



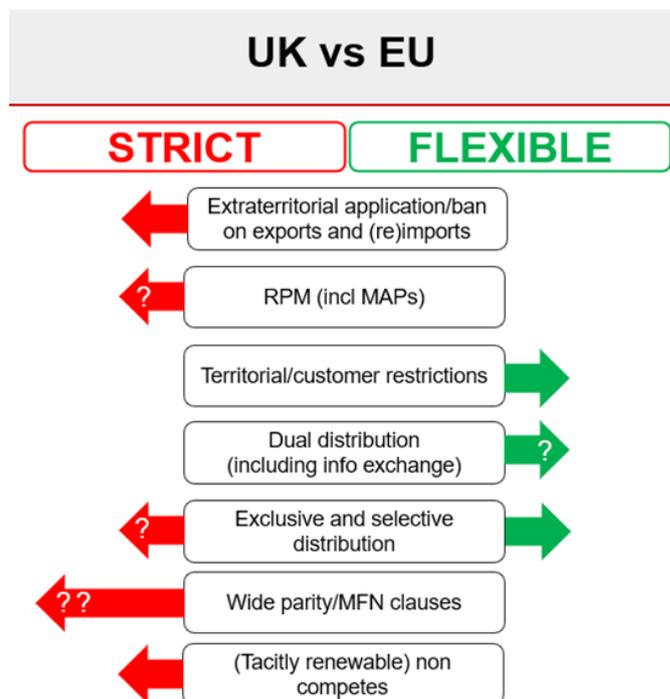
**Distribution across Europe and the UK
Verticals regime: Do you really need to
mind the “gap” ?**

Distribution across Europe and the UK Verticals regime: Do you really need to mind the “gap”?

Long awaited developments over the summer provided some appreciable clarity on the refreshed UK distribution regime (following the UK’s withdrawal from the EU). In particular, pursuant to a consultation process that ran almost in parallel to the equivalent EU process, and also adopting the same analytical framework as the EU (see [VBB Insights of 27 June 2022](#)), the UK has also now introduced a [new vertical agreements block exemption order](#) and accompanying [CMA guidance](#). Both regimes also share the same *de minimis* exemption (15% absent a restriction by object).

Whilst it is no surprise that the respective UK and EU regimes tackle similar policy questions, the extent to which the two regimes appear aligned is perhaps somewhat surprising. Some, mostly marginal, divergences are observable but, overall, it is definitely feasible to continue with – or introduce – a common distribution strategy covering both jurisdictions. It is also encouraging that the CMA recognises that restrictions relating to exports outside the UK – or imports/reimports from outside the UK (including from the EU) – are “*unlikely*” to have the object of restricting competition within the UK. The EU guidance is clearer, noting that the equivalent restrictions “*cannot*” have the object of restricting competition.

Against this background, below is a summary comparison of some of the key aspects of the regime:



Distribution across Europe and the UK Verticals regime: Do you really need to mind the “gap”?

RPM

Despite hopes that the UK would take a more flexible approach towards minimum advertised prices (MAPs), it is now clear that both the EU and the UK consider that such practices constitute RPM. Moreover, it is interesting to note that the UK has not included combating free-riding as one of the potential defences for RPM.

TERRITORIAL/CUSTOMER RESTRICTIONS

In this respect, the new UK and EU regimes are very much aligned including in relation to restrictions on online sales. For instance, both regimes have relaxed the rules on dual pricing and the non-equivalence principle. Thus, suppliers can in principle charge different prices to the same partner for products resold online or offline; and suppliers in a selective distribution system can impose non-equivalent criteria on online and offline sales.

It is possible that the CMA will – over time – be more flexible when it comes to restricting the use of specific tools and search engines, as well as suppliers imposing higher quality standards when their partners engage in online advertising campaigns.

DUAL DISTRIBUTION

Both regimes sensibly recognise the market realities and efficiencies associated with dual distribution, as well as the importance of detailed information being exchanged between a supplier and its resale partners.

