Linklaters LLP Response

Department for Business, Energy, and Industrial Strategy Consultation on the draft Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 and draft Explanatory Memorandum

1 Introduction and executive summary

(1) Linklaters LLP ("**Linklaters**") welcomes the opportunity to comment on the proposed text of the draft Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 ("**VABEO**") and draft Explanatory Memorandum on the VABEO (the "**Explanatory Memorandum**"). We would like to commend the Department for Business, Energy, and Industrial Strategy ("**BEIS**") for the level of openness, stakeholder engagement and evidence gathering in the review process of the new independent UK regime on vertical agreements.

(2) We welcome the introduction of additional flexibility in certain distribution agreements which will no longer be treated as hardcore restrictions of competition law, namely: (i) shared exclusivity; (ii) the combination of selective and exclusive distribution systems in the same geographies; (iii) non-equivalent criteria for online and offline sales; and (iv) dual or differential pricing for products intended to be sold online and offline by the same buyer. This will enable suppliers more scope to structure their distribution systems to suit their specific needs and to reflect the commercial realities of specific markets, thus resulting in efficiencies.

(3) We also agree with the proposal not to exclude hybrid platforms from the benefit of the VABEO. Similarly, we support the decision not to follow the EU approach in carving out information exchange from the benefit of the VABEO for dual distribution arrangements where the parties' retail market share exceeds 10%. This would have created unwarranted legal uncertainty and complexity for businesses trying to implement the new rules.

(4) On timing, we agree with the decision to keep the review period at six years in contrast with the 12-year review period that the European Commission is intending to adopt in the new Vertical Block Exemption Regulation ("**VBER**"). Given that there was a shorter period to reflect on the necessary changes to the distribution rules, and especially since not a lot of time has passed since Brexit to adequately appreciate the consequent market developments, a shorter lead time to the next renewal period is warranted. Moreover, we also welcome the one-year transitional period which ensures that the Chapter 1 prohibition does not apply to pre-existing agreements which satisfied the EU VBER but do not otherwise satisfy the exemption conditions in the VABEO.

(5) There are however a few areas where we believe BEIS has missed an opportunity in the VABEO to introduce beneficial change from the "**Retained VBER**" position (the existing VBER which was made under EU law and retained in UK law after the UK's withdrawal from the EU and which expires on 31 May 2022), in particular in the following areas:

- resale price maintenance ("**RPM**") – maintaining RPM as a hardcore restriction;
- price parity obligations – treating wide retail price parity obligations as hardcore restrictions;
- pass on – opting not to permit the exclusive and selective distribution restrictions to be passed on to the next level of buyer; and

- non-compete clauses – maintaining the tacitly renewable non-competes of more than five years as excluded restrictions.

(6) We set out our observations on these issues in the remainder of this submission, as well as questions on which further guidance will be helpful (at section 8), most notably, agency agreements and parallel trade restrictions.

(7) In Schedule 1 we have also identified a few drafting suggestions to address what seem to be non-deliberate omissions or inconsistencies, for example in the shared exclusivity provision and exclusive distribution definition, as well as areas which we think would benefit from clarification.

2 Relationship with EU VBER

(8) There will inevitably be divergence between the new UK and EU regimes, and we commend BEIS for taking the opportunity to develop specific rules for UK markets. As stated above, there are a number of areas where we welcome the proposed approach as compared with the current draft VBER and European Commission draft Vertical Guidelines. However, as further discussed below in section 2.2, in our view there are also aspects of the proposed divergence which are expected to result in unjustified burden and legal uncertainty for businesses, especially of a pan-European nature.

2.1 Drafting differences

(9) We note that the draft VABEO builds on drafting both from the Retained VBER regime and also the draft EU VBER. We see a benefit in departing from some of the language in the draft EU VBER to the extent it provides specific clarifications that improve the drafting or where the divergence is intentional. An example of this is adding to the definition of "selective distribution" that the supplier should reserve the exclusive geographic area "*in the absence of the vertical agreement*" – something that is implicit but not as clear in the draft VBER.[1] However, it is not clear why, in the definition of "potential competitors", the UK text removes reference to "*realistic ground and not just as a mere theoretical possibility*" to enter the relevant market. We think that excluding this caveat increases uncertainty around who could be considered a potential competitor and unnecessarily broadens its scope, making it more difficult to assess vertical agreements, as these are by definition (as per Article 3(5)) entered into between 'competing undertakings', which includes potential competitors.

