

**Response to Consultation on the retained Vertical Agreements Block Exemption
Regulation published on 17 June 2021**

Date of response: 22 July 2021

INTRODUCTION

1. This response is submitted on behalf of Amazon. Amazon supports a strong UK economy, enabling the creation and growth of successful companies and promoting and protecting consumer welfare. As such, Amazon welcomes the opportunity to engage with the Competition and Markets Authority ("CMA") on its recommendation for the replacement of the retained Vertical Agreements Block Exemption (the "**retained VABER**").
2. The retained VABER is relevant to Amazon's business because the proper functioning of competition law, including the legal certainty facilitated by the exemptions in the retained VABER, is critical to the functioning of the retail sector in which Amazon is active. For example, it provides part of the basic legal framework that governs contractual agreements between Amazon and the tens of thousands of UK SMEs whose businesses Amazon has helped to grow. Providing these additional sales opportunities produces corresponding benefits for consumers, competition, economic efficiency, retail diversity, and employment.
3. While we consider that the current regime has a broadly positive impact, we are conscious of the need to properly balance the interests of brands in controlling distribution of their products, against the interests of consumers and retailers in having access to those products on competitive terms. As the CMA recognises,¹ there have been significant developments in e-commerce in recent years, however, these changes do not imply that online sales should be treated more restrictively. Rather, such online sales have made a particular contribution to companies and individuals located in more peripheral, rural areas of the UK, allowing them to access a materially increased range of goods and services, far beyond the catalogue selling of previous generations (where no differentiation in treatment in competition law was necessary either). It follows that any unjustified restrictions upon online sales and in particular on access to third-party marketplaces would risk rolling back many of these consumer gains and would undermine the efforts of many small businesses.
4. For example, when brands use unjustified selective distribution schemes to impose restrictions such as brick and mortar requirements and marketplace bans that limit cross-border and online sales, that has a direct impact on consumers and their ability to access selection through the Amazon store. It also has a major impact on the businesses that have expanded online, and have navigated the restrictions of the COVID 19 pandemic by offering their stock across on and offline channels. As explained in more detail in the responses below, if the amendments proposed by the CMA in relation to

¹ CMA, Consultation on the retained Vertical Agreements Block Exemption Regulation published on 17 June 2021, paragraph 4.39.

dual pricing had been in place during the pandemic, they could well have prevented high street stores from providing this critical service to consumers.

5. While Amazon recognises that brands producing technically complex or high end, luxury products may have a legitimate interest in establishing a selective distribution network, the rapid expansion of such schemes to everyday products that have none of the characteristics justifying selective distribution imposes unnecessary restrictions on sales, to the detriment of consumers. Additional distinctions between on and offline retail would undermine UK competitiveness and the innovation of UK businesses. It is therefore vital that a new UK Vertical Agreements Block Exemption Order ("VABEO") recognises and properly addresses these concerns.

RESPONSE TO CONSULTATION QUESTIONS

Policy and impact 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 VABER with a new UK VABEO, rather than letting it lapse without replacement or renewing without varying the retained VABER?

- a) Yes
 - b) No
 - c) Not sure
6. Yes.

Question 2: Please explain your response providing, where possible, examples and evidence to support your answer.

7. Amazon agrees with the CMA's proposed recommendation to make a Block Exemption Order to replace the retained VABER with a new UK VABEO. We consider that the current verticals regime has a broadly positive impact, especially by increasing legal certainty for common categories of vertical agreement (including, for example, the agreements under which we provide services to those who choose to sell products on our sites). We are, however, concerned that the balance of the regime has shifted too far in favour enabling brands that wish to control distribution and pricing of their products to the detriment of consumers, rather than, rather than the interests of consumers and retailers in having access to those products on competitive terms and that the CMA's proposals, in particular, the removal of dual pricing and the equivalence principle as hardcore restrictions, would have a significant negative impact on consumers.
8. We therefore propose a rebalancing of the regime by removing brands' ability to impose restrictions on distribution, such as blanket bans on the use of marketplaces by authorised resellers or brick and mortar requirements. We also recommend that the Verticals Guidelines be revised to remove passages that have been applied by brands in

ways that go beyond what is justifiable, for example in relation to brick and mortar requirements in a selective distribution system. Through such targeted changes, Amazon suggests that consumers across the UK will be able to benefit more from retail innovations.

