Response to the CMA

Draft Guidance on the application of The Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022

Introduction

1 The following document is the response of the British Brands Group (the Group) to the Competition and Markets Authority (CMA) consultation on the draft guidance on the application of the Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 (**Draft Guidance**).[1] It builds on the Group's response of 23 July 2021 to the CMA consultation on the draft Vertical Agreements Block Exemption Order (VABEO[2]).[3]

2 The Group is a membership organisation dedicated to championing brands in the UK.[4] Our members include leading brand manufacturers of all sizes and we provide a forum for them to discuss issues affecting brands in the UK. Our objective is to ensure that the UK is a great place to create, build and sustain brands and that brands' positive contribution to consumers, the economy and society is better understood by policy makers and others.

Executive Summary

3 The Group very much welcomes the CMA's efforts in relation to the production of the Draft Guidance. It notes with approval that the Draft Guidance reflects many of the recommendations and suggestions made by the Group in its first consultation response. In particular, as described below, the Group welcomes the treatment of resale price maintenance (**RPM**), recommended resale prices (**RRPs**), information exchange in the context of dual distribution, and category management.

4 There nonetheless remain two areas in which the Group believes that the clarity of the Draft Guidance could be further improved, specifically in relation to the treatment of:

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1 Available at https://www.gov.uk/government/consultations/draft-vabeo-guidance
2 Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1055809/Draft_The_Competition_Act_1998__Vertical_Agreements_Block_Exemption__Order_2022__1_.pdf
3 Available at https://www.britishbrandsgroup.org.uk/download/response-to-the-cma-on-vaber/
4 See https://www.britishbrandsgroup.org.uk/

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- vertical agreements between suppliers of branded goods and retailers that supply competing own-brand goods; and
- maximum retail prices.

Vertical agreements between suppliers of branded goods and retailers that supply competing own-brand goods

5 At paragraph 6.18, the Draft Guidance deals with the application of the VABEO to certain agreements between competitors pursuant to Article 3(5)(i) of the VABEO. Where the conditions for the application of the VABEO are otherwise met, Article 3(5)(i) extends the scope of its application to non-reciprocal vertical agreement between competitors where:

- the supplier is a manufacturer and a distributor of goods; and
- the buyer is a distributor and not a competing undertaking at the manufacturing level.

6 Paragraph 6.18 provides that:

> "A distributor that commissions a manufacturer to produce particular goods under the distributor's brand name is not to be considered a manufacturer of such own-brand goods and thus a competitor of the manufacturer. Consequently, the exemption in Article 3(5)(i) VABEO applies to agreements between a distributor selling such own-brand goods manufactured by a third party and a supplier of branded goods on the same relevant market. In contrast, distributors that produce goods in-house under their brand name are considered manufacturers. This means that the exemption in Article 3(5)(i) of VABEO does not apply to agreements between those distributors and manufacturers of branded goods in the same relevant market. Such agreements must therefore be assessed under relevant current guidance on horizontal agreements".

7 This section of the Draft Guidance is densely drafted and, as a consequence, somewhat difficult to follow. In particular, the Group believes it should be made clearer – in line with what it understands to be the CMA's intent – that:

- the statement that a distributor that also supplies own-brand goods that are manufactured by a third party is not "a competitor of the manufacturer" is to be read narrowly to refer to the manufacturer of the relevant own-brand goods, and should not be read to mean that such a distributor is not a competitor to other suppliers of branded goods in the same relevant market; and
- the statement that vertical agreements between distributors that manufacture their own-brand goods in-house and suppliers of branded goods in the same relevant market should be assessed under the relevant current guidance on horizontal agreements (a statement that would apply to the vertical supply arrangements between certain retailers and their branded goods suppliers) relates only to those aspects of such agreements that have an impact on the horizontal relationship between the supplier and the distributor.

8 Accordingly, the Group would propose that the wording of paragraph 6.18 should be amended as follows:

> "Article 3(5)(i) of VABEO covers non-reciprocal vertical agreement between competitors where 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.

> A distributor that commissions a manufacturer to produce particular goods under the distributor's brand name is not to be considered a manufacturer of such own-brand goods and thus a competitor ~~of the manufacturer~~ at the manufacturing level for the purposes of Article 3(5)(i). Consequently, the exemption in Article 3(5)(i) VABEO applies to agreements between a distributor selling ~~such~~ own-brand goods manufactured by a third party and a supplier of competing branded goods ~~on the same relevant market~~. In contrast, distributors that produce goods in-house under their own brand name are ~~considered~~ manufacturers. This means that the exemption in Article 3(5)(i) of VABEO does not apply to agreements between those distributors and manufacturers of competing br~~anded goods in the same re~~levant market. ~~Such agreements.~~ The horizontal effects of such agreements must therefore be assessed ~~-~~under relevant current guidance on horizontal agreements".

