

The retained Vertical Agreements Block Exemption Regulation

Consultation document

17 June 2021
CMA145con

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1. About the consultation

Introduction

- 1.1 Vertical agreements are agreements for the sale and purchase of goods or services between businesses operating at different levels of the production or distribution chain, for example, between manufacturers and wholesalers or retailers.
- 1.2 The Competition Act 1998 (the Act) prohibits anticompetitive agreements between firms (known as the Chapter I prohibition).¹ The prohibition applies to decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom (UK) and which may affect trade within the UK. However, section 9(1) of the Act provides an individual exemption for agreements which meet certain conditions, and block exemptions from the Chapter I prohibition also exist for specific categories of agreement.
- 1.3 The retained Vertical Agreements Block Exemption Regulation (retained VABER) sets out a block exemption from the Chapter I prohibition for vertical agreements provided that certain conditions are met.² This means that agreements between businesses that meet the conditions of the retained VABER are automatically exempt from the Chapter I prohibition (see **Annex B: Legal framework**).³ In this way, the retained VABER provides legal certainty for businesses.
- 1.4 As an example, a distribution agreement between a manufacturer and a wholesaler would be classed as a vertical agreement, because the contracting parties operate on different levels of the supply chain. Where these two parties have market shares of 30% or less on their relevant markets, the starting point is that the agreement would fall within the retained VABER, and would therefore be exempt from the Chapter I prohibition subject to meeting the relevant conditions (see **Annex B: Legal framework** for a detailed example). As a consequence of falling within the retained VABER, by meeting the relevant conditions, the parties do not need to conduct a further self-assessment as to whether the agreement infringes the Chapter I prohibition.

¹ The Act, section 2.

² The retained VABER is one of the 'retained exemptions' created by a combination of the operation of the European Union (Withdrawal) Act 2018 and the Competition (Amendment etc.) (EU Exit) Regulations 2019 (as amended by the Competition (Amendment etc.) (EU Exit) Regulations 2020). See here: <https://www.legislation.gov.uk/eur/2010/330/contents>.

³ Unless the block exemption has been cancelled, varied or revoked in accordance with the Act.

- 1.5 By way of background, before the UK's withdrawal from the European Union (EU), the EU Vertical Block Exemption Regulation (EU VBER)⁴ applied in the UK and provided an automatic exemption for vertical agreements meeting its conditions. When the Transition Period came to an end on 31 December 2020, such that EU laws ceased to apply in the UK, the EU VBER was retained in UK law (as the retained VABER). This meant that agreements in the UK could still benefit from the block exemption (both pre-existing and new agreements, provided that they meet the relevant conditions).⁵ That is the current position.
- 1.6 The Competition and Markets Authority (CMA) has reviewed the retained VABER for the purpose of making a recommendation to the Secretary of State for Business, Energy and Industrial Strategy (Secretary of State) in accordance with the Act about whether to replace the retained VABER when it expires on 31 May 2022.
- 1.7 The CMA is proposing to recommend that the Secretary of State replaces the retained VABER with a UK Vertical Agreements Block Exemption Order (UK VABEO). The CMA has developed this proposed recommendation following a review of the retained VABER and its effect on UK markets. The CMA's review has:
- (a) Drawn on relevant evidence from an evaluation of the EU VBER and related Guidelines on Vertical Restraints (the EU Vertical Guidelines)⁶ to which the CMA and UK stakeholders contributed actively, as the EU VBER was fully applicable in the UK during the period under review (the Evaluation).⁷ This Evaluation includes evidence relevant to the UK, including to businesses operating in the UK and to UK consumers.
 - (b) Gathered additional evidence relating specifically to the application of the retained VABER in the UK to supplement the evidence obtained during the Evaluation. This evidence was gathered by the CMA during roundtables and bilateral meetings with interested parties (the CMA roundtables), including:

⁴ Commission Regulation (EU) No 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices. The block exemption set out in this Regulation is substantively the same as the retained VABER except that it applies to the EU rather than the UK.

⁵ See **Annex B: Legal framework** for further details.

⁶ Guidelines on Vertical Restraints, European Commission, OJ C 130, 19.5.2010.

⁷ European Commission's Evaluation of the Vertical Block Exemption Regulation, SWD (2020) 173 final (Evaluation SWD).

- (i) businesses with operations in the UK that rely on the retained VABER (for example, suppliers of goods and services, distributors/retailers of goods and services, and platforms/intermediaries in e-commerce);
- (ii) law firms and economists advising businesses on the application of competition law to vertical agreements in the UK; and
- (iii) industry associations.

1.8 The CMA has sought input from consumer organisations with an interest in the UK market as part of its review. However, engagement by such organisations has been limited compared with the interest from representatives of businesses and their advisers. This perhaps reflects the technical nature of the retained VABER and the EU Vertical Guidelines, as well as the fact that both are primarily aimed at providing guidance to businesses regarding compliance with competition law. We very much hope that consumer groups will be encouraged to respond to the formal consultation.

Further detail regarding the CMA's review of the retained VABER and the Evaluation is set out in **Annex D: Evidence gathering**.

Scope of this consultation

- 1.9 This consultation document seeks views on the CMA's proposed recommendation to the Secretary of State to make a UK VABEO under section 6(1) of the Act in accordance with section 8(1) of the Act. As explained below in paragraph 1.15, the present document includes consultation questions that stakeholders are invited to consider when providing their views on the CMA's proposed recommendation.
- 1.10 The CMA's proposed recommendation is set out in detail in **Section 2**, alongside consultation questions.
- 1.11 From **Section 3** to **Section 7** the CMA addresses a number of issues relating to the UK VABEO. Each of those sections contains both policy and impact questions. The CMA will consider the responses to the policy questions in order to reach a view on how best to address the underlying substantive issues. The responses to the impact questions will be used to inform the preparation of an impact assessment of the CMA's final recommendation, if the Secretary of State decides to accept the recommendation. Accordingly, responses to the present consultation may be shared with BEIS for that impact assessment. For convenience, the list of consultation questions is set out in full in **Annex A**.

- 1.12 As explained further below (see paragraphs 1.27 and 1.28), after the consultation initiated by this consultation document, the CMA will prepare its final recommendation to the Secretary of State.
- 1.13 The CMA envisages preparing guidance to accompany any UK VABEO (CMA VABEO Guidance). This consultation document therefore includes references to some issues that the CMA proposes to address in any such CMA VABEO Guidance and not in the UK VABEO itself. The CMA will do more work on such Guidance in due course and plans to consult on it later this year or early next year so that it may be published at the same time as the UK VABEO would come into force. In the meantime, the EU Vertical Guidelines remain relevant to interpreting the retained VABER.⁸
- 1.14 This consultation on a UK VABEO is distinct from the European Commission's consultation on the EU VBER, which applies in the EU.⁹

Consultation process

How to respond

- 1.15 We are publishing this consultation document on the CMA webpages and drawing it to the attention of a range of stakeholders to invite comments. We welcome comments on the proposed recommendation to the Secretary of State to make a UK VABEO, as well as the specific issues we address in the proposed recommendation.
- 1.16 We encourage you to respond to the consultation in writing (by email) using the contact details provided in paragraph 1.19 below. Please provide supporting evidence or examples for your views where possible.
- 1.17 When responding to this consultation, please state whether you are responding as an individual or are representing the views of a group or organisation. If the latter, please make clear who you are representing and their role or interest.
- 1.18 In accordance with our policy of openness and transparency, we will publish non-confidential versions of responses on our webpages. If your response contains any information that you regard as sensitive and that you would not wish to be published, please provide at the same time a non-confidential

⁸ As set out in the CMA's *Guidance on the functions of the CMA after the end of the Transition Period* (CMA 125) at paragraph 4.36, such guidance constitutes a relevant statement of the European Commission to which the CMA, concurrent regulators and UK courts must have regard after 31 December 2020.

⁹ For further details see: https://ec.europa.eu/competition/consultations/2018_vber/index_en.html

version for publication on our webpages which omits that material and which explains why you regard it as sensitive.

Duration

- 1.19 The consultation will run for 5 weeks, from 17 June 2021 to 22 July 2021. Responses should be submitted by email by 5:00 p.m. on 22 July 2021 and should be sent to: vberreview@cma.gov.uk.

Compliance with government consultation principles

- 1.20 In preparing this consultation document, the CMA has taken into account the published [government consultation principles](#), which set out the principles that government departments and other public bodies should adopt when consulting with stakeholders.

Statement about how we use information and personal data that is supplied in consultation responses

- 1.21 Any personal data that you supply in responding to this consultation will be processed by the CMA, as controller, in line with data protection legislation. This legislation is the General Data Protection Regulation 2016 (GDPR) and the Data Protection Act 2018. 'Personal data' is information which relates to a living individual who may be identifiable from it.
- 1.22 We are processing this personal data for the purposes of our work. This processing is necessary for the performance of our functions and is carried out in the public interest, in order to take consultation responses into account and to ensure that we properly consult on the proposed recommendation to the Secretary of State before it is finalised.
- 1.23 For more information about how the CMA processes personal data, your rights in relation to that personal data, how to contact us, details of the CMA's Data Protection Officer, and how long we retain personal data, see our [Privacy Notice](#).
- 1.24 Our use of all information and personal data that we receive is also subject to Part 9 of the Enterprise Act 2002. We may wish to refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, so far as practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, might, in our opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business. If you consider that your

response contains such information, please identify the relevant information, mark it as 'confidential' and explain why you consider that it is confidential.

- 1.25 Please note that information and personal data provided in response to this consultation may be the subject of requests by members of the public under the Freedom of Information Act 2000. In responding to such requests, we will take fully into consideration representations made by you in support of confidentiality. We will also be mindful of our responsibilities under the data protection legislation referred to above and under Part 9 of the Enterprise Act 2002.
- 1.26 If you are replying by email, this statement overrides any standard confidentiality disclaimer that may be generated by your organisation's IT system.

Next steps

- 1.27 After the consultation, the CMA will prepare its final recommendation to the Secretary of State.
- 1.28 The CMA will publish the final version of the recommendation to the Secretary of State on its webpages at <http://www.gov.uk/cma>. The CMA will also publish a summary of the responses received during the consultation. These documents will be available on our webpages and respondents will be notified when they are available.

2. The CMA's proposed recommendation

- 2.1 The CMA's proposed recommendation to the Secretary of State is that it would be appropriate to replace the retained VABER when it expires on 31 May 2022 with a UK VABEO, tailored to the needs of businesses operating in the UK and UK consumers.¹⁰ The CMA's proposed recommendation is that the UK VABEO would make certain important amendments to the current regime. The detail of the CMA's proposed recommendation for the UK VABEO (including those amendments) is set out in paragraphs 2.11 to 2.19 below.
- 2.2 As noted below, a relevant consideration for the proposed recommendation has been that participants at the CMA roundtables have indicated that in some instances divergence from the EU regime could result in compliance costs for some firms. The CMA has also taken into account that there will be an opportunity for further reconsideration of the 'safe harbour' available for vertical agreements within a relatively short time frame as described in **Section 7** below.
- 2.3 Overall, the evidence gathered indicates that a vertical agreements block exemption is a relevant and useful tool for businesses.¹¹ In particular, it is beneficial to have a 'safe harbour' for categories of vertical agreements that are considered likely to satisfy the requirements for exemption under section 9 of the Act¹² as such agreements will often generate benefits through promoting efficiencies, promoting non-price competition, and/or promoting investment and innovation.¹³
- 2.4 A vertical agreements block exemption has a number of benefits for businesses. First, it provides legal certainty to businesses as it enables them to know in advance how to ensure that their vertical agreements (ie agreements between businesses at different levels of the supply chain, such as between a manufacturer and a distributor) comply with competition law. Second, it avoids placing on businesses the burden of scrutinising a large

¹⁰ The replacement will result in the adoption of a UK block exemption order under section 6 of the Act (Part I of the Act), the provisions of which will be interpreted in accordance with section 60A of the Act (see the CMA's *Guidance on the functions of the CMA after the end of the Transition Period* (Brexit Guidance), paragraphs 4.18–4.24).

¹¹ See **Annex D: Evidence gathering** summarising the evidence gathered during the CMA roundtables held in March and April 2021; the EU SWD Evaluation, page 91 and the European Commission Press Release on findings ([Antitrust: Vertical Block Exemption Regulation \(europa.eu\)](#)).

¹² See **Annex B: Legal framework** for these requirements.

¹³ Notably, before the UK and EU systems of competition were aligned on 1 May 2004, the vast majority of vertical agreements were excluded from the application of competition law in the UK under the UK Exclusion Order, made under section 50 of the Act. The UK Exclusion Order had only one 'hardcore' restriction, which related to price-fixing.

number of essentially benign agreements that are likely to satisfy the requirements for exemption under section 9 of the Act. Third, the existence of a block exemption also ensures consistency of approach by providing a common framework for businesses to assess their vertical agreements against the Chapter I prohibition.

- 2.5 A vertical agreements block exemption also helps to ensure that the CMA does not need to spend time scrutinising these essentially benign agreements, and so is able to concentrate its resources on other matters that are more likely to give rise to significant competition concerns. In this regard, the CMA notes that the various conditions of the current block exemption ensure that it is unlikely to apply to agreements that may give rise to significant competition concerns.¹⁴
- 2.6 Given the evidence in favour of a vertical agreements block exemption, the CMA has concluded that there should be a safe harbour for some vertical agreements and that letting the retained VABER expire without providing for a replacement is not currently appropriate in the UK.
- 2.7 The evidence we have so far gathered also indicates that the current regime for the vertical agreements block exemption should be revised in certain respects. In particular, participants at the CMA roundtables have underlined several areas where the retained VABER could be brought up to date to reflect market conditions better.¹⁵ Such feedback was also given by stakeholders in the Evaluation which identified a number of issues with regard to the functioning of the rules.¹⁶
- 2.8 Given this evidence, the CMA has concluded that there are some issues with the current regime which warrant change and that it would not be appropriate simply to renew the existing retained VABER in its current form. In **Sections 3 to 7** of this document, the CMA sets out detailed analysis of its proposed changes to the current regime and also its thinking on areas in respect of which it is not proposing changes.
- 2.9 Lastly, although the UK is now outside of the EU regime, participants at the CMA roundtables have indicated that a degree of alignment with the EU approach is likely to reduce compliance costs for businesses which do business both in the UK and in the EU, and that the CMA should have regard

¹⁴ For example, through the operation of the market share threshold and list of hardcore and excluded restrictions – see **Annex B: Legal framework** for further explanation regarding the operation of the retained VABER.

¹⁵ See **Annex D: Evidence gathering**.

¹⁶ Evaluation SWD, pp75, 106 and 114.

to the implications of divergence from the EU regime.¹⁷ This consideration has been taken into account when considering changes.

- 2.10 **Annex C: Alternative policy options** sets out in more detail the reasons why the CMA does not recommend either (i) allowing the retained VABER to lapse without providing for a replacement; or (ii) renewing the existing retained VABER in its current form.

Detail of the CMA's proposed recommendation for the UK VABEO

- 2.11 In making its proposed recommendation to the Secretary of State, the CMA considers that large-scale and fundamental changes to the current exemption for vertical agreements are not appropriate. However, the CMA is proposing that the UK VABEO should incorporate certain important amendments set out below as finalised following consideration of the views expressed during the present consultation. The following paragraphs set out details of the CMA's proposed recommendation and follows the structure of the retained VABER.
- 2.12 The CMA's proposed recommendation to the Secretary of State is that the following provisions regarding the scope of the retained VABER remain unchanged in substance in the UK VABEO:
- (a) Definitions (Article 1 of the retained VABER), other than in the case of either the addition of new definitions, or amendments to existing definitions, required to implement the proposed recommendations set out below.
 - (b) Exemption (Articles 2 and 8 of the retained VABER), other than in the case of Article 2(4) of the retained VABER which, as mentioned in more detail in **Section 3**, the CMA is proposing to extend so as also to cover dual distribution by wholesalers and/or importers.
 - (c) Market share thresholds (Articles 3 and 7 of the retained VABER).
- 2.13 With regard to the hardcore restrictions (Article 4 of the retained VABER), as explained in more detail in **Section 4**, the CMA is proposing that the current rules remain appropriate, except for the following:
- (a) Territorial and customer restrictions (paragraphs 4.12 to 4.42) – to clarify where the boundary between active and passive sales should be, in the light of market developments such as the growth of online sales.

¹⁷ See **Annex D: Evidence gathering**.

- (b) Indirect measures restricting online sales (paragraphs 4.43 to 4.56) – to remove the prohibition of dual pricing and the requirement for overall equivalence from the list of hardcore restrictions.
 - (c) Parity obligations (or ‘most favoured nation’ clauses) (paragraphs 4.57 to 4.76) – to add wide parity obligations to the list of hardcore restrictions.
- 2.14 The CMA’s proposed recommendation to the Secretary of State is that resale price maintenance remains a hardcore restriction in the UK VABEO. As mentioned in more detail in **Section 4** (paragraphs 4.1 to 4.11), the CMA is proposing to provide further guidance on this issue in the CMA VABEO Guidance.
- 2.15 With regard to the excluded restrictions (Article 5 of the retained VABER), as mentioned in more detail in **Section 5**, the CMA’s proposed recommendation to the Secretary of State is that the current rules remain appropriate, including in relation to the treatment of non-compete obligations.
- 2.16 As explained in **Section 7**, the CMA proposes that the UK VABEO should contain a provision specifying that it should cease to have effect, ie expire, as envisaged in section 6(7) of the Act (a provision in a form which is similar to that in Article 10 of the retained VABER). The CMA proposes that the UK VABEO should expire after a period of 6 years.
- 2.17 As explained in **Section 8**, the CMA proposes that the UK VABEO should also contain:
- (a) a provision specifying that there should be a transitional period of one year;¹⁸
 - (b) as envisioned in section 6(6)(c) of the Act, a provision specifying that, if the CMA considers that a particular agreement is not an agreement which is exempt from the Chapter I prohibition as a result of section 9 of the Act, it may cancel (ie withdraw) the benefit of the block exemption in respect of that agreement;¹⁹ and

¹⁸ A provision similar to that in Article 9 of the EU VBER.

