NEW VERTICAL BLOCK EXEMPTIONS
FIT FOR A DIGITALISED DECADE

Sarwenaz Kiani of Mayer Brown outlines the new vertical agreement block exemption regimes in the EU and the UK, and their main points of diversion.

The main legal framework in the EU and in the UK governing distribution and supply agreements expired on 31 May 2022. On 10 May 2022, the European Commission (the Commission) adopted the revised framework, Regulation 2022/720/EU on the application of Article 101(3) of the Treaty on the Functioning of the European Union (TFEU) (Article 101(3)) to categories of vertical agreements and concerted practices (the Regulation), together with accompanying guidelines on vertical restraints (the Commission guidelines) (*https://ec.europa.eu/competition-policy/system/files/2022-05/20220510_guidelines_vertical_restraints_art101_TFEU_.pdf*).

In parallel, the UK adopted the Competition Act 1998 Vertical Agreements Block Exemption Order 2022 (*SI 2022/516*) (the Order), which is based on recommendations by the Competition and Markets Authority (CMA). The CMA issued draft guidance on the Order (draft CMA guidance) on 31 March 2022 (*www.gov.uk/government/consultations/draft-vabeo-guidance*). The Regulation and the Order both entered into force on 1 June 2022. They provide a one-year transitional period for agreements that were entered into before 1 June 2022 to be aligned with the new regimes. While the Regulation will apply for 12 years, the Order will apply for six years. The new regimes reflect developments in e-commerce and online platforms (*see box "The path to reform"*).

This article outlines:

- The restrictive agreement prohibitions in the EU and the UK regimes, and individual and block exemptions to these prohibitions.
- The new provisions in relation to online intermediation services and hybrid platforms.
- The expanded guidance on what constitutes genuine agency agreements, which fall outside the scope of the restrictive agreement prohibitions.
- Amendments to the safe harbour for dual distribution agreements.
- The additional flexibility for exclusive and selective distribution systems.
- The new hardcore online restriction in the Regulation and guidance on qualitative online restrictions that benefit from the block exemption.
- The narrowing of the scope of the safe harbour for parity obligations.

RESTRICTIVE AGREEMENT PROHIBITIONS

Vertical agreements are agreements between two parties that are not competing on the same level of manufacture or trade but are active on separate levels; for example, a manufacturer or a wholesaler of branded goods and a retailer of those goods. Article 101(1) of the TFEU (Article 101(1)), and the parallel UK Chapter I prohibition in section 2(1) of the Competition

Act 1998 (1998 Act), prohibit any agreements or concerted practices that, by object or by effect, prevent, restrict or distort competition in the relevant market (together, the restrictive agreement prohibitions).

Individual exemptions

Article 101(3) and section 9(1) of the 1998 Act (section 9(1)) provide individual exemptions from the restrictive agreement prohibitions. In summary, for an agreement to benefit from an individual exemption it must:

- Contribute to clear efficiency benefits.
- Provide a fair share of those benefits to consumers, such as product improvements or cost savings.
- Specify restrictions that do not go beyond what is necessary to enable consumers to gain those benefits.
- Not give companies the opportunity to eliminate competition from a substantial part of the relevant market.

Companies that enter into an agreement with either a supplier or customer must assess whether the agreement includes any competition restrictions and, if so, whether they are exempted, by conducting a self-assessment. They do not need to seek authorisation from the Commission or the CMA, as applicable.

Block exemptions

Where experience has shown that certain restrictions are generally exempted as their negative effect on competition is limited and, in any event, is offset by efficiencies, the Commission and, since Brexit, the UK Parliament, can adopt block exemption regulations (*see feature article "Competition planning for Brexit: racing against time", www.practicallaw.com/w-027-9926*). Block exemption regulations exempt a group of specific agreements and create a safe harbour for any in-scope agreements. If an agreement is within scope of the block exemption, companies do not have to carry out a self-assessment to assess potential efficiencies.

Vertical agreement block exemption

The Regulation and the Order create a safe harbour for agreements between companies that are active on different levels of manufacture and trade with respect to the resale of goods or services; that is, agreements between a supplier of goods and services, and a buyer of goods and services, which may also be a reseller (*see box "Summary of main changes"*).

In order to benefit from the safe harbour:

- The market share of each party must not exceed 30% on their respective relevant market.
- The agreement must not include any hardcore restrictions, as defined and listed in the Regulation or the Order, as applicable (*see box "Key provisions"*).

