Vertical Agreements Block Exemption Order

CMA guidance
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1. Introduction and purpose of this guidance

1.1 This guidance (Guidance) explains how the CMA applies the Chapter I prohibition in the Competition Act 1998 (CA98) to vertical agreements,[1] ie agreements between businesses operating at different levels of the supply chain. In particular, it describes the application of the Vertical Agreements Block Exemption Order (VABEO) to vertical agreements and is intended to help businesses assess vertical agreements and establish whether they benefit from the block exemption provided by the VABEO.

1.2 Before the UK's withdrawal from the EU, the EU Vertical Block Exemption Regulation (EU Regulation)[2] applied in the UK and provided a block 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 was the position on 31 May 2022 when the retained VABER expired and the VABEO came into force.

1.3 The CA98 prohibits agreements and concerted practices between undertakings (ie businesses) and 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. This is known as the Chapter I prohibition. A prohibited agreement is not enforceable.

1.4 However, there are situations where such agreements can be beneficial to consumers and so are exempt from the Chapter I prohibition; the conditions for individual exemption are specified in section 9(1) of the CA98 (section 9(1)). Where a category of agreements is likely to meet the criteria for exemption, such agreements may be subject to a block exemption. One such block exemption (the VABEO) applies to vertical agreements, provided that they meet certain conditions. Its effect is to exempt these agreements from the Chapter I prohibition.

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[1] Vertical agreements and vertical restraints are respectively defined in Article 3(2) and Article 2(1) VABEO.

[2] 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 applied to the EU rather than the UK.

1.5 Vertical agreements do not generally give rise to competition concerns unless one or more of the parties to the agreement possesses market power or the agreement forms part of a network of similar agreements. In recognition of this fact, by automatically exempting vertical agreements which meet specified conditions, the VABEO avoids placing on business the unnecessary burden of scrutinising a large number of essentially benign agreements and helps to ensure that the CMA is able to concentrate resources on other matters giving rise to significant competition concerns.

1.6 Where an agreement does not meet the conditions for block exemption set out in the VABEO, it may still be exempt from the Chapter I prohibition, but the parties would need to scrutinise the agreement to see if it fulfils the criteria for individual exemption under section 9(1).

1.7 The VABEO and this Guidance apply to vertical agreements that relate to the supply of all types of goods or services at all levels of trade, unless otherwise stated. However, the VABEO and this Guidance do not apply to agreements with final consumers where those consumers are not undertakings, since the Chapter I prohibition only applies to agreements between undertakings.

1.8 The Guidance is relevant to both existing and new vertical agreements. It replaces the European Commission's Guidelines on Vertical Restraints[3] and the CMA guidance on Vertical Agreements.[4]

1.9 The standards set out in this Guidance cannot be applied mechanically, but must be applied with due consideration for the specific circumstances of each case. Each case must be assessed in the light of its own facts.

1.10 The Guidance is without prejudice to the case-law of the UK Courts and EU retained case law (to the extent relevant and binding)[5] concerning the application of the Chapter I prohibition and (where relevant) Article 101 of the Treaty on the Functioning of the European Union (TFEU) to vertical

[3] Guidelines on Vertical Restraints, European Commission, OJ C 130, 19.5.2010.

[4] Vertical agreements: OFT419, 2004. Adopted by the CMA Board

[5] Guidance on the functions of the CMA after the end of the Transition Period, CMA125, 2020. For further information on the concept of 'retained EU law' under the Withdrawal Act, please refer to the public paper prepared by the House of Commons Library: The status of 'retained EU Law'.
Section 60A(2)(b) CA98 provides that the CMA and UK Courts will be bound by an obligation to ensure consistency with EU competition case law that pre-dates the end of the Transition Period. Furthermore, in accordance with section 6(3) to 6(6) of the European Union (Withdrawal) Act 2018, any question as to the validity, meaning or effect of unmodified retained EU law is to be decided, so far as they are relevant to it, in accordance with any case law and general principles of the CJEU laid down up until 31 December 2020. In accordance with section 60A(3) CA98, in determining any such question, the CMA must also have regard to any relevant decision or statement of the European Commission made before the end of the Transition Period and not withdrawn.

agreements. The CMA will oversee the implementation of the VABEO. It will keep under review its application and effectiveness in achieving its policy and operational objectives, especially with regard to developments in the UK market that would impact its operation and may revise this Guidance in the light of future developments and of evolving experience.

1.11 The remainder of this Guidance is structured as follows:

— Part 2 – Legal Framework;

— Part 3 – Overview of the assessment of vertical agreements;

— Part 4 – Vertical agreements which generally fall outside the scope of the Chapter I prohibition

— Part 5 – Assessment of vertical agreements which fall within the scope of the VABEO

— Part 6 – Scope of the VABEO

— Part 7 – Market definition and market share calculation;

— Part 8 – Hardcore restrictions (Article 8);

— Part 9 – Excluded restrictions (Article 9);

— Part 10 – Assessment of vertical agreements which do not meet the legal conditions of the VABEO;

— Part 11 – Obligation to provide information to the CMA (Article 12);

— Part 12 – Duration of the VABEO;

— Part 13 – Cancelation of the block exemption.

1.12 In this Guidance we use a number of abbreviations:

CA98	Competition Act 1998.
Chapter I prohibition	The prohibition on anticompetitive agreements contained in Part I, Chapter I of the Competition Act 1998.
Chapter II prohibition	The prohibition on abuse of a dominant position contained in Part I, Chapter II of the Competition Act 1998.

Section 9(1)	Section 9(1) of the CA98 which sets out the criteria for an agreement to be exempt from the Chapter I prohibition.
Guidance	The CMA Guidance on the Vertical Agreements Block Exemption Order 2022
VABEO	Vertical Agreements Block Exemption Order 2022.
TFEU	Treaty on the Functioning of the European Union.
Undertaking	Any natural or legal person (or other entity) engaged in economic activity (eg companies, firms, partnerships, sole traders, public entities).

2. Legal framework

2.1 This part gives a brief overview of the Chapter I prohibition and the exemption regime on which basis the VABEO has been adopted.

2.2 This part is structured as follows:

(a) The Chapter I prohibition.

(b) Individual exemption under section 9(1).

(c) Block exemption.

The Chapter I prohibition

2.3 Competition law is designed to protect businesses and consumers from anti-competitive behaviour. The law prevents arrangements which restrict or distort competition in order to deliver open, dynamic markets and enhanced productivity, innovation and value for customers. To this end, the CA98 prohibits:

(a) agreements which prevent, restrict or distort competition (Chapter I CA98); and

(b) conduct which constitutes an abuse of a dominant position (Chapter II CA98).

2.4 The Chapter I prohibition (section 2 of the Act) prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom and may affect trade within the United Kingdom.

2.5 The objective of the Chapter I prohibition is to ensure that undertakings do not use agreements, whether horizontal or vertical, to prevent, restrict or distort competition on the market to the ultimate detriment of consumers.

2.6 The Chapter I prohibition only applies where agreements have as their object or effect an appreciable restriction of competition within the United Kingdom or a part of it. In applying the Chapter I prohibition the CMA's focus will be on the effect on competition, as in practice it is very unlikely that an agreement which appreciably restricts competition within the United Kingdom does not also affect trade within the United Kingdom.

2.7 The effect of an agreement has to be assessed in the context in which it occurs including where it might combine with others to have a cumulative effect on competition.[6] An agreement cannot be isolated from its context and the existence of similar contracts can be taken into account in so far as all the contracts of that type as a whole are such as to restrict competition.[7] Where there is a network of similar agreements concluded by the same undertaking, the assessment of the effects of that network on competition applies to all the individual agreements making up the network.[8]

2.8 In some circumstances businesses can benefit from an exemption from the Chapter I prohibition. The following subsections address the topics of individual exemption under section 9(1) and block exemptions.

Individual exemption under section 9(1)

2.9 The Chapter I prohibition provides that some agreements that restrict competition are exempt from the prohibition where they satisfy certain conditions, set out in section 9(1).

2.10 Section 9(1) sets out the conditions that must all be met for an agreement to benefit from individual exemption from the Chapter I prohibition.[9] Broadly, the agreement must contribute to clear efficiency benefits. Second, it must provide a fair share of the resulting benefits to consumers. Third, the restrictions on competition that it provides for must be no more than the minimum that is necessary to enable consumers to gain these benefits. Fourth, it must not give companies the opportunity to eliminate competition from a substantial part of the relevant market.

2.11 An agreement that satisfies the conditions set out in section 9(1) is valid and enforceable from the moment that the conditions in section 9(1) are satisfied and for as long as that remains the case. The parties involved in such an agreement do not need to seek any authorisation from the CMA. They solely

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[6] Case 23/67, *SA Brasserie de Haecht v Consorts Wilkin-Janssen*, EU:C:1967:54 (Brasserie de Haecht), at 415; Case C-234/89 *Delimitis v Henninger Bräu* (Delimitis) [1991] ECR I-935, paragraph 14.

[7] Case 23/67 *Brasserie de Haecht*, at 415; Case C-234/89 *Delimitis*, paragraph 14.

[8] Case T-7/93, *Langnese-Iglo GmbH v European Commission*, EU:T:1995:98 (Langnese Iglo), paragraph 129; Case T-9/93, *Schöller Lebensmittel GmbH & Co. KG v European Commission*, EU:T:1995:99 (Schöller), paragraph 95.

[9] The cumulative conditions that must be met in full are that the agreement: (a) Contributes to: (i) improving production or distribution; or (ii) promoting technical or economic progress while allowing consumers a fair share of the resulting benefit; and (b) does not: (i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or (ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

need to satisfy themselves (scrutinise) that the agreement fulfils the conditions for individual exemption under section 9(1).

2.12 We set out further details on the application of section 9(1) to vertical agreements at paragraphs 10.30 to 10.35.

Block exemption

2.13 To minimise the burden which compliance with competition law poses on the parties to vertical agreements, under the CA98 the Secretary of State may make a 'block' exemption order that exempts from the Chapter I prohibition any particular categories of agreement which the CMA considers are likely to satisfy the conditions for individual exemption under section 9(1). This allows companies to have confidence that if their agreement meets the conditions of the block exemption, it is legal under the Chapter I prohibition, without needing to scrutinise that agreement against the conditions for individual exemption under section 9(1) referred to in the previous section.

2.14 An agreement that falls within a category specified in the block exemption (and that does not breach any of the conditions specified in the block exemption) will not be prohibited under the Chapter I prohibition and is enforceable by the parties to the agreement. The parties to the agreement need to satisfy themselves that the agreement meets the conditions set out in the block exemption and be in a position to prove that the agreement benefits from the block exemption provided by the VABEO.

2.15 Where an agreement has as its object or effect an appreciable restriction of competition but does not fall within the terms of the block exemption, consideration will need to be given to one of the following:

(a) Does it fulfil the conditions for individual exemption under section 9(1)?

(b) Should it be amended so as to bring it within the terms of the block exemption?

2.16 The VABEO does not apply to agreements implemented, or intended to be implemented, outside the UK.[10] Similarly, the VABEO does not exempt agreements from the application of provisions equivalent to the Chapter I prohibition which apply outside the UK such as Article 101 TFEU.

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[10] Section 2(3) CA98.

2.17 The VABEO does not apply to agreements whose subject matter falls within the scope of any other block exemptions in the UK.

2.18 Further details on the application of the CA98 and the VABEO to vertical agreements are provided in the following Part.

3. Overview of the assessment of vertical agreements

3.1 This part gives a brief overview of the various steps in the assessment of vertical agreements under the Chapter I prohibition and the VABEO and cross-refers to the relevant sections of the Guidance where those matters are addressed in more detail.

3.2 Typically, the overall assessment of a vertical agreement under competition law will entail the following steps:[11]

(a) **Step 1** - it is necessary to establish whether an agreement falls within the scope of the Chapter I prohibition in the first place. This is a preliminary step since only agreements which are within scope of the prohibition can benefit from the block exemption provided by the VABEO or individual exemption under section 9(1). In Part 4 we set out some key considerations about agreements which generally fall outside of the scope of the Chapter 1 prohibition.

(b) **Step 2** - if a vertical agreement does fall within the scope of the Chapter I prohibition, the following step is to assess whether the agreement may nonetheless benefit from the block exemption provided by the VABEO. In Part 5 we provide an overview of the various steps for assessment under the VABEO. In Part 6 we set out the definition of vertical agreements, scope of the VABEO and various legal conditions which the VABEO imposes in order to provide a block exemption for vertical agreements. Further detailed guidance on each of those conditions is then provided in Parts 7-9 of this Guidance.

(c) **Step 3** - if a vertical agreement does not meet the legal conditions of the VABEO, it can still fulfil the conditions for individual exemption under section 9(1). In Part 10 we set out the relevant guidance for assessments carried out under this legal provision.

3.3 Finally, in Part 10 we also set out some of the relevant factors for assessment of vertical agreements under the Chapter I prohibition (in cases where the agreements do not benefit from the block exemption provided by the VABEO or from individual exemption under section 9(1)).

[11] There is no requirement for these steps to be taken in this order.

4. Vertical agreements which generally fall outside the scope of the Chapter I prohibition

4.1 This part gives an overview of vertical agreements which generally fall outside of the scope of the Chapter I prohibition. If a vertical agreement is deemed as falling outside the scope of the Chapter I prohibition it follows that the VABEO is not applicable.

4.2 This part is structured according to the various types of vertical agreements which typically do not fall within the scope of the Chapter I prohibition:

(a) Lack of appreciable effect on trade and agreements of minor importance.

(b) Agency agreements.

(c) Subcontracting agreements.

4.3 Other types of vertical agreements may also fall outside of the scope of the Chapter I prohibition. For example, Part 8 of this Guidance describes examples of exceptional circumstances in which restrictions that are identified as 'hardcore' in the VABEO may actually fall outside of the scope of the Chapter I prohibition.

Lack of appreciable effect on trade and agreements of minor importance

4.4 The Chapter I prohibition applies only where an agreement has an appreciable effect on trade within the UK and brings about an appreciable restriction of competition.[12] Agreements that are not capable of appreciably affecting trade within the UK or of appreciably restricting competition by object[13] or effect[14] do not fall within the scope of the Chapter I prohibition.

4.5 In determining whether an agreement has an appreciable effect on competition for the purposes of the Chapter I prohibition, the CMA will have

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[12] See eg Case 1124/1/1/09 *North Midland Construction v OFT* [2011] CAT 14, paras 35–63.
[13] An object restriction that has an appreciable effect on trade within the UK restricts competition appreciably. *Carewatch Care Services Ltd v Focus Caring Services Ltd* [2014] EWHC 2313 (Ch), paras 149–150. See also CMA decisions eg *Online resale price maintenance in the light fittings sector*, CMA decision of 3 May 2017, paras 4.156–4.157 and 4.166; *Cleanroom laundry services and products*, CMA decision of 14 December 2017, para 5.167; *Nortriptyline tablets (market sharing)*, CMA decision of 4 March 2020, paras 6.172–6.173.
[14] *P&S Amusements v Valley House Leisure* [2006] EWHC 1510 (Ch); see also *Independent Media Support Ltd/BBC Broadcast*, OFCOM decision of 30 May 2007, paras 8.1–8.25, upheld on appeal [2008] CAT 13; permission to appeal to the Court of Appeal was refused [2008] EWCA Civ 1402.

regard to the European Commission's approach as set out in the Notice on Agreements of Minor Importance.[15]

4.6 Unless an agreement contains a hardcore restriction (see Part 8) or is part of a network of parallel agreements giving rise to cumulative effects, vertical agreements entered into by non-competing undertakings whose individual market share on the relevant market does not exceed 15% are generally considered not to have an appreciable effect on competition and therefore to fall outside the scope of the Chapter I prohibition.[16] There is no presumption that vertical agreements concluded by undertakings having more than 15% market share on the relevant market automatically infringe the Chapter I prohibition. Agreements between undertakings whose market share exceeds the 15% threshold may still not have an appreciable effect on trade within the UK or may not constitute an appreciable restriction of competition.[17] Such agreements need to be assessed on a case by case basis in their legal and economic context.

4.7 As regards hardcore restrictions, the Chapter I prohibition may apply below the 15% threshold, provided that there is an appreciable effect on trade within the UK and on competition. The applicable retained EU case-law of the European Court of Justice and the European General Court is relevant in this respect.[18] It may also be necessary to assess positive and negative effects of hardcore restrictions as described in particular Part 8 of this Guidance.

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[15] Section 60A(2)(b) CA98 provides that the CMA and UK Courts will be bound by an obligation to ensure consistency with EU competition case law that pre-dates the end of the Transition Period. Furthermore, in accordance with section 6(3) to 6(6) of the European Union (Withdrawal) Act 2018, any question as to the validity, meaning or effect of unmodified retained EU law is to be decided, so far as they are relevant to it, in accordance with any case law and general principles of the CJEU laid down up until 31 December 2020. In accordance with section 60A(3) CA98,in determining any such question, the CMA must also have regard to any relevant decision or statement of the European Commission made before the end of the Transition Period and not withdrawn. The EC's notice on Agreements of Minor Importance amounts to a 'statement of the commission' made before the end of the Transition Period.
For further details on how the CMA takes into consideration the Commission's Notice on Agreements of Minor Importance, see the competition law guideline Agreements and concerted practices (OFT401) adopted by the CMA board.

[16] For agreements between competing undertakings the de minimis market share threshold is 10% for their collective market share on each affected relevant market.

[17] See Case T-7/93 *Langnese-Iglo v Commission* [1995] ECR II-1533, paragraph 98. See also *Network Rail Infrastructure Ltd v Achilles Information Ltd* [2020] EWCA Civ 323, para 93.

[18] See Case 5/69 *Völk v Vervaecke* [1969] ECR 295; Case 1/71 *Cadillon v Höss* [1971] ECR 351 and Case C-306/96 *Javico v Yves Saint Laurent* [1998] ECR I-1983, paragraphs 16 and 17. See also relevant UK case law eg *Network Rail Infrastructure Ltd v Achilles Information Ltd* [2020] EWCA Civ 323, para 93.

