

UK competition law: Vertical Agreements Block Exemption Regulation

CMA's recommendation

© Crown copyright 2021

You may reuse this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence.

To view this licence, visit www.nationalarchives.gov.uk/doc/open-government-licence/ or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: psi@nationalarchives.gsi.gov.uk.

Contents

	<i>Page</i>
1. Summary	2
2. Introduction	3
3. The CMA's recommendation	6
4. Scope of the UK Order.....	12
5. Hardcore restrictions.....	19
6. Excluded restrictions.....	51
7. Issues for CMA Verticals Guidance	57
8. Duration	62
9. Other provisions.....	64

1. Summary

- 1.1. The purpose of this document is to make a recommendation to the Secretary of State for Business, Energy and Industrial Strategy (Secretary of State) as to whether the existing Vertical Agreements Block Exemption Regulation which has been retained from EU law (the retained VABER) should be renewed or varied.¹ Without a renewal or variation of the retained VABER, it will expire on 31 May 2022.
- 1.2. On 17 June 2021, the Competition and Markets Authority (CMA) published a [consultation document](#) pursuant to section 8(1) of Competition Act 1998 (the Act).² In the consultation document, the CMA sought views on its proposed recommendation to the Secretary of State to renew the block exemption and on certain proposed changes to the current regime. This consultation ran until 22 July 2021, with the CMA receiving a total of 37 responses from a wide variety of stakeholders.
- 1.3. The responses to the consultation will be published on the relevant CMA webpage in due course. Stakeholders suggested areas where the block exemption could be improved or adapted, and we are grateful for the useful contributions from respondents to the consultation.
- 1.4. Having carefully considered the various issues, the CMA is recommending that the Secretary of State replaces the retained VABER with a UK Vertical Agreements Block Exemption Order (UK Order) that will have a duration of six years. Although the CMA does not consider it appropriate to introduce fundamental changes to the current exemption, nevertheless this document sets out certain important amendments that the CMA proposes the future UK Order should incorporate.

¹ The retained VABER is one of the 'retained exemptions' from EU law that was retained in UK law after EU law generally ceased to have effect in the UK on 1 January 2021, as a result of a combination of the operation of the European Union (Withdrawal) Act 2018 and the Competition (Amendment etc.) (EU Exit) Regulations 2019, as amended by the Competition (Amendment etc.) (EU Exit) Regulations 2020.

² Under section 8(1) of the Act, before making a recommendation under section 6(1), the CMA must publish details of its proposed recommendation in such a way as it thinks most suitable for bringing it to the attention of those likely to be affected; and consider any representations about it which are made to it.

2. Introduction

- 2.1 Vertical agreements are agreements for the sale and purchase of goods or services between businesses operating at different levels of the production or distribution chain, for example, between manufacturers and wholesalers or retailers.
- 2.2 The Act prohibits anticompetitive agreements between ‘undertakings’ (ie businesses); this prohibition is known as the Chapter I prohibition.³ The Chapter I prohibition applies to agreements and concerted practices between undertakings and to decisions by associations of undertakings (eg trade associations) which have as their object or effect the prevention, restriction or distortion of competition within the UK and which may affect trade within the UK. However, section 9(1) of the Act provides that agreements can be exempted from the prohibition if they meet certain conditions; an agreement may be individually recognised as exempt by a competition authority or a court and, in addition, certain types of agreement will be treated as automatically exempt if they meet conditions set out in a ‘block exemption’ regulation or order applicable to that category of agreements.
- 2.3 By way of background, before the UK’s withdrawal from the EU, the EU Vertical Block Exemption Regulation (EU Regulation)⁴ applied in the UK and provided an automatic exemption for vertical agreements meeting its conditions. When the Transition Period for the withdrawal of the UK from the EU came to an end on 31 December 2020, such that EU laws generally ceased to apply in the UK, the EU Regulation was retained in UK law (as the retained VABER). This meant that agreements in the UK could still benefit from the block exemption (both pre-existing and new agreements), provided that they meet the relevant conditions. That is the current position, with the retained VABER due to expire on 31 May 2022.
- 2.4 The retained VABER sets out a block exemption from the Chapter I prohibition that applies to any vertical agreement which meets certain specified conditions.⁵ This means that agreements between businesses which meet the conditions of the retained VABER are automatically exempt from the Chapter I

³ Section 2 of the Act.

⁴ Commission Regulation (EU) No 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices. The block exemption set out in this Regulation is substantively the same as the retained VABER except that it applies to the EU rather than the UK.

⁵ The retained VABER is one of the ‘retained exemptions’ created by a combination of the operation of the European Union (Withdrawal) Act 2018 and the Competition (Amendment etc.) (EU Exit) Regulations 2019 (as amended by the Competition (Amendment etc.) (EU Exit) Regulations 2020). See here: [Commission Regulation \(EU\) No 330/2010](#).

prohibition.⁶ In this way, the retained VABER provides legal certainty for businesses.

- 2.5 As an example, a distribution agreement between a manufacturer and a wholesaler would be classed as a vertical agreement, because the contracting parties operate on different levels of the supply chain. Where these two parties have market shares of no more than 30% in their relevant markets, the agreement would fall within the retained VABER, and would therefore be exempt from the Chapter I prohibition, subject to meeting the relevant conditions (see **Annex A: Legal framework** for a detailed example). As a consequence of falling within the retained VABER, the parties could be assured of their agreement not being prohibited under the Chapter I prohibition, and so would not need to conduct a further self-assessment as to whether the agreement might infringe the Chapter I prohibition.
- 2.6 The CMA has reviewed the retained VABER for the purpose of making a recommendation to the Secretary of State in accordance with the Act about whether to replace the retained VABER when it expires on 31 May 2022.
- 2.7 The CMA has developed this recommendation following a review of the retained VABER and its effect on UK markets. The CMA's review has:
- (a) Drawn on relevant evidence from an evaluation of the EU Regulation and the related EU Guidelines on Vertical Restraints (the EU Vertical Guidelines)⁷ to which the CMA and UK stakeholders contributed actively, as the EU Regulation was fully applicable in the UK during the period under review (the EU Evaluation).⁸ The EU Evaluation includes evidence relevant to the UK, including to businesses operating in the UK and to UK consumers.
 - (b) Gathered additional evidence relating specifically to the application of the retained VABER in the UK to supplement the evidence obtained during the EU Evaluation. This evidence was gathered by the CMA during roundtables and bilateral meetings with interested parties, including:
 - (i) businesses with operations in the UK that rely on the retained VABER (for example, suppliers of goods and services, distributors/retailers of goods and services, and platforms/intermediaries in e-commerce);

⁶ Unless the block exemption has been cancelled, varied or revoked in accordance with the Act.

⁷ Guidelines on Vertical Restraints, European Commission, OJ C 130, 19.5.2010.

⁸ European Commission's Evaluation of the Vertical Block Exemption Regulation, SWD (2020) 173 final (Evaluation SWD).

- (ii) law firms and economists advising businesses on the application of competition law to vertical agreements in the UK;
- (iii) industry associations; and
- (iv) consumer organisations.⁹

- 2.8 Finally, on 17 June 2021, the CMA published a [consultation document](#) pursuant to section 8(1) of the Act.¹⁰ In the consultation document, the CMA sought views on its proposed recommendation to the Secretary of State to renew the block exemption and on certain proposed changes to the current regime. The CMA's consultation ran until 22 July 2021, with the CMA receiving a total of 37 responses from a wide variety of stakeholders.
- 2.9 The responses to the consultation will be published on the CMA's webpage in due course.¹¹ Having carefully considered these responses, the CMA has submitted this recommendation to the Secretary of State.
- 2.10 The CMA also envisages preparing guidance to accompany the UK Order (CMA Verticals Guidance). The CMA is minded to consult on a draft proposal for the CMA Verticals Guidance later in 2021 or early in 2022.

⁹ Although engagement from consumer groups was limited in the first phase of the review, the CMA held bilateral meetings with several consumer groups during the course of the CMA's consultation including Which?, the Northern Ireland Consumer Council, and MoneySavingExpert.

¹⁰ Under section 8(1) of the Act, before making a recommendation under section 6(1), the CMA must publish details of its proposed recommendation in such a way as it thinks most suitable for bringing it to the attention of those likely to be affected; and consider any representations about it which are made to it.

¹¹ A summary of the responses is included within each of the substantive sections of the present recommendation. Although the CMA has carefully considered all the views expressed by respondents, these summaries do not purport to describe exhaustively all of those views.

3. The CMA's recommendation

- 3.1 The CMA's recommendation to the Secretary of State is that it would be appropriate to replace the retained VABER when it expires on 31 May 2022 with a UK Order, tailored to the needs of businesses operating in the UK and UK consumers.¹² The CMA's recommendation is that the UK Order should make certain important amendments to the current regime. The detail of the CMA's recommendation for the UK Order (including those amendments) is summarised in paragraphs 3.9 to 3.18 below, and further explained in the remainder of this document.
- 3.2 The CMA's recommendation is based on feedback received in the context of the CMA roundtables, the EU Evaluation, and the responses to the CMA's consultation. Overall, the evidence gathered shows that a vertical agreements block exemption is a relevant and useful tool for businesses, providing legal certainty for common types of commercial agreements that pose no significant harm to competition. A vertical agreements block exemption also has the merit of relieving competition authorities and the courts of the burden of reviewing such essentially harmless agreements. The CMA therefore considers that letting the retained VABER expire without providing for a replacement is not currently appropriate in the UK. Indeed, it is beneficial to have a 'safe harbour' for categories of vertical agreements that are considered likely to satisfy the requirements for exemption under section 9 of the Act¹³ because such agreements are likely to generate consumer benefits, for example through promoting efficiencies, non-price competition, investment and innovation.¹⁴
- 3.3 A vertical agreements block exemption also has benefits for businesses. First, it provides legal certainty as it enables businesses to know in advance how to ensure that their vertical agreements (ie agreements between businesses at different levels of the supply chain, such as between a manufacturer and a distributor) comply with competition law. Second, it avoids placing on businesses the burden of scrutinising a large number of essentially benign agreements that are likely to satisfy the requirements for exemption under section 9 of the Act. Third, the existence of a block exemption also ensures

¹² The replacement will result in the adoption of a UK block exemption order under section 6 of the Act (Part I of the Act), the provisions of which will be interpreted in accordance with section 60A of the Act (see the CMA's [Guidance on the functions of the CMA after the end of the Transition Period](#) (Brexit Guidance), paragraphs 4.18–4.24).

¹³ See **Annex A: Legal framework** for these requirements.

¹⁴ Notably, before the UK and EU systems of competition were aligned on 1 May 2004, the vast majority of vertical agreements were excluded from the application of competition law in the UK under the UK Exclusion Order, made under section 50 of the Act. The UK Exclusion Order had only one 'hardcore' restriction, which related to price-fixing.

consistency of approach by providing a common framework for businesses to assess their vertical agreements against the Chapter I prohibition.

- 3.4 A vertical agreements block exemption also helps to ensure that the CMA and the courts do not need to spend time scrutinising many vertical agreements between businesses with relatively low market shares, and so is able to concentrate its resources on other matters that are more likely to give rise to significant competition concerns. In this regard, the CMA notes that the various conditions of the current block exemption ensure that it is unlikely to apply to agreements that may give rise to significant competition concerns.¹⁵
- 3.5 The vast majority of respondents to the CMA's consultation, from across different industries and sectors, agreed that that the CMA should recommend to the Secretary of State that he should make a Block Exemption Order to replace the retained VABER, rather than letting it lapse without replacement or renewing without varying it.¹⁶ Respondents from the pub sector were more ambivalent about the effectiveness of a general block exemption for vertical agreements, and called for sector-specific market share thresholds for the pub sector or the removal of exclusive purchasing and non-compete agreements in the sector from the benefits of any future UK Order.¹⁷
- 3.6 In general, legal certainty was highlighted as the key benefit of a new UK Order. Other relevant reasons given by respondents include the risk that the absence of a 'safe harbour' could discourage businesses from entering into pro-competitive agreements, as well as an increased prospect of costly litigation.¹⁸ Some respondents suggested that major changes to the retail landscape (particularly the rapid development of the digital economy) necessitated updates to the current regime.¹⁹ Several respondents highlighted the benefits of alignment with the EU, or that UK regulation should not in any

¹⁵ For example, through the operation of the market share threshold and list of hardcore and excluded restrictions – see **Annex A: Legal framework** for further explanation regarding the operation of the retained VABER.

¹⁶ L'Oréal, British Glass, Richemont, Walpole, Anonymous 1, SMMT, Addleshaw Goddard, Eversheds Sutherland, VBB, K&L Gates, ECCIA, Freshfields Bruckhaus Deringer, Brands for Europe, Travelport, Amazon, EU Travel Tech, ABI, ABA Antitrust Law and International Law Sections, Which?, BBC, City of London Law Society Competition Law Committee, In-house Competition Lawyer's Association, British Brands Group, NFDA, Joint Working Party of the Bars and Law Societies of the United Kingdom (JWP) and Gowling.

¹⁷ Pubs Advisory Service, CAMRA, and Campaign for Pubs. While the CMA acknowledges the concerns raised by these respondents, it is not recommending the introduction of sector-specific provisions in the UK Order, as the CMA considers that it is preferable for the UK Order to apply consistently across different industries, avoiding the need for sector specific provisions, and the complexity that is likely to create.

¹⁸ L'Oréal, Walpole, Addleshaw Goddard, Eversheds Sutherland, ECCIA, Freshfields Bruckhaus Deringer, Brands for Europe, Amazon; ABA Antitrust Law and International Law Sections; BBC; City of London Law Society Competition Law Committee; In-house Competition Law Lawyers Association, British Brands Group, JWP of the Bars and Law Societies of the United Kingdom and Gowling.

¹⁹ L'Oréal; Brands for Europe, JWP of the Bars and Law Societies of the United Kingdom.

case be stricter than that of the EU.²⁰ Moreover, the vast majority of respondents stated that the CMA's recommendations for the UK Order would have a positive impact on consumers.²¹

3.7 The CMA has also concluded that the current regime for the vertical agreements block exemption should be revised in certain respects, and that it would not be appropriate simply to renew the existing retained VABER in its current form. In particular, stakeholders have underlined several areas where the retained VABER could be brought up-to-date to reflect market conditions better. Such views were also expressed by stakeholders in the EU Evaluation, which identified several issues with regard to the functioning of the current rules.²² In **Sections 4 to 9** of this document, the CMA sets out detailed analysis of its proposed changes to the current regime, as well as its views on areas in respect of which it is not proposing changes.

3.8 A relevant consideration for the final recommendation has been that participants at the CMA roundtables, as well as respondents to the CMA's consultation, have indicated that in some instances divergence from the EU regime could result in compliance costs for some firms.²³ The CMA recognises the advantages of consistency, all other things being equal, particularly for businesses with activities in both the UK and the EU. However, where the CMA sees material advantages in divergence – for example to tackle what it considers to be harmful anti-competitive practices – it does not recommend that the advantages of consistency should be regarded as outweighing the need to protect UK consumers, and the UK economy, from such harmful anti-competitive practices.

Summary of the CMA's proposed changes

3.9 In making its recommendation to the Secretary of State, the CMA is not proposing fundamental changes to the current exemption for vertical agreements (ie the retained VABER), but is proposing some important amendments that the CMA believes will have practical benefits. The following paragraphs summarise the CMA's recommendation.

²⁰ British Glass, Richemont, Addleshaw Goddard, Eversheds Sutherland, Freshfields Bruckhaus Deringer, ABA and Antitrust Law and International Law Sections.

²¹ Significantly positive impact: L'Oréal, Walpole, SMMT, Eversheds Sutherland, VBB, K&L Gates, ECCIA; Brands for Europe, Which?, BBC, In-house Competition Law Lawyers Association, and Gowling. Moderately positive/ positive impact: Richemont, Addleshaw Goddard, British Brands Group, and NFDA. The only respondent to state otherwise was Amazon.

²² Evaluation SWD, pp75, 106 and 114.

²³ Notably where divergence results from the UK adopting a stricter approach than the EU.

- 3.10 In relation to the scope of the UK Order, as explained in **Section 4**, the CMA is recommending the following:
- (a) Association of undertakings (paragraphs 4.1 to 4.6) – agreements with associations of undertakings should continue to benefit from the UK Order under the same conditions as the retained VABER;
 - (b) Dual distribution (Article 2(4) of the retained VABER) (paragraphs 4.7 to 4.21) – to extend the benefit of the exemption to cover dual distribution²⁴ – that is, the limited circumstance where the block exemption is allowed to apply to certain non-reciprocal vertical agreements between competitors – by wholesalers and importers (not just dual distribution involving a manufacturer, as is currently the case).
- 3.11 The CMA’s recommendation to the Secretary of State is that resale price maintenance should remain a ‘hardcore restriction’ in the UK Order.²⁵ As mentioned in more detail in **Section 5** (paragraphs 5.1 to 5.12), the CMA is minded to provide further guidance on this issue in the CMA Verticals Guidance.
- 3.12 With regard to the other hardcore restrictions in the retained VABER (Article 4 of the retained VABER), as explained in more detail in **Section 5**, the CMA is recommending that the current rules remain the same, except for the following:
- (a) Territorial and customer restrictions (paragraphs 5.13 to 5.57) – to clarify (primarily through the CMA Verticals Guidance) where the boundary between active and passive sales should be, in the light of market developments such as the growth of online sales, as well as to give businesses more flexibility in order to design their distributions systems according to their needs.
 - (b) Indirect measures restricting online sales (paragraphs 5.58 to 5.76) – to remove the prohibition of dual pricing and the requirement for overall equivalence from the list of hardcore restrictions.

