers and called for competition policy intervention:

> *"The relationship between downstream (retailer) market power and upstream (food manufacturing) product innovation is the focus of this paper. On the basis of a formal model, we find that retailer market power reduces upstream firms incentives to introduce new products. This proposition is then tested empirically.*
>
> *In contrast to much of the existing literature on product innovation, which is based on cross-section (aggregate) industry data, we use firm level data from a survey of food manufacturing firms carried out in 2002 in Germany. The results of a negative binomial regression model supports the proposition of a negative effect of retailer market power on product innovation in food manufacturing. This negative impact of market power in the downstream market is mitigated if manufacturing firms also have some market power (countervailing power).*

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[36] The Guidance Note, par. 44: "*(...). A distinctive feature common to all cases was that the market side whose price-setting freedom was restricted (i.e. the retailers) played a rather significant role in the offences. Some retailers went as far as asking manufacturers to intervene if other retailers did not observe a uniform retail price level. In this respect the offences not only involved vertical price fixing but also came close to a horizontal coordination among the retailers."*

Innovations are positively related to firm's market share in food manufacturing. Further, we find firm's expenditures in R&D to be significantly and positively related to product innovation.

There has been considerable debate over the appropriate policy treatment towards buyer power. Our results underline the necessity to incorporate the long-run implications with respect to product innovation into competition policy considerations."[37]

In 2007, IRI identified Germany as one of the countries where innovations achieved less weighted distribution, one of the four critical "P"s that helpt explain innovations' success/failure: "The situation is different in Germany where distribution builds slowly and on average begins to fall even before the end of the first year. Poorly performing new products are weeded out quickly and overall, new products can often achieve relatively low levels of settled distribution"[38].

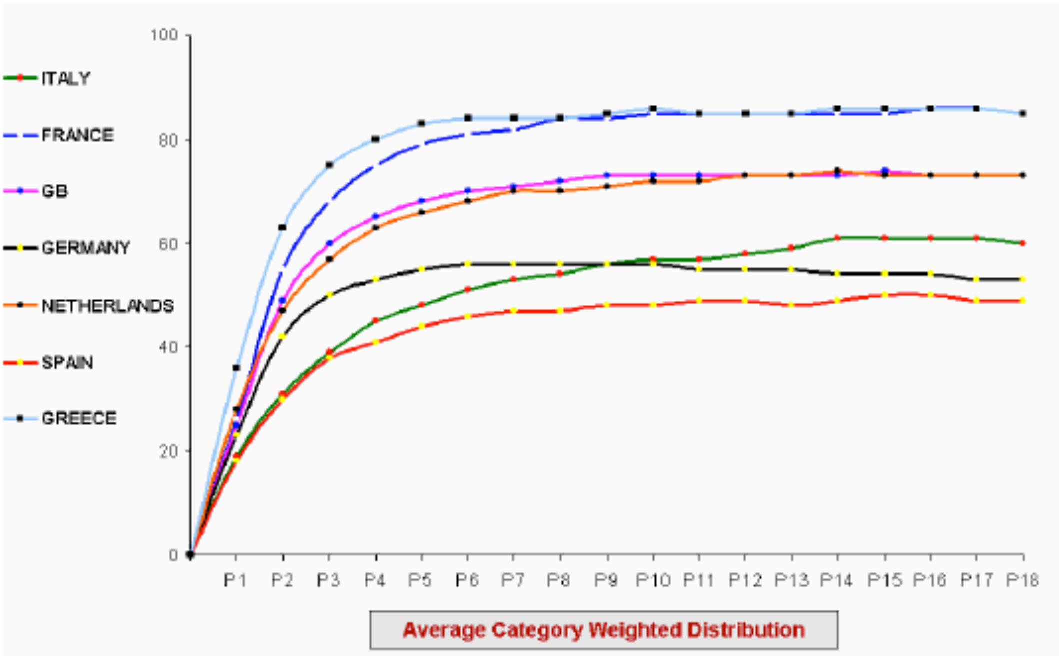

FIGURE FOUR: PRODUCT AVAILABILITY BY COUNTRY
THE BEST GROUP OF NEW PRODUCTS GAIN DISTRIBUTION QUICKLY, BUT OFTEN FALL SHORT OF THE MAXIMUM POSSIBLE

Source: "New Product Success in Europe", White Paper, February 2007, p. 8.

