

CMA Seeks Comments on Draft Guidance for its Proposed Vertical Agreements Block Exemption Order

April 11, 2022

The UK Competition and Markets Authority (the “CMA”) is consulting on its draft guidance (“**Draft Guidance**”) for its proposed Vertical Agreements Block Exemption Order (“**VABEO**”). It invites comments by May 5, 2022.¹

The Draft Guidance largely maintains the *status quo*. There are, however, a number of important changes proposed to the current EU Vertical Agreements Block Exemption Regulation (“**VABER**”) and related guidelines, which the Draft Guidance will replace.²

There are also a number of divergences from the draft text and guidelines for the EC’s new VABER, the consultation process for which is running in parallel with the CMA’s process.³ In particular, the CMA takes a different approach to “wide MFN” provisions and to the EC’s controversial proposals regarding dual distribution and platforms (online intermediaries).

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors.

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¹ See, Competition and Markets Authority, “[Draft VABEO Guidance](#)”, March 31, 2022. The CMA invites responses to its consultation to be submitted via email to vberreview@cma.gov.uk.

The CMA’s consultation follows the UK government’s publication, on February 21, 2022, of the draft text of the VABEO and an explanatory memorandum: See, Department for Business, Energy & Industrial Strategy, “[Draft Vertical Agreements Block Exemption Order](#)”, February 21, 2022 (“**Draft VABEO**”).

² Once finalised, the new VABEO will come into force on May 31, 2022, as the EU Vertical Agreements Block Exemption Regulation (“**VABER**”) expires following Brexit.

³ See, EC, “[Review of the VBER and Vertical Guidelines](#)”. See also, our previous Alert Memorandum outlining the EC’s proposals: Cleary Gottlieb Steen & Hamilton, “[EC Seeks Comments on Draft Revised Distribution Rules](#)” July 22, 2022. clearygottlieb.com



Background and Context

Since their entry into force in 2010, the EC's Guidelines on Vertical Restraints and the VABER have enabled firms to self-assess their vertical agreements' compliance with Article 101 TFEU and Chapter I of the [Competition Act 1998](#). If a vertical agreement meets the conditions of the VABER, it benefits from an automatic exemption from the Chapter I prohibition.⁴ Vertical agreements that do not meet the conditions for the block exemption must instead be individually assessed.

The CMA published a consultation document on June 17, 2021, with provisional recommendations for replacing the VABER with the VABEO.⁵ The CMA's Draft Guidance provides further detail as to the CMA's proposed approach under the VABEO, including:

- **Dual Distribution.** The CMA has retained the exemption for dual distribution, where suppliers sell directly into the market in competition with their distributors, and extended it to cover agreements with wholesalers and/or importers. In contrast to the EC's proposals, the CMA does not exclude online intermediaries from the exemption, and has not suggested amendments to the market share thresholds. The Draft Guidance clarifies that the benefit of the block exemption extends to information exchange only if it is required to implement the vertical agreement and does not restrict competition by object. The CMA provides a non-exhaustive list of examples of information likely to fulfil these conditions.⁶
- **Agency Agreements.** The Draft Guidance explains how certain agency agreements fall outside the Chapter I prohibition. Restrictions in agreements with "dual role agents", who act both as agent and distributor for the same products of a supplier may, however, be caught by the prohibition.⁷ Like the EC's proposals, the Draft Guidance explains that suppliers of online intermediation services cannot be seen as agents. Even if agency agreements with platforms are requalified as agreements for the supply of platform services, that should not prevent merchants from setting terms and conditions for sales they make to end-users via platforms.
- **Territorial and Customer Restrictions.** Vertical agreements that restrict the territory into which a buyer can sell, or the customers to whom a buyer can sell, generally remain hardcore restrictions, subject to three exceptions in addition to those under the current VABER. The VABEO would allow (i) the combination of exclusive and selective distribution, (ii) shared exclusivity (where two or more semi-exclusive distributors are appointed), and (iii) greater protection for members of selective distribution systems against sales from outside the geographical area to unauthorized distributors inside the area.⁸ The EC has proposed similar additional exceptions. Other hardcore restrictions are largely maintained, including resale price maintenance.
- **Online sales and dual pricing.** A supplier charging different prices depending on whether the buyer is reselling online or offline will no longer be regarded as a hardcore restriction. Suppliers relying on selective distribution will also have greater freedom to impose criteria for online sales that differ from those for brick-and-mortar shops. This serves to eliminate the more favoured treatment of online retailers under the VABER.
- **Parity Obligations (MFNs).** The draft VABEO includes clauses that ban suppliers from offering better terms on any other platform ("wide parity" or "wide MFN" provisions) in the list of hardcore restrictions. In contrast, the EC, while also removing the benefit of the block exemption for wide parity clauses, treats wide MFNs as an excluded restriction, rather than a hardcore one. The Draft Guidance explains the treatment as a hardcore restriction as due, among other reasons, to the concern that they restrict competition between horizontal competitors, in contrast to obligations in a business's own sales channel. "Narrow MFNs" that ban suppliers from offering better terms on their own sales channels, but allow them to offer better terms on other platforms will continue to benefit from the block exemption under both the CMA and EC proposals.

⁴See [Competition Act 1998](#), Section 6.

⁵ See, CMA, "[Review of the VBER and Vertical Guidelines](#)" (June 17, 2021). See also, Cleary Antitrust Watch, Cleary Gottlieb, "[CMA Publishes Consultation To Replace the Retained Vertical Agreements Block Exemption Regulation](#)" July 22, 2022.

⁶See CMA, "[Draft Guidance: Vertical Agreements Block Exemption Order](#)", paras 10.170-179.

⁷See CMA, "[Draft Guidance: Vertical Agreements Block Exemption Order](#)", paras 4.22-25.

⁸See CMA, "[Draft Guidance: Vertical Agreements Block Exemption Order](#)", para 8.70.

Next Steps

The CMA invites comments by May 5, 2022. The CMA will then finalise the new VABEO and Draft Guidance by the end of May 2022. We anticipate that any amendments will largely be clarifications rather than material changes. We invite you to contact us with any views on the CMA's Draft Guidance.

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