²⁴ The concept of dual distribution is explained further in paragraph 4.7.

²⁵ The term ‘hardcore restriction’ refers to the list of restrictions included in a block exemption that are considered serious restrictions of competition that should in most cases be prohibited. The block exemption will not apply to a vertical agreement that includes a hardcore restriction. The agreement must therefore be examined individually to determine whether it has the object or effect of restricting competition and, if so, whether it can benefit individually from the application of the individual exemption in s.9 of the Act.

- (c) Parity obligations (or ‘most favoured nation’ clauses) (paragraphs 5.77 to 5.100) – to add wide retail parity obligations to the list of hardcore restrictions.
- 3.13 With regard to excluded restrictions (Article 5 of the retained VABER), as mentioned in more detail in **Section 6**, the CMA’s recommendation to the Secretary of State is that the current rules remain appropriate, including in relation to the treatment of non-compete obligations.
- 3.14 As explained in **Section 7**, the CMA also recommends that clarifications on the following issues which are not addressed in the retained VABER itself should be made:
- (a) agency agreements (paragraphs 7.2 to 7.10) – clarification in the UK Order that providers of online intermediation services are to be defined as suppliers for the purposes of the block exemption, and clarification of other issues relating to online platforms, fulfilment contracts and dual role agents in the CMA Verticals Guidance); and
 - (b) environmental sustainability (paragraphs 7.11 to 7.18) – provide guidance on environmental sustainability issues in the context of the CMA Verticals Guidance, in particular in relation to the criteria for admission to selective distribution systems.
- 3.15 As explained in **Section 8**, the CMA recommends that the UK Order should contain a provision specifying that it should cease to have effect, ie expire, as envisaged in section 6(7) of the Act (a provision in a form which is similar to that in Article 10 of the retained VABER). The CMA recommends that the UK Order should expire after a period of 6 years.
- 3.16 As explained in **Section 9**, the CMA recommends that the UK Order should also contain:
- (a) a provision specifying that there should be a transitional period of one year to allow businesses time to adjust to the changes;²⁶
 - (b) as envisioned in section 6(6)(c) of the Act, a provision specifying that, if the CMA considers that a particular agreement is not an agreement which is exempt from the Chapter I prohibition as a result of section 9 of the Act,

²⁶ A provision similar to that in Article 9 of the EU Regulation. In practice this will mean that agreements that satisfy the retained VABER remain exempt from the Chapter I prohibition on the same terms until a year after it has after it has ceased to have effect.

it may cancel (ie withdraw) the benefit of the block exemption in respect of that agreement;²⁷ and

- (c) in accordance with section 6(5) of the Act, a provision specifying that the block exemption is subject to an obligation to provide information if requested.²⁸

3.17 The CMA's recommendation to the Secretary of State is that the following provisions regarding the scope of the retained VABER remain unchanged in substance in the UK Order:

- (a) Definitions (Article 1 of the retained VABER), other than in the case of either the addition of new definitions, or amendments to existing definitions, required to implement the recommendations set out below.
- (b) Exemption (Articles 2 and 8 of the retained VABER), other than in the case of Article 2(4) of the retained VABER which is mentioned above.
- (c) Market share thresholds (Articles 3 and 7 of the retained VABER).

3.18 **Annex A: Legal Framework** sets out in more detail the legal context of the retained VABER and proposed UK Order. **Annex B: Alternative policy options** sets out the reasons why the CMA does not recommend either (i) allowing the retained VABER to lapse without providing for a replacement; or (ii) renewing the existing retained VABER in its current form. **Annex C: Evidence gathering** summarises the evidence gathered during the CMA roundtables held in March and April 2021.

²⁷ Provisions similar to that in articles 19–21 of the [Competition Act 1998 \(Public Transport Ticketing Schemes Block Exemption\) Order 2001](#).

²⁸ Provisions similar to that in articles 17–18 and 20–21 of the [Competition Act 1998 \(Public Transport Ticketing Schemes Block Exemption\) Order 2001](#).

4. Scope of the UK Order

Associations of undertakings

Current regime and views from stakeholders

- 4.1 Vertical agreements entered into between an association of undertakings and its members, or between such an association and its suppliers may benefit from the retained VABER if (i) all its members are retailers of goods (ie they resell goods to final consumers) and (ii) no individual member of the association, together with its connected undertakings, has a total annual turnover exceeding £4 million (Article 2(2) of the retained VABER).²⁹ This provision may, for example, apply to an association of small retailers established for the purchase of goods.
- 4.2 No concerns were raised about the current arrangements in respect of this provision of the retained VABER by participants in the CMA roundtables.
- 4.3 The EU Evaluation showed that stakeholders generally consider that these provisions have worked well.³⁰
- 4.4 Several respondents to the CMA's consultation proposed that associations of undertakings should continue to benefit from the UK Order.³¹ No respondents argued otherwise, although one emphasised that some of their members (particularly those who sell in EU markets) had significant concerns regarding retailer buying alliances with participants above a certain size, so they viewed the safeguards included in the CMA's proposal (including that the benefit of this provision would be confined to retailers and associations of retailers where no one retailer would have a turnover greater than £44 million) as a 'helpful safety net'.³²
- 4.5 Several respondents recommended revising the current turnover threshold to reflect market changes and inflation, although there was no consensus on the level of, or methodology for calculating, a revised turnover threshold.³³

²⁹ The Competition (Amendment etc.) (EU Exit) Regulations 2019, section 5(3)(b).

³⁰ Evaluation SWD, p153.

³¹ L'Oréal; Eversheds Sutherland, VBB, K&L Gates, Freshfields Bruckhaus Deringer, BBC, City of London Law Society Competition Law Committee and NFDA.

³² British Brands Group.

³³ Eversheds Sutherland, K&L Gates, Freshfields Bruckhaus Deringer, BBC, VBB, City of London Law Society Competition Law Committee and NFDA.

Recommendation

4.6 The CMA recommends that agreements with associations of undertakings should benefit from the UK Order under the same conditions as the retained VABER. This reflects the positive findings of the EU Evaluation and positive feedback received in the CMA's consultation from respondents. Although some respondents suggested that the turnover threshold included in these conditions should be adjusted, there did not seem to be agreement between them as to what the alternative threshold should be nor how this alternative should be established. The CMA also received evidence from one respondent that raising the threshold could prompt concerns. In this context, the CMA recommends maintaining the current threshold of £44 million, consistently with the UK Government's current definition of 'Small and Medium Sized Enterprises'.³⁴

Dual distribution

Current regime and views from stakeholders

4.7 In general, the retained VABER does not apply to agreements between competitors. However, Article 2(4) of the retained VABER provides an exception for 'dual distribution' arrangements – that is, non-reciprocal vertical agreements between competitors where:

- (a) the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing level; or
- (b) the supplier is a provider of services at several levels of trade, while the buyer provides its goods or services at the retail level and is not a competing undertaking at the level of trade from which it purchases the contract services.

4.8 During the CMA roundtables with interested parties, a substantial number of participants told the CMA that it is important for them to be able to rely on the

³⁴ The UK government definition of SMEs encompasses micro (less than 10 employees and an annual turnover under €2 million), small (less than 50 employees and an annual turnover under €10 million) and medium-sized (less than 250 employees and an annual turnover under €50 million) businesses (see for example: [Department for International Trade \(DIT\) small and medium enterprises \(SME\) action plan](#)).

dual distribution exception and were therefore in favour of retaining the exception for dual distribution.³⁵

- 4.9 However, several participants recognised that information flows between the supplier and the buyer, which may arise in dual distribution scenarios, may be problematic as they can give rise to horizontal competition concerns at the retail level.³⁶ The majority of the views expressed at the CMA roundtables supported the provision of further clarity and guidance on this issue. Some participants noted that, to the extent certain types of information exchange are considered problematic, there are ways to address the issue in practice (eg by using information barriers within firms or establishing separate ‘clean’ teams³⁷).³⁸
- 4.10 Some participants, who represented or advised a variety of businesses, suggested that the flow of information between supplier and buyer is ancillary to the distribution relationship and that the provision of information should be viewed as legitimate in this context, as long as it is not used for the implementation of hardcore restrictions.³⁹
- 4.11 The majority of participants were not in favour of introducing an additional (lower) market share threshold at the retail level for dual distribution arrangements to reduce the risk of the block exemption applying to agreements that raise horizontal competition concerns.⁴⁰ They noted that it would be difficult to assess downstream market shares, particularly for smaller

³⁵ Participants noted that several market changes (including the general trend towards greater online sales in recent years, which has now been accelerated by the coronavirus (COVID-19) pandemic) have had the effect of manufacturers tending to have greater involvement in direct distribution to customers. They also indicated that consumers tend to expect that they will be able to access products and services through a variety of online and offline distribution channels, leading to many suppliers adopting what is commonly referred to as an ‘omni-channel’ strategy. Those participants, who represented or advised various businesses, noted that, given the prevalence of dual distribution, the removal of the exception would be detrimental. In particular, it would result in higher costs for suppliers, which would have to change their existing arrangements. In their view, the large-scale review of contractual arrangements that would be required as a result of such a significant change would add complexity and cost with no clear benefits for consumers. Further, some participants told the CMA that the theories of harm regarding dual distribution had not been well articulated by competition authorities; in other words, they were not convinced there was in fact a competition concern that needed to be resolved.

³⁶ This might be the case for strategic information on current or future sales and margins, the exchange of which can grant the manufacturer an unfair competitive advantage if that manufacturer is also active at the retail level or lead to collusive outcomes between undertakings. On this basis, some participants therefore suggested that the dual distribution exception should not be included in a UK Order following the expiry of the retained VABER.

³⁷ In other words, keeping staff responsible for relationships with independent resellers separate from those making pricing decisions for the organisation’s direct-to-customer business.

³⁸ However, it was also noted that the introduction of these mechanisms may not always be feasible, in particular for smaller businesses.

³⁹ For example, the provision of certain types of information (such volume and sales figures) can be used to improve products and ensure better responses to customer demand, in particular in the context of increased use of ‘omni-channel’ retail strategies.

⁴⁰ Except for some representatives of the automotive industry who were in favour of introducing an additional lower market share threshold for this exemption (eg 20% combined share in the retail market in line with the block exemption for specialisation agreements).

businesses, and more generally that this would reduce legal certainty for businesses.

- 4.12 Finally, some participants supported the extension of the dual distribution exception to wholesalers and independent importers who are also active in the downstream market, as they are in a similar situation to that of a manufacturer in a dual distribution scenario.
- 4.13 The EU Evaluation noted that most stakeholders expressed the view that the exemption of dual distribution should remain part of the EU Regulation. However, stakeholders also pointed out that the rules do not adequately reflect several issues that have become more prominent with the increased importance of dual distribution over time, particularly as a result of the increasing digitalisation and the growth of online sales. Such issues include:
- (a) lack of clarity about whether information exchanges between the supplier and buyer are part of the vertical relationship and therefore benefit from the block exemption;
 - (b) whether wholesalers or independent importers which are also active in the downstream market are wrongly excluded from the benefit of EU Regulation; and
 - (c) lack of clarity with regard to the relationship between hybrid platforms (which act as both suppliers of online platform/intermediation services and retailers) and the sellers present on such platforms.⁴¹
- 4.14 The vast majority of responses to the CMA's consultation that addressed this issue agreed with the CMA's recommendation, and confirmed concerns that information sharing between the supplier and the buyer could lead to an unfair competitive advantage for the supplier.⁴² Two respondents in the automotive sector raised concerns about manufacturers increasingly asking for access to final user data and one of these considered that the CMA's proposed recommendation on dual distribution might still leave open the possibility of franchised dealers being exploited by manufacturers through such data access.⁴³

⁴¹ Evaluation SWD, pp156–159.

⁴² Respondents who agreed with the CMA's proposals were: L'Oréal, Richemont, Walpole, SMMT, Addleshaw Goddard, Eversheds Sutherland, VBB, K&L Gates, ECCIA, Freshfields Bruckhaus Deringer, Brands for Europe, Amazon, ABA Antitrust Law and International Law Sections, City of London Law Society Competition Law Committee, In-house Competition Lawyers Association, British Brands Group, JWP of the Bars and Law Societies of the United Kingdom and Gowling.

⁴³ BVRLA and NFDA.

- 4.15 Numerous respondents expressly agreed with the proposed application of the dual distribution exemption to wholesalers and importers.⁴⁴ A few respondents cautioned against any possible introduction of additional thresholds in the form of a lower market share threshold (a proposal which the CMA did not put forward, but which is being considered by the European Commission).⁴⁵
- 4.16 Some respondents specifically raised the issue of hybrid platforms (ie, platforms acting both as a direct retailer and as an intermediary for third-party retailers). Their views were, however, mixed. One respondent mentioned that the dual distribution exception was particularly relevant for hybrid stores and leaving hybrid stores outside of the scope of UK Order would likely increase legal uncertainty for businesses selling online through hybrid stores.⁴⁶ Two other respondents argued, conversely, that the CMA should take a similar approach to that proposed by the European Commission in its separate, on-going review of VABER and should not block exempt hybrid function platforms.⁴⁷
- 4.17 Most respondents agreed that the CMA should provide guidance on information exchange, although some respondents thought that the issue is clear-cut, and guidance is not needed.⁴⁸ Most respondents sought guidance regarding the type of information that can be shared, on planning future promotions, and on internal information sharing (including information barriers).⁴⁹

Recommendation

- 4.18 The CMA recommends that the UK Order should include an exception for dual distribution in the same form as in the retained VABER, but which also applies to dual distribution by wholesalers and by importers.

⁴⁴ L'Oréal, SMMT, Eversheds Sutherland, Freshfields Bruckhaus Deringer, British Brands Group, JWP of the Bars and Law Societies of the United Kingdom and Gowling.

⁴⁵ L'Oréal, SMMT, Addleshaw Goddard, Eversheds Sutherland, Freshfields Bruckhaus Deringer, ABA Antitrust Law and International Law Sections, City of London Law Society Competition Law Committee, In-house Competition Lawyers Association, JWP of the Bars and Law Societies of the United Kingdom, Gowling and Brands for Europe; see also European Commission (2021) [Draft Revised Vertical block exemption Regulation](#).

⁴⁶ Amazon.

⁴⁷ Eversheds Sutherland and JWP of the Bars and Law Societies of the United Kingdom. The latter suggesting that the EC's proposal should be applied in relation to online platforms with significant market power only.

⁴⁸ Guidance needed: L'Oréal, SMMT, Eversheds Sutherland, VBB, K&L Gates, Freshfields Bruckhaus Deringer, BVRLA, Brands for Europe, Amazon, City of London Law Society Competition Law Committee, In-house Competition Law Lawyers Association, British Brands Group, JWP of the Bars and Law Societies of the United Kingdom and Gowling. Guidance superfluous: Richemont, Walpole, Addleshaw Goddard and ECCIA.

⁴⁹ Freshfields Bruckhaus Deringer, L'Oréal, Brands for Europe, City of London Law Society Competition Law Committee, In-house Competition Law Lawyers Association, JWP of the Bars and Law Societies of the United Kingdom, Eversheds Sutherland, VBB, and British Brands Group.

4.19 The CMA has considered whether the UK Order should include an exception for dual distribution at all, or whether the exception should be limited in scope (eg by introducing an additional (lower) market share threshold or by carving out hybrid platforms). However, having considered the evidence gathered and the responses to the CMA's consultation,⁵⁰ the CMA does not recommend either removing the dual distribution exception or limiting its scope, because:

- (a) Businesses of all sizes and in all sectors commonly operate a dual distribution model (particularly given the growth in online sales)⁵¹ with significant benefits to direct sellers, retailers and consumers (eg increased market penetration for direct sellers and retailers, increased choice for consumers, better adaptation to the market's needs, and innovation in distribution models).
- (b) The insertion of an additional market share threshold is likely to add complexity and uncertainty for businesses and the benefits of doing so are unclear at this stage. Moreover, it is not clear what alternative market share threshold would be appropriate in limiting the application of the dual distribution exception.
- (c) At present, there is, in the CMA's opinion, insufficient evidence for treating dual distribution involving hybrid platforms differently from other dual distribution arrangements, and treating them as not exempt from the Chapter I prohibition would seem, in these circumstances, unwarranted. The CMA notes however that digital markets are fast moving markets and therefore it will keep this matter under review until the next review of the UK Order. Furthermore, if evidence of competition concerns, in individual cases regarding dual distribution by hybrid platforms, emerges during the currency of the UK Order, the CMA could consider cancelling the benefit of the block exemption. It remains important therefore that businesses, including platforms, consider the extent to which their agreements comply with the VBER.

