PANORAMIC

VERTICAL AGREEMENTS

United Kingdom

LEXOLOGY

Vertical Agreements

Contributing Editor

Patrick J Harrison

Sidley Austin LLP

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United Kingdom

Sidley Austin LLP

SIDLEY

Patrick J Harrison pharrison@sidley.com
Rosanna Connolly rconnolly@sidley.com

LEGAL FRAMEWORK

Antitrust law

What are the legal sources that set out the antitrust law applicable to vertical restraints?

The key legal source on the regulation of vertical restraints in the United Kingdom (UK) is the Competition Act 1998 (CA 1998). Notwithstanding that the UK left the European Union on 31 January 2020 (Brexit), the relevant elements of the CA 1998 still follow the structure of article 101 of the Treaty on the Functioning of the European Union.

Section 2(1) of the CA 1998 prohibits agreements between undertakings that may affect trade within the UK, and have as their object or effect the prevention, restriction or distortion of competition within the UK (the Chapter I prohibition). Section 2(4) of the CA 1998 renders agreements falling within the Chapter I prohibition void. Section 9(1) of the CA 1998, in essence, provides that the Chapter I prohibition will not apply where the economic benefits of an agreement outweigh its anticompetitive effects.

In 2022, the UK replaced the post-Brexit adopted version of Commission Regulation (EU) No. 330/2010 with the Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 (SI 2022 No. 516) (VABEO). The VABEO exempts the Chapter I prohibition from vertical agreements that satisfy its terms. (The VABEO is similar to Commission Regulation (EU) No. 2022/720 (the EU Vertical Block Exemption Regulation (VBER)).) The VABEO is accompanied by the Vertical Agreements Block Exemption Order guidance (the VABEO Guidance) from the Competition and Markets Authority (CMA) .

The EU-level rules on vertical restraints are also relevant in the post-Brexit United Kingdom under section 60A of the CA 1998, by which the CMA, various sectoral regulators and UK courts are bound by an obligation to ensure consistency with EU competition case law that predates 31 December 2020 (ie, the end of the Brexit transition period).

The CMA may also conduct market studies under section 5 of the Enterprise Act 2002 and may decide to conduct more detailed market investigations where it considers that restraints, including vertical restraints, are prevalent in a market and have the effect of restricting competition.

Where a party occupies a dominant position in a market to which the vertical agreement relates, section 18 of the CA 1998 (the Chapter II prohibition), which regulates the conduct of dominant companies, will also be relevant to the antitrust assessment of a given agreement. The conduct of dominant companies is considered in Lexology Panoramic: Dominanceand not covered here.

In 2023, the Digital Markets Competition and Consumer Bill (DMCCB) was introduced to the UK parliament. The DMCCB proposes a new regime for digital markets and will amend several parts of the CA 1998. It is expected that the DMCCB will pass into law in 2024.

Law stated - 9 February 2024

Types of vertical restraint

List and describe the types of vertical restraints that are subject to antitrust law. Is the concept of vertical restraint defined in the antitrust law?

Articles 2(1) and 3(2) of VABEO provide the following definition of vertical agreements:

> agreements or concerted practices entered into between two or more undertakings each of which operates, for 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.

Vertical restraints are restrictions on the competitive behaviour of a party that occur in the context of these vertical agreements. Examples of vertical restraints include:

- exclusive distribution;
- selective distribution;
- territorial protection;
- export restrictions;
- customer restrictions;
- resale price-fixing;
- exclusive purchase obligations; and
- non-compete obligations.

Law stated - 9 February 2024

Legal objective
Is the only objective pursued by the law on vertical restraints economic, or does it also seek to promote or protect other interests?

In large part, the objectives pursued by the law on vertical restraints are economic.

Law stated - 9 February 2024

Responsible authorities
Which authority is responsible for enforcing prohibitions on anticompetitive vertical restraints? Where there are multiple responsible authorities, how are cases allocated? Do governments or ministers have a role?

On 1 April 2014, the CMA became the main body responsible for enforcing the CA 1998. Where appropriate, references in this chapter to the CMA should be understood as references

to the CMA, and its predecessors the Office of Fair Trading (OFT) and the Competition Commission.

Certain sectoral regulators have concurrent jurisdiction with the CMA concerning their respective industries, namely:

- the Office of Communications;
- the Financial Conduct Authority;
- the Payment Systems Regulator;
- the Gas and Electricity Markets Authority;
- the Northern Ireland Authority for Energy Regulation;
- the Water Services Regulation Authority;
- the Office of Rail Regulation; and
- the Civil Aviation Authority.

Generally, references in this chapter to the CMA should be taken to include the sectoral regulators concerning their respective industries.

The role of ministers is minimal in the ordinary course of business, but the Secretary of State for Business, Energy and Industrial Strategy does retain a residual power to intervene where there are exceptional and compelling reasons of public policy. (Equivalent powers are exercised by the Secretary of State for Culture, Media and Sport concerning the media, broadcasting, digital and telecoms sectors.) For example, the Secretary of State for Business, Energy and Industrial Strategy has made an order excluding the Chapter I prohibition from applying to certain agreements in the defence industry (see Competition Act 1998 (Public Policy Exclusion) Order 2006 (SI 2006 No. 605)).

Law stated - 9 February 2024

Jurisdiction

What is the test for determining whether a vertical restraint will be subject to antitrust law in your jurisdiction? Has the law in your jurisdiction regarding vertical restraints been applied extraterritorially? Has it been applied in a pure internet context and if so, what factors were deemed relevant when considering jurisdiction?

Under section 2(1) of the CA 1998, the Chapter I prohibition applies where an agreement may have an effect on trade within the United Kingdom. Section 2(3) of the CA 1998 adds that the Chapter I prohibition will only apply where the agreement 'is, or is intended to be, implemented in the United Kingdom'. However, it is not clear to what extent, if any, section 2(3) would serve to limit the number of agreements covered by section 2(1) of the CA 1998 effect-on-trade test. The CMA's VABEO Guidance does not explicitly address the interaction of sections 2(1) and 2(3) of the CA 1998 but it appears clear that some link to the United Kingdom would be needed. The CMA, through the VABEO Guidance, has clarified that it will typically presume an effect on trade within the United Kingdom where an agreement appreciably restricts competition within the United Kingdom. The VABEO Guidance notes

that where a vertical agreement only concerns restrictions relating to exports outside the UK, or imports/reimports from outside the UK, the CMA may assess whether these agreements have the effect of restricting competition within the UK. In relation to section 2(3) of the CA 1998, the VABEO Guidance also notes that the UK government has committed to amending the Chapter I prohibition so that it can apply to agreements, concerted practices and decisions that are implemented outside of the UK, depending on the effects of the conduct within the UK. The DMCCB introduces additional alternative wording to extend the extraterritorial reach of the Chapter I prohibition. Once enacted, agreements, decisions or concerted practices that are implemented outside the UK may be caught by the Chapter I prohibition if they are likely to have a substantial, immediate and foreseeable effect on trade within the UK (unless the agreement, decision or concerted practice is otherwise exempt).

The infringement decisions against (1) Roma Medical Aids Limited ***(Roma)*** and certain of its retailers ***(Mobility Scooters I);*** and (2) Private Mobility Products and certain of its retailers ***(Mobility Scooters II)*** give examples of the application of the CA 1998's jurisdictional test in an online context. ***Mobility Scooters I*** was related to prohibitions of online sales and online price advertising for Roma's mobility scooters, while ***Mobility Scooters II*** concerned prohibitions on online advertising of prices below the manufacturer's recommended retail price. The jurisdictional test in each case was deemed satisfied because the products were sold throughout the United Kingdom.

Law stated - 9 February 2024

Agreements concluded by public entities

To what extent does antitrust law apply to vertical restraints in agreements concluded by public entities?

The Chapter I prohibition applies to undertakings. The term 'undertaking' can cover any kind of entity, regardless of its legal status or how it is financed, provided such an entity is engaged in economic activity when carrying out the activity in question. Thus, public entities may qualify as undertakings when carrying out certain of their more commercial functions, but will not be classed as undertakings – and so will be exempt from the Chapter I prohibition – when fulfilling their public tasks.

The CMA's December 2011 guide on the application of the CA 1998 to public bodies clarifies that public bodies are subject to the CA 1998 when they are engaged in a supply of goods or services where that supply is commercial in nature, which, according to the CMA, is likely to be the case where the supply competes with private-sector providers.

Regarding the purchasing practices of public bodies, the judgment of the Competition Appeal Tribunal (CAT) in ***Bettercare II*** conflicts with subsequent judgments by the EU courts in ***Fenin v Commission.*** In ***Fenin,*** the EU courts focused on the use to which the purchased products are put, while the CAT, in the ***Bettercare II*** judgment, considered that the key issue was not the ultimate use of the products but whether the purchaser was in a position to generate the effects on competition that the competition rules seek to prevent. The CMA's guide on the application of the CA 1998 to public bodies explains that 'in determining whether a public body is acting as an undertaking in relation to such a purchase of goods or services in a market, the economic or non-economic nature of that purchasing activity depends on the end-use to which the public body puts the goods or services bought.'

