

Draft guidance on the application of the Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022

Consultation document

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1. Introduction

- 1.1 The Competition and Markets Authority (CMA) is consulting on the draft guidance (Draft Guidance) on the application of the Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 (Block Exemption).¹
- 1.2 When finalised this guidance is intended to supersede the EU Guidelines on Vertical Restraints in the UK which were published in 2010,² and the OFT guidance on Vertical Agreements which was published in 2004.³ The Draft Guidance reflects the changes introduced in the proposed Block Exemption following the CMA's final recommendation to the Secretary of State at the Department for Business, Energy and Industrial Strategy.⁴
- 1.3 The Draft Guidance is aimed at helping businesses to make their own assessment of their vertical agreements and decide whether these fall within the scope of the Block Exemption. Recognising that the EU Guidelines on Vertical Restraints (and their previous versions) have applied in the UK for a significant period of time, the Draft Guidance broadly reflects the guidance set out in the EU Guidelines on Vertical Restraints, amended as necessary in the light of differences between the UK and the EU and between the Block Exemption and the European Commission's proposed new Vertical Agreements Block Exemption Regulation.⁵ The CMA has taken this position to avoid so far as possible creating legal uncertainty for businesses, particularly those which operate in both the UK and the EU.
- 1.4 The CMA is inviting comments on the Draft Guidance by 5 May 2022 (5.00pm).

¹ See <https://www.gov.uk/government/consultations/draft-vertical-agreements-block-exemption-order>

² Guidelines on Vertical Restraints, European Commission, OJ C 130, 19.5.2010.

³ See <https://www.gov.uk/government/publications/vertical-agreements>

⁴ See <https://www.gov.uk/government/consultations/retained-vertical-block-exemption-regulation> The Department for Business, Energy and Industrial Strategy carried out a technical consultation on the drafting of the Block Exemption. This consultation closed on 16 March 2022. Modifications to the final text of the Block Exemption may be introduced as a result of the technical consultation process.

⁵ https://ec.europa.eu/competition-policy/document/download/bff24773-e2b9-4788-8e42-0b10e0f6b28b_en?filename=draft_revised_vertical-guidelines.zip

2. Background

- 2.1 Vertical agreements are agreements for the sale and purchase of goods or services between businesses operating at different levels of the production or distribution chain, for example, between manufacturers and wholesalers or retailers.
- 2.2 The Competition Act 1998 (CA98) prohibits anticompetitive agreements between ‘undertakings’ (ie businesses). This prohibition is known as the Chapter I prohibition.⁶ The Chapter I prohibition applies to agreements and concerted practices between undertakings and to decisions by associations of undertakings (eg trade associations) which have as their object or effect the prevention, restriction, or distortion of competition within the UK and which may affect trade within the UK. However, section 9(1) of the CA98 provides that agreements can be exempted from the prohibition if they meet certain conditions. An agreement may be individually recognised as exempt by a competition authority or a court and, in addition, certain types of agreement will be treated as automatically exempt if they meet conditions set out in a ‘block exemption’ regulation or order applicable to that category of agreements.
- 2.3 Before the UK’s withdrawal from the EU, the EU Vertical Block Exemption Regulation (EU Regulation)⁷ applied in the UK and provided an automatic exemption for vertical agreements meeting its conditions. When the transition period for the withdrawal of the UK from the EU came to an end on 31 December 2020, such that EU laws generally ceased to apply in the UK, the EU Regulation was retained in UK law (as the retained Vertical Agreements Block Exemption Regulation (retained VABER)). This meant that agreements in the UK could still benefit from the block exemption (both pre-existing and new agreements), provided that they met the relevant conditions. That is the current position, with the retained VABER due to expire on 31 May 2022.
- 2.4 The retained VABER sets out a block exemption from the Chapter I prohibition that applies to any vertical agreement which meets certain specified conditions.⁸ This means that vertical agreements between

⁶ Section 2 of the Act.

⁷ Commission Regulation (EU) No 330/2010 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. The block exemption set out in this Regulation is substantively the same as the retained VABER except that it applies to the EU rather than the UK.

⁸ The retained VABER is one of the ‘retained exemptions’ created by a combination of the operation of the European Union (Withdrawal) Act 2018 and the Competition (Amendment etc.) (EU Exit) Regulations 2019 (as amended by the Competition (Amendment etc.) (EU Exit) Regulations 2020). See here: Commission Regulation (EU) No 330/2010.

businesses which meet the conditions of the retained VABER are automatically exempt from the Chapter I prohibition. In this way, the retained VABER provides legal certainty for businesses.

- 2.5 The CMA has reviewed the retained VABER for the purpose of making a recommendation to the Secretary of State in accordance with the CA98 about whether to replace the retained VABER when it expires on 31 May 2022.
- 2.6 On 17 June 2021, the CMA published a [consultation document](#) pursuant to section 8(1) of the CA98.⁹ In the consultation document, the CMA sought views on its proposed recommendation to the Secretary of State to replace the retained VABER on its expiry with a new block exemption and on certain proposed changes to the current regime. The CMA’s consultation ran until 22 July 2021.
- 2.7 On 3 October 2022, the CMA published its recommendation to the Secretary of State to replace the retained VABER with a UK Order, tailored to the needs of businesses operating in the UK and UK consumers. The CMA also announced that it would update its published guidance in accordance with the Secretary of State’s final decision.
- 2.8 The Secretary of State accepted the CMA's recommendations and, on 21 February 2022, published the draft text of the proposed Block Exemption.¹⁰
- 2.9 The table below summarises the main amendments and clarifications recommended by the CMA that are addressed in the Draft Guidance:

Topic	Change
Dual distribution	extending the exemption to cover dual distribution by wholesalers and importers
RPM	providing further guidance, in particular on possible efficiency justifications
Territorial and customer restrictions	clarifying the boundary between active and passive sales and providing additional flexibility for businesses to design distribution systems according to their needs

⁹ Under section 8(1) of the CA98, before making a recommendation under section 6(1), the CMA must publish details of its proposed recommendation in such a way as it thinks most suitable for bringing it to the attention of those likely to be affected; and consider any representations about it which are made to it.