The relevant market is the relevant market for either the sale (in the case of the supplier) or the purchase (in the case of the buyer) of the contract goods or services. If the relevant market shares are exceeded, the Commission guidelines and the draft CMA guidance provide information on how agreements should be assessed under the relevant provisions.

The path to reform

The previous vertical agreement block exemption regulation, Regulation 330/2010/EU (2010 Regulation), applied from 1 June 2010. At the end of the Brexit transition period, the Competition (Amendment etc) (EU Exit) Regulations 2019 (*SI 2019/93*) preserved the EU block exemptions by amending the existing block exemption adoption provisions in the 1998 Act and enabled the Secretary of State to renew or replace block exemptions, either in lock-step with, or independently of, the EU.

A number of criticisms were levelled at the 2010 Regulation, including that it failed to recognise the rapid increase in e-commerce and that, by favouring unrestricted e-commerce, it undermined the purpose and effectiveness of both exclusive and selective distribution systems, in particular by categorising online sales as passive selling, therefore excluding most internet sales restrictions from the vertical agreement block exemption.

The European Commission (the Commission) began an evaluation review of the 2010 Regulation in October 2018 and published its evaluation on 8 September 2020, concluding that the 2010 Regulation needed clarification in order to provide legal certainty and that it should be amended to reflect new market developments (*https://ec.europa.eu/competition/consultations/2018_vber/staff_working_document.pdf*). On 9 July 2021, the Commission consulted on a revised regulation and draft revised guidelines (*https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3561*). Regulation 2022/720/EU on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices came into force on 1 June 2022.

On 17 June 2021, the Competition and Markets Authority consulted on a proposal to replace the retained 2010 Regulation with the Competition Act 1998 Vertical Agreements Block Exemption Order 2022 (the Order) (*https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/994552/VBER_recommendation_2021_consultation_with_annexes_170621_FINAL.pdf*). The Order was laid before Parliament on 9 May 2022 and came into force on 1 June 2022.

OIS AND HYBRID PLATFORMS

Under the Regulation and the Order, business-to-business or business-to-consumer platforms and marketplaces, among others, are defined as online intermediation services (OIS) and the legal assessment of these OIS is further clarified (*Article 1(1)e, the Regulation; Article 2(1), the Order*). The previous regime did not define OIS and did not establish any specific criteria for their assessment. Therefore, at least from a legal point of view, the new regimes bring significant change; however, the extent to which the reforms will lead to changes in the day-to-day operations of businesses remains to be seen.

Definition

Under both the Regulation and the Order, OIS are defined as services that allow undertakings to offer goods or services to other undertakings or to end users with a view to facilitating direct transactions between

