conducts a thorough examination within the scope of its investigation processes and links its findings with its previous review and decision processes.

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ANTI-COMPETITIVE PRACTICES

Restrictive business practices—reform of vertical agreements exemptions framework—Competition and Markets Authority recommendations—possible UK divergence from EU position—dual distribution exceptions—parity obligations—non-competes—withdrawal of exemption—information provision—duration

Block exemptions; Comparative law; Competition and Markets Authority; EU law; Vertical agreements

The CMA recommends a UK Vertical Agreements Block Exemption Order: Further signs of regulatory divergence?

With the post-Brexit transition period having ended on 31 December 2020, the United Kingdom (UK) and European Union (EU) are now distinct regulatory territories whose relationship is governed by the Trade and Cooperation Agreement. However, the EU block exemption regulations—which exempt certain types of agreements from EU competition law—were retained in UK law at the end of the transition period, along with their expiry dates. The block exemptions were amended to function as exemptions from UK competition law, with the UK's Secretary of State for Business, Energy and Industrial Strategy (the Secretary) empowered to vary, revoke or replace the EU block exemptions, acting in consultation with the Competition and Markets Authority (CM).

With the EU's Vertical Agreements Block Exemption Regulation (VABER) set to expire on 31 May 2022, the European Commission (EC) released a revised draft VABER on 9 July 2021 (Revised VABER), following a comprehensive consultation process launched in October 2018. The Revised VABER aims to keep up with developments and market conditions that have transformed the way businesses around the world operate, including the growth of e-commerce and online platforms during the last decade.

On the other hand, the CMA was consulted by the Secretary on whether the retained VABER should be renewed, revoked, or varied, given its impending expiration date. The CMA published its recommendation on 3 November 2021—and it has recommended to the Secretary that the VABER be replaced by a UK Vertical Agreements Block Exemption Order (VABEO) when the VABER expires on 31 May 2022. The CMA recognises that having a block exemption is beneficial for courts, regulatory authorities, and businesses as it provides legal certainty around common types of commercial agreements that pose no significant harm to competition—and it could have recommended that UK competition law would largely mirror the Revised VABER, but it has instead proactively adopted a different approach.

Whilst the CMA proposes to retain many of the principles and provisions from the retained VABER, it is keen to create a regulatory framework for exempting vertical agreements (via the VABEO) more tailored to the requirements of businesses operating in the UK and UK consumers. The CMA acknowledges that certain businesses may have to incur additional compliance costs due to the lack of consistency between the Revised VABER and the VABEO. However, the CMA's position appears to be that, if it sees material advantages in divergence—for example, in tackling harmful anti-competitive practices—the advantages of consistency for the benefit of businesses should not outweigh the need to protect UK consumers, and the

UK economy more generally, from any harmful anti-competitive practices. The VABEO and the Revised VABER are not fundamentally different, but we consider a few key areas where they currently appear likely to diverge.

Potential areas of divergence

- **Dual distribution exceptions:**

  On whether an exception for dual distribution should be included in the VABEO, the CMA concluded that an exception was necessary as many businesses operate dual distribution models which benefit sellers, retailers, and consumers. The CMA noted that the growth of online sales, accelerated by the COVID-19 pandemic, has shown manufacturers' increased wish to expand their presence at the distribution level. In addition, the CMA also recommended that the scope of the dual distribution exception should be expanded to apply to wholesalers and importers. Upon review of the responses to the consultation, the CMA could not distinguish between dual distribution arrangements involving wholesalers and importers and those involving manufacturers. While the EC is also proposing to widen the dual distribution exception in this way, it has decided for now to limit its application to information exchanges between parties that have a combined market share of 10% or more at the retail level. The CMA had considered imposing similar limits, but it appears to have concluded that an additional threshold may add unwanted complexities for businesses, the burden of which may in fact outweigh the benefits of such a change.

- **Parity obligations:**

  The CMA has noted the growth in parity obligations over the past decade, in particular in relation to e-commerce and online platforms. Therefore, to prevent anti-competitive behaviour, the CMA suggested that all "wide" parity obligations be treated as a hardcore restriction under the VABEO. The CMA had initially defined "wide retail parity obligations" as restrictions that ensure that prices (or other terms and conditions) at which a supplier's goods or services are offered to end users on a sales channel are no worse than those offered by the supplier on any indirect sales channels (for example, online platforms or intermediaries). Interestingly, the CMA has also suggested that wide parity obligations in "offline sales channels" should be included as a hardcore restriction. Many parties had queried this suggestion, as the Revised VABER removes the block exemptions for parity obligations imposed by providers of online intermediation services. However, the CMA's view appears to be that wide parity obligations may be imposed in offline markets and the harm caused by such obligations would be similar to those caused in online markets, and therefore they should not be viewed separately.

- **Non-compete obligations:**

  In the Revised VABER, the EC has proposed that non-compete obligations which are tacitly renewable beyond a period of five years should no longer be considered as part of the excluded restrictions, if the buyer can renegotiate or terminate the contract with a reasonable notice period and at a reasonable cost. The CMA was prompted by parties to consider adopting a similar approach in the VABEO. However, the CMA considers that not enough evidence is available to show that the potential for

UK economy more generally, from any harmful anti-competitive practices. The VABEO and the Revised VABER are not fundamentally different, but we consider a few key areas where they currently appear likely to diverge.

