VERTICAL AGREEMENTS UNDER THE UK COMPETITION ACT 1998: PAST, PRESENT, AND THE POST-BREXIT FUTURE

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I. INTRODUCTION

This paper charts the development of UK competition law and policy towards vertical agreements over the 20 years since the Competition Act 1998 ("CA98") came into force in March 2000. It notes, focusing on Chapter I of the CA98,[2] that the policy has progressed from a laissez-faire approach to a more interventionist one, closely aligned with EU law. Indeed, since 2005 UK law has closely followed EU jurisprudence, even where the latter has been significantly shaped by EU internal market considerations. UK authorities have, however, also analyzed a number of vertical restraints which have not yet received significant attention in jurisprudence at the EU level.

The paper then goes on to consider the changes that will, and could, occur in 2021 following the UK's final departure from the European Union at the end of the transition period. An important issue considered is whether, post-Brexit, the UK authorities should continue to follow EU competition law in this sphere, which has in significant respects been influenced by internal market considerations, or whether it should take a different course.

II. EVOLUTION AND DEVELOPMENT OF THE LAW

A. Enactment of the Competition Act and the Verticals Exclusion Order

At the time of the enactment of the CA98, UK authorities were rarely concerned about vertical agreements in the absence of one of the parties having market power or the existence of networks of agreements. Thus, even though the Chapter I and Chapter II CA98 prohibitions were modelled on Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU") respectively, and designed to be interpreted as far as possible consistently with EU law,[3] the government was unwilling to follow the then strict EU approach to vertical agreements.[4] As a result all vertical agreements were initially excluded from the Chapter I prohibition, other than those that had the effect of fixing resale or minimum resale prices (RPM).[5] Early CA98 vertical cases consequently focused only on RPM, hub and spoke agreements (with a horizontal element), or the scope of the

2 Chapter I is modelled on Article 101 Treaty on the Functioning of the European Union. Broadly, it prohibits agreements etc which have as their object or effect the restriction of competition (CA98, s 2), whilst providing a legal exception for agreements which satisfy specified criteria (CA98, s 9).

3 See CA98, s 60.

4 See e.g. A. Jones, B. Sufrin & N. Dunne, *Jones and Sufrin's EU Competition Law: Text, Cases, and Materials* (Oxford University Press, 7th eds, 2019), Chapters 5 and 11.

5 See CA98. s 50(1) and Competition Act 1998 (Land and Vertical Agreements Exclusion) Order 2000, SI 2000/310, Arts 2-4 (the exclusion did not apply to the Chap II prohibition).

Verticals Exclusion Order (see e.g. *Slack Adjusters*,[6] *Hasbro*,[7] *Lladró Comercial SA*,[8] *Toys & Games: Hasbro UK Ltd., Argos Ltd. and Littlewoods Ltd.*[9] and *Replica Football Kit*[10]).

B. Modernization of EU Law and Removal of the Verticals Exclusion Order

Disquiet about the UK approach soon began to emerge. First, there was concern about the (albeit deliberate) lack of consistency with EU law and the tension it created with the principle of supremacy of EU law,[11] especially when following EU Council Regulation 1/2003,[12] the UK's competition authority, then the Office of Fair Trading ("OFT"), now the Competition and Markets Authority ("CMA"), became obliged to apply Article 101 alongside the CA98 to vertical agreements affecting trade between Member States. Secondly, there was anxiety that the approach might be too permissive so allowing some vertical agreements creating collusion or exclusion risks to go unchecked, and creating a risk of Type II errors (or false negatives). Following consultation and an impact assessment,[13] the UK decided to repeal the exclusion order for vertical agreements with effect from April 2005. This change, combined with the CA98 procedure for parallel exemption from UK competition law for agreements satisfying the conditions of an EU block exemption,[14] laid the foundation for UK competition law to become aligned with the EU's, by then "modernized," approach towards vertical agreements under Article 101 (see the *Guidance on Vertical agreements*[15]). Broadly, under EU law:

