

**Eversheds Sutherland (International)  
LLP**

Response to the CMA'S consultation on the  
retained Vertical Agreements Block  
Exemption Regulation

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# CMA Consultation on the retained Vertical Agreements Block Exemption regulation

## Introduction

Eversheds Sutherland (International) LLP welcomes the opportunity to comment on the CMA's consultation on the retained Vertical Agreements Block Exemption Regulation. Our comments are based on the experience of our Competition, EU and Trade team in advising clients on all aspects of their vertical agreements and distribution networks. The comments and observations set out in this response are ours alone and should not be attributed to any of our clients.

We confirm that this response does not contain any confidential information and we are happy for it to be published on the CMA's website.

## CMA's proposed recommendation

### Policy and impact questions

- 1. 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 Vertical Agreements Block Exemption Regulation ("**VABER**") with a new UK Vertical Agreements Block Exemption Order ("**VABEO**"), rather than letting it lapse without replacement or renewing without varying the retained VABER?

**1.1** Yes / No / Not sure

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

**2.1** We support the CMA's proposed recommendation that the retained VABER be replaced with a new VABEO, rather than letting it lapse without replacement. The retained VABER provides legal certainty for businesses that reduces the burden of compliance and allows them to invest in more efficient distribution systems for their products. This, in turn, generates significant efficiencies for consumers, in the form of better prices, increased choice and better access to goods and services.

**2.2** That said, there are a number of areas in which the VABER and in particular the Guidelines no longer reflect market conditions, given rapid developments in distribution strategy and the impact of digital markets/online distribution. There is an opportunity in making a Block Exemption Order to replace the retained VABER with a new UK VABEO which will make changes to bring the regime up to date, and we support in principle the CMA's recommendation to replace the retained VABER with a UK VABEO including some amendments.

- 2.3** Although we consider that any new UK regime should broadly ensure consistency of approach with the EU's draft revised Vertical Block Exemption Regulation ("**draft revised VBER**") and the draft revised Vertical Guidelines ("**draft revised Guidelines**"), there is an opportunity for the CMA in making amendments to liberalise and modernise the UK's regime, further reducing the burden of compliance on businesses. As long as the UK does not end up with a more restrictive regime than the EU, businesses with a UK only focus could benefit from liberal UK only rules, while businesses whose operations are not limited to the UK, but are pan-European in scope, could chose to apply the more restrictive EU regime. We therefore consider that the CMA could go further than the proposed recommendations, particularly in respect of territorial and customer restrictions, and we comment further on this in response to relevant questions below.
- 2.4** If the CMA is minded to take a more cautious approach, then we very much support the proposal to limit the duration of the new VABEO to six years, to provide for a further opportunity to make changes reflecting developments in the market in that time.
- 3. Question 3:** How will the proposed UK VABEO as outlined in the CMA's proposed recommendation impact consumers?
- 3.1** **Significant positive impact** / Moderate positive impact / Negligible impact / Moderate negative impact / Significant negative impact
- 3.2** As outlined above, we consider that replacing the retained VABER with a UK VABEO with some amendments will continue to ensure legal certainty and reduce the compliance burden on business; this in turn will generate positive outcomes for consumers.

## Associations of undertakings

### Policy questions

- 4. Question 4:** What are your views on the CMA's proposed recommendation for agreements with association of undertakings to continue to benefit from the UK VABEO?
- 4.1** We agree with the CMA's proposed recommendation for agreements with associations of undertakings to continue to benefit from the UK VABEO. However, we consider that the current turnover threshold should be revised to reflect market growth and the impact of inflation on the UK market, given the period of time that has passed since the threshold was set.
- 4.2** We cannot speculate on what the specific UK threshold should be. We consider that the CMA could conduct market research in relation to the types of associations that currently benefit from the block exemption and the turnover of their members and consider setting a new threshold that will be meaningful for businesses and will reflect market realities.
- 5. Question 5:** Do you think that the turnover threshold should be revised for agreements with associations of undertakings to benefit from the UK VABEO (in particular, to reflect market developments, growth, inflation and/or the UK market)? If so, please provide your views on what the new turnover threshold should be.
- 5.1** Please refer to our response to question 4 above.

