

UK

ANTI-COMPETITIVE PRACTICES

Restrictive business practices—vertical agreements—Vertical Agreements Block Exemption Order—CMA Guidance—dual distribution—online platform economy—resale price maintenance—territorial and customer restrictions—retail parity obligations—non-compete obligations

🔗 Block exemptions; Comparative law; Competition and Markets Authority; EU law; Guidelines; Resale price maintenance; Vertical agreements

The UK Vertical Agreements Block Exemption Order: key takeaways from the CMA guidance

The United Kingdom (UK)'s Vertical Agreement Block Exemption Order (VABEO) came into force on 1 June 2022 and is relevant to both existing and new vertical agreements.¹ The VABEO is intended to help businesses assess whether their vertical agreements comply with competition law, or if any restrictions in such agreements could benefit from the block exemption provided by the VABEO.

The CMA has now issued guidance which describes the application of the VABEO, and sets out how the CMA will apply the Chapter I prohibition in the Competition Act 1998 to vertical agreements (Guidance). The Guidance supersedes the European Commission's (EC) Guidelines on Vertical Restraints² (EC Guidelines) and the CMA's guidance on vertical agreements.³ The Guidance reflects comments received during the CMA's consultation on a draft VABEO guidance in March 2022 (Draft Guidance).

We provide an overview of certain key areas now clarified by the Guidance, and identify areas where the CMA converges with, and diverges from, the EC's new Vertical Block Exemption Regulation (VABER) and Guidelines.⁴

Dual distribution

The VABEO provides that vertical agreements entered between competing undertakings do not fall within its scope, unless they are non-reciprocal dual distribution arrangements that meet certain conditions.

In line with the EC's approach, the CMA's Guidance clarifies that information exchange in the context of dual distribution also benefits from the VABEO, provided the exchange of information is required to implement that vertical agreement and does not restrict competition by object. Unlike the European Union (EU) rules, the VABEO does not require that such information exchange must improve the production or distribution of the contract goods or services. However, the Guidance sets out non-exhaustive lists of information that are being considered likely to restrict competition by object (e.g. information relating to future prices) and unlikely to restrict competition by object (e.g. technical and/or logistical information, recommended/maximum resale prices, marketing, and performance-related information) and in practice both of these lists are materially identical to those adopted by the EC in its new Guidelines.

Online platform economy

While the EC took a more restrictive approach vis-à-vis hybrid online platforms (online platforms that sell on their own behalf, as well as host the sales of third-party sellers), the VABEO does not exclude agreements for the supply of intermediation services by hybrid online platforms from its scope. The Guidance explains what relevant market should be considered for the purpose of calculating the market share thresholds. Where a hybrid

¹ The VABEO applies to vertical agreements from 1 June 2022. However, there is a one-year transition period in respect of existing vertical agreements, provided these fell within the VABER safe harbour, but do not otherwise satisfy the conditions for exemption provided by the VABEO.

² Communication from the Commission Notice Guidelines on vertical restraints 2022/C 248/01 (C/2022/4238) [2022] OJ C248/1.

³ Office of Fair Trading (OFT) guidance on Vertical Agreements (OFT419, 1 December 2004). Adopted by the CMA Board.

⁴ For an overview of the draft VABEO, and key areas of divergence from the EC's VABER and Guidelines, please see A Nourry and et al., "The CMA recommends a UK Vertical Agreements Block Exemption Order: Further signs of regulatory divergence?" [2022] E.C.L.R. 91; Clifford Chance Briefing, *The New EU and UK Competition regimes for Distribution Arrangements* (2022).

platform is providing online intermediation services, this will be the market for the supply of those services, and where it is reselling on its own behalf it will be the market for the supply of the goods or services that are being resold.

Resale Price Maintenance (RPM)

Aligning with the EC's final position, the Guidance explicitly confirms that the imposition of minimum advertised prices (MAPs) policy—which prohibits the distributor from advertising prices below a level set by the supplier—would amount to an indirect RPM measure, as it disincentivises the distributor from setting a lower sale price by restricting its ability to inform potential customers about available discounts.

However, in line with the new EU rules, the Guidance also recognises that a MAP or RPM might, on balance, be considered pro-competitive if necessary and proportionate to prevent loss leading (i.e. the regular resale of a product below the wholesale price) that damages to the brand image of the product and reduces the overall demand for the product over time.

Territorial and customer restrictions

The Guidance reflects the changes between the draft and final VABEO in relation to the safe harbour for territorial and customer restrictions in an exclusive, selective or “free” (i.e. neither exclusive nor selective) distribution system. Similar to VABER, the VABEO also introduces the concept of “shared exclusivity” in an exclusive distribution system but does not limit it to a specific number of suppliers (five in the case of VABER). Instead, suppliers are required to determine the number of exclusive distributors by reference to the volumes of business that are necessary to preserve distributors' investment efforts in the allocated geographic territory or customer group. Another difference to the EC rules is that the Guidance confirms that suppliers are allowed to combine selective distribution and exclusive distributions systems in the same geographical area if they are at different levels of the distribution chain (e.g. exclusive distribution at the wholesale level with a selective retail distribution system), which is expressly excluded by the Guidelines.)

As foreseen in the Draft Guidance, the Guidance removes the prohibition of dual pricing⁵ from the list of hardcore restrictions, provided that the difference in the wholesale price does not have the object of preventing the effective use of the internet by the buyer.

Further, the Guidance provides that direct and indirect restrictions of online sales or online advertising which prohibit the buyer from the effective use of the internet has the object of restricting passive sales. In line with the EC's approach, the CMA provides some flexibility around this rule by allowing, for example, the prohibition of a certain sales channel (such as marketplaces) or the use of a certain price comparison service or search engine. The Guidance also notes that parties may agree an appropriate method to implement dual pricing.

Wide retail parity obligations

Wide retail parity obligations (also known as wide MFN clauses) seek to prevent suppliers from offering goods/services on better terms on *any other* platform or sales channel, whether online or offline. The Guidance notes that these obligations are more likely than other types of parity obligations to produce anti-competitive effects and are therefore hardcore restrictions under the VABEO. This is a divergence from the EU's updated VABER and

⁵ Dual pricing is where a supplier charges a different wholesale price for products that the same distributor resells online or in physical stores.

Guidelines—which do not automatically prohibit wide retail parity obligations, but instead designate them as “excluded” restrictions if entered into by providers of online intermediation services.

Non-compete obligations

Another significant difference between the VABEO and VABER is the treatment of evergreen clauses as excluded restrictions. In particular, distribution agreements with non-compete obligations relating to the UK will still need to be renegotiated every five years (or assessed individually for their competition law compliance), in contrast to the EU where tacit renewal provisions will not bring the non-compete outside the scope of the VABER.

Conclusion

While the VABEO and the Guidance largely mirror the new VABER and the Guidelines, there are aspects which confirm the CMA’s willingness to diverge from the EC’s approach, if justified in the interests of the UK economy.

The CMA intends to keep the application and effectiveness of the VABEO under review and may revise the Guidance in the light of future developments. Notably, in contrast to the 12-year timeline of the new VABER (which is scheduled to expire in 2034), the VABEO will last only for six years—until 1 June 2028—with consultations likely to be launched by the CMA well in advance of its expiration. The shorter duration of the VABEO no doubt introduces further scope for regulatory divergence between the UK and the EU in the future.

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