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# RESPONSE OF THE CITY OF LONDON LAW SOCIETY COMPETITION LAW COMMITTEE TO THE CMA'S CONSULTATION ON THE NEW UK VERTICAL AGREEMENTS REGIME

This response is submitted by the Competition Law Committee of the City of London Law Society (**CLLS**) in response to the Competition and Markets Authority's (**CMA**) consultation on its proposed recommendations to the Secretary of State regarding the proposed new UK competition regime for vertical agreements, as set out in the document "The retained Vertical Agreements Block Exemption Regulation" (CMA145con) (the '**Consultation Paper**') published on 17 June 2021.

The CLLS represents approximately 17,000 City solicitors through individual and corporate membership including some of the largest international law firms in the world. The Competition Law Committee comprises leading solicitors specialising in UK and EU competition law in a number of law firms based in the City of London, who act for UK and international businesses, financial institutions and regulatory and governmental bodies in relation to competition law matters.

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This response reflects the authors' experience advising a range of businesses on the competition law implications of their distribution agreements. Because of the range of this experience, and the diversity of clients advised, it is not possible for us to provide meaningful answers to the CMA's 'impact' questions. As a result, we have only responded to the Consultation Paper's 'policy' questions.

The views expressed in this response are ultimately those of the Committee, and do not necessarily reflect the views of their respective firms or any individual clients.

## 1. GENERAL REMARKS

1.1 The Committee welcomes the opportunity to respond to the Consultation Paper. We also commend the CMA for the level of openness, stakeholder engagement and evidence gathering to date, including through the stimulating roundtables.

1.2 We broadly agree with the CMA's overall conclusion that "large-scale and fundamental changes to the current exemption for vertical agreements are not appropriate". In our view (which we believe is also reflected in many of the CMA's proposals), the UK Vertical Agreements Block Exemption Order ('**VABEO**') should not seek to mirror the *current* 'retained VABER' (based as it is on the 2010 EU Vertical Agreements Block Exemption Regulation ('**VBER**') regime), but the CMA should where possible adopt those aspects of the new post-2022 EU VBER regime (the details of which are now becoming clearer) that will amount to material improvements of the 2010 EU regime, without taking on those aspects of the new EU regime that either do not accord with UK market needs or do not amount to improvements in the EU verticals regime. .

1.3 In terms of timing, we agree with the CMA's recommendation to review the UK regime again after six years, in contrast with the 12 year review period that the EU regime will adopt. While this will mean that the next UK review will not be aligned with the next Commission review of the VBER, it should provide adequate time for a fully considered evaluation of how the UK regime should develop over the long term, based on development of the UK regime – and of UK markets - over that period. This would enable a more thorough assessment, based on the development of UK commerce during seven years outside the EU Single Market, of whether the adoption of a fundamentally different policy basis for the assessment of vertical agreements in UK competition law is justified.

1.4 The EU law regime for vertical agreements is well-established and comprises a sophisticated and widely understood body of rules and case law that has permeated UK case law and enforcement over recent decades. That regime, mirrored in the Competition Act 1998 and the retained VABER, has enabled the CMA (and the Office of Fair Trading before it) to take action against practices that harm competition and

consumers, including unjustified restrictions of online retail and pricing, that may have been harder to combat under a more permissive regime. Nevertheless, the EU regime is fundamentally underpinned by the principles of the EU Single Market, including in particular a hostility to restrictions on cross-border sales, as well as what could be characterised as a formalistic focus on contractual restrictions.

1.5 Although the structure adopted by the VBER, namely the combination of a relatively generous market share-based safe harbour with a detailed list of restrictions that are presumptively unlawful, has merit for defining the borders of a block exemption safe harbour, it does create tensions and uncertainties on the margin.[1] While the UK's previous highly permissive approach to vertical agreements, as reflected in the UK Exclusion Order, resolved these tensions - and moved away from a regime characterised by hostility to territorial restrictions - by creating a generous safe harbour, the CMA appears to prefer to retain its (post-Modernisation) approach that is more closely aligned with EU law. Presumably this reflects a more cautious view of the potential of vertical agreements to lead to restrictions of competition beyond straightforward resale price maintenance.

