CMA Vertical Agreements Block Exemption Regulation (VABER) Consultation

A response from the British Brands Group

Topic	Questions and response
General	Question 1: Do you agree with the CMA's proposed recommendation to the Secretary of State to make a Block Exemption Order to replace the retained VABER with a new UK VABEO, rather than letting it lapse without replacement or renewing without varying the retained VABER? a) Yes Question 2: Please explain your response providing, where possible, examples and evidence to support your answer. The British Brands Group represents branded product manufacturers of all sizes, operating primarily in fast-moving consumer goods categories (FMCG). Rules governing vertical agreements, and their interpretation, are of direct relevance to members in shaping the framework for their relationships with their distributors and so the Block Exemption Order. Such rules currently have a direct impact on market competition, innovation and consumer welfare and that is expected to continue. Where rules and their guidance provide a good level of legal certainty, help reduce costs and reflect market realities, they can be a positive force for value and growth creation. Question 3: How will the proposed UK VABEO as outlined in the CMA's proposed recommendation impact consumers? b) Moderate positive impact
Associations of undertakings	***Policy questions*** Question 4: What are your views on the CMA's proposed recommendation for agreements with association of undertakings to continue to benefit from the UK VABEO? Some of our members, notably those who sell in EU markets, have significant concerns over retailer buying alliances where the participants are above a certain size. Where alliances comprise retailers powerful in their own right, they reinforce the gatekeeper role of those large retailers, selling questionable 'services' for significant amounts of money from which shoppers tend not to benefit and use the delisting of products as direct punishment of those who refuse to co-operate. Such alliances, should they emerge in the UK market, should not be exempt from competition rules. It would be a helpful safety net were the Order to feature the safeguards outlined (confined to retailers and associations of retailers and no one retailer having a turnover >£44 million).

	Question 5: Do you think that the turnover threshold should be revised for agreements with associations of undertakings to benefit from the UK VABEO (in particular, to reflect market developments, growth, inflation and/or the UK market)? If so, please provide your views on what the new turnover threshold should be. The turnover threshold (£44 m) continues to be workable, in our view. ***Impact questions*** Question 6: To what extent is the exception for agreements with associations of undertakings, as outlined in the retained VABER, helpful to your business's operations or the operations of those you represent? b) Somewhat helpful Question 7: What would be the likely impact on your business's operations or the operations of those you represent if the turnover threshold was increased? d) Moderate negative impact Question 8: What would be the likely impact on your business's operations or the operations of those you represent if the turnover threshold was decreased? d) Moderate negative impact
Dual distribution	***Policy questions*** Question 9: What are your views on the CMA's proposed recommendation on dual distribution? The Group supports the CMA's proposals to retain the dual distribution exception without limiting its scope. Dual distribution allows a more widespread distribution of a product and may be the most efficient means of distribution. We consider the approach to be pro-competitive and to benefit consumers through additional choice, more points of sale and increased price competition. It also allows for branded suppliers to adapt and respond to all market incentives and consumer demands. However, we note that the EU VBER review has taken a narrower approach and while it still permits dual distribution within the 30% market share safe harbour, it has proposed to limit the safe harbour threshold to 10% for information sharing between suppliers and resellers in a dual distribution context. This is regrettable since it will raise potential issues of compliance and complexity for members, who may take the