4.20 In some cases, competition concerns arising from the provision of competitively-sensitive information between suppliers and their distributors can be addressed through the use of information barriers.⁵² Information barriers are internal arrangements that can be put in place within a business

⁵⁰ See paragraphs 4.8 - 4.17

⁵¹ The growth of online sales and, more recently, the COVID-19 pandemic have accelerated the tendency for manufacturers to increase their presence at distribution level.

⁵² This may also be the case where potential competition concerns arise from other information provision, or data access arrangements, for example the scenario described by some respondents in the automotive industry (BVRLA and NFDA) where franchised dealers are asked by manufacturers to provide them with data on end users.

to restrict the flow of competitively-sensitive information handled by one part of the organisation (eg obtained via a supplier's relationship with a distributor) and prevent it from being used inappropriately. The CMA considers that assessing and addressing potential competition concerns arising from information flows in connection with dual distribution is a matter best left for self-assessment by businesses. However, given the responses received during the CMA's consultation, the CMA is minded to provide more guidance on information exchange in the context of dual distribution in CMA Verticals Guidance.⁵³ In particular, a point of clarification which the CMA will include in the CMA Verticals Guidance is the fact that the dual distribution exception does not exempt horizontal agreements between a supplier and a competing buyer that have the object of restricting competition.

- 4.21 Finally, as mentioned in the CMA proposed recommendation, it is unclear to what extent dual distribution arrangements involving other suppliers such as wholesalers and importers are different from dual distribution by a manufacturer.⁵⁴ On that basis, the CMA proposed to extend the exemption to suppliers that are wholesalers and to independent importers also active in the downstream market. The responses to the CMA's consultation support the proposed approach.⁵⁵

⁵³ The need for further guidance on information exchange in the context of dual distribution was highlighted in the CMA roundtables by a number of participants.

⁵⁴ CMA roundtables and Evaluation.

⁵⁵ See paragraph 4.15.

5. Hardcore restrictions

Resale price maintenance

Current regime and views from stakeholders

- 5.1 Resale price maintenance (RPM) is a hardcore restriction under Article 4(a) of the retained VABER. This means that agreements that restrict the buyer's ability to determine its sale price cannot benefit from the safe harbour offered by the retained VABER. RPM is well-established as an infringement 'by object' under UK (and EU) competition law.⁵⁶ It may nevertheless qualify for an individual exemption if it generates efficiencies which fulfil the requirements under section 9 of the Act.⁵⁷
- 5.2 The CMA has issued several decisions finding that RPM is an infringement 'by object'.⁵⁸ In a recent judgment, the Competition Appeal Tribunal upheld the penalty imposed by the CMA on the musical instruments supplier Roland for RPM, which the Tribunal considered to be a serious restriction of competition by object.⁵⁹ The Tribunal explained that RPM has the effect of restricting resellers' freedom to set their own prices and to compete fully and effectively, as well as restricting intra-brand competition and tending to increase the prices paid by consumers for a particular brand.⁶⁰
- 5.3 During the CMA roundtables some participants expressed the view that the CMA should recommend removing RPM from the list of hardcore restrictions. In their view, the theories of harm concerning RPM were not sufficiently strong to warrant its categorisation as a hardcore restriction in the retained VABER (and as a 'by object' restriction under UK law), particularly in instances where

⁵⁶ RPM is also well-established as a 'by object' infringement under EU law. This is in contrast with the position adopted in the US. The US Supreme Court's judgment in *Leegin Creative Leather Products Inc v PSKS Inc* 551 US 877 (2007) overturned the rule that RPM was illegal 'per se' under the Sherman Act and found by a majority that RPM should instead be subject to the 'rule of reason' (ie a case-by-case analysis of the effects of the conduct in question).

⁵⁷ The fact that RPM may benefit from an individual exemption under Article 101(3) of the Treaty is currently reflected in the EU Vertical Guidelines (paragraphs 223–229).

⁵⁸ John Bruce (2002), Commercial refrigeration (2016), Domestic light fittings (2017), Fender (2020), Roland (2020); GAK (2020) and Yamaha (2020).

⁵⁹ *Roland v Competition and Markets Authority*, [2021] CAT 8.

⁶⁰ *Roland*, paragraph 81. The Tribunal also referred, at paragraph 82, to the means by which RPM may restrict competition set out in the EU Vertical Guidelines: 'These include, in addition to the direct effect on reseller's prices, the possibility of collusion between suppliers and between distributors, the softening of competition between manufacturers and/or distributors, the foreclosing of smaller rivals, and a reduction in dynamism and innovation at the distribution level'.

inter-brand competition was strong or the parties involved did not have significant market power.

- 5.4 Other participants mentioned that the current approach to RPM has led businesses to be overly cautious about the use of any form of pricing strategy that may be (wrongly) perceived as RPM, for example recommended retail prices or maximum prices.⁶¹
- 5.5 Whereas the majority of respondents to the EU Evaluation (mainly distributors and retailers) agreed that RPM should be a hardcore restriction, a significant number (mainly suppliers) argued that RPM should not be included in the list of hardcore restrictions and that this has led to over-enforcement of RPM practices. It therefore remains an area of debate, despite RPM being well established in law as an infringement 'by object'.⁶²
- 5.6 The EU Evaluation⁶³ also noted that stakeholders called for more guidance regarding the circumstances under which recommended or maximum resale prices could amount to RPM and more clarity regarding the conditions under which RPM can benefit from the exemption under Article 101(3) of the Treaty on the Functioning of the EU, which is the EU equivalent of section 9(1) of the Act.⁶⁴
- 5.7 Although a significant number of respondents expressed their support for the CMA's proposals in respect of RPM,⁶⁵ several respondents thought RPM should not remain a hardcore restriction given the scope for efficiencies.⁶⁶
- 5.8 Several respondents provided examples of circumstances where they considered RPM would lead to efficiencies that outweigh the restriction of

⁶¹ There was a broad consensus among participants that demonstrating efficiencies to justify RPM is a risky, difficult exercise and that such difficulties may be hindering businesses in terms of their willingness to engage in potentially efficiency-enhancing RPM. This was despite the inclusion of guidance about such potential efficiencies in the EU Vertical Guidelines. A few participants suggested that more guidance on the situations in which RPM could be considered pro-competitive and therefore exempt under section 9 of the Act would be welcomed and might encourage businesses to pursue genuinely pro-competitive arrangements. However, other participants considered that, even with more guidance about potential efficiencies, businesses were likely to be reluctant to take the risk of being found to have committed a 'by object' infringement. According to one participant further clarity was needed regarding the scope of the application of the prohibition of RPM to fulfilment contracts and franchise agreements.

⁶² See paragraph 5.1 above.

⁶³ Evaluation SWD, p80.

⁶⁴ In the EU, the European Commission in its [Draft Revised Vertical block exemption Regulation](#) has not proposed any changes to the current approach and therefore RPM is likely to remain as a 'hardcore' restriction of competition. This is in contrast with the approach taken in other jurisdictions such as in the US where RPM is not per se unlawful but rather must be assessed under the rule of reason.

⁶⁵ Richemont, Walpole, SMMT, Addleshaw Goddard, Eversheds Sutherland, ECCIA, Trainline, Which?, BBC and NFDA.

⁶⁶ L'Oréal, Freshfields Bruckhaus Deringer, Brands for Europe, ABA Antitrust Law and International Law Sections, JWP of the Bars and Law Societies of the United Kingdom and Pets Corner. A few more respondents highlighted the potential for efficiencies while acknowledging the rationale for the CMA's proposed approach.

competition. These examples mainly concerned product launches, short-term promotions, seasonal products, maintaining brand image (ie the aura of luxury), combatting free-riding (such as ‘replenishment’ sales⁶⁷ and ‘loss leading’⁶⁸), and counterfeit and grey market sales.⁶⁹ It was also suggested that minimum advertised pricing⁷⁰ could produce similar efficiencies,⁷¹ without restricting competition to the extent RPM does.⁷² Some respondents indicated that there may be a broader range of efficiencies resulting from RPM practices that businesses may be reluctant, or unable, to provide evidence of, given the legal risks attached to RPM.⁷³

5.9 The majority of respondents supported the CMA’s proposal to provide additional guidance concerning efficiencies. They submitted that the guidance should include examples of situations where RPM can lead to efficiencies and suggested this could include RPM in the context of:

- (a) new product launches;⁷⁴
- (b) short term promotions;⁷⁵
- (c) scenarios in which RPM could address free riding regarding pre-sale services;⁷⁶ and
- (d) scenarios where RPM might be used to protect a strong brand name⁷⁷ or may be essential to maintain the reputation of high-end products and

⁶⁷ Brands for Europe explained that the ‘replenishment’ situation occurs where a consumer will have seen, experienced and been advised on the product at a high-service bricks and mortar/online specialised store but subsequently turns to (online) stores where no services are provided at all to buy a ‘replenishment’ (often with using a ‘subscribe to save’ scheme to obtain further discounts and thus further enhancing the ‘locked’ in effect).

⁶⁸ Brands for Europe explained that the ‘loss leader’ conduct occurs where a low service, low price retailer chooses a product category champion to offer for a short period of time a very low price (sometimes below purchase price) – only aiming to attract consumers in the store and sell them many other products at full price.

⁶⁹ Brands for Europe, British Brands Group, ECCIA, Eversheds Sutherland, L’Oréal, SMMT, City of London Law Society Competition Law Committee, In-house Competition Lawyer’s Association, JWP of the Bars and Law Societies of the United Kingdom, Walpole, NFDA, Pets Corner and K&L Gates.

⁷⁰ Minimum advertised pricing restricts retailers’ ability to advertise prices below a certain level, but they are not prevented from selling below a certain price (eg in store).

⁷¹ Brands for Europe, City of London Law Society Competition Law Committee and Centre for Competition Policy.

⁷² Brands for Europe and Centre for Competition Policy.

⁷³ Freshfields Bruckhaus Deringer and JWP of the Bars and Law Societies of the United Kingdom.

⁷⁴ City of London Law Society Competition Law Committee, Eversheds Sutherland, and JWP of the Bars and Law Societies of the United Kingdom.

⁷⁵ City of London Law Society Competition Law Committee, Eversheds Sutherland, and JWP of the Bars and Law Societies of the United Kingdom.

⁷⁶ City of London Law Society Competition Law Committee, In-house Competition Lawyer’s Association, Pets Corner, Eversheds Sutherland and JWP of the Bars and Law Societies of the United Kingdom.

⁷⁷ In-house Competition Lawyer’s Association and Pets Corner.

ensure they can continue to be sold at a price point that is ‘sustainable’ and allows the manufacturer to continue to invest in their quality.⁷⁸

Recommendation

- 5.10 The responses to the CMA’s consultation confirm that businesses would benefit from further guidance on the situations where RPM practices could lead to efficiencies. However, in the CMA’s opinion, the CMA’s consultation has not provided sufficient evidence that any efficiencies arising from RPM are such that the CMA should recommend removing RPM from the category of hardcore restrictions, taking into account the harm to competition that can arise from RPM. For example, the Roland judgment referred to above (see paragraph 5.2 above) highlighted the harm from RPM in terms of the restriction of resellers’ freedom to set their own prices and to compete fully and effectively; the restriction of intra-brand competition; and upward pressure on prices paid by consumers for a particular brand.
- 5.11 Accordingly, the CMA recommends that RPM remains a hardcore restriction under the UK Order (in the same form as in the retained VABER). This approach is consistent with the well-established principle that RPM amounts to a restriction of competition by object. Further, the CMA is of the view that treating RPM as a ‘hardcore’ restriction for the purposes of the UK Order, thus excluding it from the block exemption, is an appropriate approach in terms of deterring RPM in all but those cases where it can be shown on an individual analysis that the exemption criteria in section 9 of the Act are met.
- 5.12 In line with the above, the CMA proposes to clarify in the CMA Verticals Guidance that it remains open to considering, carefully and objectively, any efficiency arguments made in the course of any investigations under the Act. The responses to the CMA’s consultation will be considered with a view to addressing the issue of efficiencies in the CMA Verticals Guidance. This approach will help ensure that businesses that intend to engage in RPM are not deterred from doing so when they genuinely consider it is justified on the basis of efficiencies assessed under section 9 of the Act.

⁷⁸ Pets Corner.

Territorial and customer restrictions

Current regime and views from stakeholders

- 5.13 Vertical agreements that restrict the territory into which, or the customers to whom, a buyer can sell are treated as hardcore restrictions of competition under Article 4(b) of the retained VABER.⁷⁹
- 5.14 The general rule is that the buyer should be allowed to approach individual customers actively ('active' sales) and to respond to unsolicited requests from individual customers ('passive' sales).
- 5.15 The current rules in Article 4(b) of the retained VABER do not block exempt the restriction of active or passive sales in the UK except in limited circumstances. The limited circumstances in which restrictions of active sales in the UK are block exempted by the retained VABER include, for example, restricting active sales by other distributors into a territory granted to an exclusive distributor to protect the exclusive distributor's investments (Article 4(b)(i)) or to protect members of a selective distribution system by preventing sales being made to unauthorised distributors located in the same territory (Article 4(b)(iii)). Restrictions of passive sales in the UK are block exempted in certain cases, but these are more limited (for example in the case of restrictions of sales to end-users by wholesalers).
- 5.16 The approach in the retained VABER reflects an extensive body of retained EU case law in which Article 101 of the Treaty on the Functioning of the EU – the EU equivalent of the Chapter I prohibition – has been applied by the European Commission and by the EU Courts, at least in part, with the objective of EU single market integration in mind.⁸⁰ In *Consten and Grundig v Commission*, the Court of Justice of the EU held that vertical agreements are caught by Article 101 of the Treaty and found that an exclusive distribution agreement in which the distributor was to enjoy absolute territorial protection restricted competition by object.⁸¹

⁷⁹ Where this document refers to territorial restrictions it should be understood as referring to both agreements that restrict the territory into which the buyer can sell and agreements that restrict the customers to whom the buyer can sell, unless otherwise specified.

⁸⁰ In accordance with section 6(3) to 6(6) of the European Union (Withdrawal) Act 2018, any question as to the validity, meaning or effect of unmodified retained EU law is to be decided, so far as they are relevant to it, in accordance with any case law and general principles of the CJEU laid down up until 31 December 2020.

⁸¹ Joined Cases 56 and 58/64, E.C.R. 299 at 342 (1966). Other relevant CJEU judgments which upheld the importance of the single market imperative include cases C-501/06P, C-513/06P, C-515/06P and C-519/06P, *GlaxoSmithKline Services Unlimited v Commission*, paragraph 61, and cases C-403/08 and C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others* and *Karen Murphy v Media Protection Services Ltd*, paragraph 139.

- 5.17 Since then, the European Commission and the EU Courts have consistently deemed absolute territorial and customer restrictions to be restrictions of competition by object on the basis that they create obstacles to market integration (including by limiting the possibility for consumers to purchase goods or services in any member state of the EU they choose).
- 5.18 The EU approach to territorial and customer restrictions is reflected in UK case law, as well as the decisional practice of the CMA and its predecessor body, the Office of Fair Trading (OFT). For example, following the CMA's decision in *Ping*, involving an infringement of both Article 101 of the Treaty and the Chapter I prohibition, the Competition Appeal Tribunal held on appeal that a ban on selling on the internet (a form of territorial and customer restriction) amounted to a restriction of competition by object.⁸² On further appeal, the Court of Appeal confirmed that such restrictions can restrict competition irrespective of any single market considerations, referring to the fact that '*as a result of the limitation on the ability of a retailer to compete for sales to customers beyond their geographic range, there is a diminution in price competition*'.⁸³
- 5.19 The OFT in its investigation into prohibitions on online sales and online price advertising of 'Roma'-branded mobility scooters, similarly found that the restrictions prohibiting online sales had the object of restricting competition and constituted 'hardcore' restrictions within the meaning of Article 4(b) of the EU Regulation. The OFT concluded that the agreements restricted retailers from accessing a wider customer base with the help of the internet which, in turn, meant consumers were unable to identify or obtain better prices by shopping around or buy products not available from brick-and-mortar retailers in their local area.⁸⁴
- 5.20 A significant number of participants considered that the treatment of territorial and customer restrictions as 'hardcore' restrictions of competition was mainly driven at EU level by the EU's 'single market' imperative involving the reduction of trade barriers between member states of the EU. They therefore questioned the extent to which it was necessary to adopt the same approach following the UK's withdrawal from the EU given that it pursued a policy objective which no longer applies to the UK. In contrast, some participants noted that lifting the current prohibition on territorial and customer restrictions

⁸² *Ping Europe Limited v Competition and Markets Authority* [2018] CAT 13.

⁸³ *Ping Europe Limited v Competition and Markets Authority* [2020] EWCA Civ 13, paragraph 81.

⁸⁴ [Roma-branded mobility scooters: prohibitions on online sales and online price advertising \(2013\)](#). Other cases in which the OFT considered the issue of territorial restrictions include [Wholesale supply of compact discs](#) (OFT 391, September 2002) and [Newspaper and magazine distribution](#) (OFT 1025, October 2008).

could lead to discrimination between certain groups of consumers or to reduced consumer choice in certain parts of the UK.