Agency agreements

4.8 The Chapter I prohibition does not apply to agreements between undertakings which form part of a single economic unit or entity.[19] Agents may be classed as an undertaking but the Chapter I prohibition does not apply to agency agreements where the agent is considered to form an integral part of the principal, and therefore treated as a single economic entity for the purpose of competition law. Accordingly, it is the relationship between principal and agent which is relevant to the assessment of whether an agreement is an agency agreement. A person (the 'agent') with the power to negotiate or conclude contracts for the sale of goods or services on behalf of another (the 'principal') will be regarded as forming part of the same economic unit if the agent can be considered to be an auxiliary organ forming an integral part of the principal's undertaking,[20] so that the principal and agent are not considered separate undertakings for competition law purposes.

4.9 This section of the Guidance provides an overview of how to assess an agency agreement and, once an agency agreement is identified, how the Chapter I prohibition may apply to it.

Concept of agency agreement

4.10 An agency agreement provides for a legal or physical person (an agent) to be vested with the power to negotiate or conclude contracts (or both) on behalf of another person (the principal), either in the agent's own name or in the name of the principal, for the:

(a) purchase of goods or services by the principal, or

(b) sale of goods or services supplied by the principal.[21]

4.11 In certain circumstances, the relationship between an agent and its principal may be characterised as one in which the agent no longer acts as an independent economic operator. This applies where the agent does not bear

[19] Case C-40/73 *Cooperative Vereniging 'Suiker Unie' UA v European Commission (Suiker Unie),* EU:C:1975:174, paragraph 542

[20] Case C-40/73 *Cooperative Vereniging 'Suiker Unie' UA v European Commission* (Suiker Unie), EU:C:1975:174, paragraph 480, T-325/01 *DaimlerChrysler AG v European Commission* (DaimlerChrysler), EU:T:2005:322, paragraph 87, and C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA* (*CEEES*), EU:C:2006:784, paragraph 43.

[21] See CMA infringement decision on *Price comparison website: use of most favoured nation clauses*, Case 50505, 19 November 2020, In its decision the CMA found that a price comparison website was not a genuine agent on the basis that the price comparison website did not negotiate or conclude contracts on behalf of home insurance providers and therefore was not a 'genuine agent' for the purposes of competition law.

any or only insignificant financial or commercial risk associated with the contracts concluded or negotiated on behalf of the principal, as further explained below.[22] Where that is the case, the agency agreement falls outside the scope of the Chapter I prohibition. The qualification given to their agreement by the parties (ie the description of the agreement by the parties involved) or by applicable legislation (which may define the concept of an 'agent' for other purposes) is not material for the assessment. Since they constitute an exception to the general applicability of the Chapter I prohibition to agreements between undertakings, the conditions for categorising an agreement as an agency agreement, for the purpose of applying the Chapter I prohibition, should be interpreted narrowly.

Agency agreements: categories of risk that are material to the analysis

4.12 There are three types of financial or commercial risk that are material to the categorisation of an agreement as an agency agreement in the consideration of the application of the Chapter I prohibition.

(a) First, there are the contract-specific risks which are directly related to the contracts concluded and/or negotiated by the agent on behalf of the principal.

(b) Second, there are the risks related to market-specific investments. These are investments specifically required for the type of activity for which the agent has been appointed by the principal and which are necessary to enable the agent to conclude and/or negotiate the particular type of contract. Such investments are usually sunk, which means that upon leaving that particular field of activity the investment cannot be used for other activities or sold other than at a significant loss.

(c) Third, there are the risks related to other activities undertaken on the same product market by the agent, to the extent that the principal requires these activities to be taken as part of the agency relationship by the agent at its own risk, and not on behalf of the principal.

4.13 For the purposes of applying the Chapter I prohibition, an agreement will be categorised as an agency agreement if the agent bears no, or only insignificant, risks of the three types set out in the previous paragraph. The

[22] See Case T-325/01 *Daimler Chrysler v Commission,* EU:T:2005:322; Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio v CEPSA,* EU:C:2006:784; and Case C-279/06 *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL,* EU:C:2008:485.

significance of any such risks undertaken by the agent is generally to be assessed by reference to the revenues generated by the agent from providing the agency services rather than by reference to the revenues generated by the sale of the goods or services covered by the agency agreement. However, risks that are related to the activity of providing agency services in general, such as the risk of the agent's income being dependent upon its success as an agent or general investments in for instance premises or personnel, are not material to this assessment.

Examples of features of agency agreements

4.14 In the light of the above, in considering the application of the Chapter I prohibition above, an agency agreement is typically one in which the agent:[23]

(a) does not acquire the property in the goods bought or sold under the agency agreement and does not itself supply the contract services;[24]

(b) does not contribute to the costs relating to the supply/purchase of the contract products, including the costs of transporting the goods;[25]

(c) does not maintain at its own cost or risk stocks of the contract goods, including the costs of financing the stocks and the costs of loss of stocks and can return unsold goods to the principal without charge;[26]

(d) does not take responsibility for customers' non-performance of the contract (for instance for non-payments by the customer), with the exception of the loss of the agent's commission;[27]

(e) does not assume responsibility towards customers of other third parties for loss or damage resulting from the supply of the contract products, unless, as agent, it is liable for fault in this respect;

(f) is not, directly or indirectly, obliged to invest in sales promotion, including through contributions to the advertising budget of the principal

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[23] This list of examples does not purport to be exhaustive.

[24] The fact that the agent may temporarily, for a very brief period of time, acquire the property of the contract goods while selling them on behalf of the principal does not preclude an agency agreement, provided the agent does not incur any costs or risks related to that transfer of property.

[25] This does not preclude the agent from carrying out the transport service, provided that the costs are covered by the principal.

[26] Unless the agent is liable for fault (for example, by failing to comply with reasonable security measures to avoid loss of stocks).

[27] Unless the agent is liable for fault (for example, by failing to comply with reasonable security or anti-theft measures or failing to comply with reasonable measures to report theft to the principal or police or to communicate to the principal all necessary information available to him on the customer's financial reliability).

or to advertising or promotional activities specifically relating to the contract products;

(g) does not make market-specific investments in equipment, premises or training of personnel;[28]

(h) does not undertake other activities within the same product market required by the principal under the agency relationship;[29]

(i) does not undertake responsibility towards third parties for damage caused to the product sold;

(j) does not take responsibility for other types of financial risks such as the risk of incurring costs due to deferred payment from credit cards or the risk of customer insolvency;

(k) does not make market-specific investments in customer support services, such as after-sales and technical support, to the extent that these services affect the relationship between the agent and the principal in that market, unless these activities are fully reimbursed by the principal.

Identifying which party bears risk

4.15 Where the agent incurs one or more of the risks or costs mentioned in paragraphs 4.11 to 4.14, the agreement between agent and principal will not be categorised as an agency agreement. It is therefore necessary to assess which party bears those risks.

4.16 The question of which party bears risk must be assessed on a case-by-case basis, and with regard to the economic reality of the situation rather than the legal form. It may be helpful to consider the risk analysis in stages, taking each of the three types of risk identified in paragraph 4.12 above in turn. For practical reasons, the risk analysis may start with the assessment of the contract-specific risks. If the agent incurs contract-specific risks which are not insignificant, that will be enough to conclude that the agent is an independent distributor. If the agent does not incur contract-specific risks, then it will be necessary to continue the analysis by assessing the risks relating to market-specific investments. Finally, if the agent does not incur any contract-specific risks or risks related to market-specific investments, the risks related to other

[28] Unless these costs are fully reimbursed by the principal.
[29] Unless these activities are fully reimbursed by the principal.

required activities required under the agency relationship within the same product market may have to be considered.

4.17 An agent will be regarded as bearing the relevant risks or costs, unless it is fully reimbursed for those investments or activities. A principal may use various methods to reimburse the agent for the relevant risks, as long as such methods ensure that the agent bears no, or only insignificant, risks of the types set out in paragraphs 4.11 to 4.14 of this Guidance. For example, a principal may choose to reimburse the precise costs incurred, or it may cover the costs by way of a fixed lump sum, or it may pay the agent a fixed percentage of the revenues from the goods or services sold in accordance with the agency agreement. To ensure that all relevant risks are covered, the agency agreement may need to provide a simple method for the agent to declare and request the reimbursement of any costs exceeding the agreed lump sum or fixed percentage. It may also be necessary for the principal to systematically monitor any changes to the relevant costs and to adapt the lump sum or fixed percentage accordingly. Where the relevant costs are reimbursed by way of a percentage of the price of the products sold under the agency agreement, the principal should also take into account that the agent may incur relevant market-specific investment costs even where it makes limited or no sales for a certain period of time. The principal must fully reimburse in a timely manner in order for the agreement to be categorised as an agency agreement for the purposes of the Chapter I prohibition.

Other relevant factors

4.18 Other factors are also relevant to the assessment of whether an agent operates as an auxiliary organ forming an integral part of its principal's undertaking so that the principal and its agent are not considered separate undertakings for competition law purposes. These factors include:

(a) the level of influence of an agent in determining its commercial strategy, including whether an agent is in a position to determine or influence the terms on which it makes sales;

(b) the unity of conduct in the market of the principal and the agent, including the extent to which an agent undertakes a very considerable amount of business for its own account on the market for the product in question, as an independent dealer;

(c) the number of principals on behalf of whom the agent acts. Where an agent acts for more than one principal this may indicate that the agent is independent and not an integral part of its principal's undertaking. In particular, where an agent acts on the same market on behalf of multiple competing principals, it is unlikely to be considered an integral part of one single principal's undertaking and therefore unlikely to be an agent for the purposes of applying the Chapter I prohibition;

(d) whether the principal and agent are perceived by third parties and on the market as forming one and the same economic unit.

Applying the concept of agency agreements to online intermediation services

4.19 Undertakings providing online intermediation services as defined in Article 2(1) VABEO are categorised as suppliers under the VABEO (see also paragraphs 6.23 to 6.27 of this Guidance) and in principle they therefore cannot qualify as agents for the purpose of applying the Chapter I prohibition.

4.20 Moreover, there are other factors which mean that providers of online intermediation services generally act as independent economic operators and not as part of the undertakings of the sellers for which they provide online intermediation services. Strong network effects and other features of the online platform economy can contribute to a significant imbalance in the size and bargaining power of the contract parties and result in a situation where the conditions of sale of the contract products and the commercial strategy are determined by the provider of online intermediation services rather than the sellers of the products that are intermediated.

4.21 In addition, providers of online intermediation services often serve a very large number of sellers in parallel, which prevents them from effectively forming a part of any of the sellers' undertakings. They also typically make significant market-specific investments, for example, in software, advertising and after-sales services, indicating that providers of online intermediation services bear significant financial or commercial risks associated with the contracts negotiated on behalf of the sellers using their online intermediation services.

Applying the concept of agency agreements to dual role agents

4.22 An independent distributor of some products of a supplier may also be also be considered to act as an agent for other products of that same supplier, provided that the activities and risks covered by the agency agreement can be effectively delineated (for example because they concern products presenting additional functionalities or new features). For the agreement to be considered an agency agreement for the purpose of applying the Chapter I prohibition, the independent distributor must be genuinely free to enter into the agency agreement (for example the agency relationship must not be *de facto* imposed by the principal through a threat to terminate or worsen the terms of the distribution relationship) and, as mentioned in paragraphs 4.10 to 4.14 of this

Guidance, all relevant risks linked to the sale of the products covered by the agency agreement, including market-specific investments, must be borne by the principal.

4.23 In some circumstances where an operator undertakes a number of activities, it may be difficult to assess if it is operating as an agent. For example, where an agent undertakes other activities for the same or other suppliers at its own risk, it is possible that the conditions imposed on the agent for its agency activity will influence its incentives and limit its decision-making freedom when it sells products as an independent activity. In particular, it is possible that the pricing policy of the principal for the products sold under the agency agreement will influence the incentives of the agent/distributor to price independently the products that it sells as an independent distributor. In addition, the combination of agency and independent distribution for the same supplier raises difficulties in distinguishing between investments and costs that relate to the agency function, including market-specific investments, and those only related to the independent activity. In such cases, the assessment of whether an agency relationship meets the conditions set out in paragraphs 4.10 to 4.14 of this Guidance can therefore be particularly complex.[30]

4.24 The risks described in paragraphs 4.11 to 4.14 of this Guidance are more likely to arise if the agent undertakes other activities as an independent distributor for the same principal in the same product market. Conversely, those risks are less likely to arise if the other activities the agent undertakes as an independent distributor concern a different product market.[31] More generally, the less interchangeable the products are, the less likely are those risks to occur. In product markets comprising products not presenting objectively distinct characteristics, such as higher quality, novel features or additional functions, such delineation appears more difficult and there may therefore be a significant likelihood of the agent being influenced by the terms of the agency agreement, notably regarding the price setting, for the products it distributes independently.

4.25 In order for an agreement with one of its independent distributors already active on the relevant market to be categorised as an agency agreement, when identifying the market-specific investments to be reimbursed, the principal should consider the hypothetical situation of an agent that is not yet active in the relevant market in order to assess which investments are relevant to the type of activity for which the agent is appointed. The only

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[30] Joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Coöperatieve Vereniging "Suiker Unie" UA and others v Commission*, ECLI:EU:C:1975:174, paragraphs 537-557.
[31] Case T-325/01 *DaimlerChrysler AG v Commission*, ECLI:EU:T:2005:322, paragraphs 100 and 113.

market-specific investments that the principal would not have to cover would be those that relate exclusively to the sale of differentiated products in the same product market that are not sold under the agency agreement but are distributed independently, by contrast to market-specific investments needed to operate in the relevant product market, which the principal would have to cover in all cases. This is because the agent would not incur the market-specific costs corresponding to the differentiated products if it did not also act as an independent distributor for those products in addition to the products it distributes as an agent, provided that it can operate on the relevant market without selling the former.[32]

Set out below is an example of how costs might be allocated where a distributor also acts as agent for certain products for the same supplier, in order to the relationship to be categorised as an agency one:

(a) An independent distributor sells products A, B and C. Products A and B belong to the same product market, which comprises differentiated products presenting objectively different characteristics. Product A features a new functionality. Product C belongs to a different product market.

(b) A supplier of product B generally distributes its products using independent distributors. However, it wishes to use an agency agreement for the distribution of Product A. It offers the opportunity of entering into an agency agreement to its independent distributors which are already operating in the same product market without *de jure* or *de facto* requiring them to enter into this agency agreement.

(c) For the agency agreement not to fall within the scope of the Chapter I Prohibition and to meet the conditions of paragraphs 4.10 to 4.14 of this Guidance, the principal has to cover all the investments which are relevant to selling each of products A and B (and not only product A) since both products A and B belong to the same product market. For example, all costs incurred to adapt or furnish a shop in order to display and sell products A and B are likely to be market-specific. Similarly, the costs of training personnel in order to sell products A and B and costs related to specific storage equipment, which may be needed for products A and B, are also likely to be market-specific. In order for the agency agreement to fall outside the scope of the Chapter I prohibition the investments which would

[32] To the extent that the relevant investments have already been depreciated (eg investments in activity-specific furniture), the reimbursement may be adjusted proportionately.

normally be required for an agent to enter the market and start selling products A and B, should be borne by the principal even if the agent is already established on that market as an independent distributor.

(d) However, the principal would not have to cover investments for the sale of product C, which does not belong to the same product market as products A and B. Moreover, in a situation where the sale of product B requires specific investments that are not necessary for the sale of product A there would be no requirement for such investments to be covered by the principal in order for the arrangement to be considered one of agency. That is provided that a distributor can operate on the relevant market comprising products A and B by selling only product A.

(e) Investments in advertising for the agent's shop (rather than any investment in advertising specific to product A) would benefit both the agent's shop in general as well as the sales of products A, B and C. These costs would therefore be partly relevant for the assessment of the agency agreement, to the extent they relate to the sale of product A which is sold under the agency agreement, as well as the general activity of selling products A and B and C. The cost of an advertising campaign relating exclusively to products B or C, however, would not be relevant to an assessment of the agency agreement. There would therefore be no need for this cost to be covered by the principal, provided that it is possible for a distributor to operate on the relevant market selling only product A.

(f) The same principles apply to investments in a website or an online store. These investments would be made irrespective of the products sold under the agency agreement, insofar as the website structure itself could be used to sell products other than those in the relevant product market (eg product C or, more generally, products other than A and B). Therefore, these general investments would not have to be reimbursed by the principal in order for the arrangement to be considered one of agency.. However, investments related to the selling or advertising products in the relevant product market (ie both products A and B) on the website would be relevant to the consideration of the agency relationship. Therefore, depending on the level of investment required to advertise and sell products A and B on the website, the principal would have to cover part of the costs of setting up the website or the online store, in order for the arrangement to categorised as one of agency. Any specific investments for advertising or selling product B or C only would not be relevant to an assessment of the agency agreement and there would therefore be no need for this cost to be covered by the principal , provided that it is possible for a distributor to operate on the relevant market selling only product A.

Applying the Chapter I prohibition to agency agreements

4.26 Where a relationship between two undertakings is characterised as one of ‘genuine agency’, the obligations imposed by the principal on the agent in relation to the contracts which the agent negotiates or concludes on behalf of the principal will fall outside the scope the Chapter I prohibition.[33] Since the principal bears the commercial and financial risks related to the selling and purchasing of the contract products all obligations imposed on the agent in the agency agreement in relation to the contracts concluded and/or negotiated on behalf of the principal fall outside the Chapter I prohibition. The assumption by the agent of the obligations set out below will be considered to form an inherent part of the agency agreement because these obligations relate to the ability of the principal to fix the scope of activity of the agent in relation to the contract goods or services. In these circumstances, the principal assumes the risks in respect of the contracts concluded and/or negotiated by the agent on the principal’s behalf. Thus, the principal is able to determine the commercial strategy in relation to:

(a) limitations on the territory in which the agent may sell these products;

(b) limitations on the customers to whom the agent may sell these products; or

(c) the prices and conditions at which the agent may sell or purchase these products.

