

RETAINED VERTICAL AGREEMENTS BLOCK EXEMPTION REGULATION

CONSULTATION ON THE PROPOSED RECOMMENDATION TO THE SECRETARY OF STATE

RESPONSE OF THE SOCIETY OF MOTOR MANUFACTURERS AND TRADERS LIMITED

The Society of Motor Manufacturers and Traders Limited (the "**SMMT**") welcomes the opportunity to respond to the consultation on the CMA's proposed recommendation that the Secretary of State replaces the retained Vertical Agreements Block Exemption Regulation (the "**retained VABER**") with a UK Vertical Agreements Block Exemption Order (the "**UK VABEO**").

The SMMT represents a broad cross-section of automotive activities including; vehicle manufacturers; parts manufacturers, suppliers, distributors and fitters, both line-side and those in the aftermarket for service, maintenance and repair; data and technical information providers; tools and equipment suppliers; and accessories suppliers.

For the avoidance of doubt, the SMMT does not represent authorised dealers, active in the resale of new vehicles to end users on either a solus or multi-brand basis ("**dealers**").

The SMMT has provided the following responses to certain of the consultation questions, and hopes that these are of assistance. If it would be helpful to receive any additional information, please contact Sefton Samuels, Operations Director and General Counsel at the SMMT (ssamuels@smmt.co.uk).

The SMMT's responses to the consultation questions

Policy and impact

- 1.1 ***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 VABER with a new UK VABEO, rather than letting it lapse without replacement or renewing without varying the retained VABER?***
- 1.2 Yes.
- 1.3 ***Question 2: Please explain your response providing, where possible, examples and evidence to support your answer.***
- 1.4 The SMMT notes that the retained VABER results from the UK's prior membership of the European Union (the "**EU**"), and the "block" exemption regime that is a facet of EU competition law.
- 1.5 Amongst other "block" exemptions retained in law following the expiry of the Brexit Transition Period:

- (a) the Vertical Block Exemption Regulation¹ was retained in an amended form² (i.e. the retained VABER), together with the accompanying guidance relevant to its interpretation³ (the "**Vertical Guidelines**"); and
 - (b) the Motor Vehicle Block Exemption Regulation⁴ (the "**MVBER**") was also retained in an amended form (the "**retained MVBER**"), together with the accompanying guidance relevant to its interpretation.⁵
- 1.6 The SMMT considers that the "safe harbours" established by the retained VABER (as well as the retained MVBER) provide greater clarity and certainty as regards the compatibility of certain commercial arrangements with section 2 of the Competition Act 1998 (the "**Chapter I Prohibition**").
- 1.7 The value of these "safe harbours" cannot be understated. In their absence, all else being equal, businesses active in the UK would be required to "self-assess" the compatibility of certain of their commercial arrangements with the Chapter I Prohibition.
- 1.8 Such self-assessments may be expected to result in a significant divergence of outcomes, given that businesses have different perceptions of (and approaches to) risk. Such divergence gives rise to the risk of under-investment, with businesses failing to respond optimally to potential opportunities for growth, which may otherwise be expected to increase competition and innovation.
- 1.9 The SMMT is therefore of the view that defined "safe harbours" from the Chapter I Prohibition are positive and beneficial for businesses within the UK, as well as for UK customers and consumers.
- 1.10 In this context, the SMMT also recognises the opportunity for the UK VABEO to define "safe harbours" which are directly relevant to the specific features of the UK economy (i.e. rather than simply extending the application of the retained VABER).
- 1.11 Considering the UK economy, it is clear the UK automotive sector constitutes a key strategic sector. The automotive industry is a vital part of the UK economy accounting for £78.9 billion turnover, £15.3 billion value added and invests more than £3 billion each year in automotive R&D. With some 180,000 people employed directly in manufacturing and 864,000 across the wider automotive industry, it accounts for 13% of total UK exports with over 150 countries importing UK produced vehicles, generating more than £100 billion of trade. More than 30 manufacturers build more than 70 models of vehicle in the UK supported by over 2,500 component providers and some of the world's most skilled engineers.

¹ Commission Regulation No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union ("**TFEU**") to categories of vertical agreements and concerted practices.

² Pursuant to Regulation 3(9) of The Competition (Amendment etc.) (EU Exit) Regulations 2019.

³ See, Commission notice – Guidelines on Vertical Restraints.

⁴ Commission Regulation (EU) No 461/2010 of 27 May 2010 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices in the motor vehicle sector.

⁵ See, Commission notice – Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles.

