Linklaters

Linklaters LLP Response

CMA Consultation on the draft guidance on the application of the Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022

1 Introduction and executive summary

(1) Linklaters LLP ("**Linklaters**") welcomes the opportunity to comment on the proposed text of the draft guidance on the application of the Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 (the "**Draft Guidance**"). We would like to commend the Competition and Markets Authority (the "**CMA**") for the level of openness, stakeholder engagement and evidence gathering in the review process of the new independent UK regime on vertical agreements. We were pleased to see the CMA take into account stakeholders' submissions in previous stages of the review process, including most recently, responses to the Department for Business, Energy, and Industrial Strategy ("**BEIS**") consultation on the draft Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 ("**VABEO**") and draft Explanatory Memorandum on the VABEO.

(2) In general, we welcome the detail contained in the Draft Guidance which provides helpful clarification on how to interpret and apply the VABEO. In particular, the useful guidance on the types of information exchange in the context of a dual distribution scheme that would be covered by the VABEO as well as the treatment of temporary transfer of title in agency agreements.

(3) However, there are some areas where we do not agree with the position the CMA has taken in the Draft Guidance and areas where we believe additional clarity or detail is necessary to ensure the Draft Guidance is as useful a tool as possible to help businesses assess vertical agreements. In particular:

- Agency agreements – further clarifications would be welcome on the approach to (i) reimbursement of costs in scenarios involving agents who have dual roles and (ii) treatment of online intermediation service providers as suppliers.
- Resale price maintenance ("**RPM**") – further detail should be provided on the circumstances in which RPM would lead to net pro-competitive effects and could benefit from an exemption and clarification of the waiver requirement for fulfilment contracts.
- Parity obligations – we disagree with the proposal to consider all wide retail parity clauses as anti-competitive without an assessment of their effects and note that, if the CMA wishes to maintain this position, further guidance on the meaning of clauses with effects similar to wide retail parity clauses is required.
- Non-competes – the blanket exclusion of all tacitly renewable non-competes beyond five years should be reconsidered.
- Selective distribution – ambiguities should be resolved around how provisions in the VABEO and Draft Guidance interact with the new flexibility towards combined exclusive and selective distribution.

(4) We set out our observations on these topics in the remainder of this submission. This has been informed by comparisons with the position of the European Commission (the

"**Commission**") in the new Vertical Block Exemption Regulation ("**Revised VBER**") and the Commission's draft revised Vertical Guidelines ("**Draft EU Vertical Guidelines**").

2 Agency

2.1 *Temporary transfer of title*

(5) We welcome the CMA providing more detail around the treatment of agency agreements in the Draft Guidance. We particularly commend the CMA for adopting the Commission's proposal in the Revised VBER and Draft EU Vertical Guidelines that the transfer of title to the agent for a short period of time does not preclude a finding of genuine agency for competition law purposes. Nevertheless, we would encourage the CMA to provide further clarity as to how the CMA would assess "*a very brief period of time*" for the transfer of title,[1] given that the length and complexity of routes to market can vary significantly. One way to achieve this could be for the CMA to provide an example of a model that involves a title transfer which would not preclude a finding of genuine agency.

2.2 *Dual distribution and agency role*

(6) We further welcome the CMA providing guidance on the role of distributors who act as agents for the same supplier but for different products, as was indicated by BEIS in its consultation process in March 2022. We commend the CMA for clarifying that a company can act as agent and distributor for a supplier within the same product market. However, we consider the position put forward by the CMA to be overly restrictive in requiring the supplier to reimburse a hybrid distributor-agent all common costs incurred for both the agency and the independent distribution of differentiated products within the same market, in order for the arrangement to be considered a genuine agency.[2]

(7) Our view is that a proportionate reimbursement should be considered in agency models, as an alternative 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 (while the CMA identifies the number of principals on behalf of whom an agent acts as a relevant factor in determining agency in paragraph 4.18, case law has made clear that the decisive factor is allocation of risk).[3] Requiring reimbursement would indirectly require the supplier to contribute financially to its competitors' route to market.