- 5.21 A significant number of participants also noted that the implementation of the Northern Ireland Protocol to the Withdrawal Agreement for the UK's withdrawal from the EU was a relevant factor which the CMA should consider (see paragraph 5.41(b)). Some also called on the CMA to provide more guidance on its approach to any possible territorial restrictions imposed by EU businesses in relation to certain parts of the UK.
- 5.22 With regard to the possibility of amending the current rules to block exempt the restriction of active sales into an exclusive territory which has been allocated to more than one distributor (ie to allow 'shared exclusivity'), some participants were of the view that such a distribution model could bring about significant efficiencies by, for example, enabling suppliers to spread risk or ensure wider distribution. Some participants mentioned that, currently, the main issue with 'shared exclusivity' is that such a model becomes, in practice, compromised because restrictions on active sales into the 'exclusive' territory are treated as hardcore restrictions.
- 5.23 More generally, a significant number of participants expressed support for solutions which give them more flexibility to design their systems according to brand objectives and appetite for risk, rather than being driven to the stark and somewhat limiting choice between exclusive and selective distribution models.
- 5.24 In relation to the distinction between 'active' and 'passive' sales, there were divergent views. A significant number of participants mentioned that this distinction is confusing and some mentioned that an effects-based assessment should be adopted instead.⁸⁵ One participant submitted that they consider that the distinction is well understood and a useful guide to determine whether or not a restriction in an individual case is lawful.
- 5.25 Finally, a number of participants also questioned the general treatment of online sales as 'passive' sales noting that in their view, given the expansion of online sales, such an approach is potentially disconnected from commercial reality. According to some participants, the growth of online sales coupled with the increased capability to target specific groups of online consumers means that the strict approach to online sales is no longer justified.

⁸⁵ The CMA notes that such approach would have the merit of giving businesses more flexibility. However, it could also increase legal uncertainty and costs.

5.26 The issues identified by the European Commission in the EU Evaluation relating to the current rules relating to territorial and customer restrictions included concerns that:

- (a) the current regime (Article 4(b)(i) of the EU Regulation) does not give businesses sufficient flexibility to appoint two or more distributors for a given exclusive territory;⁸⁶ and
- (b) there is a lack of clarity regarding the possibility of combining exclusive and selective distribution,⁸⁷ for example because there is:
 - (i) insufficient guidance on the circumstances in which businesses are allowed to combine exclusive and selective distribution **in the same territory**, but at different levels of the supply chain;⁸⁸ and
 - (ii) insufficient clarity as to how exclusive and selective distribution may be combined **in different territories**.⁸⁹

5.27 The CMA's consultation included proposals relating to three areas in relation to territorial and customer restrictions, namely that:

- (a) territorial and customer restrictions should continue to be treated as 'hardcore' restrictions, with the CMA keeping this position under review;
- (b) the distinction between 'active' and 'passive' sales remains a relevant and worthwhile distinction in relation to exclusive distribution; and
- (c) the rules should be revised to allow businesses more flexibility in designing their distribution systems.

Treatment of territorial and customer restrictions as 'hardcore' restrictions

5.28 With regard to the treatment of territorial and customer restrictions as 'hardcore restrictions' there were mixed views amongst respondents. While

⁸⁶ Evaluation SWD, p190.

⁸⁷ Evaluation SWD, p191.

⁸⁸ Some respondents to the Evaluation noted that exclusive distribution at the wholesale level and selective distribution at the retail level was considered one of the most efficient models for distributing certain goods and therefore should be unequivocally allowed. The Evaluation confirmed that this combination was common practice and that there was lack of clarity around the circumstances under which the combination of exclusive and selective distribution was block exempted.

⁸⁹ While this appears to be allowed by the current rules, respondents pointed to a lack of clarity as to whether, in the case of a supplier that uses selective distribution in some territories and exclusive distribution in others, exclusive distributors could be prohibited from making sales to unauthorised dealers in the territories where the supplier has a selective distribution system.

several respondents to the CMA consultation explicitly agreed with the CMA's recommendation,⁹⁰ other respondents expressed their disagreement.⁹¹

5.29 Respondents that supported the CMA's recommendation made the following observations:

- (a) the CMA's approach is an appropriate and balanced approach;⁹²
- (b) the recommendation provides flexibility and certainty for businesses that operate distribution arrangements both within and outside the UK;⁹³
- (c) there is a lack of evidence supporting a significant alteration of the current rules;⁹⁴ and
- (d) if territorial and customer restrictions are not treated as hardcore, there is a concern that some groups of consumers located in some parts of the UK may experience less competitive markets, reduced choice, higher prices and lower quality.⁹⁵

5.30 The main reasons given by respondents that disagreed with the CMA's recommendation include:

- (a) the UK is no longer bound by the EU single market imperative;⁹⁶
- (b) the UK market is limited in geographical size and is already fully integrated;⁹⁷
- (c) there is no evidence that the Northern Ireland protocol may increase the risk of market partitioning withing the UK;⁹⁸
- (d) there is no clear competition rationale justifying the treatment of territorial restrictions as hardcore (ie it is necessary to take into account the

⁹⁰ L'Oréal, SMMT, Which?, Amazon, ECCIA, Addleshaw Goddard, and SMMT.

⁹¹ ABA, JWP of the Bars and Law Societies of the United Kingdom, Brands for Europe, Eversheds Sutherland, VBB and Freshfields Bruckhaus Deringer.

⁹² ECCIA and Addleshaw Goddard.

⁹³ SMMT.

⁹⁴ Amazon.

⁹⁵ Which?.

⁹⁶ ABA, JWP of the Bars and Law Societies of the United Kingdom and Brands for Europe.

⁹⁷ Eversheds Sutherland, VBB and Freshfields Bruckhaus Deringer.

⁹⁸ Brands for Europe. ABA appreciated the complexities of the Northern Ireland Protocol but suggested that restrictions between Great Britain and Northern Ireland could be more strictly prohibited (ie instead of applying the hardcore restrictions more widely to all territorial restrictions).

efficiencies of such vertical restraints against any reduction in consumer choice);⁹⁹

- (e) the rules around territorial and customer restrictions are complex (in particular the active/passive sales distinction) such that applying them is difficult and there is insufficient clarity for them to be treated as hardcore restrictions;¹⁰⁰ and
- (f) treating territorial and customer restrictions as infringements of competition law 'by object' is inconsistent with the *Cartes Bancaires* and *Budapest Bank* case law, as arrangements with these restrictions are capable of giving rise to efficiencies.¹⁰¹

5.31 A few respondents suggested that it would be more proportionate to treat territorial and customer restrictions as 'excluded restrictions' thus subjecting them to a case-by-case assessment.¹⁰²

5.32 Several respondents also urged the CMA to provide clarity on the approach to restrictions of sales between the EU and the UK.¹⁰³

Distinction between active and passive sales

5.33 The views expressed by respondents on the distinction between active and passive sales were mixed. Some respondents highlighted the complexity of the distinction and, in some cases, respondents considered the current rules as unworkable.¹⁰⁴ Other respondents expressed the view that the distinction should be maintained¹⁰⁵ as it is balanced and sufficiently clear from existing guidance and past decisional practice.¹⁰⁶

5.34 Several respondents also expressed the view that online sales should not, as a general rule, be treated as passive sales, in particular where they incorporate an 'active' element, and urged the CMA to provide guidance on

⁹⁹ Brands for Europe and Freshfields Bruckhaus Deringer.

¹⁰⁰ Eversheds Sutherland, British Brands Group and JWP of the Bars and Law Societies of the United Kingdom.

¹⁰¹ JWP of the Bars and Law Societies of the United Kingdom.

¹⁰² ABA and JWP of the Bars and Law Societies of the United Kingdom.

¹⁰³ K&L Gates, Freshfields Bruckhaus Deringer, JWP of the Bars and Law Societies of the United Kingdom, Brands for Europe. Addleshaw Goddard and City of London Law Society.

¹⁰⁴ Eversheds Sutherland, British Brands Group, JWP of the Bars and Law Societies of the United Kingdom.

¹⁰⁵ Amazon and Which?,

¹⁰⁶ Amazon.

this issue. In this respect, respondents provided several examples of online sales which could potentially be deemed to be active sales:¹⁰⁷

- (a) the use of online banner adverts;
- (a) targeted advertising on social media;
- (b) advertising on 'local' websites or those aimed at particular customers (eg trade websites or specialist publications);
- (c) purchase of search terms or AdWords;
- (d) brand bidding;
- (e) paid search advertising or search engine advertising, eg popping up as the first listed advert in a search engine results page;
- (f) paying for advert included in the search results on a digital comparison tool;
- (g) paying for banner advertising on third party websites or within a digital comparison tool; and
- (h) personalised or tailored advertising targeting specific customer types or groups or regions.

5.35 One respondent mentioned that further guidance is not required since the distinction is already well understood by distributors and retailers and that, in the event that changes are made, it would be necessary to ensure that all sellers are able to make full use of the internet to offer a wide range of choice in goods to UK consumers.¹⁰⁸ This respondent also expressed the view that the future regime should not modify the principle that online selling is a passive selling activity which should not be subject to undue restrictions.

5.36 Another point noted by a few respondents was the need to ensure that manufacturers and brand owners are able to tackle 'grey market sales'¹⁰⁹ via restrictions of active and/or passive sales.¹¹⁰

¹⁰⁷ VBB, ECCIA, BBC, Walpole, Eversheds Sutherland, In-house Competition Law Lawyers Association, and Brands for Europe.

¹⁰⁸ Amazon.

¹⁰⁹ Grey sales is the term commonly used to refer to trade of goods by distribution channels not authorised by the original manufacturer or trademark proprietor.

¹¹⁰ Walpole and ECCIA.

Giving businesses more flexibility in designing their distribution systems

- 5.37 There was wide support amongst respondents for the CMA's proposal to recommend giving businesses more flexibility to design their distribution systems according to their business needs. A significant number of respondents were of the view that these proposals should be adopted (although it should be noted that some of these respondents expressed their reservations about the treatment of territorial and customer restrictions as hardcore in the first place).¹¹¹
- 5.38 One respondent highlighted the concern that giving businesses more flexibility to combine exclusive and selective distribution models could lead to a reduction in competition.¹¹²

Recommendation

- 5.39 The CMA has, in particular, considered the following questions in order to inform its recommendation about the future UK regime regarding territorial and customer restrictions:
- (a) Should territorial and customer restrictions continue to be treated as 'hardcore' restrictions which remove the benefit of the block exemption?
 - (b) Is the current distinction between active and passive sales still fit-for-purpose?
 - (c) Are there certain types of online sales that are currently categorised as passive sales which should instead be classified as active sales?
 - (d) Is there a case for changing the current regime in order to give businesses more flexibility to design their distribution systems according to their needs?

We address each of these questions in turn below.

¹¹¹ L'Oréal, Walpole, SMMT, ECCIA, Eversheds Sutherland, Brands for Europe and ABA.

¹¹² Amazon expressed concerns that the CMA's proposal could represent a shift away from the interests of consumers in having access to products (and retailers in serving those consumers) towards brands that seek to control the pricing and distribution of their products. This respondent was of the view that overall, combining exclusivity and selective distribution systems would generally be detrimental to consumers' ability to access a large range of products from different sellers at competitive prices and lead to a degree of territorial partitioning that is inconsistent with the promotion of competition.

Should territorial restrictions continue to be treated as ‘hardcore’ restrictions for the purposes of the UK Order?

- 5.40 As noted by a significant number of respondents, the CMA agrees that the treatment of territorial and customer restrictions was historically driven, at least in part, by the EU single market imperative. However, as explained above, this approach is also driven by an interest in preserving intra-brand competition and consumer choice: if distributors are restricted from selling into different territories or to different customer groups, consumers in those territories or groups are restricted in the choice of sellers of the product concerned, weakening competitive pressures.
- 5.41 Notwithstanding the fact that the UK has left the EU, the CMA considers that there are compelling reasons for retaining the current approach of treating territorial and customer restrictions as ‘hardcore’ for the purposes of the UK Order:
- (a) First, the treatment of territorial and customer restrictions as hardcore restrictions supports consumer choice across all parts of the UK and promotes intra-brand competition. The fact that the UK internal market is smaller than the EU single market does not limit the risk that consumer choice may be affected as a result of territorial and customer restrictions being erected by businesses. The UK remains a sizeable market in and of itself, and it is important to ensure that UK businesses can operate easily across the UK internal market and competition is not distorted.
 - (b) Second, the CMA is mindful that the implications of the UK’s withdrawal from the EU, including the Northern Ireland Protocol, and linked market developments, are not yet fully understood. For example, it is not yet known how businesses will adapt their distribution arrangements to reflect the existence of the Northern Ireland Protocol, which maintains some level of integration with the EU single market in Northern Ireland. Taking into account that uncertainty, the CMA is recommending the retention of measures that limit restrictions of sales between territories so as to avoid inadvertently compromising the integrity of the UK internal market or harming consumers in the UK.
 - (c) Third, the exceptions to the general rule against territorial and customer restrictions (ie subparagraphs (i) to (iv) of Article 4(b) in the retained VABER) already largely ensure that the block exemption is available for agreements in cases where territorial and customer restrictions are likely

to bring about efficiencies that outweigh any reduction of intra-brand competition and consumer choice.¹¹³

- (d) Fourth, the treatment of these restrictions as hardcore is consistent with their treatment as ‘by object’ infringements under UK case law (see paragraphs 5.18 to 5.19).

5.42 While the CMA recommends that territorial and customer restrictions continue to be treated as ‘hardcore’ in the UK Order, it considers it will be appropriate to keep this under review in order to take into account any market developments, if and when they arise.

Is the current distinction between active and passive sales still fit-for-purpose?

5.43 Taking into account the CMA’s recommendation that territorial and customer restrictions should continue to be treated as ‘hardcore’ restrictions for the purpose of the UK Order, a separate but closely linked question is whether the current distinction between active and passive sales in Article 4(b)(i) of the retained VABER remains fit for purpose.¹¹⁴ In that regard, the CMA notes that some participants questioned whether the current distinction between active and passive sales reflects commercial reality. The CMA also notes the submissions made by several respondents to the CMA’s consultation which highlighted a degree of difficulty and complexity in the application of this distinction and suggesting the need to update it in the context of online selling (see paragraphs 5.33 to 5.34).

5.44 The CMA remains of the view that the current regime strikes a fair balance between, on the one hand, the need to grant some degree of protection to exclusive distributors (by allowing the possibility of restricting active sales into the exclusive territory or to the exclusive customer group) and, on the other hand, ensuring some degree of consumer choice (by not block exempting the restriction of passive sales and therefore increasing the offers available to consumers). The CMA is of the view that any possible complexity in the application of the distinction is outweighed by the benefits of ensuring a reasonable balance between the protection of the efficiencies of exclusive

¹¹³ In other words, the treatment of territorial and customer restrictions as ‘hardcore’ restrictions does not hinder businesses’ ability to introduce such vertical restraints where they are most likely to bring about efficiencies. This is allowed in accordance with the four exceptions currently set out in article 4(b)(i)-(iv) of the retained VABER, for example by allowing suppliers to protect investments made by exclusive distributors through restrictions on ‘active’ selling by other distributors into the relevant exclusive territory or to the relevant exclusive customer group.

¹¹⁴ The definitions of active and passive sales are not set out in the retained VABER and these concepts are explained in the EU Vertical Guidelines (paragraph 51).

distribution systems, on the one hand, and consumer choice, on the other hand.

- 5.45 If the distinction between active and passive sales were to be removed, as suggested by some respondents, the two obvious alternatives would be either:
- (a) block exempting all territorial and customer restrictions (active and passive), which would enable sellers to confer absolute territorial protection on distributors, restricting consumer choice and competition further than is allowed under the current block exemption regime; or
 - (b) not block exempting any territorial and customer restrictions (whether active or passive), meaning that suppliers could offer exclusive distributors no protection at all from sales from outside the relevant territory or customer group without losing the benefit of the block exemption.
- 5.46 The CMA is concerned that the former could potentially lead to a significant reduction of intra-brand competition and consumer choice, whereas the latter could undermine the efficiency and viability of exclusive distribution models (in most cases rendering them meaningless in practice).¹¹⁵
- 5.47 Accordingly, the CMA considers that a distinction between active and passive sales is a relevant and worthwhile distinction as far as exclusive distribution systems are concerned. The CMA is mindful that there is a balance to be struck between offering sellers the ability to protect exclusive distributors, while avoiding harm to competition and consumers through potential market partitioning by territory or customer group. The CMA therefore recommends that the current exception that allows for the restriction of active but not passive sales is maintained in the UK Order.
- 5.48 Nevertheless, we recognise that in practice the distinction is not always easy to apply, particularly in the context of online sales, as described above (paragraphs 5.33 to 5.34). Therefore the CMA recommends that definitions of ‘active sales’ and ‘passive sales’ are included in the UK Order, with an explanation about how these terms are interpreted in practice set out in the CMA Verticals Guidance.

