

---

**UK COMPETITION AND MARKETS AUTHORITY REVIEW OF THE RETAINED  
VERTICAL BLOCK EXEMPTION REGULATION**

**RESPONSE TO PUBLIC CONSULTATION**

**BRANDS FOR EUROPE**

---

This response is submitted by Brands for Europe, a group of leading brands across numerous industry sectors. The member companies of Brands for Europe are Adidas, Apple, Bose, Canon, HP, the LEGO Group, Levi Strauss & Co., L'Oréal, Nestlé, Nike, Panasonic, Philips, P&G, Puig, Swatch Group, Unilever and Whirlpool. The group is represented by Baker McKenzie.

This response provides a cross-sectoral Brand owner view on the key issues raised by the UK Competition and Markets Authority (**CMA**) in the public consultation launched on 17 June 2021 (**Consultation**) as part of its review of the retained Vertical Agreements Block Exemption Regulation<sup>1</sup> (**retained VABER**), and, in due course, the accompanying guidance<sup>2</sup>.

This Response follows our contribution to the roundtable hosted by the CMA on 14 April 2021.

---

<sup>1</sup> The retained Vertical Agreements Block Exemption Regulation is one of the 'retained exemptions' created by a combination of the operation of the European Union (Withdrawal) Act 2018 and the Competition (Amendment etc.) (EU Exit) Regulations 2019 (as amended by the Competition (Amendment etc.) (EU Exit) Regulations 2020). See here: <https://www.legislation.gov.uk/eur/2010/330/contents>.

<sup>2</sup> As set out in the CMA's Guidance on the functions of the CMA after the end of the Transition Period (CMA 125) at paragraph 4.36, the Guidelines on Vertical Restraints. OJ C 130, 19.5.2010 constitute a relevant statement of the EC to which the CMA, concurrent regulators and UK courts must have regard after 31 December 2020, p. 1–46.

**TABLE OF CONTENTS**

<b><u>1. POLICY AND IMPACT QUESTIONS.....</u></b>	<b><u>3</u></b>
<b><u>2. DUAL DISTRIBUTION.....</u></b>	<b><u>4</u></b>
<b><u>3. HARDCORE RESTRICTIONS: RESALE PRICE MAINTENANCE.....</u></b>	<b><u>12</u></b>
<b><u>4. HARDCORE RESTRICTIONS: TERRITORIAL AND CUSTOMER RESTRICTIONS</u></b>	<b><u>20</u></b>
<b><u>5. INDIRECT MEASURES RESTRICTING ONLINE SALES.....</u></b>	<b><u>26</u></b>
<b><u>6. EXCLUDED RESTRICTIONS.....</u></b>	<b><u>33</u></b>
<b><u>7. CMA VABEO GUIDANCE: AGENCY .....</u></b>	<b><u>35</u></b>
<b><u>8. CMA VABEO GUIDANCE: ENVIRONMENTAL SUSTAINABILITY .....</u></b>	<b><u>38</u></b>
<b><u>9. DURATION.....</u></b>	<b><u>39</u></b>
<b><u>10. OTHER PROVISIONS .....</u></b>	<b><u>39</u></b>

## BRANDS FOR EUROPE

### 1. 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?***

1.1 Yes - Brands for Europe agrees with the CMA's proposed recommendations.

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

1.2 The retained VABER (and during the UK's membership of the EU, the VBER) provides for a broad safe harbour for vertical agreements. This brings an important degree of legal certainty, which in turn facilitates market performance. This framework is clear and comprehensible, and there is no reason why this should be left to lapse.

1.3 If the retained VABER were to be allowed to expire, the effects would be primarily negative for brand owners, the industries in which they operate, and ultimately for consumers. This is because the retained VABER block exempts agreements between suppliers and distributors for which it can be safely assumed they fulfil the exemption criteria of Section 9 of the Competition Act 1998 (CA98). This provides significant legal certainty in the markets as the absence of a block exemption (and accompanying guidelines) would bring significant uncertainty and would have the effect of "chilling competition". In particular, suppliers who would otherwise benefit from the safe harbour would not be willing to enter into pro-competitive vertical agreements due to uncertainties associated with the treatment of distribution agreements, including provisions that do not amount to hardcore restrictions of competition.

1.4 Similarly, we agree that simply renewing the retained VABER without any revisions is not appropriate. Since the VBER/retained VABER and EU Vertical Guidelines (VGL) were drafted, the retail landscape has changed beyond recognition and this trend will continue in the future, as brand owners and retailers continue to invest and innovate. The retained VABER and VGL should be updated to reflect these changes to the retail environment, and should offer the necessary flexibility to allow brand owners and retailers to continue to adapt to future changes and challenges, and to provide consumers with the seamless omni-channel experience which they expect.

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

***Significant positive impact***

***Moderate positive impact***

***Negligible impact***

***Moderate negative impact***

***Significant negative impact***

1.5 Brands for Europe is of the view that the proposed UK VABEO as outlined in the CMA's proposed recommendations will have a **significant positive impact** on consumers. In addition, as set out throughout this submission, we are of the view that the CMA's proposed recommendations will realise their full potential if the VGL are also updated (i.e., with the **CMA VABEO Guidance**) in line with the recommendations noted in the CMA's Consultation, and we look forward to providing our contribution to the upcoming CMA consultation on this updated guidance.

## BRANDS FOR EUROPE

### 2. Dual Distribution

#### *Policy questions*

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

- 2.1 Brands for Europe welcomes the CMA's recognition of the benefits of dual distribution in its Consultation on the retained VABER.
- 2.2 In particular, Brands for Europe agrees with the CMA's conclusions that businesses of all sizes and in all sectors commonly operate a dual distribution model with "*significant benefits to direct sellers, retailers and consumers (e.g. increased market penetration for direct sellers and retailers, increased choice for consumers, better adaptation to the market's needs, and innovation in distribution models)*".<sup>3</sup>
- 2.3 Brands for Europe believes that these benefits include:
- (a) **Product improvements/addressing consumer demand:** Dual distribution is a well-established means for brands to develop important direct touch points with consumers, which are complemented by the role of independent resellers. Brand owners work together with their wholesalers and retailers to continuously improve their product offering and customer experience, cooperating with resellers to shape the brand and reach consumers who may not otherwise be within the brand's reach. Dual distribution therefore provides a crucial direct touch point with consumers, allowing brands to learn more about, and from, consumers. It accelerates breakthroughs and enables brand owners to bring consumers more value, a better experience, and better service, at every touchpoint throughout the customer's purchase journey.
  - (b) **Improved choice/differentiation:** Dual distribution leads to greater choice for consumers. For example, the brand's own store may differ from those of independent resellers by offering niche products, or the ability to customise products. These are products/services which it might not be possible or profitable for resellers to stock/offer.
  - (c) **Enhanced services for consumers:** Brand owners/manufacturers consider distributors/retailers to be a vital complement to their brand building strategy, e.g., in relation to pre- and post-sales service, the speed of product delivery (in the event that stock is not readily available or the manufacturer does not have the logistics to ensure rapid delivery) and in authenticating a brand (including because they provide a multi brand setting).
- 2.4 Ultimately, the (legitimate) goal of and challenge for all brand owners and suppliers is to find the right balance between direct sales and sales through their distributors and retailers, which allows their products to be sold in a manner that best meets market demand to the benefit of the consumer, and to compete as strongly and effectively as they can against other products/brands. This is essential and universal, not only for brands, but for all suppliers of products and services.
- 2.5 A good example of the partnership between brand owners and internet resellers is the 'partner programme' operated by the e-commerce platform,<sup>4</sup> Zalando. Under this program, where a certain style, size or colour wave runs out on Zalando's site, the brand owner can 'open up' its warehouse in order to make the sale. This of course strengthens the appeal of the internet shopping platform and facilitates more intense competition with other brand owners that are also members of Zalando's partner program and thereby serves consumers better. Brands may

---

<sup>3</sup> Paragraph 3.16(a) of the CMA Consultation paper, available [here](#).

<sup>4</sup> <https://www.zalando.co.uk/men-home/>

## BRANDS FOR EUROPE

also enable customers to buy products via the brand website or app but then collect them in the store of the independent reseller.

- 2.6 Brands for Europe agrees with the CMA's conclusion that "[t]he insertion of an additional market share threshold is likely to add complexity and uncertainty for businesses and the benefits of doing so are unclear at this stage. Further, it is not clear what alternative market share threshold would be appropriate in limiting the application of the dual distribution exception."<sup>5</sup>
- 2.7 The introduction of an additional market share threshold will result in significant and wholly unnecessary additional costs for suppliers and create significant additional legal uncertainty. It would be wholly inappropriate to introduce an additional market share threshold, which is not grounded in any specific theory of harm, and which would not address any identified competition concern. This would be at odds with the very aim and spirit of the retained VABER which is to block exempt arrangements which, in the absence of certain defined restrictions, are clearly pro-competitive.
- 2.8 It is an established economic principle that distribution agreements are only capable of undermining competition in the absence of effective inter-brand competition, i.e. substantial market power on the part of the supplier. The retained VABER already excludes agreements entered into by suppliers with potential market power. If an additional market share threshold were introduced, this would lead to a plethora of wholly unnecessary complications, including the following:
- (a) A market share threshold based on the combined retail share of supplier and reseller would have the perverse effect of removing the benefit of the retained VABER from distribution networks established by even the smallest players and new entrants who sell to major retailers or platforms as well as making some sales direct.
  - (b) Selling through wholesalers or direct to other types of retailers does not fit well with the proposed introduction of an additional market share threshold to be calculated at retail level (which would only cover sales from retail to final customers).
  - (c) A new market share threshold will bring many practical challenges in that suppliers would be required to assess combined retail market shares (which might be national or local) for each product line for each retailer on a continuous basis.
- 2.9 It is also entirely unclear how dual distribution agreements that fall outside the retained VABER due to market share levels would have to be treated compared to exempted dual distribution agreements. For a supplier, it would be enormously complicated to manage a coherent distribution system where different resellers with different market shares for distribution of the same product, and / or the same reseller with different market shares for different product ranges of the same supplier, would need to be treated differently - simply due to the fact that the supplier has decided, for entirely legitimate commercial reasons, to engage in direct sales to customers.

***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.***

- 2.10 While dual distribution brings significant benefits for brand owners, their distribution partners and consumers, there is unnecessary confusion around whether and what type of information can be passed between the parties as part of a vertical agreement. This has unfortunately brought uncertainty for brand owners operating a distribution network while also selling directly to

---

<sup>5</sup> Paragraph 3.16(b) of the CMA Consultation paper, available [here](#).

## BRANDS FOR EUROPE

resellers or consumers. As such, Brands for Europe agrees that additional guidance on information exchange would be useful.

- 2.11 Guidance should clarify explicitly that, because dual distribution continues to be exempted in the UK VABEO, this means that a supplier is entirely free – also in dual distribution situations – to collect pricing, volume and other data related to the supplier's products from resellers – provided these data are not used to restrict the freedom of the reseller in a manner that would be considered hardcore under the UK VABEO. The supplier is then able to share that information freely within its own corporate group. No horizontal concerns whatsoever come into play in this context. Failure to have this information would further strengthen the position of digital platforms who already have this information (and would therefore be placed at a competitive advantage compared to brand owners). We expand on why this information flow is needed below.