4.27 By contrast, where the agent bears one or more of the relevant risks as described in paragraphs 4.11 to 4.14, the agreement between agent and principal does not constitute an agency agreement for the purpose of applying the Chapter I prohibition. In that situation, the agent will be treated as an independent undertaking and the agreement between agent and principal will be subject to the Chapter I prohibition as any other vertical agreement. For that reason, Article 2(1) VABEO clarifies that an undertaking which, under an

[33] Case C-217/05 *Confederacion Espanola de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA*, EU:C:2006:784, paragraph 62.

agreement falling within the Chapter I prohibition, sells goods or services on behalf of another undertaking, is a buyer.

4.28 Even if the agent bears no, or only insignificant, risks described in paragraphs 4.11 to 4.14 of this Guidance, it remains a separate undertaking from the principal and therefore some of the provisions concerning the relationship between the agent and the principal (which go beyond those which have been set out above) may fall within the scope of the Chapter I prohibition.[34] If within scope of the Chapter I prohibition, such provisions may benefit from the block exemption provided by the VABEO,[35] or they may satisfy the conditions for individual exemption under section 9(1) in individual cases. For instance, agency agreements may contain a provision preventing the principal from appointing other agents in respect of a given type of transaction, customer or territory (exclusive agency provisions) or a provision preventing the agent from acting as an agent or distributor of undertakings which compete with the principal (single branding provisions). Exclusive agency provisions will in general not lead to anti-competitive effects. However, single branding provisions and post-term non-compete provisions, which concern inter-brand competition, may infringe the Chapter I prohibition if they contribute to a (cumulative) foreclosure effect on the relevant market where the contract goods or services are sold or purchased (see in particular paragraphs 9.7 and 10.37 to 10.56 of this Guidance).

4.29 An agency agreement may also fall within the scope of the Chapter I prohibition, even if the principal bears all the relevant financial and commercial risks, where it facilitates collusion. This could occur, for instance, when a number of principals use the same agents while collectively excluding other undertakings from using those agents, or when they use the agents to collude on marketing strategy or to exchange sensitive market information.

4.30 In the case of an independent distributor that also acts as an agent for certain products of the same supplier, compliance with the requirements set out in paragraphs 4.22 to 4.25 of this Guidance has to be carefully considered. This is necessary to avoid a misuse of the agency concept in scenarios where the supplier does not actually become active at the retail level, taking all associated distribution decisions and assuming all related risks in accordance with the principles set out in paragraphs 4.11 to 4.14, but rather establishes an easy way to control retail prices for those products that allow high resale margins. Since resale price maintenance is a hardcore restriction under

[34] This is irrespective of whether they form part of the agreement governing the sale or purchase of the contract products or a separate agreement.
[35] Provided all the conditions in the VABEO are fulfilled.

Article 8(2)(a) VABEO, as set out in paragraphs 8.10 to 8.26 of this Guidance, the agency concept cannot be used to enable such practice or to circumvent the application of the Chapter I prohibition

Subcontracting agreements

4.31 Subcontracting occurs where one undertaking (a contractor) provides technology or equipment to another undertaking (a subcontractor) and that subcontractor undertakes to produce certain products using that technology or equipment (exclusively) for the contractor. In accordance with s60A CA98, the CMA will have regard to the Commission notice of 18 December 1978 which concerns the assessment of certain subcontracting agreements in relation to Article 85(1) of the EEC Treaty[36] (subcontracting notice). The subcontracting notice provides that subcontracting agreements whereby the subcontractor undertakes to produce certain products exclusively for the contractor generally fall outside the scope of the Chapter I prohibition[37] provided that the technology or equipment is necessary to enable the subcontractor to produce the products. However, other restrictions imposed on the subcontractor such as the obligation not to conduct or exploit its own research and development or not to produce for third parties in general may fall within the scope of the Chapter I prohibition.[38]

[36] OJ C 1, 3.1.1979, p. 2. Section 60A(2)(b) CA98 provides that the CMA and UK Courts will be bound by an obligation to ensure consistency with EU competition case law that pre-dates the end of the Transition Period. Furthermore, in accordance with section 6(3) to 6(6) of the European Union (Withdrawal) Act 2018, any question as to the validity, meaning or effect of unmodified retained EU law is to be decided, so far as they are relevant to it, in accordance with any case law and general principles of the CJEU laid down up until 31 December 2020. In accordance with section 60A(3) CA98,in determining any such question, the CMA must also have regard to any relevant decision or statement of the European Commission made before the end of the Transition Period and not withdrawn. The EC’s subcontracting notice amounts to a ‘statement of the commission’ made before the end of the Transition Period

[37] The Commission notice refers to Article 101 which is the equivalent of the Chapter I prohibition at EU level.

[38] See paragraph 3 of the subcontracting notice.

5. Assessment of vertical agreements which fall within the scope of the VABEO

5.1 In this Part we set out an overview of the different steps involving the analysis of a vertical agreement which falls within the scope of the Chapter I prohibition and may benefit from the block exemption provided by the VABEO.[39]

Methodology for assessing a vertical agreement

5.2 The assessment of a vertical agreement which falls within the scope of the Chapter I prohibition generally involves the following four steps:[40]

(a) The undertakings involved need to establish that the agreement falls within the scope of the VABEO (Part 6).

(b) If agreements is within the scope of the VABEO it is then necessary to establish the market shares of the supplier and the buyer on the market where they respectively sell and purchase the contract products (first legal condition) – paragraphs 5.3 to 5.4 and Part 7.

(c) If the relevant market share of the supplier and the buyer each do not exceed the 30% threshold, the vertical agreement is covered by the VABEO, subject to the hardcore restrictions (second legal condition) and excluded restrictions (third legal condition) set out in the VABEO – paragraph 5.5, Parts 8 and 9.

(d) If the relevant market share of the supplier or the buyer is above the 30% threshold, it is necessary to assess whether the vertical agreement fulfils the conditions for individual exemption under section 9(1) - paragraphs 10.30 to 10.35.

First legal condition – market share thresholds

5.3 The VABEO sets out general conditions that must be met by all vertical agreements in order for them to benefit from the block exemption provided by the VABEO. This first legal condition is that the supplier's and the buyer's market share must each be 30% or less. Not complying with this condition will

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[39] Any references in this Guidance to vertical agreements which benefit, or may benefit, from the block exemption provided by the VABEO should be read as implying that all the conditions set out in the VABEO are met, or must be met.
[40] There is no requirement for the steps to be done in this order. [41] Case C-74/04 P *Commission v Volkswagen AG* [2006] ECR I-6585.

have the effect of cancelling all of the block exemption in relation to a particular agreement.

5.4 Pursuant to Article 6(1) of the VABEO, it is the supplier's market share on the market where it sells the contract goods or services and the buyer's market share on the market where it purchases the contract goods or services which determine the applicability of the VABEO. In order for the VABEO to apply, the supplier's and the buyer's market share must each be 30% or less. Part 7 of this Guidance provides guidance on how to define the relevant market and calculate the market shares. Above the market share threshold of 30%, there is no presumption that vertical agreements fall within the scope of the Chapter I prohibition or fail to fulfil the conditions for individual exemption under section 9(1) but there is also no presumption that vertical agreements falling within the scope of the Chapter I prohibition will usually fulfil the conditions for individual exemption under section 9(1).

Second legal condition – hardcore restrictions

5.5 This second legal condition is that the vertical agreement does not contain any hardcore restrictions. Not complying with this condition will have the effect of cancelling all of the block exemption in relation to a particular agreement. Accordingly, if there are one or more hardcore restrictions in an agreement, the benefit of the block exemption is lost for the entire vertical agreement. Part 8 of this Guidance provides guidance on hardcore restrictions.

Third legal condition – excluded restrictions

5.6 This third legal condition is that the vertical agreement does not contain any excluded restrictions. Not complying with this condition will have the effect of cancelling the block exemption in relation to that specific provision in the agreement. The rule of severability applies to excluded restrictions and therefore the benefit of the block exemption provided by the VABEO is only lost in relation to a restriction on a vertical agreement which does not comply with the conditions set out in Article 10 VABEO. The remainder of the agreement continues to benefit from the block exemption provided by the VABEO (Article 11 VABEO). Part 9 of this Guidance provides guidance on excluded restrictions.

6. Scope of the VABEO

6.1 The VABEO applies to 'vertical agreements'. This part of the Guidance provides guidance on that definition and the scope of the VABEO.

6.2 This part is structured as follows:

(a) Definition of vertical agreements.

(b) Vertical agreements between competitors.

(c) Associations of retailers.

(d) Vertical agreements containing provisions on intellectual property rights (IPRs).

(e) Relationship to other retained block exemptions.

Definition of vertical agreements

6.3 Articles 2(1) and 3(2) of the VABEO define a 'vertical agreement' as '*an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, 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 (the contract goods or services)*'. References in this Guidance to 'agreement' should be taken also to include decisions of associations of undertakings and concerted practices, unless otherwise specified. We address each of these elements in turn below.

The VABEO applies to agreements and concerted practices.

6.4 The VABEO does not apply to unilateral conduct of the undertakings concerned. Such unilateral conduct can fall within the scope of the Chapter II prohibition, which prohibits the abuse of a dominant position, but this is outside the scope of this Guidance.

6.5 For there to be an agreement within the meaning of the Chapter I prohibition it is sufficient that the parties have expressed their joint intention to conduct themselves on the market in a specific way. The form in which that intention is expressed is irrelevant as long as it constitutes a faithful expression of the parties' intention. In many cases there will be an explicit agreement expressing the concurrence of wills. Where that is not the case, there may still be an agreement where the policy of one party receives the acquiescence of the other party. For vertical agreements, acquiescence may be established in the following ways:

(a) Acquiescence can be deduced from the powers conferred upon the parties in a general agreement drawn up in advance. If the clauses of the agreement drawn up in advance provide for or authorise a party to adopt subsequently a specific unilateral policy which will be binding on the other party, the acquiescence of that policy by the other party can be established on the basis thereof.[41]

(b) In the absence of such explicit acquiescence, an agreement may be established based on tacit acquiescence. For that, it is necessary to show first that one party requires explicitly or implicitly the cooperation of the other party for the implementation of its unilateral policy and second that the other party complied with that requirement by implementing that unilateral policy in practice.[42]

(c) Tacit acquiescence may also be deduced from the level of coercion exerted by a party to impose its unilateral policy on the other party or parties to the agreement in combination with the number of distributors that are actually implementing in practice the unilateral policy of the supplier. For instance, a system of monitoring and penalties, set up by a supplier to penalise those distributors that do not comply with its unilateral policy, points to tacit acquiescence with the supplier's unilateral policy if this system allows the supplier to implement in practice its policy.

The agreement or concerted practice is between two or more undertakings.

6.6 Vertical agreements with final consumers not operating as an undertaking are not covered by the VABEO. More generally, agreements with final consumers not operating as undertakings do not fall under the scope of the Chapter I prohibition, as that applies only to agreements between undertakings, decisions by associations of undertakings and concerted practices of undertakings. This is without prejudice to the possible application of the Chapter II prohibition.

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[41] Case C-74/04 P *Commission v Volkswagen AG* [2006] ECR I-6585.
[42] Case T-41/96 *Bayer AG v Commission* [2000] ECR II-3383.

The undertakings must operate at different levels of the production or distribution chain.

6.7 An agreement must be between undertakings operating, for the purposes of the agreement, at a different level of the production or distribution chain. Examples of activities at different levels of the production or distribution chain include supplying raw materials, manufacturing, wholesaling, and retailing. An agreement between a food manufacturer and a supermarket for the supply of baked beans would be an example of a vertical agreement between undertakings operating at different levels of the production or distribution chain.

6.8 This does not preclude an undertaking from being active at more than one level of the production or distribution chain. However, where a vertical agreement is entered into between competing undertakings the parties must have regard to Article 3(5) of the VABEO (see paragraphs 6.13 to 6.22 below on vertical agreements between competitors).

6.9 Undertakings may still operate at different levels of the production or distribution chain even when they both fall within one of the broad categories mentioned in paragraph 6.7 above. Within manufacturing, for example, one undertaking may manufacture a component part of a final product (such as a light bulb) and make an agreement to sell that part to a second undertaking which uses that part in its manufacture of the final product (such as a car). Although each of these undertakings is a manufacturer (one of light bulbs and one of cars), they would be regarded as operating at different levels of the production or distribution chain when they entered into an agreement for the supply of light bulbs to be incorporated into a car. Such an agreement may, therefore, benefit from the block exemption provided by the VABEO because each undertaking operates at a different level of the production or distribution chain.

Conditions under which the parties to the agreement may purchase, sell or resell certain products.

6.10 An agreement must relate to the conditions under which the parties to the agreement (the supplier and the buyer) may purchase, sell or resell certain products (defined in Article 3(2) of the VABEO as 'the contract goods or services'). This reflects that the purpose of the VABEO is to cover all vertical agreements relating to the supply of goods or services, irrespective of whether those goods or services are to be incorporated into other products, are themselves the final product, or are intended to be resold by the buyer.

6.11 Agreements between the provider of online intermediation services and the buyer of those services constitute vertical agreements for the purposes of Article 2(1) VABEO.

6.12 The VABEO applies to products sold and purchased for renting to third parties. However, rent and lease agreements as such are not covered because no product is sold by the supplier to the buyer.[43] More generally, the VABEO does not cover restrictions or obligations that do not relate to the conditions of purchase, sale or resale, such as an obligation preventing parties from carrying out independent research and development, which the parties may have included in an agreement otherwise falling with.

Vertical agreements between competitors and 'dual distribution'

6.13 Vertical agreements entered into between competing undertakings do not fall within the scope of the VABEO unless they are non-reciprocal and meet one of the conditions listed in Article 3(5)(i) to (iv) VABEO.

6.14 Vertical agreements between competitors that are not covered by the VABEO should be assessed by reference to relevant current guidance on horizontal agreements, including the guidance on the exchange of information in the context of vertical agreements between competing undertakings.[44]

6.15 Where a vertical agreement is non-reciprocal and meets one of the conditions in Article 3(5)(i) to (iv) of the VABEO and does not include a horizontal restriction of competition by object, this agreement should be assessed by reference to this Guidance, including to determine whether it benefits from block exemption provided by the VABEO.

6.16 Article 3(7) of the VABEO defines a competing undertaking as 'an actual or potential competitor'. Two companies are treated as actual competitors if they are active on the same relevant (product and geographic) market. A company is treated as a potential competitor of another company if, absent the agreement, in case of a small but permanent increase in relative prices it is likely that the company would within a short period of time[45] undertake the

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[43] This does not conflict with the 'end user' status for motor vehicle leasing companies as explained in fn. 98.

[44] See the competition law guidelines in Agreements and concerted practices (OFT401) and Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements Text with EEA relevance, which the CMA has regard to as noted in paragraph 3.11 of OFT401.

[45]Case T-461/07, Visa Europe Ltd and Visa International Service, [2011] ECR II-1729, paragraph 189. '*the essential factor is the need for the potential entry to take place with sufficient speed to form a constraint on market participants*'. Case C-307/18, Generis UK v CMA, paragraph 39 '*The assessment of whether there is*

necessary additional investments or incur other necessary switching costs to enter the relevant market on which the other company is active. That assessment must be based on realistic grounds, having regard to the structure of the market and the economic and legal context within which it operates. This means that the mere theoretical possibility of entering a market is not sufficient. There must be real and concrete possibilities for that undertaking to enter the market without any insurmountable barriers to entry. Conversely, there is no need to demonstrate with certainty that that undertaking will in fact enter the market concerned and, a fortiori, that it will be capable, thereafter, of retaining its place there.[46]

6.17 Article 3(5)(i)-iv)) of the VABEO identifies four forms of non-reciprocal vertical agreement between competitors that can benefit from the block exemption provided by the VABEO. Non-reciprocal means, for instance, that where one manufacturer becomes the distributor of the products of another manufacturer, the latter does not become a distributor of the products of the first manufacturer.

6.18 A distributor that commissions a manufacturer to produce particular goods under the distributor's brand name is not to be considered a manufacturer of such own-brand goods and thus a competitor of the manufacturer. Consequently, the exemption in Article 3(5)(i) VABEO applies to agreements between a distributor selling such own-brand goods manufactured by a third party and a supplier of branded goods on the same relevant market. In contrast, distributors that produce goods in-house under their brand name are considered manufacturers. This means that the exemption in Article 3(5)(i) of VABEO does not apply to agreements between those distributors and manufacturers of branded goods in the same relevant market. Such agreements must therefore be assessed under relevant current guidance on horizontal agreements.

6.19 The exemptions provided by Article 3(5)(i, iii, and iv) of the VABEO concern situations where the supplier is either a manufacturer, wholesaler or importer and is also a distributor of goods, while the buyer is only a distributor that does not compete with the manufacturer, wholesaler or importer at the relevant upstream level.

6.20 The exemption provided by Article 3(5)(ii) VABEO concerns situations where the supplier is a provider of services operating at several levels of trade, while

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potential competition must be carried out having regard to the structure of the market and the economic and legal context within which it operates.'

[46] Case C-234/89, Delimitis, EU:C:1991:91, paragraph 21; Generics (UK) and Others v Competition and Markets Authority C-307/18, ECLI:EU:C:2020:52., paragraphs 36-39.

the buyer only operates at the retail level and does not compete with the supplier at the level of trade where it purchases the contract services.

6.21 These are typically scenarios where the supplier is mainly active on the upstream market but also has some activities in the retail market. Such circumstances are sometimes referred to as ‘dual distribution’ arrangements. In these cases, competition issues are less likely to arise where the parties do not have market power and any potential negative impact on horizontal intra-brand competition between the parties at the retail level is considered of lesser importance than the potential positive impact of the parties’ vertical agreement on general competition at the supply or distribution level.

6.22 Agreements containing any horizontal restrictions of competition by object are not covered by the exemptions set out in Article 3(5) of the VABEO. The benefit of the block exemption provided by the VABEO only covers restraints that are genuinely vertical; it does not extend to horizontal agreements between competing undertakings even where these might be recorded or agreed in the same documents as a vertical agreement (or related documents) that would otherwise fall within Article 3(5) VABEO.

Vertical agreements in the online platform economy

6.23 The online platform economy plays an increasingly important role for the distribution of products. Undertakings active in the online platform economy enable new ways of doing business, some of which are not easy to categorise under the concepts traditionally associated with vertical relationships between suppliers and distributors in the bricks and mortar environment.

