COMMENTS OF THE AMERICAN BAR ASSOCIATION'S ANTITRUST LAW AND INTERNATIONAL LAW SECTIONS ON THE COMPETITION AND MARKETS AUTHORITY'S PROPOSED RECOMMENDATION ON THE RETAINED VERTICAL BLOCK EXEMPTION REGULATION

July 22, 2021

The views stated in this submission are presented on behalf of the Antitrust Law and International Law Sections. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore should not be construed as representing the policy of the American Bar Association.

The Antitrust Law and International Law Sections (the "Sections") of the American Bar Association ("ABA") respectfully submit these comments in response to the Competition and Markets Authority's ("CMA's") proposed recommendation to the Secretary of State to replace the retained Vertical Agreements Block Exemption Regulation ("VABER") when it expires on May 31, 2022 with a UK Vertical Agreements Block Exemption Order ("UK VABEO"). The Sections are available to provide additional comments or assistance in any other way that the CMA may deem appropriate. These comments are based upon the extensive experience of the Sections' members in competition law around the world.

The Antitrust Law Section is the world's largest professional organization for antitrust and competition law, trade regulation, consumer protection and data privacy as well as related aspects of economics. Section members, numbering over 7,600, come from all over the world and include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as judges, professors and law students. The Antitrust Law Section provides a broad variety of programs and publications concerning all facets of antitrust and the other listed fields. Numerous members of the Antitrust Law Section have extensive experience and expertise regarding similar laws of non-U.S. jurisdictions. For nearly thirty years, the Antitrust Law Section has provided input to enforcement agencies around the world conducting consultations on topics within the Section's scope of expertise.[1]

The International Law Section focuses on international legal issues, the promotion of the rule of law, and the provision of legal education, policy, publishing and practical assistance related to cross-border activity. Its members total over 11,000, including private practitioners, in-house counsel, attorneys in governmental and inter-government entities, and legal academics, and represent over 100 countries. The International Law Section's 56 substantive committees cover competition law, trade law, and data privacy and data security law worldwide as well as areas of law that often intersect with these areas, such as mergers and acquisitions and joint ventures. Throughout its century of existence, the

[1] Past comments can be accessed on the Antitrust Law Section's website at: https://www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs/.

International Law Section has provided input to debates relating to international legal policy.[2] With respect to competition law and policy specifically, the International Law Section has provided input for decades to authorities around the world.[3]

I. Introduction

The Sections note that the CMA proposes to replace the retained VABER when it expires on May 31, 2022 with a UK VABEO tailored to the needs of business operating in the UK and UK consumers. The Sections further note that the European Commission (the "Commission") is also reviewing its approach to the assessment of vertical agreements and has published for consultation a draft Commission Regulation on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices and accompanying guidelines (the "EU Consultation," "Draft EU VBER," and "Draft EU VGL," respectively).[4]

The Sections agree with the CMA that a vertical agreements block exemption has a number of benefits for business. In particular, it is beneficial to have a safe harbor for categories of vertical agreements that are considered likely to satisfy the requirements for exemption under section 9 of the Competition Act, as such agreements will often generate benefits through promoting efficiencies, promoting non-price competition, and/or promoting investment and innovation.

In particular, a vertical agreements block exemption provides legal certainty to businesses as it facilitates compliance with competition law and decreases compliance costs. This is likely to be particularly likely to be the case to the extent that the UK VABEO remains in material respects identical to the Commission's future vertical block exemption regulation and related guidelines. Alignment with beneficial EU approaches is likely to reduce compliance costs for business both in the UK and in the EU (although as noted below the Sections consider that a number of proposals in the Draft EU VBER and VGL are not beneficial and should not be followed by the CMA).