¹⁹ Provisions similar to that in articles 19–21 of the Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption) Order 2001.

(c) in accordance with section 6(5) of the Act, a provision specifying that the block exemption is subject to an obligation to provide information if requested.²⁰

2.18 Finally, as explained in **Section 6**, the CMA also proposes to provide clarifications in CMA VABEO Guidance on the following issues which are not addressed in the retained VABER itself or the proposed recommendation for a UK VABEO:

(a) agency agreements (including issues relating to online platforms, fulfilment contracts and dual role agents); and

(b) considerations relating to environmental sustainability.

2.19 The CMA is inviting views from all stakeholders on the specific questions relating to each of the proposed changes set out in **Sections 3 to 7** (for readers' convenience, all of the consultation questions from throughout the document can be found in **Annex A**).

Policy and impact questions

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

b) No

c) Not sure

Question 2: Please explain your response providing, where possible, examples and evidence to support your answer.

Question 3: How will the proposed UK VABEO as outlined in the CMA's proposed recommendation impact consumers?

a) Significant positive impact

b) Moderate positive impact

²⁰ Provisions similar to that in articles 17–18 and 20–21 of the Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption) Order 2001.

- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

3. Scope of the UK VABEO

Associations of undertakings

Current regime and views from stakeholders

- 3.1 Vertical agreements entered into between an association of undertakings and its members, or between such an association and its suppliers may benefit from the retained VABER if (i) all its members are retailers of goods (ie they resell goods to final consumers) and (ii) no individual member of the association, together with its connected undertakings, has a total annual turnover exceeding GBP 44 million (Article 2(2) of the retained VABER²¹). This provision may, for example, apply to an association of small retailers established for the purchase of goods.
- 3.2 The participants of the CMA roundtables did not provide any views on this provision of the retained VABER. The Evaluation showed that stakeholders generally consider that these provisions have worked well.²²

Recommendation

- 3.3 The CMA proposes that agreements with associations of undertakings should benefit from the UK VABEO under the same conditions as the retained VABER. However, the CMA invites views as to whether the turnover threshold of GBP 44 million remains appropriate or should be revised to reflect market developments, growth, inflation and/or the UK market.

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?

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.

²¹ The Competition (Amendment etc.) (EU Exit) Regulations 2019, section 5(3)(b).

²² Evaluation SWD, p153.

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?

- a) Very helpful
- a) Somewhat helpful
- b) Irrelevant
- c) Unhelpful
- d) Very unhelpful

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?

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant 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?

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

Dual distribution

Current regime and views from stakeholders

- 3.4 In general, the retained VABER does not apply to agreements between competitors. However, Article 2(4) of the retained VABER provides an exception for 'dual distribution' arrangements – that is, non-reciprocal vertical agreements between competitors where:
- (a) the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing level; or
 - (b) the supplier is a provider of services at several levels of trade, while the buyer provides its goods or services at the retail level and is not a competing undertaking at the level of trade from which it purchases the contract services.
- 3.5 During the CMA roundtables, a substantial number of participants told the CMA that it is important for them to be able to rely on the dual distribution exception. They noted that several market changes (including the general trend towards greater online sales in recent years, which has now been accelerated by the Coronavirus (COVID-19) pandemic) have had the effect that manufacturers tend to have greater involvement in direct distribution to customers. They also indicated that consumers tend to expect that they will be able to access products and services through a variety of online and offline distribution channels, leading to many suppliers adopting what is commonly referred to as an 'omni-channel' strategy.
- 3.6 The majority of participants in the roundtables were in favour of retaining the exception for dual distribution. Those participants, who represented or advised various businesses, noted that, given the prevalence of dual distribution, the removal of the exception would be detrimental. In particular, it would result in higher costs for suppliers, which would have to change their existing arrangements. In their view, the large-scale review of contractual arrangements that would be required as a result of such a significant change would add complexity and cost with no clear benefits for consumers. Further, some participants told the CMA that the theories of harm regarding dual distribution had not been well articulated by competition authorities; in other words, they were not convinced there was in fact a competition concern that needed to be resolved.
- 3.7 However, several participants recognised that information flows between the supplier and the buyer, which may arise in dual distribution scenarios, may be

problematic as they can give rise to horizontal competition concerns at the retail level. This might be the case for strategic information on current or future sales and margins, the exchange of which can grant the manufacturer an unfair competitive advantage if that manufacturer is also active at the retail level or lead to collusive outcomes between undertakings. On this basis, some participants therefore suggested that the dual distribution exception should not be included in a UK VABEO following the expiry of the retained VABER.

- 3.8 In any event, the majority of the views expressed at the CMA roundtables supported the provision of further clarity and guidance on this issue. In that regard, participants noted that, to the extent certain types of information exchange are considered problematic, there are ways to address the issue in practice (eg by using information barriers within firms or establishing separate 'clean' teams²³). However, it was also noted that the introduction of these mechanisms may not always be feasible, in particular for smaller businesses.
- 3.9 Some participants, who represented or advised various businesses, suggested that the flow of information between supplier and buyer is ancillary to the distribution relationship and that the provision of information should be viewed as legitimate in this context, as long as it is not used for the implementation of hardcore restrictions. For example, the provision of certain types of information (such volume and sales figures) can be used to improve products and ensure better responses to customer demand, in particular in the context of increased use of 'omni-channel' retail strategies.
- 3.10 The majority of participants were not in favour of introducing an additional (lower) market share threshold at the retail level for dual distribution arrangements to reduce the risk of the block exemption applying to agreements that raise horizontal competition concerns.²⁴ They noted that it would be difficult to assess downstream market shares, particularly for smaller businesses, and more generally that this would reduce legal certainty for businesses.
- 3.11 Finally, some participants supported the extension of the dual distribution exception to wholesalers and independent importers who are also active in the downstream market, as they are in a similar situation to that of a manufacturer in a dual distribution scenario.

²³ In other words, keeping staff responsible for relationships with independent resellers separate from those making pricing decisions for the organisation's direct to customer business.

²⁴ Except for some representatives of the automotive industry who were in favour of introducing an additional lower market share threshold for this exemption (eg 20% combined share in the retail market in line with the block exemption for specialisation agreements).

- 3.12 A summary of the views put forward at the CMA roundtables is in **Annex D: Evidence gathering**.
- 3.13 The CMA has also taken into account the evidence gathered during the Evaluation. The Evaluation noted that most stakeholders expressed the view that the exemption of dual distribution should remain part of the EU VBER. However, stakeholders also pointed out that the rules do not adequately reflect several issues that have become more prominent with the increased importance of dual distribution over time, particularly as a result of the increasing digitalisation and the growth of online sales. Such issues include:
- (a) lack of clarity about whether information exchanges between the supplier and buyer are part of the vertical relationship and therefore benefit from the block exemption;
 - (b) whether wholesalers or independent importers which are also active in the downstream market are wrongly excluded from the benefit of EU VBER; and
 - (c) lack of clarity with regard to the relationship between hybrid platforms (which act as both suppliers of online platform/intermediation services and retailers) and the sellers present on such platforms.²⁵

Recommendation

- 3.14 The CMA proposes that the UK VABEO should include an exception for dual distribution in the same form as in the retained VABER, but which also applies to dual distribution by wholesalers and by importers.
- 3.15 The CMA's proposed recommendation is based on feedback received in the context of the CMA roundtables and the Evaluation.²⁶ The feedback shows that it is unclear to what extent dual distribution scenarios involving other suppliers would be different from dual distribution by a manufacturer. It therefore appears reasonable to extend the exemption to wholesalers and independent importers who are also active in the downstream market. During the CMA roundtables there was no indication that a different approach should be taken in the UK.²⁷
- 3.16 The CMA has considered whether the UK VABEO should include an exception for dual distribution at all, or whether the exception should be

²⁵ Evaluation SWD, pp156–159.

²⁶ See paragraphs 3.5-3.13.

²⁷ See paragraph 3.11.

limited in scope (eg by introducing an additional (lower) market share threshold). However, having considered the evidence gathered during the CMA roundtables and the Evaluation,²⁸ the CMA does not propose either removing the dual distribution exception or limiting its scope, because:

- (a) Businesses of all sizes and in all sectors commonly operate a dual distribution model (particularly given the growth in online sales)²⁹ with significant benefits to direct sellers, retailers and consumers (eg increased market penetration for direct sellers and retailers, increased choice for consumers, better adaptation to the market's needs, and innovation in distribution models).
- (b) The insertion of an additional market share threshold is likely to add complexity and uncertainty for businesses and the benefits of doing so are unclear at this stage. Further, it is not clear what alternative market share threshold would be appropriate in limiting the application of the dual distribution exception.

3.17 In some cases, potential competition concerns arising from the provision of competitively sensitive information between suppliers and their distributors can be addressed through the use of information barriers. The CMA considers that this is a matter best left for self-assessment by businesses. The CMA is considering whether to provide more guidance on information exchange in the context of dual distribution in CMA VABEO Guidance.³⁰

Policy questions

Question 9: What are your views on the CMA's proposed recommendation on dual distribution?

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.

²⁸ See paragraphs 3.5-3.13.

²⁹ The growth of online sales and, more recently, the Coronavirus (COVID-19) pandemic have accelerated the tendency for manufacturers to increase their presence at distribution level.

³⁰ The need for further guidance on information exchange in the context of dual distribution was highlighted in the CMA roundtables by a number of participants.

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.

- a) Completely
- b) Very much
- c) Moderately
- d) A little
- e) Not at all

Question 12: To what extent does the dual distribution exception for non-reciprocal vertical agreements, as outlined in the retained VABER, negatively impact your business's operations or the operations of those you represent? Please explain your answer.

- a) Completely
- b) Very much
- c) Moderately
- d) A little
- e) Not at all

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.

Question 14: Do you consider the CMA's proposed recommendation, which also applies the exception to dual distribution by wholesalers and by importers, to have a positive or negative impact on business operations? Please explain your answer.

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact

e) Significant negative impact

4. Hardcore restrictions

Resale price maintenance

Current regime and views from stakeholders

- 4.1 Resale price maintenance (RPM) is a hardcore restriction under Article 4(a) of the retained VABER. This means that agreements that restrict the buyer's ability to determine its sale price cannot benefit from the safe harbour offered by the retained VABER. RPM is well-established as an infringement 'by object' under UK (and EU) competition law.³¹ It may nevertheless qualify for an individual exemption if it generates efficiencies which fulfil the requirements under section 9 of the Act.³²
- 4.2 The CMA has issued several decisions finding that RPM is an infringement 'by object'.³³ In a recent judgment, the Competition Appeal Tribunal upheld the penalty imposed by the CMA on Roland for RPM, which the Tribunal considered to be a serious restriction of competition by object:

'In assessing the relative seriousness of RPM, it is necessary to consider the harm to competition which RPM causes. The immediate effect of RPM is to restrict resellers' freedom to set their own prices and to compete fully and effectively. RPM restricts intra-brand competition and tends to increase the prices paid by consumers for a particular brand...

The Vertical Guidelines identify seven respects in which RPM may restrict competition. These include, in addition to the direct effect on reseller's prices, the possibility of collusion between suppliers and between distributors, the softening of competition between manufacturers and/or distributors, the foreclosing of smaller rivals, and a reduction in dynamism and innovation at the distribution level'.³⁴

³¹ RPM is also well-established as a 'by object' infringement under EU law. This is in contrast with the position adopted in the US. The US Supreme Court's judgment in *Leegin Creative Leather Products Inc v PSKS Inc* 551 US 877 (2007) overturned the rule that RPM was illegal 'per se' under the Sherman Act and found by a majority that RPM should instead be subject to the 'rule of reason' (ie a case-by-case analysis of the effects of the conduct in question).

³² The fact that RPM may benefit from an individual exemption under Article 101(3) of the Treaty is currently reflected in the EU Vertical Guidelines (paragraphs 223–229).

³³ John Bruce (2002); Commercial refrigeration (2016); Domestic light fittings (2017); Fender (2020); Roland (2020); GAK (2020); Yamaha (2020).

³⁴ *Roland v Competition and Markets Authority*, [2021] CAT 8, paragraphs 81–82.

- 4.3 Notwithstanding the current position, during the CMA roundtables some participants expressed the view that the CMA should recommend removing RPM from the list of hardcore restrictions. In their view, the theories of harm concerning RPM were not sufficiently strong to warrant its categorisation as a hardcore restriction in the retained VABER (and as a ‘by object’ restriction under UK law), particularly in instances where inter-brand competition was strong or the parties involved did not have significant market power.
- 4.4 Other participants mentioned that the current approach to RPM has led businesses to be overly cautious about the use of any form of pricing strategy that may be (wrongly) perceived as RPM, for example recommended retail prices or maximum prices.
- 4.5 There was a broad consensus among participants that demonstrating efficiencies to justify RPM is a risky, difficult exercise and that such difficulties may be hindering businesses in terms of their willingness to engage in potentially efficiency-enhancing RPM. This was despite the inclusion of guidance about such potential efficiencies in the EU Vertical Guidelines.
- 4.6 A few participants suggested that more guidance on the situations in which RPM could be considered pro-competitive and therefore exempt under section 9 of the Act would be welcomed and might encourage businesses to pursue genuinely pro-competitive arrangements. However, other participants were more sceptical and considered that, even with more guidance about potential efficiencies, businesses are likely to be reluctant to take the risk of being found to have committed a ‘by object’ infringement.³⁵
- 4.7 A summary of the views put forward at the CMA roundtables is at **Annex D: Evidence gathering**.
- 4.8 Whereas the majority of respondents to the Evaluation (mainly distributors and retailers) agreed that RPM should be a hardcore restriction, a significant number (mainly suppliers) argued that RPM should not be included in the list of hardcore restrictions and that this has led to over-enforcement of RPM practices. It therefore remains an area of debate, despite RPM being well established in law as a ‘by object’ infringement.³⁶
- 4.9 The Evaluation³⁷ also noted that stakeholders called for more guidance regarding the circumstances under which recommended or maximum resale

³⁵ According to one participant another area where further clarity was needed was the scope of the application of the prohibition of RPM to fulfilment contracts and franchise agreements.

³⁶ See footnote 31 above.

³⁷ Evaluation SWD, p80.

prices could amount to RPM and more clarity regarding the conditions under which RPM can benefit from the exemption under Article 101(3) of the Treaty on the Functioning of the European Union (the Treaty).³⁸

Recommendation

- 4.10 On the basis of the evidence set out in the previous section, the CMA proposes that RPM remains a hardcore restriction under the UK VABEO (in the same form as the retained VABER). This approach is consistent with the well-established principle that RPM amounts to a restriction of competition by object (see paragraph 4.2 above). Further, the CMA is of the provisional view that treating RPM as a ‘hardcore’ restriction for the purposes of the UK VABEO, thus excluding it from block exemption, is an appropriate approach in terms of deterring RPM in all but those cases where it can be shown on an individual analysis that the exemption criteria in section 9 of the Act are met. Finally, the CMA notes that, in the context of the Evaluation, the CMA roundtables and the CMA’s enforcement experience, there is an absence of strong evidence of RPM giving rise to actual efficiencies that would outweigh concerns about serious harm to competition or that could not be achieved through less restrictive measures.
- 4.11 Notwithstanding the above, the CMA is minded to clarify in the CMA VABEO Guidance that it remains open to carefully and objectively considering any efficiency arguments made in the course of any investigations under the Act. This is to ensure that businesses that intend to engage in RPM are not deterred from doing so when they genuinely consider it is justified on the basis of efficiencies assessed under section 9 of the Act.

Policy questions

Question 15: Do you agree with the CMA’s proposed recommendation on resale price maintenance (RPM)?

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.

³⁸ At EU level the European Commission in its Inception Impact Assessment has not proposed any changes to the current approach and therefore RPM is likely to remain as a ‘hardcore’ restriction of competition. This is in contrast with the approach taken in other jurisdictions such as in the US where RPM is not per se unlawful but rather must be assessed under the rule of reason.

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.

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
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

Question 19: Are you aware of, or have you encountered, any difficulties in your business as a result of the treatment of RPM as a hardcore restriction for the purposes of the retained VABER? If so, please give examples.

Territorial and customer restrictions

Current regime and views from stakeholders

- 4.12 Vertical agreements that restrict the territory into which, or the customers to whom, a buyer can sell are treated as hardcore restrictions of competition under Article 4(b) of the retained VABER.³⁹
- 4.13 The general rule is that the buyer should be allowed to approach individual customers actively ('active' sales) and to respond to unsolicited requests from individual customers ('passive' sales).
- 4.14 The current rules in Article 4(b) of the retained VABER do not block exempt the restriction of active or passive sales in the UK except in limited circumstances. The limited circumstances in which restrictions of active sales in the UK are block exempt by the retained VABER include, for example, restricting active sales by other distributors into a territory granted to an

³⁹ Where this document refers to territorial restrictions it should be understood as referring to both agreements that restrict the territory into which the buyer can sell and agreements that restrict the customers to whom the buyer can sell, unless otherwise specified.

exclusive distributor to protect the exclusive distributor's investments (Article 4(b)(i)) or to protect members of a selective distribution system by preventing sales being made to unauthorised distributors located in the same territory (Article 4(b)(iii)). Restrictions of passive sales in the UK are block exempt in certain cases, but these are more limited (for example in the case of restrictions of sales to end users by wholesalers).

