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Response to the CMA's consultation on the draft CMA Guidance to accompany the Vertical Agreements Block Exemption Order

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CMA consultation on the draft Guidance to accompany the Vertical Agreements Block Exemption Order

1. Introduction

1.1 Eversheds Sutherland (International) LLP welcomes the opportunity to comment on the CMA's consultation on the draft CMA Guidance ("**draft CMA Guidance**") to accompany the retained Vertical Agreements Block Exemption Order ("**draft VABEO**"). Our comments are based on the experience of our Competition, EU and Trade team in advising clients on all aspects of their vertical agreements and distribution networks. The comments and observations set out in this response are ours alone and should not be attributed to any of our clients.

1.2 We confirm that this response does not contain any confidential information and we are happy for it to be published on the CMA's website.

2. Agency

2.1 We welcome the CMA's expanded guidance on agency in the draft CMA Guidance. As noted in our responses to previous CMA and BEIS consultations on the draft VABEO, we believe that this is an area where additional guidance is of particular importance.

2.2 We note that the CMA retains the conceptual approach of distinguishing "agency agreements, for the purpose of applying the Chapter I prohibition" (commonly referred to as "genuine" agency agreements, and which fall outside the scope of the Chapter I prohibition); from agency agreements falling within Chapter I (commonly referred to as "non-genuine agency" agreements). This distinction continues to be drawn on the basis of the risk allocation between the parties and "*for the purposes of applying the Chapter I prohibition, an agreement will be categorised as an agency agreement if the agent bears no, or only insignificant risk*" (draft CMA Guidance para 4.13).

2.3 However, overall, the whole section of the draft CMA Guidance on agency would benefit from much greater clarity and precision as to which parts of it are intended to apply only to "genuine" agency agreements (i.e. those where the agent bears no or only insignificant risks) and which parts also apply to "non-genuine" agency agreements.

2.4 As a preliminary point, it is noted that the draft CMA Guidance does not use the "genuine agency" terminology (there is only one reference to the concept at paragraph 4.26). We consider that this is unhelpful, as this terminology is widely used and broadly understood by clients (notwithstanding the difficulty of applying the concept in practice). Referring to a "genuine agency agreement" is also much simpler than referring to "an agency agreement for the purposes of applying the Chapter I prohibition", particularly when the result of the classification of an agreement as a genuine agency agreement is that it actually falls outside Chapter I.

2.5 Paragraph 4.10 of the draft CMA Guidance defines an "agency agreement" as one which provides for an agent to be vested with the power to negotiate or conclude contracts for the sale or purchase of goods on behalf of a principal. This reflects the concept of agency as understood under national contract law.

2.6 Paragraph 4.11 of the draft CMA Guidance then, however, changes the focus of the previous paragraph, describing specifically situations where the agency agreement does not fall within the scope of the Chapter I prohibition. This paragraph should state explicitly that these types of agency agreements falling outside the scope of the Chapter I prohibition (because the agent bears no or only insignificant risk) are referred to as "genuine agency agreements". The paragraph should also clarify that it is still possible to enter into an agency agreement as defined in paragraph 4.10 which is a "non-genuine agency agreement" for the purposes of the application of the Chapter I prohibition, and to which the Chapter I prohibition will apply. Every subsequent reference to "agency agreement" in the draft CMA Guidance should then be amended to state either "genuine" or "non-genuine" agency agreement. This would provide much needed clarity and precision.

2.7 At present, where "agency agreement" is used in the draft CMA Guidance, this gives rise to confusion for several reasons.

2.7.1 The concept of agency is, first and foremost, an established commercial law concept which is widely used in everyday language and has certain connotations for businesses. Making clear in the guidance that, for the purposes of the application of the Chapter I prohibition, agency agreements are categorised into "genuine" and "non-genuine" agency agreements will be helpful for businesses that are not familiar with competition rules that this is something different to what they normally refer to as 'agency'.

2.7.2 In principle, agency agreements do not, of course, need to rely on the block exemption at all. Nonetheless, the extensive guidance being provided about agency agreements falling outside the Chapter I prohibition (i.e. genuine agency agreements) is already being widely misunderstood as setting the conditions for other agency relationships that do fall within Chapter I to benefit from the VABEO.