***Guidance should cover information flows related to the supplier's products which enable the parties to plan future promotions for the supplier's products and enable the supplier to determine the right level of production***

- 2.12 A brand owner will often want to contact resellers with details of the promotions which the brand intends to run across a particular market in the future, and which it would like all resellers in that market to join. This may include a discussion about future recommended retail prices (RRPs) and/or the type of funding which the brand owner would be prepared to offer. Brand owners may also want to inform resellers about future promotions which they plan to run in their own direct to consumer business - which resellers may or may not want to replicate on an independent basis (with or without support from the brand).
- 2.13 Similarly, resellers need to be able to approach the brand owners at any point to seek funding for a promotion which they plan to run in the future in relation to supplier's brands. They will also need to give advance notice of the stock they will need, etc.
- 2.14 In some sectors, such as fashion and sporting goods, the collections and level of demand will change from season to season and yet consumers expect immediate delivery of their purchases. Brand owners will therefore need to have discussions with distributors about their likely future needs (by reference to current and future collections) so that the brand owners are able to decide on the correct volume to produce.
- 2.15 It would be impossible - or at the very least significantly more risky - for the brand owner to have these sorts of necessary discussions with retailers if the UK VABEO and CMA VABEO Guidance were to adopt a stricter approach to dual distribution.

***Guidance should cover the collection of sell-out information relating to the supplier's products***

- 2.16 Brand owners may wish to collect information (SKU, volume, sell-out price relating to the brand's own products, products out of stock online, online traffic information) from their resellers for a number of legitimate reasons:
- (a) **To understand consumer profile and trends:** Brand owners need to ensure that consumers can find the products they desire at the prices they expect. Distributors/retailers are differentiated as regards the consumer segments they target (and where they are located). Hence, suppliers/brand owners require information from distributors/retailers to get a more complete view of the market or else their view is limited to only those consumers that purchase products from their own downstream operations. Without detailed information on sales made by distributors/retailers, the supplier loses out on potential sales through those same retailers/distributors. This is because they cannot make well-informed decisions on the basis of actual consumer

## BRANDS FOR EUROPE

demand, for example, regarding overall production trends, assortments and prioritisation of delivery and inventory at different distributors/retailers. Collecting this data on consumer behaviour in relation to the supplier's brand promotes stronger interbrand competition by, among other things, allowing the manufacturer to better meet consumers' needs and better position its brand in the market, including to the benefit of franchisees of course.

- (b) **To assess whether a promotion/investment decision was successful:** Suppliers may collect sell-out information relating to their products in order to be able to assess the success or otherwise of promotions organised (and often financially supported) by those suppliers or to verify that supplier financial support has been passed on to consumers. This enables suppliers to know which products to invest in, and therefore how to allocate budget. The data will show whether a consumer is sensitive to price or some other factor. This information may be needed quickly in order to enable the supplier to react to evolving consumer demand/tastes and market conditions. Pricing information is important for some suppliers so they can check that the RRP is set at the right level.
- (c) **To manage inventory efficiently:** Collecting information is also necessary for suppliers to efficiently plan their production processes to meet consumer demand. This is particularly important for suppliers of products such as fashion and sporting goods, (with seasonal collections and demand where consumers expect immediate delivery). It is crucial that suppliers have up-to-date information about the demand for particular products because consumer preferences for those products can change very quickly. This information allows suppliers to quickly shift stock from retailers where demand is low to retailers where demand is high. Importantly, it also allows for more efficient supply chain management and assortment planning with retailers because production lead times can be between 12 and 18 months and products are ordered by retailers up to 12 months in advance. Therefore, it is crucial to understand consumer preferences because if consumer preferences change, suppliers can quickly adjust their production planning and assortment planning and avoid the risk of holding substantially high levels of unwanted inventory.

2.17 The paragraphs above explain why SKU, volume, sell-out price, products out of stock online and online traffic information enables the supplier to understand the wider market and react in way that benefits consumers to the greatest degree. The Guidance should make it clear that the supplier is able to use this information internally in any way (including to inform decisions on price-setting in its own direct to consumer channel; to set RRPs and to plan production). Similarly, the Guidance should clarify that brands may legitimately take into account the information gathered from their direct to consumer team in determining RRPs which they communicate to all distributors. Of course, the supplier must not use this information in a way that would be hardcore under the UK VABEO by limiting the retailer's freedom in relation to pricing, customer or territory.

2.18 Finally, the CMA VABEO Guidance should include a paragraph, which states explicitly that dual distribution agreements are assessed exclusively under the UK VABEO and CMA VABEO Guidance. For clarity, we recommend that when the CMA adopts horizontal guidelines to replace the current EU Horizontal Guidelines (**HGL**), the UK guidelines contain a mirroring provision (explaining that dual distribution agreements are to be assessed exclusively under the UK VABEO and CMA VABEO Guidance). The current version of the HGL already contains a provision to this effect (referring to the VBER and the VGL).<sup>6</sup>

### *Impact questions*

---

<sup>6</sup> See HGL, para 12, footnote 3.

## BRANDS FOR EUROPE

*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.*

*Completely*

*Very much*

*Moderately*

*A little*

*Not at all*

2.19 The dual distribution exception positively impacts brand owners **completely** by providing much needed legal certainty. This enables the brand owners to engage in a business strategy whose benefits extend to distribution partners and consumers in the ways and for the reasons described above in response to Question 9.

2.20 The exception also provides flexibility for brand owners which is critical as consumer behaviour and consumer expectations change constantly. Brands look to optimally serve consumers with the products and services they desire, making them available however (online and offline), wherever (through own retail and independent retail and through own or independent distributors) and whenever consumers want them (at speed).

2.21 Indeed, for most brands nowadays the lines are increasingly blurred, as brands seek to produce a seamless omni-channel and online-to-offline and offline-to-online brand and shopping experience, across offline and online channels in own and independent retail, in response to consumer demand. Indeed, the COVID-19 crisis has shown just how crucially important dual distribution, and the omni-channel approach, are in practice, for brands, retailers and consumers alike.<sup>7</sup>

2.22 For example, during the pandemic, retailers and franchisees asked for the support of brands to organise omni-channel capabilities such as Click & Collect or Call & Collect. Sales via the direct to consumer and e-commerce channels have increased for many brands as a result of the pandemic as brand owners adjust the balance between independent and own retail sales in response to changing market conditions.

*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.*

*Completely*

*Very much*

*Moderately*

*A little*

*Not at all*

---

<sup>7</sup> See in this regard McKinsey & Company, The State of Fashion 2021: In search of promise in perilous times <https://www.mckinsey.com/industries/retail/our-insights/state-of-fashion> where it is mentioned how brands need to adjust to the new reality: "Strategically, there will be an imperative in 2021 to manage commercial opportunities actively and to be acute in picking winning segments, markets, and channel combinations."



## BRANDS FOR EUROPE

2.23 The dual distribution exception provides the benefits described in response to Question 11 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.***

2.24 Brands for Europe would be very concerned at the suggestion of removing the exception for dual distribution. It would limit consumer choice and reduce legal certainty by creating even greater confusion over which aspects of dual distribution might need to be assessed under the UK equivalent of the HGL and which aspects would remain to be assessed under the CMA VABEO Guidance.

2.25 We do not think that any aspect of a dual distribution agreement should be treated as a horizontal arrangement. This would overlook the commercial and economic reality, which is that the supplier-buyer relationship is inherently complementary, and cannot be equated with a horizontal competitive relationship between manufacturers/suppliers of competing products.

2.26 Making dual distribution subject to the UK equivalent of the HGL would, amount to equating dual distribution with joint commercialisation (e.g., non-reciprocal distribution between competitors). This is entirely inappropriate since joint commercialisation normally involves cooperation between competitors on the distribution and sales of their substitute products, whereas dual distribution involves the distribution and sales by the supplier and retailer of one and the same product – the supplier's product. It is therefore not surprising that the theories of harm expressed in the HGL to be pertinent to those arrangements are ill-suited to dual distribution. For example price-fixing (paragraph 234 HGL) is already a hardcore restriction under the retained VABER and therefore not exempted by the application of Article 2(4) retained VABER. The restriction on market partitioning (paragraph 236 HGL) is clearly not designed to capture the exclusive distribution of a particular product.

2.27 If the exception for dual distribution were to be removed, this would, at best, introduce enormous uncertainty and, at worst, cause suppliers to operate dual distribution systems in a much less efficient and effective way, if not abandon them entirely. All to the detriment of consumer choice.

2.28 For example, some resellers may become reluctant to join distribution networks or may refuse to share information that is requested by the supplier for legitimate reasons for fear of it being seen as influencing the horizontal relationship downstream.

2.29 In addition, brand owners may be forced to take a very cautious approach in their dealings with wholesalers and retailers, whom they might suddenly have to treat as "direct competitors". That could include:

- (a) Avoiding price recommendations or discussions with resellers about future buy-in needs, or planned promotions and the availability of funding for resellers. Many brand owners would have to stop these every day and pro-consumer practices out of fear this would be seen as pricing discussions between direct competitors.
- (b) Not seeking information from distributors that is needed for wholly legitimate and pro-consumer purposes (such as sell-out information in relation to the brand's products which enables the brand to better match consumer needs and expectations).
- (c) Moving towards more vertical integration or a third party only model. If UK VABEO reforms push suppliers towards more and more direct sales, then there will inevitably be some customers (e.g., smaller customers or those located in certain regions) that the brand owner could not realistically service themselves. Conversely, a move towards a

## BRANDS FOR EUROPE

third party / indirect sales only model would mean a loss of features/aspects valued and driven by consumers.

2.30 Brands for Europe is aware that internal firewalls are sometimes proposed as a way to address problems perceived to arise as result of dual distribution. However, we do not agree with this view of firewalls as a pragmatic solution:

- (a) Smaller companies and business divisions would find it impossible in practice to set up firewalls in their organisations. They would be forced to employ more team members, which will often be cost prohibitive, and may cause them to end dual distribution entirely.
- (b) Even if companies could achieve the firewall separation, it would still be costly, complex and cumbersome, and it would eliminate all the efficiencies that allow the brand to make informed decisions about innovation, product development and sales strategies. For example, brand owners would no longer be able to undertake production/demand planning with the same degree of accuracy. This process involves matching supply and demand and, logically, is most accurate when the two channels (direct and third party reseller) are able to look at the combined data and then decide what quantity to produce looking at the forecasted demand of the channels together. Pricing information is also important for many brands since it will show how successful a particular item has been with consumers. The mix of discounts given, combined with knowledge of volumes sold, contextualizes the sales information and informs the production/inventory decisions going forward.
- (c) Firewalls would also hamper the ability of brand owners to manage the business holistically – e.g., it would no longer be possible to coordinate launches or promotions/related advertising seamlessly across all channels. Brand owners also fear that customers would become frustrated at the artificiality and inefficiency of having to deal with separate touch points within the company. It would be particularly damaging for companies that do not treat direct to consumer and wholesale as binary options since their customers may seek to combine elements of a product or service offering that would be divided by a firewall. For example, there are situations where a supplier sells directly to customers in some geographies but relies on partners to fulfil the deal in territories where it does not have sufficient capabilities or direct presence. Alternatively, a supplier may sell a solution but rely on partners to supply certain hardware or service elements. The same could be true on a partner led deal. In the evolving omni-channel and increasingly global landscape, businesses increasingly recognize the importance of addressing customers however they choose to buy across multiple routes to market and often need to offer blended solutions to meet customer needs.
- (d) Rather than develop a firewall, some brands may opt to launch certain brands or segments in one channel only. That would not be the brand's preferred commercial strategy but would be a distortion caused by the complications caused by firewall obligations. Ultimately, this would reduce competition and consumer satisfaction at the retail level.