- 4.15 The approach in the retained VABER reflects an extensive body of retained EU case law in which Article 101 of the Treaty – the EU equivalent of the Chapter I prohibition – has been applied by the European Commission and by the EU Courts, at least in part, with the objective of EU single market integration in mind.⁴⁰ In *Consten and Grundig v Commission*, the Court of Justice of the EU held that vertical agreements are caught by Article 101 of the Treaty and found that an exclusive distribution agreement in which the distributor was to enjoy absolute territorial protection restricted competition by object.⁴¹
- 4.16 Since then, the European Commission and the EU Courts have consistently deemed absolute territorial and customer restrictions to be restrictions of competition by object on the basis that they create obstacles to market integration (including by limiting the possibility for consumers to purchase goods or services in any member state of the EU they choose).
- 4.17 The EU approach to territorial and customer restrictions is reflected in UK case law, as well as the decisional practice of the CMA and its predecessor body, the Office of Fair Trading (OFT). For example, following the CMA's decision in *Ping*, involving an infringement of both Article 101 of the Treaty and the Chapter I prohibition, the Competition Appeal Tribunal held on appeal that a ban on selling on the internet (a form of territorial and customer restriction) amounted to a restriction of competition by object.⁴² On further appeal, the Court of Appeal confirmed that such restrictions can restrict competition irrespective of any single market considerations, referring to the fact that '*as a result of the limitation on the ability of a retailer to compete for*

⁴⁰ In accordance with section 6(3) to 6(6) of the European Union (Withdrawal) Act 2018, any question as to the validity, meaning or effect of unmodified retained EU law is to be decided, so far as they are relevant to it, in accordance with any case law and general principles of the CJEU laid down up until 31 December 2020.

⁴¹ Joined Cases 56 and 58/64, E.C.R. 299 at 342 (1966). Other relevant CJEU judgments which upheld the importance of the single market imperative include cases C-501/06P, C-513/06P, C-515/06P and C-519/06P, *GlaxoSmithKline Services Unlimited v Commission*, paragraph 61, and cases C-403/08 and C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others* and *Karen Murphy v Media Protection Services Ltd*, paragraph 139.

⁴² *Ping Europe Limited v Competition and Markets Authority* [2018] CAT 13.

*sales to customers beyond their geographic range, there is a diminution in price competition’.*⁴³

- 4.18 The OFT in its investigation into prohibitions on online sales and online price advertising of Roma-branded mobility scooters, similarly found that the restrictions prohibiting online sales had the object of restricting competition and constituted ‘hardcore’ restrictions within the meaning of Article 4(b) of the EU VBER. The OFT concluded that the agreements restricted retailers from accessing a wider customer base with the help of the internet which, in turn, meant consumers were unable to identify or obtain better prices by shopping around or buy products not available from brick-and-mortar retailers in their local area.⁴⁴
- 4.19 A significant number of participants at the CMA roundtables considered that the treatment of territorial and customer restrictions as ‘hardcore’ restrictions of competition was mainly driven at EU level by the EU’s single market imperative and the need to abolish trade barriers between member states of the EU. They therefore questioned the extent to which it was necessary to adopt the same approach following the UK’s withdrawal from the EU given that it pursued a policy objective which no longer applies to the UK.
- 4.20 In contrast, some participants noted that lifting the current prohibition on territorial and customer restrictions could lead to discrimination between certain groups of consumers or to reduced consumer choice in certain parts of the UK.
- 4.21 A significant number of participants also noted that the implementation of the Northern Ireland Protocol to the Withdrawal Agreement for the UK’s withdrawal from the EU was a relevant factor which the CMA should consider. Some of them also called on the CMA to provide more guidance on its approach to any possible territorial restrictions imposed by EU businesses in relation to certain parts of the UK.
- 4.22 With regard to the possibility of amending the current rules to block exempt the restriction of active sales into an exclusive territory which has been allocated to more than one distributor (ie to allow ‘shared exclusivity’), some participants were of the view that such a distribution model could bring about significant efficiencies by, for example, enabling suppliers to spread risk or

⁴³ *Ping Europe Limited v Competition and Markets Authority* [2020] EWCA Civ 13, paragraph 81.

⁴⁴ [Roma-branded mobility scooters: prohibitions on online sales and online price advertising \(2013\)](#). Other cases in which the OFT considered the issue of territorial restrictions include [Wholesale supply of compact discs](#) (OFT 391, September 2002) and [Newspaper and magazine distribution](#) (OFT 1025, October 2008).

ensure wider distribution. Some participants mentioned that, currently, the main issue with 'shared exclusivity' is that such a model becomes, in practice, compromised because restrictions on active sales into the 'exclusive' territory are hardcore restrictions.

- 4.23 More generally, a significant number of participants expressed support for solutions which give them more flexibility to design their systems according to brand objectives and appetite for risk, rather than being driven to the stark and somewhat limiting choice between exclusive and selective distribution models.
- 4.24 In relation to the distinction between 'active' and 'passive' sales there were divergent views. A significant number of participants mentioned that this distinction is confusing and somehow disconnected from the real business world – and some mentioned that an effects-based assessment should be adopted instead.⁴⁵ One participant submitted that they consider that the distinction is well understood and a useful guide to determine whether or not a restriction in an individual case is lawful.
- 4.25 Finally, a number of participants also questioned the general treatment of online sales as 'passive' sales noting that in their view, given the expansion of online sales, such an approach is potentially disconnected from commercial reality.
- 4.26 More detail on the views put forward at the CMA roundtables is at **Annex D: Evidence gathering**.
- 4.27 The CMA has also taken into account the evidence gathered during the Evaluation. The issues identified in the Evaluation included concerns that:
- (a) the current regime (Article 4(b)(i) of the EU VBER) does not give businesses sufficient flexibility to appoint two or more distributors for a given exclusive territory;⁴⁶ and
 - (b) there is a lack of clarity regarding the possibility of combining exclusive and selective distribution,⁴⁷ for example because there is:

⁴⁵ The CMA notes that such approach would have the merit of giving businesses more flexibility. However, it could also increase legal uncertainty and costs.

⁴⁶ Evaluation SWD, p190.

⁴⁷ Evaluation SWD, p191.

- (i) insufficient guidance on the circumstances in which businesses are allowed to combine exclusive and selective distribution **in the same territory**, but at different levels of the supply chain;⁴⁸ and
- (ii) insufficient clarity as to how exclusive and selective distribution may be combined **in different territories**.⁴⁹

Recommendation

4.28 Taking into account the views of participants and the evidence gathered during the Evaluation, the CMA has, in particular, considered the following questions in order to inform its proposed recommendation about the future UK regime regarding territorial and customer restrictions:

- (a) Should territorial and customer restrictions continue to be treated as ‘hardcore’ restrictions which remove the benefit of the block exemption?
- (b) Is the current distinction between active and passive sales still fit-for-purpose?
- (c) Are there certain types of online sales that are currently categorised as passive sales which should instead be classified as active sales?
- (d) Is there a case for changing the current regime in order to give businesses more flexibility to design their distribution systems according to their needs?

Should territorial restrictions continue to be treated as ‘hardcore’ restrictions for the purposes of the UK VABEO?

4.29 The CMA notes that the treatment of territorial and customer restrictions was historically in part driven by the EU single market imperative. However, as explained above, it was also driven by an interest in preserving intra-brand competition and consumer choice – ie the consideration that if distributors are restricted from selling into different territories or to different customer groups,

⁴⁸ Some respondents to the Evaluation noted that exclusive distribution at the wholesale level and selective distribution at the retail level was considered one of the most efficient models for distributing certain goods and therefore should be unequivocally allowed. The Evaluation confirmed that this combination was common practice and that there was lack of clarity around the circumstances under which the combination of exclusive and selective distribution was block exempted.

⁴⁹ While this appears to be allowed by the current rules, respondents pointed to a lack of clarity as to whether, in the case of a supplier that uses selective distribution in some territories and exclusive distribution in others, exclusive distributors could be prohibited from making sales to unauthorised dealers in the territories where the supplier has a selective distribution system.

consumers in those territories or groups are restricted in the choice of sellers of the product concerned, weakening competitive pressures.

4.30 The CMA considers that there are compelling reasons for retaining the current approach of treating territorial and customer restrictions as ‘hardcore’ for the purposes of the UK VABEO:

- (a) First, the treatment of territorial and customer restrictions as hardcore restrictions supports consumer choice across all parts of the UK and promotes intra-brand competition.
- (b) Second, the CMA is mindful that the implications of the UK’s withdrawal from the EU, including the Northern Ireland Protocol, and linked market developments, are not yet fully understood. For example, it is not yet known how businesses will adapt their distribution arrangements to reflect the existence of the Northern Ireland Protocol, which maintains some level of integration with the EU single market in Northern Ireland. Taking into account that uncertainty, the CMA is proposing to retain measures that limit restrictions of sales between territories so as to avoid inadvertently compromising the integrity of the UK internal market or harming consumers in the UK.
- (c) Third, the exceptions to the general rule (ie Article 4(b)(i)-(iv) of the retained VABER) already largely ensure that the block exemption is available for agreements in cases where territorial and customer restrictions are likely to bring about efficiencies that outweigh any reduction of intra-brand competition.⁵⁰

4.31 While the CMA proposes that territorial restrictions continue to be treated as ‘hardcore’ in the UK VABEO, it will be appropriate to keep this under review in order to take into account any market developments, if and when they arise.

Is the current distinction between active and passive sales still fit-for-purpose?

4.32 Assuming that territorial and customer restrictions continue to be treated as ‘hardcore’ restrictions for the purpose of the UK VABEO (subject to consultation), a separate but closely linked question is whether the current distinction between active and passive sales in Article 4(b)(i) of the retained

⁵⁰ In other words, the treatment of territorial and customer restriction as ‘hardcore’ restrictions does not hinder businesses’ ability to introduce such vertical restraints where they are most likely to bring about efficiencies. This is allowed in accordance with the four exceptions currently set out in article 4(b)(i)-(iv) of the retained VABER, for example by allowing suppliers to protect investments made by exclusive distributors through restrictions on ‘active’ selling by other distributors into the relevant exclusive territory or to the relevant exclusive customer group.

VABER remains fit for purpose.⁵¹ In that regard, the CMA notes that some participants questioned whether the current distinction between active and passive sales reflects commercial reality.

- 4.33 Notwithstanding those comments, in the CMA's view the current regime strikes a fair balance between, on the one hand, the need to grant some degree of protection to exclusive distributors (by allowing the possibility of restricting active sales into the exclusive territory or to the exclusive customer group) and, on the other hand, ensuring some degree of consumer choice (by not block exempting the restriction of passive sales and therefore increasing the offers available to consumers).
- 4.34 If the distinction between active and passive sales were to be removed, the two obvious alternatives would be either: (i) block exempting all territorial and customer restrictions (active and passive), which would enable sellers to confer absolute territorial protection on distributors, reducing consumer choice and competition further than is allowed under the current block exemption regime; or (ii) not block exempting any territorial and customer restrictions (whether active or passive), meaning that suppliers could offer exclusive distributors no protection at all from sales from outside the relevant territory or customer group without losing the benefit of the block exemption. The CMA is concerned that the former could potentially lead to a significant reduction of intra-brand competition and consumer choice, whereas the latter could undermine the efficiency and viability of exclusive distribution models (in most cases rendering them meaningless in practice).
- 4.35 Accordingly, the CMA considers that a distinction between active and passive sales is a relevant and worthwhile distinction as far as exclusive distribution systems are concerned. The CMA is mindful that there is a balance to be struck between offering sellers the ability to protect exclusive distributors, while avoiding harm to competition and consumers through potential market partitioning by territory or customer group. The CMA therefore proposes to recommend that the current exception that allows for the restriction of active but not passive sales is maintained in the UK VABEO. Further, the CMA proposes to recommend that definitions of 'active sales' and 'passive sales' are included in the UK VABEO, with an explanation about how these terms are interpreted in practice set out in the CMA VABEO Guidance.

⁵¹ The definitions of active and passive sales are not set out in the retained VABER and these concepts are explained in the EU Vertical Guidelines (paragraph 51).

4.36 The question then is whether the boundary between the two should be set differently to reflect changed market characteristics as a result of increased online selling, and this is discussed in the following paragraphs.

Are there certain types of online sales that are currently categorised as passive sales and should instead be classified as active sales?

4.37 As reflected in the views of a significant number of participants in the CMA roundtables, the CMA notes that the growth of e-commerce since the EU VBER and EU Vertical Guidelines were originally adopted by the European Commission has called into question the extent to which certain online sales should still be treated as passive sales.

4.38 The current EU Vertical Guidelines seek to draw a distinction between making products and services available online, which should be regarded as passive sales, and certain promotional and advertisement strategies using the internet that should be regarded as active sales.⁵² This approach is based on the principle that every distributor should be allowed to use the internet to sell products and that, in general, merely having a website should be regarded as a form of passive selling. However, it is not the case that online selling is always assumed to be passive. Although drafted over 10 years ago, the EU Vertical Guidelines do recognise that a range of online practices amount to active selling, and therefore may be restricted by suppliers under the terms of the retained VABER. For example, this includes online advertisements specifically addressed to certain customers or being displayed to users in a particular territory.

4.39 The CMA's provisional view is that the current approach, which considers that some online sales strategies should be regarded as passive sales, whereas others should be regarded as active sales, remains an appropriate distinction. However, the CMA recognises that the significant developments that have taken place over recent years in relation to the development of e-commerce, including as a result of the Coronavirus (COVID-19) pandemic, might make it appropriate to redraw the boundary between the two.⁵³ As explained above the CMA proposes to recommend that definitions of 'active sales' and 'passive

⁵² EU Vertical Guidelines, paragraphs 51–54.

⁵³ The 2018 report *Comparing "bricks and mortar" store sales with online retail sales* published by the Office for National Statistics (ons.gov.uk) concluded: 'Whilst online sales are growing at a fast rate, bricks and mortar sales still account for nearly 82% of sales (Figure 3). Online spending has increased at a fast rate whilst spending within stores has remained relatively stable. These changes in spending habits mean consumers are now buying more online than ever before. As would be expected, the largest increase in online spending over the past decade is within non-store retailing.'

sales' are included in the UK VABEO, with an explanation about how these terms are interpreted in practice set out in the CMA VABEO Guidance.

- 4.40 The CMA therefore proposes to provide updated guidance about the treatment of different online sales strategies as either passive or active selling in CMA VABEO Guidance, drawing on its work in digital markets and on responses to this consultation document. In the meantime, as referred to in the consultation questions below, the CMA would welcome views from stakeholders on, and examples of, situations where online sales should be regarded as passive or active sales.

Is there a case for changing the current regime in order to give businesses more flexibility to design their distribution systems according to their needs?

- 4.41 In the light of the issues identified in paragraphs 4.19 to 4.25, and subject to its final position on retaining a distinction between active and passive sales, the CMA proposes to make certain changes to the current regime in order to give businesses more flexibility in designing their distribution systems.
- 4.42 Specifically, the CMA proposes that the list of exceptions to the hardcore restriction in Article 4(b) of the retained VABER should be revised in the UK VABEO and clarified in the CMA VABEO Guidance to permit the following:
- (a) the combination of exclusive and selective distribution in the same or different territories;
 - (b) 'shared exclusivity' in a territory or for a customer group by allowing the allocation of a territory to more than one 'exclusive' distributor; and
 - (c) the provision of greater protection for members of selective distribution systems against sales from outside the territory to unauthorised distributors inside that territory.

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.

Question 21: Do you agree that additional guidance on this issue would be helpful? If so, please provide your views on what that guidance should say including examples of situations where online sales should be regarded as passive or active sales.

Impact questions

Question 22: Do you have any examples of circumstances where territorial and customer restrictions might lead to operational efficiencies? Please include examples of locations within the UK and, where possible, quantitative and/or qualitative evidence in your answer.

Question 23: How helpful is the exemption for restrictions of active sales in the UK to your business or those you represent? Please explain your answer.

- a) Very helpful
- b) Somewhat helpful
- c) Irrelevant
- d) Unhelpful
- e) Very unhelpful

Indirect measures restricting online sales

Current regime and views from stakeholders

- 4.43 Typically, online distribution channels are effective channels for reaching a greater number and variety of customers than traditional distribution channels. This explains the approach taken in the retained VABER, which is, as referred to above,⁵⁴ that in principle every distributor should be allowed to use the internet to sell products since this is a reasonable way to allow customers to reach the distributor.
- 4.44 Certain online sales, for example having a website, are accordingly treated as a form of passive sales.⁵⁵ Moreover, any blanket bans preventing distributors from selling through the internet at all are considered to restrict competition by object and are hardcore restrictions not exempted by the retained VABER.⁵⁶
- 4.45 Other indirect measures restricting online sales are also considered to be hardcore restrictions under the retained VABER, including:
- (a) charging the same distributor a higher price for products intended to be resold online than for products intended to be sold offline – ‘**dual pricing**’; and
 - (b) imposing criteria for online sales that are not overall equivalent to the criteria imposed in brick-and-mortar stores in the context of selective distribution – the ‘**equivalence principle**’.
- 4.46 The views expressed at the CMA roundtables largely revealed a consensus amongst participants that the equivalence principle and the prohibition of dual pricing were no longer warranted. The reasons given for this included:
- (a) online channels have grown significantly in the last decade and no longer require the same level of protection;
 - (b) there are increased challenges for brick-and-mortar retailers due to the growth in online sales and the impact of the Coronavirus (COVID-19) pandemic;

⁵⁴ See paragraph 4.38.