## Impact questions

- 6. Question 6:** To what extent is the exception for agreements with associations of undertakings, as outlined in the retained VBER, helpful to your business's operations or the operations of those you represent?
- 6.1** Very helpful / **Somewhat helpful** / Irrelevant / Unhelpful / Very unhelpful
- 7. Question 7:** What would be the likely impact on your business's operations or the operations of those you represent if the turnover threshold was increased?
- 7.1** Significant positive impact / **Moderate positive impact** / Negligible impact/ Moderate negative impact / Significant negative impact
- 8. Question 8:** What would be the likely impact on your business's operations or the operations of those you represent if the turnover threshold was decreased?
- 8.1** Significant positive impact / Moderate positive impact / Negligible impact / **Moderate negative impact** / Significant negative impact

## Dual distribution

### Policy questions

- 9. Question 9:** What are your views on the CMA's proposed recommendation on dual distribution?
- 9.1** We agree with the CMA's proposed recommendation that the UK VABEO should include an exemption for dual distribution in the same form as in the retained VBER, but which also applies to dual distribution by wholesalers and by importers.
- 9.2** Many of our clients, particularly but not exclusively in the consumer goods sector, have started or are considering dual distribution, most commonly by making direct sales to consumers online through a branded website, while also continuing to operate a distribution network through third party distributors. This "omni channel" strategy reflects the significant trend towards greater online sales, which has been accelerated even further by the impact of the COVID-19 pandemic; as well as meeting consumer expectations that they will be able to find and purchase branded products through a wide variety of online and offline channels. Removing the exemption for dual distribution would be detrimental, as it is a key part of the distribution strategy for so many suppliers and an important feature of how consumers shop, particularly for brands.
- 9.3** We also agree with the CMA's recommendation that the exemption should be extended to apply to dual distribution by wholesalers and importers who are also active in the downstream market, as these relationships have the same basic characteristics as dual distribution by a supplier and there is no reason to differentiate them.
- 9.4** We consider that the introduction of an additional (lower) market share threshold applicable to dual distribution would cause significant complexity and uncertainty, and is not necessary. We note the Commission's proposal in its draft revised VABER and Guidelines to include a 10% aggregate market share threshold for the exemption to apply to dual distribution; and where market share is between 10% and 30%, to treat information exchanges between the parties as horizontal. We consider this to be unhelpful and to be adding unnecessary complexity, as market definition exercises can be difficult, time consuming and subject to change. This will add a material additional burden to businesses, given the increasing prevalence of dual distribution.

- 9.5** If the dual distribution exemption is to be retained and expanded in the way the CMA recommends, we consider it would be very helpful to provide specific additional guidance on dual distribution generally, focussing in particular on information exchange (see comments below), but also providing a description of the ways in which the CMA might consider horizontal concerns to arise.
- 9.6** In our experience, while dual distribution introduces a horizontal element to the relationship, the main relationship remains essentially vertical between a supplier and its distributors. Typically, the supplier is mainly active in the upstream market, with limited ancillary activities in the downstream, retail market. In that context, given that, for as long as the supplier maintains a dual system rather than abandoning distributed sales completely, and in the absence of significant market power, both parties have aligned objectives (winning the market for their brand). It is not in the supplier's long-term interests to eliminate its distributors from the downstream market or harm them, as this will reduce consumers' access to its products or services. Rather there is a common interest in maintaining a strong and competitive "whole network" focussed on inter-brand competition. Any reduction of intra-brand competition is unlikely to lead to material negative effects for consumers if inter-brand competition is strong. Accordingly, we consider the risk of real competitive harm arising from dual distribution to be low.
- 9.7** It would also be helpful for the CMA to provide guidance on agency issues in the dual distribution model. Some of our clients are considering engaging in dual distribution (i.e. distributing some products direct to consumers while also maintaining a network of third party distributors) using agents, some of whom may already act as distributors (so called "dual role agents"). See further our comments in response to question 38 below.
- 10. 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.
- 10.1** Yes, as noted above, we consider that additional guidance on information exchange in the context of dual distribution would be very helpful.
- 10.2** Dual distribution may raise theoretical horizontal concerns, primarily around information exchange and the extent to which the supplier/ brand owner may share pricing and promotional plans for its own direct channel with its distributors and vice versa. In our opinion, the guidance to accompany the VABEO would benefit from the inclusion of case studies and practical examples setting out the CMA's approach to these potential horizontal concerns, given that there may be legitimate reasons to share such information, in the vertical context.
- 10.3** It would be helpful to understand if the CMA considers that the supplier must treat the distributors as equivalent to genuine third party competitors. We do not consider that the Commission's proposal in its draft revised VABER and Guidelines to treat information exchange between the supplier and its distributor in a dual distribution relationship as purely horizontal (for assessment under the horizontal guidelines) where the parties' aggregate market share is between 10% and 30% is necessary. Within the 30% market share threshold, horizontal concerns in a supplier/distributor dual distribution relationship are unlikely to arise in our experience. These concerns might only arise in the case of platforms in a dual distribution role, and we note and agree with the Commission's proposal not to block exempt these hybrid function platforms and consider the CMA should take the same approach.