1.6 As the CMA is aware, and as discussed in the Consultation Paper, the European Commission is itself undertaking a review of the EU verticals regime, comprising both the current VBER itself and the accompanying Verticals Guidelines. As the CMA notes, the Commission has identified similar shortcomings to the current EU regime to the points noted by the CMA in the Consultation Paper, as part of its ongoing evaluation of the VBER. Indeed, the Consultation Paper draws on the extensive evidence gathered by the Commission in the course of its evaluation, as set out in the VBER Evaluation Staff Working Document.

1.7 The CMA will also be aware that the Commission had recently published consultation drafts of the proposed new VBER and Verticals Guidelines. Given this timing, we have had only limited opportunity to consider specific developments in the EU regime when preparing this response. The direction of travel of the new regime is now clear,

[1] These are summarised well by the Commission's recent *Expert report on the review of the Vertical Block Exemption Regulation,* which was prepared by UK-based academics at King's College London and the Dickson Poon School of Law. As noted further, while some of these tensions and uncertainties look set to be resolved by the new EU VBER and Guidelines, the Commission's draft texts indicate that at least as many new ones will be created by the new EU regime.

however, and it is possible to offer an initial assessment of the relative merit of the EU's proposals. As noted above, we suggest that the CMA should take this into account in preparing its recommendation to Ministers, to ensure a degree of alignment of the EU and UK regimes from 1 June 2022.

1.8 While it is of course appropriate for the CMA, and in due course the Secretary of State, to craft a verticals regime that is appropriate for the UK, where possible continued alignment between the EU and UK regimes is highly desirable. Notwithstanding the challenging trading environment, many UK businesses continue to sell goods and services into the EU and vice versa. As the CMA recognises, significant divergence in the competition law regimes applicable to the agreements governing such trade would increase uncertainty and compliance costs for such businesses. Indeed, as the UK is one part of the wider European trading bloc which companies have got used to trading in over last 50 or so years, a practical response to divergence will be that companies and their lawyers will adjust their distribution agreements to meet the higher requirements of the two regimes so they can have a uniform set of contractual terms. In terms of compliance costs, it makes little sense to adopt two sets of terms for the UK and the EU respectively. Therefore, a more uniform approach will assist in keeping compliance costs down.

1.9 This does not mean that avoiding regime divergence is the only imperative. Although UK businesses and their legal advisers fed into the EU VBER evaluation process, the UK Government and CMA no longer have any direct influence over the future shape of the EU verticals regime. Depending on how the EU regime develops in the absence of such influence, regime divergence may be necessary for the good of the UK regime and the economy more generally. We have suggested some areas in which the UK should diverge from the post-2022 EU regime below. Overall, we accept that the CMA and Government will need to strike a balance, and the specific benefits of divergence should always be weighed against its costs.

1.10 To the extent that the UK regime does diverge, we would caution against adopting an approach in the UK that is materially *less* permissive than the EU regime. This appears to be the case for the CMA's proposal to make certain types of parity obligation a hardcore restriction, which is materially more interventionist than the Commission's

proposal to designate a narrower category of online parity obligation an excluded restriction. This point is addressed further below.

1.11 Finally, we would emphasise the critical importance of the CMA's VABEO Guidance for the future UK regime. As the CMA is aware, the Commission's Verticals Guidelines are critically important for interpretation of the EU regime, especially with respect to the treatment of agreements that are not caught by Article 101 TFEU (such as 'genuine' agency agreements) or that fall outside the VBER safe harbour. While the fundamental framework of the future UK regime will be set by the VABEO, we would expect the VABEO Guidance to play a similarly important role. Presumably, a number of the changes proposed by the CMA, including clarification of the distinction between active and passive sales and changes in the treatment of dual pricing and the equivalence principle, will be addressed through the Guidance, rather than in the VABEO itself. The approach taken by the CMA to that Guidance will thus be critical and we urge the CMA to allow for adequate consultation with practitioners in finalising that document.

## 2. SPECIFIC ISSUES

2.1 Before addressing the CMA's policy questions, we would like to provide some general comments on the CMA's proposal on the following points:

2.1.1 territorial restrictions;

2.1.2 online sales restrictions;

2.1.3 dual distribution; and

2.1.4 parity clauses.

**Territorial restrictions**

2.2 We wish to underline the criticality of clarity from the CMA on the question of export bans in regard to trade with the EU.