⁵⁵ The treatment of online sales as ‘passive sales’ is part of the preferential treatment of online sales at EU level which was first introduced at a stage where online distribution was still at a developmental stage and was seen as an industrial policy tool to achieve market integration within the EU single market.

⁵⁶ For example, see *Ping Europe Limited v Competition and Markets Authority* [2020] EWCA Civ 13 and Case C-439/09, *Pierre Fabre Dermo Cosmétique v Président de l’Autorité de la Concurrence*.

- (c) the large investments required of brick-and-mortar retailers (compared to online sellers), as well as their marketing ventures, should be fully rewarded;
- (d) the costs incurred by brick-and-mortar retailers are significantly higher than for pure online distributors (which is further aggravated by the risk of free-riding from online distributors);
- (e) difficulties in practice in the application of an equivalence principle to two completely different sales environments, given the marked differences between online and brick-and-mortar distribution;
- (f) the lack of an economic justification for retaining the current approach to dual pricing and equivalence.

4.47 A summary of the views put forward at the CMA roundtables is at **Annex D: Evidence gathering**.

4.48 The evidence from the Evaluation is consistent with the views expressed by participants. A large number of respondents to the Evaluation were of the view that, in the context of a selective distribution system, it is necessary to provide offline distributors with the necessary incentives to invest in promoting products and to prevent free-riding by online distributors that focus mainly on price, without offering comparable pre-sales services.⁵⁷ These findings are also corroborated by the evidence from the European Commission's E-commerce sector inquiry, which found that '*addressing free-riding and maintaining the incentives for retailers to invest in high quality services by creating a level playing field between offline and online are key considerations for both manufacturers and retailers*'.⁵⁸

4.49 Another important aspect highlighted in the Evaluation is the fact that costs incurred by offline distributors are significantly higher than the costs for online distributors. By way of example, respondents to the Evaluation stated that employment costs are 2 to 5 times lower for online distribution than for traditional retail channels. In contrast to this position, other respondents (including online platforms) expressed the view that a 'brick-and-mortar requirement' can be a way of excluding pure online distributors from the distribution of certain products and services and that significant investments are also made by online distributors.⁵⁹

⁵⁷ Evaluation SWD, p200.

⁵⁸ EC E-commerce sector inquiry report, paragraph 11.

⁵⁹ Evaluation SWD, pp200–201.

- 4.50 Several respondents to the European Commission’s E-commerce sector inquiry, including in the public consultation, criticised the current rules on dual pricing highlighting that manufacturers are generally prohibited from charging different wholesale prices for the same products to the same retailer depending on whether the products are intended to be sold online or offline.⁶⁰
- 4.51 Dual pricing was viewed by certain stakeholders as a potentially efficient tool to address free-riding. Their view was based on the fact that dual pricing may help to create a level playing field between online and offline sales by taking into consideration differences in the costs of investments. Comments in relation to dual pricing pointed to the need for a more flexible approach to performance-related wholesale pricing. According to those stakeholders a more flexible approach would allow for differentiation between sales channels, depending on the actual sales efforts, and would encourage hybrid retailers to support investments in more costly (typically offline) services.
- 4.52 The Evaluation confirmed a widespread use of the brick-and-mortar requirement in selective distribution systems and that distribution channels have been moving towards an omni-channel model where free-riding can occur in both directions.⁶¹
- 4.53 Further to the findings above, the Evaluation also confirmed the view that online and offline distribution channels are inherently different⁶² and that, consequently, it is difficult to apply the equivalence principle, which gives rise to legal uncertainty. This view contrasted with the position of some other stakeholders who expressed the view that the principle of equivalence was effective in terms of promoting competition, choice and better access to a variety of distribution channels.⁶³

Recommendation

- 4.54 The CMA is of the provisional view that retaining the status quo would not be appropriate. This is because of market developments, such as the exponential growth of online sales⁶⁴, and the existence in case law of sufficient safeguards

⁶⁰ See EU Vertical Guidelines, paragraph 52(d). The EU Vertical Guidelines however allow for a fixed fee to support actual sales efforts in the offline (or online) channel.

⁶¹ Evaluation SWD, p201; sections 3.3.1.5, 3.3.2.5, 3.3.3.5, 3.3.4.5 and 3.3.9 of the study on consumer purchasing in Europe; section 2.1 of the Final report on the E-commerce sector inquiry at https://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html

⁶² Online sales are carried out at distance and do not allow for physical interaction, whereas brick-and-mortar sales are carried out allow for physical interaction, the provision of personalised advice and demonstration of the product at the point of sale.

⁶³ Evaluation SWD, p202.

⁶⁴ The fact that online distribution is now well-established means that any special protections are no longer warranted from a competition policy perspective.

against outright online sales bans (for example *Ping* and *Pierre Fabre*, referred to above).

4.55 In order to address the issues identified at the CMA roundtables⁶⁵ and the Evaluation⁶⁶, and to reflect the market developments mentioned above, the CMA recommends that the following changes are made in the CMA VABEO Guidance:

- (a) dual pricing should no longer be regarded as a hardcore restriction of competition; and
- (b) the imposition of criteria for online sales that are not overall equivalent to the criteria imposed on brick-and-mortar shops in a selective distribution system should no longer be regarded as a hardcore restriction.

4.56 As noted above, the CMA also proposes to revisit the treatment of certain online sales as ‘passive sales’ in the context of the CMA VABEO Guidance with a view to providing further clarity on the situations where online sales should more appropriately fall into the ‘active sales’ category, and welcomes views on what that guidance should say.

Policy questions

Question 24: What are your views on the CMA’s proposed recommendation on dual pricing and on the equivalence principle?

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.

Impact questions

Question 26: What are your views on the current regime, which treats certain online sales as a form of passive sales? What are some examples of the benefits or costs for your business operations, or the operations of those you represent? Please include examples and where possible, quantitative and/or qualitative evidence in your answer.

Question 27: Does the treatment of online sales bans as a hardcore restriction have an overall positive or negative impact on your business? Where possible, please

⁶⁵ See paragraph 4.46.

⁶⁶ See paragraphs 4.48-4.53.

provide examples of the impact on online channels and offline channels in your answer. Please include qualitative and/or quantitative evidence where possible.

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

Question 28: Do you consider that the CMA's proposed recommendation (to remove dual pricing and the requirement for overall equivalence in selective distribution from the list of hardcore restrictions) will benefit offline channels? If yes, please provide examples where possible.

Parity obligations (or 'most favoured nation' clauses)

Current regime and views from stakeholders

- 4.57 Parity clauses are obligations that require one party to an agreement to offer the other party goods or services on terms that are no worse than those offered to third parties. Parity clauses have often also been referred to by competition authorities, including the CMA, as 'most-favoured nation' or 'MFN' clauses.
- 4.58 The retained VABER does not refer to parity obligations and the EU Vertical Guidelines only refer to them as an example of a measure that may make RPM more effective.⁶⁷ However, parity obligations have become more common since the EU VBER was adopted by the European Commission in 2010, particularly in the context of agreements involving online platforms, and, as described below, have been the focus of close scrutiny by the CMA and competition authorities in the EU. In order to reflect these developments and to provide greater certainty regarding their treatment under UK competition law, the CMA is proposing to address parity obligations in the UK VABEO and CMA VABEO Guidance.

⁶⁷ EU Vertical Guidelines, paragraph 48.

4.59 One challenge of dealing with parity obligations in the UK VABEO is ensuring that they are properly and clearly defined. Traditionally, parity clauses have generally been categorised as either:

(a) 'retail' parity obligations, which ensure that the retail prices (or other terms) offered by a retailer in relation to a supplier's good or service is no worse than the retail prices (or other terms) in relation to the goods or services of one or more rival supplier;⁶⁸ or

(b) 'wholesale' parity obligations, which ensure that the wholesale prices (or other terms) offered by a supplier for its good or service to a retailer are no worse than the prices (or other terms) offered to one or more rival retailer.⁶⁹

4.60 Over the past decade there has been increased scrutiny of parity obligations that relate to terms offered by suppliers on the different sales channels they use. Following the growth of e-commerce, their use has particularly been observed in the context of online platforms, such as price comparison websites and online travel agents. Such parity obligations have, at times, been referred to as 'platform' parity obligations and the economic literature has made a distinction between these parity obligations involving online platforms and the more traditional parity obligations outlined in the previous paragraph.⁷⁰

4.61 Generally, competition concerns have primarily been identified in relation to so-called 'wide' parity obligations. 'Wide' parity obligations typically specify that a product or service may not be offered on better terms on any other channels (including, for example, a supplier's own website or through other intermediaries, such as other distributors or online platforms). By contrast, 'narrow' parity obligations involve an agreement only that better terms will not be offered on a party's own sales channel (for example, a supplier's own website), without stipulating conditions for sales via other channels.

4.62 In that regard, the CMA has previously found significant competition concerns arising from the use of 'wide' parity obligations in its market investigation into private motor insurance in 2015 (which led to the ban of the use of wide parity

⁶⁸ 'Retail' parity obligations can also ensure that the downstream prices (or other terms) offered by a downstream firm in relation to an upstream firm's good or service is no worse than the downstream prices (or other terms) in relation to the goods or services of one or more rival upstream firm.

⁶⁹ 'Wholesale' parity obligations can also ensure that the upstream prices (or other terms) offered by an upstream firm for its good or service to a downstream firm are no worse than the upstream prices (or other terms) offered to one or more rival downstream firm.

⁷⁰ See footnote 76.

obligations (or equivalent measures) in the private motor insurance sector)⁷¹ and its Competition Act infringement decision in *Price Comparison Website: use of most-favoured nation clauses* (2020).⁷² The CMA has also made public statements on potential competition concerns arising from parity obligations, in particular wide parity obligations, for example in public submissions made to OECD roundtables⁷³ and in the context of its market study on Digital Comparison Tools in 2017.⁷⁴ In addition, the CMA's predecessor, the OFT, investigated the use of parity obligations in the context of hotel online booking, e-books, and Amazon Marketplace.⁷⁵

- 4.63 In view of the different terminology used by competition authorities to describe parity clauses in the past, the CMA proposes to adopt definitions that provide a clear differentiation between (i) parity obligations that affect 'direct' sales channels and (ii) parity obligations that affect 'indirect' sales channels. This distinction broadly reflects the notions of 'narrow' and 'wide' parity obligations or 'most-favoured nation' clauses referred to by the CMA in its decisional practice, as well as other definitions of certain 'wide' parity obligations such as 'across platform parity clauses'.
- 4.64 Accordingly, the CMA proposes to define such clauses in the UK VABEO as 'sales channel parity obligations'. The definition would provide that 'sales channel parity obligations' are restrictions which ensure that the prices (or other terms) at which a supplier's goods or services are offered on a sales channel (which could be an online or offline sales channel) are no worse than those offered by the supplier on another sales channel. Further definitions would distinguish between restrictions that ensure that the prices (or other terms) at which a supplier's goods or services are offered on a sales channel are no worse than those offered: (i) by the supplier on any of its direct sales

⁷¹ PMI Market Investigation Final Report and to Articles 4 and 5 of the [PMI Order 2015](#)].

⁷² [Price comparison website: use of most favoured nation clauses](#), Case 50505, Decision 19 November 2020. Note that the CMA's decision is the subject of appeal to the Competition Appeal Tribunal. In addition, the CMA reached commitments following competition concerns relating to parity obligations used by an undertaking in the provision of auction services (see: [Auction services: anti-competitive practices](#), Case 50408, Decision to accept commitments, June 2017).

⁷³ [CMA submission](#) to OECD, Hearing on across platform parity agreements, October 2015, in particular paragraphs 9, 10 and 13; See [OECD Roundtable on Vertical Restraints for On-line Sales](#) (OFT submission from page 145).

⁷⁴ DCTs Market Study, [Final Report](#).

⁷⁵ On hotel online booking, the OFT opened an investigation under the Chapter I prohibition and Article 101 in September 2010 and closed the case on administrative priority grounds on 16 September 2015 (CE/9320-10). On E-books, the OFT opened an investigation into E-books in January 2011, but closed it in December 2011 (see CE/9440-11, e-books, update 6 December 2011) on the basis of administrative priorities given that the European Commission was also investigating similar conduct).

On Amazon Marketplace, see the OFT's decision in November 2013 to close its investigation under Chapter I of the Act and Article 101 TFEU into Amazon's price parity policy (CE/9692/12) on administrative priority grounds following Amazon taking steps to implement the removal of its price parity policy.

channels (a ‘direct sales channel parity obligation’) or (ii) by the supplier on any indirect sales channel, for example online platforms or other intermediaries (an ‘indirect sales channel parity obligation’).

4.65 The views expressed by participants at the CMA roundtables relating to parity obligations suggested that:

- (a) it would be helpful to codify in guidance the position in case law relating to parity obligations, in particular to provide clarity and legal certainty regarding the treatment of indirect sales channel parity obligations;
- (b) there is a need to recognise in the UK VABEO or in CMA VABEO Guidance the possible theories of harm relating to sales channel parity obligations (as shown by both the academic literature⁷⁶ and in enforcement activity in the UK and across Europe⁷⁷), especially with regards to indirect sales channel parity obligations; and
- (c) there was broadly a consensus that direct sales channel parity obligations give rise to potential efficiencies that are likely to outweigh potential harmful effects, at least where the market shares of the parties are below the 30% threshold in the retained VABER.

4.66 A few participants also mentioned that indirect sales channel parity obligations may be justified on efficiency grounds (for example, to improve the prospects of successful entry in a platform market or to avoid free-riding on investments by competing platforms).

4.67 Another point raised during the CMA roundtables was the fact that treating indirect sales channel parity obligations as ‘hardcore’ restrictions could potentially be undermined if businesses were still allowed to benefit from the block exemption when engaging in equivalent behaviours that replicated the effects of an indirect sales channel parity obligation, for example applying

⁷⁶ Wang and Wright (2020), Search platforms: Showrooming and price parity clauses, *The RAND Journal of Economics*, Vol. 51, Issue 1; Boik and Corts (2016), The Effects of Platform Most-Favoured-Nation Clauses on Competition and Entry, *Journal of Law and Economics*, vol.59 (February 2016); Johnson (2017), The Agency Model and MFN Clauses; Johansen, B. O. and Verge, T., (2017), Platform price parity clauses with direct sales, University of Bergen Working Papers in Economics 01/17; Larrieu, T., (2019), Most Favoured Nation Clauses on the online booking market. Working Paper; and Wang, C. and Wright, J., (2016), Platform Investment and Price Parity Clauses. Working paper no 16-17, September 2016.

⁷⁷ In addition to the UK cases referred to above, competition authorities in the EU have scrutinised the use of parity obligations, particularly in the hotel online bookings sector. For example, in 2013 the German competition authority found that wide parity obligations infringed German and EU competition law ([add ref to HRS decision]) and in 2015 the French, Italian, Swedish, and Irish national competition authorities accepted commitments from online travel agencies. Subsequently, France, Austria, and Italy each passed laws banning the use of wide MFNs in the hotel sectors, which has since been the subject of monitoring (see the [ECN Report on the EU-wide monitoring exercise](#) in the online hotel booking sector).

pressure to adhere to the principles of such a clause by linking other contractual terms to parity on price (or other terms).

- 4.68 A summary of the views put forward at the CMA roundtables is at **Annex D: Evidence gathering**.
- 4.69 The Evaluation found mixed evidence on the harms and/or potential efficiencies associated with indirect sales channel parity obligations.⁷⁸ The Evaluation noted that there are diverging views amongst stakeholders on the likely effects of parity clauses on competition, and whether they are likely to be harmful or generate efficiencies.
- 4.70 The views of respondents to the Evaluation varied in relation to the treatment of parity obligations between (depending on their perspectives) advocating the retention of a block exemption for parity obligations to adopting a stricter approach, particularly in relation to indirect sales channel parity obligations. However, it is clear that there is a general desire from stakeholders for greater legal certainty and guidance to be provided about how to assess sales channel parity obligations.⁷⁹

Recommendation

- 4.71 The CMA proposes that indirect sales channel parity obligations (ie that a product or service may not be offered on better terms on any other channels, whether the supplier's own or any intermediary's) are treated as a hardcore restriction under the UK VABEO. Based on the CMA's experience of scrutinising such obligations in its case work referred to above, the CMA is concerned that indirect channel parity obligations soften competition between indirect channels and reduce the incentives of intermediaries (such as online platforms) to compete on price, to innovate or to enter and expand.
- 4.72 The CMA considers that, in order for the hardcore restriction to be implemented effectively, it will also need to cover measures that have the same effect as an indirect sales channel parity obligation contained in a contractual provision. Such equivalent measures would include any course of action, including entering into agreements or engaging in concerted practices,⁸⁰ which have the object of replicating the anti-competitive effects of

⁷⁸ Evaluation SWD, p182-184.

⁷⁹ Evaluation SWD, p182.