- 10.4** We consider that in the context of dual distribution, it is unreasonable for a supplier to have to treat information from its distributors as equivalent to third party competitor information, as information sharing across the whole (dual) network could improve consumer insight, respond to changes in consumer demand, and drive innovation, resulting in stronger, more effective inter-brand competition.
- 10.5** It would be helpful to see guidance setting out:
- 10.5.1** the types of information a distributor may continue to freely share with the supplier and the supplier may freely use internally, as legitimate in the context of the (vertical) distribution relationship, for example, historic, current and forecast volume and sales figures, notwithstanding the dual relationship;
  - 10.5.2** specific guidance on promotional calendars and marketing plans and the extent to which these may be coordinated between the supplier and the distributors in a dual distribution context to generate strong inter-brand competition;
  - 10.5.3** examples of the types of information barriers, and the degree and nature of the separation of information required for the protection of competitively sensitive information received from the distributor that should not be shared with the supplier's direct sales channel; and confirmation that any information barriers should be proportionate to the size of the relevant supplier's business.

### **Impact questions**

- 11. 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.
- 11.1** Completely / **Very much** / Moderately / A little / Not at all
  - 11.2** As noted above, given the accelerated expansion in online sales and growing consumer expectations of being able to shop for, and find products in, a wide variety of online and offline channels, many of our clients already operate or are considering operating a dual distribution strategy. The exception for dual distribution in the retained VABER provides legal certainty and consistency, and avoids the burden on business of self-assessing numerous distribution agreements.
- 12. 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.
- 12.1** Completely / Very much / Moderately / A little / **Not at all**
  - 12.2** See our response to question 11 above. The dual distribution exception generally positively impacts our clients. However, the real problem is a lack of guidance or clarity on the extent to which the horizontal aspects of the relationship must be treated from a "purely" horizontal perspective; or if it is possible to manage the whole network as a single distribution network, comprising direct and distributed sales. Determining and implementing the necessary separation between the direct and distributed channels currently poses real practical difficulties for our clients and guidance would be welcome.
- 13. 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.

- 13.1** If the dual distribution exception was not included in the VABEO at all, it would cause a significant degree of confusion and uncertainty for our clients already operating a dual distribution system, since it would not be clear whether they should then be properly be considered to be "competing undertakings" with their distributors, such that their distribution agreements could not fall with the VABEO at all.
- 14. 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.
- 14.1 Significant positive impact / Moderate positive impact / Negligible impact / Moderate negative impact / Significant negative impact**
- 14.2** As set out above, we consider there is no basis to differentiate between wholesalers, importers and suppliers in the dual distribution arrangements.

## Resale Price Maintenance

### Policy questions

- 15. Question 15:** Do you agree with the CMA's proposed recommendation on resale price maintenance (RPM)?
- 15.1** On balance, we agree with the CMA's proposed recommendation that RPM remains a hardcore restriction under the VABEO, in the same form as the retained VABER. Generally, we consider that the rules on RPM are well understood by our clients and RPM is usually fairly straightforward to identify.
- 15.2** That said, there is definitely some scope for clarification of the circumstances under which pro-competitive RPM can benefit from the exemption under section 9(1) of the Competition Act 1998. Given that RPM can ultimately benefit consumers, it would be very helpful for businesses in the UK to be able to rely on clear guidance on what is (not) acceptable. Please also refer to our responses to questions 16 and 17 below.
- 16. 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.
- 16.1** RPM could create efficiencies where it allows the development of a new product/market while protecting it from free riding and to generate consumer trust in the new product; or in the context of short term promotions where, for example, the supplier has to plan/commit volumes and so requires certainty, or the supplier plans to invest in significant advertising/marketing campaigns. For some branded consumer goods, suppliers would like to offer customers certainty on pricing (e.g. price guarantees) and some consumers would prefer that - RPM might be able to provide this certainty.
- 16.2** However, in our experience, most suppliers will avoid even pro-competitive RPM, because the current guidance is unclear and the consequences of getting it wrong are so serious. As a result, there are not enough examples in practice of businesses engaging in pro-competitive RPM and UK consumers are missing opportunities to benefit from potential efficiencies this could generate.
- 17. 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.
- 17.1** Yes, it would be helpful for businesses to be able to rely on additional guidance on RPM-linked efficiencies. In our view, if the CMA wants to incentivise businesses to

