

Consultation on the CMA's proposed recommendation to the Secretary of State regarding the Retained Vertical Block Exemption Regulation

Introduction

1. Freshfields Bruckhaus Deringer LLP welcomes the opportunity to respond to the Competition and Markets Authority (*CMA*)'s proposed recommendation to the Secretary of State regarding the retained Vertical Block Exemption Regulation as set out in its Consultation Document¹.
2. This response is based on our significant experience and expertise in advising on issues raised by vertical agreements of many types, and, in particular, complex agency and exclusive and selective distribution arrangements. This response is submitted on behalf of the Firm and does not represent the views of any of the Firm's clients, which comprise a wide range of companies, including distributors, manufacturers and suppliers of different sizes and with differing scopes of activity.
3. Likewise, this response does not necessarily in all respects represent the personal views of every partner in the Firm.

UK Vertical Agreements Block Exemption Order and CMA Vertical Agreements Block Exemption Order Guidance

Question 1: Do you agree with the CMA's proposed recommendation to the Secretary of State to make a Block Exemption Order to replace the retained VABER with a new UK VABEO, rather than letting it lapse without replacement or renewing without varying the retained VABER?

- a) *Yes*
- b) *No*
- c) *Not sure*

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

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

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

4. We are in favour of the maintenance of the existing legal framework of a block exemption and detailed guidelines. Since many businesses distribute goods and services in both the EU and the UK, there is strong support for consistency between the two approaches, which would also avoid adding to regulatory trade tensions at the Northern Ireland border. Replacement of the retained Vertical Agreements Block Exemption Regulation (*retained VBER*) with a new UK Vertical Agreements Block Exemption Order (*UK VABEO*), will help facilitate such consistency and presents an excellent opportunity to preserve those aspects of the EU system governing vertical agreements that work well for businesses and competition, while at the same time amending and enhancing the regime to reflect important UK specificities and market developments for the benefit of UK consumers. Indeed, in some respects, we believe that, as

¹ Dated 17 June 2021 (CMA 145con).

outlined further in our answers below, a new UK VBER could encourage more pro-competitive vertical arrangements by adopting a more flexible approach and by providing greater clarity and certainty than under EU law, in order to drive better outcomes for UK consumers.

5. We agree with the points raised by the CMA in section 2 of its Consultation Document; our experience is that businesses derive value from having block exemption legislation. A very large number of agreements have been drafted to conform so far as possible to the provisions of the retained VBER and many businesses are thus able, with relatively little cost and effort, to assess whether their distribution arrangements are competition law compliant, and to engage in (re)negotiations with their business partners within a stable and relatively clear legal framework. A UK VABEO, accompanied by CMA VABEO Guidance, would provide businesses with much needed legal certainty and allow for such cost-effective compliance. In the absence of a UK VABEO, assessment of agreements would be significantly more burdensome and costly.
6. We also agree that a UK VABEO would provide clear rules to be administered by the CMA and courts, and the safe harbour provided by such an approach will enable the CMA to concentrate on more serious competition law issues and on those vertical agreements that are likely to have the greatest negative effect on competition, either because of the nature of the parties to the agreements or because of the restrictions contained within them.
7. Updated CMA VABEO Guidance is, however, required to take into account UK market developments (most notably the proliferation of e-commerce, the penetration of which is greater in the UK than in many EU Member States), and decisional practice since the retained VBER and the related EU regime were adopted.

Associations of undertakings

Policy questions

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

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.

Impact questions

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?