(8) We have significant concerns that this approach will discourage the development of new and innovative distribution models and will risk distorting competition and creating allocative inefficiency. In our view, a better solution would be to adopt a pro rata approach to cost allocation in dual systems. This would be more reflective of the service the agent in fact provides, while still ensuring that they do not bear the financial or commercial risks associated with their agency activities.

(9) We further invite the CMA to specify what the legal consequences would be if there is a risk that the agent is influenced by the terms of the agency agreement, notably regarding price

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1 Footnote 24: *the fact that the agent may temporarily, for a very brief period of time, acquire the property of the contract goods while selling them on behalf of the principal does not preclude an agency agreement, provided the agent does not incur any costs or risks related to that transfer of property*.

2 See paragraph 4.15 and footnote 28 of the Draft Guidance.

3 Case C-279/06 CEPSA, paragraph 36.

setting, for the products that it distributes independently. We understand that this would not call into question the qualification of the agent as a "genuine agent" but could potentially affect the legality of the distribution activities that the agent undertakes at his own risk.

(10) To this end, it would also be helpful for the CMA's guidance to cover a broader range of examples of the costs that must be covered and to cover scenarios when dual roles are unlikely to influence decision-making for products within the same product market.

(11) The Draft Guidance suggests that all market-specific investments that are relevant to the type of activity carried out by the agent should be borne entirely by the principal with the sole exception of market-specific investments that relate exclusively to differentiated products in the same market.[4] Further, an example is provided where a supplier wants to use its distributor of product A to sell product B as an agent (where products A and B are in the same product market).[5] Costs to furnish a shop, train employees and specific storage equipment are identified as likely to be relevant to products A and B and therefore the CMA states that they must be covered by the principal in full. By contrast, advertising for the agents shop would benefit both the shop as well as products A and B and "*would therefore be partly relevant for the assessment of the agency agreement, to the extent they relate to the sale of product A which is sold under the agency agreement, as well as the general activity of selling products A and B*."[6]

(12) It is unclear (i) how companies know which shared investments must be covered in full (i.e. what the distinction is between furnishing, training and storage on the one hand and advertising on the other); and (ii) where items must not to be covered in full and on what basis costs must be allocated (i.e. if the CMA would expect a pro rata allocation of advertising costs). These issues create real practical difficulties in understanding and interpreting the Draft Guidance.

(13) It is also important that the example provided by the CMA covers broader costs, such as transport costs, so that it is clear how they would be treated under a dual system.

(14) The CMA should, further, be clear on whether the quality of investments affects the cost allocation. Take for example a distributor that has invested in an advanced system costing £100 million. This system can be used to sell the agency products. However, a less advanced system, costing £20 million, could also have been used to sell the agency products (for example, due to the more limited volume and product range being sold in the agency channel). In this scenario, does the principal need to cover the £100 million of common costs, even though a £20 million system would have been suitable for a hypothetical distributor that is not yet active in the market?

2.3 *Online intermediation*

(15) We have concerns with the CMA's statement that "*undertakings providing online intermediation services as defined in Article 2(1) VABEO are categorised as suppliers … and in principle they therefore cannot qualify as agents for the purpose of applying the Chapter I prohibition*."[7] Online intermediation services comprise many different entities with varying business models, scale and product or service offerings. They do not have uniform attributes and, therefore, a "one size fits all" approach with regard to whether online intermediation

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4 At paragraph 4.25.

5 At paragraph 4.25(b).

6 At paragraph 4.25(d).

7 Paragraph 4.19 of the Draft Guidance.

services can qualify as agents does not work. While the CMA states that "*online intermediation services bear significant financial or commercial risks associated with the contracts negotiated on behalf of the sellers using their online intermediation services*"[8], this is not true of all such online intermediation services, may be true of some sellers but not others and, in any event, an assessment of whether the online intermediation service is a genuine agent needs to be undertaken on a case-by-case basis. Risk is the core factor in the identification of agency relationships which, for certain purposes, falls outside of the scope of Chapter I and should continue to do so.