Question 3: How will the proposed UK VABEO as outlined in the CMA's proposed recommendation impact consumers?

- a) **Significant positive impact**
 - b) **Moderate positive impact**
 - c) **Negligible impact**
 - d) **Moderate negative impact**
 - e) **Significant negative impact**
9. As set out in response to Questions 20 and 24 below, Amazon considers that changes to the application of the definition of passive sales in an online context, permitting a combination of selective and exclusive distribution and the removal of dual pricing and the equivalence principle as hardcore restrictions would have a significant negative impact on consumers. In particular, these amendments would be likely to result in reduced access to goods, in particular for consumers who live in less accessible areas and therefore rely heavily on online purchasing, and price increases driven by increased supply costs to online retailers.

Associations of undertakings

Policy questions

Question 4: What are your views on the CMA's proposed recommendation for agreements with association of undertakings to continue to benefit from the UK VABEO?

10. Amazon does not have a view on this question.

Question 5: Do you think that the turnover threshold should be revised for agreements with associations of undertakings to benefit from the UK VABEO (in particular, to reflect market developments, growth, inflation and/or the UK market)? If so, please provide your views on what the new turnover threshold should be.

11. Amazon does not have a view on this question.

Impact questions

Question 6: To what extent is the exception for agreements with associations of undertakings, as outlined in the retained VABER, helpful to your business's operations or the operations of those you represent?

- a) **Very helpful**
- b) **Somewhat helpful**
- c) **Irrelevant**

- d) Unhelpful
- e) Very unhelpful

12. Amazon does not have a view on this question.

Question 7: What would be the likely impact on your business's operations or the operations of those you represent if the turnover threshold was increased?

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

13. Amazon does not have a view on this question.

Question 8: What would be the likely impact on your business's operations or the operations of those you represent if the turnover threshold was decreased?

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

14. Amazon does not have a view on this question.

Dual distribution

Policy questions

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

- 15. Amazon supports the CMA's proposed recommendation that the VABEO should include an exception for dual distribution in the same form as in the retained VABER. In that respect, dual distribution exception is particularly relevant for hybrid stores acting both as a direct retailer and as an intermediary for third-party retailers. Online sales and marketplaces are of growing importance in the UK economy and it is important to acknowledge this trend and take it into account while drafting VABEO.
- 16. Leaving hybrid stores outside the scope of VABEO would likely increase legal uncertainty for businesses. In 2019, more than 60% of the tens of thousands of UK-based Sellers in the Amazon Store exported to customers around the world, achieved total export sales of more than £2.75 billion and supported more than 85,000 job

opportunities in the UK.² Between June 2019 and May 2020, UK-based Sellers had an average of almost £75,000 in sales, up year-on-year from around £60,000. Moreover, over 3,200 UK-based SME Sellers surpassed \$1 million in sales in 2019. For these companies, there is no other legal instrument providing such a complete set of principles for self-assessment of distribution agreements under competition law. SMEs could be prevented from selling online if their agreements with hybrid stores are no longer covered by VABEO's rules. This would negatively impact those business and the UK economy as a whole.

17. Although the CMA may have legitimate concerns regarding exchange of information within the framework of dual distribution, Amazon supports the CMA's view that appropriate clarification in the VABEO Guidance would be sufficient to create legal certainty for businesses and to create a level-playing field among stores.

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.

18. Please see the response to Question 9 above.

Impact questions

Question 11: To what extent does the dual distribution exception for non-reciprocal vertical agreements, as outlined in the retained VABER, positively impact your business's operations or the operations of those you represent? Please explain your answer.

- a) Completely
- b) Very much
- c) Moderately
- d) A little
- e) Not at all

19. Please see the response to Question 9 above.

Question 12: To what extent does the dual distribution exception for non-reciprocal vertical agreements, as outlined in the retained VABER, negatively impact your business's operations or the operations of those you represent? Please explain your answer.

- a) Completely
- b) Very much
- c) Moderately
- d) A little
- e) Not at all

² See <https://blog.aboutamazon.co.uk/jobs-and-investment/2019-amazons-economic-impact-in-the-uk>.