2.3 The CMA will be well aware that a supplier's ability to impose contractual restrictions on a buyer's ability to make active or passive sales into the UK from elsewhere in the EU (and vice versa) was materially constrained while the UK was an EU Member State. It is clear that, following the end of the transition period, such restrictions are no longer

a hardcore restriction under VBER, and will not infringe Article 101 TFEU by object.[2] The status of such restrictions as a matter of UK competition law is less clear. In our practice, the lack of clarity on this point has been one of the main uncertainties regarding the CA98 regime that has been thrown up by Brexit. This is a major practical issue, since in our experience many suppliers are now considering whether to carve the UK out of EU-wide supply chains and distribution systems and need to consider the legal risk in doing so. Indeed, if suppliers are unable to restrict sales from outside the UK into the UK, this may create significant challenges where distribution systems need to be adjusted to address the legal and practical consequences of Brexit (e.g., implications of different tax regimes or production regulations, or the application of trademark exhaustion in the UK).

2.4 We do not believe the Consultation Document as drafted is 100% clear on this question. It appears from reading the Consultation Document that the CMA is proposing an approach that would continue to mirror that adopted in the VBER and Guidelines for EU trade, in the sense that only restrictions on trade "in the UK" will be treated as hardcore under the VBAEO.[3] This suggests that contractual restrictions on sales from the EU to the UK will not generally infringe the Chapter I prohibition, in the absence of exceptional circumstances where a sufficient effect on UK trade can be demonstrated.[4] In other words, it appears that the CMA does not currently anticipate adopting the approach taken by the Swiss Competition Commission and courts, which

[2] See, in particular, footnote 24 of the Verticals Guidelines, citing *Javico v. Yves Saint Laurent*. We note that the CMA Guidance on the functions of the CMA after the end of the Transition Period (December 2020) wrongly suggests that passive sales bans from the EU to the UK may be treated as hardcore restrictions of competition. We consider that the CMA should correct this inaccuracy, bearing in mind that section 60A Competition Act 1998 (as amended) provides that the CMA and the UK Courts are bound by an obligation to ensure consistency with EU competition case law that pre-dates Brexit, thus the CMA should apply the law as stated in *Javico*.

[3] See, for example, the language adopted in paragraph 4.14 of the Consultation Document.

[4] Presumably, the statement in paragraph 4.30(b) of the Consultation Document that "the CMA is proposing to retain measures that limit restrictions of sales between territories so as to avoid inadvertently compromising the integrity of the UK internal market or harming consumers in the UK" (emphasis added) should be viewed in this context, i.e. that any contractual restriction on sales between Northern Ireland and Great Britain will be viewed as a hardcore restriction under the VABEO. Regardless of the wider impact of the Northern Ireland Protocol, Northern Ireland is clearly still part of the UK. As such, treating restriction on trade with Northern Ireland in the same way as, for example, restrictions on trade between Scotland and England seems sensible, from a competition law perspective. This is a materially different situation, in law, from a restriction on trade between the UK and an EU Member State, including for example a restriction on imports from Ireland into Northern Ireland.

effectively saw EU competition law principles imported into Swiss domestic law, so as to render (even implicit) bans on sales into Switzerland unlawful.[5]

2.5 Given the importance of this question for business, explicit clarification of the CMA's position on this critical point in its forthcoming VABEO Guidance is essential.

2.6 As far as territorial and customer restrictions more generally are concerned, we consider it not entirely clear that the hardcore approach to territorial restrictions is warranted in the absence of the EU single market imperative, although we note the counter-arguments set out in the Consultation Document. We agree that if these are retained as hardcore, the CMA is right to keep this under review.

2.7 We also recommend the CMA should consider the extent to which it should follow the Commission's proposed changes in this area, rather than simply adopting the approach taken in the (soon to be outdated) VBER and Guidelines. Specifically, we would strongly recommend the CMA adopt the Commission's new approach to Article 4, in particularly the clearer description of the permitted restrictions for selective distribution, exclusive distribution and free distribution, respectively.

2.8 We note that the Consultation Document confirms the CMA's proposal to permit greater protection of the members of selective distribution systems against sales from outside the territory. On this, the Commission has now proposed wording in Article 4 of the draft new VBER permitting the operator of a selective distribution system to prohibit sales by distributors located outside of its selective distribution territory to unauthorised sellers within that territory. We suggest the CMA should mirror this wording in the new VABEAO.