In this respect, the Sections understand that the CMA's proposed recommendation is that the following provisions regarding the scope of the retained VABER remain unchanged in substance in the UK VABEO: (i) Article 1 (definitions); (ii) Articles 2 and 8 (with a possible extension to cover dual distribution); (iii) Articles 3 and 7 (market share thresholds). Below, the Sections provide comments with regard to the three main changes that the CMA proposes to make to Article 4 of the retained VABER;namely,

- Clarification of the boundary between active and passive sales in relation to territorial and customer restrictions;

---

[2] American Bar Association, International Law Section Policy, *available at* https://www.americanbar.org/groups/international_law/policy/about/.

[3] Past comments can be accessed on the International Law Section's website at: https://www.americanbar.org/groups/international_law/policy/blanket_authorities_initiatives/.

[4] European Commission, Public consultation on the draft revised Regulation on vertical agreements and vertical guidelines, https://ec.europa.eu/competition-policy/public-consultations/2021-vber_en.

- Removing the prohibition of dual pricing and the requirement for overall equivalence from the list of hardcore restrictions included in Article 4 VABER; and

- Adding wide parity (or "most favoured nation") obligations to the list of hardcore restrictions included in Article 4 VABER.

The Sections also comment on the CMA's proposal to continue to treat resale price maintenance ("RPM") as a hardcore restriction in the UK VABEO.

II. Dual Distribution

While the VABER does not apply to agreements between competitors, Article 2(4) provides an exception for "dual distribution" agreements, i.e. non-reciprocal vertical agreements between competitors where (i) the supplier is a manufacturer and a distributor of a good, while the buyer is a distributor and not a competitor at the manufacturer level; or (ii) the supplier is a provider of services at several levels of trade, while the buyer provides its goods or services at the retail level and does not compete at the level of trade from which it purchases the contract services.

The Sections note that the growth of e-commerce has enabled suppliers to engage in dual distribution more easily than in the past, increasing the likelihood that suppliers may compete with their distributors at the retail level. This is consistent with the CMA's observation that "several market changes have had the effect that manufacturers tend to have greater involvement in direct distribution to customers" and that – in response to consumer demand - suppliers increasingly adopt an "omni-channel" strategy.

The Sections support the CMA's proposal to maintain the dual distribution exemption within the meaning of Article 2(4) VABER, as they believe that the risk of exempting vertical agreements where horizontal concerns are no longer negligible and the conditions of Article 101(3) TFEU are not satisfied is very limited, if not absent (subject to the information sharing point below). The Sections appreciate the CMA's concern that information flows between the supplier and buyer, which may arise in dual distribution scenarios, may be problematic as they can give rise to horizontal competition concerns at the retail level.

The Sections believe, however, that, to the extent certain types of information exchanges are considered problematic in the dual distribution context, there are other ways to address the issue. In particular, the Sections note that the Draft EU VBER continues to block exempt agreements in the dual distribution context where the parties' market shares are below 10% and block exempts all such agreements except information-exchange provisions for agreements between parties whose market shares are between 10% and 30%. In such cases, information exchange provisions would be treated as "excluded restrictions" and subject to self-assessment.

The Sections consider that the Draft EU VBER approach, based on market shares, is overly restrictive and formalistic. As the ABA noted in a comment in relation to the Commission's consultation process, the existing VBER and VGL already address information exchanges between a manufacturer and a reseller that go beyond the scope of the vertical relationship between them.[5]

If the CMA is concerned with dual distribution potentially limiting interbrand competition, guidance, and potentially enforcement actions, reminding manufacturers engaged in dual distribution and retailers selling their products and those of competitors that information exchanges must be limited to the vertical relationship may address those concerns without chilling the benefits dual distribution has brought consumers. The Sections also note the U.S. Federal Trade Commission's 2016 decision in *Fortiline,* in which the Federal Trade Commission reminded businesses engaged in dual distribution that "the existence of an intrabrand relationship between firms does not immunize an invitation to fix prices for interbrand transactions falling outside of that intrabrand relationship just as the law would not condone an actual price fixing agreement under similar circumstances."[6]

