

Contribution to the public consultation on the  
Retained Vertical Agreements Block Exemption Regulation

## VABEO Draft Guidance: Consultation Response from Trainline

- (1) Trainline is an independent on-line rail and coach ticket vendor, selling rail and coach tickets to millions of travellers worldwide. Via our website and mobile app, people can seamlessly search, book and manage their journeys all in one place. We bring together routes, fares and journey times from over 270 rail and coach carriers across 45 countries. We offer our customers the best price for their journey and smart, real time travel information on the go. Our aim is to make rail and coach travel easier and more accessible, encouraging people to make more environmentally sustainable travel choices.
- (2) Trainline has sales licenses in place with the principal rail and coach operators in the United Kingdom – the Rail Delivery Group (“RDG”) and National Express – as well as most rail transport suppliers and a number of coach operators in mainland Europe.
- (3) Trainline welcomes the opportunity to contribute to the Consultation on the draft guidance to accompany the Vertical Agreements Block Exemption Order (the “Draft Guidance” and “VABEO”) and would like to provide the following comments in response to the Consultation questions.

### 1. Agency Agreements

- (4) We welcome the CMA’s express acknowledgment in the Draft Guidance that the relationship between an agent and its principal cannot be characterised as a true agency agreement in the context of the Chapter I prohibition “*where the agent does not bear any or only insignificant financial or commercial risk associated with the contracts concluded or negotiated on behalf of the principal*”.<sup>1</sup>
- (5) We have experienced attempts by railway carriers (hereafter “Suppliers”) to misuse the term ‘agent’ in relation to their agreements with online independent ticket vendors - online retailers - to try to escape the application of the rules embodied in the Chapter I prohibition (and Article 101 TFEU) and prevent such retailers from challenging hard core restrictions included in contracts. Therefore, Trainline supports the risk-based assessment of agency agreements and supports the CMA’s efforts to provide more explicit guidance on the operation of such assessments.
- (6) As the CMA is aware, the term ‘travel agent’ or ‘agent’ which can generically be used in relation to online travel agencies (“OTAs”) or online retailers, is not linked to the concept of ‘agent’ in competition law. Suppliers sometimes seek to argue that Trainline is an ‘agent’ (in order to try to impose restrictions on our selling prices) but we are not an ‘agent’ in the true sense of the word for CA98 purposes. For example, we bear significant costs and risks, including, but not limited to financial risk and cost associated with: (i) building and upgrading our technology platform and operating our own customer service centre; and (ii) ticket transactions on our platform, including the cost of processing payments, chargebacks and fraud; and (ii) marketing and advertising to attract travellers. As such, Trainline welcomes the clarification that the

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<sup>1</sup> Draft Guidance, para. 4.11.

description of the agreement by the parties involved is not material for the assessment of whether or not an agreement qualifies as an agency agreement for the purposes of Chapter I at paragraph 4.11, although would suggest that this be redrafted to make clear that the description of the agreement is not *relevant*, as the reference to materiality could be construed as attributing some (if minimal) importance to the qualification for these purposes.

- (7) Trainline particularly welcomes the risk-led approach to the classification of agency agreements contained in the Draft Guidance. Trainline would suggest that the features of agency agreements be updated to also preclude circumstances where the “agent” is acting for multiple principals. This would reconcile the guidance with existing case law and policy aims (cf. Whish/Bailey, Competition Law, 9th edn, p635; ECJ in *Vlaamse Reisbureaus v Sociale Dienst*, C-311/85, at 20), which is still relevant in the UK notwithstanding Brexit. As acknowledged at paragraph 4.21 of the Draft Guidance servicing large numbers of sellers in parallel prevents businesses like ours from effectively forming a part of any sellers’ undertaking and also requires significant investment outlay in order to perform such services effectively. In our view, including this criterion in the upfront assessment metrics for all agency agreements would help to expedite that assessment and simplify the procedure of making such determination.

## 2. Parity obligations

- (8) In the past, Suppliers have sought to impose various active and passive sales restrictions in agreements with Trainline (and presumably their other online authorised retailers), including inter alia restrictions to sell at best existing fare or prevention of access to all promotional / discounted fares.
- (9) Such vertical restraints are imposed on authorised independent online retailers but not on the Supplier’s own online distribution arm (with whom the former compete on the downstream retail market). Such practices are clearly discriminatory - their object is to protect the Supplier’s in-house retail channel (often, due to historical and/or incumbency reasons, the main channel) from competition. There is in fact no objective nor qualitative justification to explain this discrimination, since the independent online retailer is expressly authorised to sell the Suppliers’ products in the first place.
- (10) With this in mind, Trainline submits that, once the Supplier has authorised and granted a license to the independent online retailer to sell its tickets, it should grant the latter FRAND commercial conditions, including remuneration, and not maintain any discriminatory restrictions vis-à-vis its own downstream online retailing activities. No exemption should be granted when there is a clear discrimination between two distribution channels. Discriminatory restraints have considerable negative effects on competition: they hinder the activity of the independent online retailer, they reduce consumer welfare and also reduce competition at Supplier level.