(16) Therefore, we would suggest that the CMA maintain the current position, following relevant case law, of treating online intermediation services (like other entities) as capable of being treated as genuine agency arrangements for competition law purposes where they do not bear contract-specific or market-specific risks, nor risks associated with other activities undertaken on the same product market,[9] and meet the criteria set out in section 4 of the Draft Guidance. This assessment should be carried out on a case-by-case basis.

(17) In addition, we understand that by classifying online intermediation services as suppliers – and not buyers – the Draft Guidance excludes the application of RPM rules to suppliers of setting prices and other terms when selling their products via online platforms. We request that the CMA explicitly confirm that this is the position being adopted, in order to provide legal certainty.

3 Resale price maintenance

(18) We are disappointed the CMA has not taken the opportunity to remove RPM as a hardcore restriction. We would encourage this to be reassessed once the VABEO and Draft Guidance is reviewed in six years' time.

3.1 *Pro-competitive effects of RPM*

(19) Although still a hardcore restriction, we welcome the CMA acknowledging the efficiencies of RPM (which are generally acknowledged by commentators and in economic literature, have long been recognised by the US Supreme Court,[10] and are detailed in the EU Staff Working Document[11] and Experts' Report). However, we consider the CMA's position to remain overly restrictive and the efficiency exemptions to be too narrow. We encourage the CMA to expand on the circumstances in which RPM would lead to net pro-competitive effects and could benefit from an exemption. We provide below specific comments on the CMA's position in the Draft Guidance.

(20) Paragraph 8.21(a) of the Draft Guidance states that the direct effect of RPM is the elimination of intra-brand price competition by preventing all or certain distributors from lowering their sales prices resulting in a price increase for the brand. This is not necessarily correct, as RPM could be employed by a supplier to encourage distributors to lower their current pricing in the belief that this will enhance the overall value of sales of the supplier's product. This should be reflected in paragraph 8.21(a) by including the following clarification "*potentially preventing all or certain distributors from lowering their sales price*".

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[8] Paragraph 4.21 of the Draft Guidance.

[9] Paragraph 4.12 of the Draft Guidance.

[10] 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.

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

(21) Further, we think that the CMA should expand the examples of potentially beneficial RPM in paragraph 8.22 by relaxing the conditions required to benefit from section 9(1) Competition Act 1998 in the event of promotional campaigns. In particular, we would welcome confirmation that it is possible to impose on distributors/retailers a requirement to pass on to consumers the benefits from supplier financed promotions, without this necessarily relating to a short-term campaign or new product launch. Indeed, promotion campaigns are very often financed by suppliers who, in return, legitimately expect that their promotional investments will be passed on to consumers in the form of lower prices. Insofar as this is beneficial to consumers, intervention or requests by a supplier that distributors pass the promotion on to customers/consumers in full (and provide evidence that they have done so) should be permissible/should benefit from the block exemption as it fosters inter-brand competition. Some clarifications in this respect would be welcome to provide suppliers with greater legal certainty.

3.2 *Fulfilment contracts*

(22) We welcome the CMA's guidance on fulfilment contracts and that these do not constitute RPM where the end user has waived its right to choose the undertaking that will execute the agreement. However, we consider this position to remain uncertain and to require further clarification.

(23) We understand that the CMA does not envision the exemption for fulfilment contracts in the context of the online platform economy only, but would appreciate the CMA making this more explicit in the Draft Guidance. Indeed, centralised price negotiation between a supplier and, for example, large customers who negotiate centrally with a single counterparty also takes place in many sectors outside the online platform context. In these circumstances, competition for the customer takes place in the central negotiation, rather than where the supplier's distributor is merely executing the agreement reached between the supplier and its customer, who is not necessarily an end-user. Therefore, the distribution of the contracted products to the customer (who need not be an end-user) by the supplier's buyer/distributor should also fall into the fulfilment contract exception, even if the distributor were to take title to the products, which is often required for logistical reasons.

