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**UK Competition and Markets Authority Confirms Direction of Travel for Post-Brexit Approach to Vertical Agreements**

**Title**

On 17 June, the UK Competition and Markets Authority (‘**CMA**’) published a keenly awaited consultation document setting out its proposed recommendations to Government for the UK’s new competition law regime for vertical agreements. Essentially, the CMA is proposing to adopt an approach that remains closely aligned with the EU verticals regime, which is itself about to undergo a refresh to take account of market and legal developments since its last update in 2010. This is a welcome development, as it should reduce the potential for material divergence between the two regimes, which would reduce legal certainty and increase costs for businesses trading in both the EU and UK.

**Background**

The need for this consultation has arisen now, as the post-Brexit transitional arrangements for vertical agreements (such as selective and exclusive distribution agreements) are about to expire. To summarise the legal position, while the UK was an EU Member State the analysis of vertical agreements in UK competition law was largely determined by the EU Vertical Agreements Block Exemption Regulation (‘**VBER**’). This sets out the circumstances in which a vertical agreement is protected from challenge under Article 101 of the Treaty on the Functioning of the European Union (‘**TFEU**’). Importantly, the VBER also defines certain ‘hardcore’ restrictions that render an agreement presumptively unlawful. Together with the accompanying European Commission Guidelines, the VBER effectively serves as a complete code for the treatment of vertical agreements in EU competition law.

The Competition Act 1998 (‘**CA98**’), which entered into force in 2000, introduced an entirely new competition law regime to the UK, based closely on EU competition law. Although the CA98 regime originally included a far broader domestic block exemption regulation for vertical agreements, which exempted any vertical restrictions apart from resale price maintenance, the modernisation of EU competition law in 2004 led to the scope of the UK regime being aligned entirely to the EU regime. This was achieved via a statutory mechanism known as ‘parallel exemption’, under which any agreement that was exempt from Article 101 TFEU by virtue of an EU block exemption (including the VBER) was also exempt from the CA98’s Chapter I prohibition, which closely mirrors Article 101. The regime alignment created by this mechanism was reinforced by the fact that the CMA and UK courts were required to apply the CA98 consistently with EU competition law, resulting in a body of UK case law that applied core principles of EU competition law in a UK domestic context.

Since the direct application of EU competition law in the UK ceased at the end of the Brexit transition period on 31 December 2020, new arrangements were needed urgently to determine the status of vertical agreements in UK competition law from that point. The immediate solution adopted by the UK Government was essentially to continue the pre-Brexit approach, by incorporating the current EU VBER in UK domestic law, as a ‘retained block exemption’, at least until the VBER’s expiry on 31 May 2022. Since that date is now approaching, the Government needs to decide what to do. At the same time, the Commission is part way through its own review of the VBER and Guidelines, as it needs to decide the extent to which the EU regime should be updated after 1 June 2022.

While it may be tempting to continue with the UK’s current approach of aligning completely with EU law in this area (which broadly works), unlike the last time the VBER was reviewed in 2010 UK Government and CMA officials no longer have any input on the text of the EU VBER and Guidelines. As a result, a decision simply to follow the (revised) EU regime from June 2022, whatever its form, would hardly be a ringing endorsement of the UK’s new found freedom to diverge from EU rules. On the other hand, the Government and the CMA need to bear in mind that diverging from EU law in this area for its own sake would introduce complexity for the large number of businesses that trade in the UK and EU. To introduce further complexity, many of the core principles of EU law competition law as applied to vertical agreements rest on EU-specific policy priorities arising from the need to create a single European market. It was unclear how far these priorities should continue to determine the shape of UK competition law, post-Brexit, especially since the UK is no longer part of the Single Market. Given this uncertainty, the UK CMA consultation document is an important step forward.

**Key recommendations**

The CMA consultation document makes it clear that the CMA favours a pragmatic and incremental approach on vertical agreements that will continue to be closely aligned with the EU regime. Indeed, it explicitly recommends that the UK should avoid “large-scale and fundamental changes” to the current regime, which as noted above is completely aligned with EU law. Although the CMA document lists a number of recommendations for change, compared with the (2010) VBER as currently incorporated in UK law, the CMA has been careful to align its proposed changes with the direction of travel of the EU’s own proposed changes to the VBER. Indeed, the CMA consultation document references the European Commission’s recent Evaluation of the Vertical Block Exemption Regulation as a key source for identifying aspects of the current regime that need updating.

The CMA recommends the adoption of a new UK-specific Vertical Agreements Block Exemption order (‘**VABEO**’), and associated Guidance, that will retain the following central aspects of the EU regime:

* a block exemption for all vertical agreements, using the same core definitions as the VBER and applying a market share threshold of 30%, which both parties must not exceed for the exemption to apply;
* a list of hardcore restrictions that are presumptively unlawful, including territorial and customer restrictions (incorporating the EU law distinction between active and passive sales restrictions) and resale price maintenance;
* a separate list of excluded restrictions, that are not protected by the block exemption but are not presumptively unlawful; and
* flexibility to withdraw the benefit of the block exemption from specific agreements that raise concerns.

