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UK Vertical agreements

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Vertical agreements are those entered into between two or more firms operating at different levels of the market, for example, distribution, agency and franchising agreements. This Practice note considers the UK competition law regime for vertical agreements.

Scope of this note

This Practice considers the application of the Chapter I and II prohibitions of the Competition Act 1998 to vertical agreements.

A vertical agreement is one that is entered into between two or more businesses that operate at different levels of the economy, such as agreements between a supplier and a dealer or between a supplier and a customer. Examples of vertical agreements include agreements relating to exclusive distribution, selective distribution, franchising, exclusive purchasing, agency and resale price maintenance (*see* Common types of vertical agreements).

The note considers:

- The application of the Chapter I prohibition and possible exclusions from its applications.
- The application and relevance of the UK vertical agreements block exemption order.
- The specific cases of:
  - newspaper and magazine distribution;
  - land agreements;
  - agreements in the groceries sector; and
  - the motor vehicle sector.
- Vertical agreements involving horizontal co-ordination.
- Examples of enforcement of the Chapter I prohibition against vertical restrictions, including price parity arrangements and resale price maintenance.
- Examples of private litigation concerning vertical restrictions.
- Vertical relationships that have been the subject of market investigations.
- Application of Chapter II prohibition.

The Chapter I prohibition

The Chapter I prohibition contained in the Competition Act 1998 (Competition Act), which is modelled closely on Article 101 of the Treaty on the Functioning of the European Union (TFEU), prohibits agreements between undertakings that may affect trade in the UK and which have the object or effect of restricting competition within the UK or a part of the UK (*section 2(1), Competition Act*). Breach of the Chapter I prohibition means that an agreement is void and that the parties may be liable to substantial fines. In addition, third parties who consider that they have been harmed may have a claim for damages in the courts (*see generally Practice note,* Chapter I prohibition).

Following the lead of the European Commission, the Office of Fair Trading (OFT), a predecessor of the CMA and the competition authority with general responsibility for enforcement of the Chapter I prohibition prior to 1 April 2014, acknowledged that vertical agreements do not generally give rise to competition concerns. The CMA replaced the OFT as of 1 April 2014 as the new single UK competition authority and follows the same approach. Thus, although it is recognised that vertical agreements may hinder intra-brand competition (competition between retailers selling the same brand), vertical agreements tend to stimulate inter-brand competition (competition between different brands), so providing wider benefits to end-consumers.

Vertical agreements can cause competition problems if one of the parties to the agreement possesses market power or the agreement is one of a number of similar agreements having a cumulative effect on the market (often called a network effect).

The Chapter I prohibition does not apply to purely unilateral conduct, as in such cases there is no agreement or concerted practice between the parties

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(in contrast, unilateral conduct of dominant companies may be caught by the Chapter II prohibition (*see Practice note,* Chapter II prohibition). However, the definition of "agreement" for the purposes of Chapter I is wide, and catches anything that expresses the parties' joint intention to conduct themselves on the market in a specific way, including an oral understanding, or a tacit "concurrence of wills" between the parties. In this respect, the approach to assessing whether an agreement has arisen for the purpose of Chapter I is the same as for Article 101 of the TFEU, and remains unchanged following the UK's departure from the EU (see Brexit).

Even if there is no explicit agreement expressing the parties' concurrence of wills, an agreement may nonetheless exist if it can be shown that the unilateral policy of one party receives the express or tacit acquiescence of the other party. For example, such acquiescence may arise where a supplier applies a degree of coercion on its distributors to refrain from responding to unsolicited orders from outside its territory, e.g., through a system of monitoring and penalties, and there is evidence that a number of distributors are actually implementing that policy in practice. For more detail on the circumstances in which such acquiescence may arise, see *Practice note: EU vertical agreements:* An agreement or concerted practice. (Given the (current) consistency in the substantive assessment under EU and UK competition laws, comment in our suite of practice notes on EU competition law remains valid.)

While the CMA is the authority that enforces the Chapter I prohibition most regularly, other sector-specific regulatory bodies also have powers to take enforcement action against vertical agreements that breach the prohibition, which affect their sector of competence. These are:

- The Office of Communications (Ofcom) - communications.
- The Water Services Regulation Authority (Ofwat) - water and sewage (in England & Wales).
- The Office of Rail and Road Regulation (ORR) - railways (and road).
- The Gas and Electricity Markets Authority (Ofgem) - gas and electricity.
- The Utility Regulator for Northern Ireland - gas, electricity and water services in Northern Ireland.
- The Civil Aviation Authority (CAA) - air traffic services and airport operation services.
- The Financial Conduct Authority (FCA) - financial sector activities.
- The Payment Systems Regulator (PSR) - participation in payment systems.

The old pre-2005 regime: Exclusion from Chapter I

The Secretary of State has power under the Competition Act to make orders providing for the exclusion of vertical agreements from the Chapter I and/or Chapter II prohibitions (section 50). In exercise of this power, the Secretary of State issued an order excluding vertical agreements from the scope of the Chapter I prohibition (but not the Chapter II prohibition) *(Competition Act 1998 (Land and Vertical Agreements Exclusion) Order 2000, SI 2000/310)* (Exclusion Order).

The result of this was that, until 1 May 2005, all vertical agreements that did not fix prices, fell outside the Chapter I prohibition, regardless of the other clauses within the agreement and the market strengths of the parties (although the benefit of the exclusion was always subject to being withdrawn by the OFT).

An example of an agreement found to benefit from the Exclusion Order was a 'pay-for-delay' agreement between IVAX Pharmaceuticals UK (IVAX) and GlaxoSmithKline (GSK).

Between 1997 and 2002, Norton Healthcare Limited (which traded as IVAX) and other generic pharmaceutical suppliers took steps to enter the UK paroxetine market. IVAX and two other generic companies (GUK and Alpharma) considered that there was a real prospect of placing on the market a generic paroxetine product that would withstand any legal challenge from GSK under patent law, on the basis that relevant GSK patent claims may be found by the courts to be invalid and/or that the product did not infringe any patent claims that were found to be valid.

However, IVAX entered into an agreement with GSK that IVAX would distribute limited quantities of GSK's branded product. At the time it did so, GSK had not instigated patent infringement proceedings against IVAX, and there was no settlement of pending litigation. The agreement included provision for significant value transfers, including cash payments, to be made from GSK to IVAX.

The CMA considered that the agreement was of no evident value to GSK, in terms of improving the efficiency of its distribution system in the UK, or its reach. The provisions relating to the transfer of value from GSK to IVAX did not reflect an exchange for any services provided to GSK by IVAX under the agreement. In fact those provisions were inducements to IVAX, incentivising it to defer placing on the UK paroxetine market an independent product that would compete against GSK's product. IVAX would stay off the market as an independent competitor, and would instead derive sufficient remuneration from GSK to make its inaction as

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a potential generic entrant worthwhile. The CMA did not consider that the terms of the agreement between GSK and IVAX were competitive.

However, the CMA found that the agreement was excluded from the Chapter I prohibition. GSK and IVAX were operating at a different level of the production and distribution chain, and the agreement did not contain elements (such as an express restriction on entry by a potential competitor) that would deprive the agreement of the benefit of the exclusion (*see further* Agreements to delay generic entry in the pharmaceutical sector).

Agreements between GSK and GUK and Alpharma, respectively, were made later, and had certain differences from the agreement with IVAX. In both cases, GSK had already instigated patent infringement proceedings against them, in view of their concrete efforts to enter the UK paroxetine market with rival products of their own. The CMA considered those agreements to be settlement agreements.

Appeals were lodged with the Competition Appeal Tribunal (CAT) by GSK, GUK and Actavis (successor to Alphapharma) claiming, among other things, that the CMA erred in not considering that the Exclusion Order applied to their agreements (*see* Generic paroxetine delay appeals). In March 2018, the Competition Appeal Tribunal (CAT) dismissed arguments that the CMA erred in finding that the agreements did not benefit from exemption under the Exclusion Order and that the CMA erred in finding that the agreements did not benefit from either a block or individual exemption (*Generics UK Limited v CMA [2018] CAT 4*; see Legal update, CAT 'intermediate' judgment in generic paroxetine delay appeals).

Modernisation and the new regime

As a result of the modernisation of EU competition law (effected by the entry into force of Council *Regulation 1/2003* (*OJ 2003 L1/1*) on 1 May 2004), the UK government decided to revoke the Exclusion Order with effect from 1 May 2005 *(Competition Act 1998 (Land Agreements Exclusion and Revocation Order, SI 2004/1260)*. From 1 May 2004 and until 31 December 2020, Regulation 1/2003 allowed the UK competition authorities and courts to apply and enforce Articles 101 and 102 of the TFEU. As a result, they were able to apply the European Commission vertical agreements block exemption (*Regulation 330/2010 (OJ 2010 L102/1)*, which replaced *Regulation 2790/1999* on 1 June 2010) to domestic vertical agreements. The vertical agreements block exemption is supplemented by Commission Guidelines, which set out the Commission's policy in relation to vertical agreements (vertical restraints guidelines). (*Regulation 2022/720 (OJ 2022 L134/4)* replaced Regulation 330/2010 on 1 June 2022. New vertical restraints guidelines (*OJ 2002 C248/1*) were also issued.) The EU vertical agreements block exemption is considered in detail in Practice note, EU Vertical agreements.

The exclusion for vertical agreements was revoked in order to eliminate the prospect of two sets of competition rules governing the treatment of vertical agreements in the UK. A further exclusion from Chapter I for "land agreements" was repealed on 6 April 2011 (*see further* Legal update, Government decides to repeal Land Agreements Exclusion Order).

Before the UK left the EU and the end of the UK-EU transition period (see Brexit), the EU vertical agreements block exemption applied to domestic vertical agreements because any agreement that is exempt from Article 101 "by virtue of a regulation" was also exempt from the Chapter I prohibition (*Article 10(1), Competition Act*). This created a system of parallel exemption. Parallel exemption also exempted from the Chapter I prohibition, an agreement that "does not affect trade between member states but otherwise falls within a category of agreement which is exempt from (Article 101) by virtue of a Regulation" (*Article 10(2), Competition Act*). This meant that an agreement that would otherwise fulfil the conditions of the EU vertical agreements block exemption, but which did not infringe Article 101(1) because of the absence of an effect on inter-state trade, was exempt from the Chapter I prohibition.

The system of parallel exemption has now been replaced by one of "retained exemption" for block exemptions.

Brexit

At 11.00 pm (UK time) on 31 January 2020 (exit day) the UK left the EU and is no longer an EU member state. During a transition period, which ended at 11.00pm (UK time) on 31 December 2020, the UK continued to be treated for most purposes as if it were still an EU member state, and most EU law (including as amended or supplemented) continued to apply to the UK. This meant, for example, the continued participation of the UK in the EU customs union and single market, the continued application of the four freedoms, and the continued application of the usual EU supervisory, judiciary and enforcement mechanisms, including Court of Justice of the European Union (CJEU) jurisdiction (see Brexit essentials: Q&As on agreements, timeframes and no deal: What happened during the transition period?).

During the transition period, the EU competition (Articles 101 and 102 of the TFEU), merger control and state aid rules continued to apply in the UK in the same way as they always had done, and arrangements for the discharge of the functions of the CMA were largely unaffected.

For more information, see Practice notes, European Union (Withdrawal Agreement) Act 2020: Transition

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period, Brexit: implications for UK competition law enforcement and Brexit: competition law transition period quick guide.

Post-transition period

Although the UK is now a third country and no longer part of the EU internal market, under the principle of extraterritorial application of EU competition law, the EU competition rules (Articles 101 and 102 of the TFEU) continue to apply post-transition period to agreements or conduct of UK companies that have an effect within the EU (see Practice note, Extraterritorial application of EU competition law). UK companies active within the EU, therefore, still need to comply with EU competition law, as well as applicable domestic law.

However, from 1 January 2021, EU competition law is no longer enforced in the UK by the CMA:

- The Competition (Amendment etc.) (EU Exit) Regulations 2019 revoke Articles 101 and 102 of the TFEU, Regulation 1/2003 and the EU Merger Regulation (and related EU regulations and European Commission decisions) and make amendments to the Competition Act and Enterprise Act (and other primary and secondary legislation) to reflect this revocation, separate the EU and UK antitrust and merger systems and make provision for a smooth transition to a standalone UK competition regime (see Legal update, The Competition (Amendment etc.) (EU Exit) Regulations 2019 made: Brexit SI).
- The Competition Act is amended to remove provisions empowering the CMA and sector regulators to investigate and enforce EU competition law and remove provisions for reciprocal investigation co-operation. However, a new section 60A of the Competition Act provides that competition regulators and UK courts will continue to be bound by an obligation to ensure no inconsistency with pre-exit EU competition case law, unless appropriate in specific circumstances. In addition, existing EU block exemption regulations have been copied into UK law as "retained exemptions". Unlike other provisions of retained EU law, it is not only the Supreme Court and Court of Appeal that can depart from pre-2021 case law of the EU Courts regarding Articles 101 and 102 TEFU - any UK court or competition authority can do so.

  The retained exemptions will operate as exemptions from domestic Chapter I prohibition (as covered by section 10 of the Competition Act). Beneficiaries of the EU block exemption regulations and any parallel exemption pre-exit will continue to benefit from the EU block exemption regulations as incorporated into domestic law after the end of the transition period (and so long as they continue to comply with the retained exemptions). A power to vary (including to extend) or revoke the application of the retained exemptions to the domestic prohibitions will lie with the Secretary of State, acting in consultation with the CMA. In addition, going forward, companies entering into new agreements after the end of the transition period will also be able to benefit from the retained exemptions provided they meet the relevant criteria. However, as noted below, the retained EU block exemption for vertical agreements has been replaced by the UK Vertical Agreements Block Exemption Order, which differs in some respects.
- The Competition (Amendment etc.) (EU Exit) Regulations 2020 amend the above 2019 Regulations to, in particular, make transitional arrangements in relation antitrust and merger cases initiated by the European Commission during the transition period over which the European Commission will continue to have competence. They also make provision for cases in which responsibility for the monitoring and enforcement of remedies imposed by the European Commission is transferred to the UK competition authorities, to enable the CMA and concurrent regulators to monitor and enforce transferred EU antitrust commitments, antitrust directions and merger remedies.

The EU-UK Trade and Co-operation Agreement, agreed on 24 December 2020, contains provisions requiring the UK to have and maintain a competition regime (tackling anti-competitive agreements and practices, abuses of dominance and anti-competitive mergers). It also contains provisions for developing arrangements for future co-operation between the EU and the UK authorities (see Legal update, UK-EU trade and co-operation agreement: competition and subsidy control provisions).

The practical effect of the end of the UK-EU transition period is that:

- UK companies doing business in the EU will still be subject to the application of EU competition law, enforced by the European Commission.
- The CMA will have jurisdiction to investigate anti-competitive behaviour that affects the UK even if the European Commission begins an investigation into the same behaviour. Companies will potentially become subject to parallel EU competition and CMA proceedings in respect of allegedly anti-competitive behaviour, such as cartels or abuses of dominance, that affect both the UK and the EU. The CMA and the UK concurrent regulators will only investigate suspected infringements of the Chapter I and II prohibitions and not of Articles 101 and 102 of the TFEU.

The CMA has published guidance on the legal framework and its powers and processes for antitrust and cartel enforcement from 1 January 2021 (see Legal update, CMA issues guidance on its functions after end of transition period).

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When the CMA is investigating conduct that may affect trade between the UK and one or more EU member states and has not issued a decision before 31 December 2020 and the case proceeds, it will no longer apply Articles 101 and 102 after 31 December 2020. All actions taken before 31 December 2020 in connection with the EU elements of the investigation, such as information gathering through notices, interviews or inspections, will be treated, after that date, as having been done for the purposes of the domestic elements of the investigation. Such actions therefore remain valid for such purposes.

Guidance on the implications for the treatment of "live" competition investigations as at 31 December 2020 is provided in Brexit checklist: Live merger and competition investigations at the end of the transition period.