## 3. Dual pricing

- (11) Trainline notes that the Draft Guidance maintains the position proposed in the VABEO Consultation that dual pricing, i.e. circumstances charge different prices depending on whether the retailer is reselling online or offline, should no longer be considered a hardcore restriction. The VABEO also gives Suppliers greater freedom to impose criteria for online sales that differ from offline sales.
- (12) Trainline remains of the view that dual pricing is not justifiable, especially in a context where the CMA recognises that a ban on internet selling is not compatible with the Chapter I prohibition.<sup>2</sup> Removing the hardcore restriction on dual pricing can in practice lead to the

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<sup>2</sup> Draft Guidance, para. 8.29.

effective prohibition of online sales by allowing Suppliers to increase the price for goods sold online to the extent that online sales may be rendered unviable. The removal of the restriction will therefore give train operators free rein to preference their own offline sales over the distributors with whom they ultimately compete or impose conditions on online sales that will disproportionately affect online-only businesses, such as Trainline's as well as other independent retailers of train tickets. This would inevitably reduce competition and thus have a detrimental impact on UK consumers.

- (13) While the CMA's recommendation in this regard referred to market developments that supposedly render the status quo inappropriate, it must be emphasised that not all sectors are the same. The CMA's conclusions in this regard seem to be uniquely derived from a review of online marketplaces and other platform-style sales; the business model for Trainline and equivalent market participants, however, is very different. As an independent online ticket vendor, Trainline is in a very different position to retailers of fast-moving consumer goods. For example, unlike most online retailers, we do not 'purchase' train tickets from train operators. Rather, the train fares are set by the operators and Trainline receives a small commission (REDACTED) which must cover our investments and costs so we are not able to offer any ongoing discounts. We also run marketing and provide customer service at our own cost. The bargaining power, therefore, remains very much with our Suppliers. We understand that the concern that has led the CMA to this decision is at least in part the perception that online retailers may "free ride" from offline retailers' investments but within market context of retailing rail tickets the CMA will appreciate that free-riding is not a realistic risk.
- (14) At the very least, therefore, the Draft Guidance should make clear that if dual pricing is no longer *per se* a hardcore restriction the factual circumstances will be relevant to determine whether dual pricing is in fact problematic in any particular situation. In particular, the Draft Guidance should make clear that restrictions on online sales that are tantamount to an effective ban on online vending remain prohibited, although Trainline remains steadfastly of the view that the removal of the hardcore restriction on dual pricing is unjustified.

#### 4. Restrictions equivalent to online sales bans

- (15) As explained in our VABEO Consultation response, one issue that Trainline has experienced which is not covered in the consultation is when Suppliers seek to restrict the use of certain ad words (not just trademarks) when bidding for online advertising. This is clearly a by object restriction of competition as explained by the European Commission in the *Guess* case, which remains law in the UK following Brexit and will continue to apply.
- (16) Trainline submits that the illustrative list of means by which Suppliers use restrictions related to online sales that prevent retailers from using the internet effectively to sell their products online should be updated to make reference to this practice at paragraph 8.38. For legal clarity, it should also be specified that the prohibition against the use of these practices applies to all types of distribution agreements (irrespective of whether they are selective, not selective, exclusive, non-exclusive).

#### 5. Resale price maintenance

- (17) Trainline welcomes the CMA's continued treatment of resale price maintenance ("RPM") as a hardcore restriction and, in particular, the Draft Guidance on the means by which RPM can be achieved via indirect means.
- (18) As explained in our VABEO Consultation response, certain Suppliers (i.e. rail carriers so far as Trainline is concerned) have precluded online ticket retailers such as Trainline from offering its own rebates and promotions in order to discount ticket prices for our customers. Such practices amount to RPM without any justification and inhibit customers' access to such reductions and so decrease competition in the market as those same Suppliers are the only market participants

in a position to offer rebates and promotions, skewing market power and removing the ability of prospective entrants into the market to utilise these sales techniques to attract new customers and attention.

- (19) The list of indirect means through which RPM can be achieved at paragraph 8.12 of the Draft Guidance is very useful. However, while we understand this list to be non-exhaustive, Trainline would appreciate the addition of *“prohibition on the granting of rebates, promotions, discount vouchers or reductions”* to this list, lest the item at paragraph 8.12(c) *“[m]aking the grant of reimbursements or the reimbursement of promotional costs by the supplier subject to the observance of a given price level”* be interpreted as the only circumstances in which restrictions on rebates are likely to fall foul of the hardcore restriction.
- (20) For the purposes of clarity we would also appreciate if the statement at paragraph 8.11 is amended to clarify that RPM is *“about the retailer’s ability to determine its onward price”* rather than the buyer’s. This is to clarify that RPM is also applicable to circumstances where tickets (or other products) are not sold to the reseller, but rather supplied on licence or similar terms, as is the case for online retailers of train tickets.
- (21) Finally, with respect to minimum advertised price policies, Trainline would suggest the addition of the following wording to clarify the position with respect to restrictions or penalties that achieve the same effect without resorting to outright prohibition:

*“Similarly, minimum advertised price policies (‘MAPs’), which prohibit, or effectively prevent, retailers from advertising prices below a certain amount set by the supplier...”*