

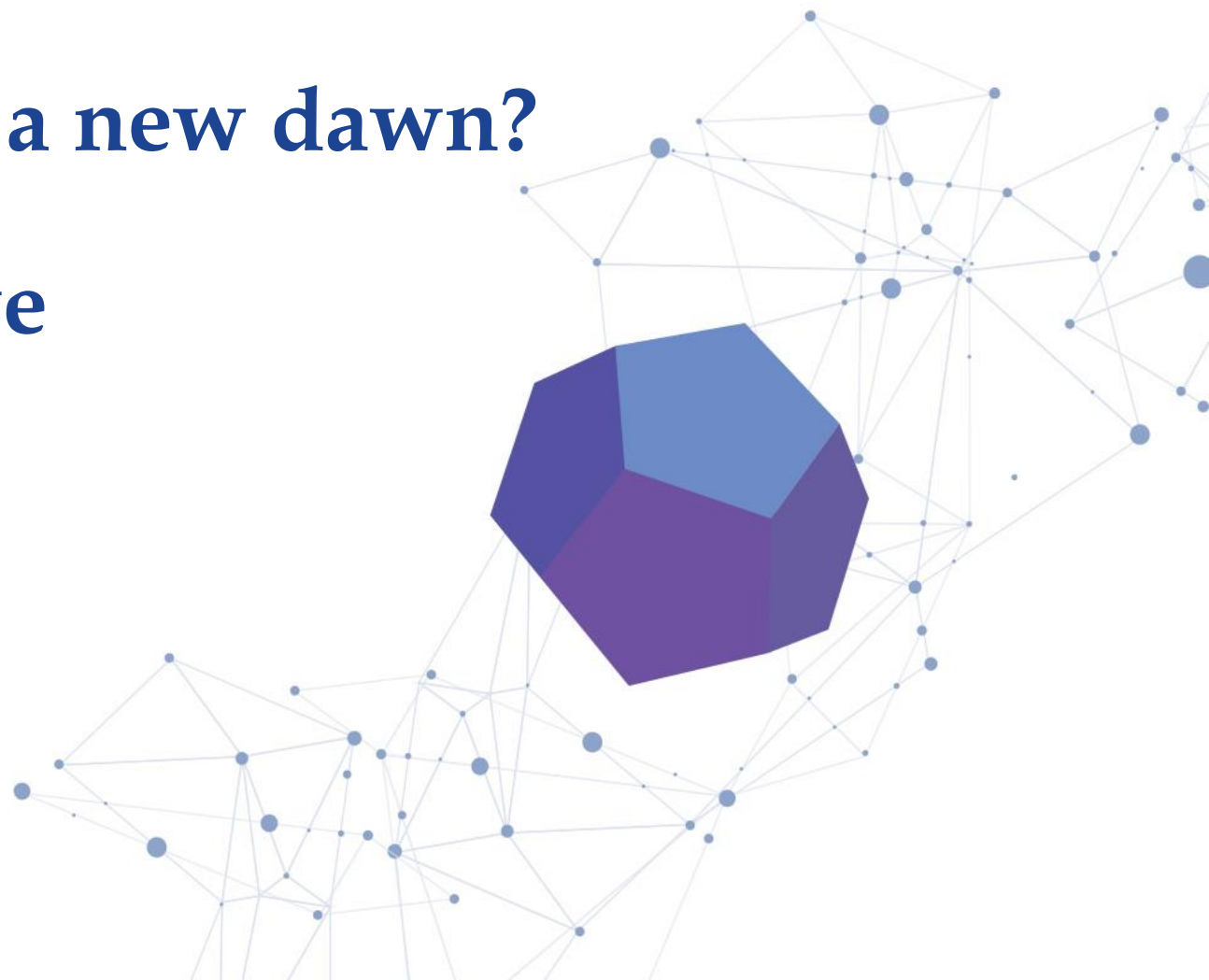


The UK verticals regime – a new dawn?

