Response of Euclid Law Ltd.
to the Consultation on the
CMA's Draft Guidance on the
Vertical Agreements Block Exemption Order 2022 (CMA154)

1. Euclid Law is a boutique competition law firm, with offices in London and Brussels. We advise on all aspects of UK and EU competition law. Our partners and consultants are senior practitioners with many decades of experience of this field, gained at some of the world's largest law firms.

2. Our lawyers advise on the compatibility of vertical agreements with EU and UK competition law on a daily basis. We also have experience of representing clients in investigations of their vertical arrangements by a number of competition authorities, including the Office of Fair Trading and the Competition and Markets Authority ('**CMA**'). As well as advising a wide range of brands, from globally established companies to start-ups, we have advised online retailers, marketplace operators, brick and mortar retailers, software companies, sporting rights companies, financial services companies, insurance companies, gaming companies and pharmaceutical companies on their distribution arrangements.

3. We are submitting this paper from the position of practitioners who see merit in having a rational, predictable and comprehensible competition law regime for vertical agreements. The views stated are our own and do not necessarily represent the views of any client of our firm.

General comments

4. We welcome publication of the CMA's draft guidance on the Vertical Agreements Block Exemption Order 2022 ('**VABEO**') (the '**Draft Guidance**') and the opportunity to comment on it. Given the shared heritage of the VABEO and the EU Vertical Agreements Block Exemption Regulation ('**VBER**'), as well as the extensive precedent in which the VBER and related principles of EU law have been applied in a UK context, we agree with the CMA's decision to "broadly reflect" the EU's Vertical Guidelines (the '**EU Guidelines**') in the Draft Guidance. While there are some instances where the application of principles developed with the EU's single market in mind to a UK-specific context can come across as somewhat strained,[1] we agree that prioritising consistency is the right approach at this time.

5. We note that in most cases, the Draft Guidance closely follows the text of the EU Guidelines, including taking account of changes to that text which are due to take effect on 1 June, based on the draft text published by the Commission in July last year.[2] The EU Guidelines text will, however, have evolved between the consultation draft and the final version, especially (we anticipate) with respect to information exchange in dual distribution. The extent of this evolution will influence the degree of divergence between the EU and UK approach, potentially including on points where the CMA's policy preference is to maintain alignment. We

[1] In particular, it is hard to envisage any circumstances where a supplier would attempt to use the language used for promotions or packaging or on a website to limit sales *within the UK*, as suggested in paragraphs 8.35(i), 8.37 and 8.46(d), respectively.
[2] In the Annex to Commission Communication, dated 9 July 2021, C(2021) 5038 final.

appreciate that the CMA is no longer able to keep abreast of such developments at the EU level in real time to ensure alignment in those aspects where this is the CMA's policy objective, since it is no longer privy to discussions of draft texts within the ECN. As a result, the CMA is forced by circumstances to track a moving target that it cannot see. Notwithstanding this, we commend the CMA for working with Commission officials as far as is possible under current circumstances.

6. In these circumstances, it is regrettable that, due to the EU legislative timetable, there is unlikely to be sufficient time for the CMA to give full consideration to the final text of the new VBER and EU Guidelines between the date when they are finally published by the Commission and the date that the VABEO and final CMA Guidance comes into force. We would nevertheless encourage the CMA to consider last minute revisions once the final Commission texts are known. More material points that cannot be addressed in such a short space of time could then be picked at the time of the first review of the VABEO or through an interim update to the Guidance.

7. Given our support for the CMA's overall approach with respect to the Guidance, and given that the overall framework and much of the detail have already been determined by the drafting of the VABEO, our specific points are correspondingly limited.

Specific points

Territorial restrictions

8. Based on the experience of our day-to-day practice, the status under the Chapter I prohibition of contractual restrictions on sales into the UK (particularly from the EEA) is the single most important antitrust question that has been thrown up by Brexit, from both a legal and commercial perspective. Notwithstanding this, the CMA has been relatively silent on its approach to this critical question. While we had hoped that the CMA's approach would be clarified by the Draft Guidance, this appears not to be the case.

9. We note the comment at paragraph 2.16 of the Draft Guidance (which is repeated at paragraph 8.27) that the VABEO does not apply to agreements implemented outside the UK, with a footnoted reference to section 2(3) of the Competition Act 1998 ('**CA98**'). As this is potentially confusing, we would suggest this be amended to reflect what section 2(3) actually says, namely that the *Chapter I prohibition* does not apply to such agreements. While the applicability of the VABEO is only relevant for agreements that are potentially caught by the Chapter I prohibition, this is a potentially material distinction in practice.

10. Presumably reflecting the constraints of section 2(3) CA98, the CMA appears to be taking the approach that it will view territorial restrictions as hardcore under Article 8(2)(b) VABEO *only* if they restrict sales *within the UK*. This is reflected in the wording of paragraph 10.57 of the Draft Guidance, which reads "*In an exclusive distribution system, the supplier allocates a territory or customer group exclusively to one or a limited number of buyers and/or reserves it to itself, while restricting its other buyers* ***within the UK*** *from actively selling into the exclusive territory or to the exclusive customer group*" (emphasis added).

11. It is clear from this statement, as well as from the discussion that follows paragraphs 8.27 (including the reference to UK-wide guarantees in paragraph 8.36 and the reference to "buyers of the supplier within the UK" at paragraphs 8.56) that an outright prohibition on sales from, say, Great Britain into Northern Ireland (or vice versa) would be a hardcore restriction under Article 8(2)(b). The Draft Guidance does not *explicitly* address the status under the CA98 of a similar restriction on sales from, say, France into the UK. Similarly, while it is clear that a ban on online sales imposed on a buyer located in the UK would be a hardcore restriction (given its impact on the buyer's ability to sell across the UK), the question of how the CMA would view a ban on online sales that is imposed on a buyer located outside the UK, is not addressed.

