

# BBC response to the CMA's consultation on the retained Vertical Agreements Block Exemption Regulation

## CMA's proposed recommendation

### *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~~

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

**We use the current VABER to give us legal certainty when considering arrangements with suppliers of goods and services to the BBC and when the BBC's commercial arm, BBC Studios, is involved in merchandising and DVD sales. We therefore welcome the CMA's proposed recommendation to the Secretary of State to make a new UK VABEO.**

**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~~

## 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?

**We agree that agreements with associations of undertakings should continue to benefit from the UK VABEO.**

**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.

**The turnover threshold of €50 million (or £44 million) should be increased in line with inflation since 2010 when the VABER came into force.**

### **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~~

**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~~

**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~~

### **Dual distribution**

#### **Policy questions**

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

**N/A**

**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.

**N/A**

**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**

**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**

**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.

**N/A**

**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~~

## Resale Price Maintenance

### *Policy questions*

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

**Yes.** Given the economic damage which RPM can cause, RPM should remain a hardcore restriction which does not benefit from the safe harbour provide by the VABER.

**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.

**No.**

**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.

**Yes.** The guidance should broadly adopt a similar approach to potential efficiencies as those set out in paragraph 182 of the European Commission's draft revised Guidelines on Vertical Restraints which were published for consultation on 9 July 2021.

### *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~~

**The BBC could be negatively impacted if RPM were no longer treated as a hardcore restriction. [X]**

**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.

**Not aware of any such difficulties.**

## 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.

**If certain territorial and customer restrictions are to continue to be treated as hardcore restrictions, then we agree that a continued distinction between active and passive sales is vital. We agree that the distinction between active and passive sales for certain types of online sales should be revisited. See further below.**

**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.

**We agree that the distinction between active and passive sales needs to be revisited in the light of market developments over the past decade or more. There should be a recognition that certain active sales techniques mean that particular forms of online sales should no longer be presumed to be passive sales. For example, if the online shop uses keyword bidding or social media marketing to bring customers to its website, then sales as a result of these techniques could be considered active sales. Moreover, providing language options which are tailored to customers outside of the territory to which the distributor has been allocated or using country website extensions which are outside of the allocated territory should also be considered active sales.**

### ***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.

**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~~

**We refer to and make use of this definition in our merchandising contracts. It assists in ensuring that distributors are willing and able to engage in the efficient distribution of our products.**

### **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?

**We have no objections to the CMA's proposed recommendations on dual pricing and on the equivalence principle.**

**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.

**Additional guidance would be helpful.**

#### ***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.

**As per our answer to question 21, we would prefer to see the definition of active and passive sales updated to reflect the active sales techniques which are standard for online shopfronts. In effect, the definition of passive online sales is too broad and should be narrowed.**

**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 use online sales bans and so cannot comment.**

**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.

**N/A**

## **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<sup>1</sup> can generate benefits/efficiencies beyond those that may be created by direct sales channel parity obligations<sup>2</sup> – if so, please provide evidence or examples in practice of circumstances where this may be the case.

**The BBC’s agreements do not generally contain parity obligations and so we do not comment further on this section.**

**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.

**N/A**

### ***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

---

<sup>1</sup> As defined in paragraph 4.63

<sup>2</sup> As defined in paragraph 4.63

e) Not at all

**N/A**

**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

**N/A**

**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.

**N/A**

## **Non-compete obligations**

### ***Policy questions***

**Question 34:** The CMA invites views on the proposed recommendation<sup>3</sup> 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)?

**We consider that non-compete obligations which are tacitly renewable should not be excluded restrictions under the UK VABEO. Where such obligations last longer than five years, they should be within the safe harbour of the VABEO provided that both parties (supplier and distributor) have a clear and unfettered option to terminate the agreement.**

### ***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.

---

<sup>3</sup> Paragraphs 5.10-5.16.



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

**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.

**This would increase legal certainty which will be helpful in a context where long-term supply agreements are sometimes required. [X]**

**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.

**[X] The BBC public service is subject to the procurement regulations which ensure that competition takes place for the award of contracts as required.**

## **Agency**

### ***Policy question***

**Question 38:** The CMA invites views on the proposed recommendation<sup>4</sup> in respect of agency issues and stakeholders to make any submissions they consider would help the CMA to develop useful guidance on this topic.

**N/A**

## **Environmental sustainability**

### ***Policy question***

**Question 39:** The CMA invites views on the proposed recommendation<sup>5</sup> in respect of environmental sustainability and stakeholders to make any submissions they consider would help the CMA to develop useful guidance on this topic.

**It is becoming increasingly common for supply and distribution contracts to include provisions on environmental sustainability and we would therefore welcome further guidance on this area. In addition, we observe that the issue is wider than environmental sustainability. For instance, many contracts make reference to ethical**

---

<sup>4</sup> Set out at paragraph 6.7.

<sup>5</sup> Set out at paragraphs 6.10-6.12.

trading policies and anti-fraud and corruption policies, which in turn reflect the requirements of legislation such as the Modern Slavery Act and the Bribery Act. We would welcome guidance which covers not just environmental sustainability but which includes these sorts of wider social issues too.

### ***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.

**Whilst the retained VABER and EU Vertical Guidelines do not as such frustrate environmental sustainability goals, it would be useful to have guidance on these sorts of issues given that they have not traditionally been considered at the forefront of competition law analysis.**

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

**Yes – guidance would assist on this topic as above and provide greater legal certainty on the legitimacy under competition law of environmental sustainability goals and other social goals.**

**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.

**Unlikely to have a negative impact.**

## **Duration**

### ***Policy question***

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

**We agree that the proposed six year duration for the UK VABEO is appropriate given that major changes are likely in supply and distribution practice over the next half-decade, and that a further revision of the UK VABEO will therefore likely be required.**

## **VABEO Obligation to provide information**

### ***Policy question***

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

**We agree with the proposed transitional period of one year. This is important given that there are substantive changes being made to the provisions of the retained VABER and guidelines in producing the UK VABEO and associated guidance. Moreover, we agree that if the CMA proposes to withdraw the benefit of the UK VABEO in respect of one or more individual agreements, then the CMA should in accordance with the principles of public law first give notice of the cancellation of the UK VABEO in respect of that agreement and allow the affected parties the right to make oral and written representations to the CMA.**

**22 July 2021**