⁸⁰ The notion of 'agreement' and 'concerted practice' in the context of vertical agreements is currently set out at paragraph 25 of the EU Vertical Guidelines.

an indirect sales channel parity obligation.⁸¹ This would have the practical effect of extending, to a large extent, the approach already adopted in the private motor insurance market to all other segments of the economy.⁸²

- 4.73 The CMA considers that the option of doing nothing would not be appropriate in the light of the issues identified above, which the CMA considers warrant a shift from the current position.⁸³
- 4.74 The CMA considers that it would not be appropriate to include direct sales channel parity obligations in the list of hardcore or excluded restrictions, given the possible efficiencies that may result from their use in particular markets.⁸⁴ However, the CMA may still decide to investigate concerns relating to direct sales channel parity obligations in agreements between undertakings if there is evidence that their use replicates the effects of indirect sales channel parity obligations.⁸⁵ Depending on the circumstances, this may be an example of where the CMA considers cancelling the benefit of the UK VABEO in an individual case (see **Section 8** below).
- 4.75 Finally, the CMA has also considered whether to treat indirect sales channel parity obligations as ‘excluded restrictions’ in the UK VABEO instead of ‘hardcore restrictions’. As mentioned above, the CMA is currently minded to recommend the latter. This is because the CMA has not seen compelling evidence of possible efficiency justifications for indirect sales channel parity obligations (above and beyond the efficiencies that can be brought about by the use of direct sales channel parity obligations). Furthermore, such an approach is the most likely to deter indirect sales channel parity obligations in all but those cases where it can be shown on an individual analysis that the exemption criteria in section 9 of the Act are met.
- 4.76 Notwithstanding the above, the CMA is minded to clarify in CMA VABEO Guidance that it is open to considering on a case by case basis, carefully and

⁸¹ For example, where a direct sales channel parity obligation in a contract effectively becomes an indirect sales channel parity obligation through indirect means (such as making position in rankings on a comparison website conditional on parity with other indirect channels) they should be treated as a hardcore restriction. This also reflects the position in relation to RPM under Article 4(a) of the retained VABER insofar as it covers RPM that is achieved through direct and indirect means, as currently set out in paragraph 48 of the EU Vertical Guidelines.

⁸² Private Motor Insurance Market Investigation Order 2015, which prohibited the use of indirect sales channel parity obligations in the private motor insurance sector from 19 April 2015.

⁸³ See paragraphs 4.58-4.70.

⁸⁴ The avoidance of free-riding is the main efficiency that may arise as a result of direct sales channel parity obligations. For more detail on possible efficiencies arising from direct sales channel parity obligations please see paragraphs 3.68-3.78 of the Final Report in the Digital Comparison Tools market study. <https://assets.publishing.service.gov.uk/media/59e093f5e5274a11ac1c4970/paper-e-competitive-landscape.pdf>

⁸⁵ For an explanation of when direct sales channel parity obligations can replicate indirect sales channel parity obligations, see paragraphs 3.34 to 3.49 of the Final Report in the Digital Comparison Tools market study.

objectively, any efficiency arguments made in the course of any investigations under the Act relating to the use of indirect sales channel parity obligations.

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 obligations⁸⁶ can generate benefits/efficiencies beyond those that may be created by direct sales channel parity obligations⁸⁷ – if so, please provide evidence or examples in practice of circumstances where this may be the case.

Question 30: Do you agree that additional guidance on this issue would be helpful? If so, please provide your views on what that guidance should say.

Impact questions

Question 31: To what extent are indirect sales channel parity obligations relevant for your business's operations, or the operations of those you represent? Please explain your answer.

- a) Completely
- b) Very much
- c) Moderately
- d) A little
- e) Not at all

Question 32: To what extent are direct sales channel parity obligations relevant for your business's operations, or the operations of those you represent? Please explain your answer.

- a) Completely
- b) Very much
- c) Moderately

⁸⁶ As defined in paragraph 4.63.

⁸⁷ As defined in paragraph 4.63.

d) A little

e) Not at all

Question 33: Are you aware of any difficulties to your business if indirect sales channel parity obligations are treated as hardcore restrictions for the purposes of the proposed UK VABEO? Please explain your answer.

5. Excluded restrictions

Non-compete obligations

Current regime and views from stakeholders

- 5.1 The retained VABER exempts non-compete obligations⁸⁸ (also sometimes called exclusive purchasing obligations on buyers) with a duration of less than 5 years. By contrast, non-compete obligations that are indefinite or have a duration that exceeds 5 years are ‘excluded’ under Article 5(1)(a) of the retained VABER, so that they must be individually assessed to establish whether they benefit from the exemption. This includes non-compete clauses that are tacitly renewable beyond a period of 5 years, which are deemed to be concluded for an indefinite duration.
- 5.2 The following types of obligations are also ‘excluded’ under the retained VABER, such that they must also be individually assessed to establish whether they benefit from exemption:
- (a) obligations causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services (Article 5(1)(b) of the retained VABER);
 - (b) obligations causing the members of a selective distribution system not to sell the brands of particular competing suppliers (Article 5(1)(c) of the retained VABER).
- 5.3 Articles 5(2) and 5(3) of the retained VABER contain certain derogations to the position set out above.
- 5.4 At the CMA roundtables, a number of participants suggested that the 5-year period for non-compete obligations is arbitrary, although no alternative was suggested. Some participants also stated that there is no harm in tacitly renewable contracts if each party has the right to terminate.⁸⁹ However, views on the most suitable length of non-compete obligations for the purposes of the block exemption were mixed, both generally and within specific sectors. In

⁸⁸ ‘Non-compete obligation’ means any direct or indirect obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services, or any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80 % of the buyer’s total purchases of the contract goods or services and their substitutes on the relevant market, calculated on the basis of the value or, where such is standard industry practice, the volume of its purchases in the preceding calendar year (retained VABER, Article 1(d)).

⁸⁹ Several participants suggested that a requirement to renegotiate any non-compete obligation every five years felt mechanistic, artificial, arbitrary, or did not reflect commercial reality.

particular, a number of participants suggested that the appropriate duration for which automatic exemption should apply would vary by agreement and sector.⁹⁰ Other participants suggested that market shares and market power were more important factors than duration in analysing the impact of a non-compete obligation.

5.5 However, certain participants suggested that the 5-year limit generally worked well as it provided certainty and gave businesses the chance to re-evaluate their agreements.⁹¹ One participant questioned whether non-compete obligations should benefit from automatic exemption at all, as there could be concerns with these obligations even where they have a duration of less than five years.

5.6 Finally, additional guidance and flexibility were advocated by a small number of participants in relation to post-term non-compete clauses (Article 5(3) of the retained VABER). In particular, that:

(a) Article 5(3)(c) required further flexibility on the definition of 'know how' to encompass ongoing investments (such as in training or intellectual property);

(b) Article 5(3)(d) was considered restrictive to the extent that it relates only to the '*premises and land*' from which the buyer had operated during the contract period. One participant characterised this as ill-suited to the UK market, where services-based franchises and distribution arrangements are more prominent than in EU markets.

5.7 A summary of the views put forward at the CMA roundtables is at **Annex D: Evidence gathering**.

5.8 The Evaluation notes that a large majority of respondents considered that Article 5 of the EU VBER provides an appropriate level of legal certainty.⁹² However, the Evaluation did raise the question as to whether tacitly renewable non-compete obligations should benefit from automatic exemption where the buyer can periodically terminate or renegotiate the agreement in order to reduce costs and the administrative burden for businesses.⁹³

⁹⁰ Several participants suggested that the ideal length of a non-compete obligation varied by sector, with the technology industry, for example, most likely requiring less than five years. One participant raised bancassurance as a specific sector where five years was too short a length of time to be efficient.

⁹¹ One participant from the automotive sector was not in favour of a more permissive approach to non-compete obligations, stating that manufacturers already exerted undue influence over dealers, and had restricted dealers operating multi-brand showrooms.

⁹² Evaluation SWD, p185.

⁹³ European Commission's Inception Impact Assessment (2020), p2.

- 5.9 A number of other points regarding Article 5 were also raised during the Evaluation (in some cases by only a few stakeholders), including:
- (a) whether non-compete obligations exceeding 5 years should benefit from automatic exemption;⁹⁴
 - (b) whether the derogations in Article 5(2) and Article 5(3) of the retained VABER should be limited to *'the premises and land'* given new market developments such as the increasing trend towards online sales;⁹⁵
 - (c) whether Article 5(1)(c) of the retained VABER, which excludes non-compete obligations imposed on members of a selective distribution system from the benefit of the retained VABER, is unjustified, considering the efficiencies that can result from restricting the ability of authorised resellers to sell products or brands of particular competing suppliers; and
 - (d) whether Articles 5(1)(a) and 5(1)(b) of the retained VABER need changes in the context of franchise agreements.

Recommendation

- 5.10 The CMA proposes that non-compete obligations the duration of which is indefinite or exceeds 5 years should remain excluded restrictions under the UK VABEO (in the same form as the retained VABER).
- 5.11 The CMA does not consider that such non-compete obligations should benefit from automatic exemption under the safe harbour as it has not received sufficient evidence that such agreements would be unlikely to give rise to anti-competitive effects.
- 5.12 The CMA has considered whether the current 5-year limit should be amended on the basis that it is arbitrary. However, having considered the evidence gathered during the CMA roundtables and the Evaluation, the CMA considers that any fixed limit of this nature would be arbitrary given that the duration of a contract is case specific whereas the block exemption is of broad application.
- 5.13 The CMA has also considered whether tacitly renewable non-compete obligations should be automatically exempt. However, although the CMA notes that reasonable termination provisions may be sufficient to alleviate competition law concerns in some cases, the CMA has not been presented with evidence that this would provide sufficient protection to qualify for a

⁹⁴ Evaluation SWD, pp 55 and 57.

⁹⁵ Evaluation SWD, p187.

general safe harbour. In this regard, the potential anti-competitive effects arise not only in respect of the parties to the agreement in question but also in respect of competing providers which could be faced with increased barriers to entry and expansion. In particular, risks may arise from the inertia of the parties where an agreement is tacitly renewable.

- 5.14 Further, the CMA notes that maintaining the current position does not preclude undertakings entering into vertical agreements with non-compete obligations with a duration of more than 5 years or those which are tacitly renewable, provided that those agreements do not restrict competition or satisfy the conditions for individual exemption under section 9 of the Act. As non-compete obligations of a longer duration are 'excluded restrictions' there is no presumption that they infringe the Chapter I prohibition, rather the position is that they do not qualify for automatic exemption. Therefore, such provisions need to be assessed on a case-by-case basis according to their likely effects in the actual economic and market circumstances. The CMA considers that this is the appropriate categorisation for such provisions given that there is not compelling evidence that such agreements do not restrict competition or are efficiency-enhancing as a general position across all vertical agreements (or even industries).
- 5.15 The CMA is open to the possibility of recommending that the derogations in Article 5(2) and Article 5(3) of the retained VABER should be amended in the UK VABEO to reflect market developments such as the increasing trend towards online sales (for example, by amending the limitations to 'premises and land'). However, at this stage, such amendments do not form part of the CMA's proposed recommendation to the Secretary of State as the CMA does not consider that there is sufficient evidence to provide a basis for such changes. The CMA would welcome further views on these provisions.
- 5.16 Finally, in the light of views raised during the CMA roundtables and Evaluation, the CMA is also considering whether to provide further guidance in CMA VABEO Guidance on the issues of (i) the way in which 'know-how' should be assessed for the purposes of the derogation in Article 5(3) of the retained VABER⁹⁶ and (ii) the assessment of non-compete obligations in the context of franchise agreements.

⁹⁶ In this regard, the CMA is minded to draw upon existing guidance on these issues in paragraph 45 of Technology Transfer Guidelines.

Policy questions

Question 34: The CMA invites views on the above proposed recommendation in respect of non-compete obligations. In particular:

- a) Should non-compete obligations that are tacitly renewable remain 'excluded restrictions' under the UK VABEO?
- b) Are there any risks in allowing such obligations to be automatically exempt under the UK VABEO?
- c) Should the current regime in the derogations in Article 5(2) and Article 5(3) of the retained VABER be revised (for example, to reflect market developments such as the increasing trend towards online sales)?

Impact questions

Question 35: To what extent are non-compete obligations relevant to your business or industry, or the industry that you represent? Please explain your answer.

- a) Completely
- b) Very much
- c) Moderately
- d) A little
- e) Not at all

Question 36: Relative to the current regime as set out in the retained VABER, what would be the likely impact on your business's operations, or the operations of those you represent, if non-compete obligations that exceed 5 years in duration were no longer treated as 'excluded' restrictions? Please include examples and where possible, quantitative and/or qualitative evidence in your answer.

Question 37: What are some of the benefits or efficiencies of non-compete obligations remaining exempt if the duration is less than 5 years? Please include examples and where possible, quantitative or qualitative evidence (or both) in your answer.

6. Issues for CMA VABEO Guidance

- 6.1 The CMA proposes that issues regarding agency and environmental sustainability are addressed in CMA VABEO Guidance and not in the UK VABEO itself. As explained above in paragraph 1.13, the CMA would hope to consult later this year or early next year on any CMA VABEO Guidance.

Agency

- 6.2 Where an agent and a principal act as a single economic unit, obligations imposed on the agent in relation to the contracts concluded or negotiated on behalf of the principal fall outside of the Chapter I prohibition.⁹⁷
- 6.3 At the CMA roundtables, participants said that, to the extent that any CMA guidance draws upon the guidance on the same issues currently set out in the EU Vertical Guidelines, certain clarifications would be helpful. A large number of participants stated that the principles of agency set out in the EU Vertical Guidelines are difficult to apply to modern business models, and some of those participants also suggested that this may be addressed by shifting the focus of the rules away from the assessment of the allocation of risk. Further, a number of participants suggested that the guidance in the EU Vertical Guidelines should be updated to reflect more recent case law.
- 6.4 Participants at the CMA roundtables also said that it would be helpful to have additional guidance on the following issues:
- (a) The application of agency principles to arrangements with online platforms (eg the extent to which the agency principles apply when online platforms can impose contractual obligations determining the price set by the supplier on other sales channels).
 - (b) The application of the rules on agency and RPM to tripartite relationships between suppliers, intermediaries and final customers in circumstances where the intermediaries adhere to the commercial conditions agreed beforehand between their supplier and a particular customer and focus solely on executing that agreement, eg by taking over logistical functions (so-called fulfilment contracts).
 - (c) The application of the rules on agency to circumstances where an undertaking active on a downstream market acts both as an agent and as

⁹⁷ For this reason the issue of agency does not arise under the retained VABER itself as the relevant provisions of agency agreements do not require exemption.

an independent distributor for different products of the same supplier (so-called dual role agents).⁹⁸

6.5 A summary of the views put forward at the CMA roundtables is at **Annex D: Evidence gathering**.

6.6 The Evaluation also noted that stakeholders requested clarity on the above issues.⁹⁹

Recommendation

6.7 The CMA proposes that the Secretary of State does not make any amendments in respect of agency issues in the UK VABEO itself but proposes to provide guidance on these issues (including the topics listed in paragraph 6.4 above) in the context of the CMA VABEO Guidance. In any such guidance, the CMA intends to make reference to the feedback received from participants and the CMA's own enforcement practice in this area.

Policy question

Question 38: The CMA invites views on the above proposed recommendation in respect of agency issues and stakeholders to make any submissions they consider would help the CMA to develop useful guidance on this topic.

Environmental sustainability

6.8 Given the importance of climate change questions and the transition to 'net zero' carbon emissions, during the course of the CMA roundtables the CMA tried to establish whether UK stakeholders had experienced any lack of legal certainty on the assessment of vertical agreements used for the attainment of environmental sustainability goals under section 9 of the Act. In particular the CMA sought views on whether such uncertainty had led to the abandonment of sustainability initiatives.

6.9 During the CMA roundtables, participants made the following points:

- (a) Where environmental benefits are classed as 'out of market' efficiencies, competition policy should take them into account instead of dismissing them on the basis that they do not occur in the relevant market.

⁹⁸ As part of the Evaluation, the European Commission has [published a working paper](#) on the application of Article 101 of the Treaty to dual role agents.

⁹⁹Evaluation SWD, p148-150.

- (b) The existence of an increasing trend for brands to require their retail networks and distribution systems to become ‘eco-friendly’.
- (c) Environmental sustainability is more likely to raise competition concerns in the context of horizontal agreements than vertical agreements.
- (d) In the context of selective distribution, it would be helpful to have more clarity on the extent to which environmental sustainability criteria for admission to a selective distribution system can be regarded as necessary to protect the quality of the product in question, especially where the sustainability criteria are not required to enable the distributor to resell the product but are objectively socially beneficial and these benefits would not otherwise be obtained. Participants added that further guidance would be helpful on the extent to which benefits from such criteria would be considered relevant under the conditions for individual exemption set out in section 9 of the Act.¹⁰⁰

Recommendation

- 6.10 The CMA proposes that the Secretary of State does not make any amendments in respect of environmental sustainability issues in the UK VABEO.
- 6.11 The transition to ‘net zero’ carbon emissions is one of the Strategic priorities for the CMA.¹⁰¹ The CMA considers that how environmental benefits are approached under the Chapter I prohibition and section 9 of the Act is not specific to vertical agreements, and that this question needs to be further considered in the broader context of competition policy.
- 6.12 Nonetheless, the CMA is minded to provide guidance on environmental sustainability issues in the context of the CMA VABEO Guidance in particular in relation to the criteria for admission to selective distribution systems (see paragraph 6.9(d) above).

¹⁰⁰ The key question here is whether selection criteria based on environmental sustainability is compatible with the concept of purely qualitative selective distribution.