- vertical agreements containing restrictions of competition by object are treated with suspicion and as presumptively illegal. Such agreements are assumed to restrict competition appreciably under Article 101(1)[16] and the European Commission's view is that they are most unlikely, and are presumed not, to satisfy the conditions of Article 101(3). Although object restraints are identified only through a flexible characterization process, jurisprudence clarifies that agreements incorporating certain established restraints – including RPM[17] (and online RPM)[18] and territorial restraints[19] – are liable in principle to pursue a restrictive objective;

- numerous vertical agreements which do not contain object restraints benefit from safe harbors, in particular agreements which:

    - have an insignificant – or *de minimis* – effect on competition (likely where the parties' market shares do not exceed 15 percent on the upstream or downstream market[20]); or

6 DGFT Decision, *Price Fixing Agreements involving John Bruce (UK) Limited, Fleet Parts Limited and Truck and Trailer Components*, May 13, 2002.

7 DGFT Decision, *Agreements between Hasbro UK Ltd. and distributors fixing the price of Hasbro toys and games*, November 28, 2002. No fines were imposed on the distributors.

8 DGFT Decision, *Agreements between Lladró Comercial SA and UK retailers fixing the price of porcelain and stoneware figurines*, March 31, 2003.

9 DGFT Decision, *Agreements between Hasbro UK Ltd., Argos Ltd. and Littlewoods Ltd. fixing the price of Hasbro toys and games*, November 21, 2003.

10 OFT Decision, August 1, 2003. See also e.g. the CMA's no grounds for action decision in Case CE-9531/11, *Paroxetine*, February 12, 2016.

11 See, e.g. Case 14/68, *Walt Wilhelm v. Bundeskartellamt* EU:C:1969:4 and Case C-360/92 P, *Publishers' Association* EU:C:1995:6,

12 [2003] OJ L1/1.

13 See, e.g. its 2001 White Paper, A World Class Competition Regime Cm 5233, July 2001 and DTI Modernisation – A consultation on the Government's proposals for exclusions and exemption from the Competition Act 1998 in light of Regulation 1/2003, April 2003.

14 CA98 s10 allows block exemptions to apply to agreements affecting trade within the UK even if they do not affect trade between Member States.

15 See OFT 419, December 2004 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284430/oft419.pdf.

16 Case C-226/11, *Expedia Inc v. Authorité de la concurrence* EU:C:2012:795.

17 See, e.g. Case 161/84, *Pronuptia de Paris v. Schillgallis* EU:C:1986:41, para. 25.

18 See, e.g. Case AT/40.465, *Asus*, September 26, 2018, IP/18/4601.

19 See, e.g. Cases 56 and 58/64, *Établissements Consten S.à.R.L. & Grundig-Verkaufs-GmbH v. Commission (Consten and Grundig)* EU:C:1966:41, Case C-439/09, *Pierre Fabre v. Président de l'Autorité de la concurrence* EU:C:2011:277 and Case AT40428, *Guess* December 17, 2018. A restraint on a distributor outside of the EU from selling into the EU is unlikely to restrict competition by object, but a broad inquiry would be necessary to determine if it might have an appreciable effect on competition in the EU or trade between Member States, see Case C-306/96, *Javico* EU:C:1998:41.

20 European Commission's Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (*De Minimis* Notice), C(2014) 4136 final.

- comply with the conditions for the group exemption from Article 101(1) set out in the Verticals Block Exemption Regulation ("VBER"), currently Regulation 330/2010,[21] which include requirements that (a) the parties' market shares do not exceed 30 percent (Article 3), and (b) the agreement does not contain specified hard-core restraints (closely aligned with object restraints), including RPM provisions and, with limited exceptions, restrictions on the territories into which, or the customers to whom, buyers can sell the product (Article 4); and

- fuller antitrust appraisal is reserved for agreements not falling within these categories.