2.7.3 Within the context of the draft CMA Guidance itself, the use of the same terminology ("agency") to refer to both scenarios (i.e. application / non-application of Chapter I) gives rise to confusion as to whether the subsequent paragraphs of the draft CMA Guidance refer to "genuine" or "non-genuine" agency scenarios.

2.8 We consider that all the references to "agency" in the draft CMA Guidance after paragraph 4.10 should be clarified as described; however, there are a number of paragraphs in the draft CMA Guidance which refer to "agency" which particularly require clarification as to whether this means "genuine" or "non-genuine" agency. These are:

2.8.1 Paragraph 4.15: "*where the agent incurs one or more of the risks or costs mentioned in paragraphs 4.11 to 415 the agreement between agent and principal will not be categorised as a genuine agency agreement*";

2.8.2 Paragraph 4.22: "*an independent distributor of some products of a supplier may also be considered to act as a genuine agent for other products of the same supplier provided that the activities and risks covered by the genuine agency agreement can be effectively delineated*" (it would also be helpful to add here

that where an independent distributor is also acting as a "non-genuine" agent for some products of the same supplier, such delineation is not necessary);

2.8.3 Paragraph 4.30: "*in the case of an independent distributor that also acts as a genuine agent for certain products of the same supplier, compliance with the requirements set out in paragraphs 4.22 to 4.25 of this Guidance has to be carefully considered*"; and

2.8.4 Paragraph 8.17: "*in the case of both genuine and non-genuine agency agreements, the principal normally establishes the sale price, as it bears the commercial and financial risks relating to the sale. However, where such an agreement cannot be categorised as a genuine agency agreement for the purposes of applying the Chapter I prohibition …*".

2.9 In addition, paragraph 4.11 also notes that the conditions for categorising an agreement as an agency agreement falling outside Chapter I "*should be interpreted narrowly*". We consider this is unduly restrictive, given the already very restrictively formulated test for an agent as being one who "*does not bear any or only insignificant financial or commercial risk*". Limiting this test still further by this additional language is not helpful and will create legal uncertainty.

2.10 Further legal uncertainty is caused by the additional text at paragraph 4.18. This refers to factors "*relevant to the assessment of whether an agent operates as an auxiliary organ forming an integral part of its principal's undertaking so that the principal and its agent are not considered separate undertakings for competition law purposes*". Is this intended to be an additional assessment to the assessment of whether the agent bears no or only insignificant risk?

2.11 The language of paragraph 4.18 is also inconsistent with that in paragraph 4.28 which states that "*even if the agent bears no or only insignificant risks described in paragraphs 4.11 to 4.14 of this Guidance, it remains a separate undertaking from the principal*". This paragraph should be clarified.

2.12 Turning to paragraphs 4.12-4.18, we note the draft CMA Guidance provides a useful categorisation of risks that are considered material or not, as well as a list of examples/case studies where a party will be considered to be an agent.

2.12.1 The examples provided at paragraph 4.14 are quite helpful. In particular, we welcome the clarification at paragraph 4.14(a) footnote 24 that the fact that an agent temporarily and briefly acquires title in the goods, does not preclude the existence of an agency agreement falling outside Chapter I (it should not preclude the existence of an agency agreement falling within Chapter I either, and this should be clarified). However, we consider the CMA should go further in respect of fulfilment contracts and similar models, such as drop shipping models, and explicitly state that qualification as an agency agreement should not be put in doubt where the agent provides logistical services to the supplier for the delivery of the products, the price of which has been negotiated and agreed directly between the supplier and the end user.

2.12.2 In particular, it is a positive step that paragraph 4.16 makes it clear that the question of which party bears the relevant risk will be assessed on a case-by-case basis.

