THE NEW EU AND UK VERTICAL REGIMES: IMPROVEMENTS, DIVERGENCES, AND MISSED OPPORTUNITIES?

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In 2022 both the EU and the UK overhauled their regimes governing vertical agreements following the expiry of Regulation 330/2010, which had block exempted many vertical agreements from both Article 101(1) TFEU in the EU and from the Chapter I prohibition set out in the Competition Act 1998 in the UK. This paper examines the new EU and UK vertical systems, emphasizing the core changes they have introduced, and considers whether they meet the objectives of the respective reform and review processes and whether, despite significant improvements, some opportunities for positive development of the regimes may have been missed. It notes that although post-Brexit there was scope for the UK to depart from the approach adopted in the EU, the path taken has essentially been one of consistency, albeit with divergences which reflect the different enforcement experiences of the EU and UK competition authorities.

I. INTRODUCTION

In 2022 both the EU and the UK overhauled their regimes governing vertical agreements. The reform processes were provoked by the expiry on May 31, 2022 of Regulation 330/2010,[2] which block exempted many vertical agreements from Article 101(1) TFEU in the EU and, through the retention of the EU block exemption (the "Retained VBER")[3] as part of UK law following Brexit, from the Chapter I prohibition set out in the Competition Act 1998 ("CA98") in the UK.

This paper examines the new EU and UK vertical systems, emphasizing the core changes they have introduced, and considering whether they meet the objectives of the respective reform and review processes. It also highlights the post-2022 divergences between the EU and UK rules, and the implications they raise for those distributing their goods or services in both the EU and the UK.

It starts in Section 2 by examining the position in the EU, considering both the background to the reforms and the principal changes introduced. It notes the particular influence of the single market project on the development of EU law and how it has been adapted to the online context. Section 3 goes on to examine the position in the UK, tracking the evolution of the UK's approach to vertical agreements. It notes that although post-Brexit there was scope for the UK to depart from the approach adopted in the EU, the path taken has essentially been one of consistency, albeit with divergences which reflect the different enforcement experiences of the EU and UK competition authorities.

Section 4 concludes that, despite significant improvements, some opportunities for positive development of the regimes may have been missed and unnecessary complexities created.

II. THE EU VERTICALS REGIME

A. Background, Modernization and the Post-1999 Regimes

Prior to 1999, a core critique of the European Commission ("Commission") was its interventionist approach under Article 101 towards agreements, especially vertical agreements. Broadly, it was criticized for interpreting the concept of a restriction of competition in Article 101(1) too broadly – to encompass, reflecting the single market objective, many restraints on cross-border trade and, in line with ordoliberal thinking,[4] many restraints on firms' economic freedom – so generating both practical and conceptual difficulties. Practically, by creating a central role for Article 101(3) in the Article 101 framework, and the Commission in its enforcement (as national courts and NCAs could not at that time apply Article 101(3)), a severe bottle-neck problem was formed which plagued the enforcement system constructed by Regulation 17;[5] numerous vertical agreements infringed Article 101(1), but the Commission was not able to formally exempt more than a handful of agreements each year. As Carles Esteva Mosso explained, under this "previous, more form-based approach to the interpretation of "restriction of competition," a large number of agreements were considered to be caught by the test of Article 101(1) and required exemption under Article 101(3) . . ."[6]

Conceptually, it was complained that the weak analysis conducted under Article 101(1), combined with the rigidity of the early vertical block exemption regulations ("BERs")[7] adopted to help resolve the bottle neck problem, eliminated "what should be the heart of the matter and antitrust (i.e. economics/law) substantive analysis of a particular agreement or practice, i.e. its competitive harms and benefits."[8] The net result was a perceived system failure – the Commission intensely regulated the content of vertical agreements and the scheme wrongly condemned, and deterred, many distribution agreements designed to promote competition within the EU.

2 [2010] OJ L102/1. See also the accompanying Guidelines on Vertical Restraints, [2010] OJ C130/10.

3 The Retained VBER is one of the "retained exemptions" created by a combination of the operation of the European Union (Withdrawal) Act 2018 and the Competition (Amendment etc.) (EU Exit) Regulations 2019, as amended by the Competition (Amendment etc.) (EU Exit) Regulations 2020.