(10) While we do not dispute that clarifications should be included in the new VABEO, there is also benefit in aligning the EU and UK texts where the EU and UK approaches do not diverge. To the extent that the EU and UK drafts are aligned on certain principles (e.g. shared exclusivity and providing greater protection to selective distribution systems), differential drafting will lead to additional uncertainty, especially for pan-European businesses, who will need to consider whether they need to differentiate their approach in the EU and the UK.

2.2 Implications for pan-European businesses

(11) More generally, when considering substantive rather than mere drafting divergences (e.g. parity obligations or pass-on), pan-European businesses will struggle in practice to adapt their business relationships to straddle two divergent regimes. Template contracts will likely need to adopt the "lowest common denominator" between EU and UK competition law, i.e.

[1] Article 2(1) VABEO.

only that conduct which is permitted under both VABEO and VBER, therefore, in practice, largely removing the benefits of divergent regimes.

(12) We think there is a real risk of this happening not only where an arrangement covers the pan-European relationship between two multinational businesses, but also where only one of the parties is active across the EU and the UK. It will be difficult for in-house counsel and business colleagues alike to manage legal risks pertaining to local differences in law. For areas where businesses self-assess on the basis of an effects-analysis, it is difficult to justify why something they ultimately conclude is not anti-competitive would be treated as such under the law in another jurisdiction.

(13) For example, under the draft VBER, if market shares rise above 30%, the exemption applies for another two years, regardless of how much the relevant market share rises, including a grace period for businesses to adapt their contracts.[2] The draft VABEO, on the other hand, extends the exemption only for one calendar year from when the relevant market share rose above 35%.[3] In a pan-European relationship between two parties affected by this agreement, the relevant contract would either need to be amended at different times for the EU and UK and split, or the lowest common denominator would need to be adopted. In reality, it is unlikely in such negotiations that the party restricted by the relevant provisions that are no longer exempt would accept them in one jurisdiction if not in the other. The bargaining power of the party seeking the relevant restriction is diminished.

(14) Of course, the relationship between VABEO and VBER will be no different than between VBER and any other non-member state where, in practice, clients often adopt the position under VBER as it tends to be most restrictive, even if other conduct would be permissible in other jurisdictions. For example, provisions governing price and discounting are often the same in contracts covering the EU and the US to comply with the VBER rules on resale price maintenance ("**RPM**"), although US antitrust law has a narrower definition of anti-competitive RPM. However, given the geographic proximity and previous connection between the EU and the UK (especially as compared with the US and the EU), there are existing distribution agreements which cover both territories and, as such, pan-European businesses would be disproportionately affected by the divergences, thus increasing their costs of compliance.

3 Resale price maintenance

(15) One area where we are disappointed BEIS has not taken the opportunity for positive divergence in the draft VABEO is RPM. We would have welcomed an acknowledgement that RPM can be pro-competitive, and does not necessarily constitute a by-object infringement and therefore hardcore restriction of competition. Given that the efficiencies of RPM – which are generally acknowledged by commentators and in economic literature – have long been recognised by the US Supreme Court,[4] and detailed in the EU Staff Working Document and Experts' Report, we would have welcomed the UK leading the way in Europe on RPM. We draw BEIS's attention particularly to the econometric analysis undertaken of the European book sector, which analysed RPM across different Member States over the past 20 years

[2] Article 7(d) VBER.

[3] Article 6(3) VABEO.

[4] Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 551 U.S. 877, 891–92 (2007), III.A. See also G. Franklin Mathewson & Ralph A. Winter, The Law and Economics of Resale Price Maintenance, 13 Rev. Indus. Org. 57 (1998), p. 67.

and found that "fixed book pricing" led to a higher output and slightly lower price, increasing consumer welfare.[5]

(16) We would encourage BEIS to reassess this position when it reviews the VABEO in six years' time. In the meantime, we welcome guidance on circumstances in which RPM would lead to net pro-competitive effects and could benefit from an exemption.

(17) One point we would welcome in the draft guidance relates to RPM considerations in fulfilment contracts. Situations where the buyer provides logistical services to the supplier for the delivery of products the price of which was negotiated directly between the supplier and the end-user should be excluded from the notion of anti-competitive RPM that is covered by the hardcore restriction. This should also extend to situations where the buyer takes title to the products, often necessary from a logistics point of view. As in the draft VBER, we encourage the UK to exclude such arrangements from being considered as amounting to RPM.