	approach of applying the stricter set of EU rules across the board for ease of compliance and internal procedures. We however firmly support the CMA's proposed approach. Question 10: Do you think that additional guidance on information exchange in the context of dual distribution would be helpful? If so, please provide your views on what that guidance should say. 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 under the Order. It is widely accepted that the exchange of certain commercial information between operators at different levels of a vertical supply chain (*i.e.*, between a supplier and its distributor(s)) is part of normal business dialogue and tends to generate efficiencies. Brand owners may wish to collect information from their resellers for a number of legitimate reasons: • Understanding consumer profiles and trends • Assessing the outcome of an advertising operation or investment decision • Managing inventory efficiently We note that the consultation paper reports that information flows between the supplier and the buyer may, in certain circumstances, be problematic (paragraphs 3.7 and 3.8). Of much greater concern for manufacturers of branded consumer products involves information flows between powerful buyers (large grocery retailers) and their suppliers (private label product suppliers). This involves commercially sensitive and confidential information concerning product and marketing plans provided by the branded supplier to the buyer in order to gain store listing, shelf position and in-store and online retail support. Such information is provided to the buyer in its role as retail customer though the buyer is, at one and the same time, a direct horizontal product competitor. Such information should not be passed to its private label supplier though in practice it is, with no restraint (confidentiality agreements tend to be resisted). Guidance should clarify that information barriers be in place to prevent such flows. ***Impact questions*** Question 11: To what extent does the dual distribution exception for non-reciprocal vertical agreements, as outlined in the retained VABER, positively impact your business's operations or the operations of those you represent? Please explain your answer. c) Moderately

	Question 13: What would be the likely impact on your business's operations, or the operations of those you represent, if the dual distribution exception was not included in the UK VABEO at all? Please include examples and where possible, quantitative and/or qualitative evidence in your answer. The inability to rely on a block exemption for dual distribution would reduce intra-brand competition and lead suppliers to be cautious in their dealings with distributors whom they would suddenly have to treat as "direct competitors". Suppliers may then consider that they should rather refrain from making price recommendations to avoid any confusion with pricing discussions between direct competitors. They may no longer seek information from distributors, reducing efficiencies. They may also decide to move towards vertical integration or a third-party only model, in both cases, to the detriment of consumers. In the same way, resellers may become reluctant to join distribution networks or to share/sell sales data with/to their suppliers irrespective of the legitimate purpose of such sharing. This would impair the omni-channel experience. Firewall separations would be extremely costly, complex and cumbersome while harming the brand owner's decision-making process on innovation, product development and corresponding sales strategies that ultimately benefit consumers. The planning of demand and production volumes and inventory would be markedly less efficient and the seamless co-ordination of product launches or advertising campaigns across all channels impaired. Rather than develop a firewall, some brands may opt to launch certain brands or segments in one channel only, which would ultimately reduce competition and consumer satisfaction. Beyond harming intra-brand competition, removing the dual distribution element of the block exemption can also be expected to reduce inter-brand competition, as less dual distribution would mean less multi-brand stores and more brand-owned stores, resulting in less innovation and less choice for consumers.
Resale price maintenance	***Policy questions*** Question 15: Do you agree with the CMA's proposed recommendation on resale price maintenance (RPM)? There is scope for a more nuanced approach to RPM by taking into account market realities, the evolving retail landscape and the increased shift in market and bargaining power to retailers. At the same time, a clear recognition that competition and consumer welfare imply more

	than low prices but also product diversity, product availability, customer service and intangible qualities such as reputation and trust would be helpful. It should be explored, for example, whether RPM as a hardcore restriction is justified when parties have a very low market share, thus being subject to fierce inter-brand competition. An alternative approach would be to define only those agreements as having a clear and inevitable negative impact on competition as *by object* restrictions. Current competition policy focuses primarily on (limiting) the behaviour of suppliers/manufacturers on the assumption that they are the stronger party in the supplier-distributor relationship. That however is an outdated view. Concentration has increased significantly at the distribution level, with large grocery retailers and significant e-commerce pure-players creating very strong market positions. Where large retailers also compete horizontally and directly with branded manufacturers via their product label ranges, they hold many of the key levers of commercial success – whether to list the product, its position on shelf, its number of facings, its ranking position, related promotions and in-store or on-site communications. They of course also determine the consumer price, both of their own products and the competing branded products. We therefore advocate a more balanced approach to the supplier/retailer relationship by taking into account both sides' interests. It would be incorrect to assume that retailers act in the only interest of consumers, as profit maximisation drives all market operators, including retailers. Policy focus on low price alone leads to decreased scope for retailers to invest in customer services and a more limited possibility for brand owners to invest in product innovation, differentiation, quality and reputation. It should be recognised that large retailers, e-tailers and platforms can bring strong pressure to bear on suppliers for price and margin support to shield them against other retailers' low prices and that such instances may amount to RPM. Recommended retail prices ("RRPs") and price monitoring do not comprise an unlawful agreement to "*restrict the buyer's ability to determine its sale price*" and so should not be suspect. Brand owners have a stake in ensuring that their retailers are successful and need to communicate their resale price recommendations and the underlying reasons for them. Brand owners must also understand why retailers have not followed the recommendation, particularly if they have reacted to market forces of which brand owners are unaware. Such information may trigger innovation and further investment to adjust to market conditions and enhance efficiency from which consumers ultimately benefit. Such discussions should not be constrained.

