

## Joint Working Party of the Bars and Law Societies of the United Kingdom ("JWP")<sup>1</sup>

### Response to the Competition and Markets Authority consultation on the retained Vertical Agreements Block Exemption Regulation

#### 1. Introduction

- 1.1 The JWP welcomes the CMA's consultation document on the retained Vertical Agreements Block Exemption Regulation. Overall, the JWP supports the CMA's approach in considering the actions it should take in respect of the retained Vertical Agreements Block Exemption Regulation in view of its expiry on 31 May 2022, which seeks to strike a balance between ensuring consistency with EU competition law and taking advantage of the flexibility afforded by the UK's withdrawal from the EU to pursue different policy objectives while at the same time providing clarity for businesses and legal advisors.
- 1.2 We have commented below on several areas where we consider that the CMA could go further than it proposes in introducing changes to provide more flexibility for businesses in designing and operating their distribution systems.
- 1.3 The JWP has not responded to every question in the consultation document and has instead focussed this response on sections where we can add most value.

#### 2. Response to consultation questions

**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 Vertical Agreements Block Exemption Regulation ("VABER") with a new UK Vertical Agreements Block Exemption Order ("VABEO"), rather than letting it lapse without replacement or renewing without varying the retained VABER?**

- 2.1 The JWP strongly supports the CMA's recommendation to replace the retained VABER with a new UK VABEO, rather than letting it lapse without replacement. Although it suffers from some limitations, the VABER has provided legal certainty for businesses and their legal advisers, avoiding the burden of individual assessment, and thus generating efficiencies. Furthermore, it has ensured general consistency of approach.
- 2.2 That said, there are a number of areas in which the VABER and, in particular, the VABER Guidelines no longer reflect latest economic thinking nor market conditions, given the rapid developments in distribution strategy and in particular, the impact of digital markets/online distribution. There is, therefore, an opportunity in replacing the retained VABER with a new UK VABEO which will bring the regime up to date and reflect the changing nature of business, and to avoid a situation where the law holds back innovation and business development. There is also an opportunity to take advantage of the flexibility afforded by the UK's departure from the EU to make changes that reflect UK policy objectives. As long as the UK regime only removes overly restrictive rules of the EU regime, there should not be a material increase in the burden for businesses, as businesses which are only active in the UK could benefit from the more permissive regime, while pan-European businesses could choose to follow the EU rules without falling foul of UK law. The JWP therefore supports in principle the CMA's recommendation to replace the retained VABER with a VABEO including some amendments.
- 2.3 More generally, the adoption of the VABEO provides an opportunity to address a number of significant internal inconsistencies which exist in relation to the assessment of vertical restrictions under EU competition law. As a general rule the European Courts have made

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clear that object restrictions (or hardcore restrictions in the context of the VABER) only encompass practices that have no plausible purposes other than the restriction of competition, in other words, practices which can have no plausible efficiency justification. RPM as well as absolute customer and territorial restrictions, practices with well-established plausible efficiency justifications, are nevertheless treated as hardcore restrictions in context of the VABER. These inconsistencies are partly explained by a failure to reflect economic insights (in the case of RPM), partly by non-competition considerations, such as the Single Market objective (in the context of absolute territorial and customer restrictions). The UK VABEO can address these deficiencies.