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anti-competitive effects arising from such obligations is diminished, to the extent that the CMA can begin to allow them to benefit from the block exemption. Therefore, the CMA has recommended that the position on non-compete obligations in the VABEO remains the same as it is in the retained VABER.

- **Cancellation in individual cases:**

  The CMA has suggested that it should be given the power to withdraw the benefit of the block exemption in individual cases, to ensure that only those agreements which should benefit from the exemption do so. The CMA has stated that it only intends to use this power in exceptional circumstances and that in the event this power is used, parties should be notified accordingly in writing. This change would in effect give the CMA the same powers to withdraw the VABEO as are currently enjoyed by the EC under the current VABER (and will continue to be enjoyed by the EC under the Revised VABER).

- **Obligation to provide information:**

  The CMA has recommended that the VABEO should include an obligation for parties to provide the CMA with information in connection with the relevant vertical agreements to which they are a party (if requested) and that if this obligation fails to be met without reasonable explanation, then the exemption should be withdrawn. The CMA is keen to impose this obligation on parties as it will allow them to assess agreements which benefit from the block exemption and enable the CMA to investigate potential related competition concerns. The Revised VABER does not include any similar obligations, although it does have separate powers for the EC to gather such information as part of its sector inquiries.

- **Duration and transition period:**

  The Revised VABER has been proposed to last for 12 years. The CMA, however, has suggested that the VABEO should last only for six years with a chance to review and revise the order at the end of this period. The CMA's suggestion was made in light of its conclusion that market developments occur frequently, for example the growth of online sales and the impact of the COVID-19 pandemic. As a result, the CMA recommends that important market developments should be appropriately regulated by the UK's legal framework and that the VABEO be reviewed regularly. Furthermore, the CMA has also recommended the inclusion of a one-year transitional period—to allow existing agreements which satisfy the retained VABER to remain exempt, with the parties being encouraged to review, and, if necessary, revise their existing vertical agreements to adapt to the finalised VABEO.

Conclusion

As the CMA and the EC consider the VABER to have been beneficial, the VABEO is generally expected to be aligned with the Revised VABER, notwithstanding any updates to reflect recent developments. However, the CMA's recommendations suggest that it will not hesitate to diverge from the Revised VABER, if justified in the best interests of the UK economy. In particular, the CMA's approach differs from the EC's approach in the Revised

VABER in a few key areas, including distribution exceptions, parity obligations, non-compete obligations and the proposed duration of the block exemption.

On the face of it, the CMA is not rigid regarding the direction of travel of UK competition law. With the EU Horizontal Block Exemption Regulations set to expire on 31 December 2022, we would not exclude the possibility of further recommendations for divergence being issued by the CMA in the forthcoming year, as UK competition law charts a new course.

Please note, this article was written in December 2021. Since then, the Secretary has given effect to the CMA's recommendations and initiated a technical consultation on the draft VABEO, which will remain open until 16 March 2022.

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MERGERS

Enforcement—review of changes to Federal Trade Commission's practice in 2021—early termination of waiting period in HSR reviews—"close-at-your-own-risk" letters—more rigorous questioning—FTC consent orders—new version of mission statement—more aggressive enforcement

Enforcement; Merger control; National competition authorities; United States

Changes in Federal Trade Commission's merger enforcement approach in 2021

In 2021, the Federal Trade Commission (FTC) announced a number of significant changes affecting its review of proposed transactions that are filed under the Hart-Scott-Rodino Antitrust Improvements Act (the HSR Act) of 1976. Many of these changes occurred in the latter half of the year, and each one of them points in the direction of more aggressive enforcement.

On 4 February 2021, the FTC announced that it was suspending its usual practice of granting early termination of the 30-day waiting period in HSR reviews. The statutory HSR waiting period is generally 30 days (with shorter periods for cash tender offers and bankruptcy sales), but historically the FTC was willing to grant "early termination" of the waiting period where they could easily determine that the transaction presented no competitive issues. That would allow the parties to a proposed transaction to close even before the 30-day waiting period concluded. In February, the FTC announced a "temporary suspension" of this practice of granting early termination, which it attributed to the "unprecedented volume" of HSR filings. The FTC stated that it expected this suspension to be "brief." As of 28 January 2022 (nearly one year after the announcement), the suspension is still in effect.

On 3 August 2021, the FTC announced that it had begun sending "close-at-your-own-risk" letters to companies involved in transactions that it cannot fully investigate within the 30-day statutory waiting period. The HSR Act provides that, within 30 days of filing, the reviewing agency must either issue a "second request" for additional information or let the waiting period expire, allowing the parties to close. In August, the FTC explained that it is sending letters to alert companies that its investigation remains open and that the FTC may eventually determine that the deal is unlawful, even after the waiting period expires and the transaction closes. Consequently, companies that receive these letters and nevertheless decide to consummate the transaction—after the expiration of the waiting period—"are doing so at