Summary of main changes

Topic	The Regulation	The Order
Online intermediation services (OIS) and hybrid platforms	• New definition of OIS. • OIS providers are categorised as suppliers, not agents, and so cannot impose hardcore restrictions on their users. • The block exemption will not apply to an OIS provider that is a competing reseller on the relevant market (a hybrid platform).	• New definition of OIS. • OIS providers are categorised as suppliers, not agents, and so cannot impose hardcore restrictions on their users.
Agency exemption	• Clarification that transfer of ownership for a very brief period still qualifies as genuine agency. • Clarification on dual role agents. • Clarification on fulfillment agreements.	• Clarification that transfer of ownership for a very brief period still qualifies as genuine agency. • Clarification on dual role agents. • Clarification on fulfillment agreements.
Dual distribution	• Clarification that the scope of dual distribution includes wholesalers, importers, and own-brand goods resellers if manufacture is subcontracted to a third party. • Information exchange as part of dual distribution is, in principle, block exempted unless it is not necessary for the implementation of, or is not related to, the distribution agreement.	• Clarification that the scope of dual distribution includes wholesalers, importers, and own-brand goods resellers if manufacture is subcontracted to a third party. • The draft Competition and Markets Authority (CMA) guidance says that the block exemption applies to information exchange only if it is genuinely vertical, that is, it is required to implement the vertical agreement.
Resale price maintenance	• No substantial changes.	• Potentially more flexibility regarding minimum advertised prices in the draft CMA guidance.
Exclusive distribution	• Possibility of determining up to five exclusive distributors for a certain exclusive territory or customer group. • Possibility of restricting active sales of selective resellers and their customers into an exclusive territory or customer group.	• Possibility of determining a limited number of exclusive distributors for a certain exclusive territory or customer group. • Possibility of restricting active sales of selective resellers and their customers into an exclusive territory or customer group.
Selective distribution	• Possibility of restricting active and passive sales to unauthorised resellers in a territory where a selective distribution system has been implemented.	• Possibility of restricting active and passive sales to unauthorised resellers in a territory where a selective distribution system has been implemented.
Combining exclusive and selective distribution	• Possibility of protecting an exclusive distribution territory or customer group from active sales by selective distributors and their direct customers from a different territory. • Possibility of protecting a selective territory from active and passive sales by exclusive (or non-exclusive) distributors and their direct customers from a different territory to unauthorised distributors in the selective territory.	• Possibility of protecting an exclusive distribution territory or customer group from active sales by selective distributors and their direct customers from a different territory. • Possibility of protecting a selective territory from active and passive sales by exclusive (or non-exclusive) distributors and their direct customers from a different territory to unauthorised distributors in the selective territory.
Online restrictions	• New hardcore restriction in Article 4(e) on preventing the effective use of the internet. • Extensive clarification in the Commission guidelines of permissible and impermissible online restrictions. • It is permissible to set different wholesale prices depending on whether products are sold online or offline by one and the same reseller (dual pricing) under certain circumstances. • A ban on marketplaces is permissible. • Criteria for online and offline environment do not need to be equivalent.	• No explicit hardcore restriction but the definition of illegal internet sales restrictions is similar to the new EU hardcore restriction. • Extensive clarification in the draft CMA guidance of permissible and impermissible online restrictions. • It is permissible to set different wholesale prices depending on whether products are sold online or offline by one and the the same reseller (dual pricing) under certain circumstances. • A ban on marketplaces is permissible. • Criteria for online and offline environment do not need to be equivalent.
Parity clauses	• Wide cross-platform parity clauses are not automatically block exempted but a case-by-case assessment of their effects is required. • Possibility of withdrawing the Regulation where there are parallel networks of retail parity obligations.	• New category of wide retail parity clauses that are hardcore restrictions and cannot be block exempted.
Non-compete clauses	• Possibility of non-compete clauses being tacitly renewable beyond five years if the buyer can effectively renegotiate or terminate the contract with a reasonable notice period and at reasonable cost.	• Non-compete clauses that are tacitly renewable beyond five years are not covered as they are deemed to be concluded for an indefinite period.

these undertakings, or between these undertakings and end users, irrespective of whether and where those transactions are ultimately concluded. In addition, the definition refers to information society services within the meaning of Article 1(1)b of the Information Society Service Directive (*2015/1535/EU*). In short, any business-to-business or business-to-consumer platform is an OIS as it provides intermediation services to companies in order to allow them to sell their products on the platform.

Key provisions

Content	The Regulation	The Order
Definitions	Article 1	Articles 2, 3(7), 8(7), 10(5) and 12(3)
Block exemption	Article 2	Article 3
Market share threshold	Articles 3 and 8	Articles 6 and 7
Annual turnover threshold	Article 9	Article 4
Hardcore restrictions	Article 4	Article 8
Excluded restrictions	Article 5	Article 10
Transitional provisions	Article 10	Article 15
Withdrawal in individual cases	Article 6	Article 13

Legal assessment

The new regimes make clear that agreements with OIS providers are complex and their legal assessment needs to take account of this complexity. Depending on the structure and content of, and the parties to, an agreement with an OIS provider, the legal assessment can require greater or lesser scrutiny.

The new regimes categorise OIS providers as suppliers in relation to an intermediation service agreement and, therefore, an OIS provider cannot act as a genuine agent as it is an independent economic operator that typically makes significant market-specific investments, such as in software or advertising (*paragraphs 46 and 62-68, Commission guidelines; paragraphs 4.19-4.21, draft CMA guidance*). Agreements with genuine agents are exempted from the restrictive agreement prohibitions so that companies are able to dictate prices to their genuine agents and impose other restrictions (*see "Agency" below*). Therefore, the restrictive agreement prohibitions will apply in full to an intermediation agreement between an OIS provider and a buyer of those OIS; for example, a product distributor that uses the OIS to sell its products. However, this does not mean that it is not possible for the buyer of the OIS to determine its prices when selling its products on the platform, as resale transactions are not included in the intermediation agreement with the OIS but are assessed separately.