In 2014, the Bundeskartellamt issued its report on the sector inquiry into buyer power in the food retail sector. The report warned that the concentrated retail market structure was likely to deteriorate further, that retailers were able to dictate business terms to their suppliers and that retailer brands generally increased their bargaining power. As a consequence, the Bundeskartellamt announced a hard-line stance on retailer mergers, retailers' unfair practices vis-à-vis their suppliers and buying alliances. Furthermore, it sought feedback on the competitive dynamics of retailers' brands. However, the

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37 WEIS and WITTKOPP, note 30, p. 13.
38 IRI, note 27.

Bundeskatellamt did not analyse retailers' category management practices and the effects on inter-brand competition and on inter-retailer of the unique market structure of the modern food retail markets: retailers control the retail prices of the manufacturer brands that compete with their own brands.

Second, it refrains from presenting even an elementary analysis of the competitive implications of some competitors (the retailers) fixing the retail price of their respective products (retailer brands) and the products of other competitors (manufacturer brands) and how vertical price fixing by suppliers of manufacturer brands may improve or worsen the competitive outcome in the market.

This omission is unwarranted in light of the high combined market share of retailer brands in Germany (43% by volume), the third-largest market share in the EU behind Spain (50%) and United Kingdom (46%).

Source: Private Label Manufacturers Association (PMLA), http://www.plmainternational.com/international-private-label-yearbook

The concentrated retail market structure, the high combined market share of retailer brands (above the tipping point identified in the study commissioned by the European Commission) and the low weighted distribution of manufacturers' innovations in Germany (a critical factor that conditions innovations success/failure) may justify reliance on RPM as a mechanism to preserve manufacturers' brands incentives to innovate and capacity to compete against each other and against retailers' brands.

Therefore, neither the Bundeskartellamt nor any other competition authority can claim that experience shows that RPM by a manufacturer brand inherently distorts competition in a market dominated by vertically integrated retailers because no theoretical or empirical analysis has been performed so far. On the contrary, experience shows that vertically integrated retailers' control of consumer pricing of manufacturer brands is used to favour retailer brands at the expense of manufacturer brands.

Conclusion

The Guidance Note should not replicate the fatal analytical errors of the Commission's Vertical Guidelines.

The "objective restriction of competition" is reserved for agreements that always or almost always restrict competition according to the economic literature and empirical experience.

RPM does not fall within this category. Several economists have supported its pro-competitive effects, backed by empirical evidence, and it is no longer considered an objective restriction of competition in important jurisdictions such as the US.

WRIGHT, FTC Commissioner at the time, analysed the economic implications of RPM from a competition policy perspective. He presented the economic literature and empirical evidence on this field and concluded:

> *"As I have already discussed, in order to determine whether per se or "inherently suspect" treatment of minimum RPM is socially optimal as compared to the rule of reason, the existing evidence must demonstrate that such agreements are always, or almost always, anticompetitive. However, economists nearly universally agree that while minimum RPM can generate anticompetitive outcomes in some instances, the empirical evidence indicates such agreements are more often than not procompetitive.*[39] *"*

Interestingly, WRIGHT also discussed the critiques proffered of an empirical study that used consumer product data for the grocery retail industry and purportedly found evidence of higher prices and reduced output in US States employing the "rule of reason" standard over States where minimum RPM is prohibited by law:

> *"As others have pointed out, a close look at the study's findings demonstrate that it does not support a more restrictive policy towards minimum RPM.46 First, although the study considers the impact of the legal environment for RPM on both price and quantity, the results are not consistent with the predictions of the anticompetitive theories of RPM – that is, a reduction in output and an increase in price for the product category.47 It turns out that merely 1.6 percent of the product categories surveyed had both an increase in price and a decrease in quantity in states that shifted to the rule of reason.48 Moreover, the study does not purport to actually present evidence that minimum RPM agreements were implemented for any of the product categories where price increases or output reductions were found.49"*[40]

WRIGHT concluded that the rule of reason is justified in the US, a conclusion that can be extrapolated to any other jurisdiction:

> *"The appropriate antitrust rule for RPM is thus a rule of reason analysis that requires plaintiffs to proffer such evidence as part of their prima facie burden before requiring defendants to offer evidence of the restraint's efficiency. The rule of reason allows courts and antitrust enforcers to determine, on a case-by-case basis, whether a particular minimum RPM agreement is anticompetitive.*

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[39] Joshua D. Wright, Commissioner, Federal Trade Commission, "The Economics of Resale Price Maintenance & Implications for Competition Law and Policy", Remarks before the British Institute of International and Comparative Law, London, United Kingdom, April 9, 2014, available at: https://www.ftc.gov/system/files/documents/public_statements/302501/140409rpm.pdf, p. 16.