***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.***

- Significant positive impact***
- Moderate positive impact***
- Negligible impact***

## BRANDS FOR EUROPE

*Moderate negative impact*

*Significant negative impact*

- 2.31 Brands for Europe considers that the dual distribution exception also applies to the situation where a supplier/manufacturer competes with its distributors at the wholesale level (i.e., the supplier and the distributor both sell to retailers)<sup>8</sup>. As regards suppliers who do not manufacture but are instead wholesalers (or importers), Brands for Europe does not see any reason to treat their dual distribution scenarios differently to those involving manufacturers. The benefits of dual distribution at the retail level apply equally when the dual distribution occurs upstream and the supplier is an importer or wholesaler.

---

<sup>8</sup> While paragraph 28 of the retained VGL appears to focus on the retail level ("potential impact on the competitive relationship between the manufacturer and retailer at the retail level"), it is clear that the retained VABER itself is worded more broadly, and logically also covers dual distribution where the supplier/manufacturer competes with its distributors at the wholesale level (i.e., the supplier and the distributor both sell to retailers).

## BRANDS FOR EUROPE

### 3. Hardcore restrictions: Resale price maintenance

#### *Policy questions*

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

- 3.1 Brands for Europe welcomes that the CMA is willing to consider RPM during the consultation on the proposed recommendations regarding the retained VABER. However, the debate on RPM should not be dogmatic but instead should be as pragmatic as possible given that industry, suppliers and retailers alike, need solutions that work in practice. Therefore, Brands for Europe regrets that the CMA's proposed recommendation is limited to the point of possible efficiency arguments that might justify an individual exemption of RPM in very limited circumstances. Brands for Europe is of the opinion that the debate around RPM should be broader and that there is need for clarification not only with respect to the circumstances in which the conditions of Section 9 CA98 are fulfilled, but also with respect to the situations in which the Chapter I prohibition of the Act does not apply in the first place and the overly strict interpretation of the buyer's ability to determine its sales prices under Article 4(a) of the retained VABER.
- 3.2 Brands for Europe invites the CMA to take into account the outcome of the EU competition rules on vertical agreements evaluation<sup>9</sup> (**Evaluation**) conducted by the European Commission (EC), including the CMA roundtables, as summarized in Annex D: Evidence Gathering, which demonstrated that the concerns of the stakeholders regarding RPM were far from limited to the possible cases in which Section 9 CA98 efficiencies would be acceptable.<sup>10</sup> The approach that the CMA should take concerning RPM should step away from the current rigid, black and white approach and evolve to a more nuanced approach that takes into account the market realities, the evolving retail landscape and the increased shift in market and bargaining power to retailers and recognises that competition and consumer welfare is not only about low prices but also about product diversity, product availability and customer services.
- 3.3 First of all, the CMA is invited to reconsider whether it is still justified to maintain the qualification for RPM as a hardcore restriction even if the RPM is implemented by parties which have a market share that is very low. Given that listing a conduct as a hardcore restriction, in all but words, comes down to qualifying such conduct as a restriction of competition *by object*, the CMA is invited to take into account the recent case law at EU level in *Budapest Bank*<sup>11</sup>, *Generics*<sup>12</sup> and *Cartes Bancaires*<sup>13</sup> that provides that only those agreements where evidential practice shows that they undoubtedly and in any event have a negative impact on competition, can be qualified as *by object* restrictions. In light of the economic theory, and the results of the evaluation study on RPM in the book sector conducted at the request of the EC, it is clear that such clear evidential practice of undoubtedly negative impact on competition is lacking in case of RPM. This finding would be all the more true in case both supplier and retailer have only a limited market share and thus would be subject to fierce interbrand competition. As explained in further detail in Annex 1 to our submission in the Evaluation, the theories of harm put forward by the EC in the VGL relating to RPM, are highly unlikely to materialise in case of sufficient inter-brand competition. Therefore, in such situation negative effects on competition which cause consumer harm can be excluded.
- 3.4 Secondly, and while not being the subject of the current CMA Consultation, with regard to the changed market realities and in particular the competitive structure of the distribution market,

---

<sup>9</sup> Available here: [EU competition rules on vertical agreements – evaluation \(europa.eu\)](https://european-council.europa.eu/media/en/press-communications/infographic/infographic_eu_competition_rules_on_vertical_agreements_evaluation.pdf)

<sup>10</sup> Annex D: Evidence Gathering, para. 29-33.

<sup>11</sup> Judgment of 2 April 2020, *Gazdasági Versenyhivatal v Budapest Bank Nyrt., and others*, C-228/18, EU:C:2020:265.

<sup>12</sup> Judgment of 30 January 2020, *Generics (UK) Ltd, and others v Competition and Markets Authority*, C-307/18, EU:C:2020:52.

<sup>13</sup> Judgment of 11 September 2014, *Groupement des cartes bancaires v European Commission*, C-67/13, EU:C:2014:2204.

## BRANDS FOR EUROPE

the CMA should reflect in the coming CMA VABEO Guidance that manufacturers do not operate in isolation but are just one actor in the entire supply chain. Currently, the VGL are almost entirely focused on (limiting) the behaviour of suppliers/manufacturers departing from the archaic view that brand owners are the stronger party in the supplier-distributor relationship. However, market trends since 2010 have seen an increased concentration at distribution level with the rise of stronger retailers and retail networks/alliances as well as the emergence of e-commerce mastodons. These phenomena are just one of the indications showing a clear shift of power away from brand owners to retailers. The CMA VABEO Guidance should thus reflect this change and have a more balanced approach to the supplier/retailer relationship and take into account the interests of both sides.

- 3.5 In that regard, it is wrong to assume that retailers act in the (only) interest of consumers. Retailers, as every economic actor, are driven first and foremost by profit maximisation. Often times however, the retailers business model relies heavily on supplier funding and margin compensation, whereby short-term price effects leading to the lowest price do not lead to any long term benefits for consumers and businesses. The focus on low price only, leads to decreased room for retailers to invest in customer services and a more limited possibility for brand owners to invest in product innovation and differentiation. This results in the long run to fewer products being developed which are in turn sold in fewer shops and with no or limited customer services being offered.
- 3.6 The CMA VABEO Guidance (and the CMA enforcement practice) should acknowledge the shift in power from brand owners/suppliers to big retailers/e-tailers and platforms that often place strong pressure on suppliers to seek price/margin protection against competition from other retailers. The CMA VABEO Guidance should recognise that retailers' threats of de-listing brands in instances where their prices are undercut by other retailers may also amount to RPM. The same holds true for the constant pressure which is exercised by retailers through e.g., demands for margin or price protection, requests for (contractual) guarantees for a fixed margin independent of the resale price applied by retailers, issuing invoices to suppliers for margin compensation. The regulatory framework - and the enforcement practice of the CMA - should reflect this market reality, and hold the instigators of problematic behaviour accountable. Cases in the past in Belgium<sup>14</sup> and recently in Portugal<sup>15</sup> and the UK<sup>16</sup> show that often retailers are the driving force behind RPM. A good start would be to clearly state in the CMA VABEO Guidance that the CMA will impose sanctions on retailers/distributors as well when they find RPM is present and not only in cases where there is an underlying horizontal agreement between retailers (hub-and-spoke scenario).
- 3.7 Thirdly, the current suspicion in the VGL (and in the current enforcement practice of some national competition authorities (NCAs)) against RRPp and price monitoring in particular, is unjustified and unnecessarily strict. Article 4(a) retained VABER has a balanced approach in distinguishing between the unlawful agreement to "restrict the buyer's ability to determine its sale price" on the one hand and the lawful unilateral conduct of providing recommended prices on the other. It is important to recognise this and ensure the enforcement is also balanced in that respect.
- 3.8 It is a brand owner's goal to ensure that its retailers are successful. As such, RRPp are established by the suppliers following extensive cross-market research on the whole product assortment for the benefit of retailers and consumers. It is often essential for brand owners to communicate to retailers about their resale price recommendations, and to explain the underlying reasons for

---

<sup>14</sup> Décision n° ABC-2015-I/O-19-AUD du 22 juin 2015 *Affaire CONC-I/O-06/0038 – Hausses coordonnées des prix de vente de produits de parfumerie, d'hygiène et de droguerie*, <https://www.mededinging.be/sites/default/files/content/download/files/2015IO19- AUD.pdf>.

<sup>15</sup> [http://www.concorrenca.pt/vEN/News\\_Events/Comunicados/Pages/PressRelease\\_202022.aspx?lst=1&Cat=2020](http://www.concorrenca.pt/vEN/News_Events/Comunicados/Pages/PressRelease_202022.aspx?lst=1&Cat=2020) and [http://www.concorrenca.pt/vEN/News\\_Events/Comunicados/Pages/PressRelease\\_212020.aspx?lst=1&Cat=2020](http://www.concorrenca.pt/vEN/News_Events/Comunicados/Pages/PressRelease_212020.aspx?lst=1&Cat=2020).

<sup>16</sup> CMA decision, 17 July 2020, Resale price maintenance in the digital piano and digital keyboard, and guitar sectors.

## BRANDS FOR EUROPE

these recommendations (as further discussed below). It is also important for brand owners to understand why retailers have not followed the recommendation, particularly if retailers are reacting to market forces of which brand owners are not aware and which in turn would help brand owners to innovate and invest further to adjust to market conditions in a manner that is efficiency enhancing and ultimately benefits consumers. In addition, prices for retailers are in the large majority of cases negotiated with the RRP in mind and the (expected) margins that the retailer can earn. Actual market performance is then obviously part of the discussion for the next sale season or year, without any intention or desire to engage in RPM. Therefore, the CMA is invited to remove in the coming CMA VABEO Guidance the language in Recitals 48 and 226-229 of the current VGL, suggesting that RRP can act as a focal point and thus can be used as (indirect) means to arrive at RPM. The UK VABEO and CMA VABEO Guidance should make clear that RPM is limited to those cases in which there is an agreement or concerted practice between supplier and retailer to fix prices, and that RRP, price monitoring and price discussions without pressure to stick to a price are in themselves always insufficient to constitute RPM, as they don't restrict the buyer's ability to determine its sale price, but are merely a unilateral conduct of the supplier.

- 3.9 Similarly, brand owners have to be able to collect data from retailers about their resale prices. Resale data helps inform brand owners' future strategy, production, development, marketing strategies etc. Resale price data allows the brand owners to better position their products in the market and can help the brand owners to take a view on the RRP. Conversations with retailers about these data points as such should not be treated as interference with the commercial policy of the retailers which is indicative of RPM, as their main purpose is to generate efficiencies in terms of optimal distribution of products across online and offline channels, ensuring availability of products throughout markets and offering the products the consumer wants at a fair price.
- 3.10 All of this makes it extremely important for brand owners to understand how the market responds to these price recommendations, to understand the actual resale prices that are applied for their products in the market, and to seek information from resellers on actual resale prices. These communications with retailers, and the fact that brand owners seek to obtain resale price information from retailers should not be interpreted as an attempt to limit reseller's liberty to define their own commercial policy and price. In fact, they strongly improve inter-brand competition on the merits.
- 3.11 In addition, a distinction should be made, even in situations of market power, between RPM, RRP and maximum resale prices. Brand owners are of the view that RRP and maximum resale prices, in absence of any pressure exercised to fix the price, would, even in situations of market power, not amount to resale price maintenance and cannot be a breach of the Chapter I prohibition. Therefore, the reference that RRP and maximum resale prices could, even without any pressure to adopt a fixed price, act as a focal point and thus be considered as fixed resale prices or RPM should be removed from the CMA VABEO Guidance.

***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.***

- 3.12 RPM, as other competition authorities have accepted in the past, might be an appropriate tool to address free-riding concerns which do not only arise in case of new product launches and short term promotions.<sup>17</sup> The CMA VABEO Guidance should therefore set out the criteria

---

<sup>17</sup> See for a detailed consideration of the Tooltechnic case where the Australian Competition and Consumer Commission (ACCC) granted conditional authorisation to Tooltechnic to engage in minimum resale price maintenance in marketing its premium Festool brand of power tools, Brands for Europe's Response to the public consultation.