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

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

- a) Significant positive impact*
- b) Moderate positive impact*
- c) Negligible impact*

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

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

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

8. Based on our experience, the exception for agreements with associations of undertakings, as outlined Article 2(2) of the retained VBER is very helpful to business and has worked well to date. We therefore see no reason to depart from the existing legal framework pursuant to which block exemption also applies to vertical agreements concluded between an association of retailers and its members or its suppliers. To the extent associations of undertakings are covered by the Chapter I prohibition we are not aware of any reason why they should not also be covered by an exception contained in a new UK VABEO.
9. We do, however, believe that the turnover threshold contained in Article 2(2) of the retained VBER should be revised in a new UK VABEO, at least by the rate of inflation, so as to reflect developments in the UK market during the last 10 years. In today's economy, a turnover threshold of £44 million is likely to be exceeded by even relatively small retailers, many of whom still need to be members of associations of retailers in order to remain competitive. Moreover, agreements between parties of such size are, in our experience, highly unlikely to give rise to material competition issues in the vertical context, and should therefore benefit from any safe harbour. An increase in the turnover threshold would thus have a moderately positive impact on the business operations of those clients we represent; whereas, if the turnover threshold were to be decreased, we would expect this to have a moderately negative impact. We are therefore in favour of a UK VABEO providing more leeway to associations of undertakings in this context.

Dual distribution

Policy questions

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

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.

Impact questions

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

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

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

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

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

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

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

10. We support the retention of Article 2(4) of the retained VBER in a new UK VABEO, which confirms that certain dual distribution arrangements may be block exempted (and accepts that horizontal competitive concerns cannot be presumed simply from the fact that a manufacturer engages in dual distribution). Legal certainty and appropriate safe harbours are very important in this area, given that many manufacturers now sell products online *via* their own websites as well as through distributors. Following significant investment in online sales by manufacturers in the last ten years, "omnichannel" distribution (a multichannel approach taken by companies to give customers a way to purchase and receive orders from several sales channels with one-touch seamless integration) is now commonplace in the digital economy and is a critical part of the go to market strategy of a large number of businesses in the UK. In our experience, the dual distribution exception for non-reciprocal vertical agreements has an extremely positive impact on the business operations of those clients we represent.
11. To disapply the safe harbour in the retained VBER simply because a manufacturer/supplier also sells products directly to end users would subject a large swathe of industry to material uncertainty and would be highly disruptive precisely at a time when they need maximum flexibility to rebuild out of the huge disruption still being caused by the Covid-19 pandemic. The impact of the removal of the safe harbour on UK businesses would, in our experience, be highly detrimental. We further support the extension to cover wholesaler/retailer and importer/distributor relationships, since there appears to be no objective basis for distinguishing between suppliers and these types of seller.
12. Clear guidance is needed to optimise the interaction between manufacturers and their distributors and to avoid the detrimental impact on UK consumers, for example, in terms of choice of sales outlet and/or depth of customer service, that an ill-considered change would provoke. This will ensure that the pro-competitive effects of such arrangements (e.g., the ability to seek information on sales in order to assess the popularity of products) are preserved for consumers. We refer to the US Federal Trade Commission (*FTC*)'s decision in the matter of

*Fortiline, LLC*², in which the FTC outlined a number of considerations relevant to dual distribution situations, finding in this case, that the distributor's actions had an impact on horizontal competition and went beyond the potentially pro-competitive impact of vertical communications between a manufacturer and supplier to promote inter-brand competition. The FTC's consent order helpfully specified that the following types of communication were not violations of Section 5 of the FTC Act: (i) requests by a distributor to receive prices, rates, rebates or discounts comparable to those that a manufacturer gives to other distributors and contractors/end users; (ii) negotiations for becoming an exclusive or quasi-exclusive distributor; and (iii) negotiations with a manufacturer to distribute products to contractors/end users previously or potentially served by that manufacturer. The CMA could consider including similar examples in CMA VABEO Guidance so as to ensure businesses manage distribution arrangements without running afoul of UK competition rules.