For more information, (see Practice note, Brexit: implications for UK competition law enforcement).

Implications for vertical agreements: Retained vertical agreements block exemption

Regulation 330/2010 was adopted into UK law in adapted form (essentially removing specific EU references), as a retained exemption.

The CMA's guidance on its functions after the end of the transition period (*CMA125*) did note that geographic scope was relevant to certain provisions of the retained vertical agreements block exemption Regulation, in particular the concept of the restriction of passive sales. For example, under Regulation 330/2010, vertical agreements that have as their object the restriction of passive sales into an exclusive territory or customer group within the UK that is reserved to the supplier or allocated to another buyer are regarded as hardcore restrictions and are likely to infringe Article 101(1) of the TFEU (and the Chapter I prohibition) since such restrictions confer absolute territorial protection. In certain circumstances, passive sales bans affecting sales to a UK market or UK customer are capable of falling within the scope of the Chapter I prohibition. The CMA considered that these may not satisfy the requirements of the retained vertical agreements block exemption Regulation and could be treated as hardcore restrictions of competition.

Regulation 330/2010 expired on 31 May 2022, and a new block exemption has been adopted (Regulation 2022/720) (see Legal update, Commission adopts new vertical agreements block exemption regulation and Guidelines on vertical restraints).

On 10 February 2021, the CMA announced that it would conduct a review of the retained vertical agreements block exemption Regulation (see Legal update, CMA announces review of retained Vertical Block Exemption Regulation) and, on 17 June 2021, published a consultation on the results of that review and its proposal to recommend that the Secretary of State replace the retained vertical agreements block exemption Regulation, when it expires on 31 May 2022, with a UK Vertical Agreements Block Exemption Order, tailored to the needs of businesses operating in the UK and UK consumers (see Legal update, CMA consultation on review of retained Vertical Block Exemption Regulation).

A relevant consideration in the CMA's review was that a degree of alignment with the EU approach to vertical agreements is likely to reduce compliance costs, and it had decided that large-scale and fundamental changes to the current exemption are not appropriate.

On 3 November 2021, the CMA published its final recommendation that the Secretary of State replace the retained vertical agreements block exemption Regulation, with a UK Order with a duration of six years and tailored to the needs of businesses operating in the UK and UK consumers (see Legal update, CMA recommendation to replace retained Vertical Block Exemption Regulation with UK Order).

The CMA recommended that the scope of the UK Order should stay largely the same as the retained vertical agreements block exemption Regulation, other than being extended to cover dual distribution (where a manufacturer both retails and wholesales its branded products) by wholesalers and importers. The basic structure and form of exemption, including market share thresholds, would remain unchanged.

On 9 May 2022, the *Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022* (*SI 2022/516*) (VABEO) was published. The retained exemption expired on 31 May 2022, when it was replaced by the VABEO.

While the new UK regime for vertical agreements retains the framework of a block exemption and accompanying guidelines, policy changes include:

- Territorial and customer restrictions. Definitions of active and passive sales have been added, and greater flexibility has been given to combining exclusive and selective distribution. In particular, combined exclusive and selective distribution, shared exclusivity and measures to protect selective distribution are included as exceptions to hardcore restrictions.
- Indirect measures restricting online sales. The prohibition of dual pricing and the requirement for overall equivalence between online brick-and-mortar sales will no longer be regarded as hardcore restrictions. The VABEO clarifies what constitutes an active sale or passive sale in relation to the selling of goods and services online. Hardcore restrictions in this regard expressly include preventing the effective use of

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the internet or online advertising channels, geographic or customer restrictions and restrictions on sales by members of a selective distribution system.,

- The introduction of guidance for providers of online intermediation services. The VABEO treats online intermediaries as independent service providers rather than as agents (Article 2(1), VABEO). Agreements between the provider of online intermediation services and the buyer of those services constitute vertical agreements for the purposes of Article 2(1) of the VABEO.
- Parity obligations (most favoured nation clauses). Wide retail parity obligations, and equivalent measures, have been added to the list of hardcore restrictions. Narrow parity obligations are not to be included on the list of hardcore or excluded restrictions. Wide parity obligations that apply to business-to-business markets will also not be treated as hardcore restrictions.

The VABEO includes provisions for the CMA to request information and to cancel the block exemption. The block exemption entered into force on 1 June 2022 and will expire on 1 June 2028. There was a one-year transition period so that the Chapter I prohibition did not apply to agreements that benefited from exemption under the retained vertical agreements block exemption but which did not meet the VABEO criteria.

The VABEO had a transitional period of one year, during which agreements that were entered into before 1 June 2022 and complied with the EU vertical agreements block exemption Regulation 330/2010 remained exempt until 1 June 2023 (*Article 15*).

On 12 July 2022, the CMA published the final version of its guidance (*CMA166*) to accompany the VABEO (see Legal update, CMA publishes final guidance on Vertical Agreements Block Exemption Order) (*CMA Guidance*). The Guidance is non-binding but is a vital aid to practitioners seeking to understand whether the agreement they are drafting may be protected by the VABEO and, if it is not, whether it may nonetheless benefit from an individual exemption under section 9 of the Competition Act 1998.

Vertical agreements covered by the VABEO

The VABEO applies to vertical agreements, which are defined as agreements or concerted practices entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice concerned, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell, or resell certain goods or services (*Article 3(2), VABEO*). Certain ancillary provisions relating to the use or assignment of intellectual property rights are also covered (see Intellectual property provisions) (*Article 3(4)*).

The VABEO also exempts vertical agreements entered into between an association of undertakings (such as a trade association) and its members or its suppliers, provided that all the association members are retailers of goods and that no individual member generates turnover above a certain threshold (Article 3(3)).

Meaning of "vertical"

An agreement is "vertical" if it is between two or more businesses, each of which operates at a different level of the production or distribution chain for the purposes of that agreement. To fall within the scope of this definition, an agreement involving, for instance, four parties, would therefore need to be concluded between one business acting in its capacity as the supplier of raw materials under the agreement, another business acting in its capacity as manufacturer, a third business acting in its capacity as distributor and a fourth business acting in its capacity as retailer.

A single agreement between a supplier and several distributors would not be covered by the definition, because the agreement would involve more than one party acting at the same level of the production and distribution chain for the purposes of the agreement.

As long as the parties to an agreement operate at different levels of the production or distribution chain for the purposes of the particular agreement, the VABEO will apply. It will therefore cover a situation where, for example, manufacturer A enters into a distribution agreement with manufacturer B for the distribution by B of goods manufactured by A.

The VABEO may apply to dual distribution arrangements, that is, where the supplier sells both through its own captive outlets and through independent distributors (see Vertical agreements between competing undertakings).

However, the benefit of the block exemption in the dual distribution context extends to information exchange only to the extent that it does not restrict competition by object and is genuinely vertical, which is to say that it is required to implement the distribution agreement. For the purposes of the VABEO, information exchange may be formal or informal, in writing or oral. Whether an exchange of information is required to implement the distribution agreement may depend in part on the particular distribution model. The CMA Guidance sets out examples of acceptable and non-acceptable information exchange (*paragraphs 6.23-6.29*).

Vertical agreements not covered by the VABEO

The vertical agreements block exemption does not, however, apply to certain types of vertical agreements:

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- Agreements between parties holding market shares above certain thresholds will not benefit from the exemption (*Article 6*).
- Subject to limited exceptions, the vertical agreements block exemption will not benefit agreements between competitors (*Article 3(5)*).
- Agreements containing one of the hardcore restrictions listed in the VABEO will not be exempted (*Article 8*) (see Hardcore restrictions).
- Agreements that are already, or could be, covered by a retained block exemption regulation or of any block exemption order, unless otherwise provided for in such a regulation or order (*Article 3(6)(a)*).
- Rent and lease agreements where no goods or services are being sold by the supplier to the buyer (*Article 3(6)(b)*).

The VABEO will also not cover agreements that relate primarily to intellectual property rights, nor, of course, those that do not satisfy the definition of "vertical" and otherwise satisfy the applicable conditions of the VABEO.

Market share threshold

To benefit from the VABEO the market shares of both the supplier and the buyer must be below 30% on the market(s) on which the goods/services covered by the agreement are sold and bought, respectively (*Article 6(1)*).

For the supplier, the relevant share is that of the market in which it sells the goods or services in question.

For the distributor, the relevant share is that of the market for purchasing the goods or services in question, which will often be of much broader geographic scope than the downstream market on which it resells the relevant goods or services.

Below the 30% threshold, no market power is presumed, and agreements may benefit from the VABEO unless the agreement contains certain hardcore restrictions (see Hardcore restrictions).

The market share calculation is based on data relating to the preceding calendar year. If the market share rises from below 30% to between 30% and 35% in a given year, the VABEO may still apply for two further years. If it rises from below 30% to above 35% in a given year, the VABEO may still apply for one further year (*Article 7(2) and 7(3)*). Subject to these two modest derogations, above the 30% threshold, the VABEO will not apply.

Vertical agreements between competing undertakings

The definition of vertical agreement refers to undertakings operating for the purposes of the agreement at different levels of the production or distribution chain. However, subject to some exceptions vertical agreements between competing undertakings are excluded from the VABEO (*Article 3(5)*). Competing undertakings are defined as actual or potential competitors. Two companies are treated as actual competitors if they are active on the same relevant market. A company is treated as a potential competitor of another company if, in the absence of the agreement, the company would, on realistic grounds and not just as a mere theoretical possibility, be likely to undertake, within a short period of time, the necessary additional investments or other necessary switching costs to enter the relevant market.

Although the parties to the agreement may not be competitors for the purposes of this agreement, they may be so in relation to other activities. This will be relevant where at least one of the parties is active at more than one level of the production or distribution chain, for example, one party is a supplier and distributor, but enters into a contract in its capacity as supplier, with another distributor.

However, there are limited circumstances in which the vertical agreements block exemption can cover "dual distribution" vertical agreements between competing undertakings. The agreement must be non-reciprocal, that is, although one party distributes the goods of another, the latter party must not also become the distributor for the first, and the supplier:

- Is a manufacturer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing level,
- Is a wholesaler and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the wholesale level, or
- Is an importer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the level of trade where it purchases the goods or at the importation level.
- Is a provider of services at several levels of trade, while the buyer provides its goods or services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services.

Hardcore restrictions

If a vertical agreement contains any one hardcore restriction the whole agreement will not benefit from the vertical agreements block exemption. The CMA Guidance also states that, in the CMA's view, the listed hardcore restrictions will in general be viewed as restrictions of competition "by object". Consequently, they will be presumed to infringe the Chapter I prohibition (regardless of their actual effects on competition) and it will be for the parties to

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demonstrate that there are sufficient pro-competitive efficiencies to satisfy the criteria for exception under section 9 of the Competition Act.

The hardcore restrictions are set out in Article 8 of the VABEO:

- **Price-fixing or resale price maintenance (RPM).** Any agreement or restrictive practice having as its direct or indirect object the establishment of a fixed or minimum resale price level to be observed by the buyer is a hardcore restriction (*Article 8(2)(a)*). A supplier may impose a maximum resale price, or recommend a resale price, provided such provisions do not have the effect of a fixed or minimum resale price as a result of pressure from or incentives offered by the parties imposing the restriction. The CMA Guidance does, however, indicate that in certain circumstances, a fixed or minimum resale price might satisfy the criteria for legal exception under section 9 of the Competition Act:

  - when a manufacturer introduces a new product, RPM may be an efficient means to induce distributors to better take into account the manufacturer's interest to promote this product;
  - fixed resale prices, and not just maximum resale prices, may be necessary to organise a co-ordinated short-term low-price campaign (of two to six weeks in most cases), in the context of a distribution system in which the supplier applies a uniform distribution format, such as a franchise system; and
  - RPM or a minimum advertised price (MAP) can be used to prevent a particular distributor from using the product of a supplier as a loss leader, if certain conditions are met. Where a distributor regularly resells a product below the wholesale price, this can damage the brand image of the product and, over time, reduce overall demand for the product and undermine the supplier's incentives to invest in quality and brand image. If that can be shown to be the case, then preventing that distributor from selling below the wholesale price by imposing on it a targeted minimum resale price or MAP may be considered on balance pro-competitive.

  (*CMA Guidance, paragraph 8.21.*)

  RPM can also be achieved through indirect means, including incentives to observe a minimum price or disincentives to deviate from a minimum price. The CMA Guidance gives the following examples:

  - fixing the distribution margin;
  - fixing the maximum level of a discount that the distributor can grant from a prescribed price level;
  - making the grant of rebates or the reimbursement of promotional costs by the supplier subject to the observance of a given price level;
  - imposing MAPs, which prohibit the distributor from advertising below a level set by the supplier;
  - linking the prescribed resale price to the resale prices of competitors; and
  - threats, intimidations, warnings, penalties, the delay or suspension of deliveries or contract terminations in relation to the observance of a given price level.

  (*CMA Guidance, paragraph 8.12.*)

  The CMA's guidelines contain new guidance for the e-commerce environment, for example, in relation to price monitoring (*paragraph 8.16*)). They also make it clear that, in relation to online platforms, a provider of online intermediation services is a supplier and must not engage in RPM with regard to the intermediated goods or services (*paragraph 6.35*).

  The CMA Guidelines also clarify that specifying the resale price to be paid by the ultimate customer in a "fulfilment contract" (where a supplier enters into a vertical agreement with a service provider for the purpose of executing (fulfilling) a supply agreement concluded previously between the supplier and a specific customer) will not amount to RPM if the supplier selects the undertaking that will provide the fulfilment services (*paragraph 8.18*).

- **Territorial restrictions and customer exclusivity.** As a starting point, the supplier must permit the distributor to decide to whom and in which territories it wishes to sell the contract goods. Restrictions on this freedom will prevent the VABEO from applying. There are, however, several exceptions. The VABEO deals with territorial restrictions and customer exclusivity separately for exclusive, selective and free (that is, neither exclusive nor selective) distribution systems.

  In a free distribution system, the supplier must not restrict the territories into which, or the customers to whom, the buyer may sell the contract goods or services (*Article 8(2)(d)*). However, the following sales restrictions are permitted:

  - the restriction of active sales by the buyer, or the buyer and its customers that have entered into a distribution agreement with the supplier or with a party that was given distribution rights by the supplier, into a geographical area or to a customer group reserved to the supplier or allocated by the supplier exclusively to one or a limited number of distributors (*Article 8(5)(a)*). The CMA Guidance states that restrictions relating to exports outside the UK or imports/re-imports into the UK are unlikely to be regarded as having the object of restricting competition within the UK (*paragraph 8.32*). This implies that if a supplier prevents an EU-based distributor from making sales into the UK it will not be considered to be a hardcore

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territorial restriction for the purposes of Article 8 of the VABEO, and will therefore be covered by the VABEO even if the restriction extends to passive sales. Note that Article 8(5)(a) permits the active sales restriction to be passed on to the next level of buyers (although not further down the supply chain). This marks a departure from the position under EU Regulation 330/2010, which did not permit this;

- the restriction of active sales or passive sales by the buyer or its customers to unauthorised distributors located in a geographical area where the supplier operates a selective distribution system for the contract goods or services (*Article 8(5)(b)*);
- the restriction on the buyer's place of establishment (*Article 8(5)(c)*);
- the restriction of active sales or passive sales to end-users by a buyer operating at the wholesale level of trade (*Article 8(5)(d)*); and
- the restriction of the buyer's ability to actively sell or passively sell components, supplied for the purposes of incorporation to a product, to customers who would use them to manufacture the same type of goods as those produced by the supplier (*Article 8(5)(e)*).

A similar restriction and exceptions to the restriction apply to the appointment of exclusive distributors (*Article 8(2)(b) and Article 8(3)*) and members of a selective distribution system (*Article 8(2)(c) and Article 8(4)*).