6.24 The VABEO categorises undertakings active in the supply and distribution chain as suppliers or buyers. Depending on whether an undertaking falls within one category or the other, the VABEO may apply differently, notably in the following areas:

(a) the exemption of non-reciprocal vertical agreements between competitors pursuant to Article 3(5) of the VABEO (see paragraphs 6.13-6.22 of this Guidance);

(b) the calculation of market shares for the application of the thresholds stipulated in Article 6 VABEO (see Part 7 of this Guidance);

(c) the removal of the benefit of the block exemption provided by the VABEO pursuant to Article 8 of the VABEO (see Part 8 of this Guidance); and

(d) the exclusion of certain restrictions from the block exemption provided by the VABEO pursuant to Article 10 of the VABEO (see Part 9 of this Guidance).

6.25 The VABEO includes definitions of the concepts of supplier and buyer in Article 2(1). To reconcile the difficulty of defining these concepts exhaustively with the objective of the VABEO of providing as much legal certainty as possible, these provisions are limited to clarifying that certain types of undertakings fall within one or the other category.

6.26 Article 2(1) of the VABEO states that an undertaking which provides online intermediation services qualifies as a supplier under the VABEO when it is providing those services. This means that, in accordance with the distinction between suppliers and buyers provided by the VABEO, the undertaking providing online intermediation services cannot qualify simultaneously as a buyer within the meaning of Article 2(1) of the VABEO in relation to the transaction that it facilitates. Furthermore, Article 2(1) of the VABEO makes clear that a provider of online intermediation services is a supplier under the VABEO including where it is itself also party to a transaction that it facilitates. This means that, where an undertaking provides online intermediation services and therefore falls within the scope of the definition of 'supplier' in Article 2(1) of the VABEO, this undertaking cannot circumvent its qualification as supplier of online intermediation services, for example by becoming a party to the transaction it facilitates or stipulating contractually that it is a buyer of the products supplied on the basis of such a transaction.

6.27 The definition of supplier of online intermediation services in Article 2(1) of the VABEO is based on definitions in Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (known as the 'P2B Regulation').[47] It builds on the notion that an undertaking providing online intermediation services provides such services with a view to facilitating direct transactions between sellers and buyers, or between sellers and consumers using its online intermediation services. The definition in Article 2(1) of the VABEO is based on the consideration that a provider of online intermediation services generally provides an infrastructure that allows undertakings to meet and transact with other undertakings or consumers

[47] OJ L 186, 11.7.2019, p. 57. On 12 July 2020, the EU Regulation on platform-to-business relations (the P2B Regulation) on promoting fairness and transparency for business users of online platforms and search engines became directly applicable in EU Member States (including in the UK, as part of the Transition Period following the UK's exit from the EU). When the Transition Period ended on 31 December 2020, the EU law version of the P2B Regulation was retained in UK law, with limited amendments largely to make it UK-centric.

online, without being legally or factually responsible for their transactions. In that way, the provider of online intermediation services supplies access to that infrastructure to the undertaking buying the online intermediation services.

Associations of retailers

6.28 Under Article 3(3) of the VABEO, vertical agreements entered into by an association of undertakings benefit from the block exemption provided by the VABEO only if all the members are retailers of goods (not services) and if each individual member of the association has a turnover not exceeding £44 million. Retailers are distributors reselling goods to final consumers.

6.29 An association of undertakings may involve both horizontal and vertical agreements. The horizontal agreements must be assessed according to the relevant principles for the assessment of horizontal cooperation agreements.[48] If that assessment leads to the conclusion that the cooperation between undertakings in the area of purchasing or selling is acceptable, a further assessment will be necessary to examine the vertical agreements concluded by the association with its suppliers or its individual members. The latter assessment will be carried out in accordance with the provisions in the VABEO and this Guidance. For instance, horizontal agreements concluded between the members of the association or decisions adopted by the association, such as the decision to require the members to purchase from the association or the decision to allocate exclusive territories to the members must first be assessed as a horizontal agreement. If that assessment leads to the conclusion that the horizontal agreement is not anti-competitive, an assessment of the vertical agreements between the association and individual members or between the association and suppliers is still necessary.

Vertical agreements containing provisions on intellectual property rights (IPRs)

6.30 Article 3(4) of the VABEO provides that vertical agreements containing certain provisions relating to the assignment or use of IPRs[49] to or by the buyer can benefit from the block exemption provided by the VABEO. All other vertical

[48] See Guidelines on the applicability of Article 101 of the Treaty to horizontal cooperation agreements. OJ C11, 14.1.2011, p. 1; as amended by Corrigenda OJ C33, 2.2.2011, p. 20. A revision of those Guidelines is forthcoming. See also Agreements and concerted practices (OFT401).

[49] In accordance with Article 3(7) VABEO, intellectual property rights include industrial property rights, know-how, copyright and neighbouring rights.

agreements containing IPR provisions are therefore excluded from the VABEO.

6.31 The VABEO applies to vertical agreements containing IPR provisions where five conditions are fulfilled:

(a) the IPR provisions must be part of a vertical agreement, that is, an agreement with conditions under which the parties may purchase, sell or resell certain goods or services;

(b) the IPRs must be assigned to, or licensed for use by, the buyer;

(c) the IPR provisions must not constitute the primary object of the agreement;

(d) the IPR provisions must be directly related to the use, sale or resale of goods or services by the buyer or its customers. In the case of franchising where marketing forms the object of the exploitation of the IPRs, the goods or services are distributed by the master franchisee or the franchisees; and

(e) the IPR provisions, in relation to the contract goods or services, must not contain restrictions of competition having the same object as vertical restraints which are not exempted under the VABEO.

6.32 Such conditions ensure that the VABEO applies to vertical agreements where the use, sale or resale of goods or services can be performed more effectively because IPRs are assigned to or licensed for use by the buyer. In other words, restrictions concerning the assignment or use of IPRs can be covered when the main object of the agreement is the purchase or distribution of goods or services.

6.33 The first condition makes clear that the context in which the IPRs are provided is an agreement to purchase or distribute goods or an agreement to purchase or provide services and not an agreement concerning the assignment or licensing of IPRs for the manufacture of goods, nor a pure licensing agreement. By way of illustration, the VABEO does not cover:

(a) agreements where a party provides another party with a recipe and licenses the other party to produce a drink with this recipe;

(b) agreements under which one party provides another party with a mould or master copy and licenses the other party to produce and distribute copies;

(c) the pure licence of a trade mark or sign for the purposes of merchandising;

(d) sponsorship contracts concerning the right to advertise oneself as being an official sponsor of an event; or

(e) copyright licensing such as broadcasting contracts concerning the right to record and/or broadcast an event.

6.34 The second condition makes clear that the VABEO does not apply when the IPRs are provided by the buyer to the supplier, no matter whether the IPRs concern the manner of manufacture or of distribution. An agreement relating to the transfer of IPRs to the supplier and containing possible restrictions on the sales made by the supplier does not benefit from the block exemption provided by the VABEO. That means, in particular, that subcontracting involving the transfer of know-how to a subcontractor[50] does not fall within the scope of application of the VABEO. However, vertical agreements under which the buyer provides only specifications to the supplier which describe the goods or services to be supplied and do not contain the transfer of any IPRs fall within the scope of application of the VABEO.

6.35 The third condition makes clear that in order to be covered by the VABEO, the primary object of the agreement must not be the assignment or licensing of IPRs. The primary object must be the purchase, sale or resale of goods or services and the IPR provisions must serve the implementation of the vertical agreement.

6.36 The fourth condition requires that the IPR provisions facilitate the use, sale or resale of goods or services by the buyer or its customers. The goods or services for use or resale are usually supplied by the licensor but may also be purchased by the licensee from a third supplier. The IPR provisions will normally concern the marketing of goods or services. An example would be a franchise agreement where the franchisor sells goods for resale to the franchisee and licenses the franchisee to use its trade mark and know-how to market the goods or where the supplier of a concentrated extract licenses the buyer to dilute and bottle the extract before selling it as a drink.

6.37 The fifth condition highlights the fact that the IPR provisions should not have the same object as any of the hardcore restrictions listed in Article 8 of the VABEO or any of the restrictions excluded from the benefit of the block exemption provided by the VABEO listed in Article 10 VABEO.

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[50] See the subcontracting notice (referred to in paragraph 4.31).

6.38 Intellectual property rights relevant to the implementation of vertical agreements within the meaning of Article 3(7) of the VABEO generally concern three main areas: trade marks, copyright and know-how.

Trade marks

6.39 A trade mark licence provided to a distributor may be related to the distribution of the licensor's products in a particular territory. If it is an exclusive licence, the agreement amounts to exclusive distribution.

Copyright

6.40 Resellers of goods covered by copyright (books, software, etc) may be obliged by the copyright holder only to resell under the condition that the buyer, whether another reseller or the end user, shall not infringe the copyright. Such obligations on the reseller, to the extent that they fall under the Chapter I prohibition at all, may benefit from the block exemption provided by the VABEO.

6.41 Agreements under which hard copies of software are supplied for resale, provided the reseller does not acquire a licence to any rights over the software but only has the right to resell the hard copies, are to be regarded as agreements for the supply of goods for resale for the purpose of the VABEO. Under that form of distribution, licensing the software only occurs between the copyright owner and the user of the software. It may take the form of a ‘shrink wrap’ licence, that is, a set of conditions included in the package of the hard copy which the end user is deemed to accept by opening the package.

6.42 Buyers of hardware incorporating software protected by copyright may be obliged by the copyright holder not to infringe the copyright, and must therefore not make copies and resell the software or make copies and use the software in combination with other hardware. Such use-restrictions, to the extent that they fall within the Chapter I prohibition at all, benefit from the block exemption provided by the VABEO.

Know-how

6.43 Franchise agreements, with the exception of industrial franchise agreements, are the most obvious example of where know-how for marketing purposes is communicated to the buyer. Franchise agreements contain licences of intellectual property rights relating to trade marks or signs and know-how for the use and distribution of goods or the provision of services. In addition to the licence of IPR, the franchisor usually provides the franchisee during the life of the agreement with commercial or technical assistance, such as procurement services, training, advice on real estate, financial planning etc. The licence and the assistance are integral components of the business method being franchised.

6.44 Licensing contained in franchise agreements is covered by the VABEO where all five conditions listed in paragraph 6.31 above are fulfilled. Those conditions are usually fulfilled as under most franchise agreements, including master franchise agreements, the franchisor provides goods and/or services, in particular commercial or technical assistance services, to the franchisee. The IPRs help the franchisee to resell the products supplied by the franchisor or by a supplier designated by the franchisor or to use those products and sell the resulting goods or services. Where the franchise agreement only or primarily concerns licensing of IPRs, it does not benefit from the block exemption provided by the VABEO, but if the CMA were to scrutinise the agreement, it would, as a general rule, apply the principles set out in the VABEO and this Guidance to such an agreement.

6.45 The following IPR-related obligations are generally considered necessary to protect the franchisor's intellectual property rights and, where these obligations fall under the Chapter I prohibition, fall within the terms of the VABEO:

(a) an obligation on the franchisee not to engage, directly or indirectly, in any similar business;

(b) an obligation on the franchisee not to acquire financial interests in the capital of a competing undertaking such as would give the franchisee the power to influence the economic conduct of such undertaking;

(c) an obligation on the franchisee not to disclose to third parties the know-how provided by the franchisor as long as this know-how is not in the public domain;

(d) an obligation on the franchisee to communicate to the franchisor any experience gained in exploiting the franchise and to grant the franchisor, and other franchisees, a non-exclusive licence for the know-how resulting from that experience;

(e) an obligation on the franchisee to inform the franchisor of infringements of licensed intellectual property rights, to take legal action against infringers or to assist the franchisor in any legal actions against infringers;

(f) an obligation on the franchisee not to use know-how licensed by the franchisor for purposes other than the exploitation of the franchise; or

(g) an obligation on the franchisee not to assign the rights and obligations under the franchise agreement without the franchisor's consent.

Relationship with other block exemptions

6.46 Article 3(6) states that the VABEO does 'not apply to vertical agreements the subject matter of which falls within the scope of any retained block exemption regulation (a) or of any block exemption order (b), unless otherwise provided for in such a regulation or order'. It is therefore useful to verify from the outset if a vertical agreement falls within the scope of application of any other block exemption regulation or order.[51]

6.47 Therefore the VABEO does not apply to vertical agreements covered by the following block exemption regulations or any future block exemption regulations relating to the types of agreements mentioned in the following sub-paragraphs, unless otherwise provided for in the respective regulation:[52]

(a) Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements;[53]

(b) Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements;[54]

(c) Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements.[55]

6.48 The VABEO applies to vertical agreements relating to the purchase, sale or resale of spare parts for motor vehicles and to the provision of repair and maintenance services for motor vehicles. Such agreements only benefit from the block exemption provided by the VABEO if, in addition to the conditions for exemption set out in the VABEO, they comply with the additional requirements of Commission Regulation (EU) No 461/2010 of 27 May 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to

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[51] For example, vertical agreements concluded between competing undertakings are in principle excluded from the scope of the VABEO and have to be assessed under the rules applicable to horizontal agreements.
[52] The regulations listed in this paragraph remain in force in the UK post implementation period as EU retained law.
[53] OJ L 93, 28.3.2014, p. 17.
[54] Currently under review by the CMA. OJ L 335, 18.12.2010, p. 36.
[55] Currently under review by the CMA. OJ L 335, 18.12.2010, p. 43.

categories of vertical agreements and concerted practices in the motor vehicle sector, and accompanying guidelines.

7. Market definition and market share calculation (Article 6)

7.1 The VABEO sets out general conditions that must all be met by all vertical agreements in order for them to benefit from the block exemption provided by the VABEO. This part considers the general condition in Article 6(1) of the VABEO that in order to benefit from the block exemption provided by the VABEO the market share of the supplier and the market share of the buyer must not exceed 30%.

7.2 Not complying with this condition (as defined in Article 6(1) of the VABEO) will have the effect of cancelling all of the block exemption in relation to a particular agreement.

7.3 This part considers:

(a) Defining the relevant market for calculating the 30% market share threshold under the VABEO.

(b) Calculation of market shares under the VABEO.

7.4 In order to calculate market shares under the VABEO it is first necessary to define the relevant market. The CMA's Guidance on Market Definition provides guidance on the rules, criteria and evidence which the CMA has regard to when considering market definition issues.[56] That guidance will not be further explained here and should serve as the basis for assessing market definition. This Guidance only deals with specific issues that arise in the context of vertical agreements and the application of the VABEO.

[56] OFT 403, Market Definition. The CMA will also have regard to the European Commission's Notice on the definition of relevant market, OJ C 372, 9 December 1997. Section 60A(2)(b) CA98 provides that the CMA and UK Courts will be bound by an obligation to ensure consistency with EU competition case law that pre-dates the end of the Transition Period. Furthermore, in accordance with section 6(3) to 6(6) of the European Union (Withdrawal) Act 2018, any question as to the validity, meaning or effect of unmodified retained EU law is to be decided, so far as they are relevant to it, in accordance with any case law and general principles of the CJEU laid down up until 31 December 2020. In accordance with section 60A(3) CA98,in determining any such question, the CMA must also have regard to any relevant decision or statement of the European Commission made before the end of the Transition Period and not withdrawn. The EC's notice on the definition of relevant market amounts to a 'statement of the commission' made before the end of the Transition Period.

Definition of the relevant market under the VABEO

7.5 Under Article 6(1) VABEO, the market share of both the supplier and the buyer need to be considered in determining if the block exemption applies.

7.6 In order for the VABEO to apply, the market share of the supplier on the market where it sells the contract products to the buyer and the market share of the buyer on the market where it purchases the contract products must not exceed 30%.

7.7 At the distribution level the vertical restraints usually concern not only the sale of products between supplier and buyer, but also their resale. As different distribution formats usually compete, markets are in general not defined by the form of distribution that is applied, for example exclusive or selective distribution. Where suppliers generally sell a portfolio of products, the entire portfolio may determine the product market definition when the portfolio and not the individual products contained in the portfolio are regarded as substitutes by the buyers.

7.8 Where a vertical agreement involves three parties, each operating at a different level of trade, each party's market share must not exceed 30% in order for the VABEO to apply. As specified in Article 6(2) VABEO, where in a multi-party agreement an undertaking buys the contract products from one undertaking that is a party to the agreement and sells the contract products to another undertaking that is also a party to the agreement, the VABEO only applies if its market share does not exceed the 30% threshold both as a buyer and a supplier. If, for instance, in an agreement between a manufacturer, a wholesaler (or association of retailers) and a retailer, a non-compete obligation is agreed, then the market shares of each of the manufacturer and the wholesaler (or association of retailers) on their respective supply markets must not exceed 30% and the market share of each of the wholesaler (or association of retailers) and the retailer must not exceed 30% on their respective purchase markets in order to benefit from the block exemption provided by the VABEO.

7.9 Where the vertical agreement, in addition to the supply of the contract products, also contains IPR provisions (such as a provision concerning the use of the supplier’s trade mark), which help the buyer to market the contract products, the supplier’s market share on the market where it sells the contract products is relevant for the application of the VABEO. Where a franchisor does not supply products for the resale of these products, but provides a bundle of products combined with IPR provisions that together form the business method being franchised, the franchisor needs to take account of its market share as a provider of a business method for the provision of specific products to end users. For that purpose, the franchisor needs to calculate its market share on the market where the business method is exploited by the franchisees to provide products to end users. The franchisor must therefore base its market share on the value of the products supplied by its franchisees on this market. On such a market, the franchisor's competitors may be providers of other franchised business methods, but also suppliers of substitutable products not applying franchising. The calculation of market shares under the VABEO

7.10 As set out in Article 7(1)(a)(i) VABEO, the market shares of the supplier and the buyer should in principle be calculated on the basis of value data (including sales to vertically integrated distributors). Where value data are not available, substantiated estimates can be made on the basis of other reliable market information such as volume figures.