2.13 In relation to online intermediation services (paragraphs 4.19-4.21), our view is that the draft CMA Guidance does not adequately explain why online intermediation services providers (i.e. platforms) cannot "*in principle*" act as agents for suppliers. Their

designation as "suppliers" is not sufficient in itself to explain this, as agents themselves are suppliers of intermediation services. A platform may provide the same services to manufacturers as are provided by non-platform agents, in terms of connecting them to customers, delivery and logistics in respect of the goods etc and be fully reimbursed for all these services; the draft CMA Guidance also makes clear at paragraph 8.19 that the supplier of goods rather than the platform must set the price. In these circumstances, the position at paragraphs 4.19-4.21 creates confusion and uncertainty.

2.14 Regarding dual role agents (paragraphs 4.22-4.25), we welcome the inclusion of a specific section in the draft CMA Guidance dealing with this issue. However, in our view, the approach taken lacks clarity and is unduly restrictive. In particular:

2.14.1 In respect of the position at paragraph 4.22 of the draft CMA Guidance that the independent distributor must be "genuinely free" to enter into the agency agreement, it is unclear if the CMA intends to capture the scenario where the supplier makes particular products available only under the agency route. This is, in practice, a common position and it should be clarified that it does not present a problem.

2.14.2 Our reading of the section indicates that it is the CMA's intention that all the common costs incurred for both the agency and the independent distribution of the differentiated products should be allocated to the agency function if it is to fall outside Chapter I. This approach is not justified and, in many instances (e.g. where the agency role is limited in terms of volume or value of sales), such cost allocation will makes the hybrid role completely unworkable in practice and would prevent the efficient development of such a hybrid model. We respectfully suggest that the CMA should instead allow a pro-rata allocation of common costs to the two functions.

2.15 Finally, in relation to paragraphs 4.26-4.30:

2.15.1 We note the reference by the CMA to "genuine agency" at paragraph 4.26. As noted above, the CMA should use the same, clear terminology throughout its guidance, to prevent confusion for businesses. It is very important to note that businesses are, to a significant extent, reliant on this guidance to determine substantive aspects of the way they reach consumers; providing clear-cut distinctions to a non-legal audience is of critical importance to facilitate compliance.

2.15.2 Paragraph 4.26 equally notes that the ability of the principal to determine the scope of the agent's activities as an "*inherent part of an agency agreement*." Nonetheless, when turning to agency agreements falling within Chapter I, paragraph 4.27 (and Article 2(1) draft VABEO) indicate that the agent is to be considered a "buyer" for the purposes of the draft VABEO. This leaves open the possibility that it will be a hardcore restriction for the principal to restrict the territory into which or the customers to whom the agent/buyer may sell the contract goods or services, notwithstanding that the agent is selling the contract goods on behalf of the principal. We respectfully request that the CMA makes clear that a principal in an agency relationship falling within Chapter I (for example, because it has not been possible to conclude with sufficient certainty that all relevant risks are being fully borne by the principal) can continue to direct the customers to whom and territory in which the agent makes sales on its behalf. If the principal in such a ("non genuine") agency relationship is not able to do this, it fundamentally undermines the whole concept of an agency relationship falling within Chapter I, and this is unjustified and unduly restrictive.

2.15.3 Paragraph 4.30 of the draft CMA Guidance states that compliance with paragraphs 4.22 to 4.25 "*has to be carefully considered*"; this is a welcome differentiation from the wording used in paragraph 43 of the draft European Commission ("**Commission**") Guidelines ("*has to be assessed strictly*"). We anticipate that the difference in wording will mark a less restrictive approach to dual role agency which runs the risk of rendering this common model wholly unworkable in practice.

3. Dual distribution

3.1 We welcome the inclusion of a new section in the draft CMA Guidance in relation to dual distribution (paragraphs 6.13- 6.22), which provides further guidance on the scope of the exception for dual distribution, in particular, in light of the CMA's welcome decision to extend the exception to dual distribution by wholesalers and by importers in the draft VABEO. The draft CMA Guidance makes clearer the conditions under which a dual distribution arrangement can benefit from the draft VABEO, distinguishing horizontal restrictions of competition by object, which clearly cannot fall within the scope of the exception.