A practitioner's perspective

4 October 2022

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The impact of Brexit on the UK verticals framework

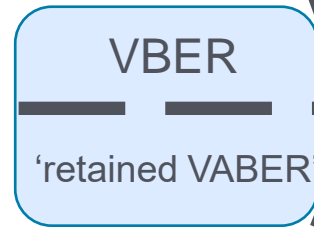
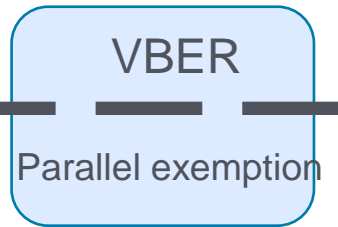
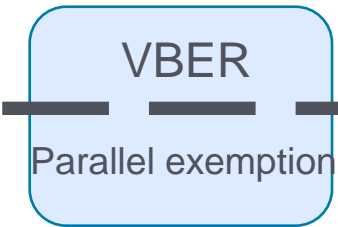
UK as Member State



Brexit day

End of transition period

Expiry of current VBER



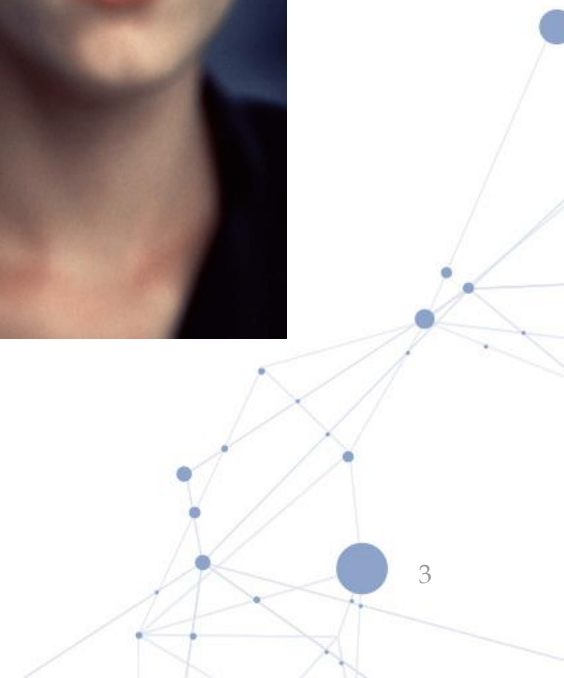
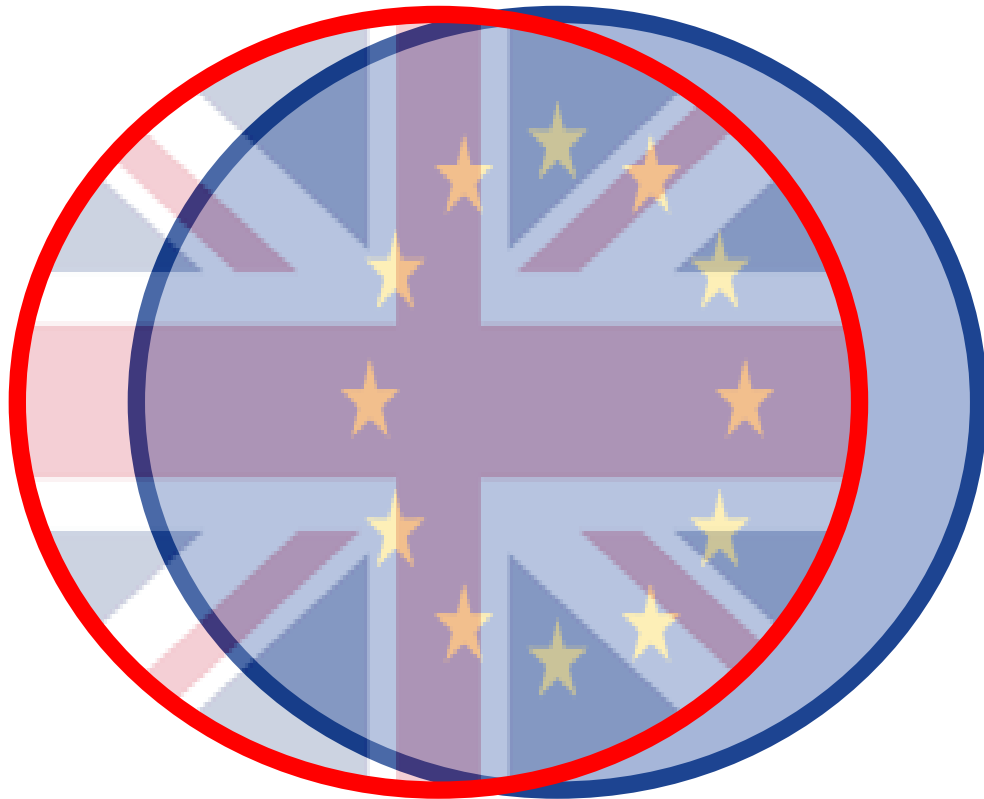
23 June 2016

