

**Contribution to the public consultation on the  
Retained Vertical Agreements Block Exemption Regulation**

- (1) Trainline is an independent on-line rail and coach ticket vendor, selling rail and coach tickets to millions of travellers worldwide. Via our website and mobile app, people can seamlessly search, book and manage their journeys all in one place. We bring together routes, fares and journey times from over 270 rail and coach carriers across 45 countries. We offer our customers the best price for their journey and smart, real time travel information on the go. Our aim is to make rail and coach travel easier and more accessible, encouraging people to make more environmentally sustainable travel choices.
- (2) Trainline has sales licenses in place with the principal rail and coach operators in the United Kingdom – the Rail Delivery Group (RDG) and National Express – as well as most rail transport suppliers and a number of coach operators in mainland Europe.
- (3) Trainline welcomes the opportunity to contribute to the consultation on the retained Vertical Agreements Block Exemption Regulation (retained VABER) and would like to provide the following comments.
- (4) It would like to emphasise upfront that as an online ticket vendor, independent from the transport suppliers with whom it has licensing agreements, Trainline very much depends on fair competition and customer satisfaction as its life-line.
- (5) As a general comment, whilst we recognise that the CMA may wish to depart from certain aspects of EU interpretation and practice when formulating new guidelines for vertical agreements, we consider that it would be beneficial if such differences could be limited to the extent possible. That is because, for many businesses such as Trainline, that operate both in the UK and EU, different rules will lead to additional costs which are likely to be borne by consumers.

**1. Non-genuine 'agent'**

- (6) We have experienced attempts by railway carriers (hereafter 'suppliers') to misuse the term 'agent' in relation to their agreements with online independent ticket vendors - online retailers - to try to escape the application of the rules embodied in the Chapter I prohibition and Article 101 TFEU and prevent such retailers from challenging hard core restrictions included in contracts.
- (7) As the CMA is aware, the term 'travel agent' or 'agent' which can generically be used in relation to online travel agencies (OTAs) or online retailers, is not linked to the concept of 'agent' in competition law. Suppliers sometimes seek to argue that Trainline is an 'agent' (in order to try to impose restrictions on our selling prices) but we are not an 'agent' in the true sense of the word for CA98 purposes.
- (8) Such generic reference must not be confused with the legal qualification of "agent" i.e. genuine

agent within the meaning of competition law, including the Vertical Guidelines which clarify the VABER, as currently applied in the UK under the retained VABER.

- (9) Indeed, the determining factor in defining an agency agreement for the application of Chapter I is the financial or commercial risk borne by the agent in relation to the activities for which it has been appointed as an agent by the principal. It is not material for this assessment the qualification given to their agreement by the parties or national legislation.
- (10) Online independent retailers such as Trainline sell a number of tickets from different suppliers and bear a number of significant and independent financial and economic risks related to the economic activity.
- (11) Such risks cover but are not limited to:
- Financial risks related to the actual ticket transaction on the platform such as costs of the platform processing payments, costs of chargebacks, fraud costs & risks
  - Economic risk and cost of developing and upgrading pro-customer and interoperability functions, as well as operating own customer service centre
  - Financial investment and risk of undertaking activities for other suppliers so as to enhance the number of agreements it has with its suppliers, to make the platform more attractive to consumers and build upon network effects,
  - Financial risks and costs of online marketing and advertising costs to attract travellers
- (12) Thus, it is clear that they cannot be qualified as a genuine agent of one supplier.
- (13) For the reasons mentioned above, Trainline would welcome an express clarification as part of the upcoming publication of CMA VABEO Guidance that independent online retailers that bear the economic risk related to their activity do not qualify as genuine agents, and thus any restriction relating to the commercial conditions imposed by the supplier in the licensing agreement falls within the Chapter I prohibition. This is all the more necessary as the VABEO will be new legislation, which may differ in some respects from the EU's proposed new VABER. As such, clarity on this important point will be needed to avoid potential issues arising in due course in connection with UK distribution and other vertical agreements.
- (14) Risk allocation should remain the most important determinant in assessing whether an arrangement should be classified as agency. However, any new guidance should also clarify that an arrangement is not an agency for competition law purposes where the "agent" is acting for multiple principals. This would reconcile the guidance with existing case law and policy aims (cf. Whish/Bailey, Competition Law, 9<sup>th</sup> edn, p635; ECJ in *Vlaamse Reisbureaus v Sociale Dienst*, C-311/85, at 20). This is, in fact, one area where divergence from existing EU law/practice would be welcome as it will provide more clarity and certainty to businesses operating in the UK.
- (15) Trainline understands that the CMA proposes that additional guidance be published on the application of agency principles to arrangements with online platforms. While certain sectors (e.g. hospitality) may be shaped by strong online platforms, others such as independent rail ticket retailers cannot be regarded as such as they normally have very little bargaining power over the rail carriers that supply them with content. Distinctions between different sectors should be made and reflected in the guidance.

