

22 July 2021

# **RESPONSE TO CMA CONSULTATION - THE RETAINED VERTICAL AGREEMENTS BLOCK EXEMPTION REGULATION**

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## **1 Introduction**

- 1.1 Addleshaw Goddard is a global law firm headquartered in London and regularly advises clients across the UK and Europe on distribution and supply arrangements. We welcome the opportunity to respond to the CMA's consultation on the retained Vertical Agreements Block Exemption Regulation (**VABER**) (CMA 145con). Our response highlights the issues we consider most pertinent to our clients and where additional guidance and clarity from the CMA is timely and opportune.
- 1.2 Our suggestions, set out below, focus largely on increasing transparency for us as advisers and for our clients in applying the retained VABER, and seek to further enhance the efficacy of the regime going forward.
- 1.3 We are happy to discuss any part of this submission with the CMA and look forward to reviewing the outcome of this consultation in due course.

## **2 CMA's proposed recommendation**

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

- 2.1 Addleshaw Goddard supports the CMA's proposed recommendation to replace the retained VABER with a new UK VABEO. We are also largely supportive of the CMA's intention, in this review, not to depart significantly from the retained VABER, whilst also ensuring that the new UK VABEO more effectively addresses market developments over the ten years since the (retained) VABER was first introduced
- 2.2 The introduction of the new UK VABEO will more accurately reflect the way in which businesses currently operate, with e-commerce as a more central theme for example, whilst also providing certainty and stability for businesses who primarily operate through distribution arrangements.
- 2.3 The recommendation not to depart significantly from the retained VABER will also reduce complexity from the perspective of businesses who operate both within the UK and through the European Union (**EU**).

**How will the proposed UK VABEO, as outlined in the CMA's proposed recommendation, impact consumers?**

- 2.4 We consider that the proposed UK VABEO will have a positive if not immediately significant impact on UK consumers, by providing a framework that facilitates efficient supply chains and provision of services while protecting against practices that cause the greatest harm.

## **3 Dual distribution**

**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.**

- 3.1 Addleshaw Goddard welcomes the CMA's approach to dual distribution and we urge the CMA not to follow the EU's proposed introduction of a new 10% threshold. In our experience, businesses think very carefully about information exchange in the context of a dual distribution

arrangement and go to great lengths to ensure that information flows that could lead to downstream coordination are not permitted. Further guidance in this area is not necessary.

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

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

4.1 We agree with the CMA's proposed recommendation to maintain RPM as a hardcore restriction.

4.2 In our experience, whilst frustrating for some that they are unable to control the minimum resale price for their goods, most manufacturers and suppliers have a good understanding of the availability of RRP's and maximum resale prices and the reasoning behind the rules.

4.3 We would also welcome the recognition by the CMA of fulfilment contracts as set out in the EU's draft revised VABER guidelines.

**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.**

4.4 We note that the EU has expanded in its draft revised VABER guidelines on when RPM may lead to efficiencies and would encourage the CMA to be as expansive as possible in its own guidance.

**What would be the likely impact on your business, or those you represent, if RPM were not treated as a hardcore restriction for the purposes of the proposed UK VABEO? Please explain your answer. Are you aware of, or have you encountered, any difficulties in your business as a result of the treatment of RPM as a hardcore restriction for the purposes of the retained VABER? If so, please give examples.**

4.5 Our clients would welcome additional guidance in the event that businesses are allowed to engage in RPM, to avoid any uncertainty as to which form of RPM might be permitted. Block exemptions are useful tools for businesses when they establish clear boundaries for conduct that falls within the safe harbour. Businesses given flexibility to incorporate some form of RPM within their distribution arrangements would need detailed guidance as to how the CMA would view such restrictions, or any arrangements with equivalent effect.

#### **5 Territorial and customer restrictions**

**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. 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**

- 5.1 We consider that the CMA's recommendation for territorial and customer restrictions to remain hardcore is appropriate. This will provide consistency and certainty for businesses who operate distribution arrangements both within and outside the UK.
- 5.2 We support the CMA's recommendation to allow the appointment of multiple exclusive distributors serving one territory or particular customer group, to give suppliers greater access to areas that may be more difficult to reach. We also urge the CMA to include guidance on an acceptable number of distributors for an exclusive territory or customer group.
- 5.3 We believe the distinction between passive and active sales is sufficiently clear from existing guidance and past decisional practice.
- 5.4 We do, however, ask the CMA to consider and give additional guidance on two aspects of territorial protection.
- (a) First, for businesses operating across a number of countries, particularly in the UK and the EU, it would be helpful if the CMA were to provide its views and guidance on how restrictions preventing sales into the UK by non-UK members of a distribution arrangement are to be dealt with.
- (b) Second, we encourage the CMA to avoid rigid distinctions between different distribution structures since this does not necessarily reflect commercial reality. In this regard, we welcome the recognition of mixed exclusive and selective networks. In practice, it is rare for business to establish a distribution system from the outset that meets the CMA's expectations of what such a system should look like. For example, whilst business will often seek to provide an exclusive distributor with protection from distributors in neighbouring territories, it will be rare for this protection to extend to all buyers since distribution systems tend to be built over time as the business grows. The EU's current VABER guidelines state that "a territory or customer group is exclusively allocated where the exclusive distributor is protected against active selling into its territory by all other buyers of the supplier in the Union". In practice such a definition is not workable, with the result that the protection afforded by the block exemption is unlikely to apply to any active sales restrictions. We therefore encourage the CMA to develop guidelines that recognise how distribution networks are established in practice and to adopt a more flexible approach as between different types of distribution system.