13. Moreover, it would be helpful if the CMA's VABEO Guidance could provide: (i) greater clarity around the definition of dual distribution for the purposes of Article 2(4) of the retained VBER, in particular, as regards the treatment of online platforms offering intermediation services; and (ii) some flexibility in indicating a reasonable interpretation of Article 2(4) of the retained VBER so that the exemption remains applicable to agreements where any competing relationship at manufacturing level between the parties is marginal or not relevant (e.g., if it concerns products completely unrelated to the agreement, or if the distributor has a de minimis manufacturing presence thereby not affecting the vertical nature or "centre of gravity" of the agreement in question). We further agree with the CMA's reasoning that insertion of an additional market share threshold below which only certain dual distribution arrangements would be exempt, is likely to add complexity and uncertainty for UK businesses, particularly when the benefits of doing so are unclear at this stage, and should therefore be avoided.
14. Additional guidance on the handling of competitively sensitive information of distributors by manufacturers/suppliers who engage in dual distribution would, nevertheless, be welcome. It would be helpful for UK VABEO Guidance to clarify how rules on information exchange apply in dual distribution situations and what steps firms should take to ensure that legitimate information exchanges that are part of a normal vertical relationship are not treated as horizontal exchanges subject to more rigorous scrutiny under Chapter I Competition Act 1998 (*CA98*). This is of particular importance in the case of vertical exchanges of data between online marketplaces and third-party sellers. The approach to information exchange in these situations should necessarily recognise that a manufacturer/supplier is not prevented from having normal discussions about a vertical relationship with its distributors simply because the manufacturer/supplier also competes at the downstream retail level. CMA VABEO Guidance could incorporate further direction on whether, and if so when, exchanges of information are likely to be problematic and how any competition concerns can be addressed as a practical matter.

Resale Price Maintenance (RPM)

Policy questions

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

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.

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.

² Docket No. C-4592: <https://www.ftc.gov/enforcement/cases-proceedings/151-0000/fortiline-llc>

Impact questions

Question 18: What would be the likely impact on your business, or those you represent, if RPM were not treated as a hardcore restriction for the purposes of the proposed UK VABEO? Please explain your answer.

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

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.

15. Many procompetitive justifications exist for a manufacturer's use of RPM, and RPM is only likely to have anticompetitive effects (through collusion or foreclosure) in defined market circumstances. The loss of intra-brand competition resulting from RPM can only be problematic if there is insufficient inter-brand competition. Where the market share of the supplier is below 30%, RPM is unlikely to have anticompetitive effects. On the other hand, RPM may be a useful tool to protect the manufacturer from potential free-riding and retailer opportunism. Overall, in the presence of sufficient inter-brand competition, RPM can help to ensure that the retailers have incentives to invest in service quality and sales efforts. In the light of this, we do not agree with the CMA's recommendation for RPM. Indeed, a particular problem with the EU system has been the application of the double presumption against RPM (assuming they infringe Article 101(1) Treaty on the Functioning of the European Union (*TFEU*) and presuming they do not satisfy Article 101(3) TFEU), which has created a perception that RPM is illegal *per se*, even in circumstances where no anticompetitive effects are likely to arise or where a *procompetitive* rationale for the agreement exists (e.g., where it results in improved inter-brand competition through suppliers incentivising retailers to promote a new product for an introductory period or provide improved pre-sale services).
16. The approach to RPM should therefore be modified by ensuring that the regime enables RPM to be used in circumstances where it would not harm competition and/or produce efficiencies. One option would be to remove RPM from the list of hardcore restraints, so the safe harbour of the UK VABEO applies where its market share thresholds are satisfied, another would be to move RPM to the list of non-exempt restraints (currently Article 5 of the retained VBER).
17. However, if RPM is to continue to be treated as a hardcore restraint in the future, we consider that it is crucial that clearer guidance is provided as regards the circumstances in which RPM might be found not to infringe Chapter I CA98 following an individual analysis of the agreement in question. Further guidance on the criteria and circumstances under which RPM can be justified is necessary. CMA VABEO Guidance should consequently clarify that:
 - RPM does not necessarily restrict competition by object. It may not do so, for example, if following an analysis of the relevant context, proven procompetitive effects cast reasonable doubt on the conclusion that the agreement has a restrictive object (see e.g., Case C-228/18, *Budapest Bank*³ EU:C:2020:265 and Case C-307/18, *Generics (UK)*⁴ EU:C:2020:52). Where a plausible efficiency rationale exists, the claimant is required to establish actual or likely restrictive effects before the parties can be required to justify their agreement under section 9 CA98; and