3.2 Equally, the provision of guidance on information exchange in dual distribution (paragraphs 10.170-10.179) is welcome. We also welcome the fact that the CMA has avoided the introduction of an additional market share threshold for information exchanges in dual distribution, as initially proposed by the Commission, and consider that the CMA's approach is considerably more positive for businesses and provides legal certainty and a clear safe harbour.

3.3 In terms of providing practical guidance to businesses to make compliance easier:

3.3.1 Paragraph 10.171 notes that the benefit of the block exemption extends to information exchanges, only to the extent that these are "genuinely vertical", i.e. required to implement the vertical agreement. We consider that this approach is appropriate to the overall scheme of the block exemption and recognises, in our view, that dual distribution is usually, first and foremost, a vertical relationship between a supplier and a distributor (despite the existence of a horizontal element, e.g. where a supplier primarily has a distribution network but also sells direct to consumer on its own branded website, or runs a limited number of "brand experience" retail outlets).

3.3.2 It is also consistent with this clear approach that the draft CMA Guidance identifies at paragraph 10.173 a single category of exchanges which are problematic, namely exchanges constituting a "by object" restriction (rather than introducing further qualifications in relation to "by effect" restrictions as a separate category of considerations in the first instance). As mentioned in our responses to previous CMA consultations, in our experience, for as long as the supplier maintains a dual system rather than abandoning distributed sales completely, and in the absence of significant market power, both parties have aligned objectives (winning the market for their shared brand, strong inter-brand competition). Accordingly, we consider the risk of real competitive harm arising from dual distribution to be low.

3.3.3 We welcome paragraph 10.175, which introduces a list of examples which are likely to be "genuinely vertical" exchanges, which can act as a quick guide for businesses. It is also a step in the right direction that the list is not qualified; indeed, "*the examples cover information communicated by the supplier or the*

buyer, irrespective of the frequency of the communication and irrespective of whether the information relates to past, present or future conduct".

3.3.4 Paragraph 10.176, by contrast, provides a list of "adverse" examples which are "*generally likely to either restrict competition by object or otherwise would be unlikely to be genuinely vertical*". The use of the qualifier "generally" seems to suggest that, as a general rule, these exchanges will be unlikely to benefit from the block exemption; even though the language used recognises that there might be exemptions, we are concerned that this part of the guidance could in effect operate as a presumption, which will need to be rebutted by the undertakings concerned.

3.3.5 In addition, turning to the first example at paragraph 10.176, we note the inclusion of an exception for coordinated short-term low price campaigns. Although this is definitely positive, the guidance on this point does not reach the degree of clarity required to enable businesses to confidently design their promotional campaigns.

3.3.6 We note also that references to paragraph 11.161 in paragraphs 10.175 (c) and (e) should be to paragraph 10.176.

3.4 Paragraph 10.179 provides certain examples of measures that can be taken where the information exchange at issue does not benefit from the block exemption. This offers some very helpful guidance to businesses. An additional step in the right direction would be further detail on the degree and nature of the separation of information required for the protection of competitively sensitive information received from the distributor that should not be shared with the supplier's direct sales channel; and confirmation that any information barriers should be proportionate to the size of the relevant supplier's business.

3.5 Finally, we note the absence of specific stipulations in the draft CMA Guidance in relation to "hybrid platforms". This can be contrasted to the position taken by the Commission, under which the retail activities of hybrid platforms do not fulfil the rationale of the dual distribution exception. We presume this means that the CMA is minded to adopt a less restrictive approach in relation to hybrid platforms; if that is the case, this can only benefit businesses active in the sector and provide additional legal certainty.

4. Resale Price Maintenance

4.1 As regards Resale Price Maintenance ("**RPM**"), the inclusion of specific examples of indirect RPM (in particular at paragraphs 8.12 onwards) will serve as a helpful guide for businesses. Paragraphs 8.13-8.16 add some much needed detail regarding 'grey' areas, such as recommendations combined with incentives to apply the 'recommended' price, minimum advertised price policies ("**MAPs**"), and monitoring measures.

4.2 We would welcome more clarity on MAPs, as the text at paragraph 8.14 of the draft CMA Guidance only indicates that MAPs "may" amount to RPM, without stating that absent the examples set out in that paragraph, a MAP would not amount to RPM.