engage in pro-competitive RPM, it should provide clear guidance (i) on what is (not) RPM and (ii) on the conditions under which RPM can lead to efficiencies that thus can benefit from the exemption.

**17.2** Currently, businesses are reluctant to use RPM and will require a much greater degree of certainty around the circumstances under which it would be permitted. Under the current regime, RPM might be considered acceptable for an "introductory period of expanding demand" or in a "short term" price campaign of "2 to 6 weeks in most cases". However, the situations where these conditions might be met are very limited – and there is no guidance for longer periods of RPM. We are aware of the Australian Tooltechnic case, in which RPM over a period of four years was considered proportionate to protect against free-riding.

**17.3** We also note the Commission's proposal in its draft Guidelines to recognise the following examples of efficiencies:

**17.3.1** when a manufacturer introduces a new product, particularly if it is a completely new product, and it is not possible to impose effective promotion requirements on all buyers by way of contract;

**17.3.2** to organise a coordinated short term low price campaign (described as being of 2 to 6 weeks in most cases);

**17.3.3** to allow retailers to provide (additional) pre-sales services, in particular in the case of experience or complex products, and avoid free-riding.

**17.4** Whilst these are sensible examples, we consider they do not go far enough. In particular, no explanation for the limitation of a low price campaign to 2-6 weeks is given, or what would be required to justify a longer period, for example, seasonality of the product, or usual purchasing cycles etc.

**17.5** In our view, the CMA should include case studies and examples to address the current lack of clarity and guidance. An additional positive step might be the active engagement of the CMA with UK businesses, e.g. by means of comfort letters.

## **Impact questions**

**18. 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.

**18.1** **Significant positive impact** / Moderate positive impact / Negligible impact / Moderate negative impact / Significant negative impact

**18.2** If RPM were not treated as a hardcore restriction and there was expanded guidance on the circumstances in which RPM may generate efficiencies, more of our clients might possibly consider or use RPM as a distribution tool in the circumstances described in our responses above. If RPM remains a hardcore restriction, this will be enough to deter some clients from ever using it, even if the guidance is expanded as the risks of non-compliance would be perceived to be too great. That is unless the CMA would provide individual guidance or comfort letters on RPM questions specifically.

**19. 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.



- 19.1** As already mentioned, the treatment of RPM as a hardcore restriction is well founded in case law and clear as a general rule. Businesses will seek to avoid RPM; and for the reasons stated above, they will often not engage even in pro-competitive RPM, as the circumstances under which this might be allowed are unclear. Accordingly, we are not aware of any specific examples where our clients have sought to engage in RPM but have not been able to due to its treatment as a hardcore restriction.

## Territorial and customer restrictions

### Policy questions

**20. 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:

- 1.** continue to treat territorial and customer restrictions as 'hardcore' restrictions so as to remove the benefit of the block exemption (subject to exceptions);
- 2.** maintain a distinction between active and passive sales;
- 3.** revisit the distinction between active and passive sales for certain types of online sales in the CMA VABEO Guidance; and
- 4.** 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:

- 1.** 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;
- 2.** the distinction between active and passive sales remains valid and whether changes to this categorisation should be made in order to:
  - 2.1** clarify the situations where online sales amount to passive or active sales; or
  - 2.2** give businesses more flexibility to combine different distribution models.

**20.1** We respectfully disagree with the CMA's proposed recommendation to continue to treat territorial and customer restrictions within the UK as hardcore restrictions. We consider that UK suppliers should be given the flexibility to organise their UK distribution in the way that best serves their needs, according to their brand objectives and appetite for risk. We note the CMA's concern to support consumer choice across all parts of the UK. However, we do not consider that there are features of the UK internal market that justify retaining the treatment of territorial restrictions as hardcore; in particular, the UK market is small and coherent enough so that there is unlikely to be material discrimination between different groups of consumers or reduced consumer choice; and any such limited discrimination or reduced consumer choice would be outweighed by the efficiencies generated by allowing suppliers to spread risk or ensure that its distribution system is run in accordance with its needs.