4 See e.g. W. Möschel, "The Proper Scope of Government Viewed from an Ordoliberal Perspective: The Example of Competition Policy" (2001) 157 *Journal of Institutional and Theoretical Economics* 4 and P. Behrens, "The Ordoliberal Concept of 'Abuse' of a Dominant Position and its Impact on Article 102 TFEU" in P. Nihoul & I. Takahashi, *Abuse Regulation in Competition Law*, Proceedings of the 10th ASCOLA Conference (2015).

5 Reg 17 [1959-1962] OJ Spec Ed 87.

6 C. Esteva Mosso, Deputy Director-General in DG Competition at the Commission, "The Contribution of Merger Control to the Definition of Harm to Competition," Brussels, GCLC Conference, February 2016, 2.

7 See e.g. Reg 1983/83 [1983] OJ L173/1 and Reg 1984/83 [1983] OJ L173/7 (successors of Reg 67/67 [1967] OJ Spec. Ed. 10) and Reg 4087/88 [1988] OJ L359/46.

8 BE. Hawk, "System Failure: Vertical Restraints and EC Competition Law" (1995) 32 *CMLRev* 973, 2.5.

These types of complaints led the Commission to recognize that change was required, and to the triggering of its modernization program, which commenced in January 1997, with its adoption of a Green Paper on Vertical Restraints. The Green Paper's conclusions, and the debate it generated, led to the adoption in 1999 of a "new-style" regime, centered around a more economic, flexible, overarching Verticals Block Exemption Regulation ("VBER")[9] and the publication of accompanying Guidelines on the appraisal of vertical agreements,[10] setting out a more coherent approach to analysis under Article 101 based on the economic objective underpinning it. The 1999 VBER provided a safe harbor for many vertical agreements, broadly where stipulated market share thresholds were satisfied, the agreement was not between competitors (with an exception for dual distribution, where the parties competed only at the downstream level), and where the agreement did not contain specified hardcore restraints (especially resale price maintenance ("RPM") provisions or, with specified exceptions, restraints on the territory into which or the customers to whom the buyer can sell the contract goods). These hardcore restraints largely mirrored the types of restraints that had been persistently found to be restrictive of competition by object in the case-law.[11] The Commission's view, consequently, was that these hardcore restraints were presumptively illegal – they were liable to infringe Article 101(1) and unlikely to satisfy the conditions of Article 101(3), for which reason the VBER did not apply. The VBER also did not exempt certain excluded restraints, which had to be analyzed individually to determine their compatibility with Article 101.[12] The Guidelines provided direction not only on the application of the VBER, but also on the application of Article 101 to vertical agreements or restraints falling outside of it.

These changes marked a major shift in Commission policy, which recognized that tested against a consumer welfare benchmark, many vertical agreements are unproblematic. The overhaul did not, however, lead to a softening of approach towards vertical agreements which impose absolute territorial restraints on distributors, so prohibiting opportunities for parallel or cross-border trade, perpetuating price differences between Member States, and violating the higher EU principle of market integration. Rather, ever since *Consten and Grundig*[13] in 1966, clauses in a distribution agreement which prohibit cross-border trade have generally been found to infringe Article 101 and have been categorized as hardcore restraints in the VBER. Further, over time these principles have been adapted to the e-commerce context and extended to bans, and *de facto* bans, on internet selling (*Pierre Fabre*).[14] EU competition authorities have made it clear that they consider these practices to constitute serious infractions which, if uncovered, will attract significant fines, see for example *VW*,[15] *Nintendo*,[16] *Guess* (geo-blocking),[17] *Video Games*,[18] *Ping* (UK),[19] *Stihl*, (France),[20] *Bikeurope* (France).[21]

The 1999 regime has now been reviewed and updated twice, in 2010[22] and in 2022, following comprehensive and lengthy evaluation processes and impact assessments.[23] Despite the introduction of important modifications following each evaluation, to deal with legal develop-

9 [1999] OJ L336/21.

10 [2000] OJ C291/1.

