# UK COMPETITION AND MARKETS AUTHORITY REVIEW OF THE RETAINED VERTICAL BLOCK EXEMPTION REGULATION

## RESPONSE TO PUBLIC CONSULTATION

## BRANDS FOR EUROPE

This response is submitted by Brands for Europe, a group of leading brands across numerous industry sectors. The member companies of Brands for Europe are Adidas, Apple, Bose, Canon, ColPal, HP, the LEGO Group, Levi Strauss & Co., L'Oréal, McDonald's, Nestlé, Nike, Panasonic, Philips, Pioneer, P&G, Puig, Swatch Group, Unilever, Whirlpool and Yum!. The group is represented by Baker McKenzie.

This response provides a cross-sectoral Brand owner view on The Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 (**Draft Order**) published by the UK Government on 21 February 2022.

This Response follows our contribution to the roundtable hosted by the UK Competition & Markets Authority (**CMA**) on 14 April 2021, and our written response of 22 July 2021[1] to the CMA's public consultation on its review of the Retained Vertical Block Exemption Regulation (**Previous Response**).

[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1030663/Brands_for_Europe_Response.pdf

**BRANDS FOR EUROPE**

## 1. Introduction

1.1 Brands for Europe is broadly supportive of the approach taken in the Draft Order. We are pleased that the UK will continue to have a block exemption that provides for a broad safe harbour for vertical agreements, as this will provide businesses with an important degree of legal certainty, which in turn facilitates market performance. We look forward to providing our contribution to the upcoming CMA consultation on UK Vertical Guidelines (**UK VGL**).

1.2 Whilst we endorse BEIS' approach and welcome the flexibility provided for in the Draft Order, we have a number of specific comments as set out below.

## 2. Dual Distribution

2.1 We welcome the retention of the block exemption for dual distribution and that it will be extended to wholesalers (Article 3(5)(iii) and importers (Article 3(5)(iv). We note that there is a typo in Article 3(5)(iv) - we assume that "the importer" at the start of that section should in fact be "the supplier".

2.2 Brands for Europe wishes to reiterate the importance of receiving guidance on how information exchange in dual distribution relationships should be assessed. As stated in our Previous Response, the new UK VGL should clarify explicitly that, because dual distribution continues to be exempted, this means that a supplier is entirely free – also in dual distribution situations – to collect pricing, volume and other data related to the supplier's products and services from resellers –provided these data are not used to restrict the freedom of the reseller in a manner that would be considered a hardcore restriction. We strongly urge the CMA to consider the points that we have made in our Previous Response in respect of information exchange and dual distribution when it drafts the UK VGL.

## 3. Resale Price Maintenance (RPM)

3.1 We note that BEIS has decided to continue to treat RPM as a hardcore restriction in the Draft Order under Article 8(2) (a). Given this strict approach and the consequences that it has for suppliers, we strongly encourage the CMA to address the points that we made on RPM in our Previous Response in the forthcoming UK VGL, in particular:

(a) There has clearly been a shift of power (buying power, negotiation lever) away from brand owners to stronger retailers (in particular e-commerce mastodons) and it is important that this change is reflected in the UK VGL.

(b) Article 8(2) (a) of the Draft Order provides that RPM will be a hardcore restriction "*without prejudice to the possibility of the supplier imposing a maximum sale price or recommending a sale price, provided that any such provisions do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties*." We consider that the suspicion in the current VGL (and in the current enforcement practice of some national competition authorities) against RRPs and price monitoring in particular, is unjustified and unnecessarily strict. We would welcome further guidance on the approach to RRPs and price monitoring.

(c) A distinction should be made, even in situations of market power, between RPM, RRPs and maximum resale prices. Brand owners are of the view that RRPs and maximum resale prices, in the absence of any pressure exercised to fix the price, would, even in situations of market power, not amount to RPM.

(d) Given that RPM is a hardcore restriction under the Draft Order, Brands for Europe also considers that the CMA should provide detailed guidance on (i) the circumstances in which RPM implemented to combat free-riding, and (ii) instances where RPM is likely to lead to sufficient efficiencies, will benefit from the Section 9 CA98 exemption.

## 4. Territorial and Customer Restrictions

4.1 Brands for Europe welcomes the additional flexibility that the Draft Order provides in relation to territorial and customer restrictions, as these better reflect the current retail environment and will enable brand owners and retailers to more easily adapt their consumer offerings.

4.2 We fully endorse the approach in the Draft Order to shared exclusivity as this will provide brand-owners with greater flexibility to appoint more than one distributor for a given exclusive territory/customer group.

4.3 We welcome the provision of greater protection to members of a selective distribution in the Draft Order. As noted in our Previous Response, we encourage the CMA to explicitly state in the UK VGL that selective distribution criteria (whether qualitative or quantitative in nature) do not need to be published by manufacturers and that manufacturers are under no obligation to provide the criteria to customers interested in entering the selective distribution system. This is consistent with CJEU case law pre-Brexit[2] and would provide additional legal certainty, allowing brand owners to protect their criteria (which in many cases is considered a business secret) from public disclosure.

4.4 With respect to exclusive distribution, Brands for Europe request that the UK VGL will clarify that under Article 8(2)(b)(i) of the Draft Order, active sales restrictions should remain valid where a territory has been reserved to the supplier or to another distributor even where the supplier or the distributor does not actually make actual sales in that territory (e.g., because the product has not been launched yet) nor has existing plans to do so (but might do in the future).

## 5. Indirect measures restricting online sales

5.1 Brands for Europe fully supports the approach to dual pricing in the Draft Order, i.e. that dual pricing for online and offline sales will no longer be regarded as a hardcore restriction of competition.

5.2 We also agree that it is appropriate that 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 will no longer be regarded as a hardcore restriction.

5.3 We would welcome clarity in the UK VGL that the exchange of information between the supplier and retailers on data showing the sales channel through which the supplier's products are sold by the retailer is not anti-competitive.

5.4 Furthermore, we invite the CMA to explicitly clarify in the UK VGL that differential pricing (i.e., applying different prices for different retailers) is block exempted, for the reasons set out in our Previous Response.

**16 March 2022**

[2] Judgement of CJEU of 14 June 2012 in Case C-158/11 Auto 24 v Jaguar Land Rover France