¹⁰¹ Since 2020, supporting the transition to ‘net zero’ carbon emissions has been a strategic priority for the CMA. The CMA Annual Plan 2021 to 2022 refers to the further work the CMA is undertaking this year - <https://www.gov.uk/government/publications/competition-and-markets-authority-annual-plan-2021-to-2022/annual-plan-2021-to-2022>. We recently published an information document to help firms, NGOs and trade associations navigate competition law as it currently stands, when engaging in cooperation agreements for the attainment of sustainability goals. <https://www.gov.uk/government/news/sustainability-agreements-cma-issues-information-for-businesses>

Policy question

Question 39: The CMA invites views on the above 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.

Impact questions

The CMA proposes that the Secretary of State does not make any changes to the UK VABEO in respect of environmental sustainability issues, but the CMA would instead seek to provide guidance on this topic in any CMA VABEO Guidance.

Question 40: What are your views, if any, on whether the retained VABER and EU Vertical Guidelines, contain or frustrate initiatives which might support the UK's Net Zero and environmental sustainability goals. Please include examples to support your views where possible.

Question 41: Relative to the current regime, would any amendments relating to environmental sustainability (either in the UK VABEO or any CMA VABEO Guidance) have a positive impact on your business's operations, or the operations of those you represent? Please provide examples and evidence where possible about how any such amendments would have a positive impact.

Question 42: Relative to the current position, would any amendments relating to environmental sustainability (either in the UK VABEO or any CMA VABEO Guidance) have a negative impact on your business's operations, or the operations of those you represent? Please provide examples and evidence where possible about how any such amendments would have a negative impact.

7. Duration

- 7.1 Under section 6(7) of the Act, a block exemption order may provide that the order is to cease to have effect at the end of a specified period. The CMA proposes that that the UK VABEO should include such a provision.
- 7.2 Part of the benefit of the UK VABEO expiring after a specified period is that it provides the opportunity for the CMA to conduct a further review of the regime for vertical agreements, taking account of market developments since the last review. The CMA considers it would be appropriate for a review of the UK VABEO to take place 6 years after its current review of the retained VABER. An important consideration in the CMA's review of the retained VABER has been recent market developments, such as the growth in online sales, the UK's withdrawal from the EU and the impact of the Coronavirus (COVID-19) pandemic. The CMA considers it is important to review the block exemption after a relatively short time frame given that these developments are ongoing, and often fast moving. This would also allow a more thoroughgoing and fundamental reappraisal of the provisions of the block exemption in the context of UK markets. The CMA is however also mindful that the stability of a longer duration might offer some benefits to businesses through greater certainty.

Policy question

Question 43: The CMA invites views on whether the UK VABEO should have a duration of 6 years.

8. Other provisions

Transitional period

- 8.1 The CMA proposes that the UK VABEO should provide for a transitional period of one year. This means that the Chapter I prohibition would not apply during a period of one year from the date on which the UK VABEO comes into effect in respect of agreements already in force on that date which (i) do not satisfy the conditions for exemption provided for in the UK VABEO, but (ii) on that date, satisfied the conditions for exemption provided for in the retained VABER.¹⁰²
- 8.2 The CMA is proposing to recommend that the UK VABEO has a transitional period of one year to allow businesses that wish to take advantage of the ‘safe harbour’ to review and (if necessary) revise their vertical agreements.

Cancellation in individual cases

- 8.3 Section 6(6)(c) of the Act provides that a block exemption order may provide that if the CMA considers that a particular agreement is not an exempt agreement,¹⁰³ it may cancel the block exemption in respect of that agreement. The CMA proposes that UK VABEO should contain such a provision.
- 8.4 The CMA proposes that any cancellation, ie withdrawal of the benefit of the UK VABEO in an individual case, should be in writing, and that the CMA should first give notice in writing of its proposal and consider any representations made to it. The CMA proposes that any notice should state the facts on which the CMA bases its decision or proposal and its reasons for making it. The CMA envisages that these provisions would be similar to those in the Public Transport Ticketing Schemes Block Exemption.¹⁰⁴
- 8.5 The CMA is proposing to recommend that the UK VABEO provides for the CMA to cancel, ie withdraw, the benefit of the block exemption in individual cases to ensure that the ‘safe harbour’ is only available for those agreements that satisfy the conditions for exemption under section 9 of the Act. The CMA considers that this provision is likely only to be used in exceptional circumstances and that the proposal to provide notice in writing and to

¹⁰² Unless the benefit of the block exemption is cancelled, or otherwise varied or revoked, in accordance with the provisions of the UK VABEO or the Act.

¹⁰³ Exempt agreement means an agreement which is exempt from the Chapter I prohibition as a result of section 9 of the Act (the Act, section 6(8)).

¹⁰⁴ Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption) Order 2001, articles 19–21.

consider any representations would ensure the provision was used appropriately.

Obligation to provide information

- 8.6 Section 6(5) of the Act provides that a block exemption order may impose obligations subject to which a block exemption is to have effect and section 6(6)(b) of the Act provides that a block exemption order may provide that if there is a failure to comply with an obligation imposed by the order, the CMA may, by notice in writing, cancel the block exemption in respect of the agreement. The CMA proposes that UK VABEO should impose an obligation for parties to provide the CMA with information in connection with those vertical agreements to which they are a party if requested to do so and that failure to do so without reasonable excuse should result in cancellation, ie withdrawal, of the block exemption.
- 8.7 The CMA proposes that the obligation should be for businesses to supply the CMA with such information in connection with those vertical agreements to which they are a party as the CMA may require within ten working days from the date on which the party receives notice in writing of the request. The CMA also proposes that if it proposes to cancel the block exemption, it should first give notice in writing of its proposal and consider any representations made to it. The CMA envisages that these provisions would be similar to those in the Public Transport Ticketing Schemes Block Exemption.¹⁰⁵
- 8.8 The CMA is recommending that the UK VABEO provides for an obligation to provide information to ensure that the CMA is in a position to assess whether an agreement that benefits from the block exemption is one that satisfies the conditions for exemption under section 9 of the Act. This provision would also enable the CMA to investigate instances where competition law concerns arise from parallel networks of similar vertical restraints.

Policy question

Question 44: The CMA invites views on the above proposed recommendations in respect of the other provisions in the UK VABEO.

¹⁰⁵ Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption) Order 2001, articles 17–18 and 20–21.

The retained Vertical Agreements Block Exemption Regulation

Annexes to consultation document

Annex A: Consultation questions

Annex B: Legal framework

Annex C: Alternative policy options

Annex D: Evidence gathering

Annex A: Consultation questions

In this Annex the CMA sets out the full list of consultation questions.

CMA's proposed recommendation

Policy and impact questions

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
- b) No
- c) Not sure

Question 2: Please explain your response providing, where possible, examples and evidence to support your answer.

Question 3: How will the proposed UK VABEO as outlined in the CMA's proposed recommendation impact consumers?

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative 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?

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.

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?

- a) Very helpful
- b) Somewhat helpful
- c) Irrelevant
- d) Unhelpful
- e) Very unhelpful

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?

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant 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?

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

Dual distribution

Policy questions

Question 9: What are your views on the CMA's proposed recommendation on dual distribution?

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.

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.

- a) Completely
- b) Very much
- c) Moderately
- d) A little
- e) Not at all

Question 12: To what extent does the dual distribution exception for non-reciprocal vertical agreements, as outlined in the retained VABER, negatively impact your business's operations or the operations of those you represent? Please explain your answer.

- a) Completely
- b) Very much
- c) Moderately
- d) A little
- e) Not at all

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.

Question 14: Do you consider the CMA's proposed recommendation, which also applies the exception to dual distribution by wholesalers and by importers, to have a positive or negative impact on business operations? Please explain your answer.

- a) Significant positive impact
- a) Moderate positive impact
- b) Negligible impact
- c) Moderate negative impact

- d) Significant negative impact

Resale Price Maintenance

Policy questions

Question 15: Do you agree with the CMA's proposed recommendation on resale price maintenance (RPM)?

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.

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.

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
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

Question 19: Are you aware of, or have you encountered, any difficulties in your business as a result of the treatment of RPM as a hardcore restriction for the purposes of the retained VABER? If so, please give examples.

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.

Question 21: Do you agree that additional guidance on this issue would be helpful? If so, please provide your views on what that guidance should say including examples of situations where online sales should be regarded as passive or active sales.

Impact questions

Question 22: Do you have any examples of circumstances where territorial and customer restrictions might lead to operational efficiencies? Please include examples of locations within the UK and, where possible, quantitative and/or qualitative evidence in your answer.

Question 23: How helpful is the exemption for restrictions of active sales in the UK to your business or those you represent? Please explain your answer.

- a) Very helpful
- b) Somewhat helpful
- c) Irrelevant
- d) Unhelpful
- e) Very unhelpful

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?

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.

Impact questions

Question 26: What are your views on the current regime, which treats certain online sales as a form of passive sales? What are some examples of the benefits or costs for your business operations, or the operations of those you represent? Please include examples and where possible, quantitative and/or qualitative evidence in your answer.

Question 27: Does the treatment of online sales bans as a hardcore restriction have an overall positive or negative impact on your business? Where possible, please provide examples of the impact on online channels and offline channels in your answer. Please include qualitative and/or quantitative evidence where possible.

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

Question 28: Do you consider that the CMA's proposed recommendation (to remove dual pricing and the requirement for overall equivalence in selective distribution from the list of hardcore restrictions) will benefit offline channels? If yes, please provide examples where possible.

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 obligations² – if so, please provide evidence or examples in practice of circumstances where this may be the case.

Question 30: Do you agree that additional guidance on this issue would be helpful? If so, please provide your views on what that guidance should say.

Impact questions

Question 31: To what extent are indirect sales channel parity obligations relevant for your business’s operations, or the operations of those you represent? Please explain your answer.

- a) Completely
- b) Very much
- c) Moderately
- d) A little
- e) Not at all

Question 32: To what extent are direct sales channel parity obligations relevant for your business’s operations, or the operations of those you represent? Please explain your answer.

- a) Completely
- b) Very much
- c) Moderately
- d) A little
- e) Not at all

¹ As defined in paragraph 4.63

² As defined in paragraph 4.63

Question 33: Are you aware of any difficulties to your business if indirect sales channel parity obligations are treated as hardcore restrictions for the purposes of the proposed UK VABEO? Please explain your answer.

Non-compete obligations

Policy questions

Question 34: The CMA invites views on the proposed recommendation³ in respect of non-compete obligations. In particular:

- a) Should non-compete obligations that are tacitly renewable remain 'excluded restrictions' under the UK VABEO?
- b) Are there any risks in allowing such obligations to be automatically exempt under the UK VABEO?
- c) Should the current regime in the derogations in Article 5(2) and Article 5(3) of the retained VABER be revised (for example, to reflect market developments such as the increasing trend towards online sales)?

Impact questions

Question 35: To what extent are non-compete obligations relevant to your business or industry, or the industry that you represent? Please explain your answer.

- a) Completely
- b) Very much
- c) Moderately
- d) A little
- e) Not at all

Question 36: Relative to the current regime as set out in the retained VABER, what would be the likely impact on your business's operations, or the operations of those you represent, if non-compete obligations that exceed 5 years in duration were no longer treated as 'excluded' restrictions? Please include examples and where possible, quantitative and/or qualitative evidence in your answer.

Question 37: What are some of the benefits or efficiencies of non-compete obligations remaining exempt if the duration is less than 5 years? Please include

³ Paragraphs 5.10-5.16.

examples and where possible, quantitative or qualitative evidence (or both) in your answer.

Agency

Policy question

Question 38: The CMA invites views on the proposed recommendation⁴ in respect of agency issues and stakeholders to make any submissions they consider would help the CMA to develop useful guidance on this topic.

Environmental sustainability

Policy question

Question 39: The CMA invites views on the proposed recommendation⁵ in respect of environmental sustainability and stakeholders to make any submissions they consider would help the CMA to develop useful guidance on this topic.

Impact questions

The CMA proposes that the Secretary of State does not make any changes to the UK VABEO in respect of environmental sustainability issues, but the CMA would instead seek to provide guidance on this topic in any CMA VABEO Guidance.

Question 40: What are your views, if any, on whether the retained VABER and EU Vertical Guidelines contain or frustrate initiatives which might support the UK's Net Zero and environmental sustainability goals. Please include examples to support your views where possible.

Question 41: Relative to the current regime, would any amendments relating to environmental sustainability (either in the UK VABEO or any CMA VABEO Guidance) have a positive impact on your business's operations, or the operations of those you represent? Please provide examples and evidence where possible about how any such amendments would have a positive impact.

Question 42: Relative to the current position, would any amendments relating to environmental sustainability (either in the UK VABEO or any CMA VABEO Guidance) have a negative impact on your business's operations, or the operations

⁴ Set out at paragraph 6.7.

⁵ Set out at paragraphs 6.10-6.12.

of those you represent? Please provide examples and evidence where possible about how any such amendments would have a negative impact.

Duration

Policy question

Question 43: The CMA invites views on whether the UK VABEO should have a duration of 6 years.

VABEO Obligation to provide information

Policy question

Question 44: The CMA invites views on the above proposed recommendations in respect of the other provisions in the UK VABEO.

Annex B: Legal framework

Chapter I prohibition

1. The Chapter I prohibition (section 2 of the Act) prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom and may affect trade within the United Kingdom, unless they meet the conditions for exemption contained in section 9(1) of the Act.

Exemption regime

1. Section 9(1) of the Act specifies that an agreement is exempt from the Chapter I prohibition if it:
 - contributes to
 - (a) improving production or distribution, or
 - (b) promoting technical or economic progress,
 - while allowing consumers a fair share of the resulting benefit; and
 - does not
 - (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or
 - (b) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.
2. Under section 6(1) of the Act if agreements which fall under a particular category of agreements are, in the opinion of the CMA, likely to be exempt agreements, the CMA may recommend that the Secretary of State make an order specifying that category for the purposes of this section.
3. Under section 8(1) of the Act, before making a recommendation under section 6(1), the CMA must:
 - publish details of its proposed recommendation in such a way as it thinks most suitable for bringing it to the attention of those likely to be affected; and

- consider any representations about it which are made to it.

Retained VABER⁶

4. The retained VABER relates to agreements between two or more undertakings that, for the purpose of the agreement, operate at different levels of the distribution or production chain and relate to the conditions under which the parties may purchase, sell or resell certain goods or services (vertical agreements).⁷ Such vertical agreements are indispensable to many sectors of the economy.
5. The retained VABER exempts from the Chapter I prohibition categories of vertical agreements and concerted practices which are assumed to confer sufficient benefits to outweigh any potentially anti-competitive effects.⁸ By virtue of satisfying the conditions of the retained VABER, such vertical agreements are automatically exempt from the Chapter I prohibition.
6. The retained VABER is one of the 'retained exemptions' created by a combination of the operation of the European Union (Withdrawal) Act 2018 and the Competition (Amendment etc.) (EU Exit) Regulations 2019.⁹ Since the end of the Transition Period (1 January 2021) the retained VABER has provided certain agreements with an exemption from the Chapter I prohibition, meaning that:
 - agreements benefiting from the EU VBER before 1 January 2021 continue to be exempt from the Chapter I prohibition under the retained VABER, provided they continue to meet the criteria of the retained VABER; and
 - agreements entered into from 1 January 2021 are exempt from the Chapter I prohibition under the retained VABER, provided they meet the criteria of the retained VABER.¹⁰

⁶ Available at <https://www.legislation.gov.uk/eur/2010/330/contents>

Please note the outstanding changes introduced by the Competition (Amendment etc.) (EU Exit) Regulations 2019 not yet incorporated into this published version of the retained VABER.

⁷ Article 1(1)(a) of the retained VABER.

⁸ See EU Vertical Guidelines, paragraph 108.

⁹ As amended by the Competition (Amendment etc.) (EU Exit) Regulations 2020.

¹⁰ See paragraph 4.31 of the Brexit guidance.

Application of the retained VABER

7. **Exemption.** Article 2 of the retained VABER exempts vertical agreements, subject to the following provisions contained in the retained VABER.
8. **Market share threshold.** The parties to the vertical agreement under consideration must have market shares of 30% or less on the relevant market (Article 3). Parties can refer to Article 7 for guidance on applying the market share threshold.
9. **Hardcore restrictions.** The vertical agreement must not contain any hardcore restrictions (Article 4). If a vertical agreement contains a hardcore restriction, the entire agreement falls outside of the retained VABER and must be assessed under the Chapter I prohibition. Given the seriousness of hardcore restrictions, there is a presumption that they fall within the Chapter I prohibition and are unlikely to satisfy the conditions for individual exemption in section 9 of the Act. Parties are, however, entitled to submit efficiency claims to demonstrate pro-competitive efficiencies that outweigh the likely harm.
10. **Excluded restrictions.** The vertical agreement must not contain any excluded restrictions (Article 5). If excluded restrictions can be severed, the remaining vertical agreement may still benefit from the retained VABER.

By way of example, Company A is a manufacturer of blodgets with a 28% share of sales across the blodget market. Company B is a retailer of blodgets and has a 15% share of all blodget purchases made. The two companies enter into an agreement for the supply of blodgets by Company A to Company B. The vertical agreement requires Company B to purchase all of its blodget requirements from Company A for the duration of the vertical agreement, which lasts for 10 years. The vertical agreement also requires Company B to sell blodgets for no less than £5. Company A does not operate a selective or exclusive distribution system.