(24) Further, as in the Draft EU Vertical Guidelines, the fulfilment exemption only applies where the counterparty has "*waived its right*" to choose the company that will execute the agreement. The purpose of this waiver is unclear, and it would be helpful for the CMA to clarify what the requirement seeks to achieve. In particular, we are aware of circumstances where the buyer dictates to the supplier the party it wants to execute the agreement/delivery of the product and in this case a waiver by the customer would be superfluous. Given that we understand (and agree) that the key element behind this exemption is that competition for the supply price has occurred as part of the central negotiation, we consider that this exemption should also apply where the counterparty has agreed to a particular company fulfilling the contract.

(25) We would suggest amending the text as follows:

> *The fixing of the resale price in a vertical agreement between a supplier and a buyer that executes a prior agreement between the supplier and a customer (hereinafter "fulfilment contract") does not constitute RPM where either of the customer or the supplier has waived its right to choose the undertaking that should execute the agreement or has agreed or required that it be executed by a specified third party.*

(26) The above amendments reflect scenarios where, in downstream situations, the customer assigns fulfilment of the order to a third party who will buy the product from the supplier and then sell it to the customer. Therefore, it is not important whether it is the customer or the supplier who waives their right to choose the company that executes the agreement because the competition process took place during the negotiation of the prior agreement between supplier and customer. In our view, it is easier to justify RPM when the supplier is the one waiving its right to choose the company to execute the agreement as this fact confirms that the supplier has no market power to fix the resale price to the distributor. In practice, in many instances, the customer chooses more than one distributor/wholesaler/dealer to execute the agreement offering such as using a list of three third-party intermediaries to execute the contract.

(27) If the requirement for waiver is retained as is, it would be necessary to provide guidance as to how the requirement would be practically satisfied, especially in the online context or where it is the customer that imposes the requirement. For example, would knowledge and tacit acceptance of delivery by a party that is not a supplier be sufficient?

4 Parallel trade

(28) We welcome the clarification in the Draft Guidance regarding the territorial scope of the VABEO. For example, it is helpful to have the express confirmation in paragraph 2.6 that the Chapter I prohibition only applies where agreements have as their object or effect an appreciable restriction of competition within the UK or a part of it and, in paragraph 2.16, that the VABEO does not apply to agreements implemented, or intended to be implemented, outside the UK. We understand that this means that restrictions preventing UK distributors from making sales outside the UK will not be problematic under the VABEO. However, an express statement to that effect would increase certainty on this point.

(29) Similarly, paragraph 8.27 helpfully clarifies that the hardcore restrictions in the VABEO apply to vertical agreements that have an effect on trade *within* the UK. This suggests that contractual restrictions on sales from the EU into the UK will not infringe the Chapter I prohibition, in the absence of exceptional circumstances where a sufficient effect on trade with the UK can be demonstrated (in line with the *Javico*[12] case). However, this point is not explicitly addressed in the Draft Guidance and we would welcome further express clarification that restrictions on sales into the UK would not be treated as hardcore restrictions. This would provide additional certainty for suppliers who are re-considering their European-wide supply chains and distribution systems including whether to carve out the UK, and further clarify the position regarding parallel trade with the EU under UK competition law.

5 Parity obligations

(30) It is encouraging that the Draft Guidance extend the benefit of the block exemption to narrow parity clauses and wholesale parity obligations (wide or narrow) and that guidance is provided for a section 9(1) Competition Act 1998 assessment for such clauses where the parties' market share exceeds 30%.

(31) We are disappointed that the CMA intends to maintain the proposed approach in Article 8(2)(f) VABEO to treat wide retail price parity clauses as a hardcore restriction. We appreciate that a significant issue under the current VBER has been the lack of legal

[12] C-306/96, *Javico International and Javico AG v Yves Saint Laurent Parfums SA*, 28 April 1998.

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,[13] we think the approach in the EU's Revised VBER is more appropriate.