20. Please see the response to question 9 above.

Question 13: What would be the likely impact on your business's operations, or the operations of those you represent, if the dual distribution exception was not included in the UK VABEO at all? Please include examples and where possible, quantitative and/or qualitative evidence in your answer.

21. Please see the response to Question 9 above.

Question 14: Do you consider the CMA's proposed recommendation, which also applies the exception to dual distribution by wholesalers and by importers, to have a positive or negative impact on business operations? Please explain your answer.

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

22. Amazon does not have a view on this question.

Resale Price Maintenance

Policy questions

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

23. Amazon does not have a view on this question.

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.

24. Amazon does not have a view on this question.

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.

25. We note that it difficult to comment on the utility of such clarification in the absence of specific proposed language. However, Amazon does not consider that the current position is unclear or misunderstood by businesses.

Impact questions

Question 18: 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.

- a) Significant positive impact
- b) Moderate positive impact

- c) **Negligible impact**
- d) **Moderate negative impact**
- e) **Significant negative impact**

26. Amazon does not have a view on this question.

Question 19: 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.

27. Amazon does not have a view on this question.

Territorial and customer restrictions

Policy questions

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.**

28. Amazon does not consider that there is any evidence to demonstrate that the present rules require significant alteration. In particular, Amazon agrees with the CMA's proposed recommendation to continue to treat territorial and customer restrictions as 'hardcore' restrictions so as to remove the benefit of the block exemption (subject to exceptions) and to maintain a distinction between active and passive sales.

Distinction between active and passive sales in an online context

29. In relation to the distinction between active and passive sales, Amazon agrees with the CMA that the current regime strikes a fair balance between, on the one hand, the need to grant some degree of protection to exclusive distributors and, on the other hand, ensuring some degree of consumer choice.³
30. Amazon does not consider that it is necessary for further guidance on the distinction between active and passive sales in relation to online sales to be included in the CMA VEBEO Guidance, as this distinction is already well understood by distributors and retailers. Nonetheless, if the distinction between active and passive sales for certain types of online sales is to be revisited and clarified in the CMA VABEO Guidance, Amazon submits that it is vital that an appropriate balance is struck and that all sellers are able to make full use of the internet to offer a wide range of choice in goods to UK consumers.
31. The CMA's consultation document does not set out a proposal in relation to the content of any potential clarification to the distinction between active and passive sales in an online context, therefore Amazon is unable to comment specifically. However, a principle that should be maintained is that online selling is a passive sales activity that should not be subject to undue restrictions.
32. We agree with the CMA's decision in *Ping*, which was upheld by the Competition Appeal Tribunal⁴ and the Court of Appeal, that a ban on selling on the internet may amount to a restriction of competition by object and that '*as a result of the limitation on the ability of a retailer to compete for sales to customers beyond their geographic range, there is a diminution in price competition.*'⁵ Any amendments to the definition of active and passive sales which could place limitations on online sales would therefore be inappropriate and counter to the interests of consumers. In particular, Amazon has provided further information on its views in relation to the equivalence principle in response to Question 24 below.
33. As the CMA recognises,⁶ there have been significant developments in e-commerce in recent years, however, these changes do not imply that online sales should be treated more restrictively. Rather, such online sales have made a particular contribution to companies and individuals located in more peripheral, rural areas of the UK, allowing them to access a materially increased range of goods and services, far beyond the catalogue selling of previous generations (where no differentiation in treatment in competition law was necessary either). It follows that any unjustified restrictions upon online sales and in particular on access to third-party marketplaces would risk rolling

³ CMA, Consultation on the retained Vertical Agreements Block Exemption Regulation published on 17 June 2021, paragraph 4.33.

⁴ *Ping Europe Limited v Competition and Markets Authority* [2018] CAT 13.

⁵ *Ping Europe Limited v Competition and Markets Authority* [2020] EWCA Civ 13, paragraph 81.

⁶ CMA, Consultation on the retained Vertical Agreements Block Exemption Regulation published on 17 June 2021, paragraph 4.39.

back many of these consumer gains and would undermine the efforts of many small businesses.