4 Parity obligations

(18) We are similarly disappointed with the proposed approach in Article 8(2)(f) VABEO to treat wide price parity clauses as a hardcore restriction. We appreciate that a significant issue under the current VBER has been the lack of legal certainty relating to parity clauses and their effect. Given the mixed evidence of the effects of parity obligations, and in light of the higher standard required for "by object" restrictions,[6] we think the approach in the EU's draft VBER is more appropriate.

(19) We acknowledge that, depending on their nature, scope and the specific circumstances of each case, parity clauses can restrict competition. However, the outcome of the EU's evaluation suggests that a large proportion of the parity clauses that are exempted under the current VBER meet the conditions for an exemption under Article 101(3) TFEU and the corresponding exemption to the Chapter 1 prohibition.[7] Moreover, the EU evaluation study also suggests that "*the effects of MFN clauses depend on the particular characteristics of the market in which they are used, and therefore a case-by-case analysis is necessary*".[8] It is encouraging to see that the draft VABEO acknowledges this with respect to narrow parity obligations, which were recognised as typically having much more limited potential for anti-competitive effects.[9] We also commend BEIS for defining "wide parity obligation" in Article 8(5) VABEO so as to exclude wholesale parity obligations, which are less likely to lead to anti-competitive effects.

(20) We recognise that there are some limited enforcement examples, including from the CMA.[10] However, given the nascent enforcement record for these types of obligations, in our view it goes too far to categorically treat all parity obligations as anti-competitive without the need for an effects assessment. The potential effects of wide parity obligations should be

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[5] Commission Staff Working Document, Evaluation of the Vertical Block Exemption Regulation, 8 September 2020, p. 173.

[6] Cf. Case C-67/13 P, *Groupement des cartes bancaires (CB) v European Commission*, 11 September 2014 and subsequent case law, e.g. Case C-345/14, *SIA „Maxima Latvija" v Commission*, 26 November 2015.

[7] Commission Staff Working Document, Evaluation of the Vertical Block Exemption Regulation, 8 September 2020, Annex 4, section 4.6.3.

[8] Commission Support Studies for the evaluation of the VBER, 2020, p. 15.

[9] Commission Staff Working Document, Evaluation of the Vertical Block Exemption Regulation, 8 September 2020, p. 131.

[10] CMA Investigation into Skyscanner's use of wide parity obligations; CMA Decision of 19 November 2020 issuing fine of nearly £18 million against an insurance price comparison website (although note that this is currently under appeal to the Competition Appeal Tribunal).

assessed based on a case by case basis, taking into account a number of relevant factors and dynamics relevant to the sector in question.

(21) Anti-competitive effects are generally more likely when parity obligations relate to price and not only to other conditions such as inventory and availability. This depends on the sector and relevant markets involved; in some markets, price competition is only one, not as important element, and other non-price competition factors may be equally important (e.g. breadth of choice, quality, etc.).

(22) The Commission's Staff Working Document found that parity clauses are requested by retailers to avoid continuous price negotiations with manufacturers and maintain a competitive price for the products concerned.[11] An identified benefit is that they reduce frequent price negotiations between manufacturers and suppliers and their block-exemption is justified.[12] They also help to solve free-riding problems where consumers see a product instore only to buy it online.[13]

(23) Other benefits identified in the literature review include: (i) helping a high-cost/high-quality platform to defend its quality investments by preventing other platforms from free-riding; (ii) reduction of consumer search and negotiation costs, promoting inter-brand competition; (iii) prevention of rent-seeking behaviours by suppliers; and (iv) protection of resellers against demand uncertainty and unfavourable price dynamics.[14]

(24) In our view, given that case law on parity obligations is relatively new and all effects have not yet been fully considered, this warrants a more measured approach, as adopted in the EU, by treating wide retail parity obligations as excluded rather than hardcore restrictions.

(25) This would still require the parties to self-assess the overall competitive effect of such clauses. For such self-assessment (including for narrow parity clauses, which are exempted under the draft VABEO), it would be important to provide clear guidance on the circumstances in which parity clauses do not raise competition concerns, such as safe harbours, as well as where illegality can be presumed. This would be more nuanced and recognise the pro-competitive effects of parity clauses, while at the same time providing the legal certainty that is currently lacking from the global enforcement on parity clauses.