One of the reasons why it was important to clarify the legal assessment of OIS in both the EU and the UK was to recognise the strong network effects and other features of the online platform economy that can contribute to a significant imbalance in the size and bargaining power of the contracting parties. This can result in a situation where the OIS provider determines the conditions of sale of the contract goods or services and the commercial strategy, rather than the seller of those goods or services (*paragraph 46, Commission guidelines; paragraph 4.20, draft CMA guidance*).

Hybrid platforms

Under the Regulation, any agreements where the buyer of the OIS and the OIS provider compete on the downstream market are not block exempted and need to be assessed under the individual exemption provisions in Article 101(3) or section 9(1), as applicable (*Article 2(6), the Regulation and paragraphs 67(c) and 104-109, Commission guidelines*). OIS providers that are also active as resellers on the relevant market are called hybrid platforms. Not every agreement with a hybrid platform falls outside of the block exemption safe harbour; the block exemption may still apply if there is no competitive relationship between the OIS provider and the distributor that is selling through the platform. For example, if a supplier sells products to a hybrid platform and the hybrid platform sells those products to end consumers through the platform, and the supplier does not use the platform to sell its own products, this agreement would still come within the block exemption safe harbour as there is no competitive relationship between the platform and the supplier on the downstream level.

The Commission guidelines helpfully explain that, unless there is significant market power on the market for OIS, it is unlikely to investigate vertical agreements relating to OIS where the OIS provider has a hybrid function (*paragraphs 108-109*). For example, the Commission is unlikely to investigate where a supplier allows its resellers to use the supplier's consumer website to sell the contract products but does not allow them to sell any competing products on that website.

However, many of the platforms that distributors use will have significant market power on the OIS market as this is why companies decide to sell through OIS and not, or not only, through their own websites. In addition, the Commission guidelines indicate that the market position should be assessed not only based on revenues, but also on alternative metrics, such as the number of users or the number of transactions intermediated (*paragraph 108*). It will be difficult in practice to conduct this assessment, in particular for distributors. Therefore, the Commission may need to provide further clarification of the self-assessment exercise under Article 101(3) with regards to agreements with hybrid platforms.

While the Order and draft CMA guidance do not assess hybrid platforms separately from non-hybrid OIS, any pure horizontal relationships or agreements between an OIS and a company will likely not fall under the block exemption of the Order. In addition, the CMA could remove the benefit of the block exemption for an OIS (*paragraph 6.24, draft CMA guidance*).

AGENCY

If an undertaking meets the requirements to be categorised as a genuine agent under the new regimes, an agreement with that

agent does not fall within the scope of the restrictive agreement prohibitions. Both the Commission guidelines and the draft CMA guidance summarise the main elements required for an agent to be categorised as a genuine agent (*paragraphs 31-34, Commission guidelines; paragraphs 4.12-4.13, draft CMA guidance*). The long list of conditions includes the requirements that:

- The agent does not bear any costs or other financial burdens or risks that are related to the sale and purchase of the contract products.
- The agent is not obliged to invest in sales promotions or advertising.

Given that genuine agency exempts the application of the restrictive agreement prohibitions, the requirements are interpreted narrowly. One point of clarification compared to the previous regime is that if the agent temporarily, for a very brief period of time, acquires the property of the products while selling them on behalf of the principal this does not preclude it from being considered a genuine agent (*paragraph 33(a), Commission guidelines; footnote 14, paragraph 4.14, draft CMA guidance*). The position in relation to dual agency is also clarified, establishing that it is not possible to establish an independent reseller and an agency relationship with a counterparty in relation to the same product market (*paragraphs 36 and 37, Commission guidelines; paragraphs 4.22-4.25, draft CMA guidance*).

A fulfilment agreement is where a supplier enters into an agreement with a buyer for the purpose of fulfilling a supply agreement that was concluded previously between the supplier and a customer. The new regimes clarify that, where the supplier selects the undertaking that will provide the fulfilment services, the supplier may impose a resale price. By contrast, where the customer selects the undertaking that will provide the fulfilment services, the imposition of a retail price may be considered resale price maintenance, which is restricted under Article 101(1), Article 4(a) of the Regulation and Article 8(2)(a) of the Order (*paragraph 193, Commission guidelines; paragraph 8.18, draft CMA guidance*).

