

Consultation Response

CMA consultation on *Retained Vertical Agreements Block Exemption Regulation*

Which? welcomes the opportunity to respond to this consultation. In many markets, the amount of choice that consumers have, the prices they pay and the quality of the products they buy will be fundamentally affected by the design of a new UK VABEO.

The expiration of the retained VABER on 31 May 2022 provides an opportunity for the CMA to update the UK's approach to vertical agreements to better reflect the changes in our retail markets. The rapid growth of online markets, including the increased importance of online platforms as marketplaces, means that it is appropriate to revise some of the hardcore restrictions previously in place and, in the case of parity obligations, to introduce a new hardcore restriction. Our responses to specific policy questions are set out below.

Answers to specific 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?

Yes

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

We think that a vertical agreements block exemption is in the best interests of consumers. By providing certainty to businesses it will discourage behaviour that might be harmful to consumers, but which businesses might believe to be legal and which would require scrutiny from the CMA. Additionally, a lack of certainty might discourage firms from adopting practices that are benign or that might even benefit consumers, but which the firm cannot be confident would be legal.

It is also appropriate to take this opportunity to replace the retained VABER with a new UK VABEO as this allows for it to be updated to reflect the current state of markets, in particular the consequences of the growth in digital markets since the retained VABER was originally drafted.

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

a) Significant positive impact

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

Yes, we agree with the CMA's proposed recommendation that RPM should remain a hardcore restriction. There is insufficient empirical evidence that RPM can create actual efficiencies which would outweigh its deleterious impact on price competition.

Question 20: What are your views on the CMA's proposed recommendation on territorial and customer restrictions?

We support the recommendation to continue to treat territorial and customer restrictions as hardcore restrictions. Our support is founded on concerns that if these were not hardcore restrictions then some groups of consumers or consumers located in some parts of the UK may experience less competitive markets, with the consequence that they may have less choice, pay higher prices, and receive lower quality.

With regard to active and passive sales, we are comfortable that there will remain a distinction between these, but updated guidance will be needed about the treatment of different online sales strategies as either passive or active selling. The distinction between these has clearly evolved in online markets. While targeted online advertising at a search engine is an obvious active sales strategy, the CMA may want to consider whether, for example, the use of influencers on social media or even search engine optimisation meet the criteria for being defined as passive.

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

It is clear that markets have developed since this restriction was introduced, such that online markets now require less protection and there are stronger arguments for allowing support for bricks-and-mortar retailers. We also recognise that case law provides safeguards against outright online sales bans. Given this, the recommendation to remove the prohibition of dual pricing and the requirement for overall equivalence from the list of hardcore restrictions may be reasonable.

However, we request that, before making this recommendation to the Secretary of State, the CMA considers what the distributional and equalities impact on consumers might be from removing these hardcore restrictions. It is possible that in some cases the removal of the restrictions might allow online prices to rise, to the detriment of those consumers who rely on online markets. This would include consumers unable to access brick-and-mortar retailers either due to personal circumstances, such as disability or location, or external factors, such as the pandemic lockdowns experienced in the past year. Similarly, if removing the prohibition enables price discrimination in which customers at bricks-and-mortar retailers end up paying more then this would harm consumers who still do not have internet access or who have physical or mental impairments that make it difficult or impossible for them to access important goods and services online.

Question 29: What are your views on the CMA's proposed recommendation on parity (or 'most favoured nation') obligations?

The growth of online platforms led to the use of parity obligations becoming widespread in online markets. We believe that there is now sufficient evidence to conclude that indirect sales channel parity clauses (ie wide most favoured nation clauses) have a harmful impact on consumer welfare because they soften price competition between rival intermediaries. We have been closely following the CMA's decisions in relation to price comparison websites and are supportive of your approach. In addition to the evidence cited in the consultation document, we would draw attention to Jones et al. (2019, enclosed), which evaluates the impact of the CMA's ban on wide MFNs in the motor insurance market and finds that the ban led to a reduction in platform prices of up to 5.75%.¹ Given all this evidence, we agree that indirect sales channel parity obligations should be a hardcore restriction, and that this should extend to equivalent measures.

With regard to direct sales channel parity obligations (narrow MFNs), we note that the roundtable participants had a broad consensus that these give rise to potential efficiencies, largely by maintaining the incentive for consumer search, and that these are likely to outweigh the damage to price competition. However, this position remains controversial and others have argued that narrow MFNs should be a hardcore restriction because there is little evidence that consumers free-ride by researching at an intermediary but booking direct.² The Digital Comparison Tools Market Study concluded that the likelihood of harm from narrow MFNs will vary according to market circumstances.³ It found that harm is more likely when the direct channel offers less of a competitive constraint or when suppliers have a weaker negotiating position. Our investigative research into hotel pricing found that small suppliers feel that narrow MFNs enforced by very large online travel agents have pushed up prices.⁴

Since the evidence that narrow MFNs are harmful is less strong than for wide MFNs, we think it is reasonable for the CMA not to include these as hardcore restrictions. However, given that narrow MFNs may cause harm in some situations we think the CMA should reflect further on whether this should be an excluded restriction. At the very least, we expect that the CMA will seek to create evidence of the impact of narrow MFNs during the duration of the VABEO by prioritising investigations into the use of these if concerns are raised.

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

We support the proposed duration of 6 years. This seems an appropriate balance between having long enough to assess the impact of the VABEO and providing certainty for businesses and being able to react in a timely fashion as markets develop. We think it is important not to have a longer duration given the continued rapid development of digital markets and the increasing importance of these for consumers.

¹ Jones, McDonald and Wren (2019), *Do broad MFNs 'soften' competition in online platform markets? Evidence from UK motor insurance*, mimeo.

² See, for example, BEUC (2021) [European Commission's Consultation on Vertical Restraints: BEUC's comments on the revision of the Vertical Block Exemption Regulation](#).

³ CMA (2017) *Digital Comparison Tools Market Study Final Report*.

⁴ Which? Travel (March 2020) *Why you're paying too much for your hotel room*.



About Which?

Which? is the UK's consumer champion. As an organisation we're not for profit - a powerful force for good, here to make life simpler, fairer and safer for everyone. We're the independent consumer voice that provides impartial advice, investigates, holds businesses to account and works with policymakers to make change happen. We fund our work mainly through member subscriptions, we're not influenced by third parties and we buy all the products that we test.

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