It is also worth noting that, under the VABEO, a supplier can require an exclusive distributor to share its territory with other distributors (shared exclusivity). The CMA Guidance states that the number of appointed distributors should be determined in proportion to the allocated geographical area or customer group in such a way as to preserve the incentive of the distributors to invest in promoting and selling the supplier's goods or services, while providing the supplier with sufficient flexibility to design its distribution system (*paragraph 10.59*). This is an area of divergence from the European Commission's new vertical agreements block exemption (Regulation 2022/720), which allows up to five shared distributors to be appointed for a territory or customer group irrespective of the size of that area or group.

- **Cross supplies between distributors within a selective distribution system.** A restriction on members of a selective distribution system from supplying goods, either actively or passively, to other distributors within the same system is a hardcore restriction (*Article 8(2)(c)(ii)*). Members of a selective distribution system must be able to buy the contract goods from other distributors within the same network. Therefore, a supplier is unable to impose exclusive purchasing commitments on its authorised distributors or territorial resale restrictions on authorised wholesalers regarding their sales to authorised distributors.
- **Resales by members of a selective distribution system.** A restriction on the members of a selective distribution system, operating at retail level, from making active or passive sales to end-users (*Article 8(2)(c)(iii)*). This means that retailers in a selective distribution system cannot be restricted as to the users to whom they sell, including online. A dealer in a selective distribution system may, however, be restricted as to the location of its business premises and restricted from making active sales into a territory reserved to one or more exclusive distributors.

  Access to spare parts. In the specific context of a supply agreement between a supplier of components and a distributor who incorporates those components, any restrictions on the supplier selling those components as spare parts to end-users or to independent repairers or other service providers are not permitted under the VABEO (*Article 8(2)(e)*).

  This means that if a component manufacturer sells parts to an original equipment manufacturer (OEM) which incorporates them into its own products and distributes them as spare parts through its own distribution network, the OEM cannot prevent or restrict the upstream component manufacturer from selling to independent repairers or service providers. This does not concern access to supply of spare parts through the OEM's own network of retailers/repairers.
- **Wide retail parity clauses.** Wide retail parity obligations, or obligations or measures which have the same effect as a wide retail parity obligation, are a hardcore restriction (*Article 8(2)(f)*).

  The VABEO defines a "wide retail parity obligation" as a restriction that ensures that the prices (or other terms and conditions) at which a supplier's goods or services are offered to end-users on a sales channel (which could be an online or offline sales channel) are no worse than those offered by the supplier on another sales channel (Article 8(7), VABEO). A "narrow" retail parity obligation, by contrast, would apply to the supplier's direct sales channels only, typically its website, without stipulating conditions for sales through indirect channels.

  Measures having the same effect as a wide retail parity obligation might include, for example, making a position in rankings on a comparison website conditional on parity with other indirect channels.

  Regulation 330/2010, and hence the retained vertical agreements block exemption, did not address parity clauses so their treatment in the VABEO marks a departure from the previous position, reflecting the CMA's view that wide retail parity clauses soften competition between horizontal competitors and

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reduce the incentives of intermediaries (such as online platforms) to compete on price, to innovate, or to enter markets and expand.

Business to business (B2B) platforms are outside the scope of the hardcore restriction. The CMA considers that the overall competitive harm and direct effect on consumers of wide parity obligations that apply to B2B platforms is less clear and will depend on the complexity of the vertical supply chain and the strength of competition downstream.

The hardcore restriction applies to both online and offline platforms. While previous enforcement activity has focused on online platforms, the CMA considers that wide retail parity obligations in online and offline sales channels should be treated in a consistent manner.

The CMA Guidance states that wide parity obligations, as hardcore restrictions under the VABEO, will be presumed to restrict competition and thus to fall within the Chapter I prohibition (*paragraph 8.90*). owever, this should be read in the context of the subsequent August 2022 ruing of the CAT in *BGL (Holdings) Limited and others v Competition and Markets Authority ([2022] CAT 36)* (see Legal update, Judgment upholding appeal by Compare The Market and setting aside "most favoured nation" infringement decision (CAT)). In that judgment, the CAT annulled the CMA's decision to impose a fine of £17.9 million on BGL (Holdings) Limited and a number of its subsidiaries that operated the price comparison website Compare The Market, in relation to their use of wide retail price parity clauses in contracts entered into with for home insurance providers for the advertising and sale of their products through Compare The Market). The CAT found that the CMA had not defined the relevant markets correctly and that there was no reliable evidence to conclude that the existence of the price parity clauses had any adverse effect on either prices quoted by home insurers or the commissions charged by price comparison websites. Consequently, it is not clear that the CAT would accept the CMA's position that wide retail parity clauses should be assumed to have the object of restricting competition, notwithstanding their categorisation as a hardcore restrictions under the VABEO.

Narrow retail parity obligations are block exempted by the VABEO. However, the CMA may still decide to investigate concerns relating to narrow retail parity obligations in agreements between undertakings if there is evidence that their use replicates the effects of wide retail parity obligation.

The treatment of parity clauses is an area of divergence from the European Commission's new vertical agreements block exemption (Regulation 2022/720), where wide retail parity clauses are not hardcore restrictions and online wide retail parity clauses are treated as excluded restrictions.

The hardcore restrictions on passive sales in Article 8(2), of the VABEO are expressed to apply to restrictions on the distributor only, not restrictions imposed on the supplier.

Meaning of "active" and "passive" sales

The distinction between "active" and "passive" sales is of fundamental importance to the application of the VABEO.

The VABEO defines the following as "passive sales":

- Sales in response to unsolicited requests from individual customers, including delivery of goods or services to such customers without the sale having been initiated through advertising actively targeting the particular customer group or geographical area.
- General advertising or promotion that reaches customers in other distributors' geographical areas or customer groups (whether exclusive or not) but which is a reasonable way to reach customers outside those geographical areas or customer groups.
- Participating in a public procurement exercise undertaken in accordance with the Defence and Security Public Contracts Regulations 2011 (*SI 2011/1848*), the Public Contracts Regulations 2015 (*SI 2015/102*), the Concession Contracts Regulations 2016 (*SI 2016/273*) or the Utilities Contracts Regulations 2016 (*SI 2016/274*).

(*Article 8(7), VABEO.*)

Examples of clauses in distribution agreements relating to sales outside the territory that *prima facie* seem acceptable but may in reality constitute a restriction of passive sales include:

- Reduction of bonuses, discounts or reimbursement.
- Reduction of supply volumes or limitation of supplied volumes to the demand within the allocated territory or customer group.
- Requiring a higher price for products to be sold outside the territory.
- Limiting the proportion of sales that can be sold outside the territory.

The VABEO defines the following as "active sales":

- Actively targeting customers by for instance calls, emails, letters, visits or other direct means of communication.
- Targeted advertising and promotion, by means of print or digital media, offline or online, including online media, digital comparison tools or advertising on search engines targeting customers in specific geographical areas or customer groups.

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- Advertisement or promotion that is only attractive for the distributor if it (in addition to reaching other customers) reaches a specific group of customers or customers in a specific geographical area (and is considered active selling to that customer group or customers in that geographical area).
- Offering on a website language options different to the ones commonly used in the geographical area in which the distributor is established.
- Using a domain name corresponding to a geographical area other than the one in which the distributor is established.

(*Article 8(7)*.)

The distinction between active and passive sales can be particularly challenging in the context of online sales (see Restrictions on online sales).

Restrictions on online sales

The VABEO states that a reference to a restriction of an active sale or passive sale, in relation to the selling of goods and services online, includes a restriction that, directly or indirectly, in isolation or combination with other factors, has as its object the prevention of distributors or their customers effectively using the internet for the purposes of selling their goods or services online or from effectively using one or more online advertising channels (Article 8(6)(a), VABEO).

It is permissible under the VABEO to restrict distributors from making active sales into the exclusive territories or to the exclusive customer groups of other distributors within the UK, but not to restrict passive sales. Having a website is generally considered a form of passive selling. However, the extent to which selling and marketing online constitutes passive selling has been a grey area, which the CMA attempts to address in its guidance.

What is not permitted

The CMA identifies the following as examples of obligations that have the object of preventing distributors from selling their products online:

- A requirement that the distributor shall prevent customers located in another geographical area from viewing its website or online store or to re-route customers to the online store of the manufacturer or of another seller. However, obliging the buyer to offer links to the online stores of the supplier or of other sellers is not a hardcore restriction.
- A requirement that the distributor shall terminate consumers' online transactions once their credit card data reveal an address that is not within the distributor's territory.
- A requirement that the distributor shall only sell in a physical space or in the physical presence of specialised personnel.
- A requirement that the distributor shall seek the supplier's prior authorisation for making individual online sales transactions.
- A requirement that the distributor shall not use the supplier's trade marks or brand names on its website.
- A prohibition on the distributor from establishing or operating one or more online stores, irrespective of whether the online store is hosted on the distributor's own server or on a third-party server.
- A direct or indirect prohibition on using a specific online advertising channel, such as price comparison tools or advertising on search engines, or other online advertising restrictions indirectly prohibiting the use of a specific online advertising channel.

(*CMA Guidance, paragraph 8.38*.)

The CMA's Guidance implies that restrictions exports outside the UK or imports/re-imports into the UK are not considered to be hardcore territorial restrictions for the purposes of Article 8 of the VABEO, and will therefore be covered by the VABEO even if the restrictions extends to passive sales (see Hardcore restrictions).

What is permitted

The following may benefit from the block exemption provided by the VABEO:

- Requirements intended to ensure the quality or a particular appearance of the distributor's online store.
- Requirements regarding the display of the contract goods or services in the online store (such as the minimum number of items displayed or the way the supplier's trademarks or brands are displayed).
- A direct or indirect ban on sales on online marketplaces.

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- A requirement that the distributor operates one or more brick and mortar shops or showrooms as a condition for becoming a member of the supplier's distribution system.
- A requirement that the buyer sells a minimum absolute amount of the contract goods or services offline (in value or volume, but not as a proportion of its total sales) to ensure the efficient operation of its brick and mortar shop. This requirement can be the same for all buyers, or it can be set at a different level for each buyer, based on objective criteria, such as the buyer's size relative to other buyers, or its geographic location.

(*CMA Guidance, paragraph 8.41.*)

As noted, restrictions on the use of a specific online sales channel, such as online marketplaces, or setting quality standards for selling online, can benefit from the block exemption, provided the restriction does not, directly or indirectly, in isolation or combination with other factors, have as its object, to prevent the distributor or its customers from selling online marketplaces to the imposition of certain qualitative requirements which the marketplaces must meet. For instance, suppliers may:

- Prohibit the use of marketplaces on which products are sold by auction.
- Require distributors to use specialised marketplaces.
- Require that the logo of the online marketplace is not visible (which may amount to a de facto ban on online marketplaces).

(*CMA Guidance, paragraph 10.120*.)

Provisions not covered by the vertical agreements block exemption: Excluded restrictions

In addition to the hardcore restrictions described above, the VABEO identifies further obligations, called "excluded restrictions", that fall outside the scope of the VABEO, even though the market share threshold is not exceeded (Article 10). Provided that these provisions can be severed, the remainder of the agreement can still benefit from the vertical agreements block exemption.

The excluded restrictions refer to:

- **Non-compete obligations.** Any direct or indirect non-compete obligation that lasts indefinitely or exceeds five years (*Article 10(2)(a)*). A non-compete obligation is as an obligation that requires the buyer not to manufacture, purchase, sell or resell competing goods or services, or to purchase from the supplier (or from someone designated by the supplier) more than 80% of the buyer's total purchases of the contract goods and services and their substitutes (*Article 10(5)*). There is a limited exception where the contract goods or services are sold by the distributor from premises or land owned by the supplier or leased by the supplier from third parties not connected with the buyer, provided that the duration of the non-compete obligation does not exceed the period of occupancy of the premises or land by the buyer Article 10(3)).

  In contrast to the position under the European Commission's Regulation 2022/720, non-compete clauses that are automatically renewable beyond a period of five years are deemed to be concluded for an indefinite duration, and therefore are not block exempted under the VABEO (*Article 10(2)(a)*). An individual exemption may still be available but this will have to be assessed on a case-by-case basis.

  The following are forms of a non-compete obligation:

  - **quantity forcing.** Quantity forcing is where incentives or obligations agreed between the supplier and the distributor require the distributor to concentrate its purchases to a large extent on one supplier. This may, for example, take the form of minimum purchase requirements or non-linear pricing practices such as quantity rebate schemes, loyalty rebate schemes or a two-part tariff (a fixed fee plus a price per unit).
  - **exclusive purchasing.** An obligation on the buyer to purchase 80% or more of its total requirement for the contract goods or services is treated as a non-compete obligation.

  The CMA Guidance uses the term "single branding" to describe non-compete obligations and quantity forcing and addresses the competition law implications of single branding obligations in some detail (see *CMA Guidance, paragraphs 10.37-10.56*).

- **Any direct or indirect obligation preventing the buyer from manufacturing, purchasing, selling or reselling goods or services after termination of the agreement** (*Article 10(2)(b)*). There are two exceptions to this rule (*Article 10(4)*):

  - a restriction lasting not more than one year post-termination that relates to goods or services that compete with the contract goods or services, is limited to the premises from which the distributor has operated during the contract period and is indispensable to protect know-how transferred to the distributor; and
  - a restriction which is indispensable to protect know-how transferred by the supplier to the buyer which

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has not entered the public domain, whether or not it is time limited, is not an excluded restriction.

As defined in Article 2(1) of the VABEO, the know-how must comprise a package of non-patented information, resulting from experience and testing by the supplier, which is each of the following: not generally known or easily accessible; significant and useful to the distributor for the use, sale or resale of the contract goods or services; and described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the two above criteria.

- **Any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers** (Article 10(2)(c)).

Relationship of VABEO to other retained block exemption regulations

The VABEO does not apply to vertical agreements the subject matter of which falls within the scope of any other retained block exemption regulations, for example, agreements covered by the retained version of:

- The Technology Transfer Block Exemption Regulation (316/2014/EU) (see Practice note, Flowchart guides: Technology transfer block exemption).
- The Motor Vehicle Distribution Block Exemption Regulation (461/2010/EU) (see Practice note, The application of EU competition law to the motor vehicles sector).
- The Research and Development Block Exemption Regulation (1217/2010/EU) and the Specialisation Block Exemption Regulation (1218/2010/EU) (see Practice note, Transactions and practices: EU Co-operation between competitors).

Disapplication of the block exemption

The CMA can withdraw the benefit of the VABEO from an agreement if it considers that a particular agreement is not exempt from the Chapter I prohibition (Article 13(1), VABEO). Before doing so, it must give notice in writing of its proposal and consider any representations made to it (*Article 13(2)*).

The CMA can require the parties to provide information to enable it to assess whether the agreement meets the requirements for exemption under the VABEO. Failure to comply may result in the withdrawal of the exemption (*Article 12*).

The CMA envisages that it would use this power in exceptional circumstances only. The disapplication of the block exemption does not apply retrospectively (*CMA Guidance, paragraph 13.6*).

Consequences of agreements falling outside the vertical agreements block exemption

Vertical agreements falling outside the VABEO do not automatically infringe Chapter I, nor is there any presumption of illegality unless they contain restrictions that are categorised as "hardcore" for the purposes of the VABEO. Generally vertical agreements only raise competition concerns where one or more parties to the agreement has a certain level of market power (or obtains market power as a result of the agreement), or networks of similar vertical agreements have the same effect as if one or more of the parties had market power.

The CMA Guidance states that, in the CMA's view, the hardcore restrictions listed in the VABEO will in general be viewed as restrictions of competition "by object". Restrictions of competition by object within the meaning of the Chapter I prohibition are agreements which, by their very nature, have the potential to prevent, restrict or distort competition. Where an agreement is found to have as its object the restriction of competition it is still capable, in principle, of fulfilling the conditions for individual exemption under section 9(1) of the Competition Act. By contrast, hardcore restrictions correspond to a category of restrictions under the VABEO for which it is presumed that they generally result in harm to competition so that a vertical agreement containing such a hardcore restriction cannot benefit from the block exemption provided by the VABEO.