## BRANDS FOR EUROPE

under which RPM implemented to combat free-riding will benefit from the Section 9 CA98 exemption.

- 3.13 It is widely recognised that RPM can generate substantial efficiencies.<sup>18</sup> Indeed, these efficiencies are recognised in the VGL, for example in Recital 225 VGL which discusses the potential for RPM to allow distributors to engage in an optimal level of promotional effort. In the same paragraph, the VGL acknowledge that RPM can serve as an effective tool to allow retailers to provide an optimal level of customer services at the point of sale, by reducing free-riding from retailers who do not provide such services and who would otherwise undercut high service retailers.
- 3.14 Given the clear rise of low-service retailers (both on and off-line), there is an increased risk that retailers, which do invest in qualitative pre- and post-sale services, are pushed out of the market due to a number of retailers which solely focus on price. Additionally, due to the increased price transparency and algorithmic pricing/price matching, the price cut of one (online) retailer can have a devastating effect on the value generated by a product for all retailers and the brand owner. This acts as a clear disincentive for retailers to invest in promotion of the product, as well as customer experience and services. This in turn limits the possibility of brand owners to invest in product innovation and the ability to bring new products to the market. In addition, such focus on pricing at the expense of customer experience and service can lead to increased instances of misleading or fraudulent sales as well as counterfeits, which have a very detrimental effect on customers, responsible retailers and brand owners alike. These issues do not only arise when a new product is launched but can exist over the lifetime of a product.
- 3.15 Two particular examples, other than those already set out in the VGL (short term promotion and new production introduction), where RPM (or to a lesser extent Minimum Advertising Pricing (MAP)-policy) might generate efficiencies are the case of "replenishment" sales and in combatting the conduct of "loss leaders".
- 3.16 The "replenishment" situation occurs where a consumer will have seen, experienced and been advised on the product at a high-service bricks and mortar/online specialised store but subsequently turns to (online) stores where no services are provided at all to buy a "replenishment" (often with using a "subscribe to save" scheme to obtain further discounts and thus further enhancing the "locked" in effect). Suppliers and specialised retailers make substantial investments in providing an optimal shopping experience to convince customers to buy a brand owner's product for the first time. Once the customer has felt, used and experienced the product after the first buy, the customer then turns to low service, low cost (online) retailers to make subsequent purchases of the same product ( e.g., para-pharmaceutical products, dietary food products, cosmetics, etc.), product family ( e.g., game extensions, accessories for consumer electronics, etc.), or product replacement ( e.g., sports shoes). This is a clear example of the low cost, low service retailer free-riding on substantial investments made by both supplier and retailer in convincing customers to make that initial sale. RPM (or MAP-policy to avoid the most visual aspects of the low price offers) would provide an appropriate solution to support the high service retailers in continuing to invest in offering these crucial services to the benefit of consumers.
- 3.17 The loss leader conduct occurs where a low service, low price retailer chooses a product category champion to offer for a short period of time a very low price (sometimes below purchase price) – only aiming to attract consumers in the store and sell them many other products at full price. The effects of this type of conduct are detrimental not only for the brands' product image and the possibility of competing retailers to make a decent margin, effects which

---

<sup>18</sup> Bishop, S and Walker, M (2010) *The Economics of EC Competition Law: Concepts, Application and Measurement*, 2<sup>nd</sup> Edition, page 202 – 204 and Goyder J (2008) "Is Nothing Sacred? Resale Price Maintenance and the EU Policy Review on Vertical Restraints" in Kronkurrensverket (ed.) *The Pros and Cons of Vertical Restraints*, page 167 – 193.

## BRANDS FOR EUROPE

are exacerbated due to the clear rise of e-commerce and online price monitoring tools, but also for the consumer in the short term and long term. In the short term such conduct may lead to competing retailers no longer offering the particular product for sale for as long as the loss leader promotion runs, as commercially not interesting, thus limiting the availability of the particular product during that short period of time and possibly also in the longer run as it is hard to re-list a particular product at certain retailers. In the long term this might lead to a decreased willingness of retailers to sell a particular range of products or to stock new products. This in turn has an impact on the incentive and possibility of brand owners to invest in product innovation and diversification. In the end this leads to fewer products being released on the market which in turn are sold by less shops which will offer less services to customers. Again RPM or fixed minimum prices (or MAP-policy) would be an appropriate means to address the negative consequences of the "loss leader" conduct with expected efficiencies in terms of wider product availability and more product innovation.

- 3.18 In case the CMA would not be willing to accept to exempt RPM in cases of "replenishment" sales or to combat loss leader conduct, the CMA is invited to allow at least the implementation of a MAP-policy in line with the current proposal of the EC in the draft new VGL.<sup>19</sup> As in a MAP-policy the retailers are only restricted to advertise prices below a certain level, retailers are not prevented from selling below a certain price. Similarly to arguments in favour of allowing for the communication of recommended resale prices, MAP is equally justified for the benefit of retailers and customers in helping retailers to understand how to best position a product for optimal customer experience. In addition, allowing a MAP-policy would take away some of the most visible (online) price promotions thus limiting the detrimental impact of (algorithmic) price adjustments as explained above.

***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.***

- 3.19 Brands for Europe welcomes the opportunity provided by the CMA to elaborate on the additional guidance which should be contained in the CMA VABEO Guidance on instances where RPM is likely to lead to sufficient efficiencies to qualify for a Section 9 CA98 exemption.
- 3.20 Firstly, agreements on resale prices in the limited situations relating to new product launches and short term promotions should be block exempted, and not merely covered by a clarification in the CMA VABEO Guidance, given the significant consumer benefits of RPM in expanding demand and promoting a product for a short time period. Particularly in case of the launch of a new product, the current absence of a block exemption for RPM leads to a situation where brand owners refrain from setting a fixed retail price, thereby negatively impacting the willingness of retailers to make investments in the marketing/promotion and customer services needed to make market entry a success. This, in turn, has a negative effect on the willingness of brand owners to invest in product innovation and launch in the first place. Aside from an inefficiently low level of customer services, this leads to long-term consumer harm by delaying or even preventing the entry of new products on the market thereby slowing product innovation, as well as acting as a disincentive for retailers to make investments for entering a new market (segment) thus hampering wider market penetration.
- 3.21 Secondly, given the length in time it takes for a new product to successfully enter an already competitive market, the time period for which the block exemption should apply should be no less than 6 months.
- 3.22 Third, the theories of harm articulated in the current VGL in respect of RPM (as discussed in more in detail in Annex 1 to our submission in the Evaluation) are highly unlikely to be realistic

---

<sup>19</sup> See para. 174 of the draft Guidelines on vertical restraints, 9 July 2021, available here: [https://ec.europa.eu/competition-policy/system/files/2021-07/draft\\_vertical-guidelines\\_en.pdf](https://ec.europa.eu/competition-policy/system/files/2021-07/draft_vertical-guidelines_en.pdf)



## BRANDS FOR EUROPE

in the context of an RPM agreement of limited duration. For example, since all parties are aware that the agreement will come to an end after a short period, this severely restricts the expected profits from collusion. With market shares not exceeding the current VBER thresholds, an RPM agreement of fixed and limited duration is therefore even more unlikely to give rise to collusive outcomes than an indefinite RPM agreement.<sup>20</sup>

- 3.23 For these reasons, the UK VABEO should cover agreements on resale price in case of new product launches for a period of 6 months, and in case of short term price promotions for a period of 6 weeks. In both cases, the CMA VABEO Guidance should clarify that RPM agreements for product launches and short term promotions may exceed the period of respectively 6 months and 6 weeks provided such longer period is justified (e.g., to recoup investments).
- 3.24 In the alternative, and at a minimum, the CMA VABEO Guidance should clarify:
- (a) **Fixed resale prices for product launches (Recital 225 of the current VGL):** given the obvious consumer benefits (introduction of new products on the market), the CMA should clarify that this is likely to meet the requirements of Section 9 CA98, and clarify what it will accept at least as an "introductory period" of 6 months. Footnote 59 of the current VGL, stating that this exception is only available where "it is not practical for a supplier to impose by contract effective promotion requirements" should be removed, because RPM has clear efficiency benefits over contractual requirements, which are extremely difficult to specify for each individual retailer, and very costly to monitor and enforce.<sup>21</sup> It should be made clear that fixed resale prices for product launches are possible in any distribution system, including in case of selective and exclusive distribution networks, as well as for franchising. Due to the increased importance of omni-channel retailers and online retailers and the related difficulty to impose under a selective distribution system qualitative criteria guaranteeing that online retailers invest significantly in effective promotion<sup>22</sup> and offering of customer services supporting new product launches, fixed resale prices for product launches have become all the more relevant. In addition, the CMA VABEO Guidance should clearly indicate which criteria it will consider as being relevant to determine whether a product qualifies as a new product. In particular, any product which introduces substantial additional features to an existing product (renovated existing products/categories) or requires significant investments in terms of research and development or promotion/marketing should be considered as a new product.
  - (b) **Fixed resale prices for short term low price campaigns (Recital 225 of the current VGL):** more flexibility is necessary here. There is no reason to limit this exemption to franchising/similar distribution systems only, given the obvious consumer benefits (low prices). In addition, the CMA VABEO Guidance should not limit the short term promotion period to a maximum of 6 weeks but should allow for more flexibility and longer term promotions, in particular when such campaigns are linked to considerable

---

<sup>20</sup> This can be seen by considering the incentives of retailers to coordinate downstream. Each retailer weighs up the potential benefits of coordination (earning higher profits over the long term, provided none of the retailers engage in fierce competition) against the potential benefits of competing fiercely (earning higher profits in the short term by winning market share from rivals). An RPM agreement of a limited duration (such as six months) substantially reduces any confidence a retailer could have that its rivals will maintain the coordinated outcome over the long term. This, in turn, makes the short term gains of engaging in fierce competition (offering better complementary customer services, promotional effort, etc.) relatively more attractive.

<sup>21</sup> See e.g., ACCC Determination, Tooltechnic Systems (Australia) Pty Ltd, authorisation number A91433, 5 December 2014, where the ACCC examined contractual requirements and found RPM to be the more effective solution.

<sup>22</sup> While online retailers are a good means to promote products, they are inclined to direct their promotional activities at those products that generate the most traffic and sales, which will hardly ever be products which are just launched on the market and are unknown to the large public.

## BRANDS FOR EUROPE

investments for the preparation and launch of the promotional campaigns.