C. Resale Price Maintenance and Online Selling Restraints

Following these changes, many UK cases have focused on agreements containing "severe" by object restraints, such as online pricing or selling restrictions. Although e-commerce has rapidly transformed distribution and retailing methods and, arguably, can exacerbate free riding risks,[22] the CMA has treated online RPM in the same way as other cases of RPM, so manifesting its concern that e-commerce can enhance the effectiveness of RPM, especially by making monitoring easier. Decisional practice establishes that the CMA generally treats online RPM, restrictions on online advertising of prices or online selling, as serious infringements of the CA98 which are likely to attract fines,[23] see e.g. *Fender Musical Instruments*,[24] *Casio Electronics*,[25] *Foster Refrigerator UK* (*Commercial Refrigeration*),[26] *Roma Medical Aids Ltd.*,[27] *Pride Mobility Products Ltd.*,[28] and *TGA Mobility Ltd.*[29]

A particularly contested case involving online selling was *Ping*.[30] In this case Ping prevented retailers from selling its golf clubs online. Ping contended that as the policy was designed to protect its brand, it did not infringe the CA98 (or Article 101). Rather, the restraints on internet selling were justified because they pursued legitimate aims – to confine sales of Ping products to brick and mortar stores that could increase club quality and consumer choice by providing buyers with custom fitting and to prevent freeriding. Further, that given the high levels of interbrand competition, customers that wished to buy golf clubs without custom fitting could easily purchase a different brand.

The CMA, whose decision was upheld by both the CAT[31] and Court of Appeal,[32] rejected these arguments finding that the prohibition of online sales restricted competition by object. It eliminated a modern means of distribution incentivizing and enabling retailers to attract, and consumers to purchase, a product outside of their normal catchment area.[33] Further, it found that the ban was not necessary and proportionate to the commercial aim of promoting in-store custom fitting – clubs could be, and were, sold online without a custom fitting. Rather, other less restrictive, technically achievable, and viable alternatives were available to meet Ping's legitimate objectives.

Although the approach adopted by both the CMA and courts in this case contained differences, they all followed, without expressly acknowledging the internal market perspective, the hardline attitude towards territorial restraints and prohibitions, or limitations, on parallel trade

21 [2010] OJ L102/1.

22 Especially where consumers rely on retail services – e.g. in the case of complex products, experience goods, or one-off purchases of durable goods.

23 Unless resulting from a small agreement between SMEs, CA98, s 39(3), applied in the cases of *Pride* and *Roma*, notes 27 and 28.

24 Case 50565-3, 20 January 2020. See also Case 50565-4, *Synthesizers and high-tech equipment*, June 29, 2020, Case 50565-5, *Electronic drum sector*, 29 June 2020 and 50565-6, *Digital keyboards and guitars*, July 17, 2020.

25 Case 50565-2, August 1, 2019.

26 Case CE/9856/14, May 24, 2016.

27 Case CE/9578-12, August 5, 2013.

28 Case CE/9578-12, March 27, 2014.

29 Case 50469, October 19, 2017.

30 Case 50230, August 24, 2017.

31 Case 1279/1/12/17 *Ping Europe Ltd. v. CMA* [2018] CAT.

32 [2020] EWCA Civ 13.

33 Relying on the Court of Justice's and the opinion of Advocate General Mazac in C-439/09, *Pierre Fabre* EU:C:2011:277.

between Member States set out in EU law and manifest, for example, in the Court of Justice's 2011 judgment in *Pierre Fabre*.[34] Because such restraints impinge on market integration goals,[35] they are almost invariably considered to be incompatible with EU competition law, irrespective of any efficiency or other justification for the agreement. Further, the promotion of online sales is considered to be "extremely important for the internal market in Europe because it broadens the market, improves the choices for customers, and generally speaking, enhances competition."[36] Under EU law, therefore, online selling can be restricted only in exceptional circumstances.