This is an indication that the CMA will follow the approach of the Court of Justice of the European Union in ***Fenin*** in future cases (ie, it is likely to find that a public body purchasing products to use as part of its social function would not be an undertaking for the CA 1998). There is no reason to consider that this will change post-Brexit.

Law stated - 9 February 2024

Sector-specific rules

Do particular laws or regulations apply to the assessment of vertical restraints in specific sectors of industry (motor cars, insurance, etc)? Please identify the rules and the sectors they cover.

Yes. Under the Competition (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019 No. 93), certain motor vehicle repair and maintenance agreements whose provisions fall within the European Commission's Motor Vehicle Block Exemption continued to be exempt from the Chapter I prohibition (see, eg, the CMA press release of 24 January 2006, concerning a complaint made against the motor manufacturer TVR Engineering Ltd). As the retained Commission's Motor Vehicle Block Exemption expired on 31 May 2023 (subject to a one-year transitional period for pre-existing agreements that will expire at the end of 31 May 2024), it was replaced by a UK Motor Vehicle Block Exemption Order, which entered into force on 1 June 2023 and will expire on 31 May 2029. It was updated to reflect market developments including a new excluded restriction such that a restriction of the ability of an independent operator to access repair and maintenance information, tools or training will not gain the benefit of exemption.

On 1 February 2012, the Restriction on Agreements and Conduct (Specified Domestic Electrical Goods) Order 1998, which applied to suppliers of specified domestic electrical goods (making it, inter alia, unlawful for such suppliers to recommend or suggest retail prices for specified goods), was lifted.

Other industry-specific block exemption regulations exist, but none is targeted specifically at vertical restraints.

Law stated - 9 February 2024

General exceptions

Are there any general exceptions from antitrust law for certain types of agreement containing vertical restraints? If so, please describe.

The Chapter I prohibition will only apply to a vertical restraint that has an appreciable effect on competition within the United Kingdom. Paragraph 2.18 of the CMA's Guidance Note on Agreements and Concerted Practices states that, in determining the appreciable effect of a restraint, the CMA will have regard to the European Commission's De Minimis Notice, which provides that, in the absence of certain hardcore restrictions such as price-fixing or clauses granting absolute territorial protection, and in the absence of parallel networks of similar agreements, the European Commission will not consider that vertical agreements have an appreciable effect on competition provided market shares of the parties' corporate groups do not exceed 15 per cent for the products in question.

There are also several Competition Act (Public Policy Exclusion) Orders (including those enacted in 2006, 2008 and 2012) exempting from the Chapter I prohibition certain agreements in the defence sector and certain agreements regarding the distribution of fuel in the event of a fuel-supply disruption.

Also, while not constituting a full exemption from the application of the Chapter I prohibition, parties to small agreements will be exempt from administrative fines under section 39 of the CA 1998 (eg, no fines were imposed in the ***Mobility Scooters I*** and ***Mobility Scooters II*** cases). However, price-fixing agreements are excluded from the scope of the small agreements exemption under section 39(1)(b) of the CA 1998, and the CMA has discretion under section 39(3) of the CA 1998 to withdraw the benefit of the small agreements exemption in a given case, a discretion it exercised in August 2017 in its investigation of TGA Mobility.

Law stated - 9 February 2024

TYPES OF AGREEMENT

Agreements

Is there a definition of 'agreement' – or its equivalent – in the antitrust law of your jurisdiction?

The EU courts have clarified that, for a restriction to be reviewed under article 101 of the Treaty on the Functioning of the European Union, there must be a concurrence of wills among the two parties to conclude the relevant restriction ***(Bayer v Commission***).The Court of Appeal expressly adopted the EU courts' 'concurrence of wills' language in ***Argos Ltd and Littlewoods Ltd v Office of Fair Trading*** and ***JJB Sports plc v Office of Fair Trading.*** The Competition and Markets Authority's (CMA) Vertical Agreements Block Exemption Order guidance (VABEO Guidance) also notes that where there is no explicit agreement expressing the parties' concurrence of wills 'there may still be an agreement where the policy of one party receives the acquiescence of the other party' either explicitly or tacitly.

Law stated - 9 February 2024

Agreements

In order to engage the antitrust law in relation to vertical restraints, is it necessary for there to be a formal written agreement or can the relevant rules be engaged by an informal or unwritten understanding?

It is not necessary for there to be a formal written agreement. Rather, a concurrence of wills will suffice.

Law stated - 9 February 2024

Parent and related-company agreements

In what circumstances do the vertical restraints rules apply to agreements between a parent company and a related company (or between related companies of the same parent company)?

Paragraph 2.6 of the CMA's Guidelines on Agreements and Concerted Practices states that section 2(1) of the CA 1998 (the Chapter I prohibition) will not apply:

> to agreements where there is only one undertaking: that is, between entities which form a single economic unit. In particular, an agreement between a parent and its subsidiary company, or between two companies which are under the control of a third, will not be agreements between undertakings if the subsidiary has no real freedom to determine its course of action on the market and, although having a separate legal personality, enjoys no economic independence.

Law stated - 9 February 2024

Agent–principal agreements

In what circumstances does antitrust law on vertical restraints apply to agent–principal agreements in which an undertaking agrees to perform certain services on a supplier's behalf for a sales-based commission payment?

Generally, the Chapter I prohibition will not apply to any agreement between a principal and its genuine agent insofar as the agreement relates to contracts negotiated or concluded by the agent for its principal. However, the concept of genuine agency is narrowly defined. The CMA has clarified that the concept of agency often depends on the level of independent risk assumed by the party purporting to be an agent. If such a party is taking on risk independent of that of the party supposedly directing the 'agent', then it is unlikely that the CMA will conclude that there is a genuine agency agreement. Also, the VABEO Guidance notes that a genuine agency agreement that facilitates collusion between principals may also fall within the Chapter I prohibition. Collusion could be facilitated where 'a number of principals use the same agents while collectively excluding others from using these agents, or when they use the agents to collude on marketing strategy or to exchange sensitive market information.'

The United Kingdom, in the Vertical Agreements Block Exemption Order (VABEO) and VABEO Guidance, has chosen to adopt the EU's stance regarding agency agreements. Additionally, as was set out in the EU revised Vertical Block Exemption Regulation No. 720/2022, the CMA, in the VABEO and associated VABEO Guidance, has indicated that, in principle, online intermediation service providers will not be considered agents.

Where agency agreements are concluded, agents in the United Kingdom may benefit from significant protection under the Commercial Agents (Council Directive) Regulations 1993 (SI 1993 No. 3053).

Law stated - 9 February 2024

Agent–principal agreements

Where antitrust rules do not apply (or apply differently) to agent–principal relationships, is there guidance (or are there recent authority decisions) on what constitutes an agent–principal relationship for these purposes?

For the purposes of the Chapter I prohibition, an agreement will be qualified as an agency agreement if the agent does not bear any, or bears only insignificant, risks concerning the contracts concluded or negotiated on behalf of the principal. The exact degree of risk that an agent can take without the Chapter I prohibition being deemed applicable to its relationship with a principal will largely be a question of fact. However, the VABEO Guidance gives guidance on the kinds of risk that, if accepted by an agent, will prevent it from being considered a genuine agent for purposes of the Chapter I prohibition.

In a 2002 case involving a complaint alleging resale price maintenance by Vodafone Ltd concerning pre-pay mobile phone vouchers, the Director-General of Telecommunications found that the agreements in question were not genuine agency agreements because, inter alia, the risk of loss or damage was borne by the buyers.

Law stated - 9 February 2024

Intellectual property rights

Is antitrust law applied differently when the agreement containing the vertical restraint also contains provisions granting intellectual property rights (IPRs)?

Section 3(4) of the VABEO specifies that the block exemption will only apply to agreements granting IPRs where these grants are not the 'primary object of such agreements and are directly related to the use, sale or resale of goods or services by the buyer or its customers'.

The VABEO Guidance goes further to state that vertical agreements granting IPRs will only fall within the scope of the VABEO where:

- the IPR provisions are part of a vertical agreement with conditions under which the parties purchase, sell or resell certain goods or services;
- the IPRs are assigned to, or licensed for use by, the buyer;
- the IPR provisions are not the primary object of the agreement;
- the IPR provisions must relate directly to the use, sale or resale of goods or services by the buyer or its customers; and
- the IPR provisions must not contain restrictions of competition that have the same object as other vertical restraints that are not exempted under the VABEO.

Law stated - 9 February 2024

ANALYTICAL FRAMEWORK FOR ASSESSMENT

Framework

Explain the analytical framework that applies when assessing vertical restraints under antitrust law.

Section 2(1) of the CA 1998 (the Chapter I prohibition) may apply to vertical restraints, provided they are not:

- in certain agreements covered by a Competition Act (Public Policy Exclusion) Order;
- concluded by public entities carrying out non-economic activities;
- in genuine agency arrangements; or
- concluded among related companies.