³ Case C-228/18, EU:C:2020:265

⁴ Case C-307/18, EU:C:2020:52

- all agreements are capable of satisfying the section 9 CA98 criteria and there is no presumption that agreements incorporating hardcore restraints do not do so. Clearer guidance would consequently be welcomed on when RPM might be considered to be ‘indispensable’ to achieve established efficiencies, and how it can be demonstrated that consumers will receive a fair share of those benefits.
18. Such additional clarity and guidance is especially important given that online RPM might be considered to be a crucial means of supporting the provision of dealer services in bricks and mortar stores and that RPM may be necessary to support the launch of new products for a few years or support occasional discounting campaigns. It seems crucial therefore that CMA VABEO Guidance recognises the potential pro-competitive benefits and provides guidance on how those benefits are to be reflected and given real and sufficient weight within the framework of the CA98. Without this, potentially pro-competitive arrangements may be deterred.
 19. By way of further example, it would be helpful if CMA VABEO Guidance clarified that the practice of manufacturers agreeing with (key) customers a price for products, then commercialised *via* one or several (competing) distributor(s), does not amount to RPM to the extent the agreed price between the manufacturer and the client is a maximum price as there remains genuine room for further negotiations and discounts agreed between the customers and the distributor(s).
 20. We also consider it necessary for the CMA to reflect on how the rules governing RPM apply to agency agreements in so far as they are caught by Chapter I CA98 (see further paragraphs 34-38 below dealing with agency agreements).
 21. We also take the opportunity to observe that the CMA’s request for evidence or experience – particularly in the context of efficiencies brought about by RPM – is likely to be perceived by companies as high risk, meaning that the outcome of the consultation is unlikely truly to reflect market reality. The CMA ought to consider – generally, but perhaps especially in the case of RPM - new ways of assessing whether so-called ‘hardcore’ restrictions can ever generate efficiencies to the benefit of consumers. For example, a non-enforcement ‘sandbox’ in which a small number of market participants can test distribution strategies may produce more meaningful evidence on which to base policy.

Territorial and customer restrictions

Policy questions

Question 20: What are your views on the CMA’s proposed recommendation on territorial and customer restrictions? In particular, what are your views on the CMA’s proposed recommendation to:

- a) continue to treat territorial and customer restrictions as ‘hardcore’ restrictions so as to remove the benefit of the block exemption (subject to exceptions);*
- b) maintain a distinction between active and passive sales;*
- c) revisit the distinction between active and passive sales for certain types of online sales in the CMA VABEO Guidance; and*
- d) change the current regime in order to give businesses more flexibility to design their distribution systems according to their needs?*

In your response please consider whether:

- a) there are any features of the UK internal market militating in favour or against retaining the treatment of territorial restrictions as ‘hardcore’ restrictions for the purposes of the UK VABEO;*
- b) the distinction between active and passive sales remains valid and whether changes to this categorisation should be made in order to:*
 - i. clarify the situations where online sales amount to passive or active sales; or*

ii. give businesses more flexibility to combine different distribution models.

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.