	Similarly, brand owners should be able to collect data from retailers about their resale prices. Resale data helps inform brand owners' future strategy in areas such as production, development and marketing. Such conversations with retailers help with efficient product distribution and pricing and ensure the availability of products and should not be treated as interference with the commercial policy of the retailers or an indication of RPM. Such communications actually improve inter-brand competition on the merits. It would be helpful were any guidance to explain that, absent any pressure to fix the retail price, RRPs and maximum resale prices never amount to RPM, even in situations of market power, where therefore would not breach the Order. Question 16: Based on your experience, do you have any examples in practice of circumstances where RPM would lead to efficiencies that outweigh the restriction of competition? If so, please provide these examples. RPM might be an appropriate tool for a defined period in relation to new product launches, such that brand owners are better able to plan their likely return from their investment. This is particularly the case in consumer goods markets where large retailers with their own private label ranges, privy to the NPD plans of their branded product suppliers well ahead of the market, are in a position to launch competing private label products sooner than might otherwise be possible. They also control the retail price both of the innovative branded product and of their competing private label product. A block exemption, or at the least some detailed and further clarified guidance, on permissible RPM in relation to new products would increase certainty for both manufacturers and retailers and therefore encourage both to make the investments necessary to make market entry a success. Based on the time involved for a new product to enter successfully an already competitive market, a block exemption should apply for a period of no less than six months. Current theories of harm over RPM could not realistically materialise in the context of an RPM agreement of limited duration. As all parties are aware that the agreement will end after a short period, this severely restricts the expected profits from collusion while providing the stimulus for innovation. Question 17: Do you think that additional guidance on when RPM may lead to efficiencies would be helpful? If so, please provide your views on what that guidance should say. *Allow RPM to let manufacturers position the prices of new products* In such situations, there would seem to be no likelihood that RPM may lead to a supra-competitive price for the product at stake. Accordingly, we propose that fixed resale prices for new product launches implemented for an adequate duration (of up to six months) should be exempted to support innovation and better products for consumers.

	Allow RPM in case of a new product launches Guidance should clarify that the exemption for an introductory period of 6 months for RPM is unconditional, for example on contractual alternatives and types of distribution model. It would help to include the circumstances under which the 6-month exemption could be extended, for example to recoup investments). It would also help were the guidance to specify the criteria for determining a new product, which we suggest is any product that introduces substantial additional features to an existing product or requires significant investments in terms of research and development or promotion and marketing. ***Impact questions*** Question 18: What would be the likely impact on your business, or those you represent, if RPM were not treated as a hardcore restriction for the purposes of the proposed UK VABEO? Please explain your answer. a) Significant positive impact
Territorial and customer restrictions	***Policy questions*** Question 20: What are your views on the CMA's proposed recommendation on territorial and customer restrictions? In particular, what are your views on the CMA's proposed recommendation to: a) continue to treat territorial and customer restrictions as 'hardcore' restrictions so as to remove the benefit of the block exemption (subject to exceptions); b) maintain a distinction between active and passive sales; c) revisit the distinction between active and passive sales for certain types of online sales in the CMA VABEO Guidance; and d) change the current regime in order to give businesses more flexibility to design their distribution systems according to their needs? In your response please consider whether: a) there are any features of the UK internal market militating in favour or against retaining the treatment of territorial restrictions as 'hardcore' restrictions for the purposes of the UK VABEO; b) the distinction between active and passive sales remains valid and whether changes to this categorisation should be made in order to: i. clarify the situations where online sales amount to passive or active sales; or ii. give businesses more flexibility to combine different distribution models.