If none of the above exceptions applies, then the analytical framework for vertical restraints is as follows.

First, does the vertical agreement contain a hardcore restraint? Article 8(2)(a)-(f) of the Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 (SI 2022 No. 516) (VABEO) sets out hardcore restraints, namely:

- the fixing of minimum resale prices;
- certain restrictions on the customers to whom, or the territory into which, a buyer can sell the contract goods;
- restrictions on members of a selective distribution system supplying each other or end users;
- certain restrictions on the sale of spare parts; and
- the setting of wide retail parity obligations.

Certain restrictions on online selling can also qualify as hardcore restraints.

Where an agreement contains a hardcore restraint, it:

- will not benefit from the exemption created by the European Commission's De Minimis Notice (to which the Competition and Markets Authority (CMA) and UK courts will have regard);
- will not benefit from the safe harbour under the VABEO; and
- is highly unlikely to satisfy the conditions for exemption under section 9 of the Competition Act 1998 (CA 1998).

Second, does the agreement have an appreciable effect on competition within the United Kingdom (UK)? Where an agreement contains a hardcore restraint, it will likely be deemed to have an appreciable effect on competition within the UK. Where an agreement does not contain a hardcore restraint, and the criteria of the EU De Minimis Notice are met, then the CMA is likely to consider that the vertical restraint falls outside the Chapter I prohibition because it does not appreciably restrict competition.

Third, does the agreement fall within the VABEO, or another applicable block exemption, which, creates a safe harbour from the Chapter I prohibition? If so, the agreement benefits from that safe harbour, which will be binding on the CMA and on any UK court that is asked to determine the legality of the vertical restraint.

Finally, where the vertical agreement does have an appreciable effect on competition within the UK and does not fall within the terms of the De Minimis Notice or the VABEO (or any other applicable safe harbour), it is necessary to conduct an individual assessment of the agreement to determine whether the conditions for an exemption under section 9 of the CA 1998 are satisfied.

Law stated - 9 February 2024

Market shares

To what extent are supplier market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other suppliers relevant? Is it relevant whether certain types of restriction are widely used by suppliers in the market?

Supplier market shares will be relevant to consideration of whether a restraint creates an appreciable restriction on competition and whether a restraint might fall within the safe harbours created by the EU De Minimis Notice or the VABEO. The CMA's Vertical Agreements Block Exemption Order guidance (VABEO Guidance) states that 'vertical agreements do not generally give rise to competition concerns unless one or more of the parties to the agreement possesses market power on the relevant market or the agreement forms part of a network of similar agreements'.

The CMA will normally take into account the cumulative impact of a supplier's relevant vertical agreements when assessing the impact on a market of a given vertical restraint. For example, in 2015, undertakings from Freightliner were accepted following a two-year investigation of its commercial practices. The undertakings prohibited certain restrictions that had been agreed with Freightliner's customers and that limited potential resellers from entering the market, thus reinforcing Freightliner's large market share in six ports and inland terminals.

Also, the assessment of a given vertical restraint can vary depending on the vertical restraints concluded by that supplier's competitors. If the vertical restraints imposed by the supplier and its competitors have the cumulative effect of foreclosing market access, any vertical restraints that contribute significantly to that foreclosure may be found to infringe the Chapter I prohibition. In the 2008 judgment in ***Calor Gas Ltd v Express Fuels (Scotland) Ltd & Anor***,the Scottish Court of Sessions rendered unenforceable vertical restraints agreed between Calor Gas and two of its buyers (whereby the buyers agreed to purchase and sell only Calor cylinder liquefied petroleum gas for five years and not to handle the cylinders after termination) in part because Calor Gas had a network of similar restraints that served to foreclose the distribution market.

Under the Enterprise Act 2002, the CMA has extensive powers to conduct market studies and, ultimately, more detailed market investigations. Networks of parallel vertical agreements in given industries are among the issues that can cause the CMA to initiate a market study (of which there have been several in recent years) or, subsequently, to initiate a market investigation (see, eg, the market investigation by the CMA's predecessor, the Competition Commission (CC), into the supply of bulk liquefied petroleum gas for domestic use (final report published in 2006) and the CC market investigation into movies on pay-TV (final report published in 2012)).

Law stated - 9 February 2024

Market shares

To what extent are buyer market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other buyers relevant? Is it relevant whether certain types of restriction are widely used by buyers in the market?

To benefit from the VABEO, neither the supplier nor buyer can have a market share exceeding 30 per cent (see article 6(1)) VABEO).

Buyer market share must, therefore, be assessed each time the application of the VABEO is under consideration.

The CMA may also take into account the cumulative impact of a buyer's relevant vertical agreements when assessing the impact of vertical restraints on competition in a given purchasing market. Also, the assessment of a given vertical restraint can vary depending on the vertical restraints concluded by that buyer's competitors. If the vertical restraints imposed by the buyer and its competitors have the cumulative effect of excluding others from the market, then any vertical restraints that contribute significantly to that exclusion may be found to breach the Chapter I prohibition.

Law stated - 9 February 2024

BLOCK EXEMPTION AND SAFE HARBOUR

Function

Is there a block exemption or safe harbour that provides certainty to companies as to the legality of vertical restraints under certain conditions? If so, please explain how this block exemption or safe harbour functions.

Upon leaving the EU, the Competition (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019 No. 93), Commission Regulation (EU) No. 330/2010 (and the EU Motor Vehicle Block Exemption) were adopted (removing the references to the European Union) into UK domestic law. In May 2022, the United Kingdom adopted the Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 (SI 2022 No. 516) (VABEO). In July 2022, the Competition and Markets Authority (CMA) published the Vertical Agreements Block Exemption Order guidance (VABEO Guidance) on the application of the Competition Act 1998 (CA 1998) to vertical agreements. Where an agreement satisfies the conditions of the VABEO, the safe harbour created means that neither the CMA nor any UK courts can determine that the agreement infringes the Chapter I prohibition as set out in section 2(1) of the CA 1998, unless a prior decision has been taken by the CMA to withdraw the benefit of the VABEO from the agreement.

To benefit from the safe harbour created by the VABEO, neither the buyer nor the supplier who is a party to a vertical agreement may have a market share exceeding 30 per cent.

Law stated - 9 February 2024

TYPES OF RESTRAINT

Assessment of restrictions

How is restricting the buyer's ability to determine its resale price assessed under antitrust law?

The Competition and Markets Authority (CMA) considers that the setting of fixed or minimum resale prices constitutes a hardcore restriction of competition. As such, it will almost always infringe section 2(1) of the Competition Act 1998 (CA 1998) (the Chapter I prohibition), will fall outside the safe harbours of the De Minimis Notice and the Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 (VABEO), and is generally considered unlikely to qualify for exemption under section 9 of the CA 1998. Indeed, the CMA states in its investigation procedures guidance that, for its leniency programme, price-fixing concerning which leniency from fines can be sought includes resale price maintenance (RPM).

The fixing of resale prices often leads to enforcement action by the CMA. For example:

- In August 2019, the CMA fined Casio Electronics Co Ltd (Casio) £3.7 million (which included a 20 per cent discount for Casio's admission and cooperation) for implementing a policy between 2013 and 2018 that restricted retailers from freely setting prices online by imposing a minimum price. Casio ensured compliance with its pricing policy by using software that enabled it to monitor online resale prices in real time, and by pressuring retailers to raise prices if they were found to be in breach of the pricing policy.
- In 2020, the CMA adopted four separate fining decisions – concerning guitar manufacturer Fender (January 2020), synthesizer and hi-tech music equipment manufacturer Korg UK (June 2020), electronic drum manufacturer Roland UK (July 2020) and digital keyboard manufacturer Yamaha and reseller GAK (also July 2020) – regarding (largely online) RPM. Fines in each case were significant, with the £4.5 million fine on Fender, and the £4 million fine on Roland UK being the largest.
- In 2022, the CMA fined a company active in the supply of domestic lighting £1.5 million for requiring its retailers to sell at or above a minimum price.

Communicating maximum or recommended resale prices from which the distributor is permitted to deviate without penalty tends to be permissible. However, the CMA is likely to view these arrangements with suspicion in concentrated markets, as these practices may facilitate collusion. In its 2016 decision in ***Bathroom Fittings,*** the CMA found that a price recommended by the supplier constituted a minimum resale price (notwithstanding that the supplier's guidelines expressly described the price as a recommendation) because the supplier had threatened distributors that deviated from the recommended price with a reduction of supplies or revocation of the copyright licence necessary for advertising the affected products, and had regularly monitored distributors' websites to verify compliance.

Law stated - 9 February 2024

Assessment of restrictions

Have the authorities considered in their decisions or guidelines resale price maintenance restrictions that apply for a limited period to the launch of a new product or brand, or to a specific promotion or sales campaign; or specifically to prevent a retailer using a brand as a 'loss leader'?

