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British Group of the
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The UK Verticals Regime – A New Dawn? Block Exemption Guidance

Date: 4 October 2022

Speakers: Ricardo Araujo, Competition Markets Authority¹ / Becket McGrath, Euclid Law

Overview of the UK regime

Ricardo Araujo (**RA**) began his talk by explaining how the review of the Retained Vertical Agreements Block Exemption Regulation (**Retained VABER**) following Brexit was conducted. He highlighted that the UK review focused on the identification of UK specific market features while having regard to the European Commission's (**EC's**) proposals bearing in mind the increased compliance cost and legal uncertainty of too much divergence. However, the UK review did enable the CMA to identify certain areas where it was in the best interests of the UK economy and British consumers to take a different approach from the one adopted by the EC.

RA explained that the VABEO has duration of 6-years in order to allow for an early review of the impact of market developments (in particular, developments resulting from Brexit, Covid 19 and the Northern Ireland Protocol), once they have become clearer. RA mentioned that the CMA's final recommendation to the Secretary of State on the Retained VABER signalled that, typically, the CMA's power to cancel the benefits of the block exemption in individual cases will only be exercised exceptionally and subject to procedural safeguards.

RA confirmed that one of the CMA's policy objectives behind the VABEO was ultimately to give more flexibility to businesses to design distribution systems according to their needs, creating a 'new dawn' for vertical agreements in terms of protecting competition and providing legal certainty.

Observations on the individual restrictions and exemptions

RA went on to confirm the key points for each of the hardcore restrictions (and conversely, each of the restrictions that benefit from the exemption) under the VABEO:

- **Territorial and customer restrictions** – the restriction has been updated to provide greater flexibility and certainty, allowing a combination of exclusive and selective distribution systems in different territories and also in the same territory provided they're at different levels of the supply chain, and enabling shared exclusivity – subject to an assessment based on proportionality, in regards to the number of parties covered by the arrangement. The CMA VABEO guidance, at paragraphs 8.31 and 8.32, provides guidance on the CMA's likely approach to restrictions to exports outside the UK or imports/reimports from outside the UK.
- **Indirect online sales restrictions** - dual pricing and equivalence are no longer treated as hardcore restrictions, since online sales no longer require the same level of protection in light of the growth that e-commerce and online platforms have experienced over the past few years, and also in light of clear legal precedent establishing that outright online sales bans are to be treated as 'hardcore restrictions' of competition. The CMA's approach attempts to ensure there is a level-playing field between online and offline distribution.

¹ Ricardo Araujo stated that the views expressed during his talk were his own personal views and should not be attributed to the CMA.



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Resale price maintenance (RPM) - the CMA has introduced new guidance on the efficiencies RPM can give rise to, for consideration under the individual exemption in section 9(1) of the Competition Act 1998 (**CA98**). This includes the launch of new products, short term promotional campaigns and minimum advertised prices as a way to tackle loss leader strategies.

- **Dual distribution** - there is no significant shift in policy, although the CMA has extended the exemption to cover hybrid platforms as well as importers and wholesalers. The CMA found there is no concrete evidence for treating hybrid platforms differently to other dual distribution scenarios, although if evidence of harm does arise the CMA will consider cancelling the benefit of the block exemption or reassessing the position when the VABEO expires. Information exchange in a dual distribution context under the VABEO must be 'genuinely vertical' in order to benefit from the benefit from the block exemption.
- **Parity clauses** - wide retail parity clauses are now a hardcore restriction (for both offline and online channels), since they are the most likely to have a direct impact on consumers. However, the CMA will carefully consider efficiency justifications for wide retail parity obligations put forward by parties under investigation under the Competition Act 1998, whilst also considering cancelling the benefit of the block exemption if there is evidence of consumers being harmed by narrow or b2b clauses which remain block exempted under the new regime.
- **Agency** - The CMA VABEO guidance provides extensive guidance on how to assess agency agreements and the single economic entity principle remains the key principle of the agency regime (i.e. genuine agents and their principal form part of the same economic entity). The crucial point is the distinction between 'genuine agency', outside of the scope of the Chapter 1 prohibition, and 'non-genuine agency' agreements which need to be assessed against the Chapter 1 prohibition given their potential to restrict competition. In line with the CMA VABEO guidance, generally, online platforms are unlikely to qualify as genuine agents as the conditions for 'genuine agency' are unlikely to be met (see paragraph 6.31 of the CMA VABEO guidance).
- **Non-compete clauses** - will continue to be treated as excluded and assessed under the individual exemption in s9(1) if they are 'tacitly renewable' beyond five years.

A Practitioner's Perspective

Becket McGrath's (**BM**) talk began by addressing the similarities between the UK and EU regimes, noting that the CMA followed many of the EC's recommendations and addressing the continued influence of EU case law and legislation in the VABEO and accompanying Guidance.

Despite this, BM noted that there are nevertheless areas of divergence (including the treatment of hybrid online platforms, shared exclusivity, parity clauses, combining exclusive and selective distribution systems, the treatment of tacitly renewable non-competes and the duration of the exemption) which may give rise to practical issues for pan-European agreements, as there is greater scope for legal uncertainty. BM noted emerging issues with the new UK regime. In particular, BM noted that Brexit has led some brands to explore the possibility of separating their UK and EEA networks entirely – leading to practical questions regarding the treatment of restrictions of trade in relation to Northern Ireland and Ireland.



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BM finished his talk by identifying the key aspects of both the EU and UK regimes, noting the continued critical importance of the 30% market share threshold and the conditional nature of the safe harbour, making the identification of hardcore restrictions crucial – for example when considering the difference between total online sales restrictions versus marketplace bans, and wide versus narrow parity clauses. BM concluded that without the legal certainty of the safe harbour, the assessment of the counterfactual and the demonstration (and quantification) needed for individual exemption under s9(1) of the CA98 can be particularly difficult in practice for vertical agreements, especially for hardcore restrictions. Whether a restriction is categorised as being by object or effect can also be of paramount importance, as can be seen in the CMA's recent *Comparethemarket* case.