7.11 The in-house supply of intermediate products for the supplier's own use may be relevant for the competition analysis in a particular case, but it will not be taken into account for the purposes of market definition or for the calculation of market shares under the VABEO. By contrast, pursuant to Article 7(1)(a) VABEO in the case of dual distribution of final goods (ie where a supplier of final goods also acts as a distributor of those goods on the market), the market definition and market share calculation should include the supplier's sales of its own goods made through its vertically integrated distributors and agents. Integrated distributors are connected undertakings within the meaning of Article 2(1) VABEO.[57]

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[57] For these market definition and market share calculation purposes, it is not relevant whether the integrated distributor sells in addition goods or services of competitors.

8. Hardcore restrictions (Article 8)

8.1 The VABEO sets out general conditions that must be met by all vertical agreements in order for them to benefit from the block exemption provided by the VABEO. This part considers the general condition that a vertical agreement must not contain any of the hardcore restrictions listed in Article [8] of the VABEO in order to benefit from the block exemption provided by the VABEO.

8.2 This part considers:

(a) general principles relating to hardcore restrictions;

(b) resale price maintenance (RPM);

(c) territorial and customer restrictions;

(d) restrictions of cross-supplies between appointed distributors within a selective distribution system;

(e) Restriction of the sales of spare parts; and

(f) wide retail parity obligations.

General principles

8.3 Article 8(2)(a) to (f) VABEO contains a list of hardcore restrictions, which are considered serious restrictions of competition. Vertical agreements that include one or more hardcore restrictions are excluded as a whole from the benefit of the block exemption provided by the VABEO.[58]

8.4 Hardcore restrictions pursuant to Article 8(2) VABEO are generally restrictions of competition by object which fall within the Chapter I prohibition.[59] Restrictions of competition by object within the meaning of the Chapter I prohibition are agreements which, by their very nature, have the potential to prevent, restrict or distort competition.[60] In that regard, certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects.[61] Where an agreement is found to have as its object the restriction of

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[58] Article 9 of the VABEO.

[59] See Commission, Guidance on restrictions of competition “by object” for the purpose of defining which agreements may benefit from the De Minimis Notice, SWD(2014) 198 final, p. 4.

[60] Case C-8/08 *T-Mobile Netherlands,* EU:C:2009:343, paragraphs 29 and31.

[61] Case C-67/13 *Groupement des Cartes Bancaires,* EU:C:2014:2204, paragraph 49.

competition it is still capable, in principle, of fulfilling the conditions for individual exemption under section 9(1).

8.5 By contrast, hardcore restrictions correspond to a category of restrictions under the VABEO for which it is presumed that they generally result in harm to competition so that a vertical agreement containing such a hardcore restriction cannot benefit from the block exemption provided by the VABEO.

8.6 In the light of the above, the CMA will adopt the following approach when assessing a vertical agreement:

(a) Where a hardcore restriction within the meaning of Article 8 VABEO is included in a vertical agreement, this agreement is likely to fall within the Chapter I prohibition.

(b) The inclusion of a hardcore restrictions in an agreement will have the effect of cancelling the benefit of the block exemption provided by the VABEO in relation to that agreement.

(c) An agreement that includes a hardcore restriction within the meaning of Article 8 VABEO is unlikely to fulfil the conditions for individual exemption under section 9(1).

8.7 Hardcore restrictions do not necessarily fall within the scope of the Chapter I prohibition.[62] If a hardcore restriction under the VABEO is objectively necessary for a vertical agreement of a particular type or nature, for instance, to ensure compliance with a public ban on selling dangerous substances to certain customers for reasons of safety or health, this agreement may exceptionally fall outside the scope of the Chapter I prohibition.

8.8 An undertaking may demonstrate pro-competitive effects which fulfil the conditions for individual exemption under section 9(1) in an particular case and the CMA will carefully consider these efficiency justifications in any investigations under the CA98.[63] For this purpose, the undertaking has to

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[62] For further details on vertical agreements which generally fall outside of Chapter I prohibition see Part 4.

[63] See in particular paragraph 10.11 describing in general possible efficiencies related to vertical restraints and paragraphs 8.10 to 8.26 on resale price restrictions. See for general guidance on the application of the conditions for individual exemption under section 9(1) the Communication from the Commission – Notice – Guidelines on the application of Article 101(3) of the Treaty, OJ C 101, 27.4.2004, p. 97. Section 60A(2)(b) CA98 provides that the CMA and UK Courts will be bound by an obligation to ensure consistency with EU competition case law that pre-dates the end of the Transition Period. Furthermore, in accordance with section 6(3) to 6(6) of the European Union (Withdrawal) Act 2018, any question as to the validity, meaning or effect of unmodified retained EU law is to be decided, so far as they are relevant to it, in accordance with any case law and general principles of the CJEU laid down up until 31 December 2020. In accordance with section 60A(3) CA98,in determining any such

substantiate that efficiencies are likely and that these efficiencies are likely to result from including the hardcore restriction in the agreement, when demonstrating that all the conditions for individual exemption under section 9(1) are fulfilled. Where this is the case, the CMA will assess the negative impact on competition that is likely to result from including the hardcore restriction in the agreement before making an ultimate assessment of whether the conditions for individual exemption under section 9(1) are fulfilled.

8.9 The examples provided below illustrate cases of exceptional circumstances under which a hardcore restriction may fall outside the scope of the Chapter I prohibition or, if within scope, fulfil the conditions for individual exemption under section 9(1).

Example of genuine entry

> A distributor which is the first to sell a new brand or an existing brand on a new market may have to commit substantial investments if there was previously no demand for the particular type of product in general or for the type of product from the particular producer. In such circumstances, considering that such expenses may often be sunk, the distributor may not enter into the distribution agreement without protection for a certain period of time against active and passive sales into its territory or to its customer group by other distributors.
>
> For example, such a situation may occur where a manufacturer established in a particular geographic market enters another geographic market and introduces its products with the help of an exclusive distributor, which needs to invest in launching and establishing the brand on this new market. Where substantial investments by the distributor to start up or develop the new market are necessary, restrictions of passive sales by other distributors into such a territory or to such a customer group which are necessary for the distributor to recoup those investments generally fall outside the scope of the Chapter I prohibition during the initial period over which the distributor is selling the contract products in that territory or to that customer group, even though such restrictions would normally be considered hardcore restrictions presumed to fall within the scope of the Chapter I prohibition.

question, the CMA must also have regard to any relevant decision or statement of the European Commission made before the end of the Transition Period and not withdrawn. The EC's Guidelines on the application of Article 101(3) of the Treaty amounts to a 'statement of the commission' made before the end of the Transition Period.

Example of cross-supplies between authorised distributors

In the case of a selective distribution system, cross-supplies between authorised distributors must normally be permitted (see paragraphs 9.71). However, if authorised wholesalers located in different territories are obliged to invest in promotional activities in the territory in which they distribute the goods or services concerned in order to support the sales by authorised distributors and it is not practical to specify in a contract the required promotional activities, restrictions on active sales by these wholesalers to authorised distributors in other wholesalers' territories to overcome possible free-riding may, in an individual case, fulfil the conditions for individual exemption under section 9(1).

Example of genuine testing

In the case of genuine testing of a new product in a limited territory or with a limited customer group or in the case of a staggered introduction of a new product, the distributors appointed to sell the new product on the test market or to participate in the first round(s) of the staggered introduction may be restricted in their active selling outside the test market or the market(s) where the product is first introduced without falling within the scope of the Chapter I prohibition for the period necessary for the testing or introduction of the product.

Resale price maintenance (RPM)

8.10 The hardcore restriction set out in Article 8(2)(a) of the VABEO concerns resale price maintenance (RPM), that is, agreements or concerted practices[64]

[64] For the distinction between vertical agreements and concerted practices see paragraphs [7.3 to 7.5] of this Guidance. However, this distinction has so far not played an important role in the enforcement practice since it is not necessary to distinguish between the two to find an infringement of the Chapter I prohibition. Furthermore, it should be noted that RPM can be linked to other restrictions, including horizontal collusion in the form of hub-and-spoke arrangements, which are addressed in the Commission's Horizontal Guidelines, paragraph 55. The CMA has regard to these guidelines, as noted in paragraph 3.11 of its competition law guidelines in Agreements and concerted practices (OFT401). See also CMA's guidance Resale price

having as their direct or indirect object the establishment of a fixed or minimum resale price or a fixed or minimum price level to be observed by the buyer. More broadly, this hardcore restriction is about the buyer's ability to determine its onward price. We set out below some of the means through which RPM can be achieved The inclusion of such a hardcore restriction in an agreement has the effect of cancelling the benefit of the block exemption provided by the VABEO in relation to that agreement

8.11 RPM can be established through direct means. This is the case for contractual provisions or concerted practices that directly establish the retail price and therefore result in clear-cut restrictions.[65] Such restrictions include contractual provisions allowing the supplier to set the price that the buyer has to charge its customer or prohibiting the buyer to sell below a certain price level. The restriction is also clear-cut where a supplier requests a price increase and the buyer complies with such a request.

8.12 RPM can also be achieved through indirect means, including incentives to observe a minimum price or disincentives to deviate from a minimum price. The following examples provide a non-exhaustive list of such indirect means:

(a) Fixing the distribution margin;

(b) Fixing the maximum level of a discount that the distributor can grant from a prescribed price level;

(c) Making the grant of rebates or the reimbursement of promotional costs by the supplier subject to the observance of a given price level;

(d) Linking the prescribed resale price to the resale prices of competitors; and

(e) Threats, intimidations, warnings, penalties, the delay or suspension of deliveries or contract terminations in relation to the observance of a given price level.

8.13 As set out in Article 8(2)(a) of the VABEO, the imposition of a maximum retail price or the determination of a resale price recommendation by the supplier does not in itself amount to RPM. However, if the supplier combines such a

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maintenance: advice for retailers - GOV.UK (www.gov.uk) and case studies published on Business cartels: case studies - GOV.UK (www.gov.uk).

[65] See, for example, Case CP/0809-01 (31 March 2003), Decision of Director General of Fair Trading, *Agreements between Lladró Comercial SA and UK retailers fixing the price for porcelain and stoneware figures*,. See also CMA infringement decisions on John Bruce (2002); Commercial refrigeration (2016); Domestic light fittings (2017); Fender (2020); Roland (2020); GAK (2020); Yamaha (2020).

maximum price, or with resale price recommendation with incentives to apply a certain price level or disincentives to lower the sales price, this can amount to RPM. An example of incentives to apply a certain price level would be the reimbursement of promotional costs in case of compliance with the maximum resale price or the recommended resale price. An example of disincentives to lower the sales price would be an intervention of the supplier in case the buyer deviates from the maximum or recommended resale price by, for instance, threatening to cut further supplies.

8.14 Similarly, minimum advertised price polices ('MAPs'), which prohibit retailers from advertising prices below a certain amount set by the supplier, may also amount to RPM for instance in cases where the supplier sanctions retailers for ultimately selling below the respective MAPs, requires them not to offer discounts or prevents them from communicating that the final price could differ from the respective MAP.[66]

8.15 Direct or indirect means of achieving price fixing 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. These measures are, however, in themselves not sufficient for a finding of RPM since they may be used by suppliers to increase the efficiency of the supply or distribution chain or for other purposes unrelated to direct or indirect means of achieving RPM.

8.16 Price monitoring is increasingly used in e-commerce where both manufacturers and retailers often use specific price monitoring software.[67] Such price monitoring does not constitute RPM as such. It however increases price transparency in the market, which allows manufacturers to effectively track the resale prices in their distribution network and to intervene swiftly in case of price decreases. It also allows retailers to track the prices of their

[66] See Case CE/9856/14, *Commercial refrigeration*, 24 May 2016. The CMA found that a policy which prevented resellers from advertising the supplier's products below a MAP set out in the supplier's MAP policy constituted de facto RPM as in the legal and economic context in which it operated, it genuinely restricted in practice the ability of the resellers to determine their online sales price for the relevant products at a price below the MAP.
[67] See Case 50565-6 *Decision of the CMA: Resale Price Maintenance in the digital piano and digital keyboard, and guitar sectors*, upheld on appeal by the Competition Appeal Tribunal. Commission Staff Working Document accompanying the Final Report on the E-commerce Sector Inquiry, document SWD(2017) 154 final of 10.5.2017, paragraphs 602-603.

competitors effectively and report price decreases to the manufacturer, together with a request to intervene against such price decreases.[68]

8.17 In the case of agency agreements, the principal normally establishes the sales price, as it bears the commercial and financial risks relating to the sale. However, where such an agreement cannot be categorised as an agency agreement for the purposes of applying the Chapter I prohibition (see in particular paragraphs 4.27 to 4.30 of the Guidance), an obligation preventing or restricting the agent from sharing its commission with the customer, irrespective of whether the commission is fixed or variable, is a hardcore restriction under Article 8(2)(a) of the VABEO. The agent should be left free to reduce the effective price paid by the customer without reducing the income for the principal.[69]

8.18 The fixing of the resale price in a vertical agreement between a supplier and a buyer that executes a prior agreement between the supplier and a specific end user (referred to in this Guidance as a ‘fulfilment contract’) does not constitute RPM where the end user has waived its right to choose the undertaking that should execute the agreement. In such a case, the fixing of the resale price does not result in a restriction within the scope of the Chapter I prohibition since the resale price is no longer subject to competition in relation to the end user concerned. However, this only applies in case the fulfilment contract does not constitute an agency agreement falling outside the scope of the Chapter I prohibition, as described in particular in paragraphs 4.27 to 4.30 of the Guidance. This may be because the buyer acquires the ownership of the contract goods intended for resale or because it assumes more than insignificant risks in relation to the execution of the contract. In contrast, where the end user has not waived its right to choose the undertaking that should execute the agreement, the supplier cannot fix the resale price without the restriction falling within Article 8(2)(a) of the VABEO. However, it may set a maximum resale price with a view to allowing price competition for the execution of the agreement.

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[68] See Case 50565-6 *Decision of the CMA: Resale Price Maintenance in the digital piano and digital keyboard, and guitar sectors*, paragraphs 3.77, 3.119-3.130, and 4.57; Case 50565-5 *Decision of the CMA, Online resale price maintenance in the electronic drum sector*, paragraphs 4.181 and 5.27; Case 50565-4 *Decision of the CMA, Online resale price maintenance in the synthesizer and hi-tech sector*, paragraphs 3.82, 3.86 and 3.91; Case 50565-3 *Decision of the CMA, Online resale price maintenance in the guitar sector*, paragraphs 4.198 and 5.28; Case 50565-2 *Decision of the CMA: Online resale price maintenance in the digital piano and digital keyboard sector*, paragraphs 4.153 and 5.34

[69] See, for instance, Case 50565-2 *Decision of the CMA: Online resale price maintenance in the digital piano and digital keyboard sector*, paragraph 4.135; Case 50565-5 *Decision of the CMA, Online resale price maintenance in the electronic drum sector*, paragraph 4.163. See also case 311/85 *ASBL Vereniging van Vlaamse Reisbureaus* [1987] ECR I-3801 paragraph 24; Commission Decision in Case No IV/32.737 *Eirpage*, in particular paragraph 6.

8.19 In the context of the online platform economy, if an undertaking is a provider of online intermediation services according to Article 2(1) VABEO, it is a supplier and must therefore comply with Article 8(2)(a) VABEO to avoid a hardcore restriction with regard to the intermediated goods or services. While this does not prevent an online intermediation services provider from incentivising the users of the online intermediation services to sell their goods or services at a competitive level or to reduce their prices, Article 8(2)(a) of the VABEO prohibits the online intermediation services provider from imposing a fixed or minimum sales price for the transaction that it facilitates.

8.20 It is well established in the decisional practice of the CMA and jurisprudence of the courts that an agreement establishing minimum or fixed retail prices, which prevents the buyer from determining its resale prices independently, restricts competition by object within the meaning of Chapter I CA98.[70] However, as mentioned in paragraphs 8.4 to 8.9 of the Guidance, the qualification of a restriction as a hardcore restriction, and by object restriction, does not mean that agreements that amount to RPM can never fulfil the conditions for individual exemption under section 9(1). Where undertakings consider that RPM is efficiency enhancing in an individual case, they may bring forward efficiency justifications showing that all the conditions for individual exemption under section 9(1) are indeed fulfilled in that individual case.

8.21 RPM is generally considered a serious restriction of competition, as it can restrict intra-brand and inter-brand competition in different ways:

(a) The direct effect of RPM is the elimination of intra-brand price competition by preventing all or certain distributors from lowering their

[70] See Case CE/9856/14 *Decision of the CMA: Online resale price maintenance in the commercial refrigeration sector*, paragraph A.39; Case CE/9857-14 *Decision of the CMA: Online resale price maintenance in the bathroom fittings sector*, paragraph A.47; Case 50565-6 *Decision of the CMA: Resale Price Maintenance in the digital piano and digital keyboard, and guitar sectors*, paragraph 4.160; Case 50565-5 *Decision of the CMA, Online resale price maintenance in the electronic drum sector* paragraph 4.162; Case 50565-4 *Decision of the CMA, Online resale price maintenance in the synthesizer and hi-tech sector* paragraph 4.236; Case 50565-3 *Decision of the CMA, Online resale price maintenance in the guitar sector* paragraph 4.179; Case 50565-2 *Decision of the CMA: Online resale price maintenance in the digital piano sector*, paragraph 4.134. See also *Argos Limited and Littlewoods Limited v OFT* [2004] CAT 24 (dismissing the appeals of Argos and Littlewoods on liability against the OFT's decision); *Roland (U.K.) Limited and Roland Corporation v CMA* [2021] CAT 8 (affirming the penalty imposed by the CMA); *Ping Europe Ltd v CMA* [2020] EWCA Civ 13, paragraph 109; *Raleigh UK Ltd v Mail Order Cycles Ltd* [2010] EWHC 1664 (Ch), paragraph 26 (noting that 'it is common ground […] that Resale Price Maintenance is unlawful'). See also the judgments of the CJEU in 243/83 *Binon v AMP,* EU:C:1985:284, paragraph 44; C-311/85 *VVR v Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten,* EU:C:1987:418, paragraph 17; C-27/87 *SPRL Louis Erauw-Jacquery v La Hesbignonne SC,* EU:C:1988:183, paragraph 15.

sales price for the brand concerned, thus resulting in a price increase for that brand.