4.3 We also welcome that the draft CMA Guidance specifically addresses fulfilment contracts, clarifying that they do not constitute RPM (where they fall within the scope of Chapter I in the first place).

4.4 The draft CMA Guidance also recognises the following examples of efficiencies (paragraph 8.22):

4.4.1 when a manufacturer introduces a new product, particularly if it is a completely new product, and it is not possible to impose effective promotion requirements on all buyers by way of contract; and

4.4.2 to organise a coordinated short term low price campaign (described as being of 2 to 6 weeks in most cases).

4.5 Whilst these are sensible examples, we consider they do not go far enough. The situations where these conditions might be met are very limited, which means that businesses will generally be (and that is our experience to date) quite reluctant to engage even in pro-competitive RPM. In our view, if the CMA wants to incentivise businesses to engage in pro-competitive RPM, its guidance needs to be much clearer (i) on what is (not) RPM and (ii) on the conditions under which RPM can lead to efficiencies that thus can benefit from the exemption. In particular, we note:

4.5.1 No explanation for the limitation of a low price campaign to 2-6 weeks is given, or what would be required to justify a longer period, for example, seasonality of the product, or usual purchasing cycles, etc.

4.5.2 In addition, we note the difference to the proposal of the Commission, that also recognises efficiencies in RPM which allows retailers to provide (additional) pre-sales services, in particular, in the case of experience or complex products, and avoid free-riding. We do not see the reason for this differentiation and would urge the CMA to include a similar example in its draft CMA Guidance.

4.5.3 For some branded consumer goods, suppliers would like to offer customers certainty on pricing (e.g. price guarantees) and some consumers would prefer that - RPM might be able to provide this certainty.

4.6 More generally, the guidance should include further case studies and examples to address the current lack of clarity and guidance. An additional positive step (noted in our previous responses) might be the active engagement of the CMA with UK businesses, e.g. by means of comfort letters.

5. Territorial and customer restrictions

5.1 Paragraph 8.27 (and paragraph 2.16) of the draft CMA Guidance make it clear that the scope of the draft VABEO is limited to agreements implemented, or intended to be implemented, in the UK. This is a welcome clarification, and one that businesses with cross-border distribution networks will need to carefully consider when re-designing their networks for the UK/the EU.

5.2 In addition, paragraph 2.6 confirms that Chapter I only applies to vertical agreements concerning trade within the UK; nonetheless, the equivalent of paragraph 162 of the draft EU Guidelines ("*in so far as vertical agreements concern exports outside the Union or imports/re-imports from outside the Union the case law of the CJEU suggests that such agreements cannot be regarded as having the object of appreciably restricting competition within the Union or as being capable of affecting as such trade between Member States*") is missing from the draft CMA Guidance. In our experience, this question of whether it is now acceptable to ban UK distributors from exporting to the EU and vice versa has been very regularly asked by our clients, and we consider it would be helpful for the CMA to explicitly state in the draft CMA Guidance, as the Commission has done, that bans on exports outside the UK will not be regarded as a vertical agreement concerning trade within the UK so as to be covered by the Chapter I prohibition.

5.3 In our view, paragraphs 8.33-8.44 that deal with online sales bans provide some additional clarity on a sales channel that is becoming increasingly important for businesses. The inclusion of examples of indirect restrictions that effectively amount to an online sales ban is also very positive; it is also consistent with a viewing of online sales as primarily a form of passive sales. Likewise, the clear differentiation of these hardcore restrictions from restrictions that can benefit from the block exemption reflects the distinction of passive/active sales which underpins the broader system of the draft VABEO.

5.3.1 In this regard, paragraph 8.40-8.41 recognise that a supplier has a significant interest in introducing quality requirements aimed at preserving its brand.

5.3.2 The examples at paragraph 8.42, in particular, the ability of the supplier to ban online marketplaces, also afford suppliers more flexibility to design their distribution networks, ensuring they will have the 'character' and 'image' they have opted for, rather than settle for uncontrolled online sales by their distributors.