Impact questions

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

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

a) Very helpful

b) Somewhat helpful

c) Irrelevant

d) Unhelpful

e) Very unhelpful

22. Since ‘hardcore restraints’ are presumed in most cases to infringe Chapter I CA98, this category of restraints should be confined to those which are highly likely to restrict competition and highly unlikely to produce efficiencies that offset the harmful effects. To demonstrate this, the CMA should therefore be clear why ‘hardcore’ classification is justified for any restraint – why it is likely to harm competition and to lack redeeming virtues in most cases (i.e., why efficiency arguments are likely to be unjustified). This would help to rationalise the approach applied, and to illustrate its consistency with the objectives underpinning the CA98. The CMA’s stated interest in preserving intra-brand competition and consumer choice, or concerns about the UK internal market does not seem to justify the proposed treatment of territorial and customer restraints, as it ignores the extent of the inter-brand competition and possible procompetitive justifications for customer and territorial restraints. It also ignores the reality of an already integrated UK market. Indeed, it is broadly accepted that EU competition policy in this sphere has been influenced significantly by its role as an instrument of single market integration. This seems to be a sphere where some reshaping of UK law could benefit UK consumers and businesses.
23. If territorial and customer restraints are to be maintained as hardcore restraints the provision should be clearly drawn to provide legal certainty. The Articles in the retained VBER, and in the proposed new EU VBER⁵, dealing with territorial and customer restraints incorporate provisions which are, or which will be, extremely difficult to apply in practice and so detract from the goal of providing clarity and an administrable system which can be applied easily by undertakings, competition agencies and courts. For example, the distinction between active and passive sales is poorly understood by business and increasingly artificial in a digital environment. This is an area where a new, more flexible and workable approach would be welcomed.
24. It would be helpful if the CMA VABEO Guidance could also shine light on the UK approach to, and enforcement priorities in respect of, jurisdiction and agreements incorporating restraints on selling outside of, or into, the UK, in particular:
- a. When agreements covering third countries and undertakings located in third countries may affect trade within the UK, for example, an agreement appointing a distributor outside of the UK and prohibiting that distributor from making sales into the UK. Will

⁵ C(2021) 5026 final, 9 July 2021, Arts 4(b)-(d).

the UK apply the approach adopted in the EU, that the conduct may affect trade if, in the absence of the agreement, resale to the UK would be both possible and likely (see *Javico*⁶)? Or might it take an approach similar to that adopted in Switzerland (ensuring that Swiss competition law captures contracts that prohibit sales into Switzerland with the aim of maintaining higher prices there)? Further how will it be determined whether such an agreement appreciably restricts competition in the UK (by object or effect)? and

- b. When a restraint on a distributor selling into the EU might affect trade, and restrict competition, within the UK and, if it does not, provide confirmation that (assuming the retention of hardcore restraints equivalent to Article 4(b)(c) in the Retained VBER) the incorporation of such a restraint would not prevent the application of the UK VABEO.

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?

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.

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.

Question 27: Does the treatment of online sales bans as a hardcore restriction have an overall positive or negative impact on your business? Where possible, please provide examples of the impact on online channels and offline channels in your answer. Please include qualitative and/or quantitative evidence where possible.

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

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.

25. We support the CMA's recommendations that: (a) dual pricing should no longer be regarded as a hardcore restriction of competition; and (b) the imposition of criteria for online sales that are not overall equivalent to the criteria imposed on brick-and-mortar shops in a selective distribution system should no longer be regarded as a hardcore restriction. Extending the prohibition to provisions which contain some, or even a substantial or significant (as proposed by the European Commission in its draft Guidance on vertical restraints⁷), limitation on online selling (without prohibiting it) would detract from a central goal of the block exemption order to provide legal certainty. The equivalence principle in particular lacks legal certainty as online

⁶ Case C-306/96, EU:C:1998:41

⁷ C(2021) 5038 final, 9 July 2021.

and offline sales channels are inherently different. In addition, brand positioning is often at the core of business strategy and for many businesses their brand is their core asset.