(b) RPM may facilitate collusion between suppliers, notably in markets prone to collusive outcomes, for instance, where suppliers form a tight oligopoly and a significant part of the market is covered by RPM agreements. This may also be the case where suppliers distribute their goods or services through the same distributors, thus allowing them to use the latter as a vehicle for implementing the collusive equilibrium. RPM makes it generally easier to detect whether a supplier deviates from the collusive equilibrium by cutting its price. This means that if a supplier decided not to enforce its RPM policy with a view to increasing its retail sales, RPM would allow the other suppliers to detect the resulting retail price decrease more easily and react accordingly.

(c) RPM may facilitate collusion between buyers at the distribution level. The resulting loss of price competition seems particularly problematic when RPM is inspired by the buyers. Strong or well organised buyers may be able to force or convince one or more of their suppliers to fix their resale price above the competitive level, thereby helping the buyers reach or stabilise a collusive equilibrium. RPM serves as a commitment device for retailers not to deviate from the collusive equilibrium through discounting prices.

(d) RPM may reduce the pressure on the supplier's margin, in particular where the manufacturer has a commitment problem, that is, where it has an interest in lowering the price charged to subsequent distributors. In such a situation, the manufacturer may prefer to agree to RPM, so as to help it to commit not to lower the price for subsequent distributors and to reduce the pressure on its own margin.

(e) By avoiding price competition between distributors, RPM may prevent or hinder the entry and expansion of more efficient or new distribution formats, thus reducing innovation at the distribution level.

(f) RPM may be implemented by a supplier with market power to foreclose smaller rivals. The increased margin that RPM may offer distributors may entice them to favour the supplier's brand over rival brands when advising customers, even where such advice is not in the interest of these customers, or not to sell these rival brands at all.

8.22 However, RPM may also lead to efficiencies, in particular where it is supplier driven. If undertakings invoke section 9(1) claiming that RPM may lead to efficiencies, it is for them to put forward concrete evidence to substantiate this claim and to show that all the conditions for individual exemption under section 9(1) are indeed fulfilled in the individual case. Two examples of such an efficiency defence are set out below.

(a) When a manufacturer introduces a new product, RPM may be an efficient means to induce distributors to better take into account the manufacturer's interest to promote this product, in particular if it is a completely new product, and to increase sales efforts. If the distributors on the respective market face competitive pressure, this pressure may induce them to expand overall demand for the product and make the launch of the product a success, also for the benefit of consumers. section 9(1) requires that less restrictive means do not exist. To meet this requirement, suppliers may, for example, demonstrate that it is not feasible in practice to impose on all buyers effective promotion requirements by contract. Under such circumstances, the imposition of fixed or minimum retail prices for a limited period of time, that does not go beyond what is strictly necessary in order to facilitate the introduction of a new product, might in certain circumstances be considered, on balance, pro-competitive.

(b) Fixed resale prices, and not just maximum resale prices, may be necessary to organise a coordinated short-term low-price campaign (of two to six weeks in most cases), which will also benefit consumers. In particular, they may be necessary to organise such a campaign in a distribution system in which the supplier applies a uniform distribution format, such as a franchise system. Given its temporary character, the imposition of fixed retail prices may be considered on balance pro-competitive.

8.23 The benefit of the block exemption provided by the VABEO may cover recommending a resale price to a reseller or requiring the reseller to respect a maximum resale price, provided it does not amount to a minimum or fixed sales price as a result of pressure from, or incentives offered by, any of the parties, as set out in paragraphs 8.12 to 8.13 of the Guidance.

8.24 The possible competition risk of recommended and maximum prices is that they will work as a focal point for the resellers and might be followed by most or all of them which in turn may facilitate RPM. Moreover, recommended and maximum prices may soften competition or facilitate collusion between suppliers.

8.25 An important factor for assessing possible anti-competitive effects of recommended or maximum resale prices is the market position of the supplier. The stronger the market position of the supplier, the higher the risk that a recommended or maximum resale price leads to a more or less uniform application of that price level by the resellers, because they may use it as a focal point. They may find it difficult to deviate from what they perceive to be the preferred resale price proposed by such an important supplier on the market.

8.26 Where appreciable anti-competitive effects are established for recommended or maximum resale prices, the question of a possible individual exemption under section 9(1) arises. For maximum resale prices, avoiding double marginalisation may be particularly relevant. A maximum resale price may also help ensure that the brand in question competes more forcefully with other brands, including own label products, distributed by the same distributor.

Territorial and customer restrictions

General principles

8.27 The hardcore restrictions in the VABEO apply to vertical agreements that have an effect on trade within the United Kingdom. As mentioned in paragraph 2.16, the VABEO does not apply to agreements implemented, or intended to be implemented, outside the UK.

8.28 As far as territorial and customer restrictions are concerned, the general rule is that the buyer should be allowed to approach individual customers actively ('active' sales) and to respond to unsolicited requests from individual customers ('passive' sales).

8.29 Under EU retained case law, absolute territorial and customer restrictions are restrictions of competition by object on the basis that they create obstacles to market integration. This approach is reflected in UK case law. For example, following the CMA's decision relating to an online sales ban in the golf equipment sector, involving an infringement of both Article 101 of the TFEU and the Chapter I prohibition,[71] the Competition Appeal Tribunal held on appeal that a ban on selling on the internet (a form of territorial and customer restriction) amounted to a restriction of competition by object.[72] On further appeal, the Court of Appeal confirmed that such restrictions can restrict competition irrespective of any single market considerations, referring to the fact that 'as a result of the limitation on the ability of a retailer to compete for

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[71]Case 50230, Decision of the CMA: *Online sales ban in the golf equipment sector*, 24 August 2017.
[72] *Ping Europe Limited v Competition and Markets Authority,* [2018] CAT 13.

sales to customers beyond their geographic range, there is a diminution in price competition'.[73]

8.30 Article 8(2)(b) to (d)) VABEO sets out a list of hardcore restrictions and exceptions that apply depending on the distribution system operated by the supplier: exclusive distribution or selective distribution. These hardcore restrictions concern agreements or concerted practices that, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object the restriction of sales by a buyer or its customers, in as far as those restrictions relate to the territory into which or the customer groups to whom the buyer or its customers may sell the contract goods or services. The inclusion of such obligations in an agreement will have the effect of cancelling the block exemption provided by the VABEO in relation to that agreement.

8.31 Article 8(2)(c) and (d) of the VABEO provide that, in a selective distribution system, the restriction of cross-supplies between the members of the selective distribution system operating at the same or different levels of trade as well as the restriction of active or passive sales to end users by members of the selective distribution system operating at the retail level of trade constitute hardcore restrictions.

8.32 Article 8(2)(b) to (d) VABEO apply irrespective of the sales channel used (whether this is bricks and mortar or online). Vertical agreements which, directly or indirectly, in isolation or combination with other factors, have as their object, to prevent the buyers or their customers from effectively using the internet for the purposes of selling their products online, operate to restrict the territories 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.[74]

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[73] See *Ping Europe Limited v Competition and Markets Authority* [2020] EWCA Civ 13, paragraph 81. The CMA's predecessor, the OFT, in its investigation into prohibitions on online sales and online price advertising of 'Roma'-branded mobility scooters, similarly found that the restrictions prohibiting online sales had the object of restricting competition and constituted 'hardcore' restrictions within the meaning of Article 4(b) of the EU Regulation. The OFT concluded that the agreements restricted retailers from accessing a wider customer base with the help of the internet which, in turn, meant consumers were unable to identify or obtain better prices by shopping around or buy products not available from brick-and-mortar retailers in their local area.
Roma-branded mobility scooters: prohibitions on online sales and online price advertising (2013). Other cases in which the OFT considered the issue of territorial restrictions include Wholesale supply of compact discs (OFT 391, September 2002) and Newspaper and magazine distribution (OFT 1025, October 2008).

[74] *Ping Europe Limited v Competition and Markets Authority* [2020] EWCA Civ 13, paragraph 81.See also judgement in Case C-439/09 *Pierre Fabre Dermo-Cosmetique SAS v Président de l'Autorité de la concurrence,* EU:C:2011:649, paragraph 54.

8.33 A ban on online sales, as well as restrictions that *de facto* ban or limit online sales to the extent that they prevent buyers and their customers from effectively using the internet to sell their products online, have as their object to prevent the buyers or their customers from effectively using the internet to sell their goods or services online. Therefore, a restriction capable of significantly diminishing the overall amount of online sales in the market constitutes a hardcore restriction of active or passive sales within the meaning of Article 8(2)(b) VABEO. The assessment of whether a restriction is hardcore does not depend on market-specific circumstances or the individual circumstances of one or more specific customers.

8.34 Restrictions that prevent the effective use of one or more online advertising channels by the buyers or their customers[75] have as their object to prevent the buyers or their customers from effectively using the internet to sell their products online and thus restrict sales to customers wishing to purchase online and located outside the physical trading area of the buyers or their customers, as they limit the buyers' or their customers' ability to target them, inform them of their offering and to attract them to their online shop or other channels. Moreover, any blanket bans preventing distributors from selling through the internet at all are considered to restrict competition by object and are hardcore restrictions not exempted by the VABEO.[76]

8.35 These hardcore restrictions may be the result of direct obligations, such as the obligation not to sell to certain customers or to customers in certain territories or the obligation to refer orders from these customers to other distributors. They may also result from indirect measures aimed at inducing the distributor not to sell to such customers, such as:

(a) the requirement to request the supplier's prior approval;[77]

(b) the refusal or reduction of bonuses or discounts,[78] and compensatory payments by the supplier if the distributor stops sales to such customers;

(c) the termination of supply;

[75] See Commission Decisions in AT.40182 *Guess*, paragraph 118-126.
[76] For example, see *Ping Europe Limited v Competition and Markets Authority* [2020] EWCA Civ 13 and Case C-439/09, *Pierre Fabre Dérmo Cosmétique v Président de l´Autorité de la Concurrence*, EU:C:2011:649.
[77] See for example Case T-77/92 *Parker Pen v Commission,* EU:T:1994:85, paragraph 37.
[78] See for example Case T-450/05 *Peugeot Nederland v Commission,* EU:T:2009:262, paragraph 47.

(d) the limitation or reduction of supplied volumes, for instance, to the demand within the allocated territory or of the allocated customer group;

(e) the threat of contract termination[79] or non-renewal;

(f) the threat or carrying out of audits to verify compliance with the request not to sell to certain customer groups or to customers in certain territories;

(g) requiring a higher price for products to be sold to certain customer groups or to customers in certain territories;

(h) limiting the proportion of sales to certain customer groups or to customers in certain territories;

(i) limiting the languages to be used on the packaging or for the promotion of the products;

(j) the supply of another product in return for stopping such sales;

(k) payments to stop such sales;

(l) the obligation to pass-on to the supplier profits from such sales.

8.36 They may further result from the supplier not providing a United Kingdom-wide guarantee service, whereby the supplier normally reimburses all distributors for providing a mandatory guarantee service, even in relation to products sold by other distributors into their territory.

8.37 The practices mentioned in paragraphs 8.30 and 8.35 are more likely to be considered a restriction of the buyer's sales when used by the supplier in conjunction with a monitoring system aimed at verifying the destination of the supplied goods, such as the use of differentiated labels , specific languages or serial numbers.

8.38 In addition to the direct and indirect obligations set out in paragraphs 8.30 and 8.35, hardcore restrictions specifically related to online sales may similarly be the result of direct or indirect obligations. Besides a direct prohibition to use the internet as a sales channel, the following are further examples of obligations, directly or indirectly, having the object of preventing distributors

[79] See for instance Case T-62/98 *Volkswagen v Commission*, EU:T:2000:180, paragraph 44.

from using the internet effectively to sell their products online anywhere, in certain territories or to certain customer groups:

(a) a requirement that the distributor, irrespective of the distribution system it operates, shall prevent customers located in another territory from viewing its website or shall automatically re-route its customers to the manufacturer's or other distributors' websites. This does not preclude an obligation on the distributor to offer on its website links to websites of other distributors and/or the supplier;

(b) a requirement that the distributor, irrespective of the distribution system it operates, shall terminate consumers' online transactions once their credit card data reveal an address that is not within the distributor's territory;

(c) a requirement that the distributor shall only sell in a physical space or in the physical presence of specialised personnel;[80]

(d) a requirement that the distributor shall seek the supplier’s prior authorisation for selling online;

(e) a requirement that the distributor shall not use the supplier’s trade marks or brand names on its website;

(f) a direct or indirect prohibition on using a specific online advertising channel, such as price comparison tools or advertising on search engines, or other online advertising restrictions indirectly prohibiting the use of a specific online advertising channel.

8.39 A direct or indirect prohibition referred to in 8.38(f), would include an obligation on the distributor not to use the suppliers’ trade marks or brand names for bidding to be referenced in search engines, or a restriction to provide price related information to price comparison tools. While a prohibition in the use of one specific price comparison tool or search engine would typically not prevent the effective use of the internet for the purposes of selling online, as other price comparison tools or search engines could be used to raise awareness of a buyer’s online sales activities, a prohibition of the use of all most widely used advertising services in the respective online advertising channel could amount to such prevention, if the remaining price comparison

[80] Case C-439/09 *Pierre Fabre Dermo-Cosmetique SAS v Président de l’Autorité de la concurrence*, EU:C:2011:649, paragraphs 36-37.

tools or search engines are de facto not capable of attracting customers to the buyer’s online shop.

8.40 By contrast, suppliers can give certain instructions to their distributors on how their products are to be sold and for the vertical agreement to benefit from the block exemption provided by the VABEO. A supplier may impose quality requirements on distributors irrespective of the distribution model applied. Methods of sale that do not have as their object the restriction of the territory into which and the customer groups to whom the product and service may be sold can be agreed upon by the suppliers and its distributors. For instance, vertical agreements that contain quality requirements, notably in the context of selective distribution, such as the minimum size of the shop, quality requirements for the set-up of the shop (eg with respect to fixtures, furnishing, design, light and floor coverings), quality requirements for the look and feel of the website, product presentation requirements (eg the minimum number of colour options displayed next to each other or of the brand's products exposed, and the minimum space requirement between products, product lines and brands in the shop), can benefit from the block exemption provided by the VABEO.[81]

8.41 Vertical agreements including a restriction on the use of a specific online sales channel, such as online marketplaces, or setting quality standards for selling online, can benefit from the block exemption provided by the VABEO, irrespective of the distribution system used by the supplier in as far as such restriction does not, directly or indirectly, in isolation or combination with other factors, have as its object, to prevent the buyers or their customers from using the internet effectively for the purposes of selling their products online or from using one or more online sales channels effectively, as explained in paragraph 8.32 above.

8.42 These restrictions do not affect a group of customers which can be circumscribed within all potential customers nor the buyers’ or their customers’ ability to operate their own websites and to advertise via the internet on price comparison tools or online search engines, enabling buyers or their customers to raise awareness of their online activities and attract potential customers. Therefore, unless they have the indirect object of preventing the effective use of the internet for the purposes of selling online, such sales restrictions do not amount to a restriction of the territories into which or the customers to whom the distributors or their customers can sell

[81] For other examples, see Commission Staff Working Document accompanying the Final Report on the E-commerce Sector Inquiry, document SWD(2017) 154 final of 10.5.2017, paragraph 241.This document was produced when the UK was still a member of the EU.

the contract products. Such restrictions which in principle may benefit from the benefit of the block exemption provided by the VABEO include:

(a) a direct or indirect ban on sales on online marketplaces;[82]

(b) a requirement that the buyer operates one or more brick and mortar shops or showrooms as a condition for becoming a member of the supplier's distribution system;

(c) a requirement that the buyer sells at least a certain absolute amount (in value or volume, but not in proportion of its total sales) of the contract goods or services offline to ensure an efficient operation of its brick and mortar shop. This absolute amount of required offline sales can be the same for all buyers, or determined individually for each buyer on the basis of objective criteria, such as the buyer's size in the network or its geographic location.

8.43 A requirement that the same buyer pays a different price for products intended to be resold online than for products intended to be resold offline can benefit from the block exemption provided by the VABEO, in so far as it has as its object to incentivise or reward the appropriate level of investments respectively made online and offline. Such difference in price should be related to the differences in the costs incurred in each channel by the distributors at retail level. To that end, the wholesale price difference should take into account the different investments and costs incurred by a hybrid distributor so as to incentivise or reward that hybrid distributor for the appropriate level of investments respectively made online and offline, as where the wholesale price difference is entirely unrelated to the difference in costs incurred in each channel, such price difference is unlikely to bring about efficiency-enhancing effects. Therefore, where the wholesale price difference has as its object preventing the effective use of the internet for the purposes of selling online it amounts to a hardcore restriction, as set out in paragraph 8.32. This would, in particular, be the case where the price difference makes the effective use of the internet for the purposes of selling online unprofitable or financially not sustainable.

8.44 Online selling or advertising restrictions in vertical agreements benefit from the VABEO as long as they do not, directly or indirectly, have as their object preventing the buyers or their customers from using the internet effectively for the purposes of selling their products online. Examples of online selling or

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[82] Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH,* EU:C:2017:941, paragraphs 64-69; see also paragraphs 11.121-11.130 of this Guidance.

advertising restrictions benefitting from the block exemption provided by the VABEO include a requirement that online advertising meets certain quality standards or includes specific content or information, or a requirement that the buyer does not use the services of individual online advertising providers not meeting certain quality standards.

Distinction between active and passive sales

8.45 A restriction of the territory or customer group into which a buyer or its customers can sell the contract products can concern active or passive sales into that territory or to those customers. Article 8(5) VABEO provides the definitions of active and passive sales.

8.46 In accordance with Article 8(5) of the VABEO, active sales mean:

(a) actively targeting customers by for instance calls, e-mails, letters, visits or other direct means of communication;

(b) targeted advertising and promotion, by means of print or digital media, offline or online, including online media, price comparison tools or advertising on search engines targeting customers in specific geographical areas or customer groups;[83]

(c) advertisement or promotion that is only attractive for the buyer if it (in addition to reaching other customers) reaches a specific group of customers or customers in a specific geographical area (and is considered active selling to that customer group or customers in that geographical area);

(d) offering on a website language options different to the ones commonly used in the geographical area in which the distributor is established;

(e) using a domain name corresponding to a geographical area other than the one in which the distributor is established.