When assessing a vertical agreement, the CMA will adopt the following approach:

- Where a hardcore restriction within the meaning of Article 8 of the VABEO is included in a vertical agreement, this agreement is likely to fall within the Chapter I prohibition.
- The inclusion of a hardcore restrictions in an agreement will have the effect of cancelling the benefit of the block exemption provided by the VABEO in relation to that agreement.
- An agreement that includes a hardcore restriction within the meaning of Article 8 of the VABEO is unlikely to fulfil the conditions for individual exemption under section 9(1) of the Competition Act.

An agreement or concerted practice may wholly fall outside Chapter I where the conditions of Chapter I are not satisfied. For example, the agreement may not be between "undertakings" or there may be no appreciable effect on competition. In relation to whether an agreement has an appreciable effect on competition, the CMA will have regard to the thresholds and guidance provided in the relevant Commission notice (*Notice on*

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agreements of minor importance OJ 2001 C368/07, since revised by OJ 2014 C291/1).

Under the new section 60A of the Competition Act, UK courts and the CMA must have regard to Commission notices, decisions and statements made before the end of the transition period when interpreting UK competition law. While UK authorities must have regard to this pre-existing EU competition law, section 60A also enables them to diverge where it is considered appropriate. This gives the UK the flexibility to diverge from pre-existing EU competition law or even continue to have regard to future changes to EU competition law. It remains to be seen whether there will be any changes in the CMA approach to the question of appreciability.

An agreement that falls within the Chapter I prohibition is not prohibited if it satisfies the conditions set out in section 9(1) of the Competition Act. These conditions are functionally identical to those contained in Article 101(3) and relate to the improvement of production or distribution or the promotion of technical or economic progress (*see further, Practice note, Chapter I prohibition: Section 9 exemption criteria*).

In determining whether the section 9(1) conditions are satisfied, the CMA will have regard to the relevant European Commission Notice (*Guidelines on the application of Article 101(3)*).

For most vertical agreements, however, the most useful guidance is that which is set out in the CMA's Guidance, which contains an analysis of the CMA's approach to assessing the following types of vertical restraints:

- Single branding.
- Exclusive distribution.
- Selective distribution systems.
- Franchising.
- Exclusive supply.
- Restrictions on the use of online marketplaces.
- Restrictions on the use of digital comparison tools.
- Upfront access payments.
- Category Management Agreements.
- Tying
- Parity obligations (other than wide retail parity obligations).

For more detailed consideration of the application of the VABEO to distribution agreements, including online distribution arrangements, see Practice note, Distribution agreements: overview (UK)). Agency is considered in Practice note, Commercial agents: UK competition law relating to agency agreements and franchising in Practice note, Franchising: overview: UK competition law and franchising.

Intellectual property provisions

The VABEO does not apply to agreements that relate primarily to intellectual property rights. However, vertical agreements containing provisions relating to intellectual property rights will be covered by the VABEO where such provisions:

- Form part of a vertical agreement and cannot be contained in a separate but associated agreement;
- Relate to the assignment to the buyer, or use by the buyer of IP rights;
- Do not constitute the primary object of the agreement;
- Are directly related to the use, sale or resale of goods or services by the buyer or its customers; and
- Do not have the same object or effect as provisions not permitted by the VABEO (for example, hardcore provisions) (*Article 3(4)*).

The CMA Guidance addresses the inclusion of intellectual property provisions in vertical agreements from paragraph 6.39.

Agreements containing provisions relating to intellectual property rights are therefore not covered by the VABEO if:

- The primary object of the agreement is the use by the buyer or assignment to the buyer of IP rights; or
- The provisions concerning IP rights are not confined to the use by the buyer or the assignment to the buyer of IP rights; or
- The provisions concerning IP rights are not directly related to the use, sale or resale of goods or services by the buyer or its customers; or
- The provisions concerning the IP rights have the same object or effect as provisions not exempted by the vertical agreements block exemption (e.g. hardcore provisions).

Although agreements containing provisions relating to intellectual property may not benefit from the VABEO, if they fall within the retained technology transfer block exemption they would also be exempt from the Chapter I prohibition by virtue of retained exemption.

Newspaper and magazine distribution

Revocation of the Vertical Agreements Exclusion Order meant that a category of vertical agreements that previously fell within the Exclusion Order but do not satisfy the conditions for the application of the EU vertical agreements block exemption needed to be assessed to determine whether they do in fact infringe

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the Chapter I prohibition and, if so, whether they meet the conditions for individual exemption under section 9 of the Competition Act 1998. A number of distribution agreements between newspaper publishers or magazine publishers/distributors and wholesalers fall within this category. The OFT, therefore, conducted a review of the industry exclusive distribution agreements in order to assess their compatibility with competition law.

Although the possibility of notifying agreements to the OFT for guidance or for an exemption decision was removed as of 1 May 2004, the OFT retained a discretion to publish a written guidance opinion in cases that raise novel or unresolved questions about the application of the law and where the OFT considered that clarification of the issue would benefit a wider audience (*OFT's Modernisation Guidelines (OFT 442), paragraph 7.4*). (The CMA has adopted this guideline, which it continues to apply as if references to the OFT are references to the CMA. It too will, therefore, retain the same discretion.)

In the Newspaper and magazine distribution case, the OFT considered that there was insufficient precedent in EU or UK case law or practice in relation to the particular circumstances of the newspaper/magazine distribution agreements and that there was a need for guidance in this area due to the economic importance of the goods concerned and the prevalence of the agreements in question. It, therefore, decided to issue a written opinion to provide guidance to enable the parties to assess whether their distribution agreements are compatible with competition law.

It published its final opinion in October 2008, following consultations on two different drafts of the opinion in May 2005 and May 2006 (*see* Legal update, OFT publishes documents on newspaper and magazine distribution). The opinion was accompanied by:

- A review of the National Newspapers Code of Practice which had been in place since 1993, but which the OFT considered to be no longer necessary, which ultimately led to the Secretary of State for Business, Enterprise and Regulatory Reform releasing the relevant wholesalers from their undertakings to comply with the Code in April 2009.
- A provisional decision not to refer the market for the supply of newspapers and magazines in the UK to the Competition Commission under the Enterprise Act market investigation regime. This decision was confirmed in September 2009, and, in March 2012, the OFT announced that it would not conduct a further update review of these markets (*see* Legal update, OFT announces that it will not be conducting an update review of newspaper and magazine distribution in the UK). An appeal to the Competition Appeal Tribunal (CAT) by the Association of Convenience Stores and National Federation of Retail Newspapers against this decision was dismissed on 24 October 2012. The CAT concluded that, on the basis of the evidence before it and with regard to its prioritisation principles, it was reasonable for the OFT to conclude that it was not appropriate to carry out an update review. The CAT rejected the applicants' challenges to the OFT's conclusion that such a review was not justified by likely customer benefits or by reference to the OFT's strategic priorities (*see Association of Convenience Stores and National Federation of Retail Newspapers v Office of Fair Trading*).

Guidance to facilitate self-assessment under the Competition Act 2008

The OFT's opinion, which took into account the responses to both the 2005 and 2006 consultations, provides guidance to facilitate self-assessment of the compatibility with the Competition Act of the agreements between national newspaper publishers/distributors and wholesalers (the Agreements) in which the former grant the latter exclusive territories for distribution of their products from which all competing wholesalers are excluded. The exclusive territorial rights conferred by the Agreements were underpinned by contractual provisions prohibiting both active and passive sales between territories. The combination of the award of exclusive territories and bans on active and passive sales across distribution territories resulted in absolute territorial protection (ATP).

The opinion notes, in relation to how the market may have developed in the absence of the Agreements, that there is a key difference between national newspaper distribution and magazine distribution, i.e., magazine sales are not subject to the same extreme time sensitivity as newspapers. This means that there may be greater scope for competition to develop for magazine wholesaling in the absence of ATP.

The opinion provides guidance as to whether the Agreements are likely to be caught by section 2 of the Competition Act and as to whether they are likely to benefit from exception under section 9 of the Competition Act. In relation to the latter, the opinion notes the following:

- **Improvement to production or distribution / promotion of technical or economic progress.** It appeared likely that the potential objective efficiency gains regarding ATP in Agreements relating to magazine distribution were not as significant as for newspaper distribution as there is greater scope for 'competition in the market' to emerge in the absence of ATP and there is less likely to be a need for an obligation to supply since consumers are likely to be able to purchase from a range of retail outlets. The OFT's opinion concludes that it may be difficult to

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demonstrate that magazine Agreements satisfy the first exemption condition.

- **Customers allowed a fair share of the resulting benefit.** The incentives for magazine publishers to pass a fair share of any efficiency gains on to customers may be weaker than for newspaper publishers, and it may be difficult to show that magazine Agreements satisfy the second exemption condition.
- **Indispensability.** While the third condition was likely to be satisfied for newspapers (under certain conditions described in the opinion), it may be difficult to demonstrate that it is met for magazines as efficiencies in magazine distribution may be achieved through competition in the market.
- **No elimination of competition in respect of a substantial part of the products in question.** The opinion provided guidance on the factors that may demonstrate that this condition is met in relation to both newspaper and magazine agreements, notwithstanding the impact of ATP on the ability of retailers to switch between wholesalers.

The parties were expected to self-assess their distribution agreements, taking the OFT's guidance in the opinion into account.

Land agreements

Following the repeal of the land agreements exclusion order (*see* Modernisation and the new regime), the Chapter I prohibition on anti-competitive agreements has applied in full to land agreements, from 6 April 2011, including to agreements entered into before that date. On 24 March 2011, the OFT published guidance on the application of competition law to land agreements, that is, to agreements concerning the transfer of an interest in land, to assist businesses in carrying out their self-assessment of land agreements for compatibility with competition law (*OFT1280a*). The CMA has adopted this guideline which it continues to apply as if references to the OFT are references to the CMA.

The guidance recognises that only a minority of restrictions in land agreements will infringe competition law, and identifies a number of restrictions that are unlikely to appreciably restrict competition, such as restrictions on use which are designed to obtain an appropriate retail mix, or to facilitate the use of an adjacent site. The guidance also identifies three types of agreement that might restrict competition, depending on the circumstances:

- Agreements between competitors which contain restrictions aimed at sharing or carving up markets.
- Freehold restrictive covenants or leasehold use restrictions which limit the availability of land for use in a downstream market (e.g. in the retail sector). These will usually be acceptable, but may restrict competition if they are entered into by tenants in return for the landlord preventing other tenants from competing with them.
- Exclusivity provisions, in particular those which protect the tenant from other competitors. The guidance recognises, however, that exclusivity provisions may be necessary to incentivise an "anchor tenant" to participate in a new retail development, and in those circumstances they will be permitted (even if they do appreciably restrict competition for the retailer's products or services in the relevant area), provided they are suitably time limited.

Factors that may affect the assessment of whether a restriction in a land agreement is prohibited include:

- The power of the parties in the markets in which they operate (e.g. in a retailer's local market).
- The availability of suitable land for competitors to enter the local market.
- The presence of substantial consumer benefits that outweigh a restrictions adverse effect on competition (such that the agreement satisfies the criteria for exception under Article 101(3) or section 9 of the Competition Act).

The guidelines contain a number of case studies illustrating the way that the CMA is likely to apply these principles to different types of restrictions in land agreements. The CMA is unlikely to pursue cases where:

- The parties are not competitors.
- Neither party has a share of the relevant market (i.e. the downstream retail market) in excess of 30%, or there are four or more independent competitors present in the relevant local market.
- Agreements are entered into when the market share of both parties is below 30%, but subsequently increases to no more than 35% within a two-year period.

Moreover, if a party to a land agreement has used its best endeavours to remove or amend a restriction and has not sought to enforce it, the CMA may take this into account as a mitigating factor when considering what penalties to impose in respect of an agreement that it finds has breached the Chapter I prohibition. Land agreements are considered in more detail in Practice note, Land agreements and the Competition Act 1998.

Other exclusions from the Chapter I prohibition

The Competition Act also excludes (or allows for the exclusion of) agreements from the Chapter I prohibition in various circumstances, some of which may be

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relevant to a vertical agreement. These include certain agreements:

- That may be subject to competition scrutiny under the Financial Services and Markets Act 2000, the Broadcasting Act 1990 or the Communications Act 2003 (*Competition Act, section 3(1)(b) and Schedule 2*).
- Concerning agricultural producer organisations (*section 3(1)(c) and paragraph 9, Schedule 3, as amended by Agriculture Act 2020, Schedule 2*).
- Made to comply with planning obligations or with specified legal requirements, to the extent that they are necessary to comply with these obligations (*section 3(1)(c) and paragraphs 1 and 5, Schedule 3*).
- That the Secretary of State is satisfied ought to be excluded for exceptional and compelling reasons of public policy. A number of such exclusion orders have been issued in relation to projects in the defence sector (see *Competition Act (Public Policy Exclusion) Order (SI 2008/1820) and Competition Act (Public Policy Exclusion) Order (SI 2006/605)*) and one in relation to agreements entered into by the Secretary of State concerning distribution of fuel in the event of a supply disruption (*Competition Act (Public Policy Exclusion) Order (SI 2012/710)*).

  The COVID-19 pandemic had an impact not just on the way that the CMA and the courts conducted their work, but also on the substance of the UK competition rules. In an exceptional step, in March and April 2020, the government used powers under paragraph 7(1) of Schedule 3 of the Competition Act 1998 to temporarily disapply the Chapter I prohibition of the Competition Act from certain agreements in various sectors (public health, groceries, dairy and Solent ferry crossings) (see Practice note, COVID-19: Competition law implications of the coronavirus crisis: Formal temporary exclusions of competition law).
- Made by undertakings providing services of general economic interest or having the character of revenue-producing monopolies, in so far as the application of the prohibition would obstruct the performance of the tasks assigned to those undertakings (*section 3(1)(c) and paragraph 4, Schedule 3*). This mirrors an equivalent exclusion from the EU Competition regime under Article 106(2) of the TFEU.
- Agreements that are block exempted by virtue of an order of the Secretary of State (*sections 6(2) and 6(7)*). To date, there has been only one such block exemption, which relates to public transport ticketing schemes, and which expires on 28 February 2026 (*see Competition Act (Public Transport Ticketing Schemes Block Exemption) Order 2001 (SI 2001/319, as amended by SI 2005/3347, SI 2011/227 and SI 2016/126)*).

Agreements in the groceries sector

Separate regimes apply to certain land agreements and supply agreements in the groceries sector. These regimes implement remedies to address adverse effects on competition that were identified by the Competition Commission (a predecessor of the CMA) in the groceries market investigation (*see Legal updates,* Competition Commission makes Groceries Market Investigation (Controlled Land) Order 2010 *and* Competition Commission makes new Groceries Market Investigation (Controlled Land) Order). They apply separately from the Chapter I prohibition, such that a restriction in a relevant supply arrangement or land agreement in the grocery sector that is not prohibited under these regimes may nonetheless be prohibited under general competition law.

The regime for supply arrangements is implemented by the Groceries (Supply Chain Practices) Market Investigation Order 2009. This Order requires retailers with a groceries turnover in excess of £1 billion per annum (designated retailers) to include the Groceries Supply Chain Code of Practice (GSCOP) in their dealing with suppliers. The GSCOP places a wide range of obligations on the designated retailers, including obligations:

- To deal with suppliers lawfully and fairly.
- Not to make retrospective changes to supply agreements unless the ability to make such variations is included as part of the trading arrangement from the outset.
- To pay for goods in accordance with the supply agreement and in any event within a reasonable time.
- To refrain from obliging suppliers to contribute to "shrinkage" costs (i.e. costs relating to losses of goods after they have been delivered to the retailer).
- Not to delist (i.e. cease to purchase or significantly reduce purchases of) products except for genuine commercial reasons and in accordance with a defined procedure, and having given reasonable notice to the supplier.

In addition, the GSCOP requires designated retailers to not to apply extraordinary commercial pressure (including economic duress or pressures that are not objectively justifiable or transparent) on suppliers to:

- Make significant changes to supply arrangements without reasonable notice in writing or full compensation for costs incurred as a result of the failure to give reasonable notice.
- Contribute to the retailer's marketing costs unless provided for in the supply agreement.
- Pay for wastage unless due to the supplier's default or negligence, or as provided for in the supply agreement.