### *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.***

***Significant positive impact***

***Moderate positive impact***

***Negligible impact***

***Moderate negative impact***

***Significant negative impact***

- 3.25 As explained above in response to Questions 16 and 17, removing RPM from the list of hardcore restrictions of the UK VABEO and thus block exempting RPM would be justified as it creates efficiencies that outweigh any possible limited negative effects on competition. Removal of RPM from the list of hardcore restrictions would create significant benefits for brand owners and competition. It would allow brand owners to more easily launch new products which in turn would provide further incentives to invest in more new and diversified products increasing inter brand competition. In addition, it is likely to increase the incentives of distributors to invest in the promotion of the products and the provision of pre-and after sales-services. Moreover, it has a positive impact on the willingness of distributors to list a broader range of products, not limited to only the best sellers, which contributes to a broader range of products which are moreover available in more shops (including smaller brick & mortar shops). All of these benefits for brand owners lead to increased inter brand competition and enhanced consumer welfare in broader product availability and more pre- and after sales services. Finally, next to these positive benefits for competition, the removal of RPM from the list of hardcore restrictions would lead to significant cost savings in terms of compliance and increased legal certainty for all actors in the distribution chain.
- 3.26 Other options, such as maintaining the current rules or providing further concrete guidance on the cases in which the CMA would likely accept an efficiencies argument on the basis of Section 9 CA98 to provide for an individual exemption of RPM, would result in suboptimal results in terms of impact on competition, consumer welfare, cost savings and legal certainty.
- 3.27 Maintaining the current rules as is without any further clarification is not an option. As recognised by stakeholders the current rules on RPM provide insufficient clarity and legal certainty leading to a disparate application of the rules throughout the EU. The lack of clarity and legal certainty lead to increased costs for the companies to ensure compliance and thus minimise the possibility to invest in promoting the sales of the brand owner's products and decrease investments in customer services. This decreased possibility to invest in turn has negative effects on competition in the market.
- 3.28 The current exclusion from the prohibition in certain circumstances of short term promotions and new product launches is insufficient. Brand owners and distributors find it very difficult to rely on this exception, particularly in European wide distribution networks. It requires a lot of resources and bureaucracy to be introduced in order to make it effective, which in turns renders the system inefficient.
- 3.29 Broadening the cases in which the CMA would be willing to accept an individual exemption of RPM on the basis of Section 9 CA98, while being a better option than maintaining the current

## BRANDS FOR EUROPE

rules as is, is still a less effective and appropriate solution compared to a clear block exemption of RPM. As we know from experience with the limited instances in which the EC (and the CMA) could accept RPM under the current VGL, many companies refrain from making use of these limited exceptions because of the inconsistent interpretation by national courts and NCAs of these exceptions and the high risk attached to being found not to fall precisely within the circumstances justifying these exceptions. Therefore, it is likely that a mere broadening of the cases in which the CMA might be willing to accept an efficiency argument to exempt RPM, will not be used by businesses in practice.

***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.***

3.30 As set out above in Question 18, brand owners are very reluctant to implement RPM even in cases where the current VGL accept that efficiencies, outweighing any potential negative effect on competition, are present due to the fact that RPM qualifies as a hardcore restriction and the current exceptions listed in the VGL do not provide sufficient legal certainty. As explained in the response to Question 16, 17 and 18 this leads to difficulties for brand owners to successfully launch new products, increase penetration rate of products or prevent free-riding from low service/low price distributors, with detrimental consequences for competition in the long term.

## BRANDS FOR EUROPE

### 4. Hardcore restrictions: 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:**

- (e) *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;*
- (f) *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.*

4.2 We welcome the CMA's initiative to update the retained VABER to reflect the changes to the retail environment, to offer the necessary flexibility to allow brand owners and retailers to continue to adapt to future changes and challenges, and to provide consumers with the seamless omni-channel experience which they expect. Since the VBER was drafted the retail landscape has changed beyond recognition and this trend will continue in the future, as brand owners and retailers continue to invest and innovate. Brand owners need the flexibility to design and adapt their distribution systems according to business and consumer needs that arise in light of these changes, whether this is in respect of (i) the rise of omni-channel distribution and the growth of online retail; (ii) consumer demands for differentiated and experience-driven retail, or, (iii) more recently, the long-lasting impact on consumer purchasing habits in light of the COVID-19 crisis.

4.3 However, the CMA's reasons for retaining the current approach on active/passive resale restrictions for the purposes of the UK VABEO are not compelling. In particular:

- (a) Treating territorial and customer restrictions as hardcore restrictions was driven by the EU single market imperative, which does not apply to the UK internal market. There has been no suggestion made that the UK does not have a well-functioning internal market, and the CMA has not produced any evidence that the Northern Ireland Protocol is likely to lead to market partitioning within the UK.
- (b) The increase in consumer choice in the absence territorial/customer restrictions needs to be balanced against many other efficiencies that such restrictions may trigger - e.g., increase investment in customer service, innovation etc. We also refer in this context to jurisdictions outside of Europe where territorial/customer restrictions are not generally treated as a "by object"/hardcore restriction of competition – e.g., US, Canada and Australia.

## BRANDS FOR EUROPE

- (c) The availability of exceptions to territorial/customer restrictions makes the overall framework unnecessarily complex, creates confusion and uncertainty which in turn leads to higher costs.

### *Exclusive distribution*

- 4.4 The exception provided for in respect of active sales restrictions where an exclusive distribution system is operated provides sufficient certainty overall. However, we encourage the CMA to further update and clarify the retained VABER and VGL, as follows:
- (a) The reference in Article 4(b)(i) to “*where such a restriction does not limit sales by the customers of the buyer*” leads to unnecessary complexity in a multi-tier exclusive distribution system. The supplier should be allowed to require pass-on of active sales restrictions down the distribution chain - in support of this, we refer to the Expert Report published in the context of the EC's Impact Assessment<sup>23</sup>.
  - (b) Active sales restrictions should remain valid where a territory has been reserved to the supplier or to another distributor even where the supplier or the distributor does not actually make actual sales in that territory (e.g., because the product has not been launched yet) nor has existing plans to do so (but might do in the future).
  - (c) We welcome the CMA's initiative to provide more flexibility to brand owners to allow for "shared exclusivity", i.e., the appointment of two or more distributors for a given exclusive territory/customer group (in the same way as the supplier is able under the existing VBER framework to sell alongside the exclusive distributor). Particularly where the distribution of a product requires significant investment, there is no reason why a brand-owner should not be permitted to appoint two or more distributors for a given territory or customer group.

### *Selective distribution*

- 4.5 We endorse the CMA's proposal to ensure a more effective protection of selective distribution systems. Selective distribution remains a very important tool for many brand owners, to protect their brand image, ensure similar levels of quality and customer service across a retail network, and to avoid free-riding by low service or no service distributors. Also, selective distribution remains as relevant and important as ever for consumers who demand a seamless omni-channel O2O brand and shopping experience across all channels. Selective distribution helps manufacturers incentivise retailers to invest in those seamless shopping experiences and reduces the risk of free-riding on the investments made by retailers and brand owners. This increased retail quality benefits the consumers, brand owners and retailers alike, by preserving the quality of their products, ensuring their optimal use, preventing counterfeiting and enhancing their brand image.
- 4.6 In this context, we encourage the CMA to explicitly state in the definition in the VABEO and/or the CMA VABEO Guidance that the selective distribution criteria (whether qualitative or quantitative in nature) do not need to be published by manufacturers and that manufacturers are under no obligation to provide the criteria to customers interested in entering the selective distribution system. This is consistent with CJEU case law pre-Brexit<sup>24</sup> and would provide additional legal certainty, allowing brand owners to protect their criteria (which in many cases is considered a business secret) from public disclosure.

---

<sup>23</sup> Expert report on the review of the Vertical Block Exemption Regulation, authored by Frank Wijckmans and Sarah Jaques, available [here](#).

<sup>24</sup> Judgement of CJEU of 14 June 2012 in Case C-158/11 Auto 24 v Jaguar Land Rover France

## BRANDS FOR EUROPE

- 4.7 We agree with the CMA that the VABEO and the CMA VABEO Guidance should permit the combination of exclusive and selective distribution in the same or different territories.
- (a) Combining exclusive and selective distribution in the same territory but at different levels of the distribution chain has significant limitations if a supplier is to currently remain within the retained VABER framework. Whilst a supplier could adopt this approach and technically be compliant with the retained VABER, brand owners have no power to stop free-riding under the current framework and thus choose not to do so - for instance, due to the fact that under the retained VABER appointed wholesalers cannot be protected from active sale by other distributors. Active sales restrictions in the specific circumstances set out in Recital 63 VGL (i.e., where appointed wholesalers located in different territories are obliged to invest in promotional activities in 'their' territories) should be block exempted. A brand owner should be given the flexibility to operate an exclusive distribution network at the wholesale level, and a selective distribution system at the retail level.
  - (b) The VGL currently takes an unnecessarily strict approach to the combination of selective distribution and exclusive distribution in different territories. Brand owners should be free to operate different distribution systems in different territories effectively, for example because of differences in consumer preferences, market structures or available infrastructures. It should be permissible to require distributors and retailers in non-selective distribution countries, to sell only to end users or authorised resellers in territories where a selective distribution system is operated, in the same way as it is possible to require authorised resellers in selective distribution countries not to sell actively in territories where exclusive distribution is operated. Distributors in territories where a selective distribution system is operated would have incurred significant investments and there is no reason not to protect those investments from free riders.

### *Territorial/customer restrictions in the context of Brexit*

- 4.8 The CMA notes in its Brexit Guidance<sup>25</sup> (**Brexit Guidance**) that geographic scope is relevant to the concept of the restriction of "passive sales". As an example, the Brexit Guidance refers to exclusive distribution networks, noting that passive sales bans affecting sales to the UK market or UK customers are capable of falling within the scope of the Chapter I prohibition, and may be treated as hardcore restrictions of competition. This example creates uncertainty for businesses where they seek to manage their distribution network "with EU Exit and the amendments made by the Competition SI in mind".
- 4.9 We refer in this context to new section 60A CA98 which states that the CMA and the UK Courts are bound by an obligation to ensure consistency with EU competition case law that pre-dates Brexit. This principle ought to apply to EU case law on imports/re-imports, and in particular, the *Javico* case which notes that vertical agreements concerning exports or imports/re-imports cannot be regarded as having the object of appreciably restricting competition (in that case within the EU)<sup>26</sup>. Applying this judgement by analogy to the UK in line with section 60A CA98, a restriction on sales from outside the UK into the UK cannot be treated as a "by object" restriction of competition within the UK<sup>27</sup>.
- 4.10 In addition, removing the ability for brands to restrict sales from outside the UK into the UK may create significant legal and practical challenges for brands who going forward may need

---

<sup>25</sup> See *Guidance on the functions of the CMA after the end of the Transition Period 1 December 2020*, CMA125 available here: [Guidance on the functions of the CMA after the end of the Transition Period \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/guidance/644114)

<sup>26</sup> See judgment in Case C-306/96 *Javico v Yves Saint Laurent* EU:C:1998:173, paragraph 20.

<sup>27</sup> Section 60A(7) CA98 provides that the CMA and the Courts may depart from pre-Brexit cases and in certain specified circumstances, however, the CMA has not provided any evidence supporting a view that this may qualify as one of the specified circumstances.

## BRANDS FOR EUROPE

to adjust their distribution system to address the legal and practical consequences of Brexit (e.g., implications of different tax regimes or production regulations and the application of trademark exhaustion in the UK).