### **Dual distribution**

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

- 2.4 The JWP supports the CMA's proposed recommendation that the UK VABEO should include an exemption for dual distribution in the same form as in the retained VABER, but which also applies to dual distribution by wholesalers and by importers.
- 2.5 We note the increasing prevalence of dual distribution strategies, particularly but not exclusively in the consumer goods sector, where suppliers make direct sales to consumers online through a branded website, while also continuing to operate a distribution network through third party distributors. Typically, the supplier is mainly active in the upstream market, with limited ancillary activities in the downstream, retail market.
- 2.6 As such we do not consider that there is any justification for removing the exemption for dual distribution, as this would unnecessarily reduce legal certainty for businesses for whom an "omni-channel" strategy is now a key feature of distribution. Absent significant market power, we consider that dual distribution is likely to generate efficiencies which outweigh any possible restriction of (intra-brand) competition, and it should continue to be block exempted.
- 2.7 The JWP also supports the CMA's recommendation that the exemption should be extended to apply to dual distribution by wholesalers and importers who are also active in the downstream market, as these relationships have the same basic characteristics as dual distribution by a supplier and there is no reason to differentiate them.
- 2.8 We also agree with the CMA's view set out in the consultation document at paragraph 3.16(b) that the introduction of an additional (lower) market share threshold applicable to dual distribution would cause significant complexity and uncertainty, and is not necessary. We note the Commission's proposal in its draft revised VABER and Guidelines to include a 10% aggregate market share threshold for the exemption to apply to dual distribution; and where market share is between 10% and 30%, to treat information exchanges between the parties as horizontal. This means that the VABER will no longer be a clear safe harbour below a 30% market share, and we consider this to be a retrograde step. From a business perspective, this is extremely unhelpful and adds unnecessary complexity, as to be confident of falling within the 10% threshold, the market definition exercise will need to be much more precise, tested and thorough, as the margin for error will be so small. This will add a material additional burden to businesses, given the increasing prevalence of dual distribution, without justification.
- 2.9 If the dual distribution exemption is to be retained and expanded in the way recommended by the CMA (which we would support), we consider it would be very helpful to provide specific additional guidance on information exchange in the context of dual distribution (see comments below). Furthermore, the guidance should provide a description of the ways in which the CMA might consider horizontal concerns to arise above the 30% market share threshold.
- 2.10 Dual distribution may raise potential horizontal concerns if the supplier and distributors coordinate their conduct or pricing on the relevant market. However, any such coordination is much harder to actually achieve where internet driven markets are highly competitive and where competitive price information is freely available to consumers. In addition, any

limited reduction of intra-brand competition is unlikely to lead to material negative effects for consumers if inter-brand competition is strong.

- 2.11 Accordingly, we consider the risk of real competitive harm, horizontal or vertical arising from dual distribution between a supplier and its own distribution network, to be low, within the market share threshold of the retained VABER.
- 2.12 This may not always be the case in respect of online platforms with significant market power which are in a dual distribution role, because the interests of those platforms and those of suppliers using the platform may diverge significantly. The JWP notes the Commission's proposal not to block exempt dual distribution by hybrid function platforms and considers that the CMA should take the same approach but only in respect of online platforms with significant market power.
- 2.13 It would also be helpful for the CMA to provide guidance on agency issues in the dual distribution model, as many businesses are considering engaging in dual distribution (i.e. distributing some products direct to consumers while also maintaining a network of third party distributors) using agents, some of whom may already act as distributors (so called "dual role agents"). See further our comments in response to question 38.

***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.***

- 2.14 As noted above, the JWP considers that additional guidance on information exchange in the context of dual distribution would be very helpful. This is the area on which practical guidance is most often sought from advisors by businesses engaging in dual distribution.
- 2.15 Questions arise in particular as to the extent to which the supplier/ brand owner may share pricing and promotional plans for its own direct channel with its distributors and vice versa. The JWP considers that the guidance to accompany the VABEO would benefit from the inclusion of case studies and practical examples setting out the CMA's approach to these potential horizontal concerns.
- 2.16 Given that the supplier – distributor relationship does not only have a horizontal element at the distribution level but also a vertical element (which justifies the sharing of information), it would be helpful to understand how the CMA considers that the supplier must treat the distributors, compared to scenarios of a pure third party competitor relationship.
- 2.17 The JWP's view is that in the context of block exempted dual distribution, it is unreasonable for the supplier to have to treat information from the distributors as equivalent to third party competitor information, as information sharing across the whole (dual) network could improve consumer insight, respond to changes in consumer demand, and drive innovation, resulting in stronger, more effective inter-brand competition. Given that there may be legitimate reasons to share such information in the vertical context, and the downstream activities of the supplier are typically ancillary to their upstream operations, it is hard to see that any reduction of intra-brand competition caused by such information exchange would have a materially negative effect on consumers if inter-brand competition remains strong.
- 2.18 It would be helpful to see guidance setting out:
- 2.18.1 the types of information a distributor may continue to freely share with the supplier and the supplier may freely use internally, as legitimate in the context of the (vertical) distribution relationship, for example, historic, current and forecast volume and sales figures, notwithstanding the dual relationship;
  - 2.18.2 specific guidance on promotional calendars and marketing plans and the extent to which these may be coordinated between the supplier and the distributors in a dual distribution context to generate strong inter-brand competition;

