

A new EU and UK block exemption regime for vertical agreements comes into effect on 1 June 2022 (with a one-year transitional period for preexisting agreements). These new rules make some important reforms to the existing treatment of vertical agreements under EU and UK competition law, creating new risks and opportunities for manufacturers, importers, wholesalers and retailers.

Background

1. The EU and UK competition law prohibition of anticompetitive agreements can apply to restrictions in agreements between parties who operate at different levels of the production/distribution chain (so-called “vertical agreements”), including distribution agreements and trademark licences.
2. Until 1 June 2022, restrictions in vertical agreements were exempt from the EU and UK prohibition if they fell within the European Commission (EC)’s 2010 Vertical Agreements Block Exemption Regulation (VABR) – VABR was retained in UK law upon the UK’s exit from the EU. However, the 2010 VABR expired on 31 May 2022 and the UK has now replaced the retained VABR with a new Vertical Block Exemption Order (VABEO).

New EU VABR

3. [On 10 May 2022, the EC adopted a New VABR](#), which comes into force on 1 June 2022, accompanied by revised [Guidelines on vertical restraints \(Guidelines\)](#).
4. This new regime replaces the 2010 VABR and accompanying guidelines, although there is a one-year transitional period, during which preexisting agreements will continue to be exempt from the prohibition under the 2010 VABR, even if they would not be exempt under the New VABR.
5. The New VABR will stay in place for 12 years, expiring on 31 May 2034.

New UK VABEO

6. On 9 May 2022, the UK government adopted [The Competition Act 1998 \(Vertical Agreements Block Exemption\) Order 2022 \(VABEO\)](#), which also comes into force on 1 June 2022 with a one-year transitional period for pre-existing agreements. The UK Competition and Markets Authority (CMA) is currently consulting on its draft [VABEO guidance](#).
7. VABEO will stay in place for six years, expiring on 1 June 2028.

Implications for EU/UK Businesses

8. New VBER and VABEO will retain the basic structure of the current regime:
 - a. They will continue to exempt vertical agreements between firms that are not competing undertakings, as well as non-reciprocal agreements between competing undertakings at the downstream level provided the buyer/licensee is not an upstream competitor.
 - b. Provided:
 - i. Each of the parties’ upstream/downstream market shares do not exceed a 30% market share cap.
 - ii. The agreement does not contain any of the “hardcore” restrictions listed in New VABR/VABEO.

Further, it will still be the case that just because an agreement falls outside the benefit of VABR/VABEO, it will not automatically be deemed prohibited, but an individual assessment will be required in accordance with the Guidelines and the VABEO guidance. However, both regimes establish a presumption that hardcore restrictions do infringe the prohibition.

9. New VABR and VABEO will make some important reforms to the existing treatment of vertical agreements under EU and UK competition law, creating new risks and opportunities for EU/UK manufacturers, importers, wholesale suppliers and retailers across the vertical supply chain. Thankfully, there are only a handful of instances of meaningful divergence between the new EU and UK regimes.
10. The key changes and key differences between the EU and UK regimes are:
 - a. **More nuanced treatment of dual-distribution** – Information flows between supplier and buyer, where they also compete downstream, and will face increased scrutiny, especially in relation to any disclosures as to future competitive conduct on the downstream market.
 - b. Introduction of the **possibility of multiple exclusive distributors** in the same exclusively allocated territory/customer group.

- c. **Increased protection of selective distribution systems (SDS)** – Suppliers can now restrict all distributors outside the SDS contract territory/customer group from actively/passively selling to customers in the SDS contract territory/CG and require those distributors to pass on that restriction to their customers.
- d. **Greater scope for manufacturers/suppliers to influence resellers' online resales via the introduction of "prevention of the effective use of the internet" as a new hardcore restriction** – The new EU and UK regimes now include:
- i. Clarity that **online marketplace exclusivity is not a hardcore restriction.**
 - ii. **Greater tolerance for online channel/advertising (including search/price comparison tools) restrictions** provided they do not prevent third-party licensees effectively using the internet for resales (including via their own online stores and with the ability to advertise online).
 - iii. Tolerance for a degree of **dual wholesale pricing** between resellers' offline and online channels.
 - iv. **More flexibility as regards manufacturers/suppliers' selective distribution system (SDS) online sales criteria**, with the **removal of the "overall equivalent" to offline sales criteria.**
- e. **New "online intermediation services" (OIS) provider designation for online platforms** – The new rules preclude OIS providers from imposing retail prices on retailers selling via the platform.
- f. **MFNs** – "Across platform retail parity obligations" imposed by online platforms (i.e. providers of OISs), such as where a platform restricts sellers on the platform from selling the same products more cheaply on third-party platforms, are now excluded from the EU block exemption safe harbour. Under VABEO, "wide retail parity obligations," whether relating to online or offline resale channels, are treated as hardcore restrictions.
- g. **In-term non-competes tacitly renewable beyond five years** – These are no longer excluded restrictions under the EU block exemption provided the buyer can renegotiate/terminate within a reasonable period of notice and at a reasonable cost – by contrast, under the UK block exemption, non-competes tacitly renewable beyond five years are still automatically excluded restrictions.

Contacts

If you have any questions about how the proposed changes in either the UK or EU could affect your business, please do not hesitate to contact our team listed below.



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