The CMA's predecessor, the Office of Fair Trading (OFT), considered several cases in which suppliers attempted to oblige retailers to inform them of any intended price discounts before the imposition of these discounts.

The OFT also considered issues specific to RPM at the launch of a new brand or product. When John Bruce (UK) Limited introduced its MEI brand of automatic slack adjusters (safety devices fitted to the braking system of trucks, trailers and buses) into the UK market to compete with the then market leader, Haldex, it asked distributors to keep retail prices for MEI slack adjusters around 20 to 25 per cent lower than those for Haldex (and stated that deviation from the agreed pricing policy was not allowed and that special deals needed to be controlled 'through marketing so John [Bruce] can be [kept] in the loop on the reasons for the request and whether he wants to agree to it'). John Bruce argued that its conduct could not breach competition law since it was developing competition where none existed. However, in its 2002 decision, the OFT found that John Bruce had infringed the Chapter I prohibition and a fine of 3 per cent of John Bruce's relevant turnover was imposed.

The CMA's Vertical Agreements Block Exemption Order guidance (VABEO Guidance) indicates that RPM agreements may be permissible under section 9(1) of the Competition Act 1998 where they lead to sufficiently substantial efficiencies on the relevant market. The CMA, in the VABEO Guidance, provides as examples of such situations cases where a manufacturer introduces a new product to the market and RPM will induce distributors to better take into account a manufacturer's interests (provided that no less restrictive means of doing so exist) and where fixed resale prices may be necessary to organise a coordinated short-term low-price campaign (of two to six weeks), which will benefit consumers. However, the VABEO Guidance cautions that the burden will be on the parties to the agreement to prove that such efficiencies are brought about by the agreement and that there were no less restrictive ways of bringing about that efficiency.

Law stated - 9 February 2024

Relevant decisions

Have decisions or guidelines relating to resale price maintenance addressed the possible links between such conduct and other forms of restraint?

A number of the higher-profile RPM cases brought by the CMA's predecessor, the OFT, involved additional elements.

In 2003, the OFT identified an element of horizontal collusion among buyers in the ***Replica Football Kits*** case. Also in 2003, the OFT adopted a decision concerning Lladró Comercial SA's agreements, which not only obliged buyers to inform Lladró of any proposed discount prices but also imposed restrictions on buyer advertising.

In 2011, the OFT fined four supermarkets and five dairy processors a total of £49.51 million for coordinating increases in the retail prices of milk and cheese (as explained in the OFT's press release, 'the coordination was achieved by supermarkets indirectly exchanging retail pricing intentions with each other via the dairy processors – A-B-C information exchanges'). Further, the agreements investigated in the context of the OFT's recent ***Hotel Online Booking*** case were found to contain retail rate most-favoured-nation (MFN) clauses in addition to agreements not to discount. The commitments accepted by the European Commission in the e-books case (which started with the OFT in the United Kingdom) also suggest a possible link between resale price restrictions and most-favoured-customer clauses.

There have also been several OFT cases that have combined examination of vertical restraints with an examination of allegations of horizontal collusion. In 2013, the OFT issued infringement decisions against Mercedes-Benz and five of its commercial vehicle dealers concerning the distribution of Mercedes-Benz commercial vehicles. The OFT noted that the 'nature of the infringements vary but all contain at least some element of market sharing, price coordination or the exchange of commercially sensitive information'. Other examples include the 2003 ***Replica Football Kits*** case, where the OFT identified an element of horizontal collusion among buyers, and the 2011 ***Dairy Products*** decision, where the OFT considered that the supermarkets had engaged in indirect exchanges of strategic information via dairy producers.

The VABEO Guidance also notes that:

> [d]irect or indirect means of achieving RPM can be made more effective when combined with measures aimed at identifying price-cutting distributors, such as the implementation of a price monitoring system, or the obligation on retailers to report other members of the distribution network that deviate from the standard price level.

The VABEO Guidance acknowledges that price monitoring software is often used for legitimate purposes in e-commerce, but also that it can be used as a method of applying, or enforcing, RPM.

Law stated - 9 February 2024

Relevant decisions

Have decisions or guidelines relating to resale price maintenance addressed the efficiencies that can arguably arise out of such restrictions?

Yes. In its 2014 decision to accept commitments to close its Hotel Online Booking investigation without reaching a final decision, The CMA's predecessor, the OFT, acknowledged that, in the specific factual context of that case, there were efficiencies in enabling hotels to have control over the headline rate for their hotel rooms, and so to restrict discounting by online travel agents.

However, the OFT gave these arguments less credence in its 2004 decision in ***UOP Limited/UKae Limited/Thermoseal Supplies Ltd/Double Quick Supplyline Ltd/Double***

Glazing Supplies Ltd, a case involving an arrangement to fix the minimum resale price for desiccant (used in double glazing). In that case, the parties raised arguments regarding the claimed efficiencies of RPM but the OFT stated that it was 'extremely hard, if not impossible' to see how the fixing of prices for UOP's desiccant would contribute to an improvement in the production of goods, or allow consumers a fair share of the resulting benefit because consumers were deprived of discounts and obliged to pay higher prices.

The VABEO Guidance indicates that RPM agreements may be permissible under section 9(1) of the Competition Act 1998 where they lead to sufficiently substantial efficiencies on the relevant market. The CMA, in the VABEO Guidance, provides as examples of such situations cases where a manufacturer introduces a new product to the market and RPM will induce distributors to better take into account a manufacturer's interests (provided that no less restrictive means of doing so exist) and where fixed resale prices may be necessary to organise a coordinated short-term low-price campaign (of two to six weeks), which will benefit consumers. However, the burden will be on the parties to the agreement to prove that such efficiencies are bought about by the agreement and that there were no less restrictive ways of bringing about that efficiency.

Law stated - 9 February 2024

Relevant decisions

Explain how a buyer agreeing to set its retail price for supplier A's products by reference to its retail price for supplier B's equivalent products is assessed.

Any agreement amounting to RPM will almost always be deemed to infringe the Chapter I prohibition, will fall outside the safe harbours of the De Minimis Notice and the VABEO and will generally be considered unlikely to qualify for exemption under section 9 of the CA 1998. In 2010, the CMA's predecessor, the OFT, fined 10 retailers and two tobacco manufacturers a total of £225 million for fixing retail prices across competing brands and competing retail outlets. The arrangements in question were alleged to involve setting the retail price for one supplier's brand of cigarettes by reference to the price for another supplier's competing brand of cigarettes. The Competition Appeal Tribunal (CAT) quashed the OFT's decision concerning the five retailers and one manufacturer who had appealed the findings to the CAT after hearing evidence from multiple witnesses whose evidence did not support the OFT's findings of fact. The CAT did not decide on whether the agreements or restraints as the OFT had understood them would have infringed the Chapter I prohibition.

Law stated - 9 February 2024

Suppliers

Explain how a supplier warranting to the buyer that it will supply the contract products on the terms applied to the supplier's most-favoured customer, or that it will not supply the contract products on more favourable terms to other buyers, is assessed.

MFN, or parity, obligations imposed outside the retail context may benefit from the safe harbour set out in the VABEO provided the conditions of the VABEO are met.

The VABEO Guidance specifically states that:

> parity obligations (wide or narrow) imposed by intermediaries relating to the conditions under which products are offered to undertakings that are not end users, ie in upstream business-to-business markets, benefit from the block exemption provided by the VABEO where both the supplier's and the buyer's market shares do not exceed 30%.

Where the conditions of the VABEO are not met, and where the parity obligations relate to products or services that are not themselves inputs, the VABEO guidance indicates that it is 'necessary to consider that, in principle, this type of obligation is capable of disincentivising competition between intermediaries in a similar way as retail parity obligations. It is also necessary to take into account the conditions of competition downstream, that is, between the undertakings that buy the intermediated products'. On the other hand, if the parity obligations relating to conditions under which products purchased as inputs by buyers do not directly affect downstream competition, the VABEO guidance notes that the relative size and market power of the parties agreeing the parity obligation, the share of the market covered by similar obligations and the cost of the input relative to buyers' total costs are relevant for the assessment of these obligations.

Law stated - 9 February 2024

Suppliers

Explain how a supplier agreeing to sell a product via internet platform A at the same price as it sells the product via internet platform B is assessed.

The VABEO states that wide retail parity obligations (ie, restrictions ensuring that the terms on which a supplier's goods or services are offered to end users on a sale channel are no worse than those offered by the supplier on any of its indirect sales channel) are considered to be hardcore restrictions of competition.

In 2013, the CMA's predecessor, the OFT, closed its investigation into Amazon's price-parity policy (which restricted sellers from offering lower prices on other online sales channels, including their own websites) following Amazon's decision to end this policy in the European Union. The OFT was concerned that 'such policies may raise online platform fees, curtail the entry of potential entrants, and directly affect the prices that sellers set on platforms (including their own websites), resulting in higher prices to consumers.'

