

From: Hugh Mullan [REDACTED]
Sent: 21 July 2021 10:37
To: VBERreview
Subject: CMA's consultation on a UK VABEO
Attachments: CLPD Volume 3 Issue 3-10.pdf

I am writing in response to the CMA's consultation on a UK VABEO. I am responding as an individual.

I have two short observations to make. One in relation to dual-pricing and one in relation to restrictions on online platforms and price comparison websites. I also point to an additional source of evidence.

Dual-pricing

I note that the CMA intends to remove the prohibition on dual-pricing and the requirement for overall equivalence from the list of hardcore restrictions. I understand the CMA's reasoning for this and consider it sensible. Nonetheless, it appears that there is a potential conflict between this and the approach of identifying restrictions of online sales as being hardcore because they are considered as a form of passive sales.

The reason for a prohibition on dual pricing being introduced was the recognition that a supplier could, effectively, prevent online sales by setting a far higher wholesale price for those products which a retailer intended to sell online relative to the wholesale price for those products which a retailer intended to sell in brick-and-mortar locations. A very high wholesale price for online sales would have the same effects as an online sales ban.

It is not clear how the CMA would approach a situation where a supplier would act in this way. Should a supplier expect to benefit from the block exemption regardless of the divergence in wholesale pricing between products intended to be sold online from those sold offline? How would the CMA expect to discourage or prevent a supplier introducing a de

facto online sales ban through this divergence in wholesale pricing? The CMA should consider clarifying its approach in this area.

Restrictions on sales through online platforms and price comparison websites

The consultation does not discuss the approach the CMA intends to take in relation to restrictions imposed by suppliers on sales made by resellers through third party platform marketplaces. This is notable because there has been differences in the attitude of different European competition authorities to these restrictions.

Paragraph 54 of the European Commission's current Guidelines on VABER indicates that it would not be hardcore for an upstream supplier to restrict distributors in its selective distribution system from selling through a marketplace (or 'third party platform'). Similarly, the Commission's draft revised Guidelines state (at paragraph 135) that "a ban on the use imposed in a discernible manner [on] third-party online platforms by a supplier of luxury goods on its authorised distributors may be considered appropriate, as long as it allows authorised distributors to advertise via the internet on third-party platforms and to use online search engines, with the result that customers are usually able to find the online offer of authorised distributors by using such engines, and not going beyond what is necessary to preserve the luxury image of those goods."

I expect that market participants would benefit from greater clarity on the CMA's approach to restrictions on sales through third party platforms (are these unlikely to be considered hardcore?); whether there is a divergence on the approach being taken by the European Commission; and how suppliers can assess whether their products may be considered as luxury goods or not.

In addition, the CMA's consultation does not indicate whether the CMA intends to take a different approach between third party marketplace platforms, through which sales are transacted, and price comparison websites, which share many features with marketplace platforms, but through which sales are not made directly (rather, sales are often transacted

by clicking through to the website of the reseller). In its draft revised Guidelines, the Commission has discussed in some depth how it would assess restrictions on the use of price comparison tools (paragraphs 323 – 332). It is apparent that the Commission is more likely to consider restrictions on price comparison websites as being hardcore relative to restrictions on sales through third party platforms, and that a restriction on the use of a third party marketplace may be acceptable as long as authorised dealers are not restricted from using third party comparison sites. Nevertheless, there are similarities between both forms of platforms.

Market participants are likely to benefit from an explanation of whether the CMA also considers restrictions on price comparison websites to be hardcore; when they might not be considered hardcore; and what theories of harm and efficiencies arise. I have attached an article, which I co-authored, which discusses some of these theories of harm and efficiencies.

Available evidence

The CMA refers to evidence gathered through its roundtables and the European Commission's Evaluation of the Vertical Block Exemption Regulation. An additional source of evidence which the CMA may wish to reflect in its assessment is 'Vertical restraints: new evidence from a business survey', prepared for the CMA by Oxera and Accent, and published on 24 March 2016.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/511332/Final_report_on_vertical_restraints_240316.pdf

Many thanks for considering this submission.

Hugh Mullan