D. Price Relationship Agreements, MFNs and Other Distribution Agreements

One problem with the EU system's significant reliance on presumptions of illegality and safe harbors is that, although providing desirable legal certainty where applicable, little jurisprudence post-modernization has emerged to clarify the law in the scenarios where they do not apply.[37] Although case law on effects analysis does exist, it is sparse and now mainly relatively old. Not only is some of the jurisprudence (which reflects a suspicion of intrabrand restraints on rivalry between a supplier's dealers unless objectively necessary to achieve a legitimate objective) difficult to reconcile with the modernized approach reflected in Commission guidelines, but it sheds little light on how Article 101 applies to, for example, price relationship agreements and a number of newer online vertical restraints. In the UK a number of cases have focused on these issues considering: contracts that reference rivals' prices, e.g. where a supplier requires a reseller to set the resale price of its product at a price related to the price set for a competitor's product; and most favored nation clauses ("MFNs") where the supplier constrains its ability to price discriminate amongst customers by promising to treat a customer no less favorably than other customers. These cases have not, however, yet led to a particularly clear picture emerging of how such restraints are to be analyzed.

The approach taken by the OFT in both *Tobacco*,[38] and *Hotel Online Booking*[39] received some criticism for the hardline approach taken. In the former, the OFT controversially found that a series of agreements between two tobacco manufacturers and 10 retailers, under which retailers agreed to set prices for tobacco products in accordance with set "parity and differential" requirements relating to competing linked brands, restricted competition by object, even though it did not find horizontal or vertical price fixing (or other "established" object restraints). In the end, however, the CAT did not have to rule on the correctness of this finding as it set aside the decision on procedural grounds.[40] In the latter, the OFT took the provisional view that agreements between hotels and Online Travel Agents (OTAs, Booking.com and Expedia Inc.), restricting each OTA's ability to discount the rate at which room-only hotel accommodation bookings were offered to consumers, had as their object the restriction of competition in breach of Chapter I CA98 and Article 101 (through limiting price competition between OTAs and hotels). Again, however, the suitability of applying object analysis to these restraints was never fully tested, as the OFT accepted commitments from the parties to change their behavior rather than proceeding to a final decision.[41] Since then the CMA has proceeded with greater caution. A number of investigations into price parity clauses have been closed[42] or conducted in conjunction with exclusivity provisions or within the more flexible forum for market studies or market investigation provisions set out in the Enterprise Act 2002 (EA02).[43]

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34 Case C-439/09, EU:C:2011:277.

35 Removal of non-tariff barriers is not sufficient for the full development of parallel trade, arbitrage and changes in distribution across Europe. For complete success it is necessary that producers and distributors do not take actions to avoid or counteract the effects of the Single Market measures.

36 "Interview with Dr. Alexander Italianer, Director General for Competition, European Commission" theantitrustsource April 2011, 1, 6.

37 In particular, the Commission has not adopted either an infringement decision involving an analysis of the restrictive effects of a vertical agreement, or a non-infringement decision or published a "guidance letter."

38 Case CE/2596–03, *Tobacco*, April 15, 2010.

39 Case CE/9320-10, January 31, 2014.

40 Cases 1160–5/1/1/10 [2011] CAT 41.

41 January 31, 2014 (see CA98, s31A). Although the case was remitted back to the CMA after the commitments were quashed, in the end the CMA closed the case on the grounds of administrative priorities,16 September 2015. By this time developments were occurring in other Member States, and within the European Competition Network, see N. Varona & A. Hernadez Canales, "Online Hotel Booking," *CPI Antitrust Chronicle* May 2015 and Report on the monitoring exercise carried out in the online hotel booking sector by EU competition authorities in 2016, <http://ec.europa.eu/competition/ecn/hotel_monitoring_report_en.pdf.