8.47 In accordance with the same provision, passive sales are defined as:

(a) sales in response to unsolicited requests from individual customers, including delivery of products to such customers without the sale having been initiated through advertising actively targeting the particular customer group or geographical area;

(b) general advertising or promotion that reaches customers in other distributors' geographical areas or customer groups (whether exclusive or not) but which is a reasonable way to reach customers outside those geographical areas or customer groups, for instance to reach customers in one's own geographical area (and general advertising or promotion is considered a reasonable way to reach such customers if it would be attractive for the buyer to incur those costs even if they would not reach customers in other distributors' geographical areas or customer groups (whether exclusive or not));

(c) participating in a public procurement exercise undertaken in accordance with the Defence and Security Public Contracts Regulations 2011(a), the Public Contracts Regulations 2015(b), the Concession Contracts Regulations 2016(c) or the Utilities Contracts Regulations 2016(d).

8.48 Article 8(5) VABEO provides that selling to customers who have not been actively targeted by setting up one's own website or online shop, irrespective of whether on an own server or hosted on a third party server, qualifies as passive sales, as it is a way to allow potential customers to reach a particular distributor. The use of a website may have effects that extend beyond the distributor's own territory and customer group, for instance, by enabling online purchases by customers located outside the physical trading area of the distributor. If, without any active targeting by the distributor of a specific territory or customer group, a customer from that territory or customer group visits the website of a distributor and contacts the distributor, and if such contact leads to a sale, including delivery, this is considered passive selling, as the customer's access to the distributor's website stems from the effective use of the internet by the customer. The same applies if a customer opts to be kept automatically informed by the distributor and such information leads to a sale. Similarly, using search engine optimisation techniques on a website, namely using tools or techniques intended to improve the ranking of that website on search engines, is a form of passive selling.

8.49 Conversely, offering on a website or online shop, language options (eg Welsh) different from the ones commonly used in the territory in which the distributor is established normally indicates that the distributor's activities are directed at the territory in which that language is commonly used and thus amounts to a form of active selling.[84] Setting up one's own website or online shop with a domain name (eg .Scot, .Wales) corresponding to a territory other

[84] Judgment in Cases C-585/08 and C-144/09 *Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG* and *Hotel Alpenhof GesmbH v Oliver Heller*, EU:C:2010:740, paragraph 93.

than the one in which the distributor is established is a form of active selling into that territory, while offering a website or online shop with a generic and non-country specific domain name is considered a form of passive selling.

8.50 Targeted online advertising or promotion is a form of active selling. In particular, in many instances, online advertising allows the distributor to determine in advance the audience that will be seeing its online advertising and thus to select the territories or customer groups that would be targeted by its advertisement. Targeted online advertising reaching customers within an exclusive territory or an exclusive customer group allocated to other distributors can thus be restricted. This includes, for instance, personalised advertising targeting customers in the exclusive territory or customer group or bidding for paid referencing on a search engine targeting an exclusive territory or customer group or any other form of online advertising enabling the distributor to design the advertisement so as to target or exclude customers in exclusive territories or customer groups. By contrast, online advertising or promotion which is meant to reach customers in a distributor's own territory or customer group but which cannot be limited to that territory or customer group, is considered a form of passive selling, to the extent that it is not designed to target customers across specific territories or customer groups. Examples of such general advertising is sponsored content on a website of a local or national newspaper that may be accessed by any visitor of that website.

8.51 The participation in public procurement is categorised as a form of passive selling irrespective of the type of the public procurement procedure (eg open procedure, restricted procedure). If the participation in a public tender were to be qualified as active sales, intra-brand competition would be significantly reduced in such markets, thus contradicting the rationale of public procurement law which includes facilitating intra-brand competition. As a result, restricting the participation of a buyer in public procurement is a hardcore restriction under Article 8(2)(b) to (d) VABEO. Similarly, the CMA considers that responding to private tenders is also a form of passive selling. A private tender is a form of unsolicited sales request addressed to multiple potential suppliers and the submission of a bid in response to a private tender is therefore passive selling.

Application of the general principles

8.52 The hardcore restriction set out in Article 8(2)(b) of the VABEO concerns agreements or concerted practices that have as their direct or indirect object the restriction of sales by a buyer party to the agreement or its customers, in as far as those restrictions relate to the territory into which or the customers to whom the buyer or its customers may sell the contract goods or services.

8.53 As explained above, this hardcore restriction relates to market partitioning by territory or by customer group. That may be the result of direct obligations, such as the obligation not to sell to certain customers or to customers in certain territories or the obligation to refer orders from these customers to other distributors. It may also result from indirect measures aimed at inducing the distributor not to sell to such customers, such as refusal or reduction of bonuses or discounts, termination of supply, reduction of supplied volumes or limitation of supplied volumes to the demand within the allocated territory or customer group, threat of contract termination, requiring a higher price for products to be exported, limiting the proportion of sales that can be exported or profit pass-over obligations. It may further result from the supplier not providing a United Kingdom-wide guarantee service under which normally all distributors are obliged to provide the guarantee service and are reimbursed for this service by the supplier, even in relation to products sold by other distributors into their territory[85]. Such practices are even more likely to be viewed as a restriction of the buyer's sales when used in conjunction with the implementation by the supplier of a monitoring system aimed at verifying the effective destination of the supplied goods, such as the use of differentiated labels or serial numbers. However, obligations on the reseller relating to the display of the supplier's brand name are not classified as hardcore. As Article 8(2)(b) only concerns restrictions of sales by the buyer or its customers, this implies that restrictions of the supplier's sales are not a hardcore restriction under the VABEO, subject to the regime regarding sales of spare parts (see paragraph 8.73).

8.54 Article 8(2)(b) applies without prejudice to a restriction on the buyer's place of establishment. Thus, the benefit of the VABEO is not lost if it is agreed that the buyer will restrict its distribution outlet(s) and warehouse(s) to a particular address, place or territory.

8.55 There are four exceptions to the hardcore restriction in Article 8(2) of the VABEO. The first exception in Article 8(2)(b)(i) allows a supplier to restrict active sales by a buyer party to the agreement to a territory or a customer

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[85] If the supplier decides not to reimburse its distributors for services rendered under the United Kingdom-wide guarantee, it may be agreed with these distributors that a distributor which makes a sale outside its allocated territory, will have to pay the distributor appointed in the territory of destination a fee based on the cost of the services (to be) carried out including a reasonable profit margin. This type of scheme may not be seen as a restriction of the distributors' sales outside their territory (see judgment of the Court of First Instance in Case T-67/01 *JCB Service v Commission* [2004] ECR II-49, paragraphs 136 to 145).

group which has been allocated exclusively to another buyer or which the supplier has reserved to itself.

> '*(b) the restriction of the geographical area into which, or of the customers to whom, a buyer party to the agreement, without prejudice to a restriction on its place of establishment, may sell the contract goods or services, except—*
>
> ***(i) the restriction of active sales into the exclusive geographical area or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer'***

8.56 This exception allows the supplier to restrict active sales by an exclusive distributor into a territory or to a customer group exclusively allocated to other buyers, or reserved to the supplier. In order to preserve their investment incentives, the exclusively appointed distributors should be appropriately protected against active sales, including online advertising, into the territory or to the customer group exclusively allocated to them by the other buyers of the supplier within the UK, including buyers to which other territories or customer groups have been exclusively allocated by the supplier. Where the active sales restrictions imposed on other buyers of the supplier do not provide an appropriate level of protection to safeguard the appointed distributor's incentives to invest in the exclusive territory and thus to justify the establishment of an exclusive distribution system, the benefit of the VABEO is likely to be withdrawn.

8.57 Sales by an exclusive distributor's customers into a territory or to a customer group that the supplier has exclusively allocated to other distributors can also undermine those other distributors' incentives to invest in quality or demand-enhancing services. To protect the investment incentives of exclusively appointed distributors, the supplier may require that such other distributors (and their customers that have entered into a distribution agreement with the supplier or with a party that was given distribution rights by the supplier) are restricted from engaging in active sales into the exclusively allocated territory or to the exclusively allocated customer group (ie, to pass on the active sales restriction to the buyer's customers).[86]

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[86] This 'pass on' may benefit from the block exemption provided by the VABEO subject to the fulfilment of all the conditions in the VABEO.

8.58 The supplier is allowed to combine the allocation of an exclusive territory and an exclusive customer group by, for instance, appointing an exclusive distributor for a particular customer group in a specific territory.

8.59 The protection of exclusively allocated territories or customer groups is not absolute. To prevent market partitioning, passive sales into such territories or to such customer groups cannot be prohibited. However, Article 8(2)(b) VABEO only concerns restrictions of sales by the buyer or its customers, which means that the supplier is not prevented from accepting a total or partial restriction, both online and offline, on both active and passive sales into the exclusive territory or to (all or some of) the customers constituting an exclusive customer group.

8.60 The second exception is set out in Article 8(2)(b)(ii) VABEO:

> *(b) the restriction of the geographical area into which, or of the customers to whom, a buyer party to the agreement, without prejudice to a restriction on its place of establishment, may sell the contract goods or services, except— […]*
>
> ***(ii) the restriction of active sales or passive sales to end users by a buyer operating at the wholesale level of trade,*'**

8.61 This exception allows a supplier to restrict active and passive sales by (i) an exclusive wholesaler or (ii) by an authorised wholesaler operating in a selective distribution system to end users, as the supplier can keep the wholesale and retail levels of trade separate. However, this exception does not preclude the possibility of allowing the wholesaler to sell to certain end users (eg a few large ones), while not allowing sales to (all) other end users.

8.62 The third exception is laid down in Article 8(2)(b)(iii):

> '*(b) the restriction of the geographical area into which, or of the customers to whom, a buyer party to the agreement, without prejudice to a restriction on its place of establishment, may sell the contract goods or services, except—[…]*
>
> ***(iii) the restriction of active sales or passive sales by the members of a selective distribution system to distributors not authorised by the supplier, located within the geographical area where the distribution system is operated.*'**

8.63 This exception allows a supplier to restrict authorised distributors and customers of these distributors from selling to unauthorised distributors located in any territory where the supplier operates a selective distribution system. This means that the supplier must have either appointed selected distributors or reserved the territory for the application of such a selective distribution system. The restriction may cover active or passive sales, at any level of trade.

8.64 The fourth exception is set out in Article 8(2)(iv):

> *'the restriction of the geographical area into which, or of the customers to whom, a buyer party to the agreement, without prejudice to a restriction on its place of establishment, may sell the contract goods or services, except—*
>
> […]
>
> ***(iv) the restriction of the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier.***'

8.65 This exception allows a supplier to restrict an authorised buyer of components (to whom the components are supplied for incorporation) from reselling them to competitors of the supplier who would use them to manufacture the same type of goods as those produced by the supplier. The term 'component' includes any intermediate goods and the term 'incorporation' refers to the use of any input to produce goods.

8.66 The hardcore restriction set out in Article 8(2)(c) VABEO excludes the restriction of active or passive sales by members of a selective distribution network to end users, whether professional end users or consumers, without prejudice to the possibility of prohibiting a member of the network from operating out of an unauthorised place of establishment.

8.67 Taking into account the fact that online and offline channels have different characteristics, a supplier operating a selective distribution system may impose on its authorised distributors criteria for online sales that are not identical to those imposed for sales in brick and mortar shops, in as far as the criteria imposed for online sales do not, directly or indirectly, in isolation or combination with other factors, have as their object preventing the buyers or their customers from using the internet effectively for the purposes of selling their products online. For example, a supplier may establish specific requirements to ensure certain service quality standards for users purchasing online, such as the set-up and operation of an online after-sales help desk, a requirement to cover the costs of customers returning the product or the use of secure payment systems. These restrictions do not affect buyers' or their customers' ability to operate their own websites and to advertise via the internet on third-party platforms or online search engines, enabling buyers or their customers to raise awareness of their online activities and attract potential customers.

Scope of the exceptions in Article 8(2)(b)(i) to (iv)

8.68 Article 8(2)(b) makes clear that the restriction of a buyer's place of establishment imposed by a supplier does not constitute a hardcore restriction. Article 8(2)(b) VABEO allows a supplier to restrict the place of establishment of the buyer (a 'location clause') in both exclusive and selective distribution systems. This implies that the benefit of the VABEO is not lost if it is agreed that the buyer will restrict its distribution outlet(s) and warehouse(s) to a particular address, place or territory. For a mobile distribution outlet, an area may be defined outside which it cannot be operated. The use by a distributor of an own website cannot be considered comparable to the opening of a new outlet in a different location and thus cannot be restricted.

8.69 Article 8(3) of the VABEO lays down some interpretative principles that help determine the scope of the exceptions in Article (8)(2)(b)(i) to (iv):

> '*(3) The exception in paragraph (2)(b)(i) to (iv) permits—*
>
> *(a) the combination of exclusive and selective distribution in the same or different geographical areas;*
>
> *(b) shared exclusivity in a geographical area or for a customer group by allowing the allocation of a geographical area to more than one distributor;*
>
> *(c) the provision of greater protection for members of selective distribution systems against sales from outside the geographical area to unauthorised distributors inside that geographical area*.'

8.70 A selective distribution system can be combined with an exclusive distribution system, as defined in Articles 2(1) and 8(5) VABEO, within the same territory if they are established at different levels of the value chain (ie exclusivity at wholesale level and selective distribution at retail level) and the exclusive wholesaler is not also a member of the selective distribution system. Further, the supplier may commit to supplying only one or a limited number of authorised distributors in a specific part of the territory where the selective distribution system is operated. The supplier may also commit not to make any direct sales itself into that territory. In addition, as mentioned above, in accordance with Article 8(2)(b) VABEO, the supplier may impose a location clause on its authorised distributors.

Restriction of sales by members of a selective distribution system to end users

8.71 The hardcore restriction set out in Article 8(2)(c) VABEO consists of the restriction of active or passive sales by members of a selective distribution network to end users, whether professional end users or consumers, without prejudice to the possibility of prohibiting a member of the network from operating out of an unauthorised place of establishment. This means that authorised distributors cannot be restricted in the choice of users, or purchasing agents acting on behalf of those users, to whom they may sell, except to protect an exclusive distribution system operated in another territory (see the first exception to Article 4(2)(b)(i)). Within a selective distribution system, authorised distributors should be free to sell to all end users,[87] both actively and passively. The inclusion of such hardcore restriction in an agreement will have the effect of cancelling the benefit of the block exemption provided by the VABEO in relation to that agreement.

Restriction of cross-supplies within a selective distribution system

8.72 Article 8(2)(d) VABEO concerns the restriction of cross-supplies between authorised distributors within a selective distribution system. This means that the supplier cannot prevent active or passive sales between its authorised distributors, which must remain free to purchase the contract products from other authorised distributors within the network, operating either at the same or at a different level of trade.[88] Consequently, selective distribution cannot be combined with vertical restraints aimed at forcing distributors to purchase the contract products exclusively from a given source. It also means that within a selective distribution network, no restrictions can be imposed on authorised wholesalers as regards their sales to authorised distributors. The inclusion of such hardcore restriction in an agreement will have the effect of cancelling the block exemption provided by the VABEO in relation to that agreement.

Restrictions of the sales of spare parts

8.73 The hardcore restriction set out in Article 8(2)(e) VABEO concerns agreements that prevent or restrict end users, independent repairers, wholesalers and service providers from obtaining spare parts directly from the

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[87] For the purposes of the VABEO, and in particular as regards the application of Article 8(2)(c) VABEO, the notion of ‘end users’ includes motor vehicle leasing companies. For further detail on this point, refer to the European Commission Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles, OJ [2010] C 138/16, paragraph 51.
[88] See, for example, Commission decision in case AT.40182 *Guess*, paragraphs 65 to 78.

manufacturer of those spare parts. An agreement between a manufacturer of spare parts and a buyer that incorporates those parts into its own products, such as original equipment manufacturers (OEMs), may not, either directly or indirectly, prevent or restrict sales by the OEM of those spare parts to end users, independent repairers, wholesalers or service providers. Indirect restrictions may arise particularly when the supplier of the spare parts is restricted in supplying technical information and special equipment, which are necessary for the use of spare parts by users, independent repairers or service providers. However, the agreement may place restrictions on the supply of the spare parts to the repairers or service providers entrusted by the OEM with the repair or servicing of its own goods. This means that the OEM may require its own repair and service network to buy spare parts from itself or from other members of its selective distribution system, where it operates such a system. The inclusion of such hardcore restriction in an agreement will have the effect of cancelling the block exemption provided by the VABEO in relation to that agreement.

Wide retail parity obligations

8.74 Parity obligations, also known as Most Favoured Nation (MFN) 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 an undertaking offering, selling or reselling goods or services to end users. Retail parity obligations may typically be categorised as either 'wide' or 'narrow' in scope.

8.75 The hardcore restriction set out in Article 8(2)(f) of the VABEO concerns wide retail parity obligations. The inclusion of such an obligation in an agreement will have the effect of cancelling the block exemption provided by the VABEO in relation to that agreement.

8.76 As set out in Article 8(5) VABEO, a '*wide retail parity obligation means a restriction by reference to any of the supplier's indirect sales channels (whether online or offline, for example online platforms or other intermediaries), which ensures that the prices or other terms and conditions at which a supplier's products are offered to end users on a sales channel are no worse than those offered by the supplier on another sales channel*'. The relevant terms and conditions may concern prices, inventory, availability or any other terms or conditions of offer or sale.

8.77 The wide retail parity obligation may be express or it may be applied by other direct or indirect means, such as differential pricing or other incentives or measures whose application depends on the conditions under which the supplier offers its products to particular parties or on particular channels. In that regard, the hardcore restriction also applies to measures that have the same effect as a wide parity obligation, such as entering into an agreement or concerted practice that has the object of replicating the anti-competitive effects of a wide retail parity obligation.