2.9 The Commission's proposals with respect to shared exclusivity and 'pass on' of exclusivity to customers of the buyer are welcome in principle as they provide more flexibility. However, the approach proposed by the Commission in the new VBER, which would block exempt shared exclusivity *only* where the number of buyers has been "determined in proportion to the allocated territory or customer group in such a

[5] See, in particular, the judgments of the Swiss Federal Supreme Court in *Gaba/Elmex* (2016) and *BMW* (2017).

way as to secure a certain volume of business that preserves their investment efforts"[6] introduces an unhelpful degree of subjectivity and uncertainty that is likely to limit the use of shared exclusivity in the EU. Should the CMA proceed, as it suggests, with including shared exclusivity within the safe harbour of the VABEO, we would urge against the addition of such qualifications in the VABEO.

2.10 We note the CMA's proposal to permit "the combination of exclusive and selective distribution in the same or different territories". The CMA will be aware that the Commission has so far declined to adopt a more permissive approach to combining systems in the same territory in the new VBER regime. This seems to us to be a missed opportunity, as we often encounter situations in which distributors request exclusive territories while retailers favour selective distribution. As a result, we welcome the CMA's proposed recommendation on this point and look forward to seeing more details in the new VABEO Guidance.

**Online sales restrictions**

2.11 We support the CMA's proposals regarding dual pricing and equivalence (which are reflected in the Commission's proposals also), given market developments with online sales and practical difficulties in application of these rules. We consider that permitting distinctions as regards treatment of online and bricks and mortar distribution channels will be efficiency-enhancing.

**Dual distribution**

2.12 We strongly agree with the CMA's proposal to add agreements with wholesalers and importers to the category of 'agreements with competitors' permitted under the dual distribution exception, on the same terms as currently apply to agreements with manufacturers.

2.13 Reflecting this, we do not see any merit in adopting the more complex approach proposed by the Commission, which would expressly exclude information exchange from the exemption in cases where the retail market share of the parties is over 10%. We also do not see a justification for the additional exceptions which remove the benefit of the block exemption for agreements containing restrictions that have the object of

[6] Article 1(1)(g).

restricting competition between supplier and buyer and disapply the exemption for agreements with hybrid online marketplaces. We do not see any justification for these exceptions, which are either duplicative of the basic legal position (there is no need to exclude horizontal aspects of the relationship between the parties, as these would not be part of the vertical agreement protected by the VBER) or introduce unwarranted legal uncertainty.

**Parity clauses**

2.14 Notwithstanding the fact that parity obligations can raise competition concerns in certain circumstances,[7] we were surprised by the CMA's proposed recommendation to designate all "indirect sales channel parity obligations" as hardcore restrictions under the VABEO. At the risk of over generalising, such restrictions are more likely to arise either where they are imposed by intermediaries with market power or where they are prevalent in a specific sector or indeed both. Both of these situations can be dealt with adequately without categorising all such restrictions as hardcore.

2.15 Where an intermediary has market power, its agreements will presumably not be protected by the VABEO, since its market share will be over 30%. Where such clauses are used by undertakings without market power, but their prevalence raises competition concerns in the specific market context, then the CMA will have the ability to disapply the VABEO. Given this, and in light of the potential efficiencies that may be protected by parity provisions, it seems unnecessary and undesirable to remove all agreements containing such clauses from the protective scope of the VABEO.

2.16 We also see potential problems with the CMA's proposed definition of hardcore parity restrictions as 'indirect sales channel parity obligations'. As proposed by the CMA, these would be defined as restrictions that ensure that the prices or other terms at which a *supplier's* goods or services are offered on a sales channel are no worse than those offered by the supplier on any indirect sales channel. Although this policy has been proposed with online platform restrictions in mind, it has potentially much wider application.

[7] See for example the 2012 Lear Report: "Can 'Fair' Prices be Unfair?"; Private motor insurance market investigation; Case 50505 Price Comparison Website: Use of most favoured nation clause (on appeal).

2.17 As recognised by the Commission in its proposed new VBER,[8] an online marketplace platform should be categorised as a *supplier* of intermediation services to facilitate sales of goods or services by a third party seller to the ultimate customer. As such, a simple online marketplace sales scenario involves two distinct (though related) vertical agreements: (1) the agreement between the online marketplace (the supplier) and a third party seller (the buyer, for these purposes) for the supply of intermediation services; and (2) the agreement between the third party seller (the supplier) for the sale of goods or services to the end customer (the buyer).

