

Comments on the CMA's Consultation on the retained Vertical Agreements Block Exemption Regulation

CMA145con of 17 June 2021

We welcome the pragmatic and commercially minded conclusions that the CMA has provisionally drawn in its review of the retained Vertical Agreements Block Exemption Regulation ("VABER"). We are a manufacturer and distributor of quality skin-care products. Our business model is based on the promotion of our luxury products through skincare professionals and the spa and beauty salon experience. We and our customers are interdependent: we need them to attract and retain customers, and drive sales, and they need us (and our competitors) to provide superior products they can use to create demand from those seeking, and willing to pay a premium for, skincare and other beauty treatments. We both rely on customer loyalty for repeat business.

However, for many years now we have been unable to encourage and protect the huge investment our salon customers make in providing first-class premises in suitable locations, and in training, employing and retaining skilled staff. For long-term sustainability, we need to be able to provide to salon customers the chance to earn a suitable return on their sales of our products. The problem they face is that of free-riding by on-line retailers, with low overheads, selling our skin-care products at a deep discount. We have consistently shared the frustration of our salon customers but been unable to assist because of the EU law principle that we cannot charge different prices for products destined to be sold on the internet.

We believe this bias in favour of supporting online retailers should cease. While the ban on dual pricing as a matter of economic policy may have had some merit in the early days of the internet, it long ago became a barrier to creative marketing and new entry by salons. We cannot offer them the return and protection they need.

The beauty salon and hairdressing sectors have been brought to their knees by the Government's introduction of lockdowns and operating restrictions associated with its response to Covid-19. Indeed, this has resulted in an existential threat to the beauty salon trade. For months salons could not open and, once they could, they were forced to pay for mandated equipment and covid-safe operating methods, all while having to reduce the customer capacity of the salon itself.

As a result, at least 10% of beauty salons that were operating before the pandemic have closed and many more are teetering on the brink. We need urgently to be able to assist those that remain. Although we devised several proposals, our legal advice each time has been that we cannot proceed without risking contravening competition law. We wanted to sell our products more cheaply to salons so that they could themselves run promotions to

encourage hesitant customers back to the salons and/or they could make a greater margin to help them get back on their feet. However, the dual pricing ban has meant that we could not proceed without offering the same discount for online sales and this risked undermining the whole point of the price reduction.

Even without the pandemic, we have always faced this same frustration. Our business model relies on drawing in loyal customers via the beauty salon experience but on-line retailers then draw the repeat business away from the salons through heavy discounting. While this may benefit some customers in the short-term, we believe it poses an existential threat to the beauty salon industry in the longer term. This, in turn, threatens a knock-on effect on the viability of the High Street.

Just to be clear, we allow all salons to sell via their own websites and, therefore, the loss of intra-brand competition is not an issue. Internet selling is an extra revenue stream for salons but, again, a salon's efforts and expenditure on developing its customer-base is undermined when cheap discounters drive down prices to levels at which the salon's business plan would be undermined and at which they cannot compete.

In light of the above, we urge the CMA to adopt its proposal no longer to treat dual pricing as a hardcore restriction of competition for the purposes of the CMA's new Vertical Agreements Block Exemption Order ("VABEO"). We believe that, taken in the round, dual pricing does not distort competition. Manufacturers, distributors and retailers should be given the greater freedom they need to develop their businesses along the lines they believe best suits their ability to develop their presence in the specific market in which they operate.

We answer the CMA's specific questions as follows:

Policy questions

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

See above.

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.

We believe that the decision about how best to price products with a view to ensuring customers are still drawn to physical stores, and the latter can better compete, should rest with the market participants and should not be determined based on an arbitrary market share threshold. Dual pricing should be available to all distributors, irrespective of market share, subject to an assessment of the effects of the conduct.

Further, if the CMA considers it possible that the benefit of the VABER might be withdrawn for agreements containing dual pricing, then it should provide guidance on the circumstances in which it envisages it may do this.

It is important that any guidance produced is easily understood by businesses such that it does not always need the latter to incur legal fees to understand what can and cannot be done (as has been the case with the European Commission's Guidance on the EU's Vertical Agreements Block Exemption Regulation).

In this context, we believe it should be possible to favour some online retailers over others. There are some that work hard to promote the brand and it should be possible to offer them better wholesale pricing than to the free-riders.

Impact questions

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.

We do not believe internet selling should be treated as passive selling. It is active selling in the same way as selling from stores. We believe this artificial distinction was developed as a strategy to promote selling on the internet in the early days of the same and because it suited the internal market policy objectives of the European Commission. Today, internet selling is well established and an essential route to market for all businesses. Online retailers no longer need this artificial protection provided under the guise of competition policy. Indeed, its continued use distorts markets. Market forces are sufficient to ensure there is sufficient choice available online.

Question 27: Does the treatment of online sales bans as a hardcore restriction have an overall positive or negative impact on your business? Where possible, please provide examples of the impact on online channels and offline channels in your answer. Please include qualitative and/or quantitative evidence where possible.

a) Significant positive impact

b) Moderate positive impact

c) Negligible impact

d) Moderate negative impact

e) Significant negative impact

We do not think that on-line sales bans will be helpful in a world that is clearly going more and more digital. There needs to be a coexistence between on-line and bricks and mortar in a way that does not favour one or the other. At the moment, the rules distort the playing field significantly in favour of the online free riders.

Question 28: Do you consider that the CMA's proposed recommendation (to remove dual pricing and the requirement for overall equivalence in selective distribution from the list of hardcore restrictions) will benefit offline channels? If yes, please provide examples where possible.

Please see above.