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- To fund more than half of the costs of a promotion, and any promotion in which a supplier makes a payment must only be held after reasonable notice has been given to the supplier.
- Pay for shelf space, although payments may be required for promotions or new product listings, where the payments are proportional to the risk incurred by the retailer in stocking the new products.
- Fund the costs of resolving customer complaints, except in certain circumstances.
- Obtain goods from a specified third party, in circumstances where the retailer stands to gain from those purchases.

The Competition Commission also made a formal recommendation that an Ombudsman be established to arbitrate disputes between retailers and suppliers in relation to the GSCOP and to investigate complaints that the GSCOP has been breached. This recommendation was accepted, and on 25 April 2013, the Groceries Code Adjudicator Act 2013 received Royal Assent (*see* Legal update, Groceries Code Adjudicator Act 2013 receives Royal Assent). It entered into force on 25 June 2013 (*see* Legal update, Groceries Code Adjudicator Act Commencement Order published). The Act established the Groceries Code Adjudicator (the Adjudicator) to enforce the GSCOP.

It requires the Adjudicator to:

- Provide advice and issue guidance to both suppliers and large retailers on matters relating to the GSCOP.
- Arbitrate, where requested, in disputes between suppliers and large retailers.
- Investigate suspected breaches of the GSCOP based on issues raised and information received.
- Enforce the GSCOP.
- Impose sanctions and other remedies for breaches of the GSCOP.
- Publish an annual report on the Adjudicator's activities

On 18 December 2013, the Adjudicator published statutory guidance on how it will carry out investigation and enforcement functions (*see* Legal update, Groceries Code Adjudicator guidance on investigation and enforcement functions). Publication of this statutory guidance allowed the Adjudicator to launch investigations into breaches of the GSCOP that have occurred since 25 June 2013. In the interim period, it had only been able to collect information. However, the Adjudicator was not be able to impose any financial penalties until the Secretary of State mads an Order empowering the Adjudicator to do so and setting the level of fines.

The Groceries Code Adjudicator (*Permitted Maximum Financial Penalty) Order 2015* (*SI 2015/722*) was made in March 2015 and entered into force on 6 April 2015 (see Legal update, The Groceries Code Adjudicator (Permitted Maximum Financial Penalty) Order 2015 published. 2015. The Order provides that the permitted maximum financial penalty is 1% of a large retailer's applicable turnover for the business year preceding the date of a penalty notice. The applicable turnover is the sum of all amounts derived from the provision of goods and services falling within the large retailer's ordinary activities in the UK and all other amounts received by the large retailer in the course of its ordinary activities in the UK by way of gift, grant, subsidy or membership fee, after deduction of trade discounts, value added tax and other taxes based on the amounts so derived or received.

On 1 April 2014, the Adjudicator supplemented the December 2013 guidance with guidance on managing complaints and disputes about the GSCOP and when the Adjudicator will investigate, and guidance on the process for arbitrating those disputes that cannot be resolved between the parties (*see* Legal update, Groceries Code Adjudicator publishes its arbitration policy and guidance on its complaints, disputes and escalation process).

As regards land agreements entered into by major UK supermarkets (Asda, Co-operative Group, Marks and Spencer, Wm Morrison Supermarket, J Sainsbury, Tesco and Waitrose), such agreements may fall within the scope of the Groceries Market Investigation (Controlled Land) Order (as amended on 10 August 2010), which came into force on 30 April 2010. This Order requires that the relevant supermarkets:

- Release existing restrictive covenants in highly-concentrated local markets identified by the Competition Commission. They must also release other restrictive covenants that the CMA (previously OFT) confirms (at the request of the owner of the burden land) may restrict grocery retailing in highly concentrated areas. The OFT published a document setting out the procedures for dealing with requests for such examination (*see* Legal update, OFT announces implementation date for its duties under Groceries Market Investigation (Controlled Land) Order).

  This was amended in 2015 and again in 2018 (see Legal updates, CMA updates guidance on procedure for dealing with requests under Groceries Market Investigation (Controlled Land) Order 2010 and CMA issues update to guidance on procedure for dealing with requests under Groceries Market Investigation (Controlled Land) Order 2010). In March 2020, the CMA consulted on substantial changes to the guidance (see Legal update, Consultation on proposed changes to its procedures guidance for

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dealing with requests to carry out the test in Schedule 4 to the Groceries (Controlled Land) Order 2010). In November 2020, the CMA published its response to the consultation together with an interim update to its Procedures Guidance (see Legal update, CMA publishes interim update on limiting large grocery retailers' ability to prevent land being used by their competitors for grocery retailing in the future). The CMA decided to delay the introduction of an internally developed software tool. In light of this, the CMA is continuing to use the updated version of the CLO Procedures Guidance that was published on 27 November 2020.

- Do not enter into restrictive covenants that may restrict grocery retailing or agreements having equivalent effect.
- Do not enforce certain existing exclusivity arrangements in highly concentrated areas, or enter into new exclusivity arrangements for a certain time period.

The Controlled Land Order is also considered in *Practice note, Land agreements and the Competition Act 1998:* Groceries Market Investigation (Controlled Land) Order.

Application of Chapter II prohibition and Article 102

The discussion below deals with the general aspects of the Chapter II prohibition in outline only. If, after reading the following text, it is concluded that the prohibition may apply, the user should refer to Practice note, Chapter II prohibition *for detailed consideration of the Chapter II prohibition generally.*

The Chapter II prohibition prohibits any abuse by one or more undertakings of a dominant position within the UK, or any part of it, which may affect trade in the UK (*section 18(1), Competition Act*). Exemption from Chapter I will not also exempt the undertaking(s) that are party to the agreement from a possible violation of the Chapter II prohibition. However, since the vertical agreements block exemption requires a market share threshold to be met, a company is unlikely to breach the Chapter II prohibition in respect of a particular agreement, if that agreement falls within the vertical agreements block exemption.

An abuse may include imposing unfair purchase or selling prices, limiting production, markets or technical development, using discriminatory trading conditions in a way that places other parties at a competitive disadvantage and making the conclusion of contracts subject to acceptance by the other parties of unconnected supplementary obligations.

Prior to the UK leaving the EU, under the so-called "consistency principle", questions arising in relation to the Chapter II prohibition had to be dealt with consistently with the treatment of corresponding questions arising under EU law (*section 60, Competition Act*).

Following Brexit, a new section 60A of the Competition Act provides that competition regulators and UK courts will continue to be bound by an obligation to ensure no inconsistency with pre-exit EU competition case law, unless appropriate in specific circumstances, including differences between markets in the UK and markets in the EU and a principle having been laid down or a decision made by the CJEU after the end of the transition period.

The following definition of a dominant position under Article 102 of the TFEU is quoted in the OFT guideline *Abuse of a dominant position* (*OFT 402*):

> "...a position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers". (*Case 322/81 Michelin v Commission [1983] ECR 3461*).

The CMA adopted this guideline, which it continues to apply as if references to the OFT are references to the CMA.

According to EU case law, with which the guideline appears to have adopted a broadly consistent approach, a company does not have to be in a monopoly position in order to be dominant, but a large market share (more than 40%) could indicate a dominant position. A company is generally in a dominant position if it can behave without regard to other participants in the market.

Dominance is not prohibited by the Chapter II prohibition, only its abuse. Examples of abuses of a dominant position which are particularly relevant to vertical agreements or relationships are:

- Discriminatory pricing (*see Practice note, Pricing:* Discounts, discriminatory pricing and delivered pricing).
- Predatory pricing (pricing at very low levels with a view to excluding competitors) (*see Practice note, Pricing:* Predatory pricing).
- Refusal to supply without justification (*see Practice note, Chapter II prohibition:* Refusal to supply).
- Fidelity rebates, exclusivity obligations and English clauses (*see Practice note, Chapter II prohibition:* Chapter II prohibition Article 102: Pricing abuses).
- Tying (*see Practice note,* Practice note, Article 102: Tying and bundling Chapter II prohibnition: Abuses

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other than pricing *Chapter II prohibition: Abuses other than pricing*).

The possible application of the Chapter II prohibition (under which no exemptions are granted) should be considered if a supplier or distributor has a dominant position in the relevant market. Restrictions imposed by suppliers or distributors (even where they are contained in an agreement that is excluded from the Chapter I prohibition, for example, under the vertical agreements block exemption), may constitute abuses under the Chapter II prohibition, particularly if they have the effect of materially restricting the supply of the relevant type of product within the market as a whole (market ***foreclosure***). However, not all restrictive agreements entered into by dominant undertakings constitute an abuse of dominance, and, where they do not, it is in principle possible (albeit less common) for such agreements to satisfy the criteria for exception under section 9(1) of the Competition Act.

A case recently before the CAT involved a claim that Ede & Ravenscroft Limited, Radcliffe & Taylor Limited, WM. Northam & Company Limited and Irish Legal and Academic Limited, the largest suppliers of academic dress to students in the UK, had abused their dominant position in the market for the sale and hire of academic dress (in particular gowns and hoods) for use at graduation ceremonies in the UK through the conclusion of exclusivity agreements of long duration with a number of UK universities, in breach of the Chapter II prohibition (see *Casetracker, Churchill Gowns Limited and Student Gowns Limited v Ede & Ravenscroft Limited and others*). On 15 July 2022, the CAT dismissed the action, finding that although the defendants do hold a dominant position in the market for the supply of graduation services to universities (one aspect of which is the hire of academic dress to students), the agreements at issue did not impose obligations on either universities or students to ensure that they hired academic dress exclusively from the defendants. In addition, the CAT found that the foreclosure effect preventing the claimants from supplying students directly arose from the rational actions and choices of the universities, whether they were contracting with the defendants or their competitors (*Churchill Gowns Limited and Student Gowns Limited v Ede & Ravenscroft Limited and others [2022] CAT 34*).

In the case of an agency agreement, it should be noted that a dominant principal may be treated as responsible for abuses committed by its agent.

Market investigations

Under the Enterprise Act 2002, the CMA, sector regulators (and, in certain limited circumstances, the Secretary of State for Trade and Industry), have the power to make a market investigation reference where they have reasonable grounds for suspecting that the market has features which prevent, restrict or distort competition in connection with the supply or acquisition of any goods or services in the UK or part of the UK. The market investigation is then carried out by the CMA, which has up to two years to produce a report on the market, and where it finds that there are adverse effects on competition within that market it has a duty to remedy them.

The CMA has a two-phase decision-making in relation to the markets regime. CMA case teams conduct market studies and the CMA Board takes phase 1 decisions as to whether or not to refer a market for a phase 2 investigation. The phase 2 investigation (the market investigation reference) is conducted by a group appointed from a panel of specialist members.

The market investigation regime can be used to scrutinise vertical agreements, in particular where they are an important feature of the structure of a market and for example have the effect of preventing potential competitors entering the market. Nevertheless, the CMA will, as a matter of policy, use its powers under the Competition Act in priority to making a market investigation reference.

Vertical agreements or relationships have on occasions been the subject of market inquiries. The following are examples of such inquiries (they include inquiries conducted by the CMA's predecessor, the Competition Commission):

- The supply of new cars in the UK, which investigated selective and exclusive distribution systems operated by car manufacturers (*see* Legal update, Competition Commission: report on cars).
- The supply of of bulk liquefied petroleum gas (LPG) for domestic use (see Legal update: Competition Commission publishes final report on LPG market investigation).
- Groceries, which considered various issues in relation to supermarkets' supply chains (*see* Legal update, Competition Commission publishes final report in groceries market investigation).
- The market for the leasing of rolling stock for franchised passenger services (*see* Legal update, Competition Commission publishes final report in rolling stock market investigation).
- The market for private motor insurance, which included consideration of vertical agreements between motor insurers and price comparison websites (*see* Legal update, CMA final report on private motor insurance market investigation).

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In addition, the CMA has general powers (under section 5 of the Enterprise Act) to gather information on the functioning of markets. Such market studies are not limited to competition issues, and in many cases focus on issues of consumer protection. Where competition issues are involved, market studies may ultimately lead the CMA to refer to the market in question for a phase 2 investigation. In a number of cases in the past the OFT (a predecessor of the CMA) opted not to make such a reference on the basis of undertakings given by market participants to alter their behaviour, or because there were other means of addressing the concerns identified, such as recommendations to the government or a regulatory body. Some examples of past OFT market studies that have involved issues relating to vertical agreements include studies of markets for:

- The sale of school uniforms, which considered whether the practice by schools of requiring that their uniforms are bought from designated retail outlets leads to higher prices for parents (see Legal update, OFT publishes outcome of review of UK school uniform market, and the OFT's 2012 update of this study *(*Legal update, OFT update report on supply of school uniforms*)*).
- New car warranties, which investigated restrictions on where cars may be serviced during the warranty term (*see* Legal update, OFT publishes study on new car warranties).
- Outdoor advertising, which considered (among other things) contractual linkages and payments between levels of the supply chain, and which resulted in the OFT opening an investigation into the compliance of these arrangements with Chapter I (*see* Legal update, OFT market study on outdoor advertising).
- Medicine distribution in the UK, which considered certain new and proposed medicine distribution arrangements, such as those introduced by a number of pharmaceutical companies when they began selling prescription drugs solely through one wholesaler (*see* Legal update, OFT publishes results of its market study into the distribution of medicines).

The UK market investigation regime is considered in detail in Practice note, Market investigations under the Enterprise Act 2002.

Separate regime for the motor vehicle sector

In 1985, a separate EU block exemption was first adopted for vertical agreements in the motor vehicle sector: the motor vehicles block exemption. By virtue of parallel exemption (*see above*) vertical agreements in the UK motor vehicle sector were also exempt from the Chapter I regime if they fall within the terms of the motor vehicle block exemption.

Commission Regulation 1400/2002, which covered distribution agreements relating to new motor vehicles and spare parts, and distribution agreements which concern the provision of repair and maintenance services by authorised repairers was due to expire on 31 May 2010 (*Regulation 1400/2002 OJ 2002 L203/30*). On 27 May 2010, the Commission announced that it had adopted a new motor vehicle block exemption regulation (*Regulation 461/2010, OJ 2010 L129/52*) and accompanying guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles (*OJ 2010 C138/16*).

Since 1 June 2010, under Regulation 461/2010, vertical agreements relating to the motor vehicle aftermarket (the purchase, sale or resale of spare parts or provision of repair and maintenance services) have benefited from exemption under Article 101(3) only if they satisfy the conditions of the vertical agreements block exemption (then *Regulation 330/2010*, now *Regulation 2022/720*) and do not contain any additional hardcore restrictions listed in Regulation 461/2010.

These additional hardcore restrictions are:

- Restrictions on the sales of spare parts for motor vehicles by members of a selective distribution system to independent repairers which use those parts for the repair and maintenance of a motor vehicle.
- A restriction, agreed between a supplier of spare parts, repair tools or diagnostic or other equipment and a manufacturer of motor vehicles, of the supplier's ability to sell those goods to authorised or independent distributors or to authorised or independent repairers or end users.
- A restriction, agreed between a manufacturer of motor vehicles which uses components for the initial assembly of motor vehicles and the supplier of such components, of the supplier's ability to place its trademark or logo effectively and in an easily visible manner on the components supplied or on spare parts.

However, Regulation 461/2010 prolonged the application of Regulation 1400/2002 to vertical agreements relating to the purchase, sale or resale of new motor vehicles until 31 May 2013. Since 1 June 2013, the vertical agreements block exemption has applied to these agreements. The reason for this difference in treatment is that the Commission considers that there is less intense competition in the aftermarkets than there is in the primary market for the sale of new cars.

For more details of the application of competition law to the motor vehicles sector in the EU see *Practice note,* The application of competition law to the motor vehicles sector.

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Regulation 461/2010 (MVBER) and Regulation 330/2010 were copied into UK law as retained exemptions (see Brexit).