DUAL DISTRIBUTION

Dual distribution refers to scenarios where a supplier of products is active on manufacturing and retail levels, and the buyer (and reseller) of those products is active on the retail level. Under the previous regime, dual distribution was, in principle, subject to a block exemption. However, given that there is a horizontal relationship between the supplier and the buyer on the retail level, it was unclear to what extent these aspects were ancillary to the vertical relationship and were therefore within the block exemption under the Regulation or whether restrictions that could have an impact on competition between the supplier and the buyer on the retail level had to be considered solely under the rules on horizontal agreements.

Dual distribution continues to fall within the block exemption under the Regulation and the Order. Both regimes have clarified that importers or wholesalers can be considered as suppliers that are active on the upstream level in a dual distribution scenario (*Article 2(4)(a), the Regulation; Articles 3(5), the Order*). However, nuances apply in relation to the assessment of information exchange in a dual distribution scenario (*see "Assessing information exchange" below*).

Manufacturers

A wholesaler or retailer that provides specifications to a manufacturer to produce goods for sale under the wholesaler's or retailer's brand name is not considered a manufacturer of those own-brand goods and, consequently, not a competitor of the manufacturer. In this scenario, where the products are manufactured by a third party, the wholesaler or retailer that is subcontracting the production of the goods will be considered active on the downstream level only, and not on the manufacturing level. Therefore, the supply relationship with wholesalers or retailers that sell third-party manufactured own-branded goods falls within the safe harbour of the block exemption *(Article 2(4)(a), the Regulation, paragraph 92, Commission guidelines; Article 3(5), the Order, paragraph 6.18, draft CMA guidance*).

The position is different where the own-branded goods are manufactured in-house, rather than by a third party. As wholesalers and retailers that manufacture their own-branded goods in-house are considered as manufacturers, they compete with any suppliers that manufacture goods and so these supply relationships do not fall within the scope of the block exemption.

Assessing information exchange

The Commission generally recognises that the exchange of information between a supplier and a buyer can contribute to the pro-competitive effects of vertical agreements (*recital 13, the Regulation*). Based on these principles, Article 2(5) of the Regulation sets out a test to assess whether information exchange in a dual distribution scenario falls within the block exemption. In general, the block exemption applies to information exchange, unless it is either:

- Not directly related to the implementation of the vertical agreement.
- Not necessary to improve the production or distribution of the contract products.

While the Order is not as explicit, the draft CMA guidance seems to follow a similar approach to the assessment of information exchange. The draft CMA guidance states that the Order does not extend to horizontal restrictions of competition by object, even where these are recorded in the same documents as the vertical agreement, and covers only restrictions that are genuinely vertical (*paragraph 10.171*). Therefore, the block exemption extends to information exchange only to the extent that it does not restrict competition by object and is genuinely vertical; that is, it is necessary in order to implement the vertical agreement. It will depend on the particular distribution model whether specific types of information are required for the implementation of the agreement; for example, under an exclusive distribution agreement, it may be necessary for the parties to exchange information relating to the territories or customer groups that are allocated to the buyer or reserved to the supplier (*paragraph 10.174, draft CMA guidance*).

Ultimately, under both regimes, companies must assess whether the information that they plan to exchange in a dual distribution scenario is required for the implementation of the distribution system and, in addition under the Regulation, whether it is necessary to improve the production or distribution of the contract products.

Both the Commission guidelines and the draft CMA guidance set out a list of information that is likely to be permissible information to be exchanged and, conversely, information that is likely to be illegal (by object) restrictions (*paragraphs 99-100, Commission guidelines;*

Information exchange examples

Examples of permissible information exchange	Examples of impermissible information exchange
• Technical information relating to the contract goods or services. • Logistical information, including information in relation to inventory, stocks, sales volumes and returns. • Information on customer preferences and feedback, and, to some extent, customer purchases if their identities are not disclosed. • Recommended resale prices and maximum prices. • Information in relation to the marketing of products, including promotional campaigns. • Performance-related information, including aggregated information relating to the marketing and sales activities of other buyers if their identities are not visible, and information relating to the volume or value of buyers' sales of competing products.	• Future prices. • Information relating to identified end users or customers except where this is necessary, for example, to monitor compliance with an exclusive or selective distribution system. • Information relating to products sold by a buyer under its own brand name that is exchanged between the buyer and a manufacturer of competing goods, unless the manufacturer is also the producer of those own-brand products.

paragraphs 10.175-10.176, draft CMA guidance) (*see box "Information exchange examples"*). However, the list does not replace the case-by-case assessment that the parties must conduct, as whether or not the specific information is required or necessary may depend on the nature of the distribution system.