2.18 Any definition adopted by the CMA would need to take account of this context and ensure that the supplier imposing such an obligation under agreement (1) is correctly differentiated from the supplier under the separate supply agreement (agreement (2)). This outcome has been achieved in the Commission's proposed Article 5(1)(d) of the new VBER, which defines as an excluded restriction "any direct or indirect obligation causing a buyer of online intermediation services not to offer, sell or resell goods or services to end users under more favourable conditions using competing online intermediation services". This works as a definition as it is specific as to the subject of the restriction and the context in which the exclusion is triggered. It is also more proportionate, in that the inclusion of such a clause in the agreement would not lead to the entire intermediation services agreement (and potentially all sales agreements that rely on it) becoming presumptively unlawful.

2.19 We would therefore recommend that the CMA reconsiders its approach on this point and either retains an approach where all forms of MFN are covered by the VABAO safe harbour (while preserving the ability to intervene in individual cases by removing agreements from the protective scope of the VABEO) or adopts a more proportionate approach that mirrors that proposed by the Commission.

[8] At Article 1(1)(d), which states "'supplier' includes an undertaking that provides online intermediation services".

## 3. RESPONSE TO THE CMA'S POLICY QUESTIONS

### 1 General

*Question 1: Do you agree with the CMA's proposed recommendation to the Secretary of State to make a Block Exemption Order to replace the retained VABER with a new UK VABEO, rather than letting it lapse without replacement or renewing without varying the retained VABER?*

a) Yes. Given that vertical agreements are typically benign, the certainty and clarity offered by block exemption and associated guidance is beneficial and efficient for business.

*Question 2: Please explain your response providing, where possible, examples and evidence to support your answer.*

The retained VABER and Guidelines have provided businesses with a high degree of legal certainty by providing a robust safe harbour for most types of vertical agreement that are not generally viewed as problematic in the absence of market power and by clearly setting out problematic vertical restrictions. This results in significant savings in compliance costs and allows for coherent self-assessment.

Given this context, it is desirable that a broadly similar regime, in the form of a new VABEO and accompanying Guidance, be retained on the expiry of the retained VABER at the end of May 2022. In contrast, allowing the retained VABER to lapse would cause significant disruption for businesses with UK operations.

### 2 Associations of undertakings

*Question 4: What are your views on the CMA's proposed recommendation for agreements with association of undertakings to continue to benefit from the UK VABEO?*

In line with the views expressed by stakeholders during the EU VBER Evaluation, the provisions relating to associations of undertakings are relevant and have worked well. Therefore, we support the CMA's recommendation to maintain these provisions in the UK VABEO.

*Question 5: Do you think that the turnover threshold should be revised for agreements with associations of undertakings to benefit from the UK VABEO (in particular, to reflect market*

*developments, growth, inflation and/or the UK market)? If so, please provide your views on what the new turnover threshold should be.*

We do not have a strong view on this question although in the context of Brexit it seems more appropriate to have a threshold related to the UK economy. The difficulty is how to determine the relevant threshold. For ease of approach in these initial years, we would suggest moving to a threshold such as £50 million.

## 3 Dual distribution

*Question 9: What are your views on the CMA's proposed recommendation on dual distribution?*

As noted above, we support the retention of the dual distribution exception in the UK VABEO and its extension to cover wholesalers and importers. Reflecting the growing importance of online sales, suppliers are increasingly engaging in direct-to-consumer distribution in competition with their resellers. This is generally done as a response to higher customer demand for omni-channel access to products and has generally resulted in more consumer choice and a higher quality online sales experience.

Given the prevalence of dual distribution, the removal of the exception would lead to significant business disruption and additional compliance costs arising out of the need to redesign existing distribution systems and would act as a disincentive for suppliers to sell direct to consumers or to permit intermediate distributors to do so. The proposed extension of the exception to importers and wholesalers is a logical one, since there is no objective basis for differentiating between suppliers and these categories of sellers in this respect. Failure to do this would result in a situation in which the legal status of a distribution system would shift if one wholesaler were permitted to sell direct to end customers, thereby becoming a downstream competitor to retailers. This would be unfortunate.

We would also favour the CMA's proposal as a simple and straightforward adaptation of the existing exception. As noted above, we would not support alignment with the Commission's proposal to introduce a new 10% market share threshold for application of the dual distribution, alongside other conditions. This would add material additional complexity for parties wishing to rely on the dual distribution exception, resulting in significantly increase uncertainty for business.