**20.2** We also respectfully disagree with the CMA's proposal to maintain the distinction between active and passive sales. In accordance with our views above, we note that this distinction would not be needed if territorial and customer restrictions within the UK were no longer treated as hardcore restrictions. In any case, the distinction is unworkable and leads to complexity; in our experience, it is virtually impossible for a

supplier to 'prove' that an order was unsolicited so as to prevent a distributor from meeting it. It would be far simpler for the CMA to state that online sales must be permitted without having to rely on categorising types of selling as "active" or "passive".

If the CMA maintains the distinction, between active and passive sales, this will definitely need to be revisited in relation to online sales, where developments in the market have rendered the boundary between active and passive sales very hard to draw.

**20.3** We agree with the CMA's proposal that the current regime should be changed in order to give businesses more flexibility to design their distribution systems according to their needs, specifically by permitting the combination of exclusive and selective distribution in the same or different territories; shared exclusivity; and greater protection for members of a selective distribution system. More flexibility could bring about efficiencies, enabling suppliers to spread risk or ensure wider distribution.

**20.4** Finally, we note the Commission's confirmation in the draft revised guidelines for the VABER at paragraph 162 that the hardcore restrictions in Article 4 VABER apply to vertical agreements concerning trade *within* the Union, and that therefore, in so far as vertical agreements concern exports outside the Union or imports/re-imports from outside the Union, the case law of the CJEU suggests that such agreements cannot be regarded as having the object of appreciably restricting competition within the Union or as being capable of affecting as such trade between Member States. We consider it would be helpful for the CMA to include an equivalent explicit confirmation with regard to exports outside the UK in the guidance on the VABEO.

**21. 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.

**21.1** As noted above, we consider that additional guidance would be helpful, if the CMA retains the distinction between active and passive sales. It would be helpful to include a list of online sales and advertising activities and set out clearly the classification of each of these, for example, the purchase of an online banner advert; targeted advertising on social media; advertising on "local" websites or those aimed at particular customers (e.g. trade websites or specialist publications); purchase of search terms or AdWords etc. In our view, each of these activities would be active selling.

### **Impact questions**

**22. 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.

**22.1** We anticipate that customer restrictions, rather than geographic territory, might be most relevant within the UK market given its size. Customer restrictions may lead to operational efficiencies where they allow the supplier to differentiate between different channels, and properly incentivise a distributor to build up expertise and retain focus on servicing a particular type of customer.

**23. 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.

**23.1** Very helpful / **Somewhat helpful** / Irrelevant / Unhelpful / Very unhelpful

- 23.2** Clients rely on the exemption for restrictions of active sales as in general, they wish to reward and incentivise distributors to retain their focus on servicing particular types of customer.

## Indirect measures restricting online sales

### Policy questions

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

- 24.1** In general, we consider that block exempting dual pricing and allowing suppliers the ability to apply different criteria for online and offline sales in a selective distribution system would allow businesses the flexibility to manage their omni-channel distribution systems efficiently and with legal certainty, which would clearly bring consumer benefits and improve competition.

#### *Dual pricing*

- 24.2** We are supportive of the CMA's proposed recommendation to no longer classify dual pricing as a hardcore restriction. We note this is also consistent with the Commission's approach in the draft revised VBER.
- 24.3** The prohibition of dual pricing was introduced more than ten years ago and against a totally different backdrop, where internet sales were less well developed. In the current circumstances, particularly as a result of COVID-19, online sales are becoming more and more common and are likely to become the new norm in a number of sectors. Suppliers are increasingly embracing online markets, while at the same recognising the continuing importance of the offline market. Suppliers are keen to prevent free-riding and maintain healthy, sustainable omni-channel distribution systems to meet the needs of different consumers.
- 24.4** In this context, suppliers may wish to adopt a dual pricing approach to recognise the different cost structures of the online and offline environments, and to support brick-and-mortar trade and ensure that their distribution networks are operated efficiently. This can only benefit consumers, especially the more vulnerable ones, that do not have access to the internet. Therefore, dual pricing can produce consumer benefits, as it provides consumer choice and multichannel products. In general, dual pricing entails a recognition that online and offline sales have different cost structures and should, therefore, be treated differently.