If information is not required or necessary, it will not fall within the block exemption but it may not automatically infringe the restrictive agreement prohibitions. In addition, if parties exchange information that is not required or necessary, this will not affect the remainder of the agreement, which may still benefit from the block exemption (*paragraph 102, Commission guidelines; paragraph 10.177, draft CMA guidance*).

EXCLUSIVE AND SELECTIVE DISTRIBUTION

Under the new regimes, it is much easier to combine exclusive and selective distribution systems.

Exclusive distribution

Under an exclusive distribution arrangement, a supplier makes its products available only to certain distributors within exclusive territories or customer groups. In the EU, these territories or customer groups will be within the single European market, that is, the 27 EU member states. In the UK, these territories or customer groups will be within the UK.

Under the previous regime, a supplier could allocate an exclusive territory or customer group to one distributor, or reserve the exclusive territory or customer group to itself. Under the Regulation, suppliers can select up to five distributors (*Article 4(b)(i)*). Under the Order, suppliers can select a "limited number" of distributors (*Article 8(3)(a)*). It remains possible for a supplier to also reserve a territory or a customer group to itself. The number of appointed distributors should be determined in proportion to the allocated territory or customer group in such a way as to secure a certain volume of business that preserves their investment efforts (*paragraph 10.59, draft CMA guidance*).

Exclusive distributors are protected from active sales (that is, targeted sales) into their territory or to their customer group (*see "Active and passive sales" below*). This means that other distributors or resellers cannot make active sales into an exclusive territory or customer group. Passive sales, which are initiated by a customer, or online non-targeted sales through a website, must be permitted. Exclusive distributors can be restricted from making active sales into other territories or customers, but only if those territories or customer groups have been allocated exclusively to another distributor.

Helpfully, the Commission guidelines and the draft CMA guidance clarify how a customer group can be defined; for example, by using one or more criteria, such as the occupation or activity of the customers, or by using a list of identified customers (*paragraph 123, Commission guidelines; paragraph 10.61, draft CMA guidance*). Depending on the criteria used, the customer group may be limited to a single customer.

Selective distribution

Under a selective distribution arrangement, the supplier undertakes to sell the contract products only to distributors that have been selected on the basis of specified criteria. The criteria used by the supplier to select distributors can be qualitative or quantitative in nature, or both. Qualitative criteria relate to how the products are sold, such as the way that products are presented or displayed, sales personnel training requirements, the service provided at the point of sale and the product range being sold. Quantitative criteria limit the potential number of distributors more directly by, for example, requiring minimum sales or determining a maximum amount of distributors in a specific territory.

A selective distribution system is efficient only if it is a closed system of authorised distributors that buy and sell the contract products. Therefore, obligations can be imposed on the authorised distributors not to sell to unauthorised distributors or resellers (*Article 1(1)(g), the Regulation and paragraph 145, Commission guidelines; Article 2(1), the Order and paragraph 10.86, draft CMA guidance*).

Selective distribution systems are comparable to exclusive distribution systems in that they restrict the number of authorised distributors. The main difference is that a selective distribution system is protected from active and passive sales by non-authorised distributors. Selective resellers cannot be prevented from selling to customers in the EU or the UK, although there are some

exceptions if an exclusive distribution system is implemented in parallel (*see below*).

Combining exclusive and selective distribution

Under the previous regime, a combination of exclusive and selective distribution would leave both distribution systems somewhat unprotected. The previous regime did not allow exclusive customer groups or territories to be protected from active (and passive) sales by selective resellers and selective territories were not protected from active and passive sales by exclusive distributors to non-authorised distributors in the selective territory or to any end customers.

Under the new regimes it is possible to:

- Protect the exclusive distribution territory or customer group from active sales by selective distributors and their direct customers from another territory (*Article 4(c)(i)(1), the Regulation; Article 8(4)(a), the Order*).

- Protect the selective territory from active and passive sales by exclusive (or non-exclusive) distributors and their direct customers from another territory to unauthorised distributors in the selective territory (*Articles 4(b)(ii) and 4(d)(ii), the Regulation; Articles 8(3)(b) and 8(5)(b), the Order*).