11 See e.g. Cases 56 and 58/64, *Consten and Grundig* EU:C:1966:41 and Case 243/83, *Binon* EU:C:1985:284,

12 Restraints which do not preclude the benefit of the VBER from applying but which are not covered by it. The agreement may therefore still benefit from the VBER if the excluded restraints are, following an individual assessment, either found not to infringe Art 101 or, to infringe Art 101 but to be severable from the remaining provisions of the agreement.

13 *Consten and Grundig*, n 10. See also e.g. Case C-501/06 P, *GlaxoSmithKline Services Unlimited v. Commission* EU:C:2009:610, para. 61.

14 Case C-439/09, EU:C:2011:649.

15 COMP/35.733, *Volkswagen* [1998] OJ L124/60 (fines reduced on appeal, Case T-62/98, *Volkswagen AG v. Commission* EU:T:2000:180, *aff'd* Case C-338/00 P, *Volkswagen AG v. Commission* EU:C:2003:473).

16 COMP/35.706 and 36.321 [2003] OJ L255/33, *aff'd* (but fines reduced) Case T-12/03, *Itochu v. Commission* EU:T:2009:130 and Case T-13/03, *Nintendo and Nintendo of Europe v. Commission* EU:T:2009:131, Case C-260/09 P, *Activision Blizzard Germany GmbH v. Commission* EU:C:2011:62).

17 AT/40.428, *Guess* 17 December 2018.

18 See e.g. AT/40.413 20 Jan 2021. The investigation in this case complements Reg 2018/302 [2018] OJ L/601/1 on unjustified geo-blocking which applies throughout the EU.

19 Case 50230, *Ping* 24 August 2017, aff'd Case 1279/1/12/17 *Ping Europe Ltd v. CMA* [2018] CAT and [2020] EWCA Civ 13.

20 Decision 18-D-23, 28 October 2018,

21 Decision 19-D-14, 1 July 2019.

22 See n 2 and text.

23 The consultation strategy document for the evaluation of the 2010 VBER was published in 2018, http://ec.europa.eu/competition/consultations/2018_vber/index_en.html, and followed by an evaluation phase with public consultation (see e.g. Staff Working Document and its annexes summarizing the results of the evaluation of the VBER, published on October 7, 2020), an impact assessment phase with further public consultation and the publication of a draft revised block exemption and Guidelines for comment.

ments and market changes, especially the growth of e-commerce and the increased power of online platforms, the general scheme of the 1999 system[24] has been preserved. In the review leading up to the 2022 VBER, however, the Commission considered whether or not the VBER and Guidelines required fine-tuning:

- to ensure that it did not create either false positives (e.g. by exempting new practices with potentially anticompetitive effect such as parity clauses, information exchange in dual distribution scenarios, or certain practices of online platforms) or false negatives (e.g. by taking an overly restrictive view of certain online sale restrictions);
- to clarify the rules in certain areas (especially how they apply to e-commerce);
- to simplify the rules; and/or
- to rebalance the regime away from online retail, towards brick and mortar (and brands).

The 2022 review also provided the Commission with an opportunity to reflect more broadly on the nature of the system which, because of its heavy reliance on a broad safe harbor and presumptions of illegality, placed a premium on compliance with the VBER and which had not developed to provide guidance on how the rules apply to newer forms of distribution arrangements or vertical restraints, especially in the online setting.

B. The 2022 Reforms

It has been seen that the 2022 system preserves the basic structure of its predecessor. At its center therefore are Vertical Guidelines[25] and the VBER, Regulation 2022/720,[26] whose application depends on the parties satisfying the VBER's 30 percent market share thresholds (Article 3), on the agreement not being between competitors (with an exception for dual distribution, Article 2(4)-(6)) and on the agreement not containing any hardcore restraints (Article 4). Some important changes and clarifications have nonetheless been introduced.