42 See, e.g. Case CE/9692/12, *Amazon Retail*, November 1, 2013 (investigation closed on administrative priority grounds after Amazon ended its Marketplace price parity policy and informed third party sellers).

43 See, e.g. investigation launched in November 2018 into the use of MFN clauses by comparethemarket.com https://www.gov.uk/cma-cases/price-comparison-website-use-of-most-favoured-nation-clauses, following a 2017 market study, CMA's market study into digital comparison tools, September 2017.

A handful of UK cases have also raised the compatibility of exclusive distribution, single branding and exclusivity agreements with Article 101 and Chapter I,[44] see e.g. the CMA's case closure in *ATG Media*,[45] the Scottish Outer House Court of Session's judgment in *Calor Gas Ltd. v. Express Fuels (Scotland) Ltd. & Anor*,[46] and the CAT's judgments in *Socrates Training Ltd. v. The Law Society of England and Wales*[47] and *Agents' Mutual Ltd. v. Gascoigne Halman Ltd*.[48] (in the latter it found that exclusivity rules imposed by Agents' Mutual Ltd. when it opened a new online portal, OnTheMarket, for the sale of properties (in competition with Zoopla and Rightmove) were compatible with the CA98).

Finally, the OFT and CMA have provided some guidance on when distribution arrangements concluded during an emergency, or a period of crisis, might be compatible with UK competition rules.[49] Indeed, during the Covid-19 pandemic the CMA made it clear that it is unlikely to enforce the CA against business cooperation – including horizontal or vertical arrangements – designed to ensure the supply and fair distribution of scarce products or services affected by the crisis to all consumers if: appropriate and necessary to avoid shortage or ensure security of supply; in the public interest; to the benefit of consumers; and, lasting no longer than necessary.[50] Specific public policy exclusion orders affecting distribution arrangements designed to prevent or mitigate disruption caused by Covid-19 were also made in the groceries[51] and dairy[52] sectors.

III. THE FUTURE

A. Changes Due at the End of the Transition Period

Under the current timetable, the UK will no longer be part of the EU competition system from the end of the transition period on January 1, 2021. Although vertical agreements concluded in the UK which affect trade between Member States will still of course need to comply with EU law,[53] from this point EU law will not be applied by the CMA, EU law will no longer have supremacy over UK law and the CMA will have principal responsibility for investigating agreements that affect trade within the UK, irrespective of whether or not the Commission is also investigating the case.

In addition, the Competition Statutory Instrument[54] amending the CA98 and EA02 will automatically come into force. This retains the VBER in UK law until its expiry on May 31, 2022. Further, the Statutory Instrument reformulates the provision for consistency between UK and EU law in a new Section 60A. This provision allows for inconsistency, and divergence, between UK and EU law in defined cases, including where necessary to reflect developments in the forms of economic activity or generally accepted principles (or the application of principles) of competition analysis.

These developments mean that, over time, the UK has scope, should it wish to do so, to diverge from EU law and practice in this area and to develop an approach more closely aligned with the interests of competition and consumers in the UK.

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44 The market investigation provisions of the EA02 have also been used to investigate markets in which vertical agreements are prevalent, where access to the market appears to be foreclosed to new competitors, and where use of the CA98 is inappropriate.

45 Case 50408, June 29, 2017. See also *Street Furniture (Outside Advertising)*, 17 May 2012 (investigation into the use of long exclusivity provisions in relation to outdoor advertising closed following assurances by the parties to change their behavior).

46 [2008] ScotCS CSOH1.

47 Case 1249/5/7/16, [2017] CAT 10. See also e.g. Case 1298/5/7/18, *Achilles Information Ltd. v. Network Rail Infrastructure Ltd.* [2019] CAT 20.

