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Response of Euclid Law Ltd.
to the Technical Consultation on the
Draft Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022
('VABEO')

1. Euclid Law is a boutique competition law firm, with offices in London and Brussels. We advise on all aspects of UK and EU competition law. Our partners and consultants are senior practitioners with many decades of experience of this field, gained at some of the world's largest law firms.

2. Our lawyers advise on the compatibility of vertical agreements with EU and UK competition law on a daily basis. We also have experience of representing clients in investigations of their vertical arrangements by a number of competition authorities, including the Office of Fair Trading and the Competition and Markets Authority ('**CMA**'). As well as advising a wide range of brands, from globally established companies to start-ups, we have advised online retailers, marketplace operators, brick and mortar retailers, software companies, sporting rights companies, financial services companies, insurance companies, gaming companies and pharmaceutical companies on their distribution arrangements.

3. We are submitting this paper from the position of practitioners who see merit in having a rational, predictable and comprehensible competition law regime for vertical agreements. The views stated are our own and do not necessarily represent the views of any client of our firm.

General comments

4. We applaud the Government's decision to give effect to the CMA's recommendations on the UK's new competition law regime for vertical agreements without modification. The CMA undertook a thoughtful and careful review of the retained Vertical Agreements Block Exemption Regulation and the end result was a well-balanced and measured set of recommendations for the UK's new regime. A subsequent decision by Government to diverge from the CMA's recommendations, however small or well-intentioned, would have risked devaluing and politicising the process and could have undermined the CMA's independence.

5. Overall, therefore, the Government's decision to follow the CMA's recommended policy approach, namely of maintaining a UK verticals regime that remains close to that reflected in the EU Vertical Agreements Block Exemption Regulation ('**VBER**'), while diverging where this is justified by local conditions and experience, is the right one.

6. Although we consider that the detail of the draft VABEO correctly gives effect to that policy decision, including by making careful use of the wording of the retained VBER and the draft new VBER where appropriate, we have concerns about some of the underlying drafting of the Order. Since the drafting concerned goes to the basic operation of the VABEO, if implemented as drafted the Order would create significant uncertainty that would undermine the operation of the regime and thus the Government's overall policy objectives. Our concerns are set out below.

Concerns with proposed drafting

Preliminary comments

7. Since the basic architecture of the VABEO reflects that of the VBER, on which the current UK regime is based, and given the shared heritage of Article 101 TFEU and the Chapter I prohibition of the Competition Act 1998 ('**CA98**'), we would suggest that the drafting of the VABEO should reflect the basic principles for block exemptions that underpin both the EU and UK competition regimes. Specifically, these include that a block exemption regulation should define: (i) a safe harbour for agreements that are exempt from a competition law prohibition by virtue of the regulation; (ii) certain hardcore provisions, the inclusion of which removes the agreement concerned from that safe harbour; and (iii) certain excluded provisions that are not protected by the safe harbour but the inclusion of which in an agreement does not in itself remove the remainder of the agreement from the safe harbour.

8. It is also important to maintain the position that an agreement that falls outside the safe harbour created by a block exemption is not necessarily unlawful. Rather, it does not enjoy automatic protection under the safe harbour and its legal status must be assessed on its facts. At most, an agreement that contains a hardcore restriction is presumptively unlawful but, even then, may be shown to fall outside a prohibition or to be exempt on its specific facts.

9. Although the VABEO adopts that architecture, it does so in a manner that is confusing and risks misapplication, thereby undermining these objectives. This can be seen from the following points:

Scope of block exemption

10. The operative provision of the VABEO, article 3, states that the category of agreements identified in paragraph 2 of that article are 'specified' for the purposes of section 6 CA98. Article 3(2) of the VABEO goes on to define the category of agreement that is exempt from the Chapter I prohibition, under section 6(3) CA98, adopting wording familiar from the VBER. Paragraphs (3), (4), (5) and (6) of article 3 then modify the scope of the category of agreements so specified. So far, this approach should be effective and broadly mirrors the approach taken in article 2 of the VBER when defining the scope of the EU exemption for vertical agreements, albeit in a slightly less clear way.[1]

Hardcore restrictions

11. As currently drafted, there is a risk of misinterpretation when the Order goes on to specify the effect of including a hardcore restriction in a vertical agreement that would otherwise be