- 2.18.3 if these are to remain, examples of the types of information barriers, and the degree and nature of the separation of information required for the protection of competitively sensitive information received from the distributor that should not be shared with the supplier's direct sales channel; and confirmation that any information barriers should be proportionate to the size of the relevant supplier's business and also, of course to the seriousness of the relevant competition problem.

### **Resale Price Maintenance**

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

- 2.19 On balance, the JWP respectfully disagrees with the CMA's proposed recommendation on RPM. In our view, as a matter of policy, RPM should not remain a hardcore restriction in the UK, as this categorisation deters businesses from engaging in potentially efficiency-enhancing RPM, which could ultimately benefit consumers. Instead, we consider that RPM should be moved from a "by object" restriction to a "by effects" restriction in relation to UK activities. The US system has made this shift following *Leegin* and there has been no evidence that this has led to increased risk of competitive harm as a result. We do, however, recognise that this would be a significant shift in the CMA's approach.
- 2.20 If the CMA decides to continue treating RPM as a hardcore restriction, the JWP considers that there is definitely scope for clarification of the circumstances under which pro-competitive RPM can benefit from the exemption of section 9(1) of the Competition Act 1998. Given that RPM can ultimately benefit consumers, it would be very helpful for businesses in the UK to be able to rely on clear guidance on what can be acceptable. Please also refer to our responses to Questions 16 and 17. However, even with expanded guidance on pro-competitive RPM, if RPM remains a hardcore restriction, this will be sufficient to deter some businesses from engaging in RPM as a strategy, because the risks are too great.

#### ***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.***

- 2.21 RPM could create efficiencies where it allows the development of a new product/market while protecting it from free riding, and generating consumer trust; or in the context of promotions where, for example, the supplier has to plan/commit volumes and so requires certainty, or the supplier plans to invest in significant advertising/marketing campaigns. It may also be the case that for some products, customers do require and prefer certainty on pricing (e.g. price guarantees) and RPM might be able to provide this certainty.
- 2.22 However, in our experience, most suppliers will currently avoid even pro-competitive RPM, because the guidance is unclear and the consequences of getting it wrong are so serious. As a result, there are not enough examples in practice of businesses engaging in pro-competitive RPM and UK consumers are missing significant opportunities to benefit from potential efficiencies this could generate.

#### ***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.***

- 2.23 The JWP considers that if RPM is to be used in a way which can generate efficiencies, additional CMA guidance on this is essential, because of the severe legal consequences for a business of making a wrong judgement call regarding RPM. In order for UK consumers to benefit from pro-competitive RPM, the CMA should provide clear guidance on the conditions under which RPM can benefit from the exemption of section 9(1) of the Competition Act 1998.
- 2.24 Currently, businesses are reluctant to use RPM and will require a much greater degree of certainty around the circumstances under which it would be permitted. Under the current regime, RPM might be considered acceptable for an "introductory period of expanding demand" or in a "short term" price campaign of "2 to 6 weeks in most cases". However,

the situations where these conditions might be met are very limited – and there is no guidance for longer periods of RPM.

2.25 We also note the Commission’s proposal in its draft VABER Guidelines to recognise the following examples of efficiencies:

2.25.1 when a manufacturer introduces a new product, particularly if it is a completely new product, and it is not possible to impose effective promotion requirements on all buyers by way of contract;

2.25.2 to organise a coordinated short term low price campaign (described as being of 2 to 6 weeks in most cases);

2.25.3 to allow retailers to provide (additional) pre-sales services, in particular in the case of experience or complex products, and avoid free-riding.