However, it is worth noting that the UK regime – unlike its EU counterpart – does not have an additional requirement that for such information exchange to be block exempted it should be necessary to improve the production or distribution of the contract goods/services. Instead, it suffices that such information is required in order to implement the vertical agreement (which must be “*genuinely vertical*” in nature). That said, the relevant UK and EU examples/guidance on acceptable and problematic information exchange are essentially the same, with the UK guidance arguably utilising stricter language by reference to a likelihood of a by-object (horizontal) violation if the exchange does not satisfy the requirements of the UK block exemption.

Finally, dual distribution agreements relating to hybrid platforms (when providing online intermediation services “OIS”) continue to benefit from the UK block exemption. This is not the case at the EU level where the provision of OIS by hybrid platforms is not covered by the EU block exemption.

(SHARED) EXCLUSIVITY AND SELECTIVE DISTRIBUTION

The UK regime is largely aligned with the more flexible approach that has now been adopted by the EU. The UK has also adopted the concept of shared exclusivity but does not limit to exclusivity to a maximum of 5 distributors. A “*limited number*” of partners can be appointed, to be determined “*in proportion to the allocated geographical area or customer group*” to incentivise investment by partners. What that “*limited number*” will be in any given scenario will, of course, require a careful and well documented assessment.



Distribution across Europe and the UK Verticals regime: Do you really need to mind the “gap”?

In contrast to the EU regime, the UK regime appears to allow the combination of exclusive and selective distribution systems in the same territory (if at different levels of the distribution chain) – but it is unclear whether this will still be the case if the exclusive distributors are also authorised retailers.

PARITY CLAUSES (also known as most favoured nation (MFN) clauses)

Although both regimes are sceptical about the effect of wide retail MFNs, the UK VABEO takes an appreciably stricter approach and designates such clauses as “hardcore” restrictions (regardless of whether relating to online or offline indirect sales channels). The EU takes a more agnostic position, designating them as “excluded” restrictions.

The UK’s stricter approach is largely based on the CMA’s approach and decisional practice, most notably its recent enforcement action against the price comparison website *Compare the Market* (for which the 2020 CMA decision was [overturned](#) last month by the UK’s Competition Appeal Tribunal (CAT)). The CAT judgment was critical of the CMA’s approach on several points and, in particular, cast serious doubt on the CMA’s theory that wide MFNs should be presumed as harmful to competition. Instead, the CAT found that the wide MFN in question had no proven anticompetitive effects and effectively advocated for a more careful and market specific effects-based analysis. As such, the CAT’s approach seems much more in line with the approach advocated by the EU VBER. Unless the CAT judgment is overturned on appeal, it is likely that the CMA will (also) have to demonstrate an anticompetitive effect if it is to succeed in any subsequent challenge of wide retail MFNs.

(TACITLY RENEWABLE) NON-COMPETES

The new EU regime allows for tacitly renewable non-competes that exceed five years to be block exempted provided that the distributor can effectively renegotiate or terminate after five years. The UK regime does not allow for such flexibility.

Lawyers to contact



Alex Stratakis
Partner
astratakis@vbb.com



Marc Freedman
Senior Associate
mfreedman@vbb.com



Todor Papanov
Associate
tpapanov@vbb.com

VAN BAEL & BELLIS

BRUSSELS

Glaverbel Building
Chaussée de La Hulpe 166
Terhulpesteenweg
B-1170 Brussels, Belgium

Phone: +32 (0)2 647 73 50
Fax: +32 (0)2 640 64 99

GENEVA

26, Bd des Philosophes
CH-1205 Geneva
Switzerland

Phone: +41 (0)22 320 90 20
Fax: +41 (0)22 320 94 20

LONDON

5, Chancery Lane
EC4A 1BL London
United Kingdom

Phone: +44 (0)20 7406 1471