26. Indeed, current case law of the Court of Justice of the European Union makes it clear that these restraints are *not* hardcore restraints under the current EU VBER (*Pierre Fabre*⁸ and *Coty*⁹ establish that although a prohibition (or *de facto* prohibition) on online selling constitutes a hardcore restraint within the meaning of Articles 4(b) and (c) EU VBER, other limitations on online selling are not prohibited unless they operate in practice as an absolute prohibition on online selling). In so far as absolute prohibitions on online selling remain hardcore restraints under a new UK VABEO, we agree that CMA VABEO Guidance should make it clear that some restraints on online selling, including dual pricing practices, limitations on online selling that are not overall equivalent to the criteria imposed in brick-and-mortar shops in a selective distribution system, marketplace bans and restrictions on the use of price comparison tools and online advertising, do not constitute hardcore restraints. We also take the view that as a matter of principle the list of hardcore restraints is not justified, as such restraints may be required to provide the necessary incentives for retailers to invest in promotion products, the provision of high-quality services and to prevent free-riding by online distributors.
27. We also observe that the current rules date from a time when online sales were less developed and were thought to need protection, whereas now the converse is true and physical stores struggle to compete with online retailers. Physical retailers have difficulties competing with online stores given the cost of investments in premises and staff dedicated to customer service and sales efforts upon which online retailers free-ride when consumers compare and try products in store before completing their purchase online. Suppliers need to be able to compensate hybrid distributors for this investment by using wholesale prices based on the costs of and investment in each channel and the value to the supplier of sales at physical locations (such as product demonstrations, customer care and service levels more generally), should they wish to do so. Current provisions allowing for a fixed fee to support investment do not address the issue effectively in many circumstances, as this is too inflexible a tool in light of the diversity of distributors (for example in terms of store sizes and the specific services provided).

Parity obligations (or ‘most favoured nation’ clauses)

Policy questions

Question 29: What are your views on the CMA’s proposed recommendation on parity (or ‘most favoured nation’) obligations? As part of this, you might like to consider whether indirect sales channel parity obligations¹⁰ can generate benefits/efficiencies beyond those that may be created by direct sales channel parity obligations¹¹ – if so, please provide evidence or examples in practice of circumstances where this may be the case.

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.

Impact questions

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

- a) Completely*
- b) Very much*
- c) Moderately*

⁸ Case C-439/09, EU:C:2011:649.

⁹ Case C-230/16, EU:C:2017:941.

¹⁰ As defined in paragraph 4.63.

¹¹ As defined in paragraph 4.63.

d) A little

e) Not at all

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

a) Completely

b) Very much

c) Moderately

d) A little

e) Not at all

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.

28. The European Commission has proposed a new EU VBER that does *not* include indirect sales channel parity obligations as a hardcore restriction. Many businesses distribute goods and services in both the EU and UK and therefore would welcome a consistent approach in the treatment of parity obligations.

29. We agree that additional guidance on parity obligations would be helpful given that:

- parity obligations have become more common in e-commerce (as recognised by the CMA);
- parity obligations have been afforded divergent treatment by the CMA and national competition authorities in the EU (for example in relation to parity obligations incorporated in contracts between hotels and online travel agents);¹² and
- there is currently limited guidance from the CMA on assessing parity obligations.

30. Given the CMA has considerable experience in assessing parity obligations in different contexts, it would be helpful if the guidance set out a structured analysis for:

- determining whether parity obligations are in an individual case likely to have anti-competitive effects under section 2 CA98;
- determining whether parity obligations give rise to relevant efficiencies and procompetitive benefits; and
- assessing how any identified restrictive effects are to be weighed against efficiencies and procompetitive benefits under section 9 CA98.

31. It would also be useful if the guidance covered: (i) the assessment of parity obligations relating to non-price terms; and (ii) factors that may make indirect sales channel parity obligations more or less problematic in a given context (particularly if the CMA is minded to continue to recommend that such parity obligations are treated as a hardcore restriction under the UK VABEO).

¹² For example, see: (i) the decision adopted by the German Federal Supreme Court in May 2021 relating to direct sales channel parity obligations; and (ii) the report on the monitoring exercise carried out in the online hotel booking sector by EU competition authorities in 2016, http://ec.europa.eu/competition/ecn/hotel_monitoring_report_en.pdf.

Non-compete obligations

Policy questions

Question 34: The CMA invites views on the proposed recommendation¹³ 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)?*

Impact questions

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

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

Question 36: Relative to the current regime as set out in the retained VABER, what would be the likely impact on your business’s operations, or the operations of those you represent, if non-compete obligations that exceed 5 years in duration were no longer treated as ‘excluded’ restrictions? Please include examples and where possible, quantitative and/or qualitative evidence in your answer.

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.