- 1.12 In addition, as the UK economy continues its recovery from the COVID-19 pandemic, it is critical that the UK VABEO encourages investment in the UK, and promotes competition and innovation.
- 1.13 The SMMT commends the CMA upon its efforts to ensure that the UK VABEO serves the interests of UK businesses and consumers.
- 1.14 The SMMT expects that the CMA will pursue an equivalent goal in relation to the retained MVBBER and looks forward to confirmation of a timetable for this work. The proper relationship between various operators within automotive, as described above and all being within SMMT membership, is more closely governed and described by the retained MVBBER and as such a full review of how this functions and may require adaptation is essential.
- 1.15 So as to maximise the value of the UK VABEO for UK businesses, customers, and consumers, the SMMT invites and encourages the CMA to ensure that the guidance accompanying the UK VABEO (the “**CMA VABEO Guidance**”):
- (a) is clear and accessible, drafted with non-lawyers in mind, and sets out in particular (using case studies and worked examples):
 - (i) the different types of distribution arrangements that would either fall outside of the scope of the Chapter I Prohibition, or would otherwise be capable of benefitting from the UK VABEO;
 - (ii) how these different types of distribution arrangements may be combined (including by reference to territory and/or customer group), so as to provide a range of options of businesses; and
 - (iii) those distribution arrangements (or combinations of arrangements) which could potentially give rise to competition concerns amongst the wide cast of operators within the automotive sector, as described above; and
 - (b) is supplemented and updated at regular intervals throughout the duration of the UK VABEO, so as to ensure that the CMA VABEO Guidance remains relevant and applicable.
- 1.16 ***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***

1.17 Significant positive impact.

Dual distribution

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

1.19 The SMMT welcomes the CMA's recommendation that the UK VABEO includes an exception for "dual distribution" in the same form as in the retained VABER, but that this exception is also extended to apply to "dual distribution" by wholesalers and importers. The SMMT considers that greater clarity and flexibility with respect to dual distribution models will increase consumer choice and innovation.

1.20 For completeness, the SMMT agrees with the CMA's position that the availability of the UK VABEO should not be dependent upon the retail sales of an OEM and/or its dealers satisfying an additional (lower) market share threshold.

1.21 ***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.***

1.22 The SMMT agrees that businesses are well placed to self-assess potential competition concerns arising from the exchange of competitively sensitive information between OEMs and their dealers.

1.23 However, to assist businesses in this regard, the SMMT considers that it would be helpful for the CMA VABEO Guidance to:

- (a) confirm that information exchanges between an OEM and an dealer in a "dual distribution" scenario would generally form part of the vertical relationship between the parties, and so would be capable of benefitting from the UK VABEO;
- (b) confirm in the context of a dealer acting on a solus basis in particular that it would be permissible for an OEM to request information to enable it to evaluate (i) the dealer's performance in positively promoting the OEM's brand; and (ii) the returns on investments made by the OEM in relation to the dealer's activities; and
- (c) clarify any specific circumstances in which the provision of information in a "dual distribution" scenario would be capable of giving rise to competition concerns from the CMA's perspective.

1.24 ***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**
- 1.25 Completely.
- 1.26 **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**
- 1.27 Not at all.
- 1.28 **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.**
- 1.29 If the "dual distribution" exception was not included in the UK VABEO, the SMMT considers this would result in additional complexity and delay, with businesses required to self-assess the extent to which their planned (and existing) arrangements were compatible with the Chapter I Prohibition.
- 1.30 As noted in response to question 2 above, such self-assessments may be expected to result in a significant divergence of outcomes, given that businesses have different perceptions of (and approaches to) risk.
- 1.31 This would give rise to the risk of under-investment – and ultimately a negative impact on consumer choice and experience - with businesses failing to respond optimally to potential opportunities for growth, which may otherwise be expected to increase competition and innovation.
- 1.32 **Question 14: Do you consider the CMA's proposed recommendation, which also applies the exception to dual distribution by wholesalers and by importers, to have a positive or negative impact on business operations? Please explain your answer.**
- (a) **Significant positive impact**

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

1.33 Moderate positive impact.

Resale price maintenance

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

1.35 The SMMT agrees with the CMA's position that RPM should remain a hardcore restriction under the UK VABEO.

1.36 However, as outlined below, the SMMT considers that it would be helpful for the CMA VABEO Guidance to confirm the circumstances in which RPM may be expected to be compatible with the Chapter I Prohibition (i.e. rather than the CMA VABEO Guidance simply confirming that the CMA "remains open to carefully and objectively considering any efficiency arguments made in the course of any investigations")⁶.

1.37 **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.**

1.38 The SMMT considers that RPM could lead to efficiencies in specific circumstances, including in the context of a short-term uniform retail price promotion (i.e. retail price reduction) being implemented across a network of dealers.