RPM, RRPs and maximum resale prices

9 The Group welcomes the generally clear statement of the CMA's attitude in relation to RPM set out at paragraphs 8.10 to 8.26 of the Draft Guidance. However, as set out further below, the Group does have concerns in relation to what it presumes to be the unintended consequences of the drafting in relation to incentives to respect maximum resale prices at para 8.13.

10 The Group welcomes, in particular, the following aspects of that guidance, which accord with the submissions made by the Group in its first consultation response:

a. First, the recognition, at paragraph 8.13 of the Draft Guidance, that RRPs do not, of themselves and in the absence of plus factors, constitute RPM;[5]

b. Second, the recognition, at paragraph 8.15 of the Draft Guidance, that price monitoring systems can give rise to efficiencies and do not, in themselves, constitute RPM;[6]

c. Third, the recognition, at paragraph 8.22(a), that RPM can itself give rise to efficiencies, and may therefore be lawful if used by a manufacturer for a limited period of time in the context of the launch of a new product.[7] However, as set out in its first consultation response, the Group remains of the view that the CMA could usefully specify that a period of 6 months is likely to be considered reasonably limited for these purposes.[8]

11 One area in which the Group does have potentially significant concerns is the drafting of paragraph 8.13 of the Draft Guidance. The second and third sentences of that paragraph in particular deal with the treatment of maximum resale prices and provide:

> "However, if the supplier combines such a maximum price, or with resale price recommendation with incentives to apply a certain price level or disincentives to lower the sales price, this can amount to RPM. An example of incentives to apply a certain price level would be the reimbursement of promotional costs in case of **compliance with the maximum resale price** or the recommended resale price" (emphasis added).

12 On its face, this language would appear to imply that any incentive to comply with a maximum price level would necessarily amount to RPM. In other words, it appears to

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[5] VABEO Consultation Response, p. 5.
[6] VABEO Consultation Response, p. 5.
[7] VABEO Consultation Response, p. 6.
[8] VABEO Consultation Response, p. 6.

state that an agreement under which a supplier offered a rebate conditional on the buyer reselling at a price at or below the level of the maximum resale price (i.e., a rebate conditional on "compliance with the maximum resale price") would constitute unlawful RPM. The Group believes that this cannot have been the CMA's intention. Notwithstanding the wording of paragraph 8.13, such a rebate would not incentivise compliance with a fixed price level or disincentivise pricing at a lower level.

13 In order to clarify the position, the Group would recommend the following amendment to the language of paragraph 8.13:

> "However, if the supplier combines such a maximum price, or ~~with~~ resale price recommendation with incentives to apply a specific resale price ~~level~~ or disincentives to lower the sales price, this can amount to RPM. An example of incentives to apply a specific retail ~~certain~~ price ~~level~~ would be the reimbursement of promotional costs only in case of compliance with ~~the maximum resale price or~~ the recommended resale price or the specific price that purports to be a maximum (i.e., not where the resale price is lower than the purported maximum)".

Category Management

14 The Group welcomes the clarity of the CMA's guidance in relation to the issues surrounding category management, as set out at paragraphs 10.144 to 10.149 of the Draft Guidance. In particular, the Group welcomes the express recognition that category management agreements can give rise to efficiencies – including allowing distributors to have access to a supplier's marketing expertise – as well as that:

> "In general, the higher the Interbrand competition … the greater the economic benefits achieved through category management."[9]

Information exchange in the context of dual distribution

15 The Group welcomes the guidance in relation to information exchange in the context of dual distribution set out at paragraphs 10.170 to 10.179. In particular, the Group welcomes the list of examples, at paragraph 10.175, of information the exchange of which is likely to be genuinely vertical in nature and is unlikely to constitute a restriction by object.

16 The Group notes that the paragraph 10.175 list includes:

- information relating to the supply of the contract products;
- aggregated information relating to customer purchases of the contract products, customer preferences and customer feedback; and
- information relating to the prices at which the buyer resells the products, provided that such information exchange is not used to directly or indirectly restrict the buyer's ability to determine its sale price or to enforce a fixed or minimum sale price.[10]

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[9] Draft Guidance, para 10.149.
[10] Draft Guidance, para 10.175 (b), (c) and (e).

17 In the Group's view, this addresses well the request in its first consultation response to the effect that:

> "It would be helpful were guidance to clarify that suppliers operating a distribution network whilst also selling directly to consumers are free to exchange information about their own products with their resellers in the context of a vertical relationship as long as they do not use such information in a way that would lead to a hardcore restriction".[11]

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[11] VABEO Consultation Response, p. 3.