12. Given the critical importance of this issue for businesses large and small, we would strongly encourage the CMA to go further than such implicit references in its final Guidance and be more explicit. Specifically, it would be helpful if the CMA could provide clear guidance on whether it currently considers that a vertical agreement between parties based outside the UK, concerning the supply of products outside the UK, that contains an explicit or implicit ban on the buyer making any sales into the UK (whether online or otherwise), is likely to infringe the Chapter I prohibition (bearing mind the current wording of section 2(3) CA98).

13. In light of the pending change in section 2(3) CA98 to widen the territorial reach of the Chapter I prohibition,[3] which will presumably come into force before the first review of the VABEO, it would also be helpful if the CMA could provide guidance on the extent to which its position on this point may change once section 2(3) has been amended to provide that the Chapter I prohibition applies to agreements implemented outside the UK that have or are likely to have direct, substantial and foreseeable effects within the UK. In particular, it would be helpful for the CMA to provide guidance on whether it would in future treat such restrictions as infringements by object or effect[4] and on the extent to which it may take account of whether restrictions are explicit (whether they arise from an express ban on sales into the UK or on the use of the internet) or implicit (for example, because the buyer is prohibited from selling outside the EEA).[5]

Agency and online intermediaries

14. Paragraph 4.19 of the Draft Guidance states that "*Undertakings providing online intermediation services as defined in Article 2(1) VABEO are categorised as suppliers under the VABEO [..] and in principle they therefore cannot qualify as agents for the purpose of applying the Chapter I prohibition*." While the first part of this statement is correct, the second part appears excessively broad without some qualification. An undertaking providing online intermediation services is undoubtedly the supplier of such services for purposes of the VABEO. It does not necessarily

[3] As confirmed by the Government in its recent response to the consultation on reforming competition and consumer policy.

[4] We note the reference to the *Javico* case in footnote 18 of the Draft Guidance, which confirms the statement of that judgment as retained EU case law. While application of *Javico* would suggest that a restriction on sales from outside the UK into the UK would, at most, be viewed as a potential infringement by effect, even after section 2(3) CA98 has been amended, it would be helpful if the CMA could confirm its view on this very important point.

[5] On this point, the approach taken by the Swiss Competition Authority and courts in the *Nikon*, *BMW* and *GABA* cases show how far this principle can be extended, so as to treat implicit bans on importing into a country as infringements. While we would not expect the CMA to take such an extreme approach, the development seen in these cases illustrates the importance of clear guidance on such points.

follow from this that the supply of such services *in itself* precludes that undertaking from acting as an agent with respect to the supply of goods or services that are the subject of the underlying arrangement with the principal.

15. To help illustrate this point, in an offline context, an agent supplies agency services to its principal, while at the same time facilitating a sale by the principal to the agent's customer. While we agree with the points made in 4.20 and 4.21, it is not clear why the fact that intermediation services are provided in an online setting *in itself* precludes an agency analysis.

Methodology for assessment

16. The methodology for applying the VABEO at paragraph 5.2 is helpful. We would nevertheless suggest that step 1 (at 5.2(a)) could be expanded to include at least a very high level reference to the main factors determining the scope of the VABEO (in particular that the agreement should not be between competitors, unless the dual distribution exception applies). While this is covered in Part 6, on the current drafting the reader would need to turn to that section to gain any understanding of the scope.

MAPs

17. We note the guidance at paragraph 8.14 that a minimum advertised price policy "*may […] amount to RPM for instance in cases where the supplier sanctions retailers for ultimately selling below the respective MAPs, requires them not to offer discounts or prevents them from communicating that the final price could differ from the respective MAP*". We also note the helpful reference at paragraph 86 to the *Commercial refrigeration* case.

18. The use of the words "may" and "for instance" in this paragraph might suggest that the CMA considers that there are circumstances where an MAP would not amount to RPM. Given the precedent cited, and the CMA's enforcement record to date, it would be helpful if the CMA could provide some more guidance on what these might be.[6]

Combining selective and exclusive distribution

19. We agree with the CMA's approach that it should be permissible for suppliers to combine exclusive and selective distribution within the same territory, where buyers are established at different levels at the supply chain. We would question, however, whether it is a necessary requirement that "*the exclusive wholesaler is not also a member of the selective distribution system*". Although the obligations on an exclusive wholesaler in such a scenario would be different from those imposed on the retailers, the wholesaler would still need to adhere to core principles of the selective distribution system, including in particular the obligation not to sell to unauthorised resellers, for such a set-up to function. As a result, the wholesaler would need to be a "member of the selective distribution system" in such circumstances, albeit one with a

[6] We note that the proposed wording on this point mirrors the wording of paragraph 174 of the draft EU Guidelines. We understand that the Commission is reviewing that wording, apparently in response to commentators coming to contradictory interpretations of what it meant (namely whether it signalled a relaxation or tightening of the Commission's approach to MAPs). We would suggest that this is one point where the CMA should, if possible, 'wait and see' until the final EU wording is available before finalising this paragraph, as suggested at paragraph 6 above.

different role and different contractual obligations to retailers. We would suggest this be clarified to avoid misunderstandings.

Euclid Law Ltd.
4 May 2022