¹¹⁵ For example, VBB explained that in order to encourage distributors to invest it is very important for brands to be able to grant them exclusivity (ie to avoid free-riding from other players).

5.49 The question then is whether the boundary between the two should be set differently to reflect changed market characteristics as a result of increased online selling, and this is discussed in the following paragraphs.

Are there certain types of online sales that are currently categorised as passive sales and should instead be classified as active sales?

5.50 The CMA notes that the growth of e-commerce, since the EU Regulation and EU Vertical Guidelines were originally adopted in 2010, has called into question the extent to which certain online sales should still be treated as passive sales. This view was shared by a significant number of participants and respondents.

5.51 The current EU Vertical Guidelines seek to draw a distinction between making products and services available online, which should be regarded as passive sales, and certain promotional and advertisement strategies using the internet that should be regarded as active sales.¹¹⁶ This approach is based on the principle that every distributor should be allowed to use the internet to sell products and that, in general, merely having a website should be regarded as a form of passive selling. However, it is not the case that online selling is always assumed to be passive. Although drafted over 10 years ago, the EU Vertical Guidelines do recognise that a range of online practices amount to active selling, and therefore may be restricted by suppliers under the terms of the retained VABER. For example, this includes online advertisements specifically addressed to certain customers or being displayed to users in a particular territory.

5.52 The CMA's view is that the current approach, which considers that some online sales strategies should be regarded as passive sales, whereas others should be regarded as active sales, remains an appropriate distinction. However, the CMA recognises that the significant developments that have taken place over recent years in relation to the development of e-commerce, including as a result of the coronavirus (COVID-19) pandemic, might make it appropriate to redraw the boundary between the two.¹¹⁷

5.53 Several respondents called on the CMA to provide further clarity on the distinction between active and passive sales, in particular in the context of

¹¹⁶ EU Vertical Guidelines, paragraphs 51–54.

¹¹⁷ The 2018 report *Comparing “bricks and mortar” store sales with online retail sales* published by the Office for National Statistics concluded: 'Whilst online sales are growing at a fast rate, bricks and mortar sales still account for nearly 82% of sales (Figure 3). Online spending has increased at a fast rate whilst spending within stores has remained relatively stable. These changes in spending habits mean consumers are now buying more online than ever before. As would be expected, the largest increase in online spending over the past decade is within non-store retailing.'

online selling, and provided concrete examples of online sales that could be considered active selling (see paragraph 5.34). The CMA is therefore minded to consult on updated guidance about the treatment of different online sales strategies as either passive or active selling in due course in the proposed CMA Verticals Guidance, drawing on its work in digital markets and on responses to the CMA's consultation.

Is there a case for changing the current regime in order to give businesses more flexibility to design their distribution systems according to their needs?

- 5.54 In view of the issues identified in paragraph 5.26, and given the CMA's final recommendation on the merits of retaining a distinction between active and passive sales, the CMA also recommends making certain changes to the current regime in order to give businesses more flexibility in designing their distribution systems. In this respect, the CMA notes that a significant number of responses to the CMA's consultation supported this change (paragraph 5.37).
- 5.55 Specifically, the CMA recommends that the list of exceptions to the hardcore restriction in Article 4(b) of the retained VABER should be revised in the UK Order and clarified in the Verticals Guidance to permit the following:
- (a) the combination of exclusive and selective distribution in the same or different territories;
 - (b) 'shared exclusivity' in a territory or for a customer group by allowing the allocation of a territory to more than one 'exclusive' distributor; and
 - (c) the provision of greater protection for members of selective distribution systems against sales from outside the territory to unauthorised distributors inside that territory.

Other aspects

- 5.56 Several respondents called on the CMA to clarify the legal position with regard to territorial and customer restrictions between the UK and the EU (paragraph 5.32). The CMA acknowledges that this is an important issue for businesses operating distribution systems across the UK and EU. As set out in the Act,

the Chapter I prohibition only applies where an agreement may affect trade within the UK and is, or is intended to be, implemented in the UK.¹¹⁸

- 5.57 Accordingly, an agreement that contains a ‘hardcore’ territorial or customer restriction under the UK Order entered into by two or more undertakings that satisfies these conditions, even if the undertakings are located outside the UK, may be found to infringe UK competition law.

Indirect measures restricting online sales

Current regime and views from stakeholders

- 5.58 Typically, online distribution channels are effective channels for reaching a greater number and variety of customers than traditional distribution channels. This explains the approach taken in the retained VABER, which is that, as explained in paragraph 5.51, every distributor should be allowed to use the internet to sell products since this is a reasonable way to allow customers to reach the distributor.

- 5.59 Certain online sales, such as the sales from a distributor’s own website, are accordingly treated as a form of passive sales.¹¹⁹ Moreover, any blanket bans preventing distributors from selling through the internet at all are considered to restrict competition by object and are hardcore restrictions not exempted by the retained VABER.¹²⁰

- 5.60 Other indirect measures restricting online sales are also considered to be hardcore restrictions under the retained VABER, including:

- (a) charging the same distributor a higher price for products intended to be resold online than for products intended to be sold offline – ‘**dual pricing**’; and
- (b) imposing criteria for online sales that are not overall equivalent to the criteria imposed in brick-and-mortar stores in the context of selective distribution – the ‘**equivalence principle**’.

¹¹⁸ The Act, sections 2(1) and 2(3). The UK government has recently consulted on whether the jurisdictional requirements of Chapter I should be changed to include where they are likely to have, direct, substantial and foreseeable effects with the UK. See: [Reforming Competition and Consumer Policy \(publishing.service.gov.uk\)](https://publishing.service.gov.uk), paragraphs 1.147 to 1.150.

¹¹⁹ The treatment of online sales as ‘passive sales’ is part of the preferential treatment of online sales at EU level which was first introduced at a stage where online distribution was still at a developmental stage and was seen as an industrial policy tool to achieve market integration within the EU single market.

¹²⁰ For example, see *Ping Europe Limited v Competition and Markets Authority* [2020] EWCA Civ 13 and Case C-439/09, *Pierre Fabre Dermo Cosmétique v Président de l’Autorité de la Concurrence*.

5.61 The views expressed at the CMA roundtables largely revealed a consensus amongst participants that the equivalence principle and the prohibition of dual pricing were no longer warranted. The reasons given for this included:

- (a) online channels have grown significantly in the last decade and no longer require the same level of protection;
- (b) there are increased challenges for brick-and-mortar retailers due to the growth in online sales and the impact of the COVID-19 pandemic;
- (c) the large investments required of brick-and-mortar retailers (compared to online sellers), as well as their marketing ventures, should be fully rewarded;
- (d) the costs incurred by brick-and-mortar retailers are significantly higher than for pure online distributors (which is further aggravated by the risk of free-riding from online distributors);
- (e) difficulties in practice in the application of an equivalence principle to two completely different sales environments, given the marked differences between online and brick-and-mortar distribution; and
- (f) the lack of an economic justification for retaining the current approach to dual pricing and equivalence.

5.62 The evidence from the EU Evaluation is consistent with the views expressed by participants. A large number of respondents to the EU Evaluation were of the view that, in the context of a selective distribution system, it is necessary to provide offline distributors with the necessary incentives to invest in promoting products and to prevent free-riding by online distributors that focus mainly on price, without offering comparable pre-sales services.¹²¹ These findings are also corroborated by the evidence from the European Commission's E-commerce sector inquiry, which found that '*addressing free-riding and maintaining the incentives for retailers to invest in high quality services by creating a level playing field between offline and online are key considerations for both manufacturers and retailers*'.¹²²

¹²¹ Evaluation SWD, p200.

¹²² European Commission (2017). *Final Report on the E-commerce Sector Inquiry*, paragraph 11.

- 5.63 Another important aspect highlighted in the EU Evaluation is the fact that costs incurred by offline distributors are significantly higher than the costs for online distributors.¹²³
- 5.64 Dual pricing was viewed by certain stakeholders as a potentially efficient tool to address free-riding. Their view was based on the fact that dual pricing may help to create a level playing field between online and offline sales by taking into consideration differences in the costs of investments. Comments in relation to dual pricing pointed to the need for a more flexible approach to performance-related wholesale pricing.¹²⁴
- 5.65 The EU Evaluation confirmed a widespread use of the brick-and-mortar requirement in selective distribution systems and that distribution channels have been moving towards an omni-channel model where free-riding can occur in both directions.¹²⁵
- 5.66 Further to the findings above, the EU Evaluation also confirmed the view that online and offline distribution channels are inherently different¹²⁶ and that, consequently, it is difficult to apply the equivalence principle, which gives rise to legal uncertainty. This view contrasted with the position of some other stakeholders who expressed the view that the principle of equivalence was effective in terms of promoting competition, choice and better access to a variety of distribution channels.¹²⁷
- 5.67 The vast majority of respondents to the CMA's consultation supported the CMA's proposal to stop treating 'dual pricing' and restrictions of online selling which are not overall equivalent to restrictions on offline selling as hardcore restrictions of competition.¹²⁸ The main reasons given for this included:

¹²³ By way of example, respondents to the Evaluation stated that employment costs are 2 to 5 times lower for online distribution than for traditional retail channels. In contrast to this position, other respondents (including online platforms) expressed the view that a 'brick-and-mortar requirement' can be a way of excluding pure online distributors from the distribution of certain products and services and that significant investments are also made by online distributors. Evaluation SWD, pp200–201.

¹²⁴ According to those stakeholders a more flexible approach would allow for differentiation between sales channels, depending on the actual sales efforts, and would encourage hybrid retailers to support investments in more costly (typically offline) services.

¹²⁵ Evaluation SWD, p201; see European Commission (2020), *Support Studies for the evaluation of the VBER: Study on consumer purchasing behaviour in Europe, Final Report*, sections 3.3.1.5, 3.3.2.5, 3.3.3.5, 3.3.4.5 and 3.3.9; European Commission (2017). *Final Report on the E-commerce Sector Inquiry*, section 2.1.

¹²⁶ Online sales are carried out at distance and do not allow for physical interaction, whereas brick-and-mortar sales are carried out allow for physical interaction, the provision of personalised advice and demonstration of the product at the point of sale.

¹²⁷ Evaluation SWD, p202.

¹²⁸ NFDA, L'Oréal, Walpole, British Brands Group, Freshfields Bruckhaus Deringer, ECCIA, K&L Gates, Addleshaw Goddard, SMMT, City of London Law Society, ABA, Brands for Europe, Richemont, Eversheds Sutherland, VBB, In-house Competition Lawyer's Association, JWP of the Bars and Law Societies of the United Kingdom, Pets Corner and Gowling.

- (a) the current prohibition on dual pricing between online and physical retail negatively affects the ability and incentives of retailers to invest in brick-and-mortar retail and risks contributing to the degradation and disappearance of the added-value services and experiences offered by brick-and-mortar retail – to the ultimate detriment of consumers;¹²⁹
- (b) the current rules do not address the ‘free riding’ problem;¹³⁰
- (c) dual pricing can deliver multiple consumer benefits:
 - (i) more effective incentives for retailers to invest in pre- and after- sales services, which enhance the customer experience; and
 - (ii) increased product availability and innovation, resulting in increased customer choice. At the same time dual pricing would allow for fairer remuneration of the online sales of the hybrid retailers, as they would be eligible to gain the same support as pure online players;¹³¹
- (d) requiring absolute equivalence is not appropriate since such a requirement hinders brands’ ability to innovate in the design of omni-channels where the offline and online play a different but integrated role;¹³²
- (e) given the strong consumer demand for online sales it can be expected that brand owners will not have the incentives for imposing conditions on online sales which undermine this sales channel’s competitiveness;¹³³

¹²⁹ VBB.

¹³⁰ Freshfields explained that 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. According to the same respondent, 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). See also Pets Corner.

¹³¹ According to Brands for Europe, with the current prohibition of dual pricing there is a genuine risk that hybrid retailers are either undercompensated as brand owners, disregard investments made by hybrid retailers for their online sales channel, or are overcompensated as brand owners give compensations based on all sales (offline/online) disregarding the lower costs associated with online sales.

¹³² Walpole.

¹³³ Walpole and In-house Competition Lawyer’s Association.

- (f) in practice, the requirement of equivalence is difficult to apply due to the inherently different character of online selling compared to bricks and mortar retail;¹³⁴
- (g) the equivalence principle leads to legal uncertainty as online and offline sales channels are inherently different;¹³⁵ and
- (h) the removal of the equivalence requirement would promote a level playing field between online and offline channels and more effective competition between the two channels.¹³⁶

5.68 Two respondents explicitly opposed the removal of ‘dual pricing’ from the list of hardcore restrictions, suggesting that the benefits of dual pricing for consumers are unclear and flagging potential economic risks and unintended consequences (eg, eliminating efficiencies in online distribution, higher prices, reduced consumer choice, risk of facilitating conduct which is akin to RPM, de facto online sales bans).¹³⁷ One respondent also highlighted that there is free riding from offline channels on online channels, which in the respondent’s view refutes the proposition that dual pricing is necessary to avoid the issue of free riding from online retailers on investments made by offline distributors.¹³⁸

5.69 Other points made by respondents included:

- (a) a suggestion that the CMA Verticals Guidance should make it clear that attempts by suppliers to restrict sales via online channels or render online sales less commercially favourable for the retailer, remain unacceptable and likely to infringe the Chapter I prohibition;¹³⁹
- (b) there being a risk that allowing dual pricing could have the unintended consequence of facilitating anti-competitive practices, such de facto online bans within certain selective distribution systems;¹⁴⁰ and

¹³⁴ VBB explained that it is often difficult, if not impossible, for companies and their counsel to reasonably determine whether criteria imposed in relation to online sales are equivalent to those imposed in relation to bricks and mortar retail. According to the same respondent, this results in significant legal uncertainty for companies as to whether their selective distribution systems are compatible with the existing competition rules.

¹³⁵ ECCIA, VBB, In-house Competition Lawyer’s Association and Eversheds Sutherland.

¹³⁶ Walpole, ECCIA, In-house Competition Lawyer’s Association and JWP of the Bars and Law Societies of the United Kingdom.

¹³⁷ Amazon and Trainline. The latter submitted that the effects of dual pricing in the context of its core activities differ from the effects which such practice has in the wider economy.

¹³⁸ Amazon.

¹³⁹ Trainline.

¹⁴⁰ Hugh Mullan (individual).

(c) calling on the CMA to consider the distributional and equalities impact on consumers from removing these hardcore restrictions.¹⁴¹

5.70 However, the majority of respondents agreed that the removal of ‘dual pricing’ and ‘equivalence’ from the list of hardcore restrictions would be an effective way to support offline channels.¹⁴²

Recommendation

5.71 The CMA is of the view that retaining the status quo would not be appropriate. This is because of market developments, such as the exponential growth of online sales,¹⁴³ and the existence in case law of sufficient safeguards against outright online sales bans (for example *Ping* and *Pierre Fabre*, referred to above).

5.72 In order to address the issues identified at the CMA roundtables,¹⁴⁴ the EU Evaluation,¹⁴⁵ and by the responses to the CMA consultation,¹⁴⁶ and to reflect the market developments mentioned above, the CMA recommends that the following changes are made to the interpretation of the ‘hardcore’ territorial and customer restrictions, and should be addressed in CMA Verticals Guidance:

(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.

5.73 The CMA agrees with the concern expressed by some respondents to the CMA’s consultation about the need to ensure that the future regime laid down in the UK Order does not have the unintended consequence of facilitating the

¹⁴¹ Which? explained that it is possible that in some cases the removal of the restrictions might allow online prices to rise, to the detriment of those consumers who rely on online markets. Such a price rise would impact consumers unable to access brick-and-mortar retailers either due to personal circumstances, such as disability or location, or external factors, such as the pandemic lockdowns experienced in the past year. According to Which?, similarly, if removing the prohibition enables price discrimination in which customers at bricks-and-mortar retailers end up paying more, then this would harm consumers who still do not have internet access or who have physical or mental impairments that make it difficult or impossible for them to access important goods and services online.

¹⁴² L’Oréal, Richemont, Walpole, SMMT, Eversheds Sutherland, K&L Gates, ECCIA, Brands for Europe and Pets Corner.

¹⁴³ The fact that online distribution is now well-established means that any special protections are no longer warranted from a competition policy perspective.

¹⁴⁴ See paragraph 5.61.

¹⁴⁵ See paragraphs 5.62 to 5.66.

¹⁴⁶ See paragraphs 5.67– 5.70.

perpetration of infringements of competition by object under the cover of dual pricing and the imposition of restrictions on online selling which are not overall equivalent to restrictions imposed on offline selling (eg a blanket or de facto online sales ban or RPM). In order to mitigate such risks, the CMA is minded to clarify in the CMA Verticals Guidance that the benefit of the block exemption will not apply to any practices which amount to restrictions of competition by object.

