

The UK verticals regime – a new dawn?

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Overview

- Retained block exemptions
- Review of the retained VBER – process and timeline
- New UK verticals regime
- Key substantive areas:
 - Territorial and customer restrictions
 - Indirect online sales restrictions
 - RPM
 - Dual distribution
 - Parity clauses
 - Agency
 - Non-compete clauses

Retained block exemptions

Retained BER	Related Guidelines	Expiry date
Vertical Agreements	Vertical Guidelines	31 May 2022
Research & Development	Horizontal Cooperation	31 December 2022
Specialisation	Horizontal Cooperation	31 December 2022
Motor Vehicles	Sale and repair of motor vehicles and distribution of spare parts	31 May 2023
Liner shipping	N/A	25 April 2024
Technology Transfer	Technology Transfer	30 April 2026

Review of the retained VBER – process and timeline

- **Formally started in January 2021 when EU VBER became the retained VBER under UK law**
- CMA's role was to make a recommendation to Secretary of State for Business, Energy and Industrial Strategy (BEIS)
- June 2021: proposed recommendation published – 5 weeks public consultation period
- November 2021: CMA published its recommendation to the Secretary of State
- May 2022 - Vertical Agreement Block Exemption Order (VABEO)
- July 2022 – CMA VABEO Guidance published

New UK verticals regime

- UK Vertical Agreements Block Exemption (VABEO) and CMA guidance on VABEO
- 6-year duration to allow for further review once implications of UK withdrawal from the EU become clearer
- Information gathering powers
- Power to withdraw the benefit of the exemption in individual cases
- **Key substantive areas:**
 - Territorial and customer restrictions
 - Indirect measures restricting online commerce
 - RPM
 - Dual distribution
 - Parity clauses
 - Agency
 - Non-compete clauses

Territorial & customer restrictions

Restriction

- Limits where or to whom a distributor can resell (i.e. limited to a particular territory or customer group)

New regime

- Treated as hardcore restrictions with certain exceptions
- Agreements which contain such restrictions do not benefit from the safe harbour except in certain circumstances (e.g. some sales restrictions in exclusive distribution or sales restrictions to non-authorised distributors in selective distribution)
- CMA's proposal was to broadly retain status quo and to introduce certain improvements (e.g. to allow greater flexibility, combination of exclusive and selective distribution, 'shared' exclusivity, more protection for members of selective distribution systems)
- CMA also proposed to redefine the boundary between active/passive sales in the context of online selling

Other points

- Originally driven by EU single market imperative, but there are other valid considerations for maintaining current position (e.g. promotion of intra-brand competition and consumer choice)
- UK position will be kept under review

Indirect online sales restrictions

Restrictions

- Charging distributors higher wholesale price for products intended to be sold online than for products sold offline (dual pricing)
- Having different criteria for distributors to meet for online and offline sales in selective distribution

New regime

- Previously treated as hardcore restrictions (ie such provisions did not benefit from the safe harbour)
- CMA proposed dropping 'dual pricing' and the imposition of different criteria for online-offline sales from the list of hardcore restrictions

Other points

- The previous approach was originally driven by desire to offer some protection to online sales at a time when they were still gaining traction but may now be outdated in the light of the expansion of e-commerce and the growth of online platforms
- Updated guidance on restrictions on the use of DCTs and online marketplaces

Resale price maintenance (RPM)

Restriction

- Provisions which fix the resale price of the buyer

New regime

- Continues to be treated as hardcore restriction
- Agreements with RPM do not benefit from the safe harbour
- Updated guidance on when RPM may give rise to efficiencies

Other points

- CMA has extensive and recent enforcement activity on RPM
- Serious competition infringement

Dual distribution

Scenario

- Where the supplier is a manufacturer and reseller of goods and so competes downstream with its distributors

New regime

- The safe harbour continues to apply to dual distribution arrangements
- CMA proposed to extend the exception to wholesalers and importers
- No carve-out for hybrid platforms (UK position will be kept under review) and no dual market share threshold for information exchange
- Revised guidance on information exchange issues in dual distribution

Other points

- Dual distribution has become increasingly more common and may impact on “horizontal competition” at the retail level

Parity clauses (or MFNs)

Restriction

- Restrictions which 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
- Typically, greater competition concerns with ‘wide’ parity clauses (product must not be offered on better terms on other sales channels) than ‘narrow’ parity clauses (product must not be offered on better terms on a party’s own sales channel)

New regime

- Previously these restrictions were not addressed in block exemption and therefore were block exempted subject to meeting the general conditions
- CMA proposed that wide parity retail obligations are treated as hardcore; narrow parity and b2b clauses remain exempted

Other points

- CMA’s evidence base for proposing to treat wide parity retail parity obligations as ‘hardcore’ restrictions

Agency

New regime

- Agreements regarding the negotiation and conclusion of contracts by an “agent” on behalf of its “principal” (genuine agency) are not subject to the Chapter I prohibition – treated as a single economic entity
- CMA provided clarifications in the VABEO guidance:
- “online platforms” when (if ever) can they be an agent?
“Fulfilment contracts” where third party is used for online transaction or delivery and logistics
“Dual role” agents (acting as agent and independent distributor for the same supplier)

Non-compete clauses

Restriction

- Direct or indirect obligation on distributor not to manufacture, purchase, sell or resell goods that compete with supplier's goods
- Includes exclusive purchasing obligation on distributor to purchase more than 80% of its requirements from the supplier

New regime

- These restrictions will continue to be treated as excluded restrictions if duration is more than 5 years
- Non-compete provisions of less than 5 years are automatically exempt, but non-compete provisions of more than 5 years are not and so parties must self-assess whether they infringes competition law
- Tacitly renewable non-competes are considered indefinite (ie more than 5 years) and therefore are also not automatically exempt

Other points

- Block exempting tacitly renewable non-competes (with reasonable termination rights) could involve risks to competition (e.g. limit new entry)

Thank you!