48 Case 1262/5/7/16 (T), [2017] CAT 15, aff'd [2019] EWCA Civ 24.

49 DGFT Decision Memorandum of Understanding on the Oil Fuels in an Emergency, October 25, 2001.

50 See https://www.gov.uk/government/news/covid-19-cma-approach-to-essential-business-cooperation.

51 See https://www.legislation.gov.uk/uksi/2020/369/made.

52 See http://www.legislation.gov.uk/uksi/2020/481/made.

53 An agreement precluding a UK distributor from selling into the EU could, in certain circumstances, affect trade and restrict competition within the EU, see, e.g. *Javico* note 19 and Case C-413/14 P, *Intel* EU:C:2017:632.

54 See the European Union (Withdrawal) Act 2018, European Union (Withdrawal Agreement) Act 2020, the Competition (Amendment etc.) (EU Exit) Regulations 2019, 22 January 2019, available at https://www.legislation.gov.uk/uksi/2019/93/contents/made.

B. Presumption of Illegality

A first important issue is whether the strong presumption of illegality[55] currently applied to RPM, online RPM, territorial restraints[56] and online selling restraints will remain or even be extended (e.g. to certain price parity provisions such as (wide) MFNs).

Although rules or presumptions of illegality serve important ends in antitrust systems – particularly the attainment of procedural economy and the clear prohibition, and deterrence, of patently anticompetitive behavior[57] – there is some concern that the EU attitude towards vertical object restraints is overly rigid.[58] Indeed, because procompetitive justifications – and an increase in interbrand competition – could be the driving economic motivation for RPM, online sales and territorial restraints,[59] it is arguable that the application of a broad and, in practice virtually irrebuttable, presumption of illegality is unjustified. Nevertheless, the approach, heavily influenced by market integration concerns, remains entrenched in EU, and UK, jurisprudence.

The rigidity of the approach could be mitigated in the UK, however, if the authorities were more willing to consider the purpose and the context of the agreement before concluding whether object or effect analysis is required and to accept that agreements with the potential to have mixed effects on competition should not fall within the object category.[60] RPM and online restraints should not then be found to restrict competition by object where plausibly necessary to the pursuit of a legitimate procompetitive objective. Further, new restraints should not be added to the object category unless theory or experience justifies a finding that the clauses and context reveal a high probability of anticompetitive effects.[61] This important characterization step would ensure that where, as in a case such as *Ping*, credible efficiency justifications for an agreement exist, the CMA would be required to establish and consider actual or likely anticompetitive effects, as well as proffered procompetitive justifications, prior to the practice being condemned.

C. Verticals Block Exemption or Another Safe Harbor

Another question that will have to be determined is whether a UK specific verticals block exemption should replace the VBER once it expires in 2022. Clearly the EU block exemption provides desirable legal certainty, which is highly appreciated by businesses. An alternative to adopting a specific UK block exemption, however, could be to provide a safe harbor in another way, perhaps through Guidelines explaining that vertical agreements are unlikely, in the absence of object restraints or networks of agreements, to restrict competition if the parties to the agreement lack market power (proxied, for example, by market shares of 30 percent).

Although this latter approach would lack the same legal effect and force of an exemption valued by firms, it would have some advantages over the block exemption approach from a legal coherence perspective. First, one problem with the VBER, which exempts agreements in case they restrict competition, is that they focus attention on the exemption criteria and, implicitly, indicate that an infringement of Article 101(1), and correspondingly section 2(1) CA98,[62] is likely to have occurred. Arguably this contributes to the lack of clarity shrouding the question of how Article 101(1), and Chapter I, analysis is to be conducted, especially given that many agreements satisfying the conditions of the current VBER seem highly unlikely to affect actual or potential competition to such an extent that a negative effect on prices, output, innovation, or the variety or quality of goods can be expected. Guidelines on the interpretation of section 2(1) would, in contrast, help to shed light on how effects analysis under Chapter I is to be conducted in the future. Secondly, Guidelines would be less rigid than block exemptions which provide an automatic exemption for vertical agreements that satisfy its conditions, even if they incorporate restraints that were not specifically considered at the time of the drawing up of the exemption; for example, in relation to the current VBER, restraints on selling on the internet via a third-party platform

55 Although no absolute or *per se* rule applies against object restraints, a perception has been built that they are most unlikely to be compatible with Article 101.