31 January 2020

31 December 2020

1 June 2022

Where we are now



Continued influence of EU law in UK law

- Direct influence of new EU texts on drafting of VABEO and CMA Guidance
- Retained EU case law, eg *Metro*, *Coty*, *Pierre Fabre*, agency cases, cases on appreciability etc
- UK precedent applying EU case law, eg *Ping*, numerous CMA and OFT decisions
- EU legislation and concepts imported directly into domestic legislation and guidance, eg
 - Online Intermediation Services definition refers to Directive 2015/1535
 - Subcontracting Notice, 101(3) Notice, Notice on agreements of minor importance, etc
 - £44m revenue threshold for trade association members
- Impact of new Commission cases, notices and European Court case law?



Divergence points

	EU VBER	UK VABEO
Treatment of hybrid online platforms	Service agreements with platforms excluded from VBER safe harbour to the extent competitors	No specific limitation
Shared exclusivity	Maximum of 5	“Limited number of buyers”
MFNs/parity clauses	Wide online MFNs excluded restriction	Wide offline and online retail MFNs hardcore restriction
Combination of exclusive and selective distribution	Not permitted	Permitted
Tacit renewal of non-competes	Permitted	Excluded
Duration	12 years	6 years

Practical implications

- Scope for complexity and legal uncertainty on status of pan-European agreements where regimes diverge:
 - differential treatment of MFNs
 - auto-renewal of non-competes
 - impact of differential treatment of hybrid online platforms
- Differences in wording – deliberate or designed to achieve same effect (eg restrictions on effective use of the internet, information exchange)?
- Continued role of single market objective in domestic context?
- Take-up of ability to introduce exclusive territories *within* the UK?
- New ‘fast track’ route for cancellation of VABEO protection potentially significant *if used*

Emerging issues

- Some VBER (and VABEO) changes already having an impact:
 - Additional guidance on marketplace restrictions
 - Flow-through of exclusivity
- Some brands exploring ability to separate UK entirely from EEA networks, given UK's exit from Single Market:
 - Article 101 TFEU applies only where agreement affects competition in the EU and **trade between Member States**
 - CA98 currently applies only where agreement affects trade within the UK *and* is **implemented in the UK** (though set to change)
 - Restrictions on sales *into* UK will usually be outside jurisdiction of CMA
 - Even then, (at most) restriction by effect, rather than object (cf new para 8.32, *Javico*)

How to deal with Northern Ireland?

- Restrictions on sales *within* the UK (including NI/GB) will be hardcore restrictions under VABEO
- Restrictions on sales between NI and Ireland difficult to police and potentially incompatible with pan-Ireland distribution networks
- Restrictions on sales between Ireland and rest of EU hardcore restrictions under VBER



Key issues with vertical agreements in practice

- It's a **safe harbour!**
 - Application of 30% market share threshold often critical (cf *Adidas, Nike*)
 - Confusion often reigns as to what this means in practice...
- It's a *conditional* safe harbour
 - Whether a restriction is hardcore is critical (cf online sales restrictions vs marketplace bans, wide vs narrow MFNs)
 - Provides legal certain but can force commercial agreements into boxes and limit business model innovation
- Outside of hardcore conduct, very difficult for parties or authorities to assess counterfactual or demonstrate individual exemption (and quantify), so proof of object or effect critical (cf *CompareTheMarket, Tobacco*)
- Enforcement priorities often more important than law (cf single market cases, RPM)
- Limited opportunity to test law through private litigation (*Mobility Scooters, Beauty Bay*)



Thank You