For example, the VBER and Guidelines provides greater detail on how the VBER applies to vertical agreements in the online platform economy, including those entered into by "providers of online intermediation services" ("OIS providers"),[27] which are now much more prevalent than at the time of the 2010 VBER. The Guidelines recognize that although platforms "enable new ways of doing business" they are not always easy "to [categorize] using the concepts applied to vertical agreements in the brick and mortar environment."[28] As the Commission's view is that such arrangements generally fall within the scope of Article 101(1) (agreements involving online platforms will generally fail to fulfil the requirements for constituting an "agent" for competition law purposes[29]), the VBER and Guidelines clarify that where the vertical agreement relates to the provision of OIS, the OIS provider is to be categorized as a supplier of those services (and an undertaking that offers or sells goods or services on its platform is categorized as a buyer). This has important implications for the application of the VBER (market share thresholds, and hardcore and excluded restraints).

The new regime also provides clarity on how the dual distribution exception, expanded to include importers and wholesalers, to the "not competitors" rule applies. Although during the review the Commission expressed concern about the increased (since 2010) competitive risks raised by information exchanges in dual distribution scenarios, in the end it accepted that such exchanges benefit from the VBER unless it "is either not directly related to the implementation of the vertical agreement or is not necessary to improve the production or distribution of the contract goods or services."[30] However, the 2022 VBER also introduced Article 2(6), which removes the benefit of the VBER entirely for agreements relating to the provision of online intermediation services where the OIS provider competes on the market for the sale of the intermediated goods or services.[31] Consequently, agreements concluded by hybrid online platforms frequently fall outside of the scope of the VBER and have to be appraised individually for their compatibility with Article 101.

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24 Relying on a presumption of illegality for object and hardcore restraints, a wide-ranging safe harbor for agreements satisfying the conditions of the VBER, and Guidelines setting out a general framework of analysis

25 [2022] OJ C248/1.

26 [2022] OJ L134/4.

27 Defined in VBER, Art 1(1)(e), broadly where the provider facilitates the initiating of direct transactions between two other parties.

28 Guidelines, para 62.

29 Guidelines, para 46.

30 VBER, Art 2(5). See also Expert report for the Commission on "Information exchange in dual distribution" prepared by S. Pautke & JM. Schultze.

31 See further Guidelines, paras. 104-109.

The VBER does not alter dramatically the type of hardcore restraints (set out in Article 4) prohibited by the VBER, which although expressed in a different form remain principally the same. However:

- The Guidelines now make it clear that RPM includes imposing minimum advertised prices (MAPs),[32] but that the imposition of a resale price in a fulfilment contract is not RPM;[33]
- The provisions prohibiting territorial and customer restraints have been expanded to clarify that they prohibit restrictions on: (i) the territory into which, or the customers to whom, the buyer party to the agreement or its customers may sell the contract goods or services subject to certain exceptions which depend on the type of distribution agreement adopted – whether exclusive distribution, selective distribution or other, "free," distribution; (ii) cross-supplies between members of a selective distribution system, and (iii) the effective use of the internet by the buyer or its customers to sell the contract goods or services (Article 4(e)). The latter provision is designed to clarify, taking account of the rulings of the Court of Justice in Pierre Fabre[34] and Coty,[35] when suppliers are permitted under the VBER to control, prevent or limit sales by buyers over the internet. The 2022 regime provides that although indirect means to prevent effective use of the internet are prohibited (including e.g. requiring buyers to block or reroute customers from different territories, to terminate transactions to customers with foreign credit card details, or to sell only from a physical space or in the physical presence of specialized personnel; prohibiting the buyer from user the supplier's trademarks or brand names online, from establishing or operating one or more online stores, or from using an entire online advertising channel, such as search engines or price comparison services),[36] restrictions relating to the use of particular online sales channels, such as online marketplaces, or the imposition of quality standards for online sales, can generally benefit from the VBER.[37] In contrast to the position adopted in the 2010 Guidelines, it is also accepted that dual pricing provisions affecting different offline and online sales channels (e.g. requiring a distributor to pay a higher price for products intended to be resold online than for ones sold offline in a bricks and mortar store) can benefit from the exemption where designed not to make selling online unprofitable or financially unsustainable, but to incentivize or reward an appropriate level of investments in online or offline sales channels.[38]
- The new VBER expands the concept of an exclusive distribution agreement to a distribution system where the supplier allocates a territory or group of customers either to itself, a single buyer, or a group of up to five buyers (so accepting shared exclusivity). It also provides that some of the exceptions to the prohibition on the supplier restricting the territory into which, or the customers to whom, a buyer can sell the products (permitted resale restrictions), can be imposed on direct customers of the buyer as well as the buyer. Further, greater guidance is provided on the important distinction drawn between restraints on active and passive selling (see especially Articles 1(l)(m) and Guidelines, paragraphs 211-215)[39] (the VBER allows a restriction on active (but not passive) sales by a buyer into an exclusive territory or to an exclusive consumer group exclusively allocated either to itself or to a maximum of five other distributors).