	Moving away from such a complex system based on the EU rules of free movement would be welcome as would taking away the complex concepts of active and passive sales in their entirety.
Indirect measures restricting online sales	***Policy questions*** Question 24: What are your views on the CMA's proposed recommendation on dual pricing and on the equivalence principle? We welcome the potential change of policy to reflect the current omni-channel commercial reality. As consumers expect a seamless shopping experience throughout their journey, whether offline, online or both, brand owners should be free to incentivise retailers to invest in those seamless shopping experiences across all channels. Online players no longer need protection over the brick-and-mortar channel and it is now the future of UK high streets that are at risk. Online sales now represent a significant proportion of total consumer sales and cover a wide range of product categories. Growth has accelerated during the pandemic and, while growth may now slow, online is predicted to remain a significant channel. Brand owners should be free to set different prices and to offer hybrid retailers discounts or compensations to reward and support their in-store efforts. As bricks-and-mortar stores need support and protection to survive, a more flexible approach is required and we endorse the intention to pursue this objective. Question 25: Do you agree that additional guidance on this issue would be helpful? If so, please provide your views on what that guidance should say. It would be helpful were the guidance to clarify that a supplier and its retailers are free to exchange information about the sales channel through which they sell the supplier's products since such activity is not indicative of any attempt to limit or restrict passive sales by the retailer. Suppliers need this information to adjust their strategy to consumer demand and the ever-evolving retail environment, and to remunerate appropriately the efforts made by hybrid retailers, either online and/or offline. The framework should explicitly allow a brand owner to collect this data and to reward a retailer for sharing such data, including in situations of dual distribution. The guidance should clarify that differential pricing is now, and in the future should remain, block-exempted, with brand owners free to adapt their commercial conditions, including their prices, to the type of retail store and breadth of product assortment, even if one retail group operates different types of outlets. This would enable them to reflect the different costs faced by different types of retailers and the different levels of investment made and services offered by those outlets when selling the brand owners' products.

	Guidance and consultation on dual pricing would be essential on the relevant levels involved where a practical effect would be sufficient to 'prohibit online sales' (which would presumably have to be at non-negligible levels) and for all parties (i.e. the supplier, online distributor and bricks-and-mortar store) to have an equal chance to justify their positions.
Parity obligations (or 'most favoured nation' clauses)	***Policy questions*** Question 29: What are your views on the CMA's proposed recommendation on parity (or 'most favoured nation') obligations? As part of this, you might like to consider whether indirect sales channel parity obligations1 can generate benefits/efficiencies beyond those that may be created by direct sales channel parity obligations – if so, please provide evidence or examples in practice of circumstances where this may be the case. We observe that the EU VBER review has taken a wider approach to MFNs and exempts all MFN obligations within the 30% safe harbour (except for certain MFNs used by e-commerce platforms, which are subject to guidance). The CMA's proposed recommendation instead proposes to treat all wide MFNs as a hardcore restriction regardless of the relevant market shares of the parties, following the CMA's insurance retail price comparison sites case. This is regrettable since it will raise potential issues of compliance and complexity for members with two sets of rules, and potentially imposes an overly strict UK set of rules broadly across all MFNs, without due market review when lower market shares are involved.
Non-compete obligations	
Agency	
Environmental sustainability	***Policy question*** Question 39: The CMA invites views on the proposed recommendation in respect of environmental sustainability and stakeholders to make any submissions they consider would help the CMA to develop useful guidance on this topic. We would support future guidance on sustainability in the context of vertical distribution competition laws. It would be important to consult on such guidance prior to adoption.

Duration	***Policy question*** Question 43: The CMA invites views on whether the UK VABEO should have a duration of 6 years. In light of the current uncertainty surrounding so many aspects of the commercial environment, we support a review after 6 years rather than the more usual 10. This should also provide ample time to explore areas of potential future liberalisation that may safeguard competition but at the same time stimulate innovation and the consumer benefits that flow from it.

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