1.39 **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.**

1.40 As noted above, the SMMT considers that additional guidance on when RPM may lead to efficiencies would be helpful.

1.41 The SMMT also considers that any such guidance should:

- (a) confirm that aspects of tripartite relationships between (i) suppliers; (ii) intermediaries providing fulfilment services; and (iii) final customers are not capable of constituting RPM (e.g. where an intermediary providing fulfilment services adheres to the resale price previously agreed between the supplier and its customer); and
- (b) set out any criteria to be satisfied by suppliers and intermediaries in order to benefit from this "safe harbour" in relation to RPM.

⁶ See, paragraph 4.11 of the Consultation document.

Territorial and customer restrictions

1.42 **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.**

1.43 The SMMT agrees with the CMA's recommendations in relation to territorial and customer restrictions. In particular, the SMMT welcomes the CMA's recommendations that:

- (a) the CMA VABEO Guidance confirms:
 - (i) the CMA's interpretation of what constitutes "active sales", and "passive sales" (including in the context of online sales); and
 - (ii) how the CMA intends to treat different online sales strategies (e.g. as either "active sales", or "passive sales"); and
- (b) the following aspects (together, the **"Permitted Customer/Territory Restrictions"**) are permitted under the UK VABEO, and addressed within the CMA VABEO Guidance:
 - (i) the combination of exclusive and selective distribution in the same or different territories, including in relation to:

- (A) the combination of exclusive and selective distribution in the same territory at different levels of the supply chain; and
 - (B) "quasi-exclusivity" being conferred upon a dealer in the context of a selective distribution system, so as to incentivise the dealer to make appropriate investments (e.g. with an OEM agreeing with the dealer that it will (i) supply only the dealer in a given area within which the selective distribution system operates; and (ii) prevent other dealers from opening premises in that given area through the use of location clauses);
 - (ii) "shared exclusivity" in a territory (or for a customer group) by allowing the allocation of a territory to more than one "exclusive" distributor; and
 - (iii) the provision of greater protection for members of selective distribution systems against sales from outside the territory being made to unauthorised resellers inside that territory.
- 1.44 The SMMT believes that these recommendations will provide greater certainty and flexibility, giving businesses more options and opportunities to consider in the context of their distribution strategies and day-to-day arrangements.
- 1.45 ***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.***
- 1.46 The SMMT agrees that additional guidance would be helpful. In this context, the SMMT believes that it would be beneficial for the CMA VABEO Guidance to clearly set out and explain:
- (a) the CMA's interpretation of what constitutes "active sales", and "passive sales", and how different online sales strategies will be treated;
 - (b) the availability of the UK VABEO in relation to each of the Permitted Customer/Territory Restrictions; and
 - (c) if any of the Permitted Customer/Territory Restrictions were to fall outside of the UK VABEO in the context of a particular agreement (e.g. due to one party's market share exceeding the relevant threshold), the circumstances in which each of the Permitted Customer/Territory Restrictions:
 - (i) would generally be permissible; and
 - (ii) could potentially give rise to competition concerns amongst the wide cast of operators within the automotive sector, as described above.

Indirect measures restricting online sales

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

- 1.48 The SMMT agrees with the CMA's proposed recommendation that the following should cease to be treated as "hardcore" restrictions of competition:
- (a) OEMs charging the same dealer a higher price for products intended to be resold online compared to products intended to be sold offline ("**dual pricing**"); and
 - (b) OEMs imposing criteria for online sales that are not overall equivalent to the criteria imposed in physical showrooms in the context of selective distribution ("**non-equivalent sales criteria**").
- 1.49 This would recognise the growth in sales channels such as e-commerce, and give the flexibility to innovate further to meet consumer needs and preferences.
- 1.50 ***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.***
- 1.51 The SMMT agrees that additional guidance would be helpful. In this context, the SMMT believes that it would be beneficial for the CMA VABEO Guidance to confirm:
- (a) the availability of the UK VABEO in relation to OEMs' use of dual pricing, and/or non-equivalent sales criteria; and
 - (b) if the use of dual pricing, and/or non-equivalent sales criteria was to fall outside of the UK VABEO in the context of a particular agreement (e.g. due to one party's market share exceeding the relevant threshold), the circumstances in which the use of dual pricing, and non-equivalent sales criteria:
 - (i) would generally be permissible; and
 - (ii) could potentially give rise to competition concerns amongst the wide cast of operators within the automotive sector, as described above.
- 1.52 ***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.***
- 1.53 The SMMT considers that the CMA's proposed recommendation may be expected to benefit offline channels. For example, removing the use of dual-pricing and non-equivalent sales criteria from the list of hardcore restrictions should:
- (a) enable OEMs to provide discounts to dealers in relation to products to be resold in-store, encouraging dealers to make investments in their physical premises, and enable those dealers to offer omni-channel experiences (i.e. online and offline) for the OEM's products; and
 - (b) enable OEMs to optimise their dealers' performances in the online and off-line sales channels, on the basis that these perform different functions (even in the context of

omni-channel experiences), and the CMA's proposed recommendation would allow for greater differentiation between these channels.