Sales to end customers remain permissible under both regimes.

Active and passive sales

Under the previous regime, the default position was that online sales were considered to be passive sales. This generalisation had its shortcomings as websites and online adverts could be targeted to specific territories and customer groups, and so be considered as active sales. The new regimes take account of the developments in e-commerce and differentiate between active and passive online sales (*paragraphs 212-215, Commission guidelines; paragraphs 8.46-8.51, draft CMA guidance*).

Active sales include:

- Actively targeting customers by calls, emails, letters, visits or other direct means of communication.

- Targeted advertising and promotion using print or digital media, whether offline or online, including online media, price comparison tools and advertising on search engines that targets customers in specific geographical areas or customer groups.

- Offering language options on a website which are different to the ones that are commonly used in the geographical area in which the distributor is established.

- Using a domain name that corresponds to a geographical area other than the one in which the distributor is established.

Passive sales include:

- Online advertising or promotion that is intended to reach customers in a distributor's own territory or customer group but cannot be limited to that territory or customer group and is not designed to target customers across specific territories or customer groups; for example, general advertising on a website of a local or national newspaper that may be accessed by any visitor to that website.

- Participation in public procurement processes.

ONLINE SALES RESTRICTIONS

The Regulation includes a new category of defined hardcore restrictions with regard to online sales restrictions: the prevention of the effective use of the internet by the buyer or its customers to sell the contract products (*Article 4(e), the Regulation*) (Article 4(e)). However, it is permissible to impose on the buyer:

- Other restrictions of online sales, that is, restrictions that do not prevent the effective use of the internet.

- Restrictions of online advertising that do not prevent the use of an entire online advertising channel.

In short, resellers must not be banned from using the internet as a sales or advertising channel. However, not every restriction amounts to a ban and, therefore, a hardcore restriction. Arguably, the Regulation's definition of a hardcore restriction leaves room for interpretation given the use of the word "effective". The Commission guidelines provide a number of examples of prohibited and permissible online restrictions (*paragraphs 203-210*). In addition, they make clear that the new assessment under Article 4(e) should not result in an effects analysis but should focus on the most harmful cases of internet restrictions.

Under the Order, there is no explicit hardcore restriction; internet sales restrictions are considered as active and passive sales restrictions. However, the definition of illegal internet sales restrictions in the Order corresponds to the definition in Article 4(e); that is, the prevention of buyers or their customers effectively using the internet for the purposes of selling their goods or services line, or from effectively using one or more online advertising channels (*Article 8(6)(a), the Order*).

Qualitative online restrictions

The Commission guidelines and the draft CMA guidance include detailed examples of qualitative online restrictions that benefit from the block exemption. The following examples are particularly noteworthy.

Online marketplaces. The prohibition on selling through marketplaces is a qualitative online restriction and can be imposed regardless of the distribution system operated; the supplier does not have to operate a selective distribution system in order to impose qualitative online criteria. Under certain circumstances, qualitative online restrictions, including a ban on selling through marketplaces, may not be considered a restriction of competition law and, therefore, regardless of market shares, are permissible. If the market shares of both the supplier and the reseller are below 30%, the prohibition on selling through a marketplace falls within the block exemption, with the caveat that the restriction must not have the object of preventing the effective use of the internet (*paragraph 208, Commission guidelines; paragraphs 10.121-10.126, draft CMA guidance*). A marketplace ban should not restrict the effective use of the internet if the reseller remains free to sell through its own online store and to advertise online.

The Commission guidelines and the draft CMA guidance state that, where the block exemption is unavailable, the supplier cannot impose restrictions in relation to marketplace sales only on some resellers but not others: if the supplier has accepted the marketplace as part of the distribution network, the supplier must allow resellers to

sell through the marketplace (*paragraph 338 Commission guidelines; paragraph 10.127, draft UK guidance*). One could draw the conclusion that where market shares are below 30% the discrimination is block exempted, which would be in line with the requirements developed by the European Court of Justice in *Metro v Commission (No 1)* (*[1977] ECR 1875*).