Finally, the VBER makes two important changes to the list of excluded restraints.

- Although the VBER remains inapplicable to non-compete obligations which are indefinite or in excess of five years,[40] it does now apply to non-compete obligations that are tacitly renewable, provided that the buyer can effectively renegotiate or terminate the agreement (the buyer is effectively allowed to switch at the end of a five-year period).[41]
- Across-platform retail parity obligations (wide retail parity clauses) imposed by OIS providers are now excluded from the VBER, that is direct or indirect obligations which cause buyers of such services not to offer, sell or resell goods or services to end users under more favorable

32 Guidelines, para 187.

33 Guidelines, para 193.

34 Case C-439/09, EU:C:2011:649.

35 Case C-230/16, EU:C:2017:941.

36 Guidelines, para 206.

37 Guidelines, para 208. See also Expert report for the Commission on "Cases dealing with online sales, and online advertising, restrictions at EU and national level" prepared by A. Jones.

38 Guidelines, para 209.

39 See also Expert report for the Commission on "Active sales restrictions in different distribution models and combinations of distribution models" prepared by F. Wijckmans & S. Jaques.

40 Under the 2010 VBER the exclusion applied if the arrangement was tacitly renewable.

41 Guidelines, para 247.

conditions via competing online intermediation services.[42] All other types of parity obligation, however, including narrow retail parity obligations relating to the direct sales channels of buyers of online intermediation services, obligations relating to the conditions under which goods or services are offered to undertakings that are not end users, and obligations relating to the conditions under which manufacturers, wholesalers, or retailers purchase goods or services as inputs (most favored customer obligations),[43] can benefit from the VBER.

III. THE UK VERTICALS REGIME

A. Background

The UK's attitude towards vertical agreements has also evolved over time – but in a different way to that in the EU. Initially, the UK chose not to embrace the more interventionist approach adopted by the Commission and assumed a more laissez-faire one, excluding most vertical agreements, apart from those incorporating RPM, from the scope of the CA98.[44] Concern mounted however, both about the (albeit deliberate) lack of consistency with EU law, and the tension it created with the principle of supremacy of EU law,[45] and the fact that the approach might be too permissive allowing some vertical agreements creating collusion or exclusion risks to go unchecked. Following consultation and an impact assessment,[46] the UK consequently decided to repeal the Verticals Exclusion Order with effect from April 2005. This change, together with the CA98 procedure for "parallel exemption" from UK competition law for agreements satisfying the conditions of an EU block exemption[47] and the adoption of EU Council Regulation 1/2003,[48] allowed the UK's competition authority, then the Office of Fair Trading ("OFT") (now the Competition and Markets Authority ("CMA")), to apply both Articles 101 and the Chapter I prohibition to vertical agreements. It also meant that UK competition law became aligned with the EU's "modernized" regime (see the Guidance on Vertical agreements).[49]

B. The Retained VBER and Proposed Reforms

Fast-forward to December 2020. Following the UK's exit from the EU and the end of the "transition period" during which EU law continued to apply in the UK (including the parallel exemption for agreements falling under the EU block exemption), it has been seen that the 2010 VBER was "retained" in UK law. Agreements concluded post January 1, 2021, thus continued to be exempt from the Chapter I prohibition, provided they satisfied the criteria of the Retained VBER. The UK Secretary of State had to decide, however, acting in consultation with the CMA, what to do on the expiry of the VBER. Hence throughout the latter half of 2021, the CMA held stakeholder roundtables and consulted widely on avenues for reform.