Flexibility to design distribution systems

34. It is unclear what specific parameters or guardrails (if any) the CMA intends to recommend in relation to permitting the combination of exclusive and selective distribution in the same or different territories, shared exclusivity and/or the provision of greater protection for members of selective distribution systems against sales from outside the territory to unauthorised distributors inside that territory. However, as explained below, Amazon has significant concerns that any such amendments to the retained VABER would have a detrimental impact for businesses and consumers in the UK.
35. Selective distribution involves restrictions of competition that are supposed to be proportionate to efficiencies expected from the protection of brand image or adapted to the technical requirements of the product. Many of these aspects already receive the protection of intellectual property rights such as trademarks, designs, and patents. These further restrictions should improve the welfare of consumers by better meeting their needs, while protecting the benefit of a functioning market. However, a combination of such a selective distribution system with exclusive distribution would be likely to reduce intra-brand competition and result in increased prices.
36. In particular, combining selective distribution and exclusivity at different levels of the distribution chain runs counter to the very purpose of balancing the interests at stake in a selective distribution network. There is no valid reason to prevent authorised resellers from cross-supplying as long as they meet the criteria for admission to the network. Any combination of exclusivity at the wholesale level and selective distribution at the retail level would reduce competition and fundamentally undermine competition in the market. In such a case: (i) either the brand owner prohibits retailers from cross-supplying each other, which would unduly restrict competition and would be contrary to existing rules; or (ii) the brand owner does not impose such a restriction, which would limit any justification for the wholesaler to be granted a supposed exclusive right.
37. Likewise, combination of exclusive and selective distribution at the same level and in the same territory could have adverse effects on competition. In particular, it seems that shared exclusivities could become an alternative for illegitimate selective distribution networks. In both cases, a supplier may impose similar restrictions. This is especially concerning as a supplier failing to determine reasonable criteria for selective distribution will favour shared exclusivities thereby increasing the number of products subject to territorial restrictions.
38. Amazon is concerned that the amends proposed in the CMA's consultation could represent a shift away from the interests of consumers in having access to products (and retailers in serving those consumers) towards brands that seek to control the pricing and distribution of their products. This is increasingly evident in the expanded use of selective distribution, even where the nature of the product is neither technically

complex nor a high end, luxury good. Overall, combining exclusivity and selective distribution systems will generally be detrimental to consumers' ability to access a large range of products from different sellers at competitive prices and lead to a degree of territorial partitioning that is inconsistent with the promotion of competition. As such, it would be inappropriate for such arrangements to be subject to a sweeping block exemption.

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.

39. Please see the response to Question 20 above.

Impact questions

Question 22: Do you have any examples of circumstances where territorial and customer restrictions might lead to operational efficiencies? Please include examples of locations within the UK and, where possible, quantitative and/or qualitative evidence in your answer.

40. Amazon does not have a view on this question.

Question 23: How helpful is the exemption for restrictions of active sales in the UK to your business or those you represent? Please explain your answer.

- a) Very helpful
- b) Somewhat helpful
- c) Irrelevant
- d) Unhelpful
- e) Very unhelpful

41. Amazon does not have a view on this question.

Indirect measures restricting online sales

Policy questions

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

Dual pricing

42. Amazon cannot see how dual pricing could be justified or indeed why it ought to be necessary. As a starting point, the supplier is always free to set its sales prices to its distributors and in doing so can take account of their characteristics. It is not obliged to have a single wholesale price for all distributors and all territories. Therefore, it should set its price at a competitive level. Thereafter the distributor should in turn set its resale price at a level that is competitive and generates profit. There is a serious risk that if suppliers are allowed to charge different prices depending on whether the goods are ultimately sold online, that will be understood as a disincentive to online selling which

would run directly counter to certain other principles stated clearly in the retained VABER.