2.26 Whilst these are helpful examples of pro-competitive RPM, we consider they do not go far enough. In particular, no explanation for the limitation of a low price campaign to 2-6 weeks is given, or what would be required to justify a longer period, for example, seasonality of the product, or usual purchasing cycles etc.

### **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.***

### **General issues with territorial/customer restrictions models**

2.27 We consider that it is essential to approach the existing rules on territorial/customer restrictions with the background of the EU Single Market imperative as the key driver in terms of policy developments over recent decades. As the EU model evolved, it looked past the genuine boundaries of competition law, to continue to impose strict prohibitions on almost all territorial/customer restrictions, in order to uphold and protect the key EU principle of Free Movement.

- 2.28 The UK is now in a post-Brexit era and no longer affected by the pan-EU policy rules on Free Movement. Consequently, we consider that the CMA's proposals regarding territorial/customer restrictions represent a missed opportunity to create a more flexible legal landscape for distribution in the UK consistent with genuine competition law principles. It is inevitable that some respondents will point to any divergence with the EU VABER and Guidelines as detrimental and/or inefficient for businesses which must comply with both regimes. However, as noted at the outset of this document we propose that any such effects would be minimised, and even welcomed, where the UK regime differed in terms of applying *only* a more relaxed version of the rules we have inherited from our EU membership, particularly where the basis of those rules no longer has relevance for the UK as a non-EU member. Clearly, any uncertainty as regards the Northern Ireland Protocol (NIP) would have to be carefully managed, but this should not in itself act as a barrier for the UK as a whole to benefit from a more tailored vertical restrictions regime.
- 2.29 We have a fundamental legal reason as well as practical reasons for calling for more flexibility. The fundamental legal reason is the one mentioned at the start: object treatment for territorial and customer restrictions is inconsistent with the *Cartes Bancaires* and *Budapest Bank* case law, as arrangements with these restrictions are capable of giving rise to efficiencies. The practical reason is that the current hardcore approach is overly rigid and subject to only the narrowest of exceptions. In practice, such exceptions have also been restrictive, technically difficult for businesses to understand and commercially apply, and prone to being largely abandoned due to their burdensome complexities and unworkable nature.
- 2.30 While the CMA's proposals attempt to provide businesses with greater flexibility by widening and clarifying these exceptions - and may offer some limited relaxation of the rules - these changes are also generally reflected in DG Competition's concurrent consultation on the EU rules. We therefore query whether the CMA's proposals really do go far enough from a post-Brexit policy perspective to take advantage of the opportunities now available. We have firmly in mind that when the UK first introduced prohibitive competition law rules through the CA 98, the *Land and Vertical Agreements Exclusion Order 2000* exempted all forms of vertical restrictions with the sole exception of RPM until it was repealed due in 2004 (with the EU VBER applying from 2005). That change was required to bring UK law into line with EU law once Article 101 (as now is) became justiciable in UK courts in its entirety following "modernisation" of EU law on 1 May 2004. We consider that the present review, now that we have left the EU, offers the ideal opportunity for the CMA to return to an updated form of the UK's initial vertical model, without any added Single Market considerations and complexities.
- 2.31 We provide the following comments to pinpoint a few examples which we regard to be the main weaknesses and impracticalities of the current regime for businesses, also taking the CMA's current proposals into account:
- 2.31.1 The VABER and CMA proposals only allow a supplier to control its 'exclusive' distribution chain immediately downstream; they do not allow it to control any 'lower' level (unless the 'other' distributor is also a party to the contract). This enables other distributors to easily hijack the supplier's distribution strategy, and represents a significant weakness in the exclusive distribution model without any clear legal basis, particularly for parties with low market shares. It is noted that this has been recognised in the current EU VABER review by DG Comp, with provision made for a new 'pass on' to restrict other distributors and their customers from other exclusive territories;
- 2.31.2 From a policy perspective, territorial/customer distribution restrictions can only affect *intra-brand* competition and therefore should not be problematic in the absence of significant market power. However, in practice, while a supplier is currently entitled to set up an in-house distribution system and grant itself absolute territorial protection to its sales departments, as soon as it appoints an external distributor this can be 'deemed' to fall into the VABER hardcore restrictions unless setting up an exclusive distribution system (with all of the technicalities and restrictions which that involves). In reality however, when low market shares are involved, we do not consider that imposing restrictions on an