*Question 10: Do you think that additional guidance on information exchange in the context of dual distribution would be helpful? If so, please provide your views on what that guidance should say.*

We support the CMA's recommendation to leave the matter of information exchange to self-assessment, as businesses are best placed to determine the information required to effectively implement a particular distribution arrangement and what is feasible in terms of safeguards (in particular for smaller firms). Guidance should indicate what information the CMA considers should not be exchanged and why; what information the CMA recognises may need to be exchanged and the ways in which, in the CMA's view, parties can take steps to minimise inappropriate information flows.

## 4 Resale Price Maintenance

*Question 15: Do you agree with the CMA's proposed recommendation on resale price maintenance (RPM)?*

We understand the CMA's rationale in retaining RPM as a hardcore restriction, although we note that it is open to debate whether RPM is restrictive of competition in all circumstances. As noted below, the fact that RPM is hardcore deters businesses from engaging in RPM even where there may be efficiencies, therefore we endorse the CMA's proposal to seek to offer guidance on circumstances where efficiencies may arise.

We further note that RPM considerations should not apply in the context of fulfilment contracts where the buyer provides logistical services to the supplier for the delivery of products the price of which was negotiated directly between the supplier and the end-user. This should be the case even where the buyer takes title to the products, which is often a logistical necessity.

*Question 16: Based on your experience, do you have any examples in practice of circumstances where RPM would lead to efficiencies that outweigh the restriction of competition? If so, please provide these examples.*

Two examples are provided below: "replenishment" and "loss leader".

The "replenishment" situation occurs where a consumer will have seen, experienced and been advised on the product at a high-service bricks and mortar/online specialised store but subsequently turns to (online) stores where no services are provided at all to buy a

"replenishment". Suppliers and specialised retailers make substantial investments in providing an optimal shopping experience to convince customers to buy a brand owner's product for the first time. Once the customer has felt, used and experienced the product after the first buy, the customer then turns to low service, low cost (online) retailers to make subsequent purchases of the same product. This is a clear example of the low cost, low service retailer free-riding on substantial investments made by both supplier and retailer in convincing customers to make that initial sale. RPM (or MAP-policy to avoid the most visual aspects of the low price offers) would provide an appropriate solution to support the high service retailers in continuing to invest in offering these crucial services to the benefit of consumers.

The loss leader conduct occurs where a low service, low price retailer chooses a product category champion to offer for a short period of time a very low price (sometimes below purchase price) – only aiming to attract consumers in the store and sell them many other products at full price. The effects of this type of conduct are detrimental not only for the product image and the possibility of competing retailers to make a decent margin, effects which are exacerbated due to the clear rise of e-commerce and online price monitoring tools, but also for the consumer. In the end this leads to fewer products being released on the market which in turn are sold by less shops which will offer less services to customers. Again, RPM or fixed minimum prices (or MAP-policy) would be an appropriate means to address the negative consequences of the "loss leader" conduct with expected efficiencies in terms of wider product availability and more product innovation.

*Question 17: Do you think that additional guidance on when RPM may lead to efficiencies would be helpful? If so, please provide your views on what that guidance should say.*

To the extent that the CMA will retain RPM as a hardcore restriction, it would be helpful to clarify and provide further guidance in its VABAO Guidance on instances where it may be justified by reference to specific efficiencies, including new product launches, short term promotions and instances where RPM is used to legitimately alleviate free riding concerns in case of pre-sale services. This is in line with the Commission’s approach in the revised Verticals Guidelines, which provides further examples of the type of evidence expected to substantiate the efficiencies flowing from RPM.

## 5 Territorial and customer restrictions

*Question 20: What are your views on the CMA's proposed recommendation on territorial and customer restrictions? In particular, what are your views on the CMA's proposed recommendation to:*

*a) continue to treat territorial and customer restrictions as 'hardcore' restrictions so as to remove the benefit of the block exemption (subject to exceptions);*

*b) maintain a distinction between active and passive sales;*

*c) revisit the distinction between active and passive sales for certain types of online sales in the CMA VABEO Guidance; and*

*d) change the current regime in order to give businesses more flexibility to design their distribution systems according to their needs?*

*In your response please consider whether:*

*a) there are any features of the UK internal market militating in favour or against retaining the treatment of territorial restrictions as 'hardcore' restrictions for the purposes of the UK VABEO;*

*b) the distinction between active and passive sales remains valid and whether changes to this categorisation should be made in order to:*

*i. clarify the situations where online sales amount to passive or active sales; or*

*ii. give businesses more flexibility to combine different distribution models.*

We are broadly sympathetic to the CMA's proposed approach but endorse the proposal to keep under review the question whether territorial restrictions should be hardcore. Please see above for details.