[40] WRIGHT, note 39, p. 21.

In doing so, the rule of reason offers the best opportunity for consumers to realize the benefits of the vast majority of minimum RPM agreements that are precompetitive while also allowing a host of modern economic tools to be used to effectively identify and prosecute those minimum RPM arrangements that actually harm competition."[41]

WRIGHT respectfully dealt with the path dependence bias that seems to pervade the analysis of RPM by competition authorities in the EU:

"The most serious economic defense of per se or "inherently suspect" treatment of minimum RPM appears to be that minimum RPM agreements are just as likely to be anticompetitive as they are to be procompetitive, and therefore it is a close call on whether the rule of reason should be applied. A corollary of this argument is that in jurisdictions initially endowed with a hostile approach to RPM, the existing evidence is not sufficient to overcome the initial rule. But path dependence of legal institutions is not an economic defense of the rule. Indeed, economists have been quite successful in changing the law over time as economic knowledge develops. Of course, even if it were true that minimum RPM arrangements are just as likely anticompetitive as they are procompetitive, such evidence would again suggest that a legal approach under which minimum RPM agreements are evaluated on a case-by-case approach would be appropriate. Remember, under a decision-theoretic approach, per se or "inherently suspect" standards are only appropriate where a business practice is always or nearly always anticompetitive. In addition, by permitting a case-by-case assessment, the rule of reason standard actually can allow courts and antitrust enforcers to obtain valuable experience about when minimum RPM is likely to result in anticompetitive effects. The rule of reason therefore has the added benefit of being a useful basis upon which to expand our existing understanding about the economics of minimum RPM and, as I will discuss in a moment, potentially to draw presumptions where case-specific evidence demonstrates doing so is appropriate.50"[42]

Even the proponents of a rule of reason standard, akin to a presumption of legality of RPM, have mostly overlooked the pro-competitive effect of manufacturer brands regaining control of their consumer price in the face of a concentrated retail market structure where retailers have become gatekeepers and major competitors of the manufacturer brands. Only OLBRICH and BUHR addressed this market structure as early as in 2004 and concluded that lifting the prohibition of RPM on independent brands could offset, at least partially, the foreclosure strategy of vertically integrated retailers:

"In view of the global change experienced by the power relationship between retailers and manufacturers in the last 30 years, and because of the accompanying negative effects on competition, which this study has only examined in part, it is no longer clear today, in particular when looking at this sector of the economy, what the reasons for not changing the prohibition of resale price maintenance might be.

This paper showed in detail the negative consequences of the prohibition of resale price maintenance under the aspect of product variety, the horizontal competition between retail companies and of the competitive position of branded article manufacturers. A decision in favour of an exception to the prohibition of resale price maintenance suggests itself for branded goods at least, because the possibility for manufacturers of these products to fix consumer prices themselves has to a certain extent the function of encouraging them to innovate. Because in many cases developing new products is only worthwhile in combination with this possibility:

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41 WRIGHT, note 39, p. 22.
42 WRIGHT, note 39, p. 23.

a uniform market appearance of a product is an important factor for its success on the market and the price is a significant component of this market appearance.

All the same, European competition policy places great importance on the prohibition of resale price maintenance. Its concern here is that price fixing could lead to intrabrand competition being sealed off. As was shown above with reference to the retail sector, in the recent past it is not the manufacturers of branded articles who have sealed off competition in several fields, but the retail sector itself through the introduction of private labels. The trend towards this kind of exclusion of a large portion of competition through the retail sector is based in part on the deliberate use of branded articles at the cost of the branded articles manufacturers, because the latter are no longer able to achieve a uniform appearance of their marketing instruments for the final consumers. The opportunity for branded article manufacturers of fixing the consumer prices of their own articles would counter the heavily unequal distribution of the possibilities for action of both stages at one position only. After all, along with setting the price, retail companies have numerous other opportunities for influencing the image of branded articles for the consumer: among other things they decide on the type and location of the placing in the sales area, on special sales promotion measures or on the stock-keeping policy, which, depending on the arrangement, leads to out-of-stock-situations with a lesser or greater probability. Even with the possibility of resale price maintenance branded articles would still be exposed to competition from private labels, such as the price-independent dimensions of the interstore-intrabrand competition (figure 3). These price-independent dimensions especially include the different placings, stockings and advertisings of a particular branded article by different retailers. In the case of private labels, however, these parameters can also be unified for the benefit of these products.