56 Although some territorial restraints will affect trade and competition within the UK, others may not (e.g. a ban on selling into the EU, but see note 53 and text).

57 See A. Jones & W.E. Kovacic, "Identifying Anticompetitive Agreements in the United States and the European Union: Developing a Coherent Antitrust Analytical Framework," (2017) 62(2) *Antitrust Bulletin* 254.

58 See, e.g. A. Jones & M. de la Mano, "Vertical Agreements Under EU Competition Law: Proposals for Pushing Article 101 Analysis, and the Modernization Process, to a Logical Conclusion," available at https://ssrn.com/abstract=2930943.

59 See literature reviewed in Jones and de la Mano *ibid.*

60 See Case C-67/13 P, *Cartes Bancaires* EU:C:2014:2204.

61 See Jones & de la Mano, *supra* note 58 and Jones & Kovacic, *supra* note 57.

62 See note 2.

or market place[63] or price parity provisions and MFNs. Although the benefit of the block exemption can be withdrawn, this can only be done prospectively, and is rarely a priority for a competition authority. In contrast, guidance under section 2 would give the CMA greater flexibility and scope to consider a new restraint and, if appropriate, address it in a decision.

D. Greater Guidance on How Chapter I Applies to Other Vertical Agreements

Another crucial matter is whether future enforcement of the CA98 can help to ensure that the law is developed and elucidated in cases where a safe harbor does not apply. Although concern about the open-textured nature of full antitrust analysis has often led decision-takers to shy away from adopting it, and an anxiety that it will become tantamount to a rule of *per se* legality (given the difficulty it presents for claimants), the UK administrative system provides a flexible forum for the CMA to develop a workable framework for assessing vertical restraints. For example, the UK competition agency's experience with price parity agreements and MFNs under both the CA98 (and the EA02) has allowed it to build experience over time in appraising their mixed effects. If progress is advanced in this way through close analysis and decisions, which are reviewed on appeal, the law could evolve and provide greater clarity to firms.

IV. CONCLUSIONS

Since the adoption of the CA98 UK competition law has always taken a hardline approach towards RPM. Following, the withdrawal of the Verticals Exclusion Order many more vertical agreements have been brought within the scope of Chapter I. A core focus of the CMA, and OFT, has been on object restraints. Indeed, all but one of their CA98 infringement decisions adopted in relation to vertical agreements between 2000-September 2020, related to RPM (some with hub and spoke or more serious horizontal aspects), online RPM or restraints on online selling. The other, more problematic infringement decision involved complex, vertical price relationship arrangements but was set aside on appeal (*Tobacco*).

As many other vertical agreements concluded in the UK benefit from safe harbors, relatively few other vertical agreements have been reviewed by the CMA or UK courts. Filling a lacuna left by the European Commission, however, the UK competition agency has taken a close interest in MFNs, especially when used in relation to platforms, examining them, both in the context of the CA98 and the EA02.

Post-Brexit, the UK authorities are likely to be keen to ensure that UK competition law and policy remains fairly closely aligned with EU competition rules which many firms will in any event need to continue to comply with. However, there will be scope for UK law to diverge from EU law over time, where this is thought to be beneficial and necessary to improve law and policy. It seems clear that some improvements could be made, to develop a more coherent framework for the analysis of vertical agreements under Chapter I CA98. For example, a more robust mechanism for identifying object restraints could be adopted. Further, steps could be taken to ensure that clearer guidance is provided on the question of how the restrictive effects and efficiencies of vertical agreements are to be identified and balanced against each other within the CA98 Chapter I framework.

63 But see Case C-230/16, *Coty* EU:C:2017:941.

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