*Question 21: Do you agree that additional guidance on this issue would be helpful? If so, please provide your views on what that guidance should say including examples of situations where online sales should be regarded as passive or active sales.*

As noted above, we consider the CMA should provide further guidance on its policy with respect to restrictions on sales into the UK.

We note that the Commission has expanded its guidance on the distinction between active and passive sales in an online environment in its draft new Verticals Guidelines. We consider that this guidance is helpful and would recommend that the CMA carries across that guidance in the VABEO Guidance.

## 6 Indirect measures restricting online sales

*Question 24: What are your views on the CMA's proposed recommendation on dual pricing and on the equivalence principle?*

We agree with the CMA's proposed approach. While the equivalence principle made sense as a broad guide, it was difficult to apply in specific situations, due to the difference in sales experiences between online and offline channels. Similarly, the existing rules on dual pricing make it difficult for a supplier to implement any form of volume-based support for brick and mortar sales and promotion.

Furthermore, since the Commission has also proposed to remove the hardcore categorisation from these types of conduct, the CMA's proposed approach will ensure helpful alignment in this respect.

*Question 25: Do you agree that additional guidance on this issue would be helpful? If so, please provide your views on what that guidance should say.*

Further guidance on these two issues would be welcome, ideally with limited divergence from the Commission's proposal.

In respect of dual pricing, it would be helpful to clarify that differential pricing between different retailers is generally not problematic. Additionally, in line with the Commission's approach, further guidance on acceptable justifications for price differentiation with respect to the same reseller, depending on whether sales are made online or offline (for example related to differences in costs / investments between the two channels), would be welcome.

In respect of the equivalence principle, it would be helpful to clarify that operators of selective distribution systems can impose different qualitative or quantitative criteria for online and offline channels that are reflective of the different characteristic of such channels, provided these are not applied with the object of inhibiting online sales. Additionally, this principle should be extended to other channels. In particular, it should be clarified that suppliers can

impose differential criteria for specific authorisation of marketplace sellers as compared with authorisation of sellers wishing to sell only on their own websites.

## 7 Parity obligations (or 'most favoured nation' clauses)

*Question 29: What are your views on the CMA's proposed recommendation on parity (or 'most favoured nation') obligations? As part of this, you might like to consider whether indirect sales channel parity obligations can generate benefits/efficiencies beyond those that may be created by direct sales channel parity obligations – if so, please provide evidence or examples in practice of circumstances where this may be the case.*

We do not agree with the CMA's proposal to designate all "indirect sales channel parity obligations" as hardcore restrictions under the VABEO. The CMA's adverse findings to-date (cite above) have arisen in circumstances of likely market power, or wide prevalence across a sector. Both of these situations can be dealt with adequately without categorising all such restrictions as hardcore.

In contrast there may be circumstances where such parity obligations are beneficial – such as (for example) where the obligation benefits an indirect sales channel which is new to market and is seeking the means to establish its presence on the market. In light of these and potential other benefits of such clauses, it seems unnecessary to create a hardcore restriction. We note that the Commission's proposals for the revised VBER strike the appropriate balance by placing these clauses on the list of excluded restrictions.

As noted above, we also consider that the definition proposed by the CMA creates potential for confusion and believe that the approach in the revised VBER would be more suitable.

*Question 30: Do you agree that additional guidance on this issue would be helpful? If so, please provide your views on what that guidance should say.*

Yes. Guidance which draws on case law in the UK (and to the extent helpful elsewhere) to clarify the circumstances in which the "wide" parity clauses have been found to give rise to competition law concerns, and why, will be a useful guide in helping business understand these not necessarily obvious concepts. Also, guidance on circumstances in which MFNs in more traditional settings may, or may not, be problematic, would also be beneficial.