(26) Additionally, we would also welcome clarification and further guidance on what would constitute a "*measure that has the same effect as a wide retail parity obligation*" and would therefore be caught by the hardcore restriction.[15] This would be important given the significant implications for distribution agreements containing a hardcore restriction. We note that the drafting says such a measure could include "*any course of action, including entering into agreements or engaging in concerted practices, which has the object of replicating the anti-competitive effects of a wide retail parity obligation*", but it is not quite clear what type of arrangement BEIS has in mind.[16]

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[11] Commission Staff Working Document, Evaluation of the Vertical Block Exemption Regulation, 8 September 2020, p. 38.

[12] Commission Staff Working Document, Evaluation of the Vertical Block Exemption Regulation, 8 September 2020, p. 38.

[13] Commission Staff Working Document, Evaluation of the Vertical Block Exemption Regulation, 8 September 2020, p. 183.

[14] Commission Staff Working Document, Evaluation of the Vertical Block Exemption Regulation, 8 September 2020, p. 182.

[15] Article 8(2)(f) VABEO.

[16] Article 8(2)(f) VABEO.

5 Pass on

(27) We are surprised that the draft VABEO does not include the "pass on" concept which the Commission has included in the draft VBER. By inserting into Article 4(b) of the VBER the words "*…or the exclusive distributor* and *its customers that have entered into a distribution agreement with the supplier or with a party that was given distribution rights by the supplier*", the Commission allows the exclusivity and selective distribution restrictions to be passed on to the next level of buyers.

(28) In contrast, the current formulation in Article 8(b)(i) VABEO retains the current wording in the Retained VBER, i.e., "*where such a restriction does not limit sales by the customers of the buyer*", and therefore appears to expressly prevent pass on.

(29) We support the Commission's inclusion of pass on as this would provide more flexibility for suppliers and would help preserve the essence of these distribution systems by enabling suppliers to incentivise and protect their distributors' investments in the distribution networks, which should be legitimate reasons for imposing restrictions. In the Commission's evaluation of the VBER and Vertical Guidelines, some respondents noted that manufacturers and brand owners are concerned that distributors intentionally use third parties for the sole purpose of undermining the active selling restrictions. They argued that it should be possible to prevent dealers from selling to customers where it is obvious that these customers intend to only or predominantly sell into other exclusive territories.[17]

(30) Omitting the concept of pass on in the VABEO could therefore undermine the intention of providing more flexibility to businesses to design their distribution systems according to their needs and could counteract the incentives created by an exclusive or selective distribution model.

(31) In addition, divergence between the UK and EU positions on this point could cause issues for pan-European businesses, as clauses to pass on the protections around exclusive and selective distribution to the next level of the supply chain would still be deemed a hardcore restriction in the UK.

6 Non-competes

(32) We are disappointed that the draft VABEO has maintained the status quo in its approach to non-competes, such that a non-compete obligation imposed on buyers which is automatically renewable beyond a period of five years is deemed to have been concluded for an indefinite duration and is considered an excluded restriction (i.e. subject to an effects-based test). The draft VABEO includes this wording expressly in Article 10(2)(a) and does not contain any caveats as to the mechanism of the tacit renewal provision.

(33) As raised in previous submissions, we believe that BEIS has missed an opportunity to introduce a more reasonable and efficient approach for parties in relation to tacitly renewable non-competes, for example by adopting the approach taken by the EU Commission in the revised VBER regime. As explained in the draft revised EU Vertical Guidelines, the Commission's revised approach proposes that non-compete obligations that are tacitly renewable beyond a period of five years are covered by the block exemption and will not count as indefinite, "*provided that the buyer can effectively renegotiate or terminate the*

[17] Commission Staff Working Document, Evaluation of the Vertical Block Exemption Regulation, 8 September 2020, p. 190.

vertical agreement containing the obligation with a reasonable notice period and at a reasonable cost".[18]

(34) This approach allows parties to enter longer exclusive commercial relationships, which may be appropriate, so long as the buyer has the ability to effectively switch its supplier after the expiry of the five-year period. This provides a reasonable approach which reduces costs, the administrative burden and improves legal certainty for parties, rather than adhering to an artificial five-year period for renegotiation which may not reflect commercial reality and may not be economically justified, particularly in the context of exclusivity coupled with long-term investments.