***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.***

4.11 Brands for Europe agrees that further guidance on these issues would be helpful. For instance, in addition to our responses to Questions 20, 22 and 23 regarding territorial/customer restrictions and Questions 24 to 28 regarding online sales, we encourage the CMA to make the following amendments to the current VGL:

- (a) There are some restrictions, currently labelled as "hardcore", which are likely to fulfil the conditions of Section 9 CA98 and should therefore be block exempted. This includes Recitals 61-62 VGL which capture protection against active or passive selling where a distributor is the first to sell a new brand or an existing brand on a new market. We urge the CMA to replace these examples with a broader exception which covers the launch of new brands and new products (under an existing brand). The CMA should not only take into account the investments made by the distributor, but also the research and development and other investments made by the supplier which have allowed the development and launch of this new brand/new product. A protection against active/passive sales, as well as a prohibition against cross-sales between retailers (or at least cross-sales to retailers who are not part of the brand owner's retailer network) should be allowed during the launch period.
- (b) The sentence included in Recital 176 VGL stating that "*However, where the characteristics of the product do not require selective distribution or do not require the applied criteria, such as for instance the requirement for distributors to have one or more brick and mortar shops or to provide specific services, such a distribution system does not generally bring about sufficient efficiency enhancing effects to counterbalance a significant reduction in intra-brand competition*" has been taken out of context by other national authorities and courts in Europe, to challenge whether certain products "deserve" a selective distribution system even where those agreements are covered by the VBER. This Recital should be removed, and the CMA VABEO Guidance should simply state, in line with the EC's Competition Policy Brief<sup>28</sup>, that it is permissible to use a selective distribution system (including one based on qualitative criteria only) for any products (and not just for those where the characteristics of the products justify it).
- (c) The CMA should clarify in the CMA VABEO Guidance that a supplier may require its authorised retailers and/or any other third party platform/marketplace to assist in the legitimate enforcement of the supplier's selective distribution system. This includes requiring authorised resellers and/or any other third party platform/marketplace to report to the supplier any sales by unauthorised resellers they become aware of (in addition to not selling to/buying from unauthorised resellers). Where authorised resellers also operate a platform/marketplace, the VGL should clarify that they can be required to block sales of selectively distributed products from unauthorised resellers on that platform/marketplace, in the same way as the supplier may require any other third party platform/marketplace to block sales by unauthorised distributors of selectively distributed products.

### ***Impact questions***

---

<sup>28</sup> Accessible here: <https://ec.europa.eu/competition/publications/cpb/2018/kdak18001enn.pdf>

## BRANDS FOR EUROPE

**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.**

- 4.12 Territorial and customer restrictions lead to significant efficiencies where they offer brand owners and retailers the necessary flexibility to adapt to provide consumers with the seamless omni-channel experience which they expect. Since the VBER/retained VABER was drafted the retail landscape has changed beyond recognition and this trend will continue in the future, as brand owners and retailers continue to invest and innovate. Brand owners need the flexibility to design and adapt their distribution systems according to business and consumer needs that arise in light of these changes, whether this is in respect of (i) the rise of omni-channel distribution and the growth of online retail; (ii) consumer demands for differentiated and experience-driven retail, or, (iii) more recently, the long-lasting impact on consumer purchasing habits in light of the COVID-19 crisis.
- 4.13 In this context, we endorse the CMA's proposals to ensure a more effective protection of selective distribution systems (see also our specific response to Question 20). Selective distribution remains a very important tool for many brand owners and the current block exemption allows Brands to protect their brand image, ensure similar levels of quality and customer service across a retail network, and to avoid free-riding by low service or no service distributors. Also, selective distribution remains as relevant and important as ever for consumers who demand a seamless omni-channel O2O brand and shopping experience across all channels. Selective distribution helps manufacturers incentivise retailers to invest in those seamless shopping experiences and reduces the risk of free-riding on the investments made by retailers and brand owners. This increased retail quality benefits the consumers, brand owners and retailers alike, by preserving the quality of their products, ensuring their optimal use, preventing counterfeiting and enhancing their brand image.
- 4.14 Moreover, the current regulatory framework, whereby the retained VABER exempts quantitative and qualitative selective distribution, regardless of the nature of the products and regardless of the nature of the selection criteria, offers essential agility and flexibility. A stricter approach (e.g., on bricks and mortar requirements, transparency and objectivity of selective distribution criteria, etc.) would make selective distribution unworkable in practice and would undermine the benefits of selective distribution. Indeed, selective distribution criteria remain an essential tool for building and maintaining brand value. This is not only a matter of free-riding on investments made by authorised retailers but also reflects the point that retailers are essential partners in the promotion of high quality service, range and presentational offering of branded products. Retailers need to be incentivised to focus beyond their own profit and to take into account the broader impact of their actions in promoting the brand owner's interests and the consumer's interest.

**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.**

- Very helpful*
- Somewhat helpful*
- Irrelevant*
- Unhelpful*
- Very unhelpful*

- 4.15 Certain members of Brands for Europe operate exclusive distribution networks, where a distributor (generally wholesaler) is exclusively appointed to serve a particular territory or



## **BRANDS FOR EUROPE**

customer group. That distributor devotes significant resources and investment to distribute the brand owner's products in that territory or for that customer group. It is in this context that brands impose active sale restrictions, in order to protect the exclusive distributor to a certain extent against possible free-riding by other distributors on its investments. The exemption for active sales in the UK is therefore somewhat helpful. It fails to achieve its full potential, however, given its limitations noted in response to Questions 20 to 22 above.

## BRANDS FOR EUROPE

### 5. 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?***

- 5.1 Brands for Europe welcomes the CMA's willingness to consider policy changes related to indirect restrictions of online sales, and we fully support the CMA's proposed recommendations on dual pricing and on the equivalence principle. Brands for Europe wants to set out some general considerations around the current omni-channel commercial reality that provide the background to its position as set out in more detail in the responses to the specific questions.
- 5.2 Brands for Europe strongly agrees with the CMA's conclusions that the retained VABER and VGL need to be updated in line with the current omni-channel commercial reality.<sup>29</sup> Consumers expect a seamless O2O brand and shopping experience throughout their journey, whether offline, online or both. It is therefore crucial that Brand owners should have the freedom to incentivise retailers to invest in those seamless O2O brand and shopping experiences across all channels as they wish in order to meet their brand strategy, maximise sales and support from retailers, whilst minimising the risk of free-riding. The UK VABEO and CMA VABEO Guidance ought to reflect this new reality. The growth of online sales is present across different product categories, ranging from white goods,<sup>30</sup> to fashion<sup>31</sup> and even to fast moving consumer goods.<sup>32</sup> This trend is not new but has accelerated due to the COVID-19 crisis. In addition, the effects on digitalisation and increased uptake of online sales caused by COVID-19 are expected to remain after the end of confinement measures and other restrictions imposed due to COVID-19.<sup>33</sup>

#### ***Dual Pricing***

- 5.3 Faced with this clear and persistent trend, the current rules that force brand owners to give omni-channel/hybrid retailers the same conditions for all of their purchases of suppliers' products independently from the retail channel through which the omni-channel retailer decided to sell that product, should be changed. Omni-channel retailers have a very different cost structure for the online and offline part of their operations<sup>34</sup> and, such an approach can disincentivise high-service retailers from investing in the service offering provided in their brick and mortar stores. Brand owners should have the flexibility to offer hybrid retailers specific discounts or compensations for products that are sold in-store to support the retailer's in-store efforts. Such a solution would be more effective than the possibilities currently offered by the retained VABER and VGL of working with a "fixed fee" to support offline or online sales, or the setting of a minimum in-store turnover target for brick and mortar stores.
- 5.4 The need for greater flexibility for dual pricing has been recognised by Martijn Snoep, head of the Dutch Competition Authority, who called on the EC to use the review of the VBER and

---

<sup>29</sup> CMA Consultation document, para. 4.46.

<sup>30</sup> See *Covid-19 Catapults White Goods Makers into the Digital Future*, available at <https://www.bain.com/insights/covid-19-catapults-white-goods-makers-into-the-digital-future/>, noting a 10.5% annual increase of online sales for domestic appliances between 2015-2019.

<sup>31</sup> See the McKinsey Report on *State of Fashion 2021*, available at <https://www.mckinsey.com/~/media/McKinsey/Industries/Retail/Our%20Insights/State%20of%20fashion/2021/The-State-of-Fashion-2021-vF.pdf> noting an almost doubling of digital sales in 2020 with the expectation of only a slight recalibration after the end of the COVID-19 pandemic (page 34-37).

<sup>32</sup> See *FMCG in the European e-commerce market* available at <https://blog.lengow.com/fmcg-european-e-commerce-market/>.

<sup>33</sup> See *How COVID-19 has pushed companies over the technology tipping point—and transformed business forever* available at <https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/how-covid-19-has-pushed-companies-over-the-technology-tipping-point-and-transformed-business-forever>.

<sup>34</sup> CMA Consultation, para. 4.46 (c) and (d), and para. 4.49.

## BRANDS FOR EUROPE

VGL to adopt a more lenient approach towards dual pricing.<sup>35</sup> This opinion is shared by other NCAs<sup>36</sup> as well as several stakeholders.<sup>37</sup> The EC has stated in the Final Report that it is prepared to consider specific cases where dual pricing may be justified, but this is not sufficient.<sup>38</sup>

- 5.5 We therefore believe the CMA should block exempt dual pricing for online and offline sales. Multiple benefits can be generated by allowing dual pricing between online and offline sales, such as (i) more effective incentives for retailers to invest in pre- and after sales services, which enhance the customer experience, and (ii) increased product availability and innovation, resulting in increased customer choice. At the same time dual pricing would allow for fairer remuneration of the online sales of the hybrid retailers, as they would be eligible to gain the same support as pure online players. With the current prohibition of dual pricing, there is a genuine risk that hybrid retailers are either undercompensated as brand owners, disregard investments made by hybrid retailers for their online sales channel, or are overcompensated as brand owners give compensations based on all sales (offline/online) disregarding the lower costs associated with online sales.
- 5.6 It is widely recognised that bonuses or turnover related discounts are an effective way to reward efficient retailers who, through their investments in promotion and services, have supported the sales of the supplier's products. Absent a dominant position of the supplier, bonuses and turnover related discounts stimulate intra- and inter-brand competition and reward those retailers who have been successful in selling the supplier's products. Allowing brand owners to offer more targeted bonuses for specific retail formats would thus better facilitate investment and innovation where needed, providing a better outcome overall for customers.
- 5.7 In addition, it is clear that online and offline sales channels are faced with a very different cost structure/base to bring the products to the customer. Investments to be made into (number of) staff, store space needed to present products to potential customers, as well as promotional campaigns have a very different price tag in the online and offline world. This holds true not only for pure online resellers or pure brick and mortar retailers but also for hybrid retailers having both an offline and online sales channel. Important in that respect is to recognise that the (opportunity) cost related to (shelf) space in a brick and mortar store, which is absent in an online environment, requires suppliers to be able to specifically reward those retailers that make available that (shelf) space. Allowing dual pricing, would enable brand owners to reward retailers more proportionately based on their costs, which would help to combat the free-riding problems outlined below.
- 5.8 The EC itself recognises that there might be free-riding issues between offline and online sales channels, where the costs between both channels differ significantly.<sup>39</sup> However, currently the VGL define the situations in which such free-riding issues may occur very narrowly which does not do justice to the fact that costs related to offering sales services in a bricks and mortar store differ fundamentally from the costs related to offering sales services in an online store.
- 5.9 Allowing for dual pricing would therefore provide brand owners the possibility to support effectively and efficiently the different sales channels within one retail organisation based on the particular needs and costs of each retail channel or format but also according to their actual

---

<sup>35</sup> See Mlex interview with Martijn Snoep reported by Mlex on 8 May 2019 -

<http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1088419&siteid=190&rdir=1>.

<sup>36</sup> See Summary of the contributions of the National Competition Authorities to the evaluation of the Vertical Block Exemption Regulation (EU) No 330/2010, page 9.

<sup>37</sup> See Staff Working Document (SWD) Evaluation of the Vertical Block Exemption Regulation [https://ec.europa.eu/competition/consultations/2018\\_vber/staff\\_working\\_document.pdf](https://ec.europa.eu/competition/consultations/2018_vber/staff_working_document.pdf), pages 212-213.

<sup>38</sup> See SWD accompanying the document Report from the Commission to the Council of the European Parliament Final report on the E-commerce Sector Inquiry SWD/2017/0154 <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52017SC0154>

<sup>39</sup> This is recognised both in paragraph 64 VGL as well as in the SWD, paragraphs 600-601.