The analysis shows that the two conceivable types of handling resale price maintenance in the retail sector lead to different changes to competition:

A prohibition of resale price maintenance leads to a bundling of the options for action directed at the consumer on the side of the retailer. The growth of private labels and the associated sealing off from competition are caused to a considerable extent by the use of these options.

In contrast to that, the permissibility of resale price maintenance would allow the manufacturers of branded articles to achieve uniform pricing for consumers through suitable agreements with their buyers. The possibility for the retail sector of fixing prices is exactly the area that it can instrumentalise most directly for its goals and at the cost of the brands. The control by the manufacturers of branded articles over the consumer prices of their own goods, and this must be stressed, would be no different to that which every other company can achieve with regard to the actual addressees of its products, provided it is not dependent on a middleman. The simple fact that, on the grounds of expediency (and in the consumers' interests as well!), certain types of products are distributed through a distribution system with middlemen instead of directly, cannot be an adequate reason for placing the manufacturers of these articles at a disadvantage in comparison with the manufacturers of other articles."[43]

These German scholars graphically exposed the different dimensions of the competition restriction strategy pursued by German retailers:

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43 OLBRICH and BUHR, note 23, pp. 28-29.

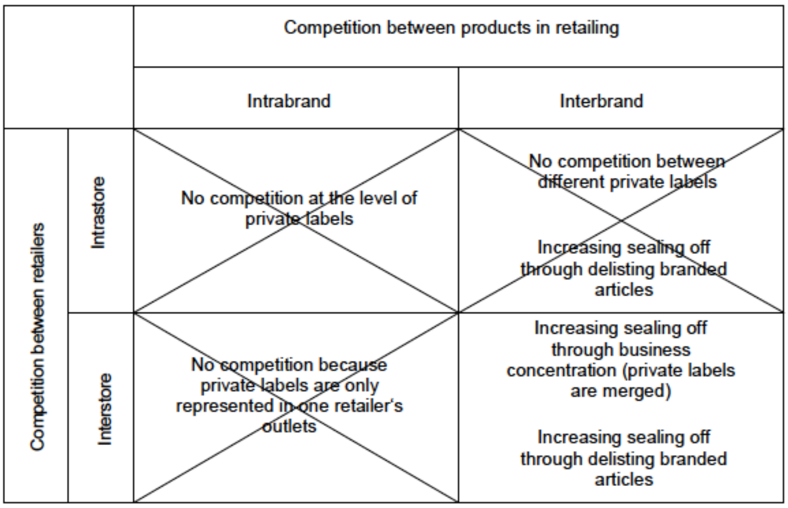

Fig. 2: Competition fields of private labels in the consumer goods sector

Source: OLBRICH and BUHR, p. 19.

Indeed, the structure and operation of the German food retail market does in no way justify a *de facto* prohibition of RPM in this sector. This prohibition will only help to increase retail concentration, increase the market share of retailer brands and undermine competition and innovation by manufacturer brands. The market share of retailer brands in Germany exceeds the tipping point identified in the study commissioned by the Commission and access to retail outlets seems to be a major entry barrier for manufacturer brands and their innovations. Therefore, RPM may be a more competitive option than vesting control of manufacturer brands' consumer prices on vertically integrated retailers. In this market scenario, the question is no longer whether RPM should be considered an objective restriction and prohibited *de facto,* but whether RPM should be merely a business choice open to manufacturer brands or an obligation under competition rules in order to preserve competition in a market dominated by vertically integrated retailers.

Therefore, I respectfully ask the Bundeskartellamt to carry out a thorough analysis of the economic literature and empirical evidence on RPM duly taking into account the dual role of gatekeepers and competitors of manufacturers' brands of German retailers before concluding that RPM by non-dominant manufacturer brands objectively restricts competition. Indeed, I consider that the economic theory and empirical evidence support a presumption of legality of RPM in dealings with vertically integrated retailers. Furthermore, the presumption of illegality should be shifted to the leading vertically integrated retailers, which fix the retail prices of the manufacturer brands that compete with their own brands.

9th March, 2017

Javier Berasategi