III. Active Sales Restrictions

In sections 4.12 and further on in the Consultation document, the CMA summarizes the general rule under Article 4(b) of the retained VABER and observes that under that provision the rule is that the buyer should be allowed to approach individual customers actively ("active" sales) and to respond to unsolicited requests from individual customers ("passive" sales). Section 4.14 summarizes the circumstances where, exceptionally, restrictions on active (and passive) sales are block exempt. The Consultation document then explains that the approach to territorial and customer restrictions in the retained VABER not only reflects an extensive body of EU case law (4.15-4.16), but is also reflected in the decisional practice of the CMA and the Office of Fair Trading. UK precedent makes clear that territorial and customer restrictions can restrict competition irrespective of any single market perspective as those (intrabrand) restrictions may limit price competition. The Consultation document then discusses four questions (4.29). Below, the Sections comment on each of the four questions raised by the Consultation document.

(a) Should territorial and customer restrictions continue to be treated as "hardcore" restrictions which remove the benefit of the block exemption?

---

[5] Comments of the American Bar Association's Antitrust Law and International Law Sections Regarding the European Commission's Consultation on the Current Regime for the Assessment of Vertical Agreements (May 23, 2019), at 4, *available at* https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/v11/belgium-comments-verticalagreements-52319.pdf (citing, *inter alia*, the footnote to ¶ 212 of the 2010 Vertical Block Exemption Guidelines).

[6] U.S. Fed. Trade Comm'n, Analysis to Aid Public Comment In the Matter of Fortiline, LLC, File No. 151-0000 (Aug. 15, 2016), *available at* https://www.ftc.gov/system/files/documents/federal_register_notices/2016/08/frn_fortiline_81516.pdf.

The CMA considers that there are compelling reasons for retaining the current approach of treating territorial and customer restrictions as "hardcore" for the purposes of the UK VABEO. However, the Sections consider that the current approach is unnecessarily formalistic and constrains pro-competitive innovation by suppliers in the organization of their distribution structures.

Particularly for territorial restrictions, the Sections query whether the hardcore classification is appropriate within a UK-only context (i.e., absent the EU Single Market objective). The integrated nature and limited geographical size of the UK would suggest that it is unlikely that allowing greater use of such restrictions will lead to significant local or regional market partitioning domestically. Further, there are often efficiency benefits that offset the restrictive effects of both territorial and customer restrictions. In the Sections' view, these considerations make such restrictions better suited for treatment as excluded restrictions for which a balanced assessment, taking account of exemption criteria, is appropriate.

The Sections appreciate, however, the complexities with regard to Northern Ireland referred to in paragraph 4.30 of the Consultation document. As a possible exception to the above approach, restrictions between Great Britain and Northern Ireland could be more strictly prohibited. (Distribution structures in Northern Ireland that operate in an island of Ireland context will likely need to comply with EU VBER requirements in any event.)

(b) Is the current distinction between active and passive sales still fit-for-purpose?

The CMA considers that the distinction between active and passive sales is relevant and worthwhile insofar as exclusive distribution systems are concerned. It recommends that the current exception allowing for the restriction of active but not passive sales be maintained in the UK VABEO and to introduce definitions of "active" and "passive" sales in the UK VABEO, together with additional guidance in the CMA VABEO Guidance. The Sections support this approach in principle, if the CMA retains the current approach of treating territorial and customer restrictions as "hardcore."

(c) Are there certain types of online sales that are currently categorized as passive sales which should instead be classified as active sales?

The CMA notes that the growth of e-commerce has called into question the extent to which certain online sales should still be treated as passive sales (4.37) and suggests that it might be appropriate to redraw the boundaries between the active and passive sales (4.39). The Sections support this proposal, as discussed in more detail below.

(d) Is there a case for changing the current regime in order to give businesses more flexibility to design their distribution systems according to their needs?

In sections 4.41 and 4.42, the CMA proposes to revise the list of exceptions to the hardcore restriction in Article 4(b) of the retained VABER to permit the following:

(a) The combination of exclusive and selective distribution in the same or different territories;

(b) "Shared exclusivity" in a territory or for a customer group by allowing the allocation of a territory to more than one "exclusive" distributor; and

(c) The provision of greater protection for members of a selective distribution system against sales from outside the territory to unauthorized distributors inside that territory.