43. There is a real risk that allowing the price paid by the distributor to be in effect derived from the manner in which the goods are sold would be verging on resale price maintenance of the type that the CMA has consistently opposed.⁷ There are low quality and high quality brick-and-mortar stores just like there are low quality and high quality online stores, and not every marketplace provides for the same sales environment and customer experience. The Amazon store feature offers from Amazon directly and from thousands of independent sellers and offers an outstanding customer experience across the board. Amazon provides for the means to customize all offers in the Amazon store, for example with videos and high-quality pictures. Among other features, the user-friendly buying experience and after-sale services, which help customers to easily make personal interaction with sellers, allow Amazon to deliver a great customer experience.
44. In practice, dual pricing would lead to significant complexity and would be very difficult to enforce consistently. It could also lead to unintended consequences, such as the creation of opportunities for anticompetitive conduct and agreements. Specifically, dual pricing assumes that the reseller (i) has a precise knowledge of quantities that will be sold online and offline, (ii) communicates those to the supplier (potentially together with details of its retail prices for all channels), and (iii) that these quantities do not change over time. This clearly gives rise to significant concerns regarding anticompetitive information exchange and creates the potential for hub and spoke collusion. Moreover, in practical terms, the adverse impact on efficiency of distribution systems is obvious, as resellers would be prevented from determining unilaterally which channels to sell through. For example, a reseller may wish to sell excess brick-and-mortar stocks online, but would be prohibited from doing so or receive a retrospective penalty. The flexibility of being able to sell the same stock through multiple channels is a normal part of modern retailing that would be massively disrupted by forcing resellers to predict, stick to, and account for their sales in each specific channel as this would imply. Had this been the situation during the current pandemic, many high street stores would have been totally unable to resell their stock through online channels, something that was critical both for consumers finding goods and for these businesses in remaining able to trade and survive.
45. It is notable that dual pricing between on and offline sales could be a means by which to, in practice, prohibit online sales by increasing pricing for goods sold through online channels to a level which would prevent online sales being commercially viable. Given that online sales bans may be an object restriction of Chapter I of the Competition Act 1998, such a result is clearly inconsistent with the aims of the CMA and competition law more generally and could result in significant enforcement issues.
46. The CMA's consultation notes that participants in the CMA's roundtables had expressed the view that dual pricing may be necessary to provide offline distributors

⁷ See for example, the CMA's infringement decisions in the musical instruments sector addressed to Casio, Fender, Roland and Korg.

with the necessary incentives to invest in promoting products and to prevent free-riding by online distributors that focus mainly on price, without offering comparable pre-sales services.⁸ However, the available evidence shows that ‘free riding’ is actually more commonly occurring in consumers using online sources to influence their offline purchasing. The Commission’s support study for the evaluation of the VBER, prepared by VVA, found that *‘consumers make parallel and complementary use of various channels and information sources online as well as offline- for a single purchase. As the most important activities in the pre purchase phase are the search for and evaluation of information, consumers actively switch between different on- and offline channels, sometimes even using them closely intertwined eg checking for prices or additional information online while being in a store.’*⁹ The study cited a Harris study which indicates that 69% of customers ‘webroom’, which means that they visit the store but use their online device to check prices and other product information (whether beforehand or in the store) but complete the purchase in the store (sometimes using the online information obtained to negotiate a price match), whereas only 46% ‘showroom’, meaning that they go into the store to browse and test products, only to subsequently go home and actually complete their purchase online. The VVA study concluded that *‘overall, consumers value the wide choice of channels. They also appreciate being able to access one and the same retailer/supplier via several channels’*.¹⁰ It is therefore wrong to treat online and offline as totally distinct parts of the consumer experience and is patently simplistic and wrong to assume (in the face of the evidence) that one method is behaving parasitically to the other.

47. In addition to this, exemption of dual pricing would not necessarily help SMEs; rather, it would favour large suppliers. The rationale for exempting dual pricing appears to be based on the mistaken assumption that SMEs are brick-and-mortar stores. However, many SMEs sell online only and, those with brick-and-mortar stores generally take an omnichannel approach. As such, dual pricing could significantly harm these businesses.
48. Overall, it is unclear what benefits dual pricing could create for either businesses or consumers. Rather, it is evident that dual pricing creates significant risks for businesses from both a legal and commercial perspective. In addition, dual pricing exemptions could eliminate the efficiencies offered by online distribution, which would result in a limitation of choice for consumers, higher resale prices and the hindrance of intra-brand competition.