## 8 Non-compete obligations

*Question 34: The CMA invites views on the above proposed recommendation in respect of non-compete obligations. In particular:*

*a) Should non-compete obligations that are tacitly renewable remain 'excluded restrictions' under the UK VABEO?*

*b) Are there any risks in allowing such obligations to be automatically exempt under the UK VABEO?*

*c) Should the current regime in the derogations in Article 5(2) and Article 5(3) of the retained VABER be revised (for example, to reflect market developments such as the increasing trend towards online sales)?*

We commend the Commission's proposals on the draft VBER on this point. There, the Commission proposes that tacitly renewable non-compete provisions will be exempt and will not count as indefinite, provided that the buyer can effectively renegotiate or terminate the vertical agreement containing the obligation with a reasonable notice period and at a reasonable cost, allowing the buyer to effectively switch its supplier after the expiry of the five-year period. This is a reasonable approach which reduces costs and administrative burden for the parties.

Further, while there is a growing trend towards digitisation of sales, sales from physical premises (including those leased from the supplier) are still prevalent and therefore the derogations in Article 5(2) are still relevant. Similarly, the derogation in Article 5(3) on post term non-competes still has a role to play in the current economy.

## 9 Agency

*Question 38: The CMA invites views on the above proposed recommendation in respect of agency issues and stakeholders to make any submissions they consider would help the CMA to develop useful guidance on this topic.*

We agree with the proposal to provide guidance with respect to agency issues.

In terms of specifics, (and as noted earlier also, in response to question 15) the first observation is that RPM considerations should not apply in the context of fulfilment contracts where the buyer provides logistical services to the supplier for the delivery of products the price of which

was negotiated directly between the supplier and the end-user. This should be the case even where the buyer takes title to the products, which is often a logistical necessity. This is broadly in line with the Commission's approach in the draft Vertical Guidelines.

Secondly, we support the CMA's intention to clarify whether a marketplace should be characterised as an agent or supplier (the latter being the Commission's current proposal in the draft Vertical Guidelines).

We also agree with the CMA that clarification and guidance should be provided regarding the hybrid roles of distributors who also act as agents for the same supplier but for different products. We caution against adopting wholesale the Commission's approach to such hybrid distributors, in particular in relation to differentiated products. In these circumstances, the Commission requires the supplier to reimburse the distributor (which fulfils also an agent role) all common costs incurred for both the agency and the independent distribution of the differentiated products.

This is a disproportionate approach which does not take into account: (i) the volume or value of sales which relate to the agency channel, which could be minimal in comparison to the independent distribution channel and (ii) that the hybrid distributor could also be using the common infrastructure for the distribution of products of the supplier's competitors, where the reimbursement requirement would effectively force the supplier to fund its competitors' route to market (again, regardless of relative sales volumes). Therefore, to the extent the CMA plans to deal with hybrid distributor/agent role in its revised Guidelines, we submit that only a proportionate reimbursement should be considered for the agency channel.

Finally, we recommend that the CMA adopt the Commission's proposal to clarify that the transfer of title for a short time period does not mean that the agent is no longer a genuine agent for competition law purposes.

## 10 Environmental sustainability

*Question 39: The CMA invites views on the above proposed recommendation in respect of environmental sustainability and stakeholders to make any submissions they consider would help the CMA to develop useful guidance on this topic.*

As discussed during the legal roundtables, environmental sustainability issues arise mainly in the context of horizontal rather than vertical arrangements. While additional guidance is needed, especially in light of recent developments in the EU,[9] such guidance should be contained in horizontal, rather than vertical, guidelines. That said, we agree with the CMA's proposal to clarify the extent to which environmental sustainability criteria for admission to a selective distribution system can be regarded as necessary to protect the quality of the product in question.

## 11 Duration

*Question 43: The CMA invites views on whether the UK VABEO should have a duration of 6 years.*

As noted above, we agree with a relatively short initial duration for the VABEO. As noted above, since the UK only recently withdrew from the EU legal order, there has been insufficient time for a full review of UK policy with respect to vertical agreements. It would be prudent for the CMA to re-evaluate the fitness of the UK VABEO after a relatively short period of time. Six years is a reasonable period for assessment of the impact of the VABEO in a new market context and should also give the CMA the ability to learn from experience with the implementation of the new EU VBER and Guidelines.

[9] See the Commission's recent decision to fine car manufacturers EUR 875 million for unlawful coordination on technical developments with respect to emission standards: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3581.