This represented the first occasion for the UK to "make its mark" post-Brexit in terms of setting forth competition legislation specific to the UK, free from encumbrances inherent in the EU regime, including hostility towards territorial restraints provoked principally by single market rather than consumer welfare concerns. It thus heralded an opportunity to reshape UK competition law to the benefit of UK consumers and businesses. Indeed, whilst most respondents to the CMA's consultation acknowledged the desirability of a degree of alignment and consistency between EU and UK law, given that many UK businesses operate cross-border, the CMA was encouraged not to adopt the new EU regime "wholesale," in particular, where the new EU legislation and Guidelines did not accord with the needs of the broader UK economy.

C. The Vertical Agreements Block Exemption Order and Guidance

In the end, however, in making its recommendation to the Secretary of State, the CMA concluded that "large-scale and fundamental changes to the current exemption for vertical agreements are not appropriate."[50] Drawing on feedback received during the consultation and on relevant

42 VBER, Art 5(1)(d).

43 Guidelines, para. 254.

44 See CA98 s.50(1) and the Competition Act 1998 (Land and Vertical Agreements Exclusion) Order 2000, SI 2000/310, Arts 2-4. greements Under the UK Competition Act 1998: Past, Present, and the Post-Brexit Future", *Competition Policy International* December 10 2020.

45 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.

46 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.

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

48 [2003] OJ L1/1.

49 See OFT 419, December 2004 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284430/oft419.pdf and Jones, n 44.

50 Consultation Document, "The retained Vertical Agreements Block Exemption Regulation," 17 June 2021, para. 2.11.

evidence from the EU evaluation (to which the CMA had contributed), the CMA proposed replacement of the Retained VBER with a UK Vertical Agreements Block Exemption Order ("VABEO") and accompanying Guidance ("VABEO Guidance") – "tailored to the needs of businesses operating in the UK and UK consumers."[51]

The CMA determined that a block exemption was a relevant and useful tool for businesses providing a "safe harbor" for vertical agreements likely to satisfy the requirements for exemption under section 9 of the CA98, through promoting efficiencies, promoting non-price competition, and/or promoting investment and innovation.[52] Much like the Commission, however, the CMA recognized that revisions were necessary to bring the rules up to date and to reflect developments, most notably the proliferation of e-commerce and post-2010 decisional practice.

1. Broad EU and UK Alignment

Those familiar with the Retained VBER will recognize the analytical framework of the new VABEO,[53] which like the VBER exempts qualifying agreements insofar as they do not contain so-called "hardcore restrictions," or "excluded restrictions" that infringe Chapter I and cannot be severed from the rest of the vertical arrangement. The good news for those seeking to comply with both the EU and UK rules is that the VABEO is largely consistent with its European counterpart, at least in terms of fundamental principles. For example, the 30 percent market share threshold below which market power is not presumed has been maintained (Article 6), as has the dual distribution exception, which in line with the VBER has also been expanded to include importers and wholesalers (Article 3(5)). The list of hardcore restrictions (in Article 8), mirroring those set out in the VBER, focus on RPM and territorial and customer restraints, and incorporates a new restriction of preventing the effective use of the internet. Moreover, the VABEO Guidance[54] has been expanded and amended to provide further clarification and detail on the application of the VABEO to vertical agreements in the online platform economy, similarly defining providers of OIS as suppliers for the purposes of the VABEO, and also setting out the view that OIS providers are generally incapable of fulfilling the conditions of agency. Like the EU Guidelines, the VABEO Guidance also softens the provisions in relation to dual pricing.