## BRANDS FOR EUROPE

performance. This is the case both for hybrid retailers (offline and online sales) as well as for retail groups that operate specialised stores (i.e., that offer a limited product range, e.g., store specialising in consumer electronics or a pet shop) next to general supermarkets (which offer a wide range of products). The in-store environment can be key to establishing a product. It is important for customers to experience their products physically in addition to virtually. It is often necessary to receive advice and services from well trained staff at brick and mortar stores. The solutions currently allowed, i.e., fixed fee support or support linked to particular specified investments, do not properly function in practice.<sup>40</sup> Offering the possibility to apply dual wholesale pricing or differentiated levels of discounts/bonuses according to the resale channel through which products are sold, would level the playing field between pure brick and mortars, pure online stores and hybrid retailers and thus be an effective way to incentivise (hybrid) retailers to invest in the necessary pre- and after sales services, store attractiveness and customer experience (both on and offline). This would allow brand owners to better support hybrid retailers to continue to invest in attractive brick and mortar shops (as well as remunerate fairly their online retail business), providing a wider access for all consumers (including those without or limited access to e-commerce) to a broader selection of products as well as to a better level and quality of services.

- 5.10 At the same time, allowing for dual pricing would be a practical way to support hybrid retailers against possible free-riding by low service retailers (both offline and online). Free-riding does not only exist in situations where online sales lead to significantly higher costs for manufacturers (cfr. Recital 64 VGL) but also exists when low service retailers benefit from customer services (touch & feel, product demonstration, promotion campaigns) offered by high service retailers (both online, offline and hybrids). Where such free-riding is not constrained, there is the risk of an unsustainable low pricing which can lead to retailers resorting to misleading or fraudulent practices, or the introduction of counterfeit products in the distribution chain in order to compete. All these practices are extremely detrimental to customers, retailers and brand owners. Brand owners would be better equipped to really support hybrid retailers that invest in offering valuable services to customers, regardless of the sales channel through which these services are offered. Instead of being forced to offer uniform conditions to hybrid retailers that either risk undercompensating or overcompensating those hybrid retailers, dual pricing provides the possibility to adapt pricing to the specific situation of hybrid retailers and reward them for the actual investments made in selling the supplier's products.

### *Equivalence principle*

- 5.11 Brands for Europe welcomes the CMA's recommendation to no longer regard the imposition of criteria for online sales that are not overall equivalent to the criteria imposed on brick-and-mortar shops as a hardcore restriction. We support the view that online and offline distribution channels are inherently different and that, consequently, it is difficult to apply the equivalence principles, which gives rise to legal uncertainty.
- 5.12 We are of the view that recognising that a set of criteria needs to be suitable for the relevant retail channel (whether online or offline) does not raise a competition concern where it falls short of a de facto ban on online sales and should be block exempted. The equivalence principle is, therefore, ill-suited.
- 5.13 The Evaluation showed that the effectiveness of the equivalence principle needs to be assessed against the new retail landscape. The retail landscape has changed dramatically over the last ten years as a result of new technologies and accelerated digitalisation which have changed consumer behaviour and expectations. Today's consumer journey is a fluid omni-channel process whereby consumers can switch easily within the online channel (e.g. between online retailers and online platforms), between online and offline channels, and within the offline

---

<sup>40</sup> See SWD, page 214 noting the consensus of all stakeholders that fixed fee support does not work.

## BRANDS FOR EUROPE

channel (i.e. between different physical stores), as well as between mono-brand and multi-brand distributors. Consumers therefore expect to have a continuous omni-channel experience when shopping for a particular product whether online or offline. In response to this change in consumer behaviour and in order to meet consumer expectations, businesses aim at creating seamless omni-channel environments to allow for the optimisation of consumer choice and a high-quality brand experience<sup>41</sup>.

- 5.14 Thus, in times where online sales have experienced significant growth and brick and mortar stores currently need support and protection to survive, a more flexible approach to this topic is essential. In practice, finding an equivalent standard between online and offline environments can lead to artificial criteria which in practice adds little value to the customer experience.

***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.***

- 5.15 As explained above in response to Question 24, block exempting dual pricing for online and offline sales presents numerous advantages in terms of increased competition, enhanced consumer welfare, cost savings and higher legal certainty.
- 5.16 In addition, we are of the view that the CMA should also clarify in the CMA VABEO Guidance that the exchange of information between the supplier and retailers on data showing the sales channel through which the supplier's products are sold by the retailer are also covered by the block exemption and can in themselves not be considered indicative of any attempt to limit or restrict passive sales by the retailer. This type of data is necessary for the suppliers to adjust their strategy to the evolution of the retail environment as well as to remunerate appropriately the efforts made by the hybrid retailers either online and/or offline. Brand owners should not only be allowed to collect this data but should also be able to reward retailers for sharing this data with the brand owner, including in situations of dual distribution (see paragraphs 2.1 to 2.31 above).
- 5.17 Moreover, Brands for Europe invites the CMA to explicitly clarify in the CMA VABEO Guidance that differential pricing (i.e., applying different prices for different retailers) is and should remain block exempted. This means that brand owners can charge different prices for retailers only operating pure online stores and retailers that also operate a brick and mortar store. In addition, it should be possible for brand owners to differentiate the commercial conditions, including the purchase price, depending on the type of retail store. A brand owner should therefore be able to differentiate prices for products that are to be sold in a specialised shop with limited product assortment (e.g., consumer electronics store, toys store, pet shop) from a shop with a broad product assortment (e.g., supermarket), even where one retail group operates different types of retail stores. In that way, brand owners can tailor their commercial conditions to reflect the different costs faced by different types of retailers and valorise the different level of investment made and services offered by those shops to sell the brand owners' products. Such distinctions between commercial conditions are merely a reflection of the outcome of the normal competitive process and should not be considered indicative of a restriction of competition.

### ***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.***

---

<sup>41</sup> Page 204 of the SWD.

## BRANDS FOR EUROPE

- 5.18 Brands for Europe considers that while overall the distinction in respect of "active" and "passive" sales remains valid, and that certain online sales may lead to a form of passive selling, not all online sales are necessarily "passive" in nature. The examples included in Recitals 51-54 VGL are unnecessarily biased towards the protection of online sales, and we ask the CMA to review and update these examples. For example, we encourage the CMA to clarify that:
- (a) A website running a promotion that is clearly targeting a territory or group of customers (e.g., by making specific local or cultural references) should be listed as an example of a type of active selling.
  - (b) Territory based banners used on any websites (not just third party websites) are also a form of active sales (cfr. Recital 63 VGL).
- 5.19 Given the position expressed by the CMA in its Brexit Guidance, it also remains important for the CMA to clarify in the CMA VABEO Guidance that a website using the UK domain (e.g., ".co.uk") operated by a distributor in order to target customers in the UK is a type of active selling. Similarly, a website using the local language(s) or dialect should be considered a type of active selling.

***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.***

***Significant positive impact***

***Moderate positive impact***

***Negligible impact***

***Moderate negative impact***

***Significant negative impact***

- 5.20 The treatment of certain vertical restraints as hardcore restrictions even where they do not amount to a *de facto* ban on online sales may have a **significant negative impact** for brand owners and reduce customer choice and experience. We refer in this context to our responses to Questions 24 and 25 above, and Question 28 below.
- 5.21 In addition, we encourage the CMA to reflect in the CMA VABEO Guidance that certain types of restrictions on internet selling which do not operate as a prohibition or de facto prohibition on online selling cannot constitute a hardcore restraint. For instance:
- (a) Brands for Europe encourages the CMA to follow the CJEU's judgement in *Coty* and state in the CMA VABEO Guidance that (i) a marketplace ban is block exempted where the parties meet the 30 % market share thresholds, and (ii) where the market share thresholds are not met, a marketplace ban may still escape the application of Chapter I by fulfilling the Metro-criteria.
  - (b) We also encourage the CMA to provide further guidance on, restrictions placed on resellers regarding the use of brand names and trademarks for search engines (e.g., Google AdWords). For instance, the VGL should clarify when restrictions on the use of brand names or trademarks in search engines are likely to be hardcore restrictions of UK competition law. While the EC decision in *Guess* treated a ban on the use of the *Guess* brand name and trademark in Google AdWords as a "by object" infringement<sup>42</sup>,

---

<sup>42</sup> CASE AT.40428 – GUESS

## BRANDS FOR EUROPE

we refer in this context to the Expert Report published in the context of the EC Impact Assessment. Professor Alison Jones rightly noted in this report that the case involved more than one restraint on online selling both to restrict the territories into which distributors could sell, and the prices at which they could sell, making it easier to discern an overarching objective to restrict online selling and cross-border sales<sup>43</sup>. In addition, we note that in the Final Report the EC also stated that restrictions could help avoid confusion with the manufacturer's website. We ask the CMA to reflect in the VGL that there are no competition concerns in such cases. The brands are of the view that it benefits consumers to be shown the link to the brand owners' page at the top of the results and we ask that the CMA to clarify that at the very least the following types of restrictions are block exempted: (i) restrictions on bidding for a particular positioning in the list of results rendered by search engines such as Google AdWords (as opposed to a ban on bidding for Google AdWords), (ii) restrictions on bidding for brand names or trademarks that the distributor does not actually sell.

***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.***

- 5.22 As noted in response to Question 24, the current framework approach in the retained VABER is overly protective of e-commerce and unnecessarily suspicious of the support provided to brick and mortar stores. While the inclusion of dual pricing and the equivalence principle as hardcore restrictions may have been justified in the past to protect online sales, as an emerging and weaker sales channel (compared to the long established brick and mortar channel), it is clear that the commercial reality has moved on.
- 5.23 As recognised by the CMA, in the current economic reality, e-commerce players are powerful and no longer need protection over the brick and mortar channel. The current framework puts at risk the future of the high street. Online sales have shown strong growth in the last five years and now represent a substantial proportion of total sales, with continuous growth expected in the future. In addition, online retailers have increased in size and strength.
- 5.24 Faced with this clear and persistent trend, the current rules that force brand owners to give omni-channel/hybrid retailers the same conditions for all of their purchases of suppliers' products independently from the retail channel through which the omni-channel retailer decided to sell that product, should be changed. Omni-channel retailers have a very different cost structure for the online and offline part of their operations<sup>44</sup> and, such an approach can disincentivise high-service retailers from investing in the service offering provided in their brick and mortar stores. Brand owners should have the flexibility to offer hybrid retailers specific discounts or compensations for products that are sold in-store to support the retailer's in-store efforts. Such a solution would be more effective than the possibilities currently offered by the retained VABER and VGL of working with a "fixed fee" to support offline or online sales, or the setting of a minimum in-store turnover target for brick and mortar stores.
- 5.25 In addition, block exempting the application of different criteria for online and offline sales in selective distribution systems would allow brand owners to adapt in an agile way to changes in the retail landscape, including to changes in offline channels to reflect consumer demand and expectations. It would allow brand owners to leverage new technologies and accelerated digitalisation to better respond to these demands. In response to this change in consumer behaviour and in order to meet consumer expectations, businesses aim at creating seamless omni-channel environments to allow for the optimisation of consumer choice and a high-quality

---

<sup>43</sup> See Expert Report available here: [Expert report on the review of the Vertical Block Exemption Regulation competition - Publications Office of the EU \(europa.eu\)](https://publications.ec.europa.eu/publication-detail/-/publication/11111111-1111-1111-1111-111111111111)

<sup>44</sup> CMA Consultation paper, para. 4.46 (c) and (d), and para. 4.49.

## **BRANDS FOR EUROPE**

brand experience. The equivalence test hinders this objective, and ultimately reduces the opportunity for brand owners to respond to consumer expectations.