Similarly, in November 2016, the CMA opened an investigation into alleged exclusionary and restrictive pricing practices, including MFNs in respect of online sales, in the supply by ATG Media of auction services. The CMA formally accepted commitments in June 2017, under which ATG Media agreed to end its MFNs in respect of online sales, as well as exclusive purchasing obligations and prohibitions on customers' promotion of rival platforms, for five years.

The findings in the private motor insurance market investigation also included concerns relating to MFNs included in agreements between insurers and price comparison websites. In September 2017, the CMA opened an investigation into the use of MFNs by price comparison websites in the home insurance sector, and in November 2020 fined ComparetheMarket (CTM) a total of £17.9 million in connection with the investigation. However, on 8 August 2022, the CAT upheld CTM's appeal setting aside this decision and the fine. As part of its findings, the CAT found that the CMA had not established that the wide retail MFNs imposed by CTM had produced anticompetitive effects (the CAT also noted that the CMA did not find that the MFNs at issue in that case were not anticompetitive 'by object').

Although the CAT judgment appears to be inconsistent with the proposition in the VABEO (and the VABEO Guidance) that wide retail parity obligations are considered to be hardcore restrictions of competition, if parties wish to use rely on the safe harbour in the VABEO their agreements must not contain wide retail parity obligations.

Law stated - 9 February 2024

Suppliers

Explain how a supplier preventing a buyer from advertising its products for sale below a certain price (but allowing that buyer subsequently to offer discounts to its customers) is assessed.

The VABEO Guidance states that imposition of minimum advertised prices (MAPs), which prohibit the distributor from advertising below a level set by the supplier, will be treated by the CMA as an indirect means of applying RPM for the purpose of applying article 8(2)(a) of the VABEO.

Although, in principle, the distributor is able to sell below the advertised price, MAPs 'disincentivise the distributor from setting a lower sale price by restricting its ability to inform potential customers about available discounts', thereby removing a key parameter of competition between retailers.

In its March 2014 decision ***Mobility Scooters II,*** the CMA's predecessor, the OFT, found that an arrangement by which a supplier prevented a buyer from advertising its products online for sale below a certain minimum price constituted a by-object restriction of competition for purposes of the Chapter I prohibition. The OFT arrived at this conclusion although the buyers in question remained free to discount away from the minimum prices and no equivalent prohibition applied to advertising in brick-and-mortar shops or local print and broadcast media or both. In May 2016, the CMA similarly imposed fines concerning Commercial Refrigeration Products, where a supplier's MAP applied to both sales online and sales from brick-and-mortar shops. The CMA's decision in Commercial Refrigeration Products sets out the CMA's view that MAPs can be equivalent to, and sanctioned as, RPM.

Law stated - 9 February 2024

Suppliers

Explain how a buyer’s warranting to the supplier that it will purchase the contract products on terms applied to the buyer’s most-favoured supplier,

or that it will not purchase the contract products on more favourable terms from other suppliers, is assessed.

As with most-favoured-customer clauses, it is not clear whether such a restriction will infringe the Chapter I prohibition. However, the CMA is likely to follow the European Commission, which has suggested that where it considers market power to be concentrated among relatively few suppliers, and where the buyer warrants to the supplier that, if it pays one of the supplier's competitors more for the same product, it will pay that same higher price to the supplier, then these arrangements may increase prices and may increase the risk of price coordination.

The VABEO states that wide retail parity obligations (ie, restrictions ensuring that the terms on which a supplier's goods or services are offered to end users on a sales channel are no worse than those offered by the supplier on any of its indirect sales channels) are considered to be hardcore restrictions of competition.

Law stated - 9 February 2024

Restrictions on territory

How is restricting the territory into which a buyer may resell contract products assessed? In what circumstances may a supplier require a buyer of its products not to resell the products in certain territories?

As territorial restrictions can lead to market partitioning, the CMA's predecessor, the OFT, had tended to see these restraints as hardcore restraints that would almost always infringe the Chapter I prohibition, would fall outside the safe harbours of the De Minimis Notice and the VABEO, and would seldom qualify for exemption under section 9 of the CA 1998.

There is one important exception to this. Where a supplier sets up a network of exclusive distributorships and prevents each buyer from selling actively into a territory granted exclusively to another buyer (or reserved to the supplier itself), it is generally accepted that this may lead to an increase in inter-brand competition. These arrangements will fall within the safe harbour provided the other conditions of the VABEO are met (including supplier and buyer market share less than 30 per cent), provided the restrictions relate only to active sales (ie, they do not cover passive or unsolicited sales) and provided the restrictions cover only active sales into territories granted on an exclusive basis to another buyer (or to the supplier itself).

Where restrictions on active sales into territories reserved exclusively to another buyer (or the supplier itself) are imposed by suppliers having a market share more than 30 per cent, these arrangements may still qualify for individual exemption under section 9 of the CA 1998.

In October 2008, the OFT published an opinion in the long-running ***Newspaper and Magazine Distribution*** case, which dealt with the assessment of territorial sales restrictions under section 9 of the CA 1998. The 2008 opinion outlines that while preventing passive sales by wholesalers of newspapers and magazines is likely to restrict competition on the retail level (because retailers are not able to switch wholesalers), a ban on passive sales may at least concerning newspapers, make more efficient the competition between wholesalers competing for the right to supply in a particular geographic market. The OFT considered that this would enable newspaper publishers to reduce their costs and would be likely to

lead to reduced prices to end consumers. Another factor considered by the OFT was that absolute territorial protection 'may support the wide availability of newspapers, in particular by enabling publishers to include in their contracts with wholesalers an obligation to supply all retailers (within reason) in a territory'.

The VABEO and VAEBO Guidance include clarifications to give businesses more flexibility in order to design their distribution systems according to their needs. It suggests permitting the combination of exclusive and selective distribution in the same or different territories (if the distribution systems are established at different levels of the distribution chain), allowing 'shared exclusivity' in a territory or for a customer group and permitting greater protection for members of selective distribution systems against sales from outside the territory to unauthorised distributors inside that territory.

Law stated - 9 February 2024

Restrictions on territory

Have decisions or guidance on vertical restraints dealt in any way with restrictions on the territory into which a buyer selling via the internet may resell contract products?

Restrictions on passive and active sales that have as their object the prevention of buyers or their customers from effectively using the internet for the purposes of reselling products online, will typically be considered as hardcore restraints of competition that will almost always fall outside the safe harbours of the De Minimis Notice and the VABEO.

The VABEO Guidance refers to a judgment of the CAT, which held that a ban on selling on the internet (a form of territorial and customer restriction) amounted to a restriction of competition by object.

Law stated - 9 February 2024

Restrictions on customers

Explain how restricting the customers to whom a buyer may resell contract products is assessed. In what circumstances may a supplier require a buyer not to resell products to certain resellers or end consumers?

Customer restrictions give rise to issues similar to those arising in territorial restrictions and will tend to be viewed by the CMA as hardcore restrictions. As such, limitations on a buyer's sales to particular classes of customer will almost always infringe the Chapter I prohibition, will fall outside the safe harbours of the De Minimis Notice and the VABEO, and will seldom qualify for exemption under section 9 of the CA 1998. However, there are certain key exceptions to this rule, namely:

- where the restriction applies only to active sales to customers of a class granted exclusively to another buyer (or reserved to the supplier itself), the arrangement may fall within the safe harbour created by the VABEO, provided the applicable conditions are met (including supplier and buyer market share less than 30 per cent);

- restrictions on a buyer's ability to sell components, supplied for incorporation, to customers who would use them to manufacture the same type of products as those produced by the supplier may also fall within the safe harbour created by the VABEO;
- restrictions on a wholesaler selling directly to end users may also fall within the safe harbour created by the VABEO; and
- distributors appointed within a selective distribution system can be restricted from selling to unauthorised distributors.

Law stated - 9 February 2024

Restrictions on use

How is restricting the uses to which a buyer puts the contract products assessed?

Objectively justifiable restrictions on the uses to which a buyer or subsequent buyer puts the contract goods are permissible and will not fall within the Chapter I prohibition (eg, restrictions on the sale of medicines to children). However, for these restrictions to be objectively justifiable, the supplier would likely have to impose the same restriction on all buyers and adhere to these restrictions itself.

Law stated - 9 February 2024

Restrictions on online sales

How is restricting the buyer's ability to generate or effect sales via the internet assessed?

The VABEO Guidance states that:

> Vertical agreements that have as their object preventing the buyers or their customers from effectively using the internet for the purposes of selling their products online, operate to restrict the geographical areas into which or the customer groups to whom the buyers or their customers may sell the contract goods or services, because they restrict sales to customers located outside the physical trading area of the buyers or their customers.

Therefore, restrictions on the use of the internet for the purpose of selling products or services online may amount to hardcore restrictions under article 8 (2)(b)-(d) VABEO. Furthermore, a restriction that has a significant impact on the volume of online sales or acts as a de facto ban on such sales will be considered to have as its object the prevention of using the internet effectively for the sale of goods or services and will therefore amount to a hardcore restriction of active or passive sales under article 8(2)(b) VABEO.