[1] Compare with Article 2(1) VBER: "*[I]t is hereby declared that Article 101(1) of the Treaty shall not apply to vertical agreements*", to the extent that "*such agreements contain vertical restraints*". The need for less clear wording in article 3(2) VABEO may be due at least in part to the wording of section 6 CA98, which requires that a block exemption "specify" the category of agreement to be exempted. It is interesting to note that the CMA and Government have not adopted the procedure for the "exclusion or exemption" of vertical agreements from the Chapter I prohibition that is specifically provided by section 50 CA98. The reasoning for this is unclear, especially considering that the original Competition Act 1998 (Land and Vertical Agreements Exclusion) Order 2000 (SI 2000 No 310) was enacted under that provision, rather than under section 6.

protected by the block exemption. Rather than stating that including such restrictions in an agreement will lead to the exemption "not applying" to the agreement, or to the agreement "being removed from the benefit of the block exemption" (the wording used by the VBER), article 8(1) VABEO states that "*A vertical agreement must not contain a hardcore restriction*". Article 9 goes on to state that "*breach of any of the conditions imposed by either of articles 6 or 8* [presumably including the condition in article 8(1) not to include a hardcore restriction] *has the effect of cancelling the block exemption in respect of that vertical agreement*". While this is presumably intended to have an effect similar to that of including a hardcore restriction in an agreement that is subject to EU law under the VBER, use of the phrase "must not contain" could be misinterpreted as amounting to an *independent prohibition* on including a hardcore restriction in an agreement, over and above the prohibition in section 2 CA98. Such an outcome would be unfortunate, given that, as noted above, the mere fact that an agreement falls outside the protective scope of a block exemption does not in itself render it automatically unlawful, even where it contains a hardcore restriction.

12. To avoid this confusion, it would be preferable if the wording of article 6(1) VABEO were to be amended to specify instead that the exemption provided for by article 2 "shall not apply" to vertical agreements that contain a hardcore restriction. At the very least, wording consistent with previous UK block exemption orders, which state that, in order to benefit from the exemption, agreements "shall not" do certain things,[2] would be preferable to the wording currently proposed.

Excluded restrictions

13. A similar issue arises in article 10 VABEO, when referring to excluded restrictions. Use of the phrase "*a vertical agreement must not contain an excluded restriction*" in article 10(1) is even more confusing, however, given that the effect of containing an excluded restriction in an agreement is *not* to remove the agreement itself from the block exemption's safe harbour but, rather, is to remove only the offending restriction, leaving the remainder of the agreement enforceable.[3]

14. Article 11 VABEO is presumably intended to achieve this, by stating that "*breach of the condition imposed by article [10][4] has the effect of cancelling the block exemption in respect of the vertical agreement to the extent that the agreement contains an excluded restriction*". Rather than adopting such convoluted and confusing wording, it would be far preferable for article 11 simply to state that "The exemption provided for in Article 2 shall not apply to excluded restrictions contained in vertical agreements", with article 10 omitting the current article 10(1) and commencing instead with the definition of excluded restriction in article 10(2).

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[2] See, in particular, The Competition Act 1998 (Public Transport Schemes Block Exemption) Order 2001 (SI 2000 No. 319), at articles 6 – 9.

[3] See, for example, the wording of article 5(1) VBER, which states that the "exemption provided for in Article 2 shall not apply *to the following obligations* contained in vertical agreements" (emphasis added). The only circumstances in which the entire agreement would fail in such circumstances is if normal severability principles dictate that the excluded restriction is central to the overall agreement.

[4] While the text refers to article 8 at this point, this is presumably a misprint and the text should instead refer to **article 10**.

Requests for information

15. It is sensible for the VABEO to include provision, as it does in article 13, for the CMA to remove an agreement from the block exemption's protective scope if it considers that the agreement does not meet the requirements for exemption under section 9 CA98. It is unclear, however, why the CMA should in addition be able to remove an agreement from the protective scope of the block exemption *solely* on the grounds that the parties have failed to respond to a request for information with respect to that agreement, without any further reference to substance, as is proposed by article 12. If implemented, this asymmetric proposal would represent an unjustified interference with parties' rights of defence.

16. While the CMA may wish to incentivise parties to respond to information requests, this could be achieved by making response to such a request mandatory. Since the CMA already has the powers under section 26 CA98 to request information on potentially restrictive agreements, however, it is unclear why article 12 is needed at all. Rather, the use of the powers proposed by article 13, where needed in combination with the CMA's existing information gathering powers, should be sufficient to address any situations where the VABEO was found to be protecting a problematic agreement from the Chapter I prohibition.

Euclid Law Ltd.

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