The VABEO replaced the retained Regulation 330/2010 on 1 June 2022.

On 4 October 2022, the CMA published its final recommendation to the Secretary of State on the retained MVBER (see Legal update, CMA publishes final recommendations on retained Motor Vehicle Block Exemption Regulation). The CMA recommended to the Secretary of State that it would be appropriate to replace the retained MVBER, when it expired on 31 May 2023, with a Motor Vehicle Block Exemption Order (MVBEO) tailored to the needs of businesses operating in the UK and UK consumers. The CMA recommended that any MVBEO would be broadly similar to the retained MVBER, to ensure the continuity of the current regime for businesses, while making some amendments to improve the block exemption and reflect market developments. The CMA recommended that the UK MVBEO be in place until 31 May 2029. This would enable the CMA to carry out a review of the block exemption at an early stage taking account of likely significant ongoing developments in the sector ahead of the phase-out date for the sale of new petrol and diesel cars and vans in 2030.

On 8 February 2023, the Department for Business and Trade launched a consultation on the proposed drafting of the Competition Act 1998 (Motor Vehicle Agreements Block Exemption) Order 2023 (see Legal update, Department for Business and Trade consults on draft Competition Act 1998 (Motor Vehicle Agreements Block Exemption) Order 2023). This reflected the CMA's recommendation.

The Competition Act 1998 (Motor Vehicle Agreements Block Exemption) (No. 2) Order 2023 (MVBEO) (*SI 2023/586*) entered into force on 1 June 2023 (see Legal updates, The Competition Act 1998 (Motor Vehicle Agreements Block Exemption) Order 2023 published and The Competition Act 1998 (Motor Vehicle Agreements Block Exemption) (No.2) Order 2023 published revoking previous Order). It replaced the retained MVBER, following its expiry on 31 May 2023. The main policy changes relate to the following:

- The introduction of a new excluded restriction for restrictions of an independent operator to access repair and maintenance information and tools and training for the purpose of repair and maintenance services.
- The introduction of several new definitions, including, in particular, replacing the reference to "spare parts" with a reference to a new definition of "aftermarket goods".

The block exemption will expire on 31 May 2029.

Now, the VABEO applies to vertical agreements relating to the purchase, sale or resale of spare parts for motor vehicles and to the provision of repair and maintenance services for motor vehicles. Such agreements only benefit from the block exemption provided by the VABEO if, in addition to the conditions for exemption set out in the VABEO, they comply with the additional requirements of the MVBEO.

On 18 April 2023, the CMA published draft guidance on the application of the then draft MVBEO, setting out how it apply the MVBEO and VABEO to areas of relevance to the motor vehicle sales and aftermarket sector (see Legal update, CMA publishes draft guidance on retained Motor Vehicle Block Exemption Regulation).

Examples of enforcement of the Chapter I prohibition against vertical restrictions

Prior to April 2014, it was the CMA's predecessor, the OFT, who had responsibility, alongside the sector regulators, for enforcing the Chapter I prohibition. The OFT's enforcement policy regarding vertical agreements tended to focus on those that also involved some degree of horizontal co-ordination between competitors (price-fixing agreements are cartel arrangements which infringe the Chapter I prohibition, and, as described above, were outside the scope of the Exclusion Order (and continue to be outside the scope of the VABEO).

The CMA's enforcement focus has tended to include more cases that relate to purely vertical agreements, with a particular focus on restrictions on online sales.

Vertical agreements involving horizontal co-ordination

A number of OFT decisions related to horizontal co-operation that has been carried out in the context of a vertical supply relationship. In particular, it has focused on so-called "hub and spoke" (or "A-B-C") agreements, in which retailers have co-ordinated their market conduct indirectly, using a supplier as an intermediary.

In November 2002, the OFT announced it was imposing a then record £4.95 million fine on the toy manufacturer Hasbro for entering into price-fixing agreements which prevented ten distributors from selling Hasbro toys and games below Hasbro's list price without permission (*Decision CA98/18/2002*). Subsequently, the OFT announced in February 2003 the imposition of a record fine of £22.65 on Argos and Littlewoods (Argos was fined £17.28 million and Littlewoods £5.37 million) for entering into agreements with Hasbro to fix the prices

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of Hasbro toys and games (*OFT press release PN 18/03*). Hasbro was granted full leniency by the OFT because it provided evidence that initiated the investigation and co-operated fully, and this meant that its potential penalty of £15.59 million was reduced to zero.

Although the CAT originally remitted the case back to the OFT (the OFT adopted a new decision on 21 November 2003), on 14 December 2004, the CAT upheld the OFT's decision on the liability of Argos, Littlewoods and Hasbro for price-fixing in breach of the Chapter I prohibition. On 1 August 2003, the OFT concluded its investigation into the pricing of replica football kits and imposed fines on a number of manufacturers and retailers a total of £18.6 million for price-fixing (*OFT press release PN 107/03*). This decision was largely upheld by the CAT in its judgment of 1 October 2004 (*see JJB Sports v OFT (Case 1102/1/1/03), Allsports v OFT (Case 1021/1/1/03), Manchester United Plc v OFT (Case 1020/1/1/03) and Umbro Holdings Ltd v OFT (Case 1019/1/1/03)*). These cases were appealed to the Court of Appeal on points of liability and the level of penalty.

The appeals were heard together and a combined judgment was handed down on 19 October 2006. The Court of Appeal dismissed all the appeals by Argos Limited, Littlewoods Limited and JJB Sports and upheld the CAT judgments (*Argos Limited and Littlewoods Limited v Office of Fair Trading and JJB Sports plc v Office of Fair Trading [2006] EWCA Civ 1318; see also OFT press release 149/06*).

The Court of Appeal developed a three-limb test for a finding that a hub and spoke arrangement infringes the competition rules:

- Retailer A discloses to supplier B its future pricing intentions in circumstances where A may be taken to intend that B will make use of that information to influence market conditions by passing that information to other retailers.
- B does pass that information to retailer C in circumstances where C may be taken to know the circumstances in which the information was disclosed by A to B.
- C does in fact use the information in determining its own future pricing intentions.

Judgments of the EU Courts suggest that this last limb of the test may in fact not need to be satisfied for the purpose of Article 101, as where anti-competitive information is unilaterally disclosed to a competitor, a rebuttable presumption applies that the competitor will indeed act upon the information (*see, for example, paragraph 62 of the Commission's Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements ((OJ 2011 C11/1, as corrected by OJ 2011 C33/20) and Case C-8/08 T-Mobile Netherlands and Others v Raad van bestuur van de Nederlanse Medeingingsautoriteit [2009] ECR I-04529*).

The CAT reviewed and discussed the law on A-B-C information exchanges in its December 2012 judgment on Tesco's appeal against the OFT's *Dairy Retail Price initiative* decision (*Tesco v Office of Fair Trading [2012] CAT 31, judgment of 20 December 2012*). The CAT set out its views on what the OFT must establish to show an infringement of the Chapter I prohibition, involving both a conduct and a mental element (*for further information see Practice note, UK Co-operation between competitors: A-B-C information exchanges*).

Accordingly, where a supplier's employee becomes aware of the future pricing intentions of a customer (e.g., timing or amount of a future intended price rise), they should be careful to ensure that such information is not then passed on to other customers and, preferably, is not disclosed to other employees of the supplier, in particular those acting as account managers for other customers.

These cases emphasise the tough line the OFT will take on horizontal price-fixing arrangements, even when carried out in the context of a vertical commercial relationship, sending a clear warning that such activities will lead to heavy fines; they also illustrate how leniency arrangements operate to uncover cartel activity by giving companies a strong incentive to "blow the whistle" on anti-competitive behaviour.

In March 2013, in a case that involved, to some extent, both horizontal and vertical information exchange/price co-ordination, the OFT announced that it had issued decisions finding that Mercedes-Benz and five of its commercial vehicle dealers infringed Chapter I prohibition of the Competition Act in relation to the distribution of Mercedes-Benz commercial vehicles (trucks and vans). The case concerns five separate infringements, involving separate agreements and/or concerted practices, involving varying parties, different products (vans or trucks) over different areas and timeframes. The OFT imposed fines totalling over £2.8 million on Mercedes-Benz and four of the dealers (*see Legal updates,* OFT issues five infringement decisions in investigation into distribution of Mercedes-Benz commercial vehicles *and* OFT publishes five infringement decisions relating to distribution of Mercedes Benz commercial vehicles).

In the fifth of the infringements considered in this case, the OFT found that at a meeting on 8 December 2009, Ciceley, Enza, Road Range and Mercedes-Benz entered into an agreement and/or concerted practice which had as its object the dampening of price competition for the sale of trucks to customers based in the participating dealers' areas. The infringement, at its narrowest, took

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the form of an agreement and/or concerted practice that each participating dealer would be "reasonable with their margins" in quotations to customers in each other's areas. The OFT rejected arguments from Mercedes-Benz that it was not involved in assisting, facilitating or promoting the discussions which took place between the dealers. There was no statement by the Mercedes-Benz representative at the meeting that it would not be a party to the agreement, or that Mercedes did not condone the agreement. Mercedes had organised the meeting and its representative did not intervene to prevent the discussions. In addition, the representative attended a subsequent meeting at Ciceley, where the sales team was being instructed to comply with the terms of the agreement and/or concerted practice. Mercedes-Benz, therefore, continued to give at least tacit approval to Ciceley's actions to implement the agreement and/or concerted practice.

In relation to Mercedes-Benz, the OFT noted that it is established case law that an undertaking does not have to be active on the same market where an infringement took place in order for it to be found to have infringed the Chapter I prohibition where the purpose of its conduct, as co-ordinated with that of other undertakings, is to restrict competition. Therefore, the fact that Mercedes-Benz was a supplier (and franchisor) to the participating dealers and had limited direct sales on the relevant market (or none at all) did not exclude the attribution of liability to Mercedes-Benz for its participation in the infringement. It had a direct involvement in the meeting where the agreement and/or concerted practice was concluded (the meeting was organised by the Mercedes-Benz representative). It, therefore, contributed to the agreement and/or concerted practice among the participating dealers.

In addition, the attendance of the representative of Mercedes Benz would have given the participating dealers the impression that Mercedes-Benz approved of the agreement and/or concerted practice reached at that meeting. It was not relevant that the individual concerned did not immediately disclose details about the meeting to their superiors at Mercedes-Benz. An agreement and/or concerted practice among undertakings may be made on an undertaking's behalf by its employees acting in the ordinary course of their employment, despite the ignorance of more senior management.

Further, the OFT noted that where a particular party holds a central position in relation to the other parties, it is obliged to display particular vigilance in order to prevent concerted efforts from giving rise to practices contrary to competition law. Mercedes-Benz holds a central position vis-à-vis its network of dealers. In this context, by helping the participating dealers in reaching and adhering to the agreement and/or concerted practice, Mercedes-Benz had failed to fulfil its responsibility to display particular vigilance.

The OFT, therefore, concluded that Mercedes-Benz's participation in this infringement was such as to make it liable as a co-perpetrator together with the participating dealers (unlike the classic cases of hub and spoke infringements, it did not act as such as a conduit for any information exchange between the competing dealers). Mercedes-Benz was fined £1,492,646 after a 15% settlement reduction.

In May 2015, the CMA found, among other things, that a newspaper publisher had, under pressure, become a party to an agreement between estate and lettings agents to prevent agents from advertising their fees or discounts in their local newspaper (*see* Legal update, CMA publishes full decision on property sales and lettings Competition Act investigation).

Price parity arrangements

On 15 April 2010 the OFT imposed fines totalling £225 million on two tobacco manufacturers and ten retailers, for alleged breaches of the Chapter I prohibition. It concluded that each manufacturer had a series of individual distribution arrangements with each retailer whereby the retail price of a tobacco brand was linked to that of a competing manufacturer's brand. The OFT had concluded that those arrangements restricted the ability of those retailers to determine their selling prices independently and breached the Chapter I prohibition. A number of the retailers received reduced fines under the OFT's leniency programme, and one received complete immunity for having alerted the OFT to the relevant arrangements. However, a number of parties appealed the OFT's decision to the CAT.

During the course of the hearing of these appeals, it became clear following the cross-examination of witnesses that individuals involved in the relevant arrangements had not interpreted or applied them in the way alleged by the OFT, and that the theory of harm relied on in the OFT's decision was therefore unsupported by the evidence. A subsequent attempt by the OFT to refine its case was rejected by the CAT, which proceeded to quash the OFT's decision in relation to the appellants (*see* Legal update, CAT allows appeals against OFT's tobacco retail pricing decision).

Another example of a situation in which a "price parity" arrangement can give rise to competition concerns is in the context of attempts by the operator of an online platform to limit the freedom of retailers using that platform to set their own resale prices. In 2012, the OFT launched a formal investigation into whether a price parity requirement used by Amazon (which

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restricted third party sellers using the Amazon market place from offering lower prices on other online sales channels) infringes the Chapter I prohibition of the Competition Act and/or Article 101 of the TFEU. The OFT was concerned that Amazon's policy might be anti-competitive as it may:

- Increase online platform fees.
- Curtail the entry of potential entrants.
- Directly affect the prices which sellers set on platforms (including their own websites).

In August 2013, however, Amazon announced that it would end its price parity policy across its Marketplace in the EU. In particular, it stated that it would discontinue enforcement of contractual price parity obligations as to all EU Marketplace sellers and remove the Marketplace price parity policy clauses from all current versions of Amazon's click-through agreements across the EU. In addition, Amazon stated that it would notify all other current EU Marketplace sellers on individually negotiated agreements that it had ceased enforcement of the price parity obligations with the intention of removing the provisions from those agreements when they are next renewed.

On this basis, the OFT stated that it was minded to end its investigation and it did so in November 2013. However, it indicated that it may investigate such price parity policies in the future. It recommended that other companies who operate similar policies should review them carefully and it invites businesses who are concerned that they are being prevented from setting their own prices to contact the OFT (*see* Legal update, OFT minded to close competition investigation following Amazon's decision to end price parity policy).

It is worth noting that, in June 2015, the European Commission opened formal proceedings to investigate whether business practices by Amazon in the distribution of e-books infringe Article 101 and/or Article 102 of the TFEU. On 4 May 2017, it announced that it had decided, under Article 9 of Regulation 1/2003, to make binding commitments offered by Amazon to address its competition concerns.

The Commission was concerned that Amazon may have abused a dominant position by including "parity" or MFN clauses in its agreements with e-book publishers. These clauses required the publishers to notify Amazon of more favourable or alternative terms and conditions they offer elsewhere and/or to make available to Amazon terms and conditions which directly or indirectly depend on the terms and conditions offered to another e-book retailer. The offending clauses covered not only price but other aspects that a competitor can use to differentiate itself from Amazon, such as an alternative business (distribution) model, an innovative e-book or a promotion. The Commission considered that such clauses could make it more difficult for other e-book platforms to compete with Amazon as they reduce publishers' and competitors' ability and incentives to develop new and innovative e-books and alternative distribution services. To address these concerns, Amazon has agreed not to enforce the relevant clauses and not to include them in any new contracts. In addition, publishers will be able to terminate e-book contracts that contain a clause linking discount possibilities for e-books to the retail price of a given e-book on a competing platform. The commitments will apply for five years and cover any e-book in any language distributed by Amazon in the EEA (*see* Amazon e-book distribution arrangements).

On 19 November 2020, the CMA issued an infringement decision finding that ComparetheMarket's use of retail MFN clauses was stopping home insurers from quoting lower prices on rival sites and other channels. The CMA found the network of wide MFNs had the effect of restricting and distorting price competition between price comparison websites and home insurers by reducing price competition, reducing the ability of comparison site rivals to expand, and reducing price competition between home insurers on listed prices. The CMA imposed a fine of £17,910,062 (see Legal update, CMA issues infringement decision against ComparetheMarket for its network of MFN clauses in contracts with home insurers).