external distributor harms intra-brand competition any more than imposing such restrictions within an in-house sales department;

- 2.31.3 There are legitimate commercial reasons and efficiency considerations why suppliers distinguish between channels and apply different prices. However, under the current regime and CMA proposals, a supplier has limited to no options available to it to legitimately prevent a distributor undermining its sales channel set up by selling goods purchased within one of its channels (i.e. low prices for high volumes) straight into another of its own channels (i.e. higher prices, which the supplier categorises differently due to justifiably different market/commercial conditions). It is and remains overly interventionist to simply prohibit channel management in all circumstances, where there appear to be clearly reasonable and justified commercial interests to incentivise distributors and retailers to sell within their own channel;
- 2.31.4 The CMA proposal regarding 'shared exclusivity' must be examined by understanding what it practically seeks to achieve and could potentially deliver in terms of added flexibility. The proposal retains the existing regime, and hardcore prohibitions, and it is currently presented as 'allowing the allocation of a territory to *more than one* 'exclusive' distributor'. Accordingly, this does not appear to allow a supplier *an unlimited number of distributors* within a given exclusive territory which would be the ideal solution to many suppliers for the 'exclusive distribution' model problem. Any positive effects may well be limited in practice as the exclusive distribution model 'exception' will likely still remain simply too inflexible and impractical to apply to current commercial distribution methodologies. Put simply, a supplier may (i) simply not want to confine certain channels or territories to a limited number of distributors; while (ii) legitimately wanting to incentivise its distributors in other channels or territories to sell more of its products. That may be an efficient business goal, particularly for customer channels. It is noted that this has been recognised in part in the current EU VABER review by DG Comp, with the number of 'exclusive' distributors to be 'proportionate' to the size or volume of the territory or group; and
- 2.31.5 Finally, where there are perceived issues or anti-competitive effects with any of the above, it would be more practical to approach them from an 'excluded' restriction route than a ban.
- 2.32 In summary, outside of the EU Single Market, the UK now has the option of introducing and applying a much more flexible and practical verticals regime. Indeed, where a block exemption regime permits territorial/customer restrictions, and this is limited by strict market share thresholds to parties that do not hold significant market power, any potentially anti-competitive effects would be insignificant. Of course, absent such thresholds a strong brand could take advantage of that flexibility to the detriment of intra-brand competition – but that is what we have the market share thresholds for. It would be hugely regrettable if the CMA does not seek to explore the potential changes it is now at liberty to consider, as regards these hard-core restrictions.

#### Active vs passive sales

- 2.33 An additional layer of complexity to the rules as we have already identified above, is the added restrictiveness caused by the distinction between active and passive sales. This problem is often further compounded since it is just simply not clear-cut whether the initial contact was made by the customer or the distributor.
- 2.34 The CMA suggests that if the distinction between active and passive sales were to be removed, the alternatives would be to either *block exempt all* territorial and customer restrictions or *to not block exempt any* territorial and customer restrictions. However, those are not the only options.
- 2.35 We think the CMA should consider other alternatives, e.g. making territorial and customer restrictions excluded restrictions requiring an effects-based assessment.