The Sections support these proposals and note that they are in line with the Commission's approach in the Draft EU VBER and Draft EU VGL.

IV. Indirect measures restricting online sales

The Consultation document notes that online channels are effective for reaching a greater number and variety of customers. The CMA notes that two indirect measures are no longer warranted, (i) charging the same distributor a higher price for products intended to be resold online than for products intended to be sold offline – "dual pricing"; and (ii) imposing criteria for online sales that are not equivalent to the criteria imposed on brick & mortar stores in the context of selective distribution – the "equivalence principle."

Accordingly, the CMA recommends that the following changes be made to in the CMA VABEO Guidance:

(a) Dual pricing should no longer be regarded as a hardcore restriction of competition; and

(b) The imposition of criteria for online sales that are not overall equivalent to the criteria imposed on brick & mortar shops in a selective distribution system should no longer be regarded as a hardcore restriction.

In the Sections' view, neither dual pricing generally, nor restrictions imposed for online sales that are not imposed for sales in physical stores in a selective distribution system specifically should be considered hardcore restrictions for the purposes of the CMA VABEO. On the contrary, such conduct should be covered by the CMA VABEO, subject to the extent necessary to limiting principles set out in the CMA VABEO Guidance (for instance to clarify that the CMA VABEO does not cover "sham" dual pricing used as disguised RPM).

This approach is consistent with the Commission's approach in the Draft EU VBER, which no longer characterizes dual pricing as a hardcore restriction. This allows

suppliers to set different wholesale prices for online and offline sales by the same distributor to incentivize or reward an appropriate level of investment, and relates to the costs incurred for each channel. Similarly, in a selective distribution system, criteria for online sales would no longer have to be overall equivalent to the criteria for brick & mortar shops (in each case assuming these restrictions are not intended to prevent buyers or their customers from using the internet for the purpose of selling their goods or services online).

This approach is also consistent with the emerging international consensus supporting the deregulation of price discrimination as a matter of good competition policy. The VBER's current approach to dual pricing and the equivalence principle can be seen as a form of prohibition of discrimination in price and non-price terms of sale. But U.S. experience with the Robinson-Patman Act, which prohibits certain forms of price and other discrimination, shows that regulation of price discrimination in the United States, "has had the unintended effect of limiting the extent of discounting generally."[7] Indeed, in 2007, the U.S. Antitrust Modernization Commission, which recommended repeal of the Robinson-Patman Act, asserted that the Act inhibits entry and "requires price rigidity that imposes costs on consumers through higher prices, lower quality, and less choice than would be the case in its absence."[8] Federal enforcers in the United States have not brought a case under the Robinson-Patman Act in more than twenty years.

In 2009, Canada changed the treatment of price discrimination from a *per se* criminal offense to a violation only in circumstances where such conduct could constitute an abuse of dominance.[9] Indeed, the policy objective underlying the current approach to indirect restriction of online sales and dual pricing for online and offline resellers, to ensure consumers can access goods online, has lost relevance with the explosive growth of e-commerce.

V. Parity Obligations

The CMA Consultation document notes that all types of parity obligations are currently block-exempted by the VBER and proposes to address these types of clauses in the UK VABEO and the CMA VABEO Guidance. The CMA proposes to distinguish between (i) parity obligations that affect "direct" sales channels and (ii) parity obligations that affect "indirect" sales channels. This distinction broadly reflects the notions of "narrow" and "wide" parity obligations or "most-favored nation" clauses referred to by the CMA in its decisional practice, as well as other definitions of certain "wide" parity obligations such as "across platform parity clauses" (4.63).