ComparetheMarket appealed the decision and, on 8 August 2022, the CAT set aside the CMA's decision (*BGL (Holdings) Limited and others v Competition and Markets Authority [2022] CAT 36*; see *BGL (Holdings) Limited & others v CMA*). The CAT held that the CMA made material errors in defining the relevant market and adopting an approach to market definition that was not "outcome neutral". The CAT also held that the CMA had not established the anti-competitive effects of the wide MFN clauses set out in its decision. The CAT considered that much of the evidence relied on by the CMA was inadequate, being merely "anecdotal".

Resale price maintenance

On 31 March 2003, the OFT found that agreements between Lladró Comercial, a Spanish producer of luxury porcelain and stoneware figurines and its retailers infringed the Chapter I prohibition by fixing prices. No financial penalty was imposed but Lladró and the retailers were required to remove the price-fixing clauses from the agreements within 20 working days of the OFT's decision (*OFT press release PN34/03*).

Subsequently, on 18 May 2004, the OFT accepted assurances from cut crystal glassware and jewellery supplier Swarovski UK Ltd, that Swarovski would amend its distribution agreements with UK retailers and not

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seek to influence the prices at which retailers sell Swarovski products (*OFT press release PN86/04*).

The OFT continued to monitor the terms in supply arrangements and the action it took did not always involve a full investigation. For example, on 8 September 2006, the OFT announced that it had closed its investigation into a discount scheme being offered by Yamaha Kemble UK (Yamaha) for its high-end digital pianos and keyboards, which rewarded face-to-face sales in preference to internet sales. The OFT was concerned that the scheme hindered sales made by dealers to customers located at a distance and reduced the incentive for dealers to discount products, but closed its investigation because the scheme operated for only a short duration, and Yamaha announced its withdrawal during the course of the OFT's investigation (*OFT press release 132/06*).

Similarly, in February 2007, the OFT closed an investigation into resale price maintenance of Oakley sunglasses, on the grounds that the alleged infringement related only to a small number of sales of Oakley sunglasses and was terminated by the parties, who had adopted extensive compliance measures. Furthermore, an OFT survey did not provide sufficient evidence that an RPM culture continued to persist amongst Oakley retailers (*see* OFT case closure notice, Alleged price-fixing of Oakley sunglasses).

In July 2012, the OFT issued a statement of objections alleging that Booking.com B.V., Expedia Inc and Intercontinental Hotels Group plc (IHG) had infringed competition law in relation to the online supply of room only hotel accommodation by online travel agents. The statement of objections alleged that Booking.com and Expedia each entered into separate arrangements with IHG which restricted the online travel agent's ability to discount the price of room only accommodation (*see,* Legal update, OFT sends statement of objections to Booking.com, Expedia and InterContinental Hotels Group).

After consultations in August and December 2013, in January 2014, the OFT accepted binding commitments from the parties to address its competition concerns in this case. The commitments are intended to enable the online travel agencies to offer discounts, funded by their commission revenue or margin, from headline room rates to members of closed groups (such as membership or loyalty schemes) and to advertise the availability of such discounts (but not the level of specific discounts) to non-members of such closed groups. The parties will amend their existing agreements in line with these principles, and agree not to enter into future agreements that breach these principles for a period of two years.

The OFT recognised that these commitments did not remove all restrictions on the ability of the online travel agencies to discount headline room rates. However, it considered that there is force in the parties' arguments that there are efficiencies in enabling hotels to have control over the headline rate for their hotel rooms, and so to restrict discounting. It concluded that the benefits of the commitments, in opening up price competition and facilitating new entry, outweighed the residual restrictions on discounting (*see* Legal update, OFT accepts binding commitments in hotel online booking case).

However, in September 2014, on appeal by Skyscanner, which operates a price comparison website, the CAT annulled the OFT's decision on the basis that the OFT had failed properly to consider or conscientiously to take into account Skyscanner's objections to the commitments (*Skyscanner Limited v Competition and Markets Authority ([2014] CAT 16*; *see* Legal update, CAT quashes OFT's decision to accept binding commitments in hotel online booking case). On 28 October 2014, the CMA, therefore, re-opened the hotel online booking investigation.

The CMA re-examined the matter afresh, taking into account market developments. In particular, as a result of investigations by other EU national competition authorities, Booking.com and Expedia have removed certain rate parity (most favoured nation) restrictions that prevent hotels from offering cheaper room rates on competing online travel agents' sites than they offer on Booking.com or Expedia. With regard to the strategic significance, impact, risks and resource implications of continuing the investigation, on 16 September 2015, the CMA decided that it was appropriate to close the investigation on the grounds that it no longer constituted an administrative priority.

Although the commitments given in 2015 by Booking.com and Expedia not to enforce "wide" parity clauses expired on 1 July 2020, the companies confirmed that they would continue to act in accordance with the commitments going forward. Both companies also confirmed that their commitments will still apply in the UK (see Legal update, CMA announces voluntary extension to parity commitments by Booking.com and Expedia).

The CMA did open a project to continue monitoring the pricing practices of online travel agents. This will include monitoring the effects of the changes made by Booking.com and Expedia, as well as the impact on competition and consumers of continuing rate parity restrictions (in relation to prices offered on hotels' own websites and certain other direct sales channels). On 13 July 2016, the CMA announced that it had sent a questionnaire to a large sample of hotels in the UK as part of a joint monitoring project, in partnership with the European Commission and nine other national competition authorities, in the EU to examine how changes to room pricing terms, and other recent

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developments, have affected the market. The resulting report was published in April 2017 (see Legal update, Report on ECN monitoring exercise in the online hotel booking sector) and the CMA decided not to prioritise further investigation on the application of competition law to pricing practices in this sector at this stage (*see* Legal update, CMA decides not to prioritise further investigation in online hotel booking sector). The European Competition Network (ECN) has agreed to keep the online hotel booking sector under review and to re-assess the competitive situation in due course.

The CMA stated it view that it was too early to reach any conclusions on whether 'narrow' parity clauses (which allow the hotel to offer lower room prices and better room availability on other online travel agents (OTAs) and on offline sales channels, but still allows the OTA to stop the hotel from publishing lower room prices on the hotel's own website) should separately be regarded as giving rise to competition concerns and therefore warrant investigation by the CMA.

Two cases in the mobility scooters sector also provide examples, of indirect means of imposing restrictions on resale prices, connected to restrictions on making sales over the internet:

- In the first case, the OFT decided that Roma Medical Aids Limited (a manufacturer of mobility scooters) and seven of its online retailers had infringed the Chapter I prohibition of the Competition Act 1998. The OFT found that the parties entered into agreements, or engaged in concerted practices, that prevented the UK-wide online retailers from selling Roma-branded mobility scooters online or from advertising their prices online (*see Legal updates,* OFT issues Chapter I infringement decision in mobility scooters case *and OFT* Chapter I prohibition decision in Roma-branded mobility scooters case).
- In a second case, on 27 March 2014, the OFT announced that it had decided that a manufacturer of mobility scooters, Pride Mobility Products Limited, and eight of its retailers have breached the Chapter I prohibition by agreeing to restrictions on advertising discounts online. The OFT found that the parties entered into agreements, or engaged in concerted practices, that prevented the UK-wide online retailers from advertising online prices below the manufacturer's recommended retail price for certain of its models of mobility scooter. It considered that the infringement had the object of restricting competition and constituted a hardcore restriction under the EU vertical agreements block exemption. The OFT did not impose fines as the parties' turnovers fell within the thresholds for immunity from fines for "small agreements" under section 39 of the Competition Act. However, the OFT directed the parties to bring the arrangements to an end (where this had not already happened) and to refrain from entering into the same or similar arrangements in the future (*see Legal updates,* OFT issues infringement decision in second mobility scooters case *and* CMA publishes Chapter I prohibition decision in Pride mobility scooters case).

  On 21 June 2016, the CAT published a notice of an application to commence collective proceedings under section 47B of the Competition Act 1998. The proposed collective proceedings combine follow-on actions for damages arising from this OFT decision (*see Dorothy Gibson v Pride Mobility Products Limited*).

In September 2013, the OFT also announced that it had sent a statement of objections to a manufacturer and three retailers in what appeared to be a straight forward case of vertical RPM: the manufacturer was alleged to have entered into separate agreements with each of the individual department stores to set a fixed or minimum resale price for sports bra products (*see* Legal update, OFT issues statement of objections alleging RPM to sports bra manufacturer and three department stores for RPM). However, on 13 June 2014, the CMA announced that it had decided to close the investigation. However, having reviewed the companies' submissions, which disputed the allegations, the CMA's Case Decision Group concluded that they had provided credible alternative explanations for certain evidence relied on by the OFT. Therefore, the CMA decided that it had no grounds for action in relation to the allegations set out in the statement of objections.

On 10 May 2016, the CMA issued an infringement decision against Ultra Finishing Limited (Ultra) and Ultra Finishing Group Limited, for breaching the Chapter I prohibition and Article 101 of the TFEU. The CMA found that Ultra and three of its resellers were party to agreements and/or concerted practices, which had as their object the appreciable prevention, restriction, or distortion of competition (through resale price maintenance) in relation to the supply of bathroom fittings in the UK (*see* Legal update, CMA issues infringement decision to Ultra Finishing Limited in bathroom fittings sector).

In 2009, in response to a number of complaints from Ultra's resellers about significant discounting of Ultra's products online, Ultra had introduced an online trading policy. The online trading policy required Ultra's resellers not to resell its products online below a maximum discount of 20% off the RRP for that product. There were consequences for failing to comply with the maximum discount, including reducing resellers' wholesale terms and withdrawal of Ultra's permission to use its copyrighted images on resellers' websites. Ultra withdrew the 2009 policy after a short time but, in 2012, in response to further complaints, it introduced trading

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guidelines. These related to the representation of Ultra's brands on resellers' websites, including images and logos but also contained a 'recommendation', which was stated not to be legally binding, that online prices should be no lower than 25% off in-store RRPs for Ultra's products.

However, despite being described as a 'recommendation', the evidence showed that Ultra aimed to prevent resellers from selling or advertising its products online below a specified level and that at least some of Ultra's resellers (and distributors) understood that the guidelines required them to price at or above the recommended online price. The online trading guidelines were implemented through a copyright licence for the use of Ultra's images. This provided a mechanism to ensure that resellers signed up and adhered to the online trading guidelines and meant Ultra could threaten to withdraw a reseller's rights to use its images online if a reseller set its online resale prices below the recommendation. The licence also reinforced the recommended price, by preventing promotions in relation to Ultra's products. Ultra regularly monitored resellers' websites to check that resellers were not selling or advertising its products below the recommended price. It also threatened or took enforcement action if it found they were, including temporarily or permanently ceasing supply, reducing wholesale terms of supply or withdrawing a reseller's right to use images of Ultra's product.

The CMA found that, in practice, Ultra's recommendation as to online prices in practice effectively restricted the ability for resellers to set online prices below a specified level, which amounted to RPM. This was specifically demonstrated in relation to three resellers, where the evidence shows that they set their prices no lower than the recommendation and had amended their pricing on instruction from Ultra, so that they were not pricing below the recommended online price. The CMA noted the importance of the internet as a driver of price competition (between sales made through both online and offline channels) due to the increased transparency of prices on the internet and the ability of resellers to use the online sales channel (with its lower overheads) to sell at lower prices.

On 24 May 2016, the CMA announced that it had imposed a fine of £2,298,820 on fridge supplier ITW Limited (ITW) for engaging in RPM in internet sales of its Foster commercial fridges from 2012 to 2014. The initial fine was reduced by 10% because ITW had set up a comprehensive programme to train its staff in compliance with competition law and a further 20% to reflect savings due to ITW's admission and co-operation with the CMA under a settlement agreement (*see* Legal update, CMA fines ITW in relation to fridge supplier sector).

The CMA found that Foster Refrigerator UK (Foster), a division of ITW, had issued a discounting policy to its entire network of resellers (the MAP Policy). The MAP Policy prohibited resellers from advertising any Foster products below a minimum advertised price (MAP) both online and offline. Foster regularly monitored resellers' websites to check that they were not advertising Foster's products for sale below the MAP. Foster also requested its resellers to report instances where Foster products were advertised for sale below the MAP. Where Foster identified instances where resellers' online prices for Foster products were below the MAP, it took enforcement action to compel resellers to change their online prices so that they were no lower than the MAP. In particular, from time to time, Foster:

- Requested resellers to change their online prices so that they were no lower than the MAP.
- Threatened to reduce resellers' wholesale terms of supply if prices were not amended so that they were no lower than the MAP.
- Temporarily or permanently ceased supply of Foster's products, or threatened to do so; and
- Permanently closed a reseller's account.

The CMA found that Foster's prohibition on advertising prices below the MAP genuinely restricted in practice the ability of resellers to determine their online sales prices at a price below the MAP and, as such, amounted to RPM in respect of online sales of Foster products. This was specifically demonstrated in relation to three resellers, where the evidence demonstrated that they adhered to the MAP Policy.

On 4 May 2017, the CMA announced that, having reached a settlement agreement, it had issued an infringement decision finding that The National Lighting Company Limited and its subsidiaries Saxby Lighting Limited, Endon Lighting Limited and Poole Lighting Limited (the parties) have breached the Chapter I prohibition and/or Article 101 of the TFEU. The CMA issued a statement of objections to the parties in January 2017 (see Legal update, CMA issues statement of objections in light fittings investigation). The CMA alleged that the companies (either directly or indirectly as parent companies of the companies directly involved), stopped retailers from setting their own prices online and forced them to sell at, or above, a minimum price (resale price maintenance). The CMA did not address the statement of objections to any retailer. It applied Rule 5(3) of its Competition Act 1998 Rules, under which the CMA may address its proposed infringement decision to fewer than all the persons who were party to the relevant agreements.

In September 2018, the CMA settled its investigation into suspected breaches of the Chapter I prohibition

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in relation to Heathrow Airport's agreement with the Arora Group in relation to the lease of Arora's Sofitel hotel at Terminal 5. This agreement included a clause restricting how parking prices should be set by Arora for non-hotel guests. The CMA concluded that the pricing restriction prevented the Arora Group from charging non-hotel guests cheaper prices than those offered at other car parks at the airport and infringed competition law. Both parties formally accepted this infringement and removed the pricing restriction. The CMA also announced that Heathrow Airport had agreed to pay a fine of £1.6 million. The Arora Group escaped being fined due to immunity granted under the CMA leniency process (see Legal update, CMA announces fines of £1.6 million in settlement of its airport transport facilities investigation).

In August 2019, the CMA settled its investigation into suspected breached of the Chapter I prohibition and Article 101 of the TFEU by Casio Electronics Co. Ltd (Casio). Casio admitted that, between 2013 and 2018, it unlawfully engaged in RPM, implementing a policy designed to restrict retailer freedom to set prices online, requiring retailers to sell digital pianos and keyboards at or above a minimum price. Casio monitored retailers' prices and pressured them to modify or raise their prices online when they fell below the specified minimum price.

Casio used software that made it easier to monitor online prices in real time and ensure widespread compliance with its pricing policy. This also meant that individual retailers had less incentive to discount for fear of being caught and potentially sanctioned. Casio's monitoring was helped by retailers reporting to Casio retailers which discounted its instruments.

The CMA imposed a fine of £3.7 million on Casio, which was a record fine for RPM (see Legal update, CMA imposes fine of £3.7 million on Casio in settlement of investigation into online discounting for digital keyboards and pianos and Legal update: CMA publishes full text of infringement decision in online discounting for digital keyboards and pianos investigation).

On 22 January 2020, the CMA imposed a new record fine, of £4.5 million, on Fender Musical Instruments Europe Limited (Fender Europe) for operating a policy designed to restrict competitive online pricing, requiring its guitars to be sold at or above a minimum price (see Legal update, CMA fines Fender Europe for restricting online discounting for its guitars) (Legal update: CMA publishes full text of infringement decision in online resale price maintenance in the guitar sector). An application to bring a collective action against Fender for damages caused by its RPM policy has been lodged before the CAT (see *Casetracker, Elisabetta Sciallis v Fender Musical Instruments Europe Limited and another*).