In August 2013, the CMA's predecessor, the OFT, issued an infringement decision in its ***Mobility Scooters I*** case against Roma Medical Aids Limited ***(Roma)*** and certain of its retailers. The OFT found that Roma entered into arrangements with seven UK-wide online

retailers that prevented them from selling Roma-branded mobility scooters online, and from advertising their prices for Roma-branded mobility scooters online. The OFT considered that these practices limited consumers' choice and obstructed their ability to compare prices and get value for money. No fines were imposed in this case as Roma and each of the seven retailers involved benefited from immunity under the small agreement exemption. The OFT expressed similar reasoning and reached the same result in ***Mobility Scooters II.***

More recently, the CMA issued an infringement decision against Ping Europe in relation to its online sales ban in respect of its golf clubs. The CMA found that the ban at issue, which prohibited online sales but permitted online advertising, limited the ability of customers to make use of price comparison websites and restricted passive sales to customers. In September 2018, an appeal by Ping Europe was dismissed by the CAT, subject to a reduction in the fine. In January 2020, the Court of Appeal dismissed a subsequent appeal by Ping against the CAT's judgment.

Law stated - 9 February 2024

Restrictions on online sales

Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel? In particular, have there been any developments in relation to 'platform bans'?

The VABEO Guidance notes that:

> [r]estrictions relating to the use of particular online sales channels, such as online marketplaces, or the imposition of quality standards for online sales can generally benefit from the exemption provided by the VABEO, irrespective of the type of distribution system, provided that they do not indirectly have the object of preventing the effective use of the internet by the buyer to sell the contract goods or services to particular geographical areas or customers.

Wide retail parity obligations that specify that a product cannot be offered on better terms on any other platform are considered hardcore restrictions under the VABEO. This extends to online retail platforms. Narrow retail parity obligations (those which specify that a product or service may not be offered on better terms on a particular platform) are, however, able to benefit from the safe harbour of the VABEO.

Accordingly, restrictions on the use of platforms, especially specific platforms or a large number of platforms, for the purpose of selling products or services online may amount to hardcore restrictions under article 8 (2)(b)-(d) VABEO. Furthermore, a restriction that has a significant impact on the volume of online sales or acts as a de facto ban on such sales will be considered to have as its object the prevention of using the internet effectively for the sale of goods or services and will therefore amount to a hardcore restriction of active or passive sales under article 8(2)(b) VABEO.

In its January 2019 judgment in ***Gascoigne Halman v Agents' Mutual,*** the Court of Appeal affirmed a CAT decision, holding that online marketplace rules, which prohibited sellers who

had purchased access to the marketplace at issue from listing their products on more than one other online marketplace and promoting any other online marketplace, did not constitute restrictions of competition by object (albeit noting that the lack of market power of the Agents' Mutual online platform was relevant to finding that there was no by object infringement).

Law stated - 9 February 2024

Selective distribution systems

Briefly explain how agreements establishing 'selective' distribution systems are assessed. Must the criteria for selection be published?

Following the Court of Justice of the European Union (CJEU) judgment in ***Metro v Commission,*** and under the obligation imposed on the CMA and UK courts under section 60A of the CA 1998, selective distribution systems will fall outside the Chapter I prohibition where distributors are selected on objective criteria of a purely qualitative nature. To fall outside the Chapter I prohibition:

- the contract products must be of a kind necessitating selective distribution (eg, technically complex products where after-sales service is of paramount importance);
- the criteria by which buyers are selected must be objective, laid down uniformly for all potential buyers and not applied in a discriminatory manner (though there is no necessity that the selection criteria be published); and
- the restrictions imposed must not go beyond that which is necessary to protect the quality and image of the product in question.

Where selective distribution systems do not satisfy the above criteria, they will fall within the Chapter I prohibition but may benefit from safe-harbour protection (irrespective of the nature of the goods or any quantitative limits) under the De Minimis Notice or VABEO, provided they do not incorporate certain further restraints. In particular, these systems may benefit from exemption under the VABEO, provided that:

- resale prices are not fixed;
- there are no restrictions on active or passive sales to end users; and
- there are no restrictions on cross-supplies among members of the system.

Separately, where selective distribution systems incorporate obligations on members not to stock the products of an identified competitor of the supplier, this particular obligation itself may be unenforceable. However, this last restriction should not affect the possibility of the system overall benefiting from the safe harbour.

Certain restrictions frequently incorporated into selective distribution systems are expressly permitted, including the restriction of active or passive sales to non-members of the network within a territory reserved by the supplier to operate that selective distribution system (ie, where the system is currently operated or where the supplier does not yet sell the contract products).

The VABEO and associated VABEO Guidance permit the combination of exclusive and selective distribution in the same or different territories, and permit greater protection for members of selective distribution systems against sales from outside the territory to unauthorised distributors inside that territory.

Law stated - 9 February 2024

Selective distribution systems

Are selective distribution systems more likely to be lawful where they relate to certain types of product? If so, which types of product and why?

According to the CJEU's judgment in ***Metro v Commission,*** and under the obligation imposed on the CMA and UK courts under section 60A of the CA 1998, in purely qualitative selective distribution systems, restrictions may fall outside the Chapter I prohibition, inter alia, where the contract products necessitate after-sales service.

Also, the VABEO Guidance provides that the nature of the contract products may be relevant to the assessment of efficiencies under section 9(1) of the Competition Act 1998 to be considered where selective distribution systems fall within the prohibition under the Chapter I prohibition.

Additionally, the CMA's predecessor, the OFT, recognised in the ***Newspaper and Magazine Distribution*** case (Opinion of the Office of Fair Trading – guidance to facilitate self-assessment under the CA 1998) the advantages of selective distribution concerning newspapers, since newspapers can be sold only during a limited period (ie, the newspapers must be delivered and sold on the day of production, with most demand for newspapers expiring by midday).

Law stated - 9 February 2024

Selective distribution systems

In selective distribution systems, what kinds of restrictions on internet sales by approved distributors are permitted and in what circumstances? To what extent must internet sales criteria mirror offline sales criteria?

The VABEO Guidance states that:

> the supplier may impose requirements on the buyer relating to the manner in which the contract goods or services are to be sold online. Restrictions relating to the use of particular online sales channels, such as online marketplaces, or the imposition of quality standards for online sales can generally benefit from the exemption provided by the VABEO, irrespective of the type of distribution system, provided that they do not indirectly have the object of preventing the effective use of the internet by the buyer to sell the contract goods or services to particular geographical areas or customers. Online sales restrictions generally do not have such an object where the buyer remains free to operate its own online store and to advertise online. In such cases, the buyer

is not prevented from making effective use of the internet to sell the contract goods or services.

Furthermore, dual pricing – ie, where the buyer is required to pay a different wholesale price for products sold online than for products sold offline – may benefit from the exemption in the VABEO provided that it does not have as its object the restriction of sales to a particular customer group or geographic area. Online advertising restrictions may also benefit from the exemption in the VABEO provided that they do not have the object of preventing the use of an entire advertising channel by the buyer.

Law stated - 9 February 2024

Selective distribution systems

Has the authority taken any decisions in relation to actions by suppliers to enforce the terms of selective distribution agreements where such actions are aimed at preventing sales by unauthorised buyers or sales by authorised buyers in an unauthorised manner?

In a 2003 decision concerning the selective distribution agreements of Lladró Comercial SA, the CMA's predecessor, the OFT, noted, concerning Lladró's reservation of the right to repurchase goods that a retailer has proposed to sell below the recommended price level, that: '[w]hether or not Lladró Comercial has thus far exercised that ongoing contractual right is immaterial to the . . . finding of an infringement'.

In *Football Replica Kits,* the OFT did not object to Umbro's selective distribution system in itself, even though it included refusing or failing to supply major UK supermarkets. However, it did take the view that this facilitated the price-fixing arrangements, which were prohibited, and concerning which fines were imposed.

In 2022, the CMA fined Dar Lighting £1.5 million for imposing a minimum sales price and restricting the ability of its resellers to offer discounts online. The CMA noted in its decision that Dar Lighting moved to a selective distribution model for some of its brands from 2017 having previously operated an open distribution model. The CMA recognises the legitimacy of selective distribution agreements, but noted that Dar Lighting's implementation and enforcement of its selective distribution system 'supported an environment that seemed inimical to discounting in the minds of Resellers and so engendered a perception amongst its Resellers that the SDAs [selective distribution agreements] and Brand Guidelines allowed Dar to prevent discounting'.

Law stated - 9 February 2024

Selective distribution systems

Does the relevant authority take into account the possible cumulative restrictive effects of multiple selective distribution systems operating in the same market?

Yes. In the VABEO Guidance, the CMA notes that whether a selective distribution system can benefit from the block exemption set out in the VABEO will, in part, depend on the effect of cumulative effect of multiple selective distribution systems, which can, in some cases, amount to a hardcore restriction (such as through segmenting the market by territory).