- a) Company A and Company B satisfy the market share thresholds contained in Article 3. Therefore, their vertical agreement satisfies Article 2 subject to Articles 4 and 5 of the retained VABER.
- b) The requirement for Company B to purchase all blodget requirements from Company A is a non-compete obligation, because Company B cannot purchase blodgets from any of Company A's competing suppliers. This is an excluded restriction under Article 5 because the vertical agreement lasts for 10 years. The vertical agreement can still benefit from the retained VABER

(subject to any hardcore restrictions – discussed below) if the provision is removed from the agreement or the duration of the agreement is reduced to 5 years.

- c) The requirement for Company B to price blodgets at £5 or more amounts to RPM because it stipulates a minimum sale price. This is a hardcore restriction under Article 4(a). The entire agreement cannot benefit from the retained VABER unless this provision is removed. As a result, the agreement would be individually assessed under the Chapter I prohibition.

Withdrawal of the retained VABER

11. The CMA is entitled to withdraw the benefit of the retained VABER in respect of individual agreements under section 10(5)(d) of the Act.¹¹
12. The Secretary of State is entitled to vary or revoke the retained VABER pursuant to section 10A of the Act. This includes revoking the retained VABER in relation to parallel networks of similar vertical agreements covering more than 50% of a given market.¹²

¹¹ See also The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014, Rule 15.

¹² This power was maintained post-Transition Period by the Competition (Amendment etc.) (EU Exit) Regulations 2019 (as amended), Schedule 3, Part 2, paragraph 10.

Annex C: Alternative policy options

1. The CMA does not recommend that the Secretary of State either:
 - a) allows the retained VABER to lapse on its expiry on 31 May 2022; or
 - b) renews without varying the retained VABER for any period.

Lapse

2. Vertical agreements are recognised as having many positive benefits, such as optimising supply chains and promoting improved quality of services.¹³ Without the retained VABER or any UK VABEO, parties would have to individually self-assess every vertical agreement for compliance with Chapter I of the Act. A UK VABEO would instead exempt certain categories of vertical agreements, such that an individual self-assessment is not required.
3. Individual self-assessments can place a considerable burden on both the CMA, national courts, and parties to vertical agreements.
4. Parties can rely on the enforcement practice of the CMA and the European Commission as well as the existing case law of the UK and European courts.¹⁴ However, such decisions and judgments are case-specific and cannot always be directly applied, which limits the degree of legal certainty they provide.
5. The CMA focuses its efforts on deterring and influencing behaviour that poses the greatest threat to consumer welfare, weighing up the merits of each investigation according to its impact on consumer welfare and wider economy, strategic significance, risks and resources required.¹⁵ The occupation of the resources of the CMA to assess individually a wide-range of vertical agreements would undermine the CMA's ability to pursue this strategically targeted enforcement approach as well as adequately resource its other functions. The objectives of a block exemption for vertical agreements are:
 - facilitating self-assessment of vertical agreements by providing greater legal certainty as to which agreements can be considered compliant with

¹³ EU Vertical Guidelines, paragraph 33.

¹⁴ The CMA and UK courts will continue to have regard to European Commission decisions made prior to EU exit (section 60A(3) of the Act). Subject to exceptions contained in section 60A(4) to (7) of the Act, the CMA and UK courts will ensure no inconsistency between UK decisions following EU exit and any EU court decisions prior to EU exit (section 60A(1) to (2) of the Act).

¹⁵ See the CMA's Prioritisation Principles (CMA16), available on [Prioritisation principles for the CMA \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

Chapter I of the Act and which agreements require an individual assessment; and

- avoiding the risk of false positives or false negatives by ensuring that only those agreements which it can be assumed with sufficient certainty fulfil the conditions of section 9(1) of the Act are exempted.
6. If the retained VABER is allowed to lapse on expiry, parties to vertical agreements previously exempted under the retained VABER would need to assess the compliance of all vertical agreements with Chapter I of the Act under section 9(1) of the Act.
 7. Such individual assessment would bring some benefits:
 - a) Parties would enjoy increased flexibility with the ability to design their distribution systems in view of their own assessment of the risks of an infringement of the Chapter I prohibition.
 - b) The CMA would be able to individually assess any vertical restraints, which may be helpful in capturing agreements which would have fallen within the retained VABER or a UK VABEO but nonetheless have a detrimental impact on competition. This may be particularly valuable for any new types of vertical restraints arising as the UK market continues to evolve.
 8. Allowing the retained VABER to lapse could also result in the following disadvantages:
 - c) A reduction in legal certainty for parties to vertical agreements and a corresponding increase in compliance costs.
 - d) An increase in the resources that the CMA would need to devote to assess a wider range of vertical agreements, undermining its ability to focus on those vertical agreements with a greater likelihood of competitive harm.

Renew without varying

9. Since the European Commission's adoption of the EU VBER on 1 June 2010, there have been various changes in the UK market, primarily linked to the increasing digitalisation of the UK economy, which have been mirrored by developments in applicable case law, as well as the CMA's and European Commission's decisional practice. These changes have affected the distribution and pricing strategies of both suppliers and distributors.

10. Market changes that have been observed include increased price transparency and monitoring, access to a wider customer base, increased direct-to-customer sales, and a rise in the use of selective distribution systems. There has also been a rise in the number of online platforms acting as intermediaries and/or making direct sales.
11. As a result of changes in the market, it is likely to be helpful to businesses for the current regime under the retained VABER to be brought up to date in a UK VABEO for the purposes of legal certainty.

Annex D: Evidence gathering

The Evaluation

12. The European Commission launched an evaluation on 3 October 2018 with the aim of gathering evidence on the functioning of the EU VBER and the EU Vertical Guidelines. The scope of the European Commission's evaluation comprised all member states of the EU (which at the time included the UK). Its evaluation included the decisional practice of member states' national competition authorities ('**NCA**s') (including the CMA) and the European Commission as well as the relevant jurisprudence of national (including UK) and European courts.
13. The European Commission used the following sources: a public consultation; a targeted NCA consultation; a stakeholder workshop; an evaluation support study; spontaneous stakeholder submissions; and evidence gathered through other initiatives.¹⁶ The limitations of the analysis included difficulties in gathering evidence on EU VBER related costs and benefits, a certain lack of representativeness of stakeholder feedback, and a lack of information about consumer views.¹⁷

Evidence gathered by the CMA

14. The CMA gathered evidence by inviting interested parties to share their views, in particular on any UK-specific issues relating to the retained VABER and the EU Vertical Guidelines. The CMA invited views from:
 - businesses with operations in the UK that rely on the retained VABER (for example, suppliers of goods and services, distributors/retailers of goods and services, and platforms/intermediaries active in e-commerce);
 - professional advisers (law firms and economists) who advise businesses on the application of competition law to vertical agreements in the UK;
 - industry associations; and
 - consumer organisations with an interest in the UK market.
15. The CMA has hosted five roundtables and four bilateral meetings with interested parties between 29 March 2021 and 11 June 2021. The CMA has

¹⁶ Evaluation SWD, section 4.1 on pp 22-25.

¹⁷ Evaluation SWD, section 4.3 on pp 27-29.

also received a number of written submissions from interested parties. These have been used by the CMA when considering its recommendation to the Secretary of the State. The views expressed are summarised below.¹⁸

Dual distribution

Retention of the dual distribution exception

16. A common theme emerging from the CMA roundtables was support for retaining the exception from the general rule in Article 2(4) of the retained VABER for dual distribution in any UK vertical agreement block exemption. Participants said that several market changes (including the trend of online customers that has been accelerated by the Coronavirus (COVID-19) pandemic) have made manufacturers consider increasing their involvement in distribution. Some participants queried how dual distribution should apply to online platforms.
17. Several participants were of the opinion that removal of the exception would be detrimental. They suggested that, given the prevalence of dual distribution, there would be a high cost for suppliers changing their existing arrangements if they were to choose between vertical integration and independent sellers. Hence, they reasoned that there would be a huge practical impact on businesses if the exception were removed, as contract agreements would need largescale review adding complexity with little benefit to the consumer.
18. It was also suggested that the removal of the exception would fundamentally disrupt the distribution setup of the UK. It was noted that it is beneficial for retailers and direct sellers to both have access to the market as they can attract different consumers and increase market penetration.
19. However, some participants, particularly representatives from the automotive sector, were generally more critical of the retained VABER, with one participant suggesting that dual distribution should not be covered by the block exemption and should instead be fully addressed under the horizontal framework.

¹⁸ The present Annex does not purport to be an exhaustive record or compilation of all the views expressed by participants. Instead it attempts to summarise the key, high-level points made by participants. This summary does not constitute a reflection of the CMA's position in respect of the issues which were discussed. The CMA's representatives chaired and attended the various roundtables to listen to the views of participants.

Role of information flows in dual distribution

20. Another common theme from the CMA roundtables was that further guidance relating to 'information exchange' issues is needed. In particular, it was suggested that guidance on the specific circumstances in which the provision of information in a dual distribution scenario would be capable of giving rise to competition concerns from the CMA's perspective would be helpful. There was also discussion on whether these information flows should be considered ancillary to a dual distribution relationship or should be a separate horizontal consideration.
21. Participants noted that there were ways to address the issues surrounding the flow of information within a company (such as through staff compartmentalisation or use of information barriers) but others noted that these could be impractical or impossible for smaller businesses.
22. Other participants noted that data could be legitimately shared between manufacturers and distributors to gain greater knowledge of a supply chain, improve products, and ensure better responses to customer demand. Some participants also questioned the theory of harm relating to this issue. It was suggested that information exchanges in a 'dual distribution' scenario, generally form part of the vertical relationship between the supplier and its distributor. It was also noted that the provision of historical information used to understand market dynamics is acceptable.
23. However, other participants recognised that the provision of information had the potential to be problematic and smaller firms may suffer if there is not sufficient clarity regarding the provision of information. It was noted that it is sometimes difficult to distinguish between a pro-competitive vertical exchange of information and an anti-competitive horizontal exchange.
24. Some participants, particularly representatives from the automotive sector, raised concerns over manufacturers' ability to gain unfair access to information from retailers (such as detailed information on their sales and margins) which could grant the manufacturer a competitive advantage if they chose to enter the market as a retailer.

Addition of a lower market share threshold

25. Participants were generally not in favour of introducing market share thresholds as they considered that this would add complexity for businesses. In particular, it was noted that a need to ascertain a company's market share would be possible for larger businesses but not smaller firms.

Extension of the dual distribution exception to other types of firms

26. Some participants noted that the extension of the exception for dual distribution to wholesalers, importers and distributors is needed as there is currently a situation where, if such firms decide to sell directly, then their agreements with resellers potentially fall outside the scope of the block exemption.

Retail Price Maintenance

27. Participants noted that there are circumstances in which RPM may be problematic, for example:
- where there are networks of agreements such that RPM is prevalent across a particular market; or
 - where RPM is agreed between parties with market power, as this has greater potential to affect inter-brand competition, including, for example, where downstream retailers with joint market power use RPM to preserve the status quo and prevent the emergence of new business models.
28. Other participants noted that the theories of harm for RPM were relatively specific, and that RPM should only be considered problematic when it affects inter-brand competition.
29. Participants (both at the CMA roundtables and in bilateral meetings) provided the following examples of when efficiencies may arise from RPM:
- for new product launches, although there were differing views regarding the permissible duration of RPM;
 - for seasonal or high-end products;
 - to prevent free-riding, for example, where bricks-and-mortar outlets invest heavily in quality or service;
 - for common promotions in franchising models;
 - to prevent products being used as 'loss leaders' or 'traffic generators';
 - to maintain brand value during the lifecycle of a product; and
 - to test the positioning of a product in a market.

30. Some participants (particularly economists) said that RPM should not be categorised as a hardcore restriction and instead an ‘economic effects’ approach would be more appropriate. Some participants pointed to the more effects-based treatment of RPM in certain other jurisdictions.
31. Other participants said that the current regime should not be revised. Several participants (both at the CMA roundtables and in written submissions) suggested that further worked examples of the circumstances in which RPM may be justified would be useful. Participants also suggested that guidance in the context of franchising arrangements would be helpful.
32. Some participants observed that under the current regime businesses may be unwilling to engage in RPM because of the risks involved even in circumstances where they consider it overall pro-competitive. Other participants said that it is important to consider the way in which efficiency arguments are assessed in any particular case, alongside the appropriate categorisation of RPM under any block exemption. Participants suggested that a possible option may be to encourage firms to seek short-form opinions from the CMA on specific cases or the provision of clear guidance and worked examples.
33. Finally, participants (both at the CMA roundtables and in written submissions) said that further guidance on a number of other issues would be useful:
 - determining the permissibility of recommended resale prices (particularly in the context of parties with higher market shares);
 - the assessment of fulfilment contracts (or ‘flash title transfer’), including in the context of logistics or sales facilitation services; and
 - the assessment of the collection by suppliers of retail pricing data from their retail distributors.

Territorial and customer restrictions

Exclusivity

34. A few participants suggested that businesses should have the ability to restrict active sales and allocate different territories to different distributors. One participant noted that, in some sectors, absolute territorial protection may be justified by network complexities and the need for local economies of scale.
35. It was noted, however, that allowing absolute territorial and customer restrictions could have unintended consequences such as certain consumers

in the UK being unable to use a shop or service in a part of the UK where they do not live.

Combining distribution models

36. There was general agreement that the current rules were somewhat inflexible and forced businesses to be cautious by either entering into a fully selective or fully exclusive distribution model in order to benefit from the block exemption. This prevents businesses from adopting alternative pro-competitive arrangements that do not fall squarely into the 'exclusive' or 'selective' distribution categories.
37. Participants said that territorial sales restrictions were less viable outside of exclusive distribution networks. They were in favour of more flexibility for businesses to choose their own route to market as it was difficult for businesses to reconcile the current rules with what they wanted to do in terms of distribution.
38. Many participants were in favour of a more permissive system that allowed businesses to combine different models at different levels of the supply chain. A suggestion was made to allow the combination of exclusivity at the wholesale level with selective distribution at the retail level. It was noted that such a change would provide flexibility and greater legal certainty for businesses wishing to adopt such distribution models.

Shared exclusivity

39. Another common theme which emerged from the CMA roundtables was businesses' aspiration to have the ability to appoint more than one distributor per exclusive territory whilst still benefitting from the block exemption. According to some participants, allowing 'shared exclusivity' would lead to significant efficiencies by spreading risk across more than one distributor, ensuring wider distribution and bolstering intra-brand competition. They noted that shared exclusivity was currently avoided due to the inability to prevent active sales into territories where there is more than one distributor.

Extraterritorial restrictions and Northern Ireland

40. Participants called for more clarity as to whether businesses could impose territorial restrictions between the UK and the EU, especially considering the possible implications of the Northern Ireland Protocol.
41. Participants explained that there were legitimate reasons to prevent the re-import of goods due, for example, to the different standards between states as

regards, for example, labelling and language requirements. Participants also noted possible issues around intellectual property, trademark exhaustion and differing trading standards. It was noted that the current approach to export bans was brought about to protect the EU single market and some participants did not understand the theory of harm outside of this particular context.

42. When considering the possible implications of the Northern Ireland Protocol, participants noted that businesses were unfamiliar with the possible consideration of different parts of the UK as different markets and that this approach could lead to burdensome management arrangements for businesses.
43. Participants were of the view that it would be helpful to have more clarity around the possible scenarios where a supplier operating a selective distribution model across Europe may lawfully restrict sales from outside the territory to unauthorised distributors within the UK.

Online sales bans

44. Participants were sceptical that any firm would have an incentive to fully restrict online sales given the importance of this distribution channel as a route to market. According to those participants, rather than restricting online sales, brand owners might want to have the ability to incentivise the sale of goods from physical stores.
45. It was suggested by some participants that some online restrictions were artefacts of an earlier age and that flexibility regarding efficiencies is needed if online sales bans were to remain hardcore restrictions.
46. Other participants suggested that if non-dominant businesses wanted to attempt to restrict online sales this would be a self-inflicted risk due to the importance of the online sales channel. It was also mentioned that those businesses should be entitled to ignore or control online sales as they see fit. However, it was noted that, if online sales were subject to increased restrictions, certain geographic areas within the UK without access to brick-and-mortar stores could experience exacerbated geographic market issues.

The distinction between active and passive sales

47. Participants questioned the conceptual distinction between active and passive sales. They queried whether the perceived strict approach to online sales was still justified given that online sales no longer needed the same protection due to the growth in online sales in recent years and the increased capability to target specific groups of online consumers.

48. It was suggested that the distinction was no longer relevant outside of the context of the EU single market imperative. It was also noted that there is only a competition concern where the parties to the vertical agreement have market power and, when this is the case, the distinction between active and passive sales becomes irrelevant.
49. On the other hand, it was noted in a written submission that the distinction between active and passive sales is well understood and provides a workable differentiator between lawful and unlawful restrictions in individual cases. It was recognised that, despite the challenges in the distinction between active and passive selling, it remained useful.
50. It was also suggested that any CMA guidance on this issue should reflect recent case law and decisional practice, including the European Court of Justice judgment in *Coty*¹⁹ and the European Commission decision in *Guess*.²⁰ This would improve legal certainty and prevent inconsistency of approach across relevant authorities.

Other issues

51. Participants, especially those representing luxury brands, expressed the view that the integrity of selective distribution should not be compromised by any future changes to the rules. It was noted that quality-based selective distribution systems were permitted in the European Court of Justice judgment in *Coty* and participants wanted to see this, and other recent case law, incorporated into any CMA guidance.
52. Some participants suggested that suppliers should have the ability to require distributors to provide information about their customers where they were caught reselling. Those participants were in favour of introducing restrictions on active and passive sales to those customers facilitating 'grey market' sales.