This was followed, in June 2020, by further fines on musical instrument makers Roland and Korg, as well as a retailer GAK, as well as an open letter being sent to 70 manufacturers and retailers in the industry (see Legal updates, CMA issues two infringement decisions and a statement of objections in investigations into resale price maintenance in supply of musical instruments and announces follow-up compliance activity; CMA publishes full text of infringement decision fining Korg for resale price maintenance of synthesizers and hi-tech equipment and CMA publishes full text of infringement decision fining Roland for resale price maintenance of electronic drum kits, related components and accessories) and, in July 2020, on Yamaha and GAK (see Legal updates, CMA issues infringement decision to Yamaha and GAK finding RPM in sale of musical instruments and CMA publishes full text of infringement decision on resale price maintenance in supply of musical instruments).

Applications to bring collective actions against Korg, Roland and Yamaha have also been lodged (see Casetrackers, *Elisabetta Sciallis v Korg (UK) Limited and Korg Inc*, *Elisabetta Sciallis v Roland Europe Group Limited and Roland Corporation* and *Elisabetta Sciallis v Yamaha Music Europe GmbH and Yamaha Corporation*).

The CMA noted, in the drum kits investigation, that Roland UK used automated price-monitoring software, to monitor online prices, tracking prices to make sure resellers were selling at or above the prices Roland specified. Some of Roland UK's resellers also used price monitoring software to inform their own pricing and to identify non-compliance with the Roland Pricing Policy, which was then reported to Roland UK, amplifying impact of the infringement. This was taken into account in the CMA's calculation of the fine imposed. Roland's appeal before the CAT challenging the CMA's calculation of the fine was dismissed (see *Roland v CMA (fine for RPM)*).

In March 2022, the CMA found that Dar Lighting Limited infringed the Chapter I prohibition by entering into an agreement and/or participating in a concerted practice with its UK resellers of domestic lighting products, whereby the resellers would not advertise or sell online domestic lighting products below a minimum price specified by Dar from time to time and which amounted to resale price maintenance in respect of online sales of the relevant products. The CMA found that Dar's use of selective distribution arrangements (SDAs) created an environment to support its pricing policy, the purpose of which was to ensure that resellers would not advertise or sell the relevant products online below a minimum price. Dar's implementation and enforcement of the SDAs and their respective brand guidelines supported an environment that seemed inimical to

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discounting in the minds of resellers and so engendered a perception amongst them that the SDAs and brand guidelines allowed Dar to prevent discounting. The CMA considered Dar committed the infringement intentionally, operating a culture of concealment (see Legal update, CMA publishes full text of infringement decision in Dar Lighting resale price maintenance investigation).

Bans on online sales

On 24 August 2017, the CMA announced that it had imposed a fine of £1.45 million on Ping Europe Limited for breach of the Chapter I prohibition and Article 101 of the TFEU. The CMA found that Ping had been operating an online sales ban, which was not objectively justified.

The CMA found that Ping had prevented two UK retailers from selling Ping golf clubs on their websites. It noted that whilst Ping must allow retailers to sell online it may require them to meet certain conditions before doing so. These conditions must, though, be compatible with competition law. It found that although Ping was pursuing a genuine commercial aim of promoting in-store custom fitting, it could have achieved this through less restrictive means than imposing an online sales ban. The fine, nevertheless, reflected the fact that the CMA found that the breach of competition law occurred in the context of a genuine commercial aim of promoting in-store custom fitting.

In addition to the fine, the CMA directed that Ping bring the online sales ban to an end, and that it does not impose the same or equivalent terms on other retailers. The CMA decided not to take action against or fine the retailers involved. See further Anti-competitive practices in sports equipment sector.

Ping lodged an appeal against the CMA's decision with the CAT, claiming amongst other things that the CMA was wrong to characterise Ping's internet sales policy as a restriction by object since it pursued a legitimate aim (custom-fitting) that benefited consumers and had no material adverse effect on competition. Ping also claimed that its policy fell within the 'ancillary restraints' doctrine or was exempt under Article 101(3) of the TFEU or section 9 of the Competition Act.

The CAT gave its judgment on 7 September 2018, upholding the CMA's decision and the finding that the ban on internet selling within the agreements constituted a restriction of competition by object (*Ping Europe Limited v Competition and Markets Authority [2018] CAT 13*; see Legal update, Ping online sales ban appeal dismissed (CAT)).

The CMA had found that promoting a custom fitting service in the distribution of a high-quality or high-technology product, such as a custom fit golf club, in principle constituted a legitimate aim. However, the CAT noted that the EU case law establishes that an agreement may be regarded as having an anti-competitive object even if it does not have a restriction of competition as its sole aim but also pursues other legitimate objectives. Although Ping's aim in introducing the internet ban was to promote custom fitting, the ban could be characterised as an object infringement because the internet policy had a real potential or capacity to restrict competition. The ability to sell Ping clubs online was important for retailers, given that Ping had a significant market share in relation to each category of golf club and the fact that the internet was an important sales channel.

The CAT also agreed with the CMA that there were suitable and appropriate alternative measures to meet the legitimate aim of promoting custom fitting which were less restrictive than the internet ban and would allow account holders to sell golf clubs online. These included:

- Amending Ping's current selective distribution criteria to require that an account holder should be able to demonstrate an ability to promote custom fitting online.
- Requiring distributors to promote custom fitting services online, by displaying a prominent and clear advisory notice strongly recommending that consumers take advantage of a custom fitting service, to achieve the potential benefits of Ping custom fit clubs before each purchase.
- Including a contractual requirement that approved internet retailers' websites provide customers with all available custom fit options. Ping could determine that only account holders with an appropriate website with drop-down boxes providing a certain range of relevant Ping custom fit options would meet its quality standards. It would then be for account holders to assess whether this was an investment that they wished to make in order to sell Ping custom fit clubs online.
- A requirement that approved internet retailers' websites must have online interactive features which provide an opportunity for personal advice, such as the provision of 'live-chat' technology to promote custom fitting and affording consumers an opportunity for a personal conversation to take place online before completing an online transaction.
- A contractual requirement that approved internet retailers' websites must have a mandatory tick-box for consumers to confirm that they understand the importance of custom fitting and the 'risks' of purchasing without having a custom fitting before being able to purchase Ping golf clubs.

The CAT also dismissed Ping's arguments that the CMA's decision infringed its human rights and that the

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CMA erred in finding that the ban on internet selling was not objectively justified, did not constitute an ancillary restraint, and did not benefit from an individual exemption.

However, as the CAT concluded that the CMA erred on the facts of this case in treating director involvement as an aggravating factor, it reduced the penalty by £200,000 to £1.25 million.

On 21 January 2020, the Court of Appeal dismissed Ping's appeal against the CAT's judgment. The Court of Appeal found that there is now a body of case law and decisional practice that shows that, for the purposes of Article 101 of the TFEU, the imposition by a supplier of a prohibition on internet sales by authorised dealers in a selective distribution network reveals a sufficient degree of harm to competition and is a restriction by object. The CAT was right to conclude that there was nothing in the economic or legal context in which Ping's online sales ban operated that negated the conclusion that it revealed a sufficient degree of harm to justify being regarded as an object restriction. The Court of Appeal also found that the CAT had not erred in finding that Ping's infringement was negligent or in setting the fine at £1.25 million (*Ping Europe Limited v Competition and Markets Authority [2020] EWCA Civ 13*; see Legal update, Illegality of Ping online sales ban as restriction of competition by object confirmed (Court of Appeal)).

The Supreme Court refused Ping permission to appeal the Court of Appeal's judgment.

Exclusivity

On 17 May 2012, the OFT announced that it had accepted voluntary assurances from Clear Channel UK and JCDecaux and closed its investigation into whether street furniture advertising contracts between these companies and individual local authorities breached Chapter I. The OFT opened its investigation on the basis of information gained during a market study into outdoor advertising. It was concerned that the long duration of street furniture advertising contracts, combined with the use of exclusivity clauses, was protecting the position of incumbents and restricting competition. As a result of the investigation, Clear Channel and JCDecaux voluntarily agreed not to enforce certain exclusivity clauses, "first refusal" clauses or tacit renewal clauses in their contracts with local authorities. In addition, they committed not to seek extensions to contracts, to clarify the end dates of their contracts and to clarify the ownership of street furniture at contract termination. On the basis of these assurances, the OFT closed its investigation on grounds of administrative priority, without making a decision as to whether there had been an infringement.

In parallel, but separately, the OFT published non-binding recommendations to local authorities which, if followed, would increase competition in the market (*see* Legal update, OFT accepts voluntary assurances to close Competition Act investigation into street furniture advertising contracts).

In a case concerning exclusive supply, in March 2022, the CMA accepted, under section 31A of the Competition Act, commitments offered by Gridserve Holdings Limited (the owner of The Electric Highway Company Limited), MOTO Holdings Limited, Roadchef Limited and Extra MSA Property (UK) Limited to address concerns about possible breaches of the Chapter I and Chapter II prohibitions. Under the commitments, Gridserve will not enforce, after 2026, long-term exclusivity electric vehicle charging supply arrangements at its motorway service station sites. During its investigation, the CMA found concern that the existing exclusivity arrangements could be preventing competitor charging operators from being able to operate at motorway service areas, and this foreclosure could impede the successful roll-out of the government's anticipated Rapid Charging Fund (see Legal update, CMA decision to accept commitments shortening long-term exclusive arrangements for the supply of electric vehicle chargepoints on or near motorways).

Franchising

One of the first examples of the OFT's enforcement of the EU competition law applicable to vertical agreements occurred in August 2004, when the OFT helped to obtain clarification for franchised Peugeot dealers that the use of the Peugeot "Blue Box" corporate branding standard (whereby the exterior of sales premises is clad in Peugeot blue) was recommended by Peugeot, but not compulsory. Dealers were concerned that compulsory distinctive branding would discourage multi-franchising of different brands of car on the same premises, a practice encouraged by the motor vehicle block exemption (*OFT press release PN124/04*).

In 2013, the OFT fined franchisor Mercedes Benz and five of its dealer franchisees over £2.8 million for breaching the Chapter I prohibition in relation to the distribution of Mercedes-Benz commercial vehicles (trucks and vans). The dealers were all SMEs with small market shares operating on small local markets. This did not make them immune from competition law. The OFT found that the dealers entered into arrangements under which each of the parties would contact the other before providing a quotation to a customer based in the other's area and that they would co-ordinate their responses in order to allow the local party to

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win the sale. These arrangements were considered to constitute a serious restriction on competition between the dealers, involving market-sharing, price-fixing and/or the exchange of commercially sensitive information (Mercedes-Benz commercial vehicles: OFT case CE/9161-09).

Mercedes Benz was also found to be a party to the anti-competitive conduct for its role as a facilitator to the arrangement (see Vertical agreements involving horizontal co-ordination).

Examples of private litigation concerning vertical restrictions

In some cases, parties to private litigation have asked a court of the UK to consider the compliance of a vertical restriction with Chapter I or Article 101 of the TFEU, usually with a view to securing a judicial ruling that the relevant restriction is void and unenforceable. Some examples include:

- *A Nelson & Co Ltd and Bach Flower Remedies Ltd v Guna SPA*, in which the defendant claimed unsuccessfully that certain restrictions in a distribution agreement restricted or limited parallel trade between EU member states, and prevented the defendant from selling products that competed with those of the claimant (*[2011] EWHC 1202*).
- *Pirtek (UK) Ltd v Joinplace Ltd (t/a Pirtek Darlington) & Ors*, in which the High Court held that a post-termination restraint in a franchise agreement fell outside the Chapter I prohibition on the grounds that it was essential to prevent the risk that know-how and assistance provided by the franchisor to the franchisee would, after termination, be used to aid the franchisor's competitors (*[2010] EWHC 1641 (Ch)*).
- *Calor Gas Ltd v Express Fuels (Scotland) Ltd & Anor*, in which the Scottish Court of Sessions held that certain restrictions in contracts for the distribution of bulk and cylinder liquefied petroleum gas infringed Article 101 and were, therefore, unenforceable. The restrictions tied dealers to Calor Gas (the market leader) for five years in a mature market where demand was declining, and prevented them from handling Calor cylinders after termination of the contract (*[2008] ScotCS CSOH_13*).
- *The Football Association Premier League Ltd v QC Leisure and Others*, judgment of 3 February 2012, in which the English High Court ruled, in accordance with a preliminary reference ruling of the European Court of Justice, that obligations in exclusive licence agreements of the claimant, which prohibited the supply of decoder cards to TV viewers who wished to watch the broadcasts outside the member state for which the licence was granted, constituted a restriction on competition prohibited by Article 101(1), and were, therefore, also void under Article 101(2) (*[2012] EWHC 108 (Ch)*).
- *Days Medical Aids Ltd v Pihsiang Machinery Manufacturing Co Ltd and WU*, in which the High Court found that an agreement for the distribution of scooters did not infringe Article 101. This was, as it did not contain any provisions restricting intra-brand competition for purchasers, so could not be viewed as having the object of restricting competition (whatever its intended duration) and it contained no 'hardcore' restrictions of competition (*[2004] EWHC 44 (Comm)*).
- *Inntrepreneur Pub Company v Crehan*, judgment of 19 July 2006, in which the House of Lords (now the Supreme Court) held that the Court of Appeal had erred in relying on a decision of the European Commission, involving similar facts in the same market but different parties, to conclude that certain exclusivity requirements in pub leases ('beer ties') infringed Article 101 of the TFEU. The House of Lords considered that the earlier judgment of the High Court had been correct in conducting its own assessment of the facts and concluding that the beer tie did not breach Article 101 as it not make it difficult to enter the beer market in the UK in the relevant period (*[2006] UKHL 38*).

These cases suggest that, in the UK, legal proceedings before the courts are perceived by businesses as a mechanism for enforcement of competition law that is at least as important as seeking intervention of the competition authorities, if not more so.

For a full list of private actions in the High Court involving the application of EU or UK competition law, see *Case-tracker,* Private actions in the High Court involving the application of EU or UK competition law.

The CAT is also seeing standalone claims for damages for breaches of the Competition Act, most recently *Belle Lingerie Limited v Wacoal EMEA Ltd and Wacoal Europe Ltd*. Belle claimed that Wacoal implemented a number of anti-competitive and discriminatory measures, including RPM, an online platform ban and a minimum advertised prices policy. Wacoal allegedly monitored discounted prices and applied sanctions, including refusals to supply. Belle claimed that Wacoal refused to supply to it as punishment for Belle failing to comply with the RPM policy and protesting the other measures and that Wacoal's practices had the object and effect of preventing, restricting or distorting competition in the UK lingerie market. The parties settled the litigation in October 2022.

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Common types of vertical agreements

Distribution agreements

A manufacturer or supplier of goods appoints an independent third party (a "reseller") to market its goods. The reseller purchases the goods on its own account and trades under its own name. In an **exclusive** distribution agreement, the supplier allots the reseller a defined territory on which the reseller must concentrate its sales efforts, and in return undertakes not to supply any other reseller in that territory.

Agency agreements

An agent is invested with a power to negotiate, or to negotiate and conclude, contracts in the name of and/or on behalf of a principal for the purchase or sale of goods or the use or supply of services.

Purchasing or supply agreements

The person to be supplied, who will often be a retailer, undertakes to obtain its requirements of certain goods for resale from a particular supplier. In an **exclusive** purchasing agreement an exclusive purchaser agrees not to obtain such goods from any source other than the supplier. Such agreements are particularly common in the beer and petrol industries.

Franchising agreements

Under a franchising agreement, the franchisor allows the franchisee to use a name which is associated with the franchisor, and the franchisor exercises continuing control over and provides assistance to the franchisee, including the communication of know-how, in return for a lump sum and/or royalty payments by the franchisee to the franchisor. Franchising is used in a number of sectors including the clothing, food and hotel industries.

Selective distribution agreements

A supplier operates a restricted system of distribution and appoints only a selective group of wholesalers or retailers according to specified criteria. This method of distribution is often employed in sectors involving luxury or high technology products, such as perfumes and consumer electronics.

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