**6 Indirect measures restricting online sales**

**What are your views on the CMA's proposed recommendation on dual pricing and on the equivalence principle? Do you agree that additional guidance on this issue would be helpful? If so, please provide your views on what that guidance should say.**

- 6.1 We are largely supportive of the CMA's proposed recommendation that dual pricing and the equivalence principle should no longer be regarded as hardcore restrictions. Both the CMA and EU have recognised that offline distribution may require more price support than online. This approach is welcomed. However, we urge the CMA to address the issue of dual pricing and equivalence more broadly and take into account that businesses often see pro-competitive commercial value (most typically to win new business) in charging different wholesale prices depending on channel (e.g. dealer versus retailer) or, for resale, to a particular end customer. We therefore encourage the CMA to provide guidance on when dual pricing can be pro-

competitive and highly unlikely to act as a disincentive to selling outside the buyer's territory/customer group or online.

- 6.2 In relation to brand protection, our clients would also welcome further detail in the CMA VABEO UK guidance on the extent to which businesses with a non-selective distribution system could still impose certain quality requirements as to how products are sold. Our clients note that this is particularly important because end-customers do not always dissociate the supplier from the distributor. A poor customer experience at the distribution level can then be detrimental to the supplier's reputation. Our clients would therefore be interested in seeing guidance similar to the EU's on the types of measures that do not amount to indirect restrictions, and which would therefore add pro-competitive commercial value. By way of example, the EU's draft revised guidelines provide examples of exceptions to the hardcore restrictions, such as where the supplier is permitted to restrict an appointed distributor in a selective distribution system from selling, at any level of trade, to unauthorised distributors located in any territory where the system is currently operated or where the supplier does not yet sell the contract products. Similar guidance from the CMA would be welcomed.
- 6.3 In relation to online and in-branch sales, the EU appears to treat obligations which may dissuade appointed dealers from using the internet to reach more and different customers by imposing criteria for online sales which are not overall equivalent to those for sales from the brick and mortar shop, as hardcore restrictions. However, its draft revised guidance provides examples of how different criteria for online and offline sales can pursue the same objectives and achieve comparable results but that any difference between the criteria must be justified by the different nature of these two distribution modes. For instance, to prevent sales to unauthorised dealers, a supplier can require its selected dealers not to sell to an individual end user more than a given quantity of contract products. This requirement may have to be stricter for online sales if it is easier for an unauthorised dealer to obtain those products by using the internet. Similarly, it may have to be stricter for offline sales if it is easier to obtain them from a brick and mortar shop. We would also welcome the CMA's guidance on this issue

## 7 Parity obligations

**What are your views on the CMA's proposed recommendation on parity (or 'most favoured nation') obligations? As part of this, you might like to consider whether indirect sales channel parity obligations can generate benefits/efficiencies beyond those that may be created by direct sales channel parity obligations - if so, please provide evidence or examples in practice of circumstances where this may be the case. Do you agree that additional guidance on this issue would be helpful? If so, please provide your views on what that guidance should say.**

- 7.1 We welcome the CMA's proposed recommendation on parity, the CMA's clear distinction between wide and narrow parity obligations and clarity as to type of obligation that CMA considers will fall outside VABEO.
- 7.2 Narrow parity obligations are helpful and generate efficiencies, as the CMA has recognised, and it is helpful for businesses to now have certainty that such arrangements are permissible.
- 7.3 Additional guidance on this issue would be extremely helpful, particularly to provide examples of the types of conduct or restriction that may be deemed equivalent to wide parity obligations.

## **8 Issues for CMA VABEO Guidance**

### **Sustainability**

- 8.1 As the CMA has identified sustainability, in particular, the transition to net zero carbon emissions, is a key strategic priority, we would welcome further guidance from the CMA on the treatment of this issue. This is a matter that is particularly relevant both to Addleshaw Goddard and to a great number of its clients. More specifically, from our clients' perspective, guidance from the CMA on whether or not environmental considerations or requirements may be used as qualifying criteria for selective distribution networks where they are not essential to the product/services delivered will be important. We would also welcome clarity on the types of sustainability agreements and provisions that would raise competition concerns. Although we appreciate this has not yet been tested in the courts, we would be particularly interested in further guidance on the extent to which environmental collaboration could be considered to serve a public interest and thus fall within the scope of the block exemption.