#### *Equivalence principle*

- 24.5** We are also supportive of the CMA's proposed recommendation to remove the application of different criteria for online and offline sales (i.e. the equivalence principle) as a hardcore restriction in the context of a selective distribution system.
- 24.6** We consider that the application of different criteria for online and offline sales in a selective distribution system would generate benefits in terms of legal certainty and reduced costs for business. This is because the current position of having to apply the equivalence principle in considering standards results in confusion and uncertainty. The online and offline channels are different environments, and having to devise standards that are both commercially sensible and practical and also "equivalent" is very challenging.

**25. 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.

**25.1** We consider strongly that any safeguards to be applied to the treatment of dual pricing/different criteria should be set out clearly within the CMA VABEO Guidance in order to provide maximum legal certainty and clarity. In this respect, we note the position of the Bundeskartellamt in a number of decisions (Gardena, Bosch Siemens and LEGO), which could be relevant.

**25.2** In our opinion, the CMA VABEO Guidance should make clear that different prices for goods/services which are intended to be resold online are permitted provided that the price differential:

**25.2.1** is intended to incentivise or reward the level of investment made online/offline; and

**25.2.2** reflects the differences in the costs incurred in each of the different distribution channels at the retail level.

We note that this is consistent with the Commission's approach.

**25.3** The CMA VABEO Guidance should also provide guidance on how the factors listed above would apply to hybrid distributors.

**25.4** In relation to the equivalence principle, the CMA VABEO Guidance should explain that different standards that are cost reflective or objectively justifiable would be permitted, provided that these do not amount to a *de facto* prohibition on online sales.

**25.5** We consider that the CMA VABEO Guidance should provide case studies and examples to demonstrate when the CMA would permit dual-pricing/different criteria to assist businesses.

### **Impact questions**

**26. 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.

**26.1** As set out in our response above, we consider that the current distinction between active and passive sales is largely unworkable, as it is so difficult to apply in practice, particularly in relation to online sales. The exponential growth in the online channel and its importance to distribution networks (accelerated by the COVID-19 pandemic) means that describing online selling as a whole as "passive" selling is not accurate. Successful brands and distributors make significant investments in their online strategy to identify and target specific groups or types of customer. Being able to prevent some forms of online selling and advertising to ensure consistency and maintain brand standards would help our clients, but the risk is often too great given the lack of clarity as to what would be a true "passive" sale.

**27. 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.

**27.1** Significant positive impact / **Moderate positive impact** / Negligible impact / Moderate negative impact / Significant negative impact

**27.2** We consider that, given the exponential growth of online sales, particularly post-pandemic, the great majority of suppliers would not wish to impose an outright prohibition of online sales, as may have been desired in the past. The majority have embraced an omnichannel approach to meet the different needs of consumers. Therefore, in our view, the current outright online sales ban does not affect the majority of suppliers.

**27.3** The real effect on our clients is trying to distinguish and categorise different "types" of online selling activities to consider if they can be controlled or restricted, generally in order to maintain network integrity or brand standards.

**28. 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.

**28.1** In our experience, the majority of suppliers are keen to embrace and expand online sales in order to reach more consumers and maintain growth, but have concerns about their ability to maintain a viable brick and mortar network that remains important to some consumers.

**28.2** Therefore, as online sales continue to grow exponentially, the current situation is reversed: the risk is that physical stores will start to disappear, as more and more suppliers are focusing their efforts on their online sales. Allowing dual pricing/different criteria for physical/online would recognise and accommodate this new reality, and benefit offline channels. It would allow suppliers to design their distribution networks in a more flexible way, knowing that they can support their physical distributors if needed. It would incentivise physical stores to make additional investments. That is vital, not only for the economy as a whole but also for consumers, especially the more vulnerable ones. In addition, dual pricing/different criteria entails a recognition that online and offline sales have different cost structures and should be treated differently.

## Parity obligations (or 'most favoured nation' clauses)

### Policy questions

**29. Question 29:** What are your views on the CMA's proposed recommendation on parity (or 'most favoured nation') obligations? As part of this, you might like to consider whether indirect sales channel parity obligations<sup>1</sup> can generate benefits/efficiencies beyond those that may be created by direct sales channel parity obligations<sup>2</sup> – if so, please provide evidence or examples in practice of circumstances where this may be the case.