The equivalence principle

49. The imposition of criteria for online sales that are not overall equivalent to the criteria imposed on brick-and-mortar shops in a selective distribution system should continue to be regarded as a hardcore restriction. Indeed, we are concerned that the balance even in the current regime has shifted too far away from the interests of consumers in having access to products (and retailers in serving those consumers) and instead

⁸ CMA, Consultation on the retained Vertical Agreements Block Exemption Regulation published on 17 June 2021, paragraph 4.48.

⁹ European Commission, Support studies for the evaluation of the VBER, page 13.

¹⁰ European Commission, Support studies for the evaluation of the VBER, page 13.

disproportionately favours brands that seek to control the distribution and pricing of their products. This is increasingly evident in the expanded use of selective distribution, even where the nature of the product is neither technically complex nor a high end, luxury good.

50. Amazon fully agrees with the CMA's decision in *Ping*, which was upheld by the Competition Appeal Tribunal¹¹ and the Court of Appeal,¹² that a ban on selling on the internet may amount to a restriction of competition by object. As such, we are concerned that removing the equivalence principle as a hardcore restriction in any replacement to the retained VABER could undermine this principle and open the door to a growing number of similar abuses in the future. Legal certainty for businesses is already reduced when suppliers exploit the greater latitude offered by selective distribution and the opportunity for such exploitation would be increased by the CMA's proposed amends to the retained VABER.
51. When placing restrictions or bans on online sales, brands often argue that an online marketplace could harm the brand image of a given product. This argument is inherently flawed. Importantly, not all online sales channels or marketplaces are the same and many provide a high quality customer experience. Amazon invests tremendous resources to create a great shopping experience, and that is evidenced by the customer-centric support features which are available for our customers. For example, Amazon has a highly reliable and accessible store with at least 99.9% availability, no "pop-up windows", and very low latency. In addition, Amazon provides customer service for e-mail contacts, seven days a week, 24 hours a day, and for online channels like chat and phone, it provides customer services between the hours of 08:00 – 00:00. Amazon aims to respond to customer queries within less than 24 hours. Products are packed and shipped in a way to provide convenience to customers, usually within 24-48 hours after the customer has placed the order and with information about the estimated delivery time. In addition, Amazon encourages and facilitates authentic customer reviews, and ensures secure payment through its fully integrated payment system, protecting both customers and sellers. All of these features mean that Amazon is able to meet the vast majority of legitimate requirements in selective distribution systems. In this context, Amazon submits that the inclusion in paragraph 54 of the current Guidelines of Vertical Restraints of the statement that a supplier may require distributors to have one or more brick and mortar shops or showrooms is unnecessary and inappropriate. What is relevant is not whether a distributor has a physical store, but whether it is able to offer an equivalent customer service and experience to offline retailers who are authorised under the same selective distribution system. As such, the accompanying guidance to any replacement to the retained VABER should not include this example.
52. Amazon has significant concerns that, if the imposition of criteria for online sales that are not overall equivalent to the criteria imposed on brick-and-mortar shops in a selective distribution system was to be removed from the list of hardcore restrictions,

¹¹ *Ping Europe Limited v Competition and Markets Authority* [2018] CAT 13.

¹² *Ping Europe Limited v Competition and Markets Authority* [2020] EWCA Civ 13.

this would encourage suppliers to further misuse selective distribution systems to inhibit online sales to the ultimate detriment of consumers. Importantly, the block exemption is not a straitjacket that limits the commercial freedom of suppliers. It is a safe harbour that provides substantial latitude to suppliers. We note that retaining the equivalence principle would not prevent a supplier from imposing additional restrictions, whether in relation to online or offline sales; they are able to do so as long as their agreements withstand individual legal scrutiny against the criteria of section 9 of the Competition Act 1998. However, to apply a block exemption to such restrictions would tip the balance of regulation too far in favour of suppliers seeking to control distribution, and away from the interests of consumers, likely resulting in reduced access to goods and possible price increases.

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.

53. As set out in response to Question 24, neither dual pricing nor the equivalence principle should be removed as hardcore restrictions. Amazon does not consider that new guidance is required in this respect. Amazon's views in relation to guidance on the treatment of certain online sales as passive sales are set out in response to Questions 20 and 21 above.

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.

54. Please see the response to Question 20 above.

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

55. The treatment of online sales bans as a hardcore restriction has a significant positive impact on the welfare of consumers and on Amazon's business. The reasons for this are set out in response to Question 24 above.