2. Points of Divergence

Despite convergence in many material respects, some points of divergence have been introduced. For example, unlike the VBER, the VABEO does not exclude OIS providers from the benefit of the dual distribution exception. According to the CMA, there was insufficient evidence for treating dual distribution involving hybrid platforms differently from other dual distribution arrangements. Given the fast-moving nature of digital markets, however, this matter will be monitored until the next review of the VABEO.[55]

As regards the new concept of "shared exclusivity," the VABEO neither limits nor caps the number of exclusive distributors that can be appointed to a maximum of five, but allows instead a "limited number" of buyers (Article 8(3)). Additionally, the VABEO is more permissive and flexible as it allows the combination of exclusive and selective distribution within the same territory, provided they are established at different levels of the distribution chain.[56] The VBER in contrast only allows combinations of exclusive and selective distribution to be pursued in distinct territories.[57]

Conversely, the UK VABEO treats parity clauses more strictly than the VBER,[58] including wide retail parity clauses in its list of hardcore restrictions (Article 8(2)(f)). In accounting for the difference in approach, the CMA cites its considerable experience of scrutinizing such obligations, which suggests that wide retail parity obligations soften competition between horizontal competitors and reduce the incentives of intermediaries (such as online platforms) to compete on price, to innovate, or to enter markets and expand.[59] Likewise, in treating such restrictions as hardcore,

51 *Ibid.* para. 2.1.

52 *Ibid.* para 2.3.

53 The Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022, SI 2022/516.

54 Vertical Agreements Block Exemption Order, CMA Guidance, 12 July 2022.

55 UK Competition law: Vertical Agreements Block Exemption Regulation, CMA's recommendation, 3 October 2021, para. 4.19 (CMA's Recommendation).

56 See Para. 8.81 of the VABEO Guidance.

57 See Para. 236 of the Vertical Guidelines.

58 See n 42 and text.

59 Para 5.90 of the CMA's Recommendation.

as opposed to excluded, the CMA stated that it had not seen compelling evidence of possible efficiency justifications for wide retail parity obligations (above and beyond the efficiencies that can be brought about by the use of narrow retail parity obligations).[60]

With regards to excluded restrictions, the UK has not followed the EU's more permissive approach to tacitly renewable non-competes. Rather, preserving the status quo it has maintained such provisions as excluded restrictions (Article 10). Again, the CMA considers that there is insufficient evidence to justify a change.[61]

The VABEO also strengthens CMA powers to gather information and to cancel the block exemption. Article 12 of the VABEO imposes an obligation on parties to provide the CMA with information in connection with those vertical agreements to which they are a party, if requested to do so, within 10 working days. Failure to do so without reasonable excuse may result in cancellation, i.e. withdrawal, of the block exemption. The VBER contains no equivalent information gathering power and the Commission may only withdraw the benefit of the VBER to a specific agreement where it concludes that it infringes Article 101.[62]

While not a substantive divergence, it is worth noting that the VABEO is set to expire on 1 June 2028, only 6 years after its entry into force. Its European counterpart, in contrast, only expires in 2034. This was a deliberate policy move by the UK to allow the CMA to conduct a further review in the short-term and to take into account ongoing market developments, including the growth in online sales, the UK's withdrawal from the EU and the impact of the COVID-19 pandemic.[63]

3. Jurisdiction

Finally, a recurring issue which arose during the UK consultation process, was how the CMA intended to approach jurisdiction under the new regime and, for example, whether it would be likely to prioritize enforcement against agreements (whether or not concluded outside of the UK), preventing sales into,[64] or outside of, the UK.

In the EU, Article 101's jurisdictional requirement – the effect on trade concept – has been interpreted broadly to catch agreements where it is possible to foresee that the agreement may have an influence, direct or indirect, actual or potential on the pattern of trade between EU Member States.[65] Consequently, both EU agreements and agreements covering third countries concerning imports or exports are capable of affecting trade between EU Member States.[66] For example, an agreement appointing a distributor outside of the EU (e.g. in the UK) and prohibiting that distributor from making sales outside of its contractual territory may affect trade in the EU if, in the absence of the agreement, resale to the EU would be both possible and likely[67] (such agreements will however only infringe Article 101 if found to appreciably restrict competition (by object or effect) and not to satisfy the conditions of Article 101(3)).[68] Only if importation is not a realistic commercial prospect, for example because of the nature of the product or because any price differential would be eroded by transport costs or customs duties, is the agreement likely to fall outside the jurisdictional reach of Article 101. Agreements between undertakings located in third countries may therefore affect trade and be caught by Article 101 if the agreement is operated through the medium of a subsidiary within the EU,[69] is implemented within the EU[70] or has immediate and substantial effects within the EU.[71]

60 *Ibid.* para. 5.99.