Non-compete obligations

1.54 **Question 34: The CMA invites views on the above proposed recommendation 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)?**

1.55 The SMMT agrees with the CMA's proposal that non-compete obligations, which are indefinite or exceed five years in duration, should remain excluded restrictions under the UK VABEO.

1.56 **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**

1.57 Moderately.

Agency

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

1.59 The SMMT welcomes the CMA's proposed recommendation to provide clarification within the CMA VABEO Guidance in relation to agency agreements (including issues relating to online platforms, fulfilment contracts (see also the SMMT's response to Question 17 above), and "dual role" agents).

1.60 In this context, the SMMT believes that it would be beneficial for the CMA VABEO Guidance to:

- (a) provide guidance and worked example case studies addressing how agency agreements are to be assessed for the purposes of the application of the Chapter I Prohibition (including in relation to the assessment of the magnitude of the risk borne by an agent);
- (b) confirm that distribution models in which a "dual role" agent acts as both agent and dealer for different products of the same OEM can fall outside of the Chapter I Prohibition, and provide clear and accessible guidance setting out the criteria to be satisfied to achieve this outcome; and
- (c) confirm that distribution models in which a "dual role" agent acts as both agent and dealer for different products of more than one OEM can also fall outside of the Chapter I Prohibition, and provide clear and accessible guidance setting out the criteria to be satisfied to achieve this outcome, noting in particular the possibility of:
 - (i) a dealer acting as an agent for more than one OEM in relation to specific types of vehicles (e.g. electric vehicles), thereby enabling consumers to benefit from greater choice, particularly when comparing those vehicles in-store; and
 - (ii) a new entrant OEM being able to establish a "route to market" in relation to in-store sales through the use of "dual role" agents, thereby enabling consumers to benefit from greater choice;
- (d) provide guidance and worked example case studies in relation to the appropriate calculation and apportionment of the costs to be paid by the principal (or reimbursed by the principal to the agent), including in circumstances in which:
 - (i) a third party is appointed to act as an agent on behalf of an OEM where there is no prior commercial relationship between the third party and the OEM; and
 - (ii) a long-standing dealer appointed by an OEM (whereby the dealer has made investments in premises, equipment, and staff training in this context) is appointed to act as an agent on behalf of the OEM to conclude contracts in relation to a specific range of the OEM's products, while continuing to resell the remainder of the OEM's product as a dealer; and
- (e) provide guidance in relation to the circumstances in which an agreement that cannot be characterised as a genuine agency agreement would nevertheless be compatible with the Chapter I Prohibition (e.g. if the "agent" remained free to share its commission payment with the customer, so as to effectively reduce the resale price to the customer, while maintaining the income of the "principal").

Environmental sustainability

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

- 1.62 The SMMT welcomes the CMA's proposal to provide guidance in the CMA VABEO Guidance in relation to when environmental sustainability considerations may be applied in the context of criteria for admission to selective distribution systems.
- 1.63 As the CMA is aware, purely qualitative selective distribution is generally considered to fall outside of the Chapter I Prohibition, provided that:
- (a) the nature of the product in question requires the use of selective distribution;
 - (b) members of the distribution network are chosen on the basis of objective criteria of a qualitative nature which are laid down uniformly for all potential members, and are not applied in a discriminatory manner; and
 - (c) the criteria laid down do not go beyond what is necessary.⁷
- 1.64 However, if an OEM intended for its authorised repairers to satisfy certain environmental sustainability considerations, it is not clear whether the use of criteria of this nature would result in the relevant distribution arrangements ceasing to be characterised as purely qualitative selective distribution.
- 1.65 It would therefore be beneficial for the CMA to confirm its approach to, and the criteria it will apply when assessing, whether selection criteria intended to satisfy environmental sustainability considerations are compatible with the concept of purely qualitative selective distribution.

Duration

- 1.66 ***Question 43: The CMA invites views on whether the UK VABEO should have a duration of 6 years.***
- 1.67 The SMMT considers that the proposed duration of six years would enable a timely review of the UK VABEO, and if necessary, a recalibration to ensure that the UK regime remains relevant in the context of market developments.

Other provisions

- 1.68 ***Question 44: The CMA invites views on the above proposed recommendations in respect of the other provisions in the UK VABEO.***
- 1.69 The SMMT welcomes the CMA's recommendation to implement a one-year transitional period, in order to allow businesses to review and (where necessary) revise their existing arrangements.

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⁷ See, Supplementary Guidelines to the Retained MVBBER, paragraph 43.