5.3.3 We are also supportive of paragraph 8.43, which recognises the ability of businesses to engage in 'dual pricing'. In the current context of predominantly online sales, suppliers may wish to adopt a dual pricing approach to recognise the different cost structures of the online and offline environments, and to support brick-and-mortar trade and ensure that their distribution networks are operated efficiently. Suppliers are keen to prevent free-riding and maintain healthy, sustainable omni-channel distribution systems to meet the needs of different consumers. This can only benefit consumers, especially the more vulnerable ones, that do not have access to the internet.

5.4 Turning to the distinction between active and passive sales (paragraphs 8.45 et seq.), given that the CMA decided to retain the distinction, we consider the inclusion of examples of each type of sales as quite useful for businesses. In particular, we welcome the clear indication that targeted advertising, including by price comparison tools or in specific geographical areas/customer groups, constitutes active sales. We would recommend that the helpful categories at paragraph 8.46 be even more detailed with additional specific examples of active selling, such as targeted advertising on social media, the purchase of an online banner advert, or advertising on "local" websites or those aimed at particular customers (e.g. trade websites or specialist publications). We understand these examples are already covered by paragraph 8.46, but businesses can only benefit from the additional clarity.

5.5 As an additional, more structural point, we would recommend that this section be amended so that all of the examples of active/passive sales are clearly set out, with the explanations of why certain conduct is classified as active/passive following each example. The current structure of the section could potentially give rise to confusion, as it is (to a certain degree) repetitive (e.g. public procurement is listed as an example of passive sales at paragraph 8.47(c), but the reason is explained at paragraph 8.51).

5.6 The policy options providing additional flexibility in respect of territorial and customer restrictions are welcome although we continue to be concerned that how they will work in practice is unclear. In particular:

5.6.1 in principle, the ability to introduce shared exclusivity in a geographical area or for a customer group by allowing the allocation of a geographical area to more than one distributor (paragraph 8.69) is welcome. The concept of 'shared exclusivity' could provide suppliers with greater flexibility to design their

distribution systems efficiently. However, there is the potential for real uncertainty as to how the supplier is supposed to assess whether the number of appointed distributors will secure the volume of business necessary to preserve their investment efforts (in accordance with paragraph 10.59). Any complexity in this assessment is likely to deter suppliers from using the 'shared exclusivity' option and this would be a wasted opportunity. We would therefore welcome guidance on how this assessment should be conducted, and explicit confirmation that this need not be an exhaustive ongoing examination; and

5.6.2 the provision of "greater protection" for members of selective distribution systems against sales from outside the geographical area to unauthorised distributors inside that geographical area (paragraph 8.69), would be a positive step. Again, however, there is a real need for further clarity on how this provision will be applied. The draft CMA Guidance at 8.69 describes Article 8(3) of the draft VABEO as "interpretative provisions" but neither in the draft VABEO itself nor in the draft CMA Guidance is it set out how these provisions are meant to be applied. In particular, Article 8(2)(b)(iii) of the draft VABEO as described in 8.62 and 8.63 of the draft CMA Guidance permits only a restriction of active and passive sales *by the members of a selective distribution system* [emphasis added] to distributors not authorised by the supplier located within the geographic area where the [selective] distribution system is operated. It is not clear how this is "greater" protection for the members of a selective distribution system, since it restricts only them from making sales to unauthorised distributors, while making no provision for the restriction of sale by non-members of the system to unauthorised distributors. The Commission's draft new VABER explicitly permits a supplier operating neither an exclusive or selective system to restrict active or passive sales by the buyer or its customers to unauthorised distributors located in a territory where the supplier operates a selective distribution system. If the CMA intends to permit this too, this should be explicit with the draft CMA Guidance.

5.7 Finally we note that paragraph 8.57 allows the passing on of active sales restrictions to downstream distributors. This was not clear in the draft VABEO and it is very positive that the draft CMA Guidance now clarifies this, in particular, given the Commission's clear statement to that effect. This proposal will provide businesses with more flexibility to structure their distribution networks and the necessary confidence that their investments will not be lost.