- 5.74 The CMA considers that the growth of online selling as an established route to market may mitigate any possible incentives that some businesses may have to restrict online selling. This fact, coupled with the existence of safeguards in the case law against blanket online sales bans, should provide a reasonable degree of protection against the most egregious forms of restrictions on online selling.
- 5.75 Moreover, the CMA roundtables¹⁴⁷, the EU Evaluation¹⁴⁸ and the responses to the CMA's consultation¹⁴⁹ supported the conclusion that the requirement for equivalence and the prohibition of dual pricing are no longer warranted. Their removal from the list of vertical restraints considered to be hardcore restrictions is, in the CMA's view, likely to promote competition between online and offline channels and promote innovation in the design of omni-channel distribution systems. In turn, this is likely to translate into benefits for consumers.¹⁵⁰
- 5.76 As noted above, the CMA is also minded to revisit the treatment of certain online sales as 'passive sales' in the context of the CMA Verticals Guidance with a view to providing further clarity on the situations where online sales should more appropriately fall into the 'active sales' category.

Parity obligations (or 'most favoured nation' clauses)

Current regime and views from stakeholders

- 5.77 Parity clauses are obligations that require one party to an agreement to offer the other party goods or services on terms that are no worse than those

¹⁴⁷ See paragraph 5.61.

¹⁴⁸ See paragraphs 5.62 to 5.66.

¹⁴⁹ See paragraphs 5.67– 5.70.

¹⁵⁰ The safeguards in UK case law against blanket online sales bans (coupled with the growth of online sales) should provide a sufficient degree of protection for groups of consumers who are particularly reliant on online selling. The possible efficiency gains in distribution via physical stores are likely to benefit groups of consumers who are particularly reliant on those stores. Consumers are likely to benefit from stronger competition between online and offline channels.

offered to third parties. Parity clauses have often also been referred to by competition authorities, including the CMA, as ‘most-favoured nation’ or ‘MFN’ clauses.

- 5.78 The retained VABER does not refer to parity obligations and the EU Vertical Guidelines only refer to them as an example of a measure that may make RPM more effective.¹⁵¹ However, parity obligations have become more common since the EU Regulation was adopted by the European Commission in 2010, particularly in the context of agreements involving online platforms, and, as described below, have been the focus of close scrutiny by the CMA and competition authorities in the EU.
- 5.79 Over the past decade there has been increased scrutiny of parity obligations that relate to terms offered by suppliers on the different sales channels they use. Following the growth of e-commerce, their use has particularly been observed in the context of online platforms, such as price comparison websites and online travel agents.
- 5.80 Competition concerns have primarily been identified in relation to so-called ‘wide’ parity obligations. ‘Wide’ parity obligations typically specify that a product or service may not be offered on better terms on any other channels (including, for example, a supplier’s own website or through other intermediaries, such as other distributors or online platforms). By contrast, ‘narrow’ parity obligations specify only that better terms will not be offered on a party’s own sales channel (for example, a supplier’s own website), without stipulating conditions for sales via other channels.
- 5.81 In that regard, the CMA has previously found significant competition concerns arising from the use of ‘wide’ parity obligations in retail markets in its market investigation under the Enterprise Act 2002 into private motor insurance in 2015 (which led to the ban of the use of wide parity obligations (or equivalent measures) in the private motor insurance sector)¹⁵² and in its infringement decision finding a breach of the Chapter I prohibition and Article 101 of the Treaty on the Functioning of the EU in *Price Comparison Website: use of most-favoured nation clauses* (2020).¹⁵³ The CMA has also made public statements on potential competition concerns arising from parity obligations, in particular wide parity obligations, in public submissions made to OECD

¹⁵¹ EU Vertical Guidelines, paragraph 48.

¹⁵² PMI Market Investigation [Final Report](#) and Articles 4 and 5 of the [PMI Order 2015](#).

¹⁵³ [Price comparison website: use of most favoured nation clauses](#), Case 50505, Decision, 19 November 2020. Note that the CMA’s decision is the subject of appeal to the Competition Appeal Tribunal. In addition, the CMA reached commitments following competition concerns relating to parity obligations used by an undertaking in the provision of auction services (see: [Auction services: anti-competitive practices](#), Case 50408, Decision to accept commitments, June 2017).

roundtables¹⁵⁴ and in the context of its market study on Digital Comparison Tools in 2017.¹⁵⁵ In addition, the CMA's predecessor, the OFT, investigated the use of parity obligations in the context of hotel online booking, e-books, and Amazon Marketplace.¹⁵⁶

5.82 The views expressed at the CMA roundtables suggested that:

- (a) it would be helpful to codify in guidance the position in case law relating to parity obligations, in particular to provide clarity and legal certainty regarding the treatment of wide parity obligations;
- (b) there is a need to recognise in the UK Order or in CMA Verticals Guidance the possible theories of harm relating to parity obligations (as shown by both the academic literature¹⁵⁷ and in enforcement activity in the UK and across Europe¹⁵⁸), especially with regards to wide parity obligations; and
- (c) there was a broad consensus that narrow parity obligations give rise to potential efficiencies that are likely to outweigh potential harmful effects, at least where the market shares of the parties are below the 30% threshold specified in the retained VABER.

¹⁵⁴ [CMA submission](#) to the OECD, Hearing on across platform parity agreements, October 2015, in particular paragraphs 9, 10 and 13; see [OECD Roundtable on Vertical Restraints for On-line Sales](#) (OFT submission from page 145).

¹⁵⁵ DCTs Market Study, [Final Report](#).

¹⁵⁶ On hotel online booking, the OFT opened an investigation under the Chapter I prohibition and Article 101 in September 2010 and closed the case on administrative priority grounds on 16 September 2015 (CE/9320-10). On e-books, the OFT opened an investigation in January 2011, but closed it in December 2011 (see CE/9440-11, e-books, update 6 December 2011) on the basis of administrative priorities given that the European Commission was also investigating similar conduct).

On Amazon Marketplace, see the OFT's decision in November 2013 to close its investigation under Chapter I of the Act and Article 101 TFEU into Amazon's price parity policy (CE/9692/12) on administrative priority grounds following Amazon taking steps to implement the removal of its price parity policy.

¹⁵⁷ Wang and Wright (2020), 'Search platforms: Showrooming and price parity clauses', *The RAND Journal of Economics*, Vol. 51, Issue 1, pp.32-58; Boik and Corts (2016), 'The Effects of Platform Most-Favoured-Nation Clauses on Competition and Entry', *Journal of Law and Economics*, vol.59, pp.105-134; 016; Johnson, J (2017), 'The Agency Model and MFN Clauses' *The Review of Economic Studies* Vol. 84, No. 3, pp.1151-1185; Johansen, B. O. and Verge, T., (2017), 'Platform price parity clauses with direct sales', University of Bergen Working Papers in Economics 01/17; Larrieu, T., (2019), 'Most Favoured Nation Clauses on the online booking market'. Working Paper; and Wang, C. and Wright, J., (2016), 'Platform Investment and Price Parity Clauses'. Working paper no 16-17, September 2016.

¹⁵⁸ In addition to the UK cases referred to above, competition authorities in the EU have scrutinised the use of parity obligations, particularly in the hotel online bookings sector. For example, in 2013 the German competition authority found that wide parity obligations infringed German and EU competition law (see press release here: Bundeskartellamt (2013) [Online hotel portal HRS's 'best price' clause violates competition law – Proceedings also initiated against other hotel portals](#)), and in 2015 the French, Italian, Swedish, and Irish national competition authorities accepted commitments from online travel agencies. Subsequently, France, Austria, and Italy each passed laws banning the use of wide MFNs in the hotel sectors, which has since been the subject of monitoring (see the [ECN Report on the EU-wide monitoring exercise](#) in the online hotel booking sector).

- 5.83 A few participants also mentioned that wide parity obligations may be justified on efficiency grounds (for example, to improve the prospects of successful entry in a platform market or to avoid free-riding on investments by competing platforms).
- 5.84 Another point raised during the CMA roundtables was that treating wide parity obligations as ‘hardcore’ restrictions could potentially be undermined if businesses were still allowed to benefit from the block exemption when engaging in equivalent behaviours that replicated the effects of a wide parity obligation, for example applying pressure to adhere to the principles of such a clause by linking other contractual terms to parity on price (or other terms).
- 5.85 The EU Evaluation found mixed evidence on the harms associated with retail parity obligations and the potential justifications for including them in agreements.¹⁵⁹ The EU Evaluation noted that there are diverging views amongst stakeholders on the likely effects of parity clauses on competition, and whether they are likely to be harmful or whether their use can be justified – with national competition authorities in EU member states indicating that narrow retail parity clauses are generally more likely to be justified than wide retail parity clauses.
- 5.86 The views of respondents to the EU Evaluation varied in relation to the treatment of parity obligations between (depending on their perspectives): (i) advocating the retention of a block exemption for parity obligations or (ii) adopting a stricter approach, particularly in relation to wide parity obligations. However, it is clear from the EU Evaluation that there is a general desire from stakeholders for greater legal certainty and guidance to be provided about how to assess parity obligations.¹⁶⁰
- 5.87 Views from respondents to the CMA’s consultation were mixed. While several respondents explicitly supported the CMA’s recommendation,¹⁶¹ others either opposed to it or expressed reservations.¹⁶²
- 5.88 The main arguments expressed by respondents in favour of the CMA’s provisional recommendation included:

¹⁵⁹ Evaluation SWD, p182-184.

¹⁶⁰ Evaluation SWD, p182.

¹⁶¹ ABI, the JWP of the Bars and Law Societies of the United Kingdom, K&L Gates, Eversheds Sutherland, Addleshaw Goddard and Which?.

¹⁶² British Brands Group, ABA Antitrust Law and International Law Sections, City of London Law Society Competition Law Committee, EU Travel Tech, Travelport, VBB and Freshfields Bruckhaus Deringer.

- (a) the evidence of harm caused by wide parity clauses is greater than the evidence of harm caused by narrow parity clauses;¹⁶³
- (b) the similarities between wide parity clauses and retail price maintenance militate in favour of treating both of these vertical restraints in a consistent manner ;¹⁶⁴ and
- (c) a stricter approach than the one adopted by the European Commission is merited given the likely effects of wide parity clauses on the smaller UK market.¹⁶⁵

5.89 The main reservations expressed by respondents included:

- (a) inconsistency between the UK and the EU position will potentially increase legal uncertainty and create issues of compliance and complexity for firms active in both markets;¹⁶⁶
- (b) the 30% market share threshold, coupled with additional guidance in the EU Vertical Guidelines, would be effective in identifying any potentially anti-competitive use of wide and narrow price parity clauses (ie there is no justification for making changes to the current regime beyond providing additional guidance);¹⁶⁷
- (c) there may be circumstances where wide parity obligations are beneficial;¹⁶⁸
- (d) there is a lack of clarity on the exact scope of the proposed hardcore restriction in the CMA's provisional recommendation (eg whether it includes wholesale parity clauses);¹⁶⁹
- (e) wide parity obligations have been in place in sectors such as the travel industry for some time without giving rise to competition issues;¹⁷⁰ and

¹⁶³ Which?

¹⁶⁴ The Centre for Competition Policy explained that while the treatment of wide parity clauses and RPM should be consistent, this did not necessarily imply that they should be blacklisted.

¹⁶⁵ Eversheds Sutherland.

¹⁶⁶ British Brands Group.

¹⁶⁷ ABA Antitrust Law and International Law Sections and City of London Law Society Competition Law Committee.

¹⁶⁸ City of London Law Society Competition Law Committee. gave the example where the obligation benefits an indirect sales channel which is a new player seeking the means to establish its presence on the market.

¹⁶⁹ Travelport.

¹⁷⁰ EU Travel Tech, and Travelport. VBB mentioned that parity obligations are often used in the mining industry without generating obvious competition concerns.

- (f) the treatment of wide parity obligations as hardcore restrictions is based on limited enforcement activity in digital platforms markets. Therefore, it has not been proven that any detrimental effects may occur more widely across a range of sectors.¹⁷¹

Recommendation

- 5.90 The CMA recommends that wide retail parity obligations are treated as a hardcore restriction under the UK Order. Based on the CMA's experience of scrutinising such obligations in its casework referred to above, the CMA is concerned that wide retail parity obligations soften competition between horizontal competitors and reduce the incentives of intermediaries (such as online platforms) to compete on price, to innovate, or to enter markets and expand.
- 5.91 The CMA considers that, in order for the hardcore restriction to be implemented effectively, it will also need to cover measures that have the same effect as a wide retail parity obligation contained in a contractual provision. Such equivalent measures would include any course of action that involves undertakings entering into agreements or engaging in concerted practices¹⁷² that have the object of replicating the anti-competitive effects of a wide retail parity obligation.¹⁷³ This would have the practical effect of extending, to a large extent, the approach already adopted in the private motor insurance market to all other segments of the economy.¹⁷⁴
- 5.92 The CMA recommends that the UK Order adopts the 'wide' and 'narrow' terminology, as well as making clear that the hardcore restriction relates to retail parity obligations only (see paragraph 5.94).¹⁷⁵ Accordingly, the CMA recommends that the definition should provide that 'retail parity obligations' are restrictions which ensure that the prices (or other terms and conditions) at which a supplier's goods or services are offered to end users on a sales

¹⁷¹ VBB and Travelport.

¹⁷² The notion of 'agreement' and 'concerted practice' in the context of vertical agreements is currently set out at paragraph 25 of the EU Vertical Guidelines.

¹⁷³ For example, where a narrow parity obligation in a contract effectively becomes a wide parity obligation through indirect means (such as making position in rankings on a comparison website conditional on parity with other indirect channels) they should be treated as a hardcore restriction. This also reflects the position in relation to RPM under Article 4(a) of the retained VABER in so far as it covers RPM that is achieved through direct and indirect means, as currently set out in paragraph 48 of the EU Vertical Guidelines.

¹⁷⁴ Private Motor Insurance Market Investigation Order 2015, which prohibited the use of wide parity obligations in the private motor insurance sector from 19 April 2015.

¹⁷⁵ In its provisional recommendation the CMA used the terms 'direct sales channel parity obligations' and 'indirect sales channel parity obligations' which broadly reflect the 'narrow' and 'wide' terminology. For the sake of clarity and simplicity, in the final recommendation the CMA is recommending that the most commonly used terminology of 'wide' and 'narrow' parity obligations is adopted in the UK Order and CMA Verticals Guidance. .

channel (which could be an online or offline sales channel) are no worse than those offered by the supplier on another sales channel. Further definitions would distinguish between restrictions that ensure that the prices (or other terms and conditions) at which a supplier's goods or services are offered to end users on a sales channel are no worse than those offered: (i) by the supplier on any of its direct sales channels (a '**narrow retail parity obligation**') or (ii) by the supplier on any indirect sales channel, for example online platforms or other intermediaries (a '**wide retail parity obligation**'). The latter would be a 'hardcore' restriction under the UK Order.

- 5.93 In the process of defining the scope of the hardcore restriction, having taken into account the views provided during its consultation, the CMA reached the following conclusions:
- (a) the hardcore restriction should be confined to wide retail parity obligations (ie business to business markets should not be within the scope of the hardcore restriction);
 - (b) the hardcore restriction should apply to both online and offline intermediation services;
 - (c) it is more appropriate to treat wide retail parity obligations as hardcore restrictions than excluded restrictions; and
 - (d) narrow parity obligations should remain block exempted.

We address each of these considerations in turn below.

- 5.94 The CMA recommends that wide parity obligations that apply to business-to-business markets are not treated as hardcore restrictions. Although these parity obligations could potentially soften competition between intermediaries in a similar way as in business to consumer (ie retail) markets, the overall competitive harm and direct effect on consumers is less clear and will depend on the complexity of the vertical supply chain and the strength of competition downstream. In this respect, the CMA has also taken into account submissions made by respondents, which indicated that the theories of harm associated with wide parity clauses may be less of a concern in certain markets (paragraph 5.89).
- 5.95 Notwithstanding the above, the CMA notes that, if evidence of harm relating to the use of wide parity obligations in business to business markets were to

arise during the currency of the UK Order, it is open to the CMA to withdraw the benefit of the block exemption.¹⁷⁶

5.96 The CMA has carefully considered the submissions made by respondents who expressed the view that there is no evidence of harm associated with the use of wide parity obligations in markets other than online platform markets. The CMA accepts that the majority of competition enforcement cases has focused on the use of these clauses in online platform markets, and, as mentioned above, considers that there are good reasons to exclude wide parity obligations in business-to-business markets from the scope of the hardcore restriction.

5.97 The CMA's view is that those reasons do not apply to the possible exclusion of wide retail parity obligations imposed in offline markets. While previous enforcement activity focused on online platforms, the CMA considers that wide retail parity obligations in online and offline sales channels should be treated in a consistent manner, given:

- (a) the theories of harm are the same for both online and offline intermediaries and therefore it would be inconsistent to treat them differently;¹⁷⁷
- (b) the CMA has not seen credible evidence that efficiencies stemming from the use of wide retail parity obligations in offline markets are any greater than in online markets; and
- (c) the treatment of these clauses as hardcore restrictions does not prevent businesses from adopting them provided the conditions for individual exemption under section 9 of the Act are met. In this respect, the CMA is minded to clarify and reiterate in CMA Verticals Guidance that it is open to considering on a case-by-case basis, carefully and objectively, any efficiency arguments made in the course of any investigations under the Act relating to the use of wide parity obligations.