7 Obligation to provide information

(35) We are concerned that a period of ten working days "*to provide information in connection with vertical agreements that the CMA may require*", as specified in Article 12 VABEO, is unnecessarily short. Following a request from the CMA to provide information, it can take businesses considerable time to identify, locate and contact the relevant individuals who are involved in the relevant agreements and to gather the requested information, especially where businesses have many different agreements in place. This tight timeframe seems unnecessary, and we suggest a minimum period of 20 working days would be more appropriate.

(36) In addition, we consider it would be helpful to include scope for the CMA to agree to an extension of the time period for providing information to ensure there is adequate flexibility.

8 Further guidance

8.1 Agency

(37) We look forward to seeing more detail around the treatment of agency agreements in the Verticals Guidance to accompany the draft VABEO.

(38) We also encourage BEIS to adopt the EU Commission's proposal in the draft VBER and Vertical Guidelines to clarify that the transfer of title for a short period of time does not preclude an agent from a finding of genuine agency for competition law purposes.

(39) BEIS has indicated that it intends to provide guidance on the role of distributors who act as agents for the same supplier but for different products. Our view would be that, regarding cost-allocation, only a proportionate reimbursement should be considered in agency models, contrary to the EU Commission's proposals in the draft Vertical Guidelines requiring the supplier to reimburse the hybrid distributor-agent all common costs incurred for both the agency and the independent distribution of differentiated products within the same market. Such an approach overlooks two factors. Firstly, the volume or value of sales which relate to the agency channel could be minimal in comparison to the independent distribution channel or vice versa. Secondly, the hybrid distributor could also be using a common infrastructure for the distribution of products from the supplier's competitors. Requiring reimbursement would indirectly require the supplier to contribute financially to its competitors' route to market. This could deter efficient business models. It would also be helpful for the CMA's guidance to cover a broader range of examples of the costs that must

[18] Annex to the Communication from the Commission, Approval of the content of a draft for a Communication from the Commission Notice Guidelines on vertical restraints, 9 September 2021 C(2021) 5038, para 234.

be covered, and to cover scenarios when dual roles are unlikely to influence decision-making for products within the same product market.

8.2 Parallel trade

(40) The position regarding parallel trade with the EU under UK competition law remains an open question under the VABEO and has been one of the main uncertainties regarding the Competition Act 1998 regime coming out of Brexit. As highlighted in a previous submission,[19] we consider this to be a crucial area where clarity is needed, because it has practical implications for suppliers who are re-considering their European-wide supply chains and distribution systems and whether to carve out the UK.

(41) According to the Explanatory Memorandum, the territorial extent and application of the VABEO is the entirety of the United Kingdom (section 4). This means that only restrictions on trade "in the UK" will be treated as hardcore under the VABEO. This suggests that contractual restrictions on sales from the EU to the UK will not generally infringe the Chapter I prohibition, in the absence of exceptional circumstances where a sufficient effect on UK trade can be demonstrated. However, this is not addressed directly in the VABEO and we would welcome further clarity in the VABEO Guidance that restrictions on sales into the UK would not be treated as hardcore restrictions, given the importance of this question for businesses.

(42) We would also welcome confirmation from BEIS that restrictions on sales outside the UK should not be considered problematic under the VABEO (as per the position in the EU).

Linklaters LLP, 16 March 2022

[19] RESPONSE OF THE CITY OF LONDON LAW SOCIETY COMPETITION LAW COMMITTEE TO THE CMA'S CONSULTATION ON THE NEW UK VERTICAL AGREEMENTS REGIME, 22 July 2021

Schedule 1: comments on drafting

1 General approach to revised hardcore restrictions

1.1 Article 8(2) adopts the formulation of hardcore restrictions and exceptions in the Retained VBER but then introduces further exceptions in Article 8(3) which are meant to offer suppliers additional flexibility in implementing selective and exclusive distribution systems (e.g. shared exclusivity).

1.2 As with the draft VBER, it would be helpful to consolidate the restrictions/exceptions in Article 8(2) with the additional exceptions captured in Article 8(3). The current approach leads to contradicting clauses, and having exceptions to exceptions is confusing and would lead to legal uncertainty for businesses trying to interpret these.