### Conclusion

- 2.36 In conclusion, what we are suggesting as a solution to all of the above problems is that the UK VABEO does not replicate the customer and territorial hardcore restrictions in the VABER but rather re-creates the VABER's hardcore restrictions as excluded restrictions. That would preserve the safe harbour for the existing exceptions while leaving what are currently hardcore object restrictions (an approach we consider is both wrong in law and unduly inflexible and which we consider the UK is no longer bound to follow) to be examined for their effects on competition.
- 2.37 In applying that effects analysis, due account should be taken of the NI Protocol (**NIP**), where territorial (or indeed customer) restrictions have a genuine effect on trade between GB and NI.

**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.**

- 2.38 It is regrettable that the CMA has not taken the opportunity to address the very current post-Brexit legal issue of whether it is legal for UK suppliers to now impose a ban on exports outside of the UK. This has been one of the most common legal questions arising within day-to-day competition distribution advice since Brexit took effect. We understand that the CMA indicated that it would provide guidance on this issue but has not yet done so. It is clear that the current lack of guidance - or even an informal position - from the CMA is leaving UK businesses in a position of significant uncertainty.
- 2.39 More broadly we are conscious that the UK IPO is currently undertaking a consultation regarding the exhaustion of IP rights as regards parallel trade: [Exhaustion of IP rights and parallel trade - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/exhaustion-of-ip-rights-and-parallel-trade). It will be important to take account of emerging thinking in that area to ensure the new vertical regime is coherent with it, particularly as regards the NIP.
- 2.40 Finally, it would be useful for the CMA to clarify in any guidelines that outside of the engagement of the NIP the effects assessment we are suggesting for customer and territorial restrictions which qualify as excluded restrictions will be carried out on the basis of competition law principles.

### **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?**

- 2.41 We agree that, in light of the significant growth and popularity of online sales over the past decade, online sales channels no longer require the same level of protection as they were afforded in the 2010 VABER review, and so it is reasonable and commercially justified to remove dual pricing and the equivalence principle from the list of hardcore restrictions. It is widely recognised that online selling is now simply another distribution channel available to suppliers/distributors, and businesses should have more flexibility to decide how their products/services are distributed. The demise of the bricks-and-mortar store and British high streets has only been accelerated by the continuing pandemic and it is important that suppliers should generally be free to set different prices, and offer compensation and discounts to reward and support in-store efforts.
- 2.42 We agree that dual pricing is a potentially efficient tool to address free-riding and that it should help to create a level playing field between online and offline sales by taking into consideration differences in the costs of investments. We support the current EU VABER DG Comp proposal to permit suppliers to set different wholesale prices for online and offline sales by the same distributor, provided that this is intended to incentivise or reward an appropriate level of investment and relates to the costs incurred for each sales channel.



**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.**

- 2.43 On balance, we consider that additional guidance would be helpful. However, any such guidance should seek to provide illustrative examples and not be too restrictive. Guidance and consultation on dual pricing would be helpful on where, at the margins, concerns may be raised and justifications that may still be brought forward in those circumstances.

**Question 26: What are your views on the current regime, which treats certain online sales as a form of passive sales? What are some examples of the benefits or costs for your business operations, or the operations of those you represent? Please include examples and where possible, quantitative and/or qualitative evidence in your answer.**

- 2.44 The current regime, which treats bans on a reseller's use of online sales as a passive sales restriction, would benefit from some updating in light of the significant market developments caused by increased online sales. We note that the current EU VABER DG Comp proposals give additional examples of obligations that, directly or indirectly, have the object of preventing distributors from effectively using the internet to sell their goods or services online anywhere, in certain territories or to certain customer groups. Such examples include restrictions on the reseller's use of online advertising, including de facto restrictions such as preventing the reseller using the supplier's brand names and trademarks for the purposes of online search advertising.
- 2.45 We note that the CMA's proposals do not make any reference to the DG Competition *Guess* infringement decision (AT.40182), and associated 'by object' vertical restrictions identified in that case - restricting the distributors' purchase and use of AdWords for online sales, and reserving this to the supplier alone. The decision found a restriction of competition on both the online supply market for the goods in question between the supplier and distributors, and secondly on the market for the purchase of the AdWords themselves by the supplier and distributors.
- 2.46 This is recognised in the current EU VABER review by DG Comp in its guidelines at paragraph 188 which provides that '*Restrictions that prevent the effective use of one or more online advertising channels by the buyers or their customers have as their object to prevent the buyers or their customers from effectively using the internet to sell their goods or services online and thus restrict sales to customers wishing to purchase online and located outside the physical trading area of the buyers or their customers, as they limit the buyers' or their customers' ability to target them, inform them of their offering and to attract them to their online shop or other channels.*
- 2.47 We would recommend that the CMA addresses similar such type of restrictions within its proposed forthcoming verticals guidelines, and clarifies its position on this restriction under UK competition law.