## BRANDS FOR EUROPE

### 6. Excluded restrictions

#### *Policy questions*

**Question 34: The CMA invites views on the above proposed recommendation in respect of non-competes obligations. In particular:**

- (a) *Should non-competes 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)?*
- 6.2 Brands for Europe is of the view that non-competes obligations that are tacitly renewable should not remain "excluded restrictions", and that they should be automatically exempt under the UK VABEO.
- 6.3 There are no meaningful risks in allowing such obligations to be automatically exempt under the UK VABEO, primarily because the availability of the block exemption is already subject to the relevant market share thresholds. The risk of any party exerting market power in this context is therefore already addressed.
- 6.4 In addition, the exclusion from the UK VABEO of an obligation prohibiting authorized dealers to sell the brands of specific competitors is artificial. This is rarely if ever used in practice, and in any event, there is no reason why this restriction should not be covered by the block exemption given this would already be subject to the application of market share thresholds.

#### *Impact questions*

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

- Completely*
- Very much*
- Moderately*
- A little*
- 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-competes 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.**

- 6.5 If non-competes obligations that exceed 5 years in duration were no longer treated as "excluded" restrictions, and thus be covered by the block exemption, brand owners would no longer encounter the practical problems that the current "artificial" renewal requirements bring, such as the artificial termination or renegotiation of contracts or non-competes clauses every five years. This in turn would save costs and increase efficiencies.

## BRANDS FOR EUROPE

*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.*

- 6.6 Continuing to block exempt non-compete obligations that have a duration of less than 5 years brings legal certainty and reduces the costs associated with the need to "artificially" terminate or re-negotiate contracts or non-compete clauses when they expire.

## BRANDS FOR EUROPE

### 7. CMA VABEO Guidance: Agency

#### *Policy question*

***Question 38: The CMA invites views on the above 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.***

7.1 Brands for Europe is of the view that the CMA VABEO Guidance will need to provide further guidance on how certain intermediaries ought to be treated under the existing framework given the nature of the services they provide, the complex role that certain market participants perform and the economic reality of those relationships. The updated CMA VABEO Guidance should provide suppliers with the flexibility to design their distribution models according to business needs and to meet customer demands across all relevant distribution methods, including in relation to (i) distribution systems that rely on certain intermediaries to provide certain services enabling the execution of agreements (so-called fulfilment services), or (ii) distribution agreements entered into with intermediaries who also occasionally provide agency services. Reflecting this in the VABEO, as well as the CMA VABEO Guidance, would bring additional legal certainty to businesses.

#### *The importance of fulfilment services in distribution networks*

7.2 Many sectors/industries have seen an increase in the use of intermediaries who adhere to the commercial conditions agreed beforehand between their supplier and a particular customer (whether a retailer or a consumer) and focus solely on executing that agreement, e.g. by taking over logistical functions. The agreements between the supplier and the intermediary, and between the intermediary and the customer are each a "vertical agreement" within the meaning of Article 1(1)(a) retained VABER. In these situations, however, the intermediary does not have an influence on the commercial conditions of the agreement concerned (notably the price or end-customer) and thus is not acting as an independent distributor. At the same time, the intermediary may not fulfil the requirements of the agency exception either, e.g. because it does not "negotiate and/or conclude contracts" on behalf of the supplier (Recital 12 VGL) and it does acquire the ownership of the contract goods intended for delivery (Recital 16 VGL).

7.3 The existing framework does not, therefore, provide for an adequate assessment of the role of such intermediaries, and the respective fulfilment services that they provide. It is currently driving brand owners to adopt artificial, economically sub-optimal distribution structures simply to remain within the existing framework of the retained VABER/VGL. Brand owners call upon the CMA to reflect the economic reality of fulfilment services, and to consider extending the block exemption to cover the use of the use of intermediaries who adhere to the commercial conditions (notably the price and end-customer) agreed beforehand between their supplier and a particular customer and focus solely on the execution/fulfilment of that agreement.

7.4 Specific examples of fulfilment contracts relevant in this context are as follows:

- (a) Fulfilment wholesalers who deliver products to retailers with whom the brand owners have directly negotiated the price at which they can buy the brand owners' products. Such retailers are often the most important resellers of the brand owners' products (e.g., certain large retail chains) and brand owners wish to compensate those retailers for specific investments made in the promotion of the brand owners' products. However, brand owners do not sell these products directly to the particular retailer but instead rely on the 'fulfilment wholesalers', mainly for logistics' reasons. In some cases the 'fulfilment wholesaler' is even chosen by the retailer rather than the manufacturer, particularly where the retailer sources products from a variety of sources, does not want to keep large quantities of stock or is looking to improve transport efficiencies.

## BRANDS FOR EUROPE

In such cases, the wholesaler who fulfils the sale, whilst formally taking title on the goods, does not bear any meaningful contractual risks, other than transport costs and warehousing, and has not made any marketing or relationship specific costs or investments for the relationship with that retailer. In certain cases, the realisation risk (i.e., the risk that the retailer would not pay the full price of the delivered products) is covered by the brand owner. Nevertheless the 'fulfilment wholesaler' will not qualify as a genuine agent under the VGL as title on the products has transferred to the 'fulfilment wholesaler'.

- (b) Certain third party online intermediaries provide technological solutions for the online sale and delivery of products sold by brand owners via their own websites to consumers. Brands frequently sell to consumers online via their own branded websites. The consumer purchasing journey consists of an online acquisition of the products directly from the brand owner's website, with the brand owner being in charge of arranging the delivery of the product to the consumer. In reality, brand owners often use third party intermediaries to support (i) the operation of the brand owner's own website, (ii) the technological functions of the platform, including the actual online purchasing mechanism, management of payment solutions, etc.; or (iii) the shipping/delivery of the product to the consumer. The intermediary provides the services "behind the scene" as it were, in that the brand owner's website remains the interface underpinning the consumer purchasing journey. The intermediary does not itself compete for customers, as the business model of the intermediary is to support the brand owner's own marketing and logistics/delivery activities. However, title to the products passes to the intermediary very shortly before the consumer has submitted its order online (in many cases due to tax reasons, or consumer laws) - indeed, in many cases this takes place a few seconds before that order is made by the consumer pursuant to the brand owner's online offering on its own website<sup>45</sup>.

- 7.5 Brands for Europe is of the view that the current framework does not adequately reflect the economic reality of the relationship with these intermediaries. The execution of the agreement by the intermediary according to the conditions agreed on between the supplier and a particular customer (e.g., retailer or consumer) should not be considered a restriction of competition within the meaning of Chapter I CA98 since these conditions are no longer subject to competition once the agreement has been concluded. This type of arrangement does not have any adverse effect on competition and leads to an optimisation of the distribution of the brand owners' products to the benefit of both the brand owner and the retailer or consumer. The CMA should, therefore, extend the availability of the block exemption to fulfilment services, by allowing wholesalers/distributors and certain online intermediaries to perform the services they were contracted for, including agreeing with the supplier that the products will be delivered to the retailer or end-customer at the price pre-agreed between the latter and the supplier, without risking that this could amount to hardcore restrictions under the retained VABER.<sup>46</sup>

### *Dual-role of intermediaries*

- 7.6 Brands for Europe notes the CMA's proposal to provide guidance on a topic which was recently addressed by the EC in its Working Paper on "dual role" agents<sup>47</sup>. We note at the outset that

---

<sup>45</sup> We refer in this context to paragraph 31 of the draft VGL published by the EC on 9 July 2021 which notes that "*The fact that the agent may temporarily, for a very brief period of time, acquire the property of the contract goods while selling them on behalf of the principal does not preclude an agency agreement, provided the agent does not incur any costs or risks related to that transfer of property*".

<sup>46</sup> We refer in this context to paragraph 178 of the draft VGL published by the EC on 9 July 2021 which notes that "*the fixing of the resale price in a vertical agreement between a supplier and a buyer that executes a prior agreement between the supplier and a specific end user (hereinafter "fulfilment contract") does not constitute RPM where the end user has waived its right to choose the undertaking that should execute the agreement*".

<sup>47</sup> See EC's working paper: *Distributors that also act as agents for certain products for the same supplier*

## **BRANDS FOR EUROPE**

Brands for Europe was very surprised to see the rigid approach expressed by the EC in this Working Paper. The analysis framework provided by the EC is overly formalistic and fails to recognise the practical complexity surrounding the relevant dual role scenarios.

- 7.7 This is particularly the case in respect of the requirement to show that all relevant risks linked to the sale of goods are borne by the principal, including in relation to products sold outside an agency agreement where these are in the same market as other products sold by the same party under an agency agreement. For instance, many brands would opt to use the agency model with their existing distributors in respect of new launches of a specific line of products, where the intermediary is used as a distributor for all other products. Requiring the brand owner in these instances to cover all relevant risks of the intermediary (i.e., both in respect of the new product launch and the existing product lines) is particularly disproportionate as the costs associated with the distribution business are far greater than those incurred for the agency model.

## BRANDS FOR EUROPE

### 8. CMA VABEO Guidance: Environmental sustainability

#### *Policy question*

***Question 39: The CMA invites views on the above 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.***

- 8.1 Brands for Europe agrees with the CMA's recommendation to not make any amendments in respect of environmental sustainability issues in the UK VABEO, and for the CMA to provide guidance on these issues in the context of the CMA VABEO Guidance.
- 8.2 Consumers and brand owners are getting more and more environmentally conscious - this is also an accelerated effect of the COVID-19 pandemic. Sustainability considerations are an important aspect influencing the consumer's buying decision and selection of a brand. Brand owners prioritise sustainability projects and targets in all parts of the supply chain. From a legal perspective, it is therefore important that brand owners are in a position to enforce sustainability requirements on their independent resale channel. However, we do not think that the UK VABEO needs to be amended in order to legitimise such requirements.
- 8.3 We note in this context that some sustainability measures can be implemented most efficiently in physical stores which again underlines the importance to protect investment in such stores. For instance, some brand owners offer recycling services in-store and do this at the moment mainly in their own stores or in franchise stores. Brand owners should be in a position to implement the offer to consumers to return used products for recycle more widely in their distribution system, and therefore, need the legal discretion to impose such requirement as part of their distribution systems. This may be possible when there is a selective distribution agreement but outside a selective distribution agreement this is more difficult to achieve.

#### *Impact questions*

***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.***

- 8.4 Please see our answer to Question 39.

***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.***

- 8.5 Please see our answer to Question 39.

***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.***

- 8.6 Please see our answer to Question 39.

## **BRANDS FOR EUROPE**

### **9. Duration**

#### *Policy question*

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

- 9.1 Brands for Europe is of the view that a review of the VABEO in anything shorter than 6 years is likely to undermine legal certainty and stability. A revision may not be needed even in 6 years, and indeed there is merit in a revision of the VABEO to take place in parallel with any future review of the VBER by the EC, given their close similarity and also the European-wide nature of many of the businesses present in the UK and the EU.
- 9.2 Such an approach is premised however on the VABEO providing businesses operating in the UK with sufficient flexibility to adapt to markets that are developing at fast pace (e.g., online sales), to address the uncertainty regarding the position after the UK's withdrawal from the EU and the long term impact of COVID-19 on the UK market.

### **10. 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.***

- 10.1 Requiring businesses to provide the CMA with information regarding their distribution agreements within ten working days is unreasonably strict and in most cases impossible to achieve. This is particularly the case for suppliers who operate pan-European or global distribution networks (including in the UK), for multiple brands across different channels and markets. While providing such information in a timely fashion is in the companies' interests where a legal matter arises, the suggested timeframe is unrealistic and fails to recognize the complexity of today's distribution arrangements.