**29.1** We agree with the CMA's proposed recommendation that indirect sales channel parity obligations (i.e., that a product or service may not be offered on better terms on any other channels whether a supplier's own or any intermediaries, i.e. a 'wide MFN') be treated as a hardcore restriction under the UK VABEO.

**29.2** We consider that there may be some limited circumstances where an indirect sales channel parity obligation may generate efficiencies, for example where a new platform seeks to enter the market and wishes to use an indirect sales channel parity obligation to gain a foothold in the market, recoup its investment and avoid free-riding. However, these are likely to be quite limited circumstances and could be covered in the VABEO

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

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

Guidance. Above the 'safe harbour' market share threshold, it is unlikely that such clauses can generate efficiencies that would justify the benefit of the block exemption.

**29.3** We note the Commission's proposal in its draft revised VBER to include these types of restriction as excluded restrictions rather than hardcore, but we consider that a stricter approach is merited by the CMA as consistent with UK case law and the likely effects of such clauses on the smaller UK market.

**30. Question 30:** Do you agree that additional guidance on this issue would be helpful? If so, please provide your views on what that guidance should say.

**30.1** We consider it absolutely crucial that there be consistent terminology and clear definitions of what parity clauses are permitted and prohibited. We note that inconsistency is already arising between the Commission's draft revised Guidelines and the CMA's proposed recommendations and the case-law. If the CMA prefers to use its own terminology, it should at the very least cross-refer to alternative descriptions and provide a usable, clear set of definitions.

**30.2** We note the Commission's explicit confirmation in paragraph 239 of its revised Guidelines that all other types of parity clause (i.e. direct or narrow parity clauses, parity obligations relating to the conditions under which goods or services are offered to customers who are not end users, and parity obligations relating to the conditions under which manufacturers, wholesalers or retailers purchase goods or services as inputs) are covered by the block exemption. It would be helpful for the CMA to include a similar explicit statement in the guidelines to the VABEO.

### **Impact questions**

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

**31.1** Completely / **Very much** / Moderately / A little / Not at all

**31.2** Many of our clients are users of online intermediation services (i.e., platforms), and have had such indirect sales channel parity clauses imposed upon them by the powerful platforms. The effect of this is to limit distribution and restrict competition and it prevents our clients from trialling or supporting innovative new platform entrants.

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

**32.1** Completely / **Very much** / Moderately / A little / Not at all

**32.2** Similarly, our clients frequently have such clauses imposed upon them. However, where the parity obligation covers only the direct sales channel, it is usually more palatable to the supplier.

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

**33.1** No. See our responses above.

## Non-compete obligations

### Policy questions

**34. Question 34:** The CMA invites views on the proposed recommendation<sup>3</sup> in respect of non-compete obligations. In particular:

- a) Should non-compete obligations that are tacitly renewable remain 'excluded restrictions' under the UK VABEO?
- b) Are there any risks in allowing such obligations to be automatically exempt under the UK VABEO?
- c) Should the current regime in the derogations in Article 5(2) and Article 5(3) of the retained VABER be revised (for example, to reflect market developments such as the increasing trend towards online sales)?

**34.1** We agree with the CMA's proposed recommendation that non-compete obligations the duration of which is indefinite or exceeds 5 years should remain excluded restrictions. This position is well understood by clients and, although the five-year period appears somewhat arbitrary, it is on balance a reasonable length of time and we note of course that exceeding such a period does not result in a presumption that the Chapter I prohibition is infringed. We do not consider that there are material risks in allowing such obligations to be automatically exempt.

**34.2** Our clients have not particularly relied on the derogations in Articles 5(2) and 5(3) of the current VABER and we are not aware of examples of clients using these derogations and thus cannot offer views on whether the current regime should be revised.

**34.3** We note the Commission's paragraph 234 of the draft revised VABER Guidelines clarifying that non-compete obligations that are tacitly renewable beyond a period of five years are covered by the block exemption, provided that the buyer can effectively renegotiate or terminate the vertical agreement containing the obligation with a reasonable notice period and at a reasonable cost, thus allowing the buyer to effectively switch its supplier after the expiry of the five-year period. We think it would be helpful for the CMA to include equivalent clarification in the VABEO Guidelines.

### Impact questions

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

**35.1 Completely** / Very much / Moderately / A little / Not at all

**35.2** The great majority of our clients seek to include some form of non-compete obligation in their vertical agreements and have regard to the five-year limitation under the VABER. As noted above, although the five-year period is somewhat arbitrary, it has the benefit of clarity and is well understood.