**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<sup>2</sup> can generate benefits/efficiencies beyond those that may be created by direct sales channel parity obligations<sup>3</sup> – if so, please provide evidence or examples in practice of circumstances where this may be the case.**

- 2.48 The JWP supports the CMA's proposed recommendation that indirect sales channel parity obligations (i.e., that a product or service may not be offered on better terms on any other

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<sup>2</sup> As defined in paragraph 4.63 [of the consultation document].

<sup>3</sup> As defined in paragraph 4.63 [of the consultation document].

channels, whether a supplier's own or any intermediaries, (a 'wide MFN')) be treated as a hardcore restriction under the UK VABEO.<sup>4</sup>

- 2.49 We acknowledge that there may be some limited circumstances where an indirect sales channel parity obligation may generate efficiencies, for example where a new platform seeks to enter the market and wishes to use an indirect sales channel parity obligation to gain a foothold in the market, recoup its investment and avoid free-riding. However, these are likely to be limited circumstances and could be covered in guidance.
- 2.50 "Wide" MFNs are often forced upon suppliers by platforms in a strong market position (even within the VABER safe harbour), with suppliers having no option but to accept this type of clause in order to secure an acceptable commercial relationship with the platform. The effect of these obligations may be to disincentivise investment by the supplier in its own direct channel, and to hinder the entry and/or development of alternative platforms. These kinds of competition concerns have also been identified in national case law, including most recently in the CMA's *ComparetheMarket* decision.
- 2.51 Accordingly, the JWP supports the recommendation that indirect sales channel parity obligations should not benefit from the VABEO; but that direct sales channel parity obligations should be block exempted. This would provide legal certainty for businesses, as they would be able to make decisions on their sales channels more easily. Direct sales channel parity obligations can have a number of pro-competitive effects, including limiting free-riding by providers and protecting investment, which are proportionate to their restrictive effects. The existence of the market share threshold of 30% minimises the risk of anti-competitive effects of these obligations.
- 2.52 The JWP particularly supports the CMA's recommendation to adopt clear definitions to differentiate between direct sales channel parity clauses (so-called "narrow" parity clauses) and indirect sales channel parity clauses (so-called "wide" parity clauses). As the terms "narrow" and "wide" parity clauses are referred to in the CMA's decisions, we consider that it would be helpful to include this terminology in the CMA VABEO Guidance. It would also be helpful to cross refer to the definitions used by the Commission in its draft revised VABER guidance.
- 2.53 We note the Commission's proposal in its draft revised VABER to include these types of wide MFN restrictions as excluded restrictions rather than hardcore, but we consider that a stricter approach is merited by the CMA as consistent with UK case law and the likely effects of such clauses on the smaller UK market.

**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.**

- 2.54 As indirect sales channel parity obligations would need to be assessed on an individual basis, the CMA VABEO Guidance should explain and provide examples of what is likely to be accepted and what is not, to provide legal certainty for businesses. In general, the JWP considers that the broader the parity clause the more likely it is to cause competition concerns.
- 2.55 We note the Commission's explicit confirmation in paragraph 239 of its revised Guidelines that all other types of (narrow) parity clause (i.e. direct or narrow parity clauses, parity obligations relating to the conditions under which goods or services are offered to customers who are not end users, and parity obligations relating to the conditions under which manufacturers, wholesalers or retailers purchase goods or services as inputs) are covered by the block exemption. It would be helpful for the CMA to include a similar explicit statement in the guidelines to the VABEO.