¹⁰ [Draft Vertical Agreements Block Exemption Order - GOV.UK \(www.gov.uk\)](#)

Indirect measures restricting online sales	removing the prohibition of dual pricing and the requirement for overall equivalence from the list of hardcore restrictions
Parity obligations	providing guidance on the treatment of 'wide' retail parity obligations as hardcore restrictions and the assessment of other parity obligations
Agency agreements	clarifying that providers of online intermediation services are suppliers for the purposes of the Block Exemption, and clarifying other issues relating to online platforms, fulfilment contracts and dual role agents

3. Scope of the consultation

- 3.1 This consultation seeks the views of interested parties on the Draft Guidance which is published separately on the consultation page.
- 3.2 After the consultation initiated by this consultation document, the CMA will prepare its final guidance based on the final text of the Block Exemption and taking into account the feedback received as part of this consultation.¹¹
- 3.3 This consultation is distinct from the European Commission's consultation on the EU Vertical Guidelines, which applies in the EU.¹²

¹¹ Any possible changes to the final version of the proposed Block Exemption following from the consultation undertaken by the Department for Business, Energy and Industrial Strategy may have to be reflected in the final version of the CMA guidance.

¹² See https://ec.europa.eu/competition-policy/public-consultations/2021-vber_en

4. Consultation process

How to respond

- 4.1 We are publishing this consultation on the CMA webpages and drawing it to the attention of a range of stakeholders to invite comments on the Draft Guidance.
- 4.2 We encourage you to respond to the consultation in writing (by email) using the contact details provided in paragraph 4.5 below. Please provide supporting evidence or examples for your views where possible.
- 4.3 When responding to this consultation, please state whether you are responding as an individual or are representing the views of a group or organisation. If the latter, please make clear who you are representing and their role or interest.
- 4.4 In accordance with our policy of openness and transparency, we will publish non-confidential versions of responses on our webpages. If your response contains any information that you regard as sensitive and that you would not wish to be published, please provide at the same time a non-confidential version for publication on our webpages which omits that material and which explains why you regard it as sensitive.

Duration

- 4.5 The consultation will run from 31 March 2022 to 5 May 2022. Responses should be submitted by email by 5:00 p.m. on 5 May 2022 and should be sent to: vberreview@cma.gov.uk.

Compliance with government consultation principles

- 4.6 In preparing this consultation, the CMA has taken into account the published government consultation principles, which set out the principles that government departments and other public bodies should adopt when consulting with stakeholders.

Statement about how we use information and personal data that is supplied in consultation responses

- 4.7 Any personal data that you supply in responding to this consultation will be processed by the CMA, as controller, in line with data protection legislation. This legislation is the General Data Protection Regulation 2016 (GDPR) and

the Data Protection Act 2018. 'Personal data' is information which relates to a living individual who may be identifiable from it.

- 4.8 We are processing this personal data for the purposes of our work. This processing is necessary for the performance of our functions and is carried out in the public interest, in order to take consultation responses into account and to ensure that we properly consult on the proposed recommendation to the Secretary of State before it is finalised.
- 4.9 For more information about how the CMA processes personal data, your rights in relation to that personal data, how to contact us, details of the CMA's Data Protection Officer, and how long we retain personal data, see our Privacy Notice.
- 4.10 Our use of all information and personal data that we receive is also subject to Part 9 of the Enterprise Act 2002. We may wish to refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, so far as practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, might, in our opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business. If you consider that your response contains such information, please identify the relevant information, mark it as 'confidential' and explain why you consider that it is confidential.
- 4.11 Please note that information and personal data provided in response to this consultation may be the subject of requests by members of the public under the Freedom of Information Act 2000. In responding to such requests, we will take fully into consideration representations made by you in support of confidentiality. We will also be mindful of our responsibilities under the data protection legislation referred to above and under Part 9 of the Enterprise Act 2002.
- 4.12 If you are replying by email, this statement overrides any standard confidentiality disclaimer that may be generated by your organisation's IT system.

Next steps

- 4.13 After the consultation, the CMA will prepare the final version of the guidance.
- 4.14 The CMA will publish the final version of the guidance on its webpages at <http://www.gov.uk/cma>. The CMA will also publish the responses received during the consultation. These documents will be available on our webpages and respondents will be notified when they are available.

5. Consultation questions

- 5.1 Is the content, format, and presentation of the Draft Guidance sufficiently clear? If there are particular parts of the Draft Guidance where you feel greater clarity is necessary, please be specific about the sections concerned and the changes that you feel would improve them.
- 5.2 Do you have any other comments on the Draft Guidance?