Dual pricing. Under the previous regime, setting different online and offline prices for distributors or resellers was considered to be a hardcore restriction. This is now acceptable under the new regimes to the extent that the different prices aim at incentivising or rewarding a certain level of investments made in online and offline sales channels, and reflect the costs incurred (*paragraph 209, Commission guidelines; paragraph 8.43, draft CMA guidance*). This shift in the Commission's view on dual pricing will provide more flexibility to suppliers and distributors, which were previously concerned about free-riding issues and the inability to recoup costs incurred for maintaining a bricks and mortar store. The Commission guidelines helpfully suggest how to implement this different pricing in practice; for example, by ex-post balancing accounts on the basis of actual sales.

Price comparison tools. The Commission guidelines and the draft CMA guidance state that price comparison tools are not considered to be online sales channels, as they merely redirect customers to certain online shops rather than offer a sale and purchase function (*paragraph 206(g), Commission guidelines; paragraph 10.129, draft CMA guidance*). However, price comparison tools are considered online advertising channels. Therefore, a total ban on price comparison tools cannot be seen as a qualitative criterion and is a hardcore restriction (*paragraph 206(g), Commission guidelines; paragraph 10.132, draft CMA guidance*). Similarly, any other direct or indirect prohibition on using an entire online advertising channel, such as search engines, or an obligation not to use the supplier's trademarks or brand names for bidding, is considered a hardcore restriction.

However, a selective prohibition, that is, a prohibition on using a specific price comparison tool or a specific search engine could be permissible, unless those are the most popular ones that customers use and the resellers' online stores cannot attract customers without their use (*paragraph 206(g), Commission guidelines; paragraph 10.135, draft CMA guidance*). It is also permissible to require that online advertising meets certain quality standards or includes specific content or information, or that the brand name is not used in the domain name of the reseller (*paragraphs 207-208, Commission guidelines; paragraph 10.134, draft CMA guidance*).

Equivalence requirement. Under the previous regime, qualitative criteria applying to the online environment had to be equivalent to the criteria imposed in the physical bricks and mortar environment. The Commission guidelines clarify that, under the new regime, the online and offline criteria do not have to be equivalent given that each channel has specific characteristics (*paragraph 235*). This is helpful, as criteria that are important in one of the channels often cannot be transferred into the other channel.

PARITY CLAUSES

Parity clauses, also known as most favoured nation clauses, are restrictions that require one party to an agreement to offer the other party goods or services on terms that are no worse than those offered to its own customers or to third parties. The term "retail parity obligation" is used to describe restrictions that apply in the retail context and involve a business offering, selling or reselling goods or services to end users. Retail parity obligations are typically categorised as

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either wide or narrow in scope (*paragraph 358, Commission guidelines; paragraph 8.74, draft CMA guidance*).

Under the Regulation, wide cross-platform parity clauses are excluded clauses (*Article 5(1) d*). This means that they are not automatically within the block exemption, but a case-by-case assessment of their effects is required. Wide cross-platform parity clauses are those that restrict the retailer from offering better pricing to other platforms; that is, any direct or indirect obligation causing a buyer of online intermediation services not to offer, sell or resell goods or services to end users under more favourable conditions using competing OIS. If a clause is incompatible with competition law, the remainder of the agreement can still benefit from the block exemption. In addition, the Commission guidelines state that the benefit of the block exemption can be withdrawn in case of parallel networks of retail parity obligations (*paragraph 259*).

The UK takes a stricter stance with regard to wide retail parity clauses, which are now considered to be hardcore restrictions (*Article 8(2)(f), the Order*). This means that agreements including a wide retail parity obligation cannot benefit from the block exemption in their entirety; they can only benefit from an individual exemption under section 9(1). The hardcore restriction relating to wide retail parity obligations covers situations where a supplier uses an intermediary as an indirect sales channel by which it sells its products to end users (*paragraph 8.76, draft CMA guidance*).

The intermediary can be an online sales channel, such as an online marketplace, or an offline sales channel, such as a traditional broker. If a supplier agrees with the intermediary that it will offer its products at prices, or on other terms and conditions, that are no worse than those offered to other intermediaries, that agreement will fall within the hardcore restriction. This is to avoid the situation where a supplier agrees with an intermediary that the intermediary will not be placed at a disadvantage relative to the intermediary's competitors (*paragraph 8.78, draft CMA guidance*). The CMA is concerned that wide retail parity obligations restrict competition between horizontal competitors, both at supplier and intermediary level, by reducing their incentives to compete on price, innovate, and enter markets or expand (*paragraph 8.79, draft CMA guidance*).

Narrow parity clauses continue to be exempt under both of the new regimes.

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