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## 2. Active and passive restraints in relation to online travel ticket distribution

- (16) In the past, travel suppliers have sought to impose various active and passive sales restrictions in agreements with Trainline (and presumably their other online authorised retailers). These include restrictions to sale at best existing fares or access to all promotional/discounted products.
- (17) Such vertical restraints are imposed on the online authorised retailers but not on the supplier's own online distribution arm (with whom the former compete on the retail market). Such practices are clearly discriminatory - their object is to protect the supplier's in-house retail channel (often due to historical reasons, the main channel) from competition. There is in fact no objective nor qualitative justification to explain this discrimination, since the online independent retailer is expressly authorised to sell the suppliers' products in the first place.
- (18) With this in mind, Trainline submits that, once the supplier has authorised and granted a license to the independent online retailer to sell its tickets, it should grant the latter FRAND commercial conditions, including remuneration, and not maintain any discriminatory restrictions.
- (19) No exemption should be granted when there is a clear discrimination between two distribution channels.
- (20) Discriminatory restraints have considerable negative effects on competition: they hinder the activity of the online retailer, they reduce consumer welfare and also reduce competition at supplier level.

### **3. Dual pricing**

- (21) Trainline notes the CMA's proposed recommendation that dual pricing should no longer be a hardcore restriction, but considers it important to continue to treat dual pricing as a hardcore restriction. Practices of suppliers granting more favourable commercial terms to offline distributors/sales than online ones (and vice versa), should fall under hardcore restrictions as such practices constitute an indirect restriction on online or offline sales.
- (22) While the CMA's proposed recommendation refers to market developments that supposedly render the status quo inappropriate, it must be emphasised that not all sectors are the same. As an independent online ticket vendor, Trainline finds itself in a very different position to retailers of, for example, fast-moving consumer goods. Therefore, to the extent the CMA does propose to remove dual pricing from the list of hardcore restrictions, the VABEO Guidance should make it clear that attempts by suppliers to restrict sales via online channels (as has been the case in the past), or render online sales less commercially favourable for the retailer, remain unacceptable and likely to infringe the Chapter I prohibition.
- (23) In other words, the legislation and guidance needs to take into account the specificities of particular industries and supply chains. For example, unlike most online retailers, we do not 'purchase' train tickets from train operators. Rather, the train fares are set by the operators and Trainline receives a small commission (**REDACTED**) which must cover our investments and costs so we are not able to offer any discounts. We also run marketing and provide customer service at our own cost so free-riding is not a relevant factor in our sector. As such, attempts by train operators to make the terms for online distribution less attractive will have a detrimental impact on UK consumers. This is particularly relevant given the Government's green agenda and public policy to encourage more rail travel. Any restrictions on the ability of online retailers to operate will therefore have material knock-on effects.
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- (24) In connection with restrictions of online sales, one issue that Trainline has experienced which is not covered in the consultation is when suppliers seek to restrict the use of certain adwords (not just trademarks) when bidding for online advertising. Such type of restriction is clearly a by object restriction of competition as explained by the European Commission in the *Guess* case, which remains law in the UK following Brexit and will continue to apply.
- (25) The hardcore nature of such restriction should be included in the CMA VABEO Guidance and for legal clarity, it should be specified that such qualification applies to all types of distribution agreements (irrespective of whether they are selective, not selective, exclusive, not exclusive).
- (26) In addition, Trainline would suggest including amongst the hardcore restrictions of any distribution agreement the imposition of commercial conditions to authorised online independent retailers which are not equivalent to those imposed by the supplier on its own online sales channel, and which are not objectively justified. Given the increase in the number of suppliers who sell direct as well as via third parties (such that their customers are also their competitors) this 'level playing field' is necessary to ensure that distributors are not unfairly treated or disadvantaged.
- (27) Any restriction on selling online always acts against the final consumer and against competition.

#### **4. Resale price maintenance**

- (28) Certain suppliers (i.e. rail carriers so far as Trainline is concerned) have precluded online ticket retailers such as Trainline from offering its own rebates. Such practices amount to resale price maintenance without any justification.
- (29) The prohibition of rebates or vendor's vouchers has an unjustified impact on access of customers to such reductions and thus on the resale price of the supplier's tickets.
- (30) At the same time, the supplier's integrated distribution arm, is reinforced by being the only distributor offering such discounts, best fares, vouchers by several means.
- (31) An inability to market, eg by way of (limited) price promotions, would make it exceptionally difficult for new innovators to attract sufficient attention and reach new customers willing to switch, even if they had an innovative high-quality product in the first place. There are absolutely no efficiencies to be had and RPM should remain banned, not benefitting from any safe harbour. We therefore welcome the CMA's proposal that RPM will remain a hardcore restriction. It is however important that the new UK block exemption makes it clear that this hardcore restriction will cover any form of (disguised) RPM, however applied.
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