61 *Ibid.* para. 6.18.

62 VBER, Art 6 and Reg 1/2003, Art 29(1)(2).

63 Department for Business, Energy and Industrial Strategy, Draft Vertical Agreements Block Exemption Order, Government Response to Consultation, para. 1.37.

64 See e.g. the approach in Switzerland where EEA distribution agreements preventing imports into Switzerland have been condemned under Swiss law, see D. Mamane & K. Hummel, "Extraterritorial Reach of Swiss Competition Law: The BMW Case and Its Consequences for Worldwide Distribution Agreements" (2016) 7(5) *JECLAP* 326.

65 Case 56/65, *STM* EU:C:1966:38.

66 Guidelines on the effect on trade concept contained in Articles [101] and [102] of the Treaty, para 100.

67 Case C-306/96, *Javico* EU:C:1998:41, para. 27 and Guidelines on the effect on trade concept, *ibid*, para 109.

68 Case C-306/96, *Javico* EU:C:1998:41.

69 Case 48/69, *Dyestuffs* EU:C:1972:70.

70 Cases 89/85 etc., *Woodpulp* EU:C:1988:477.

71 Case C-413/14 P, *Intel* EU:C:2017:632, paras 41-46.

An important question therefore is whether UK law is to be interpreted in a similar way. The VABEO Guidance sheds some light on this matter, stating that an agreement containing hardcore territorial or customer restraints only falls within the scope of Chapter I if it may affect trade within the UK and is implemented, or intended to be implemented, in the UK. Further, insofar as the Chapter I prohibition is engaged, where a vertical agreement only concerns restrictions relating to exports outside the UK or imports/reimports from outside the UK, the CMA is unlikely to regard it as having the object of restricting competition within the UK. The CMA would instead assess whether such a vertical agreement has the effect of restricting competition within the UK, taking into account the nature of the products or services, as well as the real operating conditions and the structure of the market concerned.[72]

4. COMMENT AND CONCLUSIONS

The new vertical regimes in the EU and the UK provide welcome clarity on a range of issues which were uncertain under the previous regime, including, whether, and if so when, platforms, dual distribution, limitations (as opposed to absolute prohibitions) on online selling, and parity clauses can benefit from the block exemption and how active selling efforts are to be distinguished from passive ones in the e-commerce context.

Some commentators may, nonetheless, be concerned by gaps, inconsistencies, and missed opportunities.

The regime remains heavily reliant on legal rules – a safe harbor for vertical agreements meeting the conditions of the VBER or VABEO and a presumption of illegality for agreements incorporating hardcore restraints. These rules cannot provide for every eventuality or scenario. It seems likely therefore that, as with the 1999 and 2010 regimes, questions and uncertainties will arise as to how unforeseen forms of distribution arrangements or restraints are to be assessed or treated under the new system. As the Guidelines and modern jurisprudence have done little to develop a coherent and modernized antitrust framework for individual assessment of vertical agreements, the answer to these questions may not be easy to find.

In addition, a regime which relies heavily on rules will inevitably create error risks. Although the VBER and VBAEO provide for withdrawal of the block exemptions for agreements in certain circumstances, the 2022 systems do not weaken or alter the strong presumption against hardcore restraints or provide significant guidance as to when price, territorial or customer restraints may be justifiable under Article 101. Not all potential false positives created by the regime have thus been addressed.

Further, although the UK has the chance to re-assess the VABEO in six years times, there may be disappointment that it did not take the opportunity to unshackle itself from the EU system and provide a framework more closely centered around a consumer-welfare objective, free of the single market imperative. There may also be some dissatisfaction that having opted for the convergence route, the UK nevertheless decided to introduce some not insignificant divergences into the system. Although relatively limited in number, the notable differences between the new EU and UK rules present compliance challenges for agreements spanning both the EU and the UK.

Finally, for U.S. companies in particular, the revisions to both the EU and UK regimes serve as an important reminder that antitrust tolerance towards vertical agreements is much lower outside the U.S.

72 VABEO Guidance, para 8.32.

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