¹⁷⁶ The CMA is entitled to withdraw the benefit of the retained VABER in respect of individual agreements under section 10(5)(d) of the Act.

¹⁷⁷ By way of example, the CMA considers that the theories of harm for an offline intermediary implementing a wide parity clause broadly mirror that set out in the PMI Market Investigation [Final Report](#) and the DCTs Market Study, [Final Report](#):

- a) Rival intermediaries may be restricted in gaining a price advantage over the intermediary with the wide parity clause, for example, by lowering their commission fees to encourage retailers to quote lower prices.
- b) The competitive pressures on the intermediary itself may be weakened. Without the protection of a wide parity clause, the intermediary would have had to compete harder to get lower prices from retailers in order to compete with other intermediaries, for example by reducing the commission fees it charged.
- c) Reduction of retailers' ability and incentives to differentiate their prices across different intermediaries (as there is nothing to be gained by the retailer from doing so).

- 5.98 The CMA recognises that, all other things being equal, there are advantages for businesses, particularly those that operate distributions systems in both the UK and the EU, in consistency between UK and EU competition law. However, in this case, the CMA considers that there are significant advantages of substance in treating wide retail parity clauses in offline markets as hardcore restrictions, and the CMA considers that it is important that UK consumers be protected from such anti-competitive practices.
- 5.99 The CMA has also considered whether to treat wide retail parity obligations as ‘excluded restrictions’ in the UK Order instead of ‘hardcore restrictions’.¹⁷⁸ As mentioned above, the CMA recommends the latter. This is because the CMA has not seen compelling evidence of possible efficiency justifications for wide retail parity obligations (above and beyond the efficiencies that can be brought about by the use of narrow retail parity obligations). Furthermore, such an approach is the most likely to deter wide retail parity obligations in all but those cases where it can be shown on an individual analysis that the exemption criteria in section 9 of the Act are met.
- 5.100 Finally, the CMA considers that it would not be appropriate to include narrow retail parity obligations in the list of hardcore or excluded restrictions, given the possible efficiencies that may result from their use in particular markets.¹⁷⁹ However, the CMA may still decide to investigate concerns relating to narrow retail parity obligations in agreements between undertakings if there is evidence that their use replicates the effects of wide retail parity obligations.¹⁸⁰ Depending on the circumstances, this may be an example of where the CMA considers cancelling the benefit of the UK Order in an individual case (see **Section 9** below).

¹⁷⁸As noted above, the inclusion of a ‘hardcore restriction’ in a vertical agreement leads to the exclusion of the whole vertical agreement from the scope of application of the block exemption. By contrast, as explained at paragraph 65 of the EU Vertical Guidelines, an ‘excluded restriction’ is a restriction that does not qualify for automatic exemption, but if it is found to restrict competition the remainder of the agreement may still benefit from the block exemption (provided the excluded restriction is severable).

¹⁷⁹ The avoidance of free-riding is the main efficiency that may arise as a result of narrow parity obligations. For more detail on possible efficiencies arising from narrow parity obligations please see [Digital Comparison Tools Market Study, Final Report: Paper E: Competitive landscape and effectiveness of competition](#), paragraphs 3.68-3.78.

¹⁸⁰ For an explanation of when narrow parity obligations can replicate wide parity obligations, see paragraphs 3.34 to 3.49 of the [Final Report](#) in the Digital Comparison Tools market study.

6. Excluded restrictions

Non-compete obligations

Current regime and views from stakeholders

- 6.1 The retained VABER exempts non-compete obligations¹⁸¹ (also sometimes called exclusive purchasing obligations on buyers) with a duration of less than 5 years. By contrast, non-compete obligations that are indefinite or have a duration that exceeds 5 years are ‘excluded’ under Article 5(1)(a) of the retained VABER, such that they must be individually assessed to establish whether they benefit from the exemption. This includes non-compete clauses that are tacitly renewable beyond a period of 5 years, which are deemed to be concluded for an indefinite duration.
- 6.2 The following types of obligations are also ‘excluded’ under the retained VABER, such that they must also be individually assessed to establish whether they benefit from exemption:
- (a) obligations causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services (Article 5(1)(b) of the retained VABER); and
 - (b) obligations causing the members of a selective distribution system not to sell the brands of particular competing suppliers (Article 5(1)(c) of the retained VABER).
- 6.3 Articles 5(2) and 5(3) of the retained VABER contain certain derogations to the position set out above.
- 6.4 At the CMA roundtables, a number of participants suggested that the 5-year period for non-compete obligations is arbitrary, although no alternative was suggested. Some participants also stated that there was no harm in tacitly renewable contracts if each party had the right to terminate.¹⁸² Views on the

¹⁸¹ ‘Non-compete obligation’ means any direct or indirect obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services, or any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80 % of the buyer’s total purchases of the contract goods or services and their substitutes on the relevant market, calculated on the basis of the value or, where such is standard industry practice, the volume of its purchases in the preceding calendar year (retained VABER, Article 1(d)).

¹⁸² Several participants suggested that a requirement to renegotiate any non-compete obligation every five years felt mechanistic, artificial, arbitrary, or did not reflect commercial reality.

most suitable length of non-compete obligations for the purposes of the block exemption were, however, mixed, both generally and within specific sectors.

- 6.5 However, certain participants suggested that the 5-year limit generally worked well as it provided certainty and gave businesses the chance to re-evaluate their agreements.¹⁸³ One participant questioned whether non-compete obligations should benefit from automatic exemption at all.
- 6.6 Finally, additional guidance and flexibility were advocated by a small number of participants in relation to post-term non-compete clauses (Article 5(3) of the retained VABER). It was suggested that Article 5(3)(c) required further flexibility on the definition of ‘know how’ and that Article 5(3)(d) could be considered restrictive to the extent that it relates only to the ‘*premises and land*’ from which the buyer had operated during the contract period.
- 6.7 The EU Evaluation noted that a large majority of respondents considered that Article 5 of the EU Regulation provides an appropriate level of legal certainty.¹⁸⁴ However, the EU Evaluation did raise the question as to whether tacitly renewable non-compete obligations should benefit from automatic exemption where the buyer can periodically terminate or renegotiate the agreement in order to reduce costs and the administrative burden for businesses.¹⁸⁵
- 6.8 A number of other points regarding Article 5 were also raised during the EU Evaluation (in some cases by only a few stakeholders), including:
- (a) whether non-compete obligations exceeding 5 years should benefit from automatic exemption;¹⁸⁶
 - (b) whether the derogations in Article 5(2) and Article 5(3) of the retained VABER should be limited to ‘*the premises and land*’;¹⁸⁷
 - (c) whether Article 5(1)(c) of the retained VABER, which excludes non-compete obligations imposed on members of a selective distribution system from the benefit of the retained VABER, may not be justified; and

¹⁸³ One participant from the automotive sector was not in favour of a more permissive approach to non-compete obligations, stating that manufacturers already exerted undue influence over dealers, and had restricted dealers operating multi-brand showrooms.

¹⁸⁴ Evaluation SWD, p185.

¹⁸⁵ European Commission’s Inception Impact Assessment (2020), p2.

¹⁸⁶ Evaluation SWD, pp55 and 57.

¹⁸⁷ Evaluation SWD, p187.

(d) whether Articles 5(1)(a) and 5(1)(b) of the retained VABER need changes in the context of franchise agreements.

- 6.9 Several respondents to the CMA's consultation stated that tacitly renewable non-compete obligations should not remain excluded restrictions, often stating that these should raise few concerns provided any tacit renewal was subject to reasonable termination provisions.¹⁸⁸ Some respondents observed, in support of this, that removing tacitly renewable non-compete obligations from excluded restrictions would be consistent with the European Commission's recently published Draft Revised Vertical block exemption Regulation and associated vertical guidelines,¹⁸⁹ where the European Commission has proposed to add language into the vertical guidelines indicating that non-compete obligations which are tacitly renewable beyond a period of 5 years are covered by VABER if the buyer can effectively renegotiate or terminate the contract with a reasonable notice period and at a reasonable cost.¹⁹⁰
- 6.10 One respondent that argued in favour of tacitly renewable non-compete clauses being exempted and argued that concerns should be raised only if a supplier held market power. This respondent suggested that in exceptional circumstances where non-competes could foreclose suppliers from partnering with distributors, or where there are cumulative effects of a network of such non-compete provisions, the benefit of the UK Order could be removed.¹⁹¹
- 6.11 A few respondents stated that continuing to treat non-compete clauses under 5 years which meet the conditions of the retained VABER as exempt would bring legal certainty and reduced costs,¹⁹² arguing that if this were to change it could lead to the need for onerous individual assessments,¹⁹³ or undermine 'universal business practice'.¹⁹⁴
- 6.12 Several respondents argued that there would be a positive impact if non-compete obligations that exceed 5 years in duration were no longer treated as excluded restrictions. Reasons given in support of this varied, but included potential disruption, uncertainty and cost or administrative burden associated with shorter-term agreements and changing suppliers¹⁹⁵, as well as the

¹⁸⁸ L'Oréal, BBC, Richemont, VBB, K&L Gates, Freshfields Bruckhaus Deringer, Brands for Europe, City of London Law Society Competition Law Committee and In-house Competition Law Lawyers Association.

¹⁸⁹ City of London Law Society Competition Law Committee, In-house Competition Law Lawyers Association and Eversheds Sutherland

¹⁹⁰ European Commission (2021). [Draft Revised Vertical block exemption Regulation](#).

¹⁹¹ VBB

¹⁹² Brands for Europe

¹⁹³ In-house Competition Law Lawyers Association

¹⁹⁴ K&L Gates.

¹⁹⁵ L'Oréal, K&L Gates and Brands for Europe

differing lifecycles of some products and services (some of which might require longer-term agreements either to support an initial investment to embed relevant infrastructure or recover set-up costs,¹⁹⁶ or across the lifecycle of the product or service, which might be longer than 5 years).¹⁹⁷ A few respondents argued that in the absence of significant market power it would not be harmful to allow non-competes of a longer duration.¹⁹⁸

- 6.13 However, other respondents argued that the current limitation period is reasonable and well-understood by businesses.¹⁹⁹ Further, the CMA received a few responses to the CMA's consultation that flagged concerns with the use of non-compete restrictions in particular sectors. One respondents in the automotive sector submitted that tacitly renewable non-compete obligations should remain excluded restrictions.²⁰⁰ A respondent in the pubs sector suggested that exclusive purchasing 'beer tie' arrangements between pub companies and their tenants should not be block exempted at all, on the basis that they have restrictive effects that are not compensated by quantifiable countervailing benefits.²⁰¹
- 6.14 No respondents recommended changes to the current provisions related to Article 5(2) and Article 5(3).

Recommendation

- 6.15 Although several respondents submitted that automatic exemption should be extended to non-compete clauses longer than 5 years, the CMA remains of the view that non-compete obligations the duration of which is indefinite or exceeds 5 years should remain excluded restrictions under the UK Order (in the same form as the retained VABER).
- 6.16 The CMA received feedback during the CMA roundtables and to the CMA's consultation that the 5 year limit could be considered arbitrary; as described above some respondents also put forward the view that some non-compete clauses of more than 5 years would not give rise to competition concerns, giving a variety of reasons in support of this:
- (a) As to whether the limit is arbitrary, having considered the evidence and consultation responses, the CMA considers that any fixed limit of this

¹⁹⁶ BBC.

¹⁹⁷ K&L Gates and In-house Competition Law Lawyers Association.

¹⁹⁸ VBB and In-house Competition Law Lawyers Association.

¹⁹⁹ Eversheds Sutherland, JWP of the Bars and Law Societies of the United Kingdom, Gowling and SMMT.

²⁰⁰ NFDA.

²⁰¹ Pubs Advisory Service.

nature would inevitably be, to some degree, arbitrary given that the duration of a contract is case specific, whereas the block exemption is of broad application.

- (b) As to the potential benefits of non-compete clauses of more than 5 years, the CMA has not been presented with compelling evidence that such agreements do not restrict competition or are efficiency-enhancing as a general position across all vertical agreements (or even industries), and so should qualify for a general safe harbour.

6.17 The CMA also notes that the current position does not preclude undertakings entering into vertical agreements with non-compete obligations with a duration of more than 5 years, provided that those agreements do not restrict competition and satisfy the conditions for individual exemption under section 9 of the Act. As non-compete obligations of a longer duration are ‘excluded restrictions’, the position in the retained VABER is that they do not qualify for automatic exemption – but if found to restrict competition the remainder of the agreement may still benefit from the block exemption, provided the non-compete obligation is severable. In principle, the factors raised by respondents in the CMA’s consultation in favour of some non-competes with a duration longer than 5 years being exempted may be relevant to the assessment of whether an individual exemption could apply to a particular agreement. However, such provisions need to be assessed on a case-by-case basis according to their likely effects in the actual economic and market circumstances.

6.18 Several respondents in the CMA’s consultation also expressed the view that tacitly renewable non-compete clauses should benefit from block exemption on the basis that reasonable termination provisions could alleviate competition law concerns. However, again, the CMA has not been presented with sufficient evidence that this would provide sufficient and appropriate protection to qualify for a general safe harbour. In this regard, the potential anti-competitive effects of tacitly renewable non-competes arise not only in respect of the parties to the agreement in question, but also in respect of competing providers which could be faced with increased barriers to entry and expansion, weakening competitive pressures on the incumbent. In particular, risks may arise from the inertia of the parties where an agreement is tacitly renewable. As with non-compete clauses longer than 5 years, exclusion from the benefit of the block exemption should not preclude the possibility of an individual exemption being available to a tacitly renewable non-compete agreement, but that is to be assessed on a case-by-case basis.

- 6.19 The CMA acknowledges that this position diverges from the EC draft position.²⁰² As noted above, the CMA recognises that there are advantages for businesses, particularly those that operate distributions systems in both the UK and the EU, in consistency between UK and EU competition law. However, this needs to be balanced against the need to protect UK consumers from harmful anti-competitive practices. In this case, the CMA considers that tacitly renewable non-compete clauses should continue to be treated as excluded restrictions, given the potential for anti-competitive effects to arise from these types of clauses.
- 6.20 The CMA therefore recommends that the non-compete exclusion in Article 5(1) of the retained VABER should be adopted into the UK Order without amendment.
- 6.21 Taking into account the absence of submissions expressing a need for Article 5(2) and Article 5(3) of the retained VABER to be amended in the UK Order, the CMA is recommending that these Articles be adopted into the UK Order without amendment.

²⁰² European Commission (2021). [Draft Revised Vertical block exemption Regulation](#).

7. Issues for CMA Verticals Guidance

- 7.1 The CMA recommends that issues regarding agency and environmental sustainability are addressed in CMA Verticals Guidance and not in the UK Order itself. As explained above in paragraph 2.10, the CMA is minded to consult later this year or early next year on any CMA Verticals Guidance.

Agency

Current regime and views from stakeholders

- 7.2 Where an agent and a principal act as a single economic unit, obligations imposed on the agent in relation to the contracts concluded or negotiated on behalf of the principal fall outside of the Chapter I prohibition.²⁰³
- 7.3 At the CMA roundtables participants said that, to the extent that any CMA guidance draws upon the guidance on the same issues currently set out in the EU Vertical Guidelines, certain clarifications would be helpful.²⁰⁴
- 7.4 Participants at the CMA roundtables also said that it would be helpful to have additional guidance on issues involving the application of:
- (a) agency principles to arrangements with online platforms (eg the extent to which the agency principles apply when online platforms can impose contractual obligations determining the price set by the supplier on other sales channels);
 - (b) rules on agency and RPM to fulfilment contracts;²⁰⁵ and
 - (c) rules on agency to dual role agents.²⁰⁶

²⁰³ For this reason, the issue of agency does not arise under the retained VABER itself as the relevant provisions of agency agreements do not require exemption.

²⁰⁴ A large number of participants stated that the principles of agency set out in the EU Vertical Guidelines are difficult to apply to modern business models, and some of those participants also suggested that this may be addressed by shifting the focus of the rules away from the assessment of the allocation of risk. Further, a number of participants suggested that the guidance in the EU Vertical Guidelines should be updated to reflect more recent case law.

²⁰⁵ Tripartite relationships between suppliers, intermediaries and final customers in circumstances where the intermediaries adhere to the commercial conditions agreed beforehand between their supplier and a particular customer and focus solely on executing that agreement, eg by taking over logistical functions.

²⁰⁶ A dual role agent acts both as agent and as an independent distributor for different products of the same supplier. As part of the Evaluation, the European Commission has [published a working paper](#) on the application of Article 101 of the Treaty to dual role agents.