6. Parity obligations (or "most favoured nation" clauses)

6.1 We generally consider that the section on wide retail parity obligations is quite helpful and set out clearly.

6.2 The CMA has clearly considered feedback received in relation to the draft VABEO and clarifies at paragraph 8.84 that the hardcore restriction does not apply to wide upstream parity obligations.

6.3 As noted in our responses to previous consultations, we consider that there may be some limited circumstances where an indirect sales channel parity obligation may generate efficiencies, for example where a new platform seeks to enter the market and wishes to use an indirect sales channel parity obligation to gain a foothold in the market, recoup its investment and avoid free-riding. However, these are likely to be quite limited circumstances. Paragraph 8.85 recognises that and notes the ability to raise an efficiency justification. It would be helpful to provide an indication of the efficiency justifications

the CMA would be likely to consider, or perhaps examples of parity clauses that are more likely to be considered as efficiency-generating.

7. Obligation to provide information to the CMA

7.1 As regards the obligation to provide information on vertical agreements, we note that the draft CMA Guidance does provide some further comments on:

7.1.1 the circumstances where this might be the case ("*for example if a complaint is made about the agreement*"). However, this, in our view, is not sufficient and further examples should be provided of the situations in which (and the reasons why) the CMA would request information; and

7.1.2 the procedural guarantees that will accompany such a request (e.g. possibility of providing advance notice/request in draft, measures to protect confidentiality of certain parts of the documents). In principle, we view these procedural guarantees as sufficient to protect the interests of addressees of such requests. However, we do note that a lot will depend on the flexibility of the CMA in practice, e.g. when it comes to providing extensions for responses.

8. Other provisions

8.1 As suggested in our previous responses to the CMA's consultations in relation to the draft VABEO, the decision that the VABEO have a duration of 6 years is quite positive, and will provide an opportunity for the CMA to have a further review and consideration in the not too distant future, and potentially the introduction of more significant changes.

8.2 We also note paragraph 12.3 of the draft CMA Guidance, which refers to the CMA's power to recommend the variation or revocation of a block exemption order. In our view, the current proposed duration of six years should be sufficient to provide flexibility to the CMA, so that the exercise of this power should not be necessary. In any event, the express acknowledgement in the draft CMA Guidance that the CMA will be open to calls for an earlier review is positive (provided that such calls are justified, as the CMA itself suggests).

8.3 In terms of the power of the CMA to cancel the block exemption in individual cases (paragraphs 13.3-13.9), we are not in principle opposed to this, although we consider it should be used only in the most limited circumstances, again, particularly in light of the short duration of the VABEO. We do note that the draft CMA Guidance states that the individual cancellation of the VABEO is subject to a number of conditions/procedural guarantees:

8.3.1 notice in writing of the CMA's proposal "*to those persons whom it can reasonably identify as being parties to the relevant vertical agreement*"; and where that is not reasonably practicable, by publication in the "register maintained by the CMA under rule 20 of the CMA's rules set out in the Schedule to the CA98 (CMA's Rules) Order 2014(a); (ii) the London, Edinburgh and Belfast Gazettes; (iii) at least one national daily newspaper; and (iv) if there is in circulation an appropriate trade journal which is published at intervals not exceeding one month, in such trade journal, stating the facts on which the CMA bases the proposal, and its reasons for making it". We presume the relevant information will be derived from a third-party complaint in the majority of cases, and therefore the CMA will be well-informed of the identity of the relevant parties. Nonetheless, where that is not the case, we consider that the publication suggested will be sufficient for the parties to be informed of the CMA's proposal;

8.3.2 the fact that the CMA will consider representations made to it;

8.3.3 the fact that a proposal to cancel the block exemption in individual cases may happen in two situations, namely (a) if the CMA considers that a particular vertical agreement, considered either in isolation or in conjunction with similar agreements enforced by competing suppliers or buyers, is not one to which section 9(1) applies; or (b) in case of a failure to comply with an information request under Article 12(1) draft VABEO without reasonable excuse;

8.3.4 the fact that a cancellation decision can only have *ex nunc* effect; and

8.3.5 the fact that a proposal to cancel the block exemption can only be made in individual cases, as opposed to networks of agreements.

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