Law stated - 9 February 2024

Selective distribution systems

Has the authority taken decisions (or is there guidance) concerning distribution arrangements that combine selective distribution with restrictions on the territory into which approved buyers may resell the contract products?

The following are identified in the VABEO Guidance as hardcore restrictions of competition (ie, restrictions that, in the United Kingdom, will fall within the Chapter I prohibition, will not benefit from the safe harbour provided by the VABEO and are unlikely to benefit from an individual exemption):

- restricting approved buyers at the retail level of trade from selling actively or passively to end users in other territories;
- restricting cross-supplies between approved buyers in different territories in which a selective distribution system is operated; and
- restricting the territory into which approved buyers at levels other than the retail level in a selective distribution system may passively sell the contract products.

Law stated - 9 February 2024

Other restrictions

How is restricting the buyer's ability to obtain the supplier's products from alternative sources assessed?

Such an arrangement may raise concerns regarding market partitioning. Where the supplier insists that a given buyer must buy all of its requirements of the supplier's products from, for example, the supplier's local subsidiary, this may prevent the ordinary arbitraging that would otherwise occur. On its own, however, this restriction, known as exclusive purchasing, will only infringe the Chapter I prohibition where the parties have a significant market share and the restrictions are of long duration. Further, where the supplier and the buyer each have a market share of 30 per cent or less, the restriction will benefit from the safe harbour created by the VABEO, regardless of duration.

Law stated - 9 February 2024

Other restrictions

How is restricting the buyer's ability to sell non-competing products that the supplier deems 'inappropriate' assessed?

Neither the CMA nor its immediate predecessors has looked at this issue in detail. However, in a 1992 investigation by the Monopolies and Mergers Commission (MMC) (the predecessor to the Competition Commission, itself a predecessor to the CMA) concerning the sale of fine-fragrance products in supermarkets and low-cost retailers, the MMC suggested amendments to how the products were distributed, but recognised that suppliers should be able to control the distribution of their products 'in order to protect brand images which consumers evidently value'.

Law stated - 9 February 2024

Other restrictions

Explain how restricting the buyer's ability to stock products competing with those supplied by the supplier under the agreement is assessed.

An obligation on the buyer not to manufacture or stock products competing with the contract products (non-compete obligation) may infringe the Chapter I prohibition. The assessment of such a clause will depend on its exact effects, which will be determined by reference, inter alia, to the duration of the restraint, the market position of the parties and the ease (or difficulty) of market entry for other potential suppliers.

Providing that non-compete clauses do not have a duration exceeding five years (which, under the VABEO Guidance, includes agreements that are tacitly renewable beyond a period of five years), they may benefit from the safe harbour under the VABEO if the other criteria for its application are met. If the criteria for the application of the VABEO are not met, non-compete clauses may, nevertheless, fall outside the scope of the Chapter I prohibition or may satisfy the conditions for exemption under section 9 of the CA 1998, depending on the market positions of the parties, the extent and duration of the clause, barriers to entry and the level of countervailing buyer power.

The CMA's predecessor, the OFT, considered long-term exclusivity provisions in several cases, including its 2011 Outdoor Advertising market study and related investigation into street furniture contracts concluded by advertising agencies Clear Channel UK and JCDecaux. The OFT closed its Clear Channel UK and JCDecaux investigation in May 2012 when the parties agreed voluntarily not to enforce certain exclusivity clauses, first-refusal clauses and tacit-renewal clauses in their long-term contracts with local authorities. Similarly, in October 2017, the CMA accepted commitments from the Showmen's Guild of Great Britain, under which it would amend its membership rules so as not to prohibit members from purchasing a licence to operate an amusement from a competing non-member. In January 2018, the Showmen's Guild of Great Britain approved these amendments to its rules.

Law stated - 9 February 2024

Other restrictions

How is requiring the buyer to purchase from the supplier a certain amount or minimum percentage of the contract products or a full range of the supplier's products assessed?

The CMA considers these clauses to be akin to non-compete clauses, effectively restricting the ability of the buyer to stock products competing with the contract products. They are, therefore, subject to a similar antitrust assessment. In particular, the VABEO Guidance identifies as equivalent to a non-compete obligation, a requirement to purchase minimum volumes amounting to substantially all of the buyer's requirements (quantity forcing).

Law stated - 9 February 2024

Other restrictions

Explain how restricting the supplier’s ability to supply to other buyers is assessed.

In an exclusive distribution network, as a corollary of limiting the buyer's ability actively to sell the contract products into other exclusively allocated territories, the supplier often agrees:

- not to supply the products in question directly itself; and
- not to sell the products in question to other buyers for resale in the assigned territory.

The VABEO Guidance does not deal separately with the restrictions imposed on the supplier in this kind of arrangement. However, they do acknowledge that the restrictions on the supplier and the buyer usually go hand in hand. These systems should therefore be assessed under the framework regarding the assessment of territorial resale restrictions imposed on buyers.

Law stated - 9 February 2024

Other restrictions

Explain how restricting the supplier’s ability to sell directly to end-consumers is assessed.

The VABEO Guidance does not deal in much detail with the restrictions imposed on the suppliers. However, a restriction on a component supplier from selling components as spare parts to end users or to repairers that are not entrusted by the buyer with the repair or servicing of the buyer's products is considered a hardcore restriction of competition. As such, these restrictions will almost always fall within the Chapter I prohibition, will fall outside the safe harbours of the De Minimis Notice and the VABEO, and will seldom qualify for exemption under section 9 of the CA 1998.

Law stated - 9 February 2024

Other restrictions

Have guidelines or agency decisions in your jurisdiction dealt with the antitrust assessment of restrictions on suppliers other than those covered above? If so, what were the restrictions in question and how were they assessed?

The VABEO Guidance guides exclusive supply, which covers the situation in which a supplier agrees to supply only one buyer for resale or a particular use. The main anticompetitive effect of these arrangements is the potential foreclosure of competing buyers, rather than competing suppliers. As such, the buyer's market share is the most important element in the assessment of these restrictions. In particular, negative effects may arise where the market share of the buyer on the downstream market as well as the upstream purchase market exceeds 30 per cent. However, where the buyer and supplier market shares are less than 30 per cent, and the exclusive supply agreements are shorter than five years, these restrictions will benefit from the safe harbour created by the VABEO.

Parties to a vertical agreement that contains restraints related to environmental sustainability or climate change initiatives should additionally consult the CMA's 2023 Green Agreements Guidance. The Guidance sets out the CMA's approach to the application of competition law to environmental sustainability agreements between competitors or businesses operating at the same level of the supply chain. Of particular note is the CMA's criteria for exemptions from competition law for climate change agreements. The Green Agreements Guidance indicates that the 'approach to the application of the exemption criteria also applies to vertical agreements that contribute to combating climate change, in line with the UK's binding climate change targets under domestic or international law, and this Guidance constitutes a subsequent publication for the purpose of footnote 115 of the Guidance on Vertical Agreements'.

Law stated - 9 February 2024

NOTIFICATION

Notifying agreements

Outline any formal procedure for notifying agreements containing vertical restraints to the authority responsible for antitrust enforcement.

In line with the modernisation reforms effected by the European Union in May 2004, the United Kingdom abolished the notification system that previously existed under the Competition Act 1998 (CA 1998). Subject to the making of requests for guidance in novel cases (which raise novel or unresolved questions about the application of section 2(1) of the CA 1998 (the Chapter I prohibition) and where the Competition and Markets Authority (CMA) considers there is an interest in issuing clarification for the benefit of a wider audience), a notification of a vertical restraint is not possible.

Law stated - 9 February 2024

Authority guidance

If there is no formal procedure for notification, is it possible to obtain guidance from the authority responsible for antitrust enforcement or a declaratory judgment from a court as to the assessment of a particular agreement in certain circumstances?

Generally, the CMA considers that parties are well placed to analyse the effect of their own conduct. Parties can, however, obtain guidance from the CMA in the form of a written opinion

where a case raises novel or unresolved questions about the application of the Chapter I prohibition and where the CMA considers there is an interest in issuing clarification for the benefit of a wider audience. However, the CMA's predecessor, the Office of Fair Trading, only issued one such opinion. In limited circumstances, the CMA will also consider giving non-binding informal guidance on an ad hoc basis. The CMA stated in 2023 that it has an open-door policy for informal guidance on proposed agreements between businesses that promote environmental sustainability.

Law stated - 9 February 2024

ENFORCEMENT

Complaints procedure for private parties

Is there a procedure whereby private parties can complain to the authority responsible for antitrust enforcement about alleged unlawful vertical restraints?

Yes. The Competition and Markets Authority (CMA) has published a notification form that parties can use to lodge complaints. Receipt of complaints will be acknowledged but the CMA preserves its discretion to act – or not act – on receipt of a complaint.