1.3 For example, Article 8(2)(d) seems to contradict the exception in Article 8(3)(a). On the one hand, Article 8(2)(d) prevents a supplier from restricting cross-supplies between distributors operating at different levels of trade. This is currently interpreted as preventing a supplier from allocating an exclusive territory to a wholesale supplier in a selective distribution as it would prevent cross-supplies by authorised distributors into the exclusive wholesaler's territory. However, Article 8(3)(a) now allows combinations of exclusive and selective distribution which would allow a supplier to restrict sales into the exclusive territory of a wholesaler. This contradiction will need to be clarified in the VABEO.

1.4 Additionally, it is not clear what the exception in Article 8(3)(c) means. While the sentiment of offering "*greater protection for members of selective distribution systems*" is welcomed, it would be helpful to spell out, as in the EU draft VBER, that this means that the supplier can prevent active/passive sales outside the selective distribution territory to unauthorised distributors within the selective distribution territory.

2 Shared exclusivity

2.1 We welcome BEIS's approach to permit the combination of exclusive and selective distribution in the same or different territories, but Article 8(3)(b) VABEO is a little bit unclear. It suggests that shared exclusivity is allowed for both geographic areas and customer groups in the first part of the sentence but then omits the reference to customer groups in the second part of the sentence. To address this, we propose the clause should read as follows:

> *"shared exclusivity in a geographical area or for a customer group by allowing the allocation of a geographical area or customer group to more than one distributor" [proposed addition in red];*

2.2 Similarly, the definition of "exclusive distribution" in Article 8(5) VABEO does not consistently refer to both "geographical area" and "customer group". In particular, the reference to geographical area is omitted in the parallel imposition of the active sale restriction on the other buyers. To address this, we propose the clause should read as follows:

> "*exclusive distribution" means a distribution system where the supplier allocates a geographical area or customer group exclusively to itself or to one or a limited number of buyers, determined in proportion to the allocated geographical area or customer group in such a way as to secure certain volumes of business that preserves their investment efforts, and restricts other buyers from actively selling into the exclusive geographical area or exclusive customer group. [Proposed additions in red.]*

2.3 Finally, we note that the reference to "wholesalers" is missing in Article 8(2)(e), which is a welcome addition in the draft VBER. We suggest inserting the additional clarification to per the below:

> *"the restriction, agreed between a supplier of components and a buyer who incorporates those components, of the supplier's ability to sell the components as spare parts to end-users or to repairers, wholesalers or other service providers not entrusted by the buyer with the repair or servicing of its goods". [Proposed addition in red.]*

3 Drafting clarifications and miscellaneous errors

3.1 We think it could be made clearer in Article 3(1) how the block exemption applies and spell out that "*specified for the purposes of section 6 of the Competition Act 1998*" means that it is exempt from is exempt from the Chapter 1 prohibition. We suggest this Article could be clarified as follows: "*The category of agreements identified in paragraph (2) as vertical agreements is specified under this Order for the purposes of section 6 of the Competition Act 1998 and is therefore exempt from the prohibition in Chapter 1 of the Competition Act 1998*". *[Proposed additions in red.]*

3.2 Article 4(1) contains a cross referencing error. We believe the reference to Article 3(4) should be a reference to Article 3(3).

3.3 The reference to 110 per cent in Article 4(2) is a bit confusing. We suggest that it could be clarified as follows: "*The block exemption remains applicable where, for any period of two consecutive financial years, the total annual turnover exceeds the total annual turnover threshold by no more than 10 per cent.*" *[Proposed additions in red.]*

3.4 In Articles 9 and 11, the drafting that states "*…has the effect of cancelling the block exemption…"* is somewhat unclear and unnecessarily departs from the way this has been described in the Retained VBER, which is familiar terminology for many businesses which will rely on the VABEO. We suggest the wording should more closely track the Retained VBER and the revised VBER: "*…has the effect of removing the benefit of the block exemption in respect of that vertical agreement". [Proposed additions in red.]*

3.5 In Article 11, we believe the reference to "article 8" should be a reference to "article 10" (Excluded restrictions). In addition, under the current drafting it is not sufficiently clear that the effect of having an excluded restriction in a vertical agreement is that the block exemption does not apply to that restriction, but that the remainder of the vertical agreement can still benefit from the block exemption. We suggest it could be clarified as follows:

Breach of the condition imposed by article 10 has the effect of removing the benefit of the block exemption in respect of the excluded restriction contained in the vertical agreement. To the extent that the excluded restriction is severable from the vertical agreement, the block exemption may continue to apply to the remainder of the vertical agreement. [Proposed additions in red.]