Indirect measures restricting online sales

The exponential growth of online sales

53. Participants agreed that online channels had grown significantly over the last decade and no longer required the level of protection afforded to them under the current regime. It was noted that the current guidelines were introduced

¹⁹ *Coty Germany GmbH v Parfümerie Akzente GmbH* (Case C-230/16) EU:C:2017:941.

²⁰ See Commission press release of 24 July 2018, IP 18/4601, available [here](#). A non-confidential version of the prohibition decisions is available on DG Competition's website.

when internet sales were still taking shape but in the current climate, if anything, brick-and-mortar stores were the distribution channel in need of protection.

54. Participants recognised that brick-and-mortar retailers were facing increasing challenges when competing against online channels, a situation which was further exacerbated by the restrictions placed on retail premises as a result of the Coronavirus (COVID-19) pandemic.

Brick-and-mortar distribution channels

55. There was broad agreement that there should be scope to be more permissive in relation to what brand owners can do to encourage investments made by bricks-and-mortar retailers without necessarily disrupting online retailers.
56. Participants were of the view that businesses desired more flexibility to reward investments made by brick-and-mortar retailers or otherwise incentivise the sale of goods from physical stores. Recognising that physical retail stores incur much higher costs than pure online distributors, participants stated that brands wanted to support brick-and-mortar stores but there was a perception that it was difficult to fully compensate or reward investments in those stores under the current VBER rules.
57. Participants acknowledged that the EU Vertical Guidelines did allow for some incentives to be given in order to reward investments in brick-and-mortar distribution. However, it was suggested that these mechanisms were not particularly utilised because they did not reflect the complexity of many commercial arrangements, or implied the need to monitor the costs of authorised dealers; something which was regarded by participants as impractical.
58. Participants agreed that significant investment was required for brick-and-mortar stores and that brands should be able to provide additional rebates, discounts and support, or, at least, more than a mere lump sum payment to fully reward investments in physical stores, marketing or broader efforts for the brand.

Omni-channel distribution

59. Many participants stated that both online and brick-and-mortar channels were important for the businesses they represent. Consumers utilised both channels in both directions (offline to online, as well as online to offline) in their decision-making processes. These businesses were therefore committed

to an omni-channel distribution and would not have any incentives to restrict online sales, even if they were allowed to do so.

Equivalence principle

60. Participants suggested that offline and online channels served different purposes and had different methods of securing consumer purchases. It was also noted that not all services offered in store could be offered online. In this regard, brands had practical difficulties in developing equivalent criteria for two very different sales environments.
61. Taking into account that these channels serve completely different purposes, there was wide agreement amongst participants that full equivalence was not possible in every single case and that the equivalence principle was somehow out of tune with current market conditions. Some participants stated that, if the equivalence principle were to be relaxed (ie removed as hardcore restriction of competition), this would enable greater optimisation of performance within these differing channels. The CMA has received a written submission in which the opposite view was held. In this submission it was noted that despite the challenges presented by the equivalence principle, it still remained a useful and coherent guide for self-assessment.
62. Some participants stated that, in their industries, the protection of luxury brand 'aura' was of critical importance and therefore it was crucial for their businesses to maintain control over what was shown to customers online.
63. The importance of the requirement for proportionality (as per the *Metro* criteria²¹) in any assessment of the equivalence criteria between brick-and-mortar and online distribution was mentioned, and it was suggested that it would be helpful to have more guidance on these criteria.

Dual Pricing

64. Many participants agreed that the relaxation of the rules on dual pricing would help businesses encourage investments in bricks-and-mortar channels. It was therefore suggested that the any CMA guidance on the issue should not treat dual pricing as a hardcore restriction and set out examples of when dual pricing would cease to benefit from exemption. In a written submission it was mentioned that it would be beneficial to allow variable promotional support in some circumstances.

²¹ Case 26/76 *Metro v Commission* (No 1) [1977] ECR 1875, EU:C:1977:167.

Parity obligations

65. There were a range of views amongst participants regarding direct and indirect sales channel parity obligations but there was a consensus that more clarity on the treatment of these clauses was needed.
66. The discussion was largely dominated by indirect sales channel parity obligations (also referred to as 'wide most favoured nation' clauses) and participants generally agreed that these typically give rise to more competition concerns than direct sales channel parity obligations (also referred to as 'narrow most favoured nation' clauses).

Theories of harm: indirect sales channel parity obligations

67. Many participants agreed that indirect sales parity obligations were particularly problematic when in widespread use and/or employed by businesses with significant market power.
68. It was noted that the extent of harm from a particular type of sales channel parity obligation depends on the importance of the parameter of competition that the parity obligation relates to.
69. Participants made the following points regarding the possible theories of harm on the use of indirect sales channel parity obligations:
 - finding the same price across all platforms due to parity clauses leads to the avoidance of price competition;
 - platforms were able to charge high fees and there was little evidence of fee cutting, which indicated that sales channel parity clauses were dampening the incentives for platforms to compete;
 - if allowed, sales channel parity clauses for online platforms would create a similar competitive landscape as RPM did for retail, which is currently prevented and viewed as harmful regardless of any market share thresholds; and
 - indirect sales channel parity clauses could prevent entry of new platforms and businesses from creating new offerings.

Efficiencies: indirect sales channel parity obligations

70. Participants recognised possible efficiency justifications for indirect sales channel parity obligations. There was a general consensus among

participants that the avoidance of free-riding was the main justification used for online platforms (eg consumers may gather all the information needed to make their choice on a comprehensive online platform and then go to another platform to book at a cheaper rate).

71. It was also mentioned that indirect sales channel parity obligations could lead to the following efficiencies:
- reduced consumer search costs if prices are the same across channels;
 - increased consumer trust in online platforms if consumers are not able to find a better price on other channels;
 - reduced negotiation costs between suppliers and platforms;
 - facilitation of new entry; and
 - avoidance of free riding by alternative channels.
72. Regarding the avoidance of free riding, other participants were sceptical about the relevance of this factor and suggested that:
- any free-riding issues were likely to be minimal because the amount of investment required for platforms paled in comparison to investments made by the businesses who provided the actual goods and services; and
 - any free-riding issues may be mitigated as a result of other competitive factors such as revenue generated by platforms obtaining and utilising data from customers.

Inclusion in the UK VABEO and/or the CMA VABEO Guidance

73. Some participants suggested that they would like to see sales parity obligations codified within the block exemption regulation itself while others saw merit in addressing them within the any future guidelines.
74. Participants called for more legal certainty through an update to the guidelines to reflect recent case law.
75. In relation to the future treatment of sales parity obligations there were mixed views. A few participants expressed scepticism that parity obligations merited much attention at all with regards to the retained VABER, as the circumstances in which they are problematic were narrow and becoming clearer with current case law. They were comfortable with the provision of a safe harbour for sales parity clauses employed by businesses with a market

share below 30%. Another participant stated that at least indirect sales channel parity obligations should not benefit from safe harbour at all.

76. It was also suggested by some participants that parity clauses should be subject to an effects-based analysis and a 'by object' type of categorisation should be avoided.
77. In general, participants were more comfortable with the idea of creating a safe harbour for direct sales channel parity obligations than for indirect sales channel parity obligations. Participants generally agreed that whichever direction the CMA takes, clear guidance with examples was crucial. Some participants called on the CMA to not only focus on market shares but also to provide additional guidance on market definition which was perceived to be a complex exercise in some cases.
78. Some participants noted that any hard stance taken by the CMA would be rendered pointless if online platforms were to remain able to replicate the effect of parity clauses by means other than parity clauses, for example by penalising non-compliant suppliers through ranking changes.

Wholesale parity obligations

79. Participants who opined on wholesale parity obligations generally agreed that they were less problematic in the absence of market power and that additional guidance would be helpful.
80. A further participant noted that they tended to be problematic in a very limited set of circumstances and clarified that the problematic ones could be dealt with outside of the retained VABER context because either (i) the parties exceeded the market share cap or (ii) the parity obligations could be categorised as contractual provisions in horizontal rather than vertical agreements.

Other issues

81. It was noted that businesses were increasingly raising concerns around non-price parity provisions and that therefore the CMA should provide guidance on how these can be assessed. It was suggested that a non-price term could be assessed by looking at whether it was a competitive factor in the given marketplace.

Non-compete obligations

Duration of non-compete obligations

82. One of the issues that the CMA roundtables focused on was the most suitable length of non-compete obligations, both generally and within specific sectors. Some participants suggested that the five-year limit generally worked well as it provided certainty and gave businesses the chance to re-evaluate their market position. One participant suggested that businesses would generally opt for the exempted length provided in any UK vertical block exemption.
83. Other participants suggested that the ideal length of a non-compete obligation varied by sector. For example, it was suggested that bancassurance was a sector where five years was too short a length of time to be efficient, while five years was probably too long for agreements in the technology sector. One participant suggested that high initial set-up costs incurred by a distributor or franchisee could justify a non-compete obligation of up to ten years.
84. It was also noted that issues with the five-year timeframe were irrelevant in the context of franchising. Another participant added that non-compete obligations that did not cover 100% of a given buyer's purchases should be allowed to extend beyond five years. One participant raised that, while the five-year requirement was not ideal, a divergence between the EU and UK on the legal basis for non-compete obligations was undesirable.
85. In contrast, one participant questioned whether non-compete obligations should even be covered by the 'safe harbour', as there could be concerns with these obligations even under five years. One participant representing the automotive sector argued against a more permissive approach to non-competes, supporting that manufacturers already exerted undue influence over dealers and had restricted dealers operating multi-brand showrooms.²² This participant suggested dealers were subject to strong manufacturer influence towards the end of a five-year agreement.
86. Finally, a common theme emerging from a number of the CMA roundtables was that market shares and market power were more important factors than duration in analysing the impact of a non-compete obligation, and that an agreement where firms had under a 30% market share would have limited effects, even over five years. Other participants suggested that the retained

²² Article 3 of the Commission Regulation (EU) No 461/2010 (the Motor Vehicle Block Exemption Regulation) read in conjunction with Article 5(1)(a) of the EU VBER permits suppliers and distributors with a share of the relevant market not above 30% to agree on a single-branding obligation (see supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles, paragraph 26).

VABER, with its reliance on the 30% market share threshold, does not always accurately reflect or capture the balance of power in non-compete relationships.

Tacit renewal of non-compete obligations

87. Several participants suggested that a requirement to renegotiate any non-compete obligation every five years felt mechanistic, artificial, arbitrary, or did not reflect commercial reality. It was suggested that tacitly renewable non-compete obligations exceeding five years should not be an excluded restriction, and that these could also be efficiency-enhancing. Some participants also requested a more flexible approach, suggesting that an ability for either party to terminate the (tacitly renewable) obligation at any point would be sufficient, absent significant market shares.

Post-term non-compete obligations

88. Two participants suggested that additional clarity and guidance regarding ongoing investments related to know-how (such as in training or intellectual property) was needed. It was also argued that, as the conditions regulating post-term non-compete obligations relate only to premises rather than exclusive or non-exclusive territory, they were ill-suited to the UK market, where services-based franchises and distribution arrangements were more predominant than in EU markets.

Other Issues

89. It was noted that the block exemption does not currently apply to any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers. One participant suggested that this requirement felt artificial in practice and should be removed from any future version of the retained VABER. It was also suggested that further CMA guidance is needed on clauses that are treated as, or act as, non-compete obligations in practice such as 'English clauses', minimum purchase requirements and exclusive purchase obligations.

Agency

General

90. Some participants considered that the guidance on the definition and assessment of agency in the EU Vertical Guidelines is useful,²³ whilst others considered that clarifications were needed. In particular, participants considered that any guidance accompanying the UK VABEO should be updated to reflect current commercial realities.
91. Participants (both at the CMA roundtables and in written submissions) suggested the following general revisions to the current regime:
- Further guidance on any grey areas where it is currently unclear if an agency relationship exists (eg where a retailer with strong bargaining power requires a supplier with limited market power to guarantee its margins).
 - Further guidance regarding the assessment of relationship-specific risks and sunk investments specific to a brand.
 - Additional guidance in the form of worked examples of how agency agreements are to be assessed, including in relation to the assessment of the magnitude of the risk borne by an agent.
 - Additional guidance on agency issues in the context of franchise relationships.
 - Additional guidance on the assessment of agency arrangements in the context of modern platforms and distribution models. It was noted by some participants that as business models become more innovative, a broader definition of agency allowing for greater flexibility would be welcome. Several participants suggested that there should be a move away from the current focus on the allocation of risk, whilst others considered that risk allocation remains an important determinant.
92. Some participants noted that there are differing perspectives on the definition of agency arrangements between lawyers and economists (based on differing

²³ Participants of the Automotive sector roundtable thought that the EU Vertical Guidelines are generally helpful, especially in carefully considering the concept of risk and the definition of genuine agents. It is also straightforward to differentiate between agency for competition law purposes as compared to the commercial definition of agency.

perspectives on risk allocation in the context of an undertaking), which should be borne in mind.

93. Finally, one participant noted that agency agreements provide businesses with flexibility and that there is a risk that distorting the definition of such arrangements to cover too much would ultimately lead to the benefits being lost. One participant said that it may not be appropriate to codify case law in any guidance as it could quickly become outdated given the fast-changing nature of commercial models. Another participant noted that although more flexibility would be useful, it was more important that any guidance increases legal certainty in relation to the definition and assessment of agency agreements.

Online platforms

94. Participants considered that clarifications to the current regime were required to address their application to agreements with online platforms, particularly given the rise of the internet as a channel for selling goods. In particular, some participants considered that platforms should be categorised neither as agents nor retailers, but instead as a third category of undertaking. Other participants suggested that some specific examples relevant to online sales would be helpful, particularly on how risk is allocated across the elements of online transactions.
95. Participants explained that it can be difficult to apply the traditional definitions of agency to online platforms. Participants noted the following points:
- platforms generally impose terms on suppliers, which is the opposite of what is traditionally the case in agency relationships; and
 - parity clauses (which may arise in agreements with online platforms) generally benefit the platform and not the supplier and can diminish competition between platforms with a profound effect on suppliers.

Fulfilment contracts

96. Participants considered that clarifications to the current regime were required to address the application of agency to fulfilment contracts, where a party takes title of the goods when providing a service for the supplier (eg logistics or operating the supplier's website). Participants generally considered that this model is currently caught by the Chapter I prohibition even though any negotiation regarding price takes place between the supplier and end-customer (ie the intermediary sells at the price requested by the supplier according to the contract between the supplier and end-customer).

97. Some participants noted that in some instances, the retailer requires the supplier to use a particular logistics company to deliver the goods, so the intermediary relationship is dictated by the retailer. Participants considered that the rules preventing the supplier from imposing a price on the third-party logistics provider (on the basis that they are not an agent as they have taken full risk over the goods for delivery purposes) do not reflect the commercial reality of the negotiation.

Dual-role agents

98. Participants considered that clarifications to the current regime were required to address the application to so called 'dual role agents' (where companies act as independent distributors for certain products and as agents for other products for the same supplier), the use of which is emerging in the automotive, financial services and other sectors.
99. In written submissions some participants suggested that any CMA guidance should confirm that the agency aspects of such arrangements can fall outside of the Chapter I prohibition. However, other participants considered the use of dual role agents to be unfair as manufacturers choose which products to prioritise for the agency route, whilst relying on retailer investment for sales of other products.
100. Participants were also concerned that this practice allowed manufacturers to control retail prices whilst potentially pushing more risk onto agents or former resellers. Participants said that the parameters of intra-brand competition (especially on price) were diminished by pushing more sales through the agency route.
101. Finally, it was suggested that some guidance on cost allocation in the context of dual role agents would be useful (ie how to accurately allocate costs to a partner in their capacity as independent distributor versus as an agent).

Environmental sustainability

102. The general observation made at the CMA roundtables was that environmental sustainability is a theme that is mostly discussed in the context of horizontal agreements. It was also noted that there was no consensus on what fell under the term 'sustainability' as it could include social impacts (eg fair wages and working conditions).
103. Participants noted however that environmental sustainability is of strategic importance for businesses and consumers, and that manufacturers/brands

have shown interest in becoming 'greener', for example by wanting their retail networks and distribution systems to accept packaging returns.

Use of sustainability commitments and obligations as selection criteria in a selective distribution system and for assessment under section 9 of the Act

104. Participants noted that any CMA guidance could usefully set out how sustainability commitments and obligations could be used as selection criteria in a selective distribution system and how this would be assessed under Section 9 of the Act.
105. Participants asked specifically for more guidance on how environmental criteria could be imposed in selective distribution where such criteria may not be necessary for the provision of the goods or services in question. This point was further developed in the context of purely qualitative selective distribution system, in a written submission.

Out-of-market efficiencies

106. Participants raised out-of-market efficiencies as a special case of efficiencies and suggested that competition policy could be a good tool in this area. It was noted that most of these efficiencies might be rooted in the negative externalities of these agreements, which may make them difficult to assess (eg to quantify the benefits).
107. The general consensus was that out-of-market efficiencies should be considered by competition authorities when reviewing agreements under Chapter I of the Act. In particular, one participant noted that most of the benefits of sustainability enhancing agreements were to society as a whole and thus out-of-market.
108. One participant suggested there may be a connection between out-of-market efficiencies and non-price parity clauses, which could be a way to address the potential market failure in which consumers could not credibly interrogate the sustainability of a supply chain.
109. One participant noted that in a vertical relationship, the seller could simply impose minimum quality standards downstream which are unlikely to cause competition concerns.