(32) As we have set out in our response to the BEIS consultation, we think an effects assessment should be required instead of categorically treating all wide retail parity obligations as anti-competitive. Noting the outcome of the Commission's evaluation, the potential effects of wide retail parity obligations should be assessed on a case-by-case basis, taking into account a number of relevant factors and the dynamics of the sector in question. The CMA acknowledges this in paragraph 8.79 of the Draft Guidance, where it is stated that "*wide retail parity obligations are more likely than other types of parity obligation to produce anti-competitive effects*" (emphasis added). Provisions which are voluntarily agreed between supplier and intermediary in the context of commercial negotiations that are merely "likely to" rather than definitively will produce competitive effects should not be subject to a hardcore restriction in line with the case law on "by object" restrictions.[14]

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

(34) Should the CMA wish to maintain the hardcore restriction, we would 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 Article 8(2)(f) VABEO 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 and the CMA have in mind. This in turn causes legal uncertainty, which undermines the aim of the VABEO and Draft Guidance.

6 Information exchange

(35) We support the confirmation in the Draft Guidance that information exchange in the context of dual distribution schemes is exempted under broadly the same conditions as vertical agreements and the absence of a market threshold (as per the Commission's initial approach in the Revised VBER).[16] We note the added requirements for the information exchange to be covered by the VABEO, namely (i) not being a restriction by object and (ii) being genuinely vertical (i.e. required to implement the vertical agreement).[17]

(36) It would be helpful to understand the purpose of, and interplay between, the two limbs as presumably if the information exchange is "genuinely vertical", it would not fall into the horizontal "by object" category.

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[13] 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.

[14] Ibid.

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

[16] Paragraph 10.171 of the Draft Guidance.

[17] Paragraph 10.171 of the Draft Guidance.

(37) In the interests of legal certainty and consistency for pan European businesses, it is helpful that the guidance on what type of information exchange is exempted aligns with the Commission's draft guidance on the same issue.[18] We consider the drafting used in the CMA's Draft Guidance regarding the relevant test of whether the information exchange is a type benefitting from the exemption is clearer than that used in the Commission's draft guidance. The CMA Draft Guidance describes it as information exchange that *"does not restrict competition by object and is genuinely vertical, which is to say it is required to implement the vertical agreement*" (emphasis added)[19] whereas the Commission links it to the test in Article 101(3) TFEU – whether the information exchange is "*necessary to improve the production or distribution of the contract goods or services by the parties*".[20] We consider the CMA's approach to be more appropriate and in line with the recommendations of the expert report prepared during the VBER evaluation phase.[21]

(38) We are pleased that the Draft Guidance contains useful examples to illustrate what type of information exchange in the context of a dual distribution scheme would, and would not, be covered by the VABEO.[22] Given how comprehensive the list of examples is, something that would be helpful to clarify is that the instances of information exchange which are not caught by the "positive" and "negative" list can still benefit from the exemption under the VABEO provided they meet the two limbs rather than automatically requiring self-assessment as indicated in paragraph 10.177 of the Draft Guidance.

(39) The Draft Guidance also provides some limited guidance relating to the assessment of horizontal issues arising out of information exchange in the dual distribution context and which is not exempted under the VABEO. The confirmation that the presumptions established by relevant case law on information exchange still apply[23] is useful clarification and the practical suggestions regarding steps that business can take to minimise the risk[24] is welcomed.

7 Non-compete obligations

(40) We are disappointed that the VABEO and Draft Guidance have maintained the status quo in their 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). Unlike the draft revised EU Vertical Guidelines, which includes a proviso that non-compete obligations that are tacitly renewable beyond a period of five years do not count as indefinite, "*provided that the buyer can effectively renegotiate or terminate the vertical agreement containing the obligation with a reasonable notice period and at a reasonable cost*", the CMA's Draft Guidance excludes from the scope of the VABEO all tacitly renewable non-competes beyond five years on a blanket basis. This approach seems overly inclusive and inflexible and fails to recognise that some tacitly renewable non-competes beyond five years may be non-problematic. For example, it seems disproportionate to

[18] European Commission, Consultation on Guidance on information exchange in the context of dual distribution, 4 February 2022.

[19] Paragraph 10.171 of the Draft Guidance.

[20] European Commission, Consultation on Guidance on information exchange in the context of dual distribution, 4 February 2022, e.g. paragraphs 10, 13,14.