- 7.5 The EU Evaluation also noted that stakeholders requested clarity on the above issues.
- 7.6 A few respondents to the CMA's consultation mentioned that more guidance would be useful, in particular around the level²⁰⁷ and types of risks a genuine agent could bear.²⁰⁸ Others submitted that clarification was needed regarding the situations where platforms can qualify as genuine agents²⁰⁹ or expressed the view that the CMA should extend the availability of the block exemption to fulfilment services or confirm that there are no RPM concerns in this context.²¹⁰ A few respondents also raised the issue of transfer of title for a short time-period disqualifying the agent, which they thought was unreasonable, in cases where (i) the momentary transfer of title might be a logistical necessity only; (ii) no economic risks are taken with such transfer of title; or (iii) the actual negotiation of terms takes place between the principal and the end customer/retailer.²¹¹
- 7.7 Several respondents thought the CMA should confirm that dual role agency agreements can fall outside of the Chapter I prohibition²¹² and sought guidance on accounting for common costs, so it is clear to what extent the principal should pay or reimburse the agents for costs that are relevant to both the products sold within and outside of the agency agreement.²¹³

Recommendation

- 7.8 The CMA recommends that the Secretary of State does not make any substantive amendments in respect of agency issues in the UK Order itself since it is minded to provide guidance on these issues (including the topics listed in paragraph 7.4 above) in the context of the CMA Verticals Guidance. In any such guidance, the CMA intends to make reference to the feedback received in the CMA's consultation, CMA roundtables as well as to the CMA's own enforcement practice in this area.
- 7.9 However, given the views expressed by some respondents about the need to clarify the position of online platforms under the agency regime, and taking

²⁰⁷ Gowling, JWP of the Bars and Law Societies of the United Kingdom, Eversheds Sutherland and In-house Competition Lawyer's Association.

²⁰⁸ JWP of the Bars and Law Societies of the United Kingdom, Eversheds Sutherland and In-house Competition Lawyer's Association.

²⁰⁹ JWP of the Bars and Law Societies of the United Kingdom, Freshfields Bruckhaus Deringer and Trainline.

²¹⁰ The City of London Law Society Competition Law Committee, Brands for Europe and Gowling.

²¹¹ The City of London Law Society Competition Law Committee, K&L Gates and L'Oréal.

²¹² Gowling and SMMT.

²¹³ Gowling, SMMT, City of London Law Society Competition Law Committee and JWP of the Bars and Law Societies of the United Kingdom.

into consideration the European Commission's proposal in Article 1(1)(d) of the Draft Revised Vertical block exemption Regulation,²¹⁴ the CMA is recommending that the Secretary of State clarifies in the UK Order that providers of online intermediation services should be treated as suppliers for the purposes of the UK Order.²¹⁵ The CMA considers that this is a helpful clarification of the position relating to providers of online intermediation services which would increase legal certainty.²¹⁶ The CMA is minded to provide further guidance on this particular aspect in the CMA Verticals Guidance.

- 7.10 The definition of online intermediation services would be based on the definition in the UK retained version of Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (commonly known as the P2B Regulation). This definition would cover online services that allow undertakings to offer goods or services to other undertakings or to end users with a view to facilitating direct transactions between such undertakings or between such undertakings and end users, irrespective of whether and where those transactions are ultimately concluded.

Environmental sustainability

Background and views from stakeholders

- 7.11 The transition to 'net zero' carbon emissions is one of the CMA's strategic priorities.²¹⁷ Given the importance of climate change questions and the transition to 'net zero' carbon emissions, the CMA sought to understand whether UK stakeholders had experienced any lack of legal certainty on the

²¹⁴ European Commission (2021). [Draft Revised Vertical block exemption Regulation](#).

²¹⁵ Providers of online intermediation services typically act independently without being part of the undertakings of the sellers to which they provide their services. In addition, providers of online intermediation services often enter into agreements with a significant number of sellers and make significant market-specific investments such as the investments in the development of the infrastructure associated with the platforms they run, advertising and after sales services. These factors strongly suggest that providers of online intermediation services bear significant financial and/or commercial risks.

²¹⁶ The consequence of being classified as a supplier for the purposes of the UK ORDER is that providers of online intermediation services would in principle not qualify as agents for the purposes of the Chapter I prohibition.

²¹⁷ Since 2020, supporting the transition to 'net zero' carbon emissions has been a strategic priority for the CMA. The CMA Annual Plan 2021 to 2022 refers to the further work the CMA is undertaking this year - [Competition and Markets Authority Annual Plan 2021/22 \(CMA137\)](#); the CMA recently published an information document to help firms, NGOs and trade associations navigate competition law as it currently stands, when engaging in cooperation agreements for the attainment of sustainability goals: [Sustainability agreements: CMA issues information for businesses](#).

assessment of vertical agreements used for the attainment of environmental sustainability goals under section 9 of the Act. In particular, the CMA sought views on whether such uncertainty had led to the abandonment of sustainability initiatives.

- 7.12 During the CMA roundtables, participants provided their views on issues including environmental benefits as ‘out of market’ efficiencies, the increasing trend for brands to require retail networks and distribution systems to become ‘eco-friendly’, and the extent to which environmental sustainability criteria for admission to a selective distribution system can be regarded as necessary to protect the quality of the product in question.²¹⁸ They also commented that environmental sustainability is more likely to raise competition concerns in the context of horizontal agreements than vertical agreements.
- 7.13 A range of respondents to the CMA’s consultation welcomed the prospect of environmental sustainability guidance.²¹⁹ Of these, several requested guidance on whether, and how, environmental sustainability considerations could be included as criteria for selective distribution systems.²²⁰ Others requested greater clarity on the types of sustainability agreements that could raise competition concerns.²²¹
- 7.14 A few respondents were opposed to, or were unsure of, the benefits of the CMA Verticals Guidance addressing sustainability. These respondents suggested that these issues could not adequately be addressed in guidance at present, given the still-developing thinking on the interplay between competition law and sustainability,²²² or that if sustainability issues were to be addressed anywhere, it would be best to address them in guidance on horizontal agreements between competitors.²²³
- 7.15 Some respondents suggested that the CMA consider a broader definition of ‘sustainability’ to encompass issues related to human rights such as forced labour, or anti-fraud and corruption policies.²²⁴

²¹⁸ The key question here is whether selection criteria based on environmental sustainability is compatible with the concept of purely qualitative selective distribution.

²¹⁹ Addleshaw Goddard, SMMT, Walpole, Eversheds Sutherland, ECCIA, Brands for Europe, BBC; In-house Competition Law Lawyers Association, Gowling, and British Brands Group.

²²⁰ Walpole, SMMT, Gowling, Addleshaw Goddard, ECCIA, Competition Law Lawyers Association, and K&L Gates

²²¹ In-house Competition Law Lawyers Association, Richemont, and Eversheds Sutherland

²²² L’Oréal, VBB.

²²³ City of London Law Society Competition Law Committee.

²²⁴ Walpole and ECCIA.

Recommendation

- 7.16 The CMA recommends that the Secretary of State does not make any amendments in respect of environmental sustainability (or other sustainability) issues in the UK Order.
- 7.17 The CMA considers that how environmental benefits are approached under the Chapter I prohibition and section 9 of the Act is not specific to vertical agreements, and that this question needs to be further considered in the broader context of competition policy. To that end, the CMA has published a call for inputs to inform its advice to government on how the competition and consumer protection regimes can better support the UK's Net Zero and sustainability goals.²²⁵ The call for inputs includes questions on the application of the Chapter I prohibition and section 9 of the Act, without distinguishing between horizontal and vertical agreements. The responses received will inform the advice to government that will be published in early 2022.
- 7.18 Nonetheless, the CMA is minded to provide guidance on environmental sustainability issues in the context of the CMA Verticals Guidance, in particular in relation to the criteria for admission to selective distribution systems. This guidance would focus on environmental sustainability; the CMA does not consider that it received sufficient evidence to warrant widening the language in guidance to a broader definition of sustainability incorporating other topics.

²²⁵ [Environmental sustainability advice to government: Call for inputs.](#)

8. Duration

Current regime and views from stakeholders

- 8.1 Under section 6(7) of the Act, a block exemption order may provide that the order is to cease to have effect at the end of a specified period. The CMA recommends that the UK Order should include such a provision, in recognition of the evolving nature of markets.²²⁶
- 8.2 The duration of the UK Order was not a prominent issue raised by participants during the CMA roundtables, and similarly the duration of the proposed new EU VABER did not feature in the EU Evaluation.
- 8.3 Respondents to the consultation had mixed views on the appropriate duration of the UK Order, but most were in agreement with, or did not oppose, the CMA's recommendations.²²⁷ A few respondents suggested that the proposed duration of six years was relatively short, and that anything shorter was likely to be counterproductive.²²⁸ Several respondents stated that the duration of six years was sensible, given considerable business uncertainty related to EU Exit and the COVID-19 pandemic, as well as the fast-evolving ecommerce and digital markets (with one suggesting that a longer duration risked the UK Order lacking flexibility to respond to developments in these digital markets).²²⁹ One respondent also highlighted the likelihood of more general changes in supply and distribution practice and that a six-year duration would allow the UK Order to be adjusted in response to such changes.²³⁰ A few other respondents noted the potential benefits of alignment with the European Commission's own timeframes (or the fact that after two six-year UK Order reviews, the UK regime would then be aligned with a twelve-year EU Regulation).²³¹

Recommendation

- 8.4 Having considered these responses and given the lack of firm consensus among stakeholders, the CMA remains of the view that it would be

²²⁶ The current EU Regulation was adopted by the European Commission in 2010, and the European Commission are again proposing a twelve-year duration (meaning that the new EU Regulation will expire in 2034).

²²⁷ SMMT, Eversheds Sutherland, VBB, Which?, BBC, City of London Law Society Competition Law Committee, British Brands Group, JWP of the Bars and Law Societies of the United Kingdom and Gowling.

²²⁸ L'Oréal, Richemont, and Brands for Europe.

²²⁹ Which?, Eversheds Sunderland, City of London Law Society Competition Law Committee, VBB, BBC, British Brands Group, JWP of the Bars and Law Societies of the United Kingdom and Gowling.

²³⁰ BBC.

²³¹ Brands for Europe, Richemont and Freshfields Bruckhaus Deringer.

appropriate for a review of the UK Order to take place within 6 years of the adoption of the UK Order.

- 8.5 Part of the benefit of the UK Order expiring after a specified period is that it provides the opportunity for the CMA to conduct a further review of the regime for vertical agreements, taking account of market developments since the last review.
- 8.6 An important consideration in the CMA's review of the retained VABER has been recent market developments, such as the growth in online sales, the UK's withdrawal from the EU and the impact of the COVID-19 pandemic. The CMA considers it is important to review the block exemption after a relatively short time frame given that these developments are ongoing, and often fast moving. This would also allow a more thoroughgoing and fundamental reappraisal of the provisions of the block exemption in the context of UK markets. On the other hand, the CMA considers that such duration should not be unduly short since this could potentially undermine the stability and certainty which businesses require. For these reasons, the CMA considers that the recommended 6-year duration is an appropriate duration which strikes a reasonable balance between these considerations.

9. Other provisions

Transitional period

- 9.1 The CMA recommends that the UK Order should provide for a transitional period of one year. This means that the Chapter I prohibition would not apply during a period of one year from the date on which the UK Order comes into effect in respect of agreements already in force on that date which (i) do not satisfy the conditions for exemption provided for in the UK Order, but (ii) on that date, satisfied the conditions for exemption provided for in the retained VABER.²³² In other words, existing agreements that meet the conditions of the retained VABER could continue to benefit from its terms for a year after its expiry, whereas agreements entered into after its expiry would need to meet the conditions of the new UK Order to benefit from the block exemption. This will allow businesses that wish to take advantage of the ‘safe harbour’ to review and (if necessary) revise their existing vertical agreements.
- 9.2 This recommendation is consistent with positive feedback received in the CMA’s consultation, where several respondents agreed with the CMA’s proposal to implement a one-year transitional period,²³³ although one respondent did suggest that a longer period could be beneficial as it would offer businesses greater leeway for adjustment.²³⁴

Cancellation in individual cases

- 9.3 Section 6(6)(c) of the Act provides that a block exemption order may provide that if the CMA considers that a particular agreement is not an exempt agreement,²³⁵ it may cancel the block exemption in respect of that agreement. The CMA proposes that the UK Order should contain such a provision.
- 9.4 The CMA recommends that the UK Order provides for the CMA to cancel, ie withdraw, the benefit of the block exemption in individual cases to ensure that the ‘safe harbour’ is only available for those agreements that satisfy the conditions for exemption under section 9 of the Act.

²³² Unless the benefit of the block exemption is cancelled, or otherwise varied or revoked, in accordance with the provisions of the UK Order or the Act.

²³³ SMMT, VBB, SIBA, Freshfields Bruckhaus Deringer, BBC, Gowling and Eversheds Sutherland.

²³⁴ Travelport.

²³⁵ Exempt agreement means an agreement which is exempt from the Chapter I prohibition as a result of section 9 of the Act (the Act, section 6(8)).

- 9.5 The CMA considers that this provision is likely only to be used in exceptional circumstances and that any cancellation, ie withdrawal of the benefit of the UK Order in an individual case, should be in writing, and that the CMA should first give notice in writing of its proposal and consider any representations made to it. The CMA proposes that any notice should state the facts on which the CMA bases its decision or proposal and its reasons for making it. The CMA envisages that these provisions would be similar to those in the Public Transport Ticketing Schemes Block Exemption.²³⁶
- 9.6 This recommendation is consistent with the responses that the CMA received in the CMA's consultation. The majority of respondents who provided views on this agreed that the CMA's power to cancel or withdraw the benefit of the exemption should be subject to safeguards including giving prior notice and considering representations made by the affected parties.²³⁷
- 9.7 One respondent proposed the inclusion of additional procedural safeguards such as the right to request an 'issues meeting' before any final determination,²³⁸ while another requested further details regarding the cancellation procedure and the circumstances in which the CMA may seek cancellation in the CMA's Verticals Guidance, asking that the guidance clarify that cancellations could only have *ex nunc* effects.²³⁹
- 9.8 The CMA is minded to provide some further clarifying guidance in the CMA Verticals Guidance but does not consider that additional clarification on these issues, should be required in the UK Order itself. The CMA will publish its draft Verticals Guidance in due course and stakeholders will have an opportunity to make representations on such guidance before it is approved.

Obligation to provide information

- 9.9 Section 6(5) of the Act provides that a block exemption order may impose obligations subject to which a block exemption is to have effect and section 6(6)(b) of the Act provides that a block exemption order may provide that if there is a failure to comply with an obligation imposed by the order, the CMA may, by notice in writing, cancel the block exemption in respect of the agreement.

²³⁶ [Competition Act 1998 \(Public Transport Ticketing Schemes Block Exemption\) Order 2001](#), articles 19–21.

²³⁷ Freshfields Bruckhaus Deringer; BBC and Eversheds Sutherland.

²³⁸ K&L Gates.

²³⁹ Freshfields Bruckhaus Deringer.

- 9.10 The CMA recommends that the UK Order should impose an obligation for parties to provide the CMA with information in connection with those vertical agreements to which they are a party if requested to do so and that failure to do so without reasonable excuse should result in cancellation, ie withdrawal, of the block exemption. This would ensure that the CMA is in a position to assess whether an agreement that benefits from the block exemption is one that satisfies the conditions for exemption under section 9 of the Act and would also enable the CMA to investigate instances where competition law concerns arise from parallel networks of similar vertical restraints.
- 9.11 The CMA recommends that the obligation should be for businesses to supply the CMA with such information in connection with those vertical agreements to which they are a party as the CMA may require within ten working days from the date on which the party receives notice in writing of the request. The CMA also recommends that if it proposes to cancel the block exemption, it should first give notice in writing of its proposal and consider any representations made to it. The CMA envisages that these provisions would be similar to those in the Public Transport Ticketing Schemes Block Exemption.²⁴⁰
- 9.12 The CMA notes that a few of the respondents to the CMA’s consultation who provided views on the proposal for an obligation to provide information stated that the proposed ten-day timeframe was too short and was unlikely to be feasible.²⁴¹ One respondent also suggested that the provisions on the obligation to provide information overlapped with the CMA’s pre-existing powers and might make the block exemption less attractive.²⁴² The CMA notes that its recommendation is for the benefit of the UK Order to be withdrawn only when information is not provided within the required time *without reasonable excuse*; this is also consistent with the provisions and timeframe included in the Public Transport Ticketing Schemes Block Exemption.²⁴³ In this context, the CMA considers the ten working day period to be reasonable.
- 9.13 A few respondents requested further clarity on the circumstances, format, and process regarding obligations to provide information, and that this should be set out in CMA Verticals Guidance.²⁴⁴ The CMA is minded to provide some further clarifying guidance in the CMA Verticals Guidance, but does not

²⁴⁰ [Competition Act 1998 \(Public Transport Ticketing Schemes Block Exemption\) Order 2001](#), articles 17–18 and 20–21.

²⁴¹ L’Oréal, Brands for Europe, K&L Gates and Freshfields Bruckhaus Deringer.

²⁴² In-house Competition Law Lawyers Association.

²⁴³ [Competition Act 1998 \(Public Transport Ticketing Schemes Block Exemption\) Order 2001](#), articles 17–18 and 20–21.

²⁴⁴ Eversheds Sutherland and Freshfields Bruckhaus Deringer.

consider that any additional clarification on these issues should be required in the UK Order itself.