BEIS technical consultation on the drafting of the Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022

ICLA UK Response

16 March 2021

1. The In-House Competition Lawyers' Association UK ("ICLA UK") is an informal association of in-house competition lawyers in the UK comprising around 100 members. ICLA UK meets usually twice a year to discuss matters of common interest, as well as to share competition law knowledge. ICLA UK does not represent companies but rather is made up of individuals who are experts in competition law. As such this paper represents the views of the ICLA UK members and not the companies who employ them, and it does not necessarily represent the views of all its members.

2. ICLA UK is part of the wider In-house Competition Lawyers' Association of in-house competition lawyers across Europe and in South East Asia which currently numbers more than 450 members based in different countries around the globe.

3. Because of their role, in-house competition lawyers have a clear interest in a simple and straightforward competition law regime that prioritises legal certainty, minimises costs, and does not represent a disproportionate demand on businesses' time and resources.

4. ICLA UK welcomes the retention of a vertical agreements block exemption in the UK and the implementation of certain important improvements to the current legislative framework. The presence of a block exemption provides more flexibility and certainty for firms in the creation and implementation of distribution systems in the UK.

5. ICLA UK is grateful for the opportunity to provide feedback on BEIS' technical consultation on the drafting of the Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 ("VABEO"). ICLA UK has not sought to respond on every aspect, but rather on the issues most relevant to its members.

Articles 12 to 14 of the VABEO

6. ICLA UK notes the inclusion of a statutory 10 working day deadline for a firm to respond to requests for information (**"RFIs"**) from the CMA relating to the vertical agreements to which it is party.

7. RFIs often place onerous obligations on companies, particularly where these are issued without prior consultation with the firm concerned as to what resources are available. ICLA UK therefore requests BEIS to encourage the CMA to add clarity, within its upcoming Verticals Guidelines, on the scenarios where it may exercise its powers under Article 12 and the circumstances in which it may consider granting extensions of time to the 10 working date period.

8. Similarly, the power of the CMA to cancel the application of the block exemption, in respect of an individual vertical agreement following the issuing of a notice in writing and consideration of any representations by the parties, requires further clarifications. In particular the VABEO as drafted includes no indication of the duration of the notice period that the CMA will apply or the timelines

within which the parties must submit representations. In order to provide business certainty, these matters of timings and deadlines ought to be set out in the VABEO, or at the very least in the Verticals Guidelines that are to accompany it.

Upcoming Verticals Guidelines

9. ICLA UK awaits the CMA's publication of draft Verticals Guidelines, which we understand will be published later this month, and welcomes the opportunity to comment on those draft Verticals Guidelines.

10. ICLA UK would like to see detailed guidance on a number of topics, and encourages BEIS to underline these areas to the CMA to ensure a VABEO and vertical agreements regime that provides as much business certainty and practical application as possible. Particular topics for focus include:

- Clarifications regarding the definition of and circumstances required for a finding of genuine agency, including examples of what is and is not genuine agency.

- Clarification regarding whether the CMA will take a similar approach to fulfilment agreements as the EU Commission in its review of the EU vertical agreements regime. For example, confirmation that an agreement, between a supplier and a buyer, pursuant to which the buyer purchases and resells products to enable the fulfilment of the supplier's commercial agreement with a specific customer (i.e. where the resale price has already been agreed between the supplier and the customer), does not constitute RPM. Further, clarification of whether this is the case regardless of whether that customer is an end-user or also resells the products downstream.

- Clarifications of the circumstances where RPM may satisfy the conditions for exemption in an individual assessment, including examples.

- Worked examples of distribution models permissible under the VABEO;

- Worked example of new permissible dual distribution models; and

- Worked examples of online passive vs active sales.

- Clarifications on the new hardcore restriction relating to wide retail parity obligations:
    - First, in relation to the definition of "wide parity retail obligation" in Article 9 refers to both "prices or other terms and conditions". Clarifications, including examples, are required of the types of terms and conditions that the CMA will consider to be hardcore restrictions would be useful. For example, will it include an obligation for a supplier to supply a buyer with as full a range of its products as it supplies to another buyer (rather than a more limited range)?

    - Second, regarding the extent to which wide parity obligations, in both wholesale B2B relationships and B2B direct relationships, may be considered an issue in vertical

agreements. Whilst B2B wide parity obligations have not been included as hardcore restrictions in the VABEO, there is a need for greater clarity as to the types of B2B arrangements which, if they include wide MFNs, may give rise to concern. Further guidance, including examples, around the circumstances when such parity obligations will constitute restrictions and the extent to which they may or may not satisfy the tests for individual exemption is required.

Explanatory Memorandum to The Competition Act 1998 (vertical Agreements Block Exemption) Order 2022

11. ICLA UK notes that, in the Explanatory Memorandum, in the sections dealing with hardcore restrictions and excluded restrictions, these two types of restriction are explained in the same terms as follows: "[Hardcore][Excluded] restrictions are provisions in agreements that are in general considered to be anticompetitive" (see paragraphs 7.14 and 7.16 respectively). Whilst this description may be appropriate in respect of hardcore restrictions, ICLA UK does not support this description of excluded restrictions. ICLA UK would encourage BEIS to differentiate between the two, taking into account the less restriction nature of excluded restrictions.