[21] Expert Report on the review of the Vertical Block Exemption Regulation: Information exchange in dual distribution.

[22] Paragraphs 10.174 – 10.176 of the Draft Guidance.

[23] Paragraphs 10.178 of the Draft Guidance.

[24] Paragraphs 10.179 of the Draft Guidance.

consider indefinite a five year non-compete which is tacitly renewable for a limited period e.g. three years only.

(41) As raised in previous submissions, we believe that the CMA has missed an opportunity to introduce a more reasonable and efficient approach, which could allow 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 would provide a more reasonable approach which reduces costs and administrative burdens as well as improving 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.

(42) We would encourage this to be reassessed once the VABEO and Draft Guidance is reviewed in six years' time.

8 Selective distribution

(43) The additional flexibility granted for the selective distribution networks in the VABEO is most welcome. In particular, it is helpful that the VABEO and the Draft Guidance allow for the combination of exclusive and selective distribution in the same or different geographies, which is still prohibited under the EU Revised VBER. However, there are a few ambiguities that require resolution.

(44) First, Article 8(2)(d) VABEO 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 in a selective distribution 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 even if it is part of a selective distribution network. This contradiction will need to be clarified in the VABEO.

(45) Similarly, paragraph 8.9 of the Draft Guidance replicates the example of "cross-supplies between authorised distributors" from the EU guidelines, which makes the ability to grant exclusivity to wholesalers within a selective distribution network only an exception which must meet certain requirements (e.g. investment in promotional activities which cannot be specified in a contract). This again contradicts the new flexibility introduced in Article 8(3)(a), which we understand would allow the combination of exclusivity and selectivity within the same territory without additional criteria needing to be met.

(46) Finally, paragraph 8.70 of the Draft Guidance seems to water down the permitted conduct under Article 8(3)(a) by stating that selective and exclusive distribution systems can be combined in the same territory only if two requirements are met: (i) they are imposed at different levels of the supply chain (i.e. wholesale and retail); and (ii) the exclusive wholesaler is not a member of the selective distribution system. It is unclear what it would mean for a wholesaler not to be a member of the selective distribution system in this context. Does this mean they are not required to sell only to authorised distributors (which would defeat the purpose of the provision) or that they themselves do not have to meet selective criteria to become a wholesaler for a selective distribution network? It would be helpful to receive guidance on this.

(47) 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 Revised 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. As such, it would be most helpful to resolve these ambiguities as they will invariably hamper the appetite of market players to make use of the newly granted flexibility. This could be addressed by adding the following drafting into Article 8(3)(c):

> *the provision of greater protection for members of selective distribution systems against active or passive sales from outside the geographical area of the selective distribution system to unauthorised distributors inside that geographical area.*

9 Other comments

(48) *Potential competitors*: the definition of a 'potential competitor' in paragraph 6.16 largely replicates the definition adopted in the EU Revised VBER but unhelpfully omits the reference to "one year" as an illustration of the short period within which entry should take place. The one year reference point has been a helpful benchmark, the removal of which creates legal uncertainty. We would urge the CMA to reinsert this reference in the final version of the VABEO.

(49) *Pass on*: we welcome the CMA's adoption of the pass on approach to exclusive territorial/customer restrictions in paragraph 8.57 and footnote 86. However, some ambiguity is created by retaining the reference in paragraph 8.55 to ensuring that such exclusivity restrictions do "*not limit sales by the customers of the buyer*" as this contradicts the pass on approach and sets as a default that pass on is not permitted. To maintain legal certainty, we would suggest removing this qualifier from the VABEO text and paragraph 8.55. We would also suggest that footnote 86, which states that pass on may benefit from the exemption subject to fulfilment of the VABEO conditions, should be clarified along the same lines as footnote 94 of the EU Revised VBER, which stipulates that the requisite condition for exemption relates to meeting the 30% market share threshold. Finally, it should be expressly stated that pass on applies also to restrictions on sales to unauthorised distributors in the context of selective distribution networks. It is unclear to us why exclusive and selective distribution models should not be treated equally in this respect.

Linklaters LLP, 9 May 2022