Law stated - 9 February 2024

Regulatory enforcement

How frequently is antitrust law applied to vertical restraints by the authority responsible for antitrust enforcement? What are the main enforcement priorities regarding vertical restraints?

The CMA's recent enforcement decisions imposing fines in vertical restraints cases all related to resale price maintenance (RPM), largely in an online context.

Law stated - 9 February 2024

Regulatory enforcement

What are the consequences of an infringement of antitrust law for the validity or enforceability of a contract containing prohibited vertical restraints?

Under section 2(4) of the Competition Act 1998 (CA 1998), any agreement that falls within section 2(1) of the CA 1998 (the Chapter I prohibition) and does not satisfy the conditions for exemption under section 9(1) of the CA 1998 (or does not benefit from a safe harbour under the De Minimis Notice, or the Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 (SI 2022 No. 516) will be void and unenforceable. However, where it is possible to sever the offending provisions of the contract from the rest of its terms, the latter will remain valid and enforceable. As a matter of English contract law, severance of offending provisions is possible unless, after the necessary excisions have been made, the contract 'would be so

changed in its character as not to be the sort of contract that the parties entered into at all' *(Chemidus Wavin Ltd v Société pour la Transformation*).Such an assessment will depend on the exact terms and nature of the agreement in question.

Law stated - 9 February 2024

Regulatory enforcement

May the authority responsible for antitrust enforcement directly impose penalties or must it petition another entity? What sanctions and remedies can the authorities impose? What notable sanctions or remedies have been imposed? Can any trends be identified in this regard?

The CMA can apply the following enforcement measures itself:

- give directions to bring an infringement to an end;
- give interim measures directions during an investigation;
- accept binding commitments offered to it; and
- impose financial penalties on undertakings.

In the event of non-compliance, the CMA can bring an application before the courts resulting in a court order against the parties to fulfil their obligations. Where any company fails to fulfil its obligations under a court order, its management may be found to be in contempt of court, the penalties for which, in the United Kingdom, include imprisonment. Under sections 9A to 9E of the Company Directors Disqualification Act 1986, the CMA also has the power to apply to the court for a disqualification order to be made against the director at a company that has breached competition law or to accept a disqualification undertaking from such a director, for a maximum of 15 years. The CMA first exercised this power in December 2016 and has been exercising it increasingly in recent years.

Where the CMA has taken a decision finding an infringement of the Chapter I prohibition, it may impose fines of up to 10 per cent of the infringing undertaking's worldwide revenues for the preceding year. In practice, however, fines in vertical restraints cases have tended to be well below the 10 per cent maximum. In August 2019, the CMA imposed a fine of £3.7 million on Casio Electronics Co Ltd for RPM, and, in 2020, fines of £4.5 million on Fender and £4 million on Roland UK for online RPM. In 2022, the CMA imposed a fine of £1.5 million on DAR Lighting Limited, which included a 35 per cent increase as part of the fine calculation because Dar did not take adequate steps to comply with two 'warning letters' that the CMA sent before opening its investigation.

The CMA's remedies can require positive action, such as informing third parties that an infringement has been brought to an end and reporting back periodically to the CMA on certain matters (eg, prices charged). Directions may in some cases require an undertaking to make structural changes to its business. In its 2006 decision in ***Independent Schools,*** the settlement included the infringing schools paying a nominal fine and contribute £3 million to an educational trust for the benefit of those pupils who had attended the schools during the period of infringement.

Law stated - 9 February 2024

Investigative powers of the authority

What investigative powers does the authority responsible for antitrust enforcement have when enforcing the prohibition of vertical restraints?

The CMA's investigation powers are set out in sections 25 to 30 of the CA 1998. In outline, where the CMA has reasonable grounds for suspecting an infringement of the Chapter I prohibition, it may by written notice require any person to provide specific documents or information of more general relevance to the investigation. The CMA may also conduct surprise on-site investigations, requiring the production of any relevant documents and oral explanations of these documents.

Concerning vertical agreements not involving allegations of resale price-fixing, the CMA is more likely to investigate a case through written notice.

In exercising these powers, the CMA must recognise legal professional privilege and the privilege against self-incrimination under the European Convention on Human Rights.

The proposed changes in the Digital Markets Competition and Consumer Bill would also bolster the CMA's investigation powers, including establishing a specific duty to preserve documents relevant to investigations and adding to the CMA's powers to request information or documents from entities outside the United Kingdom.

Law stated - 9 February 2024

Private enforcement

To what extent is private enforcement possible? Can non-parties to agreements containing vertical restraints obtain declaratory judgments or injunctions and bring damages claims? Can the parties to agreements themselves bring damages claims? What remedies are available? How long should a company expect a private enforcement action to take?

Private actions for damages for breaches of the Chapter I prohibition may be brought in the High Court or the specialist competition court, the Competition Appeal Tribunal (CAT), regardless of whether an infringement decision has been reached by the CMA or another sectoral regulator. Several actions have been brought including the ground-breaking case of ***Courage v Crehan*** concerning which, on reference, the Court of Justice of the European Union confirmed that a party to an agreement infringing article 101 of the Treaty on the Functioning of the European Union must be able to bring an action for damages if, as a result of its weak bargaining position, it cannot be said to be responsible for the infringement. Also, non-parties to agreements can challenge their validity directly before the courts (see, eg, ***Football Association Premier League Ltd & Others v LCD Publishing Limited***).Though relatively few cases have proceeded to final awards of damages, many private damages actions brought in the United Kingdom have been settled out of court.

Following the December 2020 judgment of the Supreme Court in ***Merrick v Mastercard,*** the number of private damages cases in the United Kingdom has risen, owing to the interpretation by the Supreme Court of the requirements for certifying a 'class' of claimants for purposes of the United Kingdom's opt-out collective redress scheme under the Consumer Rights Act 2015.

Outside the opt-out collective redress scheme, the Consumer Rights Act 2015 also created a fast-track procedure for more straightforward cases brought by individuals and small and medium-sized entities before the CAT. The second of these cases before the CAT, brought in February 2016 by a supplier of certain lands to Tesco, concerned a restrictive agreement against the supplier in respect of its use of retained lands, including a prohibition on sales to the buyer's competitors.

In March 2017, the United Kingdom formally implemented the EU Damages Directive through the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017, which amended the rules on limitation periods, disclosure, and the passing-on of overcharges to indirect purchasers.

In 2023, the Competition Appeal Tribunal received five separate applications from Elisabetta Sacallis as class representative to commence collective proceedings against several musical instruments manufacturers where each proceeding combines a mixture of stand-alone claims for damages and follow-on damages in relation to CMA settlement decisions related to RPM. Each claim relies on findings of fact and evidence cited in each relevant CMA decision.

(For more detail on private enforcement more generally, see Lexology Panoramic: Private Antitrust Litigation.)

Law stated - 9 February 2024

OTHER ISSUES

Other issues

Is there any unique point relating to the assessment of vertical restraints in your jurisdiction that is not covered above?

Although the United Kingdom's new vertical regime remains close to the EU's vertical block exemption regulation (Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practice), there are some differences, notably in relation to retail parity obligations. The EU treats cross-platform retail parity obligations as excluded restrictions under article 5 of Commission Regulation (EU) No. 2022/720 (the EU Vertical Block Exemption Regulation). This means that an individual assessment of the specific obligation may be made, but the rest of the vertical agreement continues to benefit from the block exemption. On the other hand, the United Kingdom treats a wide retail parity obligation (which may be offline or online) as a hardcore restriction under article 8 Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 (SI 2022 No. 516). This means that the benefit of the block exemption may be lost for the entire vertical agreement, rather than for the specific restriction (assuming that restriction can be severed from the rest of the agreement).

Law stated - 9 February 2024

UPDATE AND TRENDS

Recent developments

What were the most significant two or three decisions or developments in this area in the past 12 months?

The most significant development in the past 12 months has been the new Digital Markets, Competition and Consumer Bill, which was introduced into Parliament in April 2023 and will bring significant changes to the current competition regime once enacted. The extraterritorial reach of the Chapter I prohibition will be extended to agreements implemented outside the UK that are likely to have a substantial, immediate and foreseeable effect on trade within the UK (unless the agreement, decision or concerted practice is otherwise exempt). The Competition and Markets Authority's (CMA) investigation powers will be strengthened, including establishing a specific duty to preserve documents relevant to investigations, and there will be a special regime for certain entities active in the digital sector designated as having 'strategic market status'.

Law stated - 9 February 2024

Anticipated developments

Are important decisions, changes to the legislation or other measures that will have an impact on this area expected in the near future? If so, what are they?

The new Digital Markets, Competition and Consumer Bill is expected to come into force in 2024. Once enacted, it will bring several changes to the UK competition law landscape, including stronger investigative and enforcement powers for the Competition and Markets Authority.

The substance of UK competition laws regarding vertical agreements following the United Kingdom's departure from the European Union has largely remained the same to date, but divergence between the substance of EU and UK competition laws may develop in due course.

Law stated - 9 February 2024