Accordingly, the CMA proposes that wide parity clauses, i.e. that a product or service may not be offered on better terms in any other channels, whether the supplier's

---

[7] U.S. Antitrust Modernization Commission, Report and Recommendations (Apr. 2007) at 311, *available at* https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.
[8] *Id.* at 320.
[9] Competition Bureau of Canada, A guide to Amendments to the Competition Act (Apr. 22, 2009) at 2, *available at* https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/A-Guide-to-Amendments-to-the-Competition-Act-e.pdf/$file/A-Guide-to-Amendments-to-the-Competition-Act-e.pdf.

own or any intermediary's, including any equivalent measures, are treated as hardcore restrictions under the UK VABEO (4.71).

The Sections agree that, as a general proposition, the potential of wide price parity clauses (which require suppliers to offer the platform the same or better prices and conditions as those offered on any other sales platform) to result in anti-competitive effects is larger than that of narrow price parity clauses (which bind only the supplier's direct online channel). However, the Sections also note that both types of price parity clause may be inspired and justified by significant efficiency considerations. In both cases, anti-competitive effects, if any, are likely to arise only if the platform at hand has significant market power. Accordingly, the Sections respectfully suggest that the CMA reconsider the proposal to treat wide price parity clauses as hardcore restrictions.

The Sections note that the Draft EU VBER would remove the benefit of the block exemption for wide parity obligations but add them to the list of excluded restrictions. The consequence of this proposed change is that this type of parity obligation would have to be assessed individually.

Although the Commission's proposed approach to parity clauses is preferable to the CMA's, the Sections question whether even wide parity obligations need to be treated as excluded restrictions. As a general matter, the Sections believe that the 30% market share thresholds, coupled with additional guidance in the VGL, are effective in identifying any potentially anticompetitive use of wide and narrow price parity clauses.

The Sections would support additional guidance on the question of how the nature of platforms – "supplier platforms" versus "distributor platforms" – would affect the antitrust assessment and the assessment of market shares, market power, and the cumulative effect of (wide) price parity clauses. The Sections advise against a policy predominantly based on a limited number of cases in a single industry – namely, the hotel business. Any future policy in relation to price parity clauses should in the Sections' view be generally applicable and not inhibit potentially pro-competitive business practices.

VI. Resale Price Maintenance

The CMA proposes that RPM remain a hardcore restriction under the UK VABEO (4.10), albeit that it is receptive to the notion that RPM may give rise to efficiencies (4.11). The Sections submit that the treatment of RPM as a hardcore restriction is inappropriate and leads to unintended consequences.

The Draft EU VBER would continue to treat RPM as a hardcore restriction, although the Draft EU VGL includes an expanded discussion of situations in which RPM may qualify for an exemption. The consequence of treating RPM as a hardcore restriction in such a situation is that the entire agreement loses the benefit of the block exemption. This result is counterintuitive, removing the efficiency benefits of applying the block exemption to non-problematic provisions that have nothing to do with RPM.

The Sections believe a better option would be to include RPM as an excluded restriction, requiring contracting parties to assess the legality of any proposed RPM. In an environment in which RPM is considered a by-object infringement subject to divergent enforcement policies in different Member States, however, this approach might not be sufficient to provide legal certainty for businesses that wish to use limited RPM in ways that may be pro-competitive. A better approach could be to expressly exempt RPM in circumstances in which it is recognized as offering efficiencies (e.g., to achieve an expansion of demand during the launch of a new product, to create incentives for substantial no-extra-charge product support such as training or installation).

The CMA may wish to consider other circumstances in which RPM may be used in ways consistent with EU competition policy objectives. The Sections submit that, at a minimum, the UK VABEO or CMA VABEO Guidance should maintain and elaborate on the circumstances in which RPM may be pro-competitive.

It would also be helpful for the CMA in its Guidance to provide commentary on when the supplier's involvement in the buyer's resale pricing activity may not constitute RPM at all. In particular, in circumstances where the balance of bargaining power or even a degree of market power lies with the buyer, such as a large retailer (including online), the bar for establishing an RPM agreement or concerted practice may be higher.

VII. Conclusion

The Sections appreciate this opportunity to provide their views on the CMA's proposed recommendation to the Secretary of State in relation to a UK VABEO and are available for any further consultation the CMA may deem appropriate.