**36. Question 36:** Relative to the current regime as set out in the retained VABER, what would be the likely impact on your business's operations, or the operations of those you represent, if non-compete obligations that exceed 5 years in duration were no longer treated as 'excluded'

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



restrictions? Please include examples and where possible, quantitative and/or qualitative evidence in your answer.

**36.1** As set out in response to question 35 above, the five-year limitation period under the VABER has the benefit of clarity and is well understood.

**37. 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.

**37.1** Please refer to our response to question 35 above.

## Agency

### Policy question

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

**38.1** Our view is that some additional guidance on agency is necessary. The concept of 'genuine agency', which is based on the risk allocation between the parties is in theory useful, but in practice difficult to apply in 'grey area' scenarios.

**38.2** Such situations may arise e.g. in the case of online platforms or fulfilment contracts. In addition, there are often intermediaries that may undertake certain risks, e.g. in relation to premises or staff, but no risk as regards the contract goods. As noted already, some of our clients are considering engaging in dual distribution (i.e. distributing some products direct to consumers while also maintaining a network of third party distributors) using agents, some of whom may already act as distributors (so called "dual role agents").

**38.3** An inflexible treatment of all such cases as non-genuine agency does not reflect business realities or the overall objective of the rules on agency. As such, we believe that the agency definition needs to be further clarified, so that businesses are in a position to assess what level of risk and investment their agents can undertake, without the risk of being considered as non-genuine agents.

**38.4** We note, in this respect, that the Commission's draft revised Guidelines provide a useful categorisation of risks that are considered material or not as well as a list of examples/case studies where a party will be considered to be an agent. In addition, the draft Guidelines also address the issue of dual role agents, which as mentioned above, is crucial for many businesses. A similar approach in the UK VABEO and Guidance with specific examples and case studies would be very helpful.

## Environmental sustainability

### Policy question

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

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

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



**39.1** We do not consider that the current rules represent a material barrier to vertical sustainability agreements. Such barriers are far more likely to arise in a horizontal context.

**39.2** However, businesses may benefit from guidance as to the extent to which they can impose sustainability obligations on their distributors or supply chain which may have a direct or indirect impact on the distributor's ability to set their own resale price; or on other elements of their independent competitive strategy.

### **Impact questions**

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

**40. 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.

**40.1** We do not consider that the retained VABER and EU Vertical Guidelines contain or frustrate initiatives which might support the UK's Net Zero and environmental sustainability goals.

**41. 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.

**41.1** Please refer to our response to question 39 above.

**42. 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.

**42.1** Please refer to our response to question 39 above.

## **Duration**

### **Policy question**

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

**43.1** We agree with the CMA's recommendation that the UK VABEO should have a duration of 6 years if the CMA's proposed amendments to the retained VABER as set out in the consultation document are implemented. As noted above, our view is that there is an opportunity for the CMA to go further in its amendments and more fully liberalise the UK market and increase flexibility for business to generate efficiencies. However, if the CMA prefers to take a more cautious approach at this stage, given the relatively recent expiry of the transition period following the UK's exit from the EU and the uncertainty around the longer term impact of the COVID-19 pandemic, we agree that the period for the VABEO should be relatively short. This will allow for a further review

and consideration in the not too distant future, and potentially the introduction of more significant changes.

## VABEO Obligation to provide information

### Policy question

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

- 44.1** We agree with the CMA's proposed recommendation that the UK VABEO provide a transitional period of one year. This will provide businesses with sufficient time to adjust their business operations to the new UK regime and, if necessary, amend their vertical agreements.
- 44.2** In terms of the power of the CMA to cancel the block exemption in individual cases, we are not in principle opposed to this, provided that the procedural guarantees mentioned in paragraph 8.4 of the consultation document are present, i.e., that the withdrawal is in writing, there is notice of it in writing and the CMA considers any representations made to it.
- 44.3** Finally, as regards the obligation to provide information on vertical agreements, we would appreciate further guidance from the CMA on the circumstances where this might be the case and the procedural guarantees that will accompany such a request (e.g. measures to protect confidentiality of certain parts of the documents, disposal of documents). Considering the potential effects of a failure to comply with such a request, we would suggest that the parties be provided with sufficient time to respond and, if needed, extensions.

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