- 32. We support a change in the treatment of non-compete obligations which exceed five years in circumstances where the buyer is able to terminate or renegotiate the agreement with a reasonable notice period and at reasonable cost, such that those ‘tacitly renewable’ non-competes would no longer be excluded restrictions under the new UK VABEO.
- 33. In vertical agreements where the risk and reward that is the subject of the arrangement will take more than 5 years to come to fruition, removal of non-compete obligations in excess of five years from the list of ‘excluded’ restrictions in a new UK VABEO may have a positive impact on the UK Government’s Net Zero objectives and on sustainability more generally.¹⁴ For example, as regards non-compete clauses contained in agreements pursuant to which the goods/services provided are of long duration or amortised over a period longer than 5 years, e.g. agreements relating to infrastructure, and/or where considerable collaboration is required in order to develop a new product, e.g. environmental or sustainable alternatives to currently available products, no longer viewing such non-competes as an excluded restriction would help

¹³ As defined in paragraphs 5.10-5.16

¹⁴ In this respect we refer to the recent letter from the Secretary of State to Dr. Andrea Coscelli, dated 19 July 2021, in which the Secretary of State invites the CMA to consider whether current competition legal frameworks constrain or frustrate initiatives that might support the UK’s Net Zero and sustainability goals and, if so, whether there are changes that can be made to the UK’s competition laws that would help to achieve such goals.

reduce the parties' risk of a finding of infringement and therefore provide significant impetus to investment.

Agency

Policy question

Question 38: The CMA invites views on the proposed recommendation¹⁵ in respect of agency issues and stakeholders to make any submissions they consider would help the CMA to develop useful guidance on this topic.

34. We believe that, as proposed in paragraph 6.7 of the Consultation Document, further clarification on the compatibility of agency arrangements with Chapter I CA98, especially those between suppliers and platforms, is required.
35. It would be helpful if CMA VABEO Guidance could state more clearly the principles that govern the question of when genuine agency relationships are so closely interrelated that the relationship is characterised by economic unity (they fall outside the scope of Chapter I CA98).
36. Although some early cases suggest agents must act as 'auxiliary organs' of the principal (and constitute independent entities if acting for a number of principals, see *VZW Vereniging van Vlaamse Reisbureaus v VZW Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten (1987)*)¹⁶, modern cases focus on the question of whether the agent bears more than a negligible proportion of the financial and commercial risks linked to sales of goods to third parties (*CEES*¹⁷ and *CEPSA*¹⁸).
37. The principles and current guidance are, however, difficult to apply in many situations, especially where sales are made online *via* a platform. More guidance on how the agency principle applies to agency arrangements concluded between platforms and suppliers, and in digital markets, is consequently required. The current criteria are unclear in this context (for example because it is now often the agent rather than the principal which adopts a policy with regard to commission levels). New CMA VABEO Guidance should clarify that platforms can in certain circumstances be genuine agents, in particular, where ownership of the products/services is not passed to the platform (the platform does not buy products from suppliers for resale), where contracts concluded are formed between the supplier and customer, and where the platform does not bear any of the risks related to the sale or provision of the goods or services, but receives a commission or remuneration for concluded contracts (and that this may be the case even when they bear the entire risk of investing in infrastructure and/or simultaneously work for various smaller principals). It cannot be right in principle that platforms are barred from such status.
38. In so far as agency agreements involving online platforms do fall within the scope of the Chapter I prohibition, however, the new verticals regime and VABEO Guidance should recognise that different principles to those governing other vertical agreements should apply where ownership of the products/ services is not passed to the platform (there is no resale by the platform to the customer) and where the contracts are formed between the supplier and customer. In such cases, the platform is merely providing intermediation services and the principal should remain free to set its own prices.

¹⁵ As set out in paragraph 6.7.

¹⁶ Case 311/85, EU:C:1987:418.

¹⁷ Case C-217/05, EU:C:2006:784.

¹⁸ Case C-279/06, EU:C:2008:485.

Environmental sustainability

Policy question

Question 39: The CMA invites views on the proposed recommendation¹⁹ in respect of environmental sustainability and stakeholders to make any submissions they consider would help the CMA to develop useful guidance on this topic.