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.

56. Please see the response to Question 24 above.

Parity obligations (or ‘most favoured nation’ clauses)

Policy questions

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 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.

57. Amazon does not have a view on this question.

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.

58. Amazon does not have a view on this question.

Impact questions

Question 31: To what extent are indirect sales channel parity obligations relevant for your business’s operations, or the operations of those you represent? Please explain your answer.

- a) Completely
- b) Very much
- c) Moderately
- d) A little
- e) Not at all

59. Amazon does not have a view on this question.

Question 32: To what extent are direct sales channel parity obligations relevant for your business’s operations, or the operations of those you represent? Please explain your answer.

- a) Completely
- b) Very much
- c) Moderately
- d) A little
- e) Not at all

60. Amazon does not have a view on this question.

Question 33: Are you aware of any difficulties to your business if indirect sales channel parity obligations are treated as hardcore restrictions for the purposes of the proposed UK VABEO? Please explain your answer.

61. Amazon does not have a view on this question.

Non-compete obligations

Policy questions

Question 34: The CMA invites views on the proposed recommendation 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)?**

62. Amazon does not have a view on this question.

Impact questions

Question 35: To what extent are non-compete obligations relevant to your business or industry, or the industry that you represent? Please explain your answer.

- a) Completely**
- b) Very much**
- c) Moderately**
- d) A little**
- e) Not at all**

63. Amazon does not have a view on this question.

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.

64. Amazon does not have a view on this question.

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.

65. Amazon does not have a view on this question.

Agency

Policy question

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

66. Amazon does not have a view on this question.

Environmental sustainability

Policy question

Question 39: The CMA invites views on the proposed recommendation in respect of environmental sustainability and stakeholders to make any submissions they consider would help the CMA to develop useful guidance on this topic.

67. Please see the response to Question 40 below.

Impact questions

The CMA proposes that the Secretary of State does not make any changes to the UK VABEO in respect of environmental sustainability issues, but the CMA would instead seek to provide guidance on this topic in any CMA VABEO Guidance.

Question 40: What are your views, if any, on whether the retained VABER and EU Vertical Guidelines contain or frustrate initiatives which might support the UK's Net Zero and environmental sustainability goals. Please include examples to support your views where possible.

68. A study of the economic and environmental impact of e-commerce published by Oliver Wyman in 2021 found that offline shopping results in between 1.5 and 2.9 times more greenhouse gas emissions than online shopping. While e-commerce needs delivery vans to circulate, these reduce car traffic by between four and nine times the amount they generate. Moreover, land use for e-commerce is lower than for physical retail, when logistics, selling space, and related parking space are included.¹³

69. As such, a shift towards greater online sales would clearly assist the UK in meeting its sustainability goals. It follows that any amendments to the retained VABER which could discourage online sales, or put online sellers at a disadvantage compared to offline sellers, could undermine the UK's sustainability efforts. As set out in more detail in response to Questions 20 and 24 above, amendments which could discourage online sales include the removal of the prohibitions on dual pricing and the equivalence principle as hardcore restrictions and amendments to the definition of passive sales as applied in an online context.

Question 41: Relative to the current regime, would any amendments relating to environmental sustainability (either in the UK VABEO or any CMA VABEO Guidance)

¹³ Oliver Wyman, 'Is E-Commerce Good for Europe?', available at: <https://www.oliverwyman.com/content/dam/oliver-wyman/v2/publications/2021/apr/is-ecommerce-good-for-europe-english.pdf>.

have a positive impact on your business's operations, or the operations of those you represent? Please provide examples and evidence where possible about how any such amendments would have a positive impact.

70. Amazon does not have a view on this question.

Question 42: Relative to the current position, would any amendments relating to environmental sustainability (either in the UK VABEO or any CMA VABEO Guidance) have a negative impact on your business's operations, or the operations of those you represent? Please provide examples and evidence where possible about how any such amendments would have a negative impact.

71. Amazon does not have a view on this question.

Duration

Policy question

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

72. Amazon does not have a view on this question.

Other provisions

Policy question

Question 44: The CMA invites views on the above proposed recommendations in respect of the other provisions in the UK VABEO.

73. Amazon does not have a view on this question.