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<sup>4</sup> There was some dissenting opinion within the JWP: some thought that indirect sales channel parity obligations should be treated as excluded restrictions, rather than hardcore.

## **Non-compete obligations**

**Question 34: The CMA invites views on the proposed recommendation<sup>5</sup> 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)?**

2.56 We consider that the current approach of exempting non-compete obligations with a duration of 5 years or less, and excluding non-competes with a duration exceeding years (or those that are tacitly renewable), is generally understood and accepted by businesses as a bright line time limit which is helpful in managing expectations. We would not propose any amendment on this point and think that retaining the status quo is the preferred option, being a reasonable term which continues to work well in practice. In particular, we see no good reason to increase the 5 year exemption limit. In saying all of this, we are guided by the key point that exclusion of a restriction simply means it is not automatically exempt under the safe harbour and needs to be self-assessed – and that it does not affect the application of the safe harbour to the rest of the agreement.

**Question 36: Relative to the current regime as set out in the retained VABER, what would be the likely impact on your business's operations, or the operations of those you represent, if non-compete obligations that exceed 5 years in duration were no longer treated as 'excluded' restrictions? Please include examples and where possible, quantitative and/or qualitative evidence in your answer.**

2.57 Please see above.

**Question 37: What are some of the benefits or efficiencies of non-compete obligations remaining exempt if the duration is less than 5 years? Please include examples and where possible, quantitative or qualitative evidence (or both) in your answer.**

2.58 N/A

## **Agency**

**Question 38: The CMA invites views on the proposed recommendation<sup>6</sup> in respect of agency issues and stakeholders to make any submissions they consider would help the CMA to develop useful guidance on this topic.**

2.59 Our view is that some additional guidance on agency is necessary. The concept of 'genuine agency', which is based on the risk allocation between the parties is in theory useful, but in practice difficult to apply in 'grey area' scenarios.

2.60 Such situations may arise e.g. in the case of online platforms or fulfilment contracts. In addition, there are quite often intermediaries that may undertake certain risks, e.g. in relation to premises or staff, but no risk as regards the contract goods. For example, in the context of fulfilment contracts the qualification as an agency arrangement should not be put in doubt 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.

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<sup>5</sup> Paragraphs 5.10-5.16.

<sup>6</sup> Set out at paragraph 6.7.

This should be the case even where the buyer takes title to the products, which is often a logistical necessity.

- 2.61 More generally, an inflexible treatment of all such cases as non-genuine agency does not reflect business realities and is not in accordance with the purpose of the rules on agency. As such, the agency definition needs to be further clarified, so that businesses are in a position to assess what level of risk and investment their agents can undertake, without being considered non-genuine agents.
- 2.62 Furthermore, 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).
- 2.63 Finally, further guidance and clarification is needed where distributors also act as agents for the same supplier but for different products (so-called hybrid role). The JWP is of the view the Commission's approach to such hybrid distributors, in particular, the requirement that all common costs incurred for both the agency and the independent distribution of the differentiated products to be allocated to the agency function, to be flawed. In many instances (e.g. where the agency role is limited in terms of volume or value of sales) such cost allocation makes the hybrid role unworkable in practice and would prevent the efficient development of such a hybrid model. The JWP proposes instead a pro-rata allocation of common costs to the two functions.

### **Duration**

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

- 2.64 The JWP supports the CMA's recommendation that the UK VABEO should have a duration limited to 6 years. As noted above, the expiry of the VBER represents a clear opportunity for the CMA to overhaul its approach to vertical agreements and bring it up to date to meet UK market conditions and general developments in the supply and distribution of goods. We acknowledge that there may be some reasonable grounds for exercising caution at this stage, but we consider that a shorter duration for a UK VABEO is sensible, so as not to lose this opportunity for real reform and liberalisation for too long a period.

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On behalf of the JWP<sup>7</sup>

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