Impact questions

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

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

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.

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.

39. We are not aware of any of the current rules creating any obstacles for vertical agreements to pursue sustainability objectives. To date, examples we have come across where competition rules have created an impediment to progress on environmental sustainability have involved co-operation between actual or potential competitors and not pure vertical relationships, i.e., environmental sustainability is more likely - in our experience - to raise competition concerns in the context of *horizontal* agreements than vertical agreements. Nevertheless, we refer to our response in paragraph 33 and footnote 14 above, in which we note that the ability to enter into longer term exclusivity/non-compete obligations exceeding five years would be useful in terms of supporting longer-term and what might otherwise be considered 'more risky' investment in new technology and/or infrastructure, for example, and so is more likely to support and have a positive impact on the UK's ambitions to move towards Net Zero and sustainability more generally.
40. We agree with the CMA that the issue of environmental sustainability needs also to be further considered in the broader context of competition policy, although we welcome guidance on environmental sustainability issues in the context of new CMA VABEO Guidance, in particular, in relation to the criteria for admission to selective distribution systems.

Duration

Policy question

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

41. We are in favour of the CMA conducting a further review of the regime for vertical agreements after a specified period in order to take account of further market developments since this review, in particular, the likely continued growth in online sales, the UK's withdrawal from the EU and the impact of the Coronavirus (COVID-19) pandemic, and support a thorough re-appraisal of the provisions of the block exemption in the context of UK markets. However,

¹⁹ As set out in paragraphs 6.10 – 6.12.

given the extent of trade relations with EU Member States, our view is that any such review ought to be aligned in terms of timing with a future review of the new EU VBER.

VABEO Obligation to provide information

Policy question

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

42. We support the inclusion of a transitional period of one year during which agreements already in force and that do not satisfy the conditions for exemption provided for in the new UK VABEO, but do satisfy the conditions for exemption provided for in the retained VABER, continue to benefit from the block exemption. Such a provision will allow businesses that wish to take advantage of the ‘safe harbour’ in the new UK VABEO to review and (if necessary) revise their vertical agreements accordingly.
43. In so far as the CMA considers a particular agreement not to be an exempt agreement and proposes to cancel the block exemption in respect of that agreement, we agree that any cancellation or withdrawal of the benefit of the UK VABEO in an individual case should be in writing, and that the CMA should give prior notice in writing of its intention and consider any representations made to it by or on behalf of the parties to the agreement. We further agree that any notice should state the facts on which the CMA bases its decision or proposal and its reasons for making it. We would welcome further details regarding the cancellation procedure and the circumstances in which the CMA may seek cancellation of the benefit of the block exemption to be set out in the CMA VABEO Guidance. Likewise, such Guidance should also recognise that agreements are naturally entered into by at least two parties who may not be equally culpable in respect of any provisions contained therein and which the CMA may find objectionable. CMA VABEO Guidance should also confirm that if the CMA cancels the benefit of the UK VABEO, such cancellation can only have *ex nunc* effects, i.e. the exempted status of the agreement in question will remain unaffected for the period preceding the date on which the cancellation becomes effective.
44. To the extent the UK VABEO imposes an obligation on parties to provide the CMA with information in connection with vertical agreements to which they are a party (if requested), we consider it appropriate for CMA VABEO Guidance to set out the circumstances in which the CMA may make such a request, as well as the format and process for doing so. So as to provide businesses with sufficient time to be able to comply with such a request, we suggest a time limit that is longer than the 10 working days that are proposed in the Consultation Document. In the event the CMA subsequently proposes to cancel the block exemption pursuant to the cancellation procedure referred to in paragraph 43 above, we agree that the CMA should first give notice in writing of its proposal and consider any representations made to it. The nature of the information to be provided should be such that enables the CMA to assess whether the agreement in question satisfies the conditions for exemption under the UK VABEO and should be clearly set out in the accompanying CMA VABEO Guidance.

 **Freshfields Bruckhaus Deringer**

22 July 2021