The CMA recommends the following changes, compared with the current VBER regime:

* a new hardcore restriction for wide parity/’most favoured nation’ obligations, i.e. restrictions imposed by a platform on the ability of a seller using the platform to offer products on other platforms at more favourable prices or terms;
* a more permissive treatment of so-called dual distribution (i.e. distribution systems where parties at different levels of the distribution chain compete downstream), so that agreements between retailers, on the one hand, and wholesalers or importers that also sell direct to consumers, on the other, are protected (in contrast to the current regime, which only protects such agreements between retailers and manufacturers);
* a more permissive approach to dual pricing (i.e. setting different wholesale prices for online and offline retail);
* a more permissive approach to the setting of selective distribution criteria for online sales, under which selective distribution criteria for online sales will no longer have to be overall equivalent to criteria for brick-and-mortar sales;
* new guidance to clarify the difference between active and passive sales, particularly in the online context;
* new guidance on the treatment of agency agreements, including issues relating to online platforms; and
* new guidance on the analysis of environmental sustainability considerations in vertical agreements.

The CMA has recommended that the new UK VBAEO should expire after six years, i.e. half the duration of the current EU VBER. The CMA acknowledges that this is a relatively short period but notes that it is important to be able to review the regime in this timescale to take account of what may be fast-moving market developments. The CMA has also recommended that there should be a transitional period of one year from 1 June 2022, during which agreements that are protected by the current retained VBER will continue to be protected, even if they are not compatible with the new UK VBAEO.

Overall, these proposed recommendations, if followed by Government, will be favourable to brands, as they will provide welcome clarity on the law and more flexibility to determine online distribution arrangements, while also avoiding major divergence with EU law. Indeed, the broad thrust of these proposals is consistent with the European Commission’s view that the current EU VBER and Guidelines may have swung too far towards facilitating the expansion of online retailers and platforms, given the strengthening of their market position since 2010 and the particular challenges now faced by brick and mortar retailers.

The only notable omission from the consultation document is any discussion of the CMA’s future treatment of restrictions on sales into the UK. While the scope for brands to restrict sales from the EU into the UK was limited while the UK was a member state, they have more scope to do so post-Brexit, at least as far as EU competition law is concerned. What is less clear is whether the imposition of such restrictions will be viewed as an infringement of UK competition law. While CMA officials have stated a desire to continue the current approach of taking action against brands that limit online sales (which rests on EU law principles and case law), the future approach to restrictions on sales into the UK remains unclear. It is to be hoped that this pressing issue will be addressed in the CMA’s guidance document, a draft of which should be published in due course.

**Next steps**

Following consultation on the CMA’s proposals, the Government must decide whether to adopt them. While the CMA’s proposed changes are sensible and welcome in themselves, it is notable that the European Commission has itself proposed very similar reforms to the EU VBER regime, which will take effect on expiry of the current VBER in May 2022. The alignment of approaches is presumably not coincidental, as the Commission’s proposals take account of the same market and case law developments and evidence base as the CMA has used. It is also likely that CMA officials will have had some informal contact with the Commission’s VBER review team, notwithstanding the lack of any formal cooperation agreement between the agencies. Furthermore, the CMA has acknowledged the desirability of maintaining a consistent approach, to the extent possible, to avoid excessive complexity and costs for businesses trading in the EU and UK. This is very welcome. It is therefore to be hoped that the Government follows this pragmatic approach, notwithstanding the professed desire of ministers to exercise the UK’s new found freedom to diverge from EU law.

Since the Commission has not yet published the draft text of the new EU VBER and Guidelines, it is not yet possible to identify any specific areas of divergence from the revised EU position in the UK proposal. Although the Commission’s proposals were also broadly sensible, some changes being considered (such as introducing a new lower market share threshold for certain forms of dual distribution) would introduce new levels of complexity to the EU regime. Were the more radical reform options to be adopted by the Commission in the new VBER and Guidelines, there could be greater divergence between the EU and UK regime than is currently anticipated.

The CMA has set a deadline of 22 July for responses to its consultation. Hopefully the Commission will have published its draft new VBER and Guidelines texts by then, so that respondents can take them into account when responding to the CMA’s consultation.

**Becket McGrath**

**Partner, Euclid Law**

**Meet the Author**

**Becket McGrath** is a partner in the London and Brussels office of Euclid Law. Before joining Euclid in June 2020, Becket was a partner at US firm Cooley.

Becket advises clients on all aspects of EU and UK competition law, with an emphasis on online distribution, defending companies against antitrust investigations and merger control.  He is qualified as a solicitor in England & Wales and as a Belgian advocaat.

Becket has experience of enforcing UK and EU competition law at a senior level in the UK’s Office of Fair Trading (now the Competition and Markets Authority). He was listed in GCR’s 40 under 40 Competition Lawyers and is listed in the current Who’s Who Legal/GCR directory of leading competition lawyers.

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