8.78 Accordingly, the hardcore restriction relating to wide retail parity obligations covers situations where a supplier of a good or service (the 'product supplier') uses an intermediary as an indirect sales channel by which it reaches end users. End users are generally consumers, but may also include other undertakings. The intermediary can be an online sales channel (eg a price comparison website or online marketplace) or an offline sales channel (eg a traditional broker). If a product supplier agrees with such an 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, then that agreement will fall within the hardcore restriction.[89] This is to avoid the situation where a product supplier agrees with an intermediary that the intermediary will not be placed at a disadvantage relative to the intermediary's competitors by being undercut on price or by better terms and conditions being offered to those other intermediaries.

8.79 The CMA is concerned that wide retail parity obligations restrict competition between horizontal competitors (both at product supplier and intermediary level) by reducing their incentives to compete on price, to innovate, and to enter markets or expand. Wide retail parity obligations are more likely than other types of parity obligation to produce anti-competitive effects and are therefore hardcore restrictions under the VABEO.

8.80 In order to gain a competitive advantage, intermediaries want product suppliers to offer lower prices and better terms through their indirect sales channel. This allows intermediaries to attract consumers and gain market share. Wide retail parity obligations prevent product suppliers from offering lower prices or better terms on other intermediaries. Accordingly, other intermediaries cannot gain a competitive advantage if they improve the terms of the intermediation service they supply to a product supplier (eg through lowering the commissions charged). This is because the product supplier cannot offer lower prices or better terms to another intermediary than those offered to the intermediary benefiting from the wide retail parity obligation.

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[89] By contrast, 'narrow' retail parity obligations specify only that better terms will not be offered on a party's own sales channel (for example, the product supplier's own website), without stipulating conditions for sales via other intermediaries. Narrow retail parity obligations may benefit from the block exemption provided by the VABEO: see Part 10 for further details.

8.81 Similarly, the intermediary benefitting from the wide retail parity obligation is protected from competition from other intermediaries, and therefore has less incentive to improve the terms of its own intermediation service. For example, an intermediary that benefits from a wide retail parity obligation can increase the commission it charges a product supplier without the risk that the product supplier will respond by offering a higher price or worse terms on that intermediary as compared to another sales channel. The overall effect is that wide retail parity obligations reduce the competitive pressure on the commission rates and other terms offered by intermediaries to product suppliers.

8.82 In addition to softening competition between intermediaries, wide retail parity obligations reduce the ability and incentive of intermediaries to enter and expand. In the absence of wide retail parity obligations, an intermediary looking to enter a market has an incentive to find innovative ways of attracting lower prices from suppliers. For example, this may be by reducing commissions or investing in ways of reducing suppliers' expected costs in other ways. With a wide retail parity obligation in place, such entry strategies are undermined because the entrant's ability to acquire market share through offering a lower retail price or better terms to consumers is constrained.

8.83 Finally, wide retail parity obligations are also likely to soften competition between product suppliers competing on intermediaries, particularly online where there is greater price transparency. In the absence of wide retail parity obligations, product suppliers are not constrained by having to offer the lowest prices and best terms to the intermediary or intermediaries benefitting from the wide retail parity obligation. This means that product suppliers can adopt strategies that differentiate between intermediaries by flexing their terms to reflect an intermediary's lower commissions or better performance. Other product suppliers thereby come under pressure to respond, increasing competition between them to offer lower prices and better terms to end users through indirect sales channels.

8.84 As noted above, the hardcore restriction in the VABEO relating to wide retail parity obligations only applies in relation to agreements that relate to the offer, sale or resale to end users. Wide parity obligations that apply to upstream business-to-business markets are not treated as hardcore restrictions. Although these wide parity obligations could potentially soften competition between intermediaries in a similar way as in business to consumer (ie retail) markets, the overall competitive harm and direct effect on consumers is less clear and will depend on the complexity of the vertical supply chain and the strength of competition downstream.[90]

8.85 Where an agreement includes a wide retail parity obligation, that agreement is presumed to restrict competition and thus to fall within the Chapter I prohibition. It also gives rise to the presumption that the agreement is unlikely to fulfil the conditions for exemption from the Chapter I prohibition, for which reason the VABEO does not apply. However, undertakings have the possibility to raise an efficiency justification under section 9(1). The burden is on the parties to substantiate any efficiencies resulting from the inclusion of wide retail parity obligations in their agreement and to demonstrate that all the conditions for individual exemption under section 9(1) are fulfilled. In this respect, the CMA is open to considering on a case-by-case basis, carefully and objectively, any efficiency arguments made in the course of any investigations under the CA98 relating to the use of wide retail parity obligations.

[90] Note that if evidence of harm relating to the use of wide parity obligations in business-to-business markets were to arise, it is open to the CMA to cancel the benefit of the block exemption provided by the VABEO (see Part 13 below).

9. Excluded restrictions (Article 10)

9.1 Article 10 of the VABEO excludes certain obligations found in vertical agreements from the benefit of the block exemption provided by the VABEO irrespective of whether or not the market share threshold in Article 6 of the VABEO is exceeded. These are referred to as 'excluded restrictions'.

9.2 Excluded restrictions are those obligations for which it cannot be assumed with sufficient certainty that they fulfil the conditions for individual exemption under section 9(1). There is no presumption that the excluded restrictions specified in Article 10 of the VABEO fall within the scope of the Chapter I prohibition or otherwise fail to fulfil the conditions for individual exemption under section 9(1). The exclusion of these obligations means only that they are subject to an individual assessment under the Chapter I prohibition on a case by case basis. Moreover, unlike for hardcore restrictions in Article 8 of the VABEO, the exclusion from the block exemption provided by Article 11 of the VABEO is limited to the specific obligation in question. If that obligation is capable of being severed from the rest of the vertical agreement then the remainder of the vertical agreement continues to benefit from the VABEO. The ordinary rules of severance will apply.[91]

9.3 This part of the Guidance considers each of the restrictions in Article 10 of the VABEO in turn:

(a) Non-compete obligations.

(b) Post term non-compete obligations.

(c) Sale of competing goods in a selective distribution system.

Non-compete obligations

9.4 The first 'excluded restriction' is provided for in [Article 10(2)(a))] of the VABEO and concerns non-compete obligations exceeding a duration of five years, including if their duration is indefinite or they are tacitly renewable beyond a period of five years. Non-compete obligations are arrangements that cause the buyer not manufacture, purchase, sell or resell goods which compete with the contract goods or services, or cause the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80% of the buyer's total purchases of the contract products and their

[91]The rules on severance are outside the scope of this guidance. The relevant principles were considered by the Supreme Court in the context of the common law doctrine of restraint of trade in Egon Zehnder Ltd v Tillman [2020] AC 154 (see, in particular, paragraphs 85 to 87).

substitutes during the preceding calendar year (as defined by Article 10(5) of the VABEO). This means that non-compete obligations are those that prevent the buyer from purchasing competing goods or services or limiting such purchases of competing goods or service to less than 20% of total purchases. Where no relevant purchasing data for the buyer are available for the year preceding the conclusion of the contract, the buyer's best estimate of its annual total requirements may be used. However, actual purchasing data should be used as soon as it is available.

9.5 Non-compete obligations are excluded by the VABEO and must be assessed on a case-by-case basis if their duration is indefinite or exceeds five years. Non-compete obligations that are tacitly renewable beyond a period of five years are also not covered by the VABEO because they are deemed to have been concluded for an indefinite duration (see Article 10(2)(a) of the VABEO). In general, non-compete obligations are exempted under the VABEO where their duration is limited to five years or less and no obstacles exist that hinder the buyer from effectively terminating the non-compete obligation at the end of the five-year period. If, for instance, the agreement provides for a five-year non-compete obligation and the supplier provides a loan to the buyer, the repayment of that loan should not hinder the buyer from effectively terminating the non-compete obligation at the end of the five-year period. Similarly, when the supplier provides the buyer with equipment which is not relationship-specific, the buyer should have the possibility of taking over the equipment at its market asset value once the non-compete obligation expires.

9.6 Pursuant to Article 10(3) of the VABEO, the five-year duration limit does not apply when the goods or services are resold by the buyer ‘from premises and land owned by the supplier or leased by the supplier from third parties not connected with the buyer’. In such cases the non-compete obligation may be of the same duration as the period of occupancy of the point of sale by the buyer. The reason for this exception is that it is normally unreasonable to expect a supplier to allow competing products to be sold from premises and land owned by the supplier without its permission. By analogy, the same principles apply where the buyer operates from a mobile outlet owned by the supplier or leased by the supplier from third parties not connected with the buyer. Artificial ownership constructions, such as a transfer by the distributor of its proprietary rights over the land and premises to the supplier for only a limited period, intended to avoid the five-year limit cannot benefit from the block exemption provided by the VABEO.

Post term non-compete obligations

9.7 The second exclusion from the VABEO is provided for in Article 10(2)(b) of the VABEO and concerns post term non-compete obligations on the buyer. Such obligations are normally not covered by the VABEO, unless the obligation is indispensable to protect know-how transferred by the supplier to the buyer, is limited to the point of sale from which the buyer has operated during the contract period, and is limited to a maximum period of one year (see Article 10(4)(a)) of the VABEO). As defined in Article 3(7) of the VABEO, the know-how must comprise information which is significant and useful to the buyer for the use, sale or resale of the contract goods or services.

Sale of competing goods in a selective distribution system

9.8 The third exclusion from the VABEO is provided for in Article 10(2)(c) of the VABEO and concerns the sale of competing goods in a selective distribution system. The VABEO covers the combination of selective distribution with a non-compete obligation, obliging the dealers not to resell competing brands in general. However, if the supplier prevents its appointed dealers, either directly or indirectly, from buying products for resale from specific competing suppliers, such an obligation cannot benefit from the benefit of the block exemption provided by the VABEO. The objective of the exclusion of such an obligation is to avoid a situation whereby a number of suppliers using the same selective distribution outlets prevent one specific competitor or certain specific competitors from using these outlets to distribute their products (foreclosure of a competing supplier which would be a form of collective boycott).

10. Assessment of vertical agreements which do not meet the legal conditions of the VABEO

10.1 Where a restrictive agreement does not meet the conditions of the VABEO and has an appreciable impact on competition, it may nonetheless be exempt from the Chapter I prohibition if it fulfils the conditions for individual exemption under section 9(1).Such an agreement is valid and enforceable from the moment the conditions in section 9(1) are fulfilled and for as long as that remains the case.

10.2 This part of the Guidance provides an overview of the effects of vertical agreements on competition as well as guidance on key principles to consider when analysing restrictions in vertical agreements.

Effects of vertical agreements on competition

10.3 A vertical agreement is an agreement or a concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, 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 (Article 3(2) VABEO) As mentioned above, 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.

10.4 Vertical agreements between undertakings operating at different levels of the production or distribution chain are generally less harmful than horizontal agreements between competitors supplying substitutable products. In principle, this is due to the complementary nature of the activities of the parties to a vertical agreement, which normally implies that pro-competitive actions by one of the undertakings benefit the other party to the agreement, and ultimately consumers. In contrast to horizontal agreements, the parties to a vertical agreement tend to have an incentive to agree on lower prices and higher levels of service, which also benefits consumers. The complementary nature of the activities of the parties to a vertical agreement in placing products on the market also implies that any restrictions that may be included in the agreement (vertical restraints)[92] may provide substantial scope for

[92] A vertical restraint means a restriction on competition in a vertical agreement to which the Chapter I prohibition applies (Article 2(1) VABEO).

efficiencies, for example by optimising manufacturing or distribution processes and services.

10.5 Undertakings with market power may try to use vertical restraints to pursue anti-competitive purposes that ultimately harm consumers. Market power is the ability to maintain prices above competitive levels or to maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a not insignificant period of time.

10.6 The degree of market power associated with vertical agreements raising competition concerns is less than the degree of market power required for a finding of dominance under the Chapter II prohibition.[93] However, in view of the complementary nature of the activities of the parties to a vertical agreement, the exercise of market power by an undertaking either upstream or downstream would normally hurt the demand for the contract goods or services by the other undertaking party to the vertical agreement. Undertakings party to a vertical agreement therefore usually have an incentive to prevent the exercise of market power by the other party.

Positive effects of vertical agreements on competition

10.7 Vertical agreements may have positive effects on competition, for example they may lead to lower prices, the promotion of non-price competition or improved quality of services. Agreements between a supplier and a buyer that determine only the price and quantity of a transaction may lead to sub-optimal levels of investment and sales. This is because they do not take into account externalities arising from the complementary nature of the activities of the supplier and its distributors. These externalities fall into two categories: vertical externalities and horizontal externalities.

10.8 Vertical externalities arise because the decisions and actions taken at different levels of the supply and distribution chain determine aspects of the sale of products, such as price, quality, related services and marketing, which affect not only the undertaking making the decisions but also other undertakings at other levels of the supply and distribution chain. For instance, a distributor may not gain all the benefits of its efforts to increase sales, as some of these benefits may go to the supplier. This is because for every extra unit a distributor sells by lowering its resale price or by increasing its sales efforts, the supplier benefits if its wholesale price exceeds its marginal production costs. Thus, there may be a positive externality bestowed on the

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[93] The Chapter II prohibition is the statutory provision contained in the CA98 which prohibits conduct amounting to an abuse of a dominant position.

supplier by such distributor's actions. Conversely, there may be situations where, from the supplier's perspective, the distributor may be pricing too high[94] or making too little sales effort.

10.9 Horizontal externalities may arise between distributors of the same products when a distributor is unable to fully accrue the benefits of its sales efforts. For instance, demand-enhancing pre-sale services provided by one distributor, such as personalised advice in relation to particular goods or services, may lead to higher sales by competing distributors offering the same products and thus create incentives among distributors to free-ride on costly services provided by others. In an omni-channel distribution environment (online and offline), free-riding can occur in both directions.[95] For example, customers may visit a brick and mortar shop to test goods or services or to obtain other useful information on which they base their decision to purchase, but then order the product online from a different distributor. Conversely, customers may gather information in the pre-purchase phase (including inspiration, information, and evaluation) from an online shop, and then visit a brick and mortar shop, ask for and test particular products based on this information, and finally purchase offline in a brick and mortar shop. Where such free-riding is possible and where the distributor that provides pre-sales services is unable to fully accrue the benefits, this may lead to a sub-optimal provision of such services in terms of quantity or quality.

10.10 In the presence of such externalities, suppliers have an incentive to control certain aspects of their distributors' operations. In particular, vertical agreements may allow suppliers to internalise the abovementioned external effects, increase the joint profit of the vertical supply and distribution chain and, under certain circumstances, consumer welfare.

10.11 While trying to give a comprehensive overview of the various justifications for vertical restraints, these Guidelines do not claim to be complete or exhaustive. The reasons set out below may justify the application of certain vertical restraints in certain circumstances.

(a) The vertical externality issue or double marginalisation problem: the setting of too high a price by the distributor, not taking into account the effect of its decisions on the supplier, can be avoided by the supplier imposing a maximum resale price on the distributor. To increase the

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[94] Sometimes referred to as "double marginalisation problem".

[95] Commission, Final report on the E-commerce Sector Inquiry, COM(2017) 229 final, 10 May 2017, paragraph 11.

distributor's sales efforts, the supplier may, for example, use selective distribution or exclusive distribution.

(b) The 'free-rider problem': free-riding between buyers may occur at the wholesale or retail level, in particular where it is not possible for the supplier to impose effective promotion or service requirements on all buyers. Free-riding between buyers can only occur on pre-sales services and other promotional activities, but not on after-sales services for which the distributor can charge its customers individually. Pre-sales efforts on which free-riding may occur may be important, for example, when the products are relatively new, technically complex or of a high value, or when the reputation of the goods or services is an important determinant of their demand. Non-compete restrictions can help overcome free-riding between suppliers.

(c) To open up or enter new markets: where a supplier wishes to enter a new geographic market, for instance by expanding to provide products in another part of the UK, this may involve special sunk investments by the distributor to establish the brand on the market. In order to persuade a local distributor to make these investments, it may be necessary to provide territorial protection so that the distributor can recoup these investments. This may justify restricting distributors located in other geographic markets from selling on the new market. This is a special case of the free-rider problem set out in point (b) above.

(d) The certification free-rider issue: in some sectors, certain distributors have a reputation for stocking only quality goods or providing quality services (so-called 'premium distributors'). In such a case, selling through those distributors may be crucial, in particular for the successful launch of a new product. If the supplier cannot limit its sales to such premium distributors, it runs the risk of being de-listed. There may, therefore, be justifications for allowing exclusive distribution or selective distribution.

(e) The hold-up problem: sometimes there are client-specific investments to be made by either the supplier or the buyer, such as investments in special equipment or training. For instance, a component manufacturer may have to build new machines and tools in order to satisfy a particular requirement of one of its customers. Where such client-specific investments cannot be contracted directly, or where such contracting is incomplete, the undertaking concerned may not be able to commit to make the optimal level of investments from the point of view of the supplier and, once selected by the supplier, the buyer may only engage in sub-optimal investments. Vertical agreements may help remove or alleviate such a commitment problem.

(f) The specific hold-up problem that may arise in the case of the transfer of substantial know-how: the know-how, once provided, cannot be taken back and the provider of the know-how may not want it to be used for or by its competitors. Insofar as the know-how was not readily available to the buyer, and it is substantial and indispensable for the operation of the agreement, such a transfer may justify a non-compete restriction, which would normally fall outside the Chapter I prohibition in such cases.

(g) Economies of scale in distribution: to have scale economies exploited and thereby see a lower retail price for its products, the manufacturer may want to concentrate the resale of its products on a limited number of distributors. To do so, it could use exclusive distribution; quantity forcing in the form of a minimum purchasing requirement; selective distribution containing such a requirement; or exclusive sourcing.

(h) Uniformity and quality standardisation: a vertical restraint may help create a brand image by imposing a certain measure of uniformity and quality standardisation on the distributors, thereby increasing the attractiveness of the products concerned for finals customer and thereby sales. This applies, for instance, in selective distribution and franchising.

(i) Capital market imperfections: providers of capital such as banks and equity markets may provide capital sub-optimally when they have imperfect information on the solvency of the borrower or where there is an inadequate basis to secure the loan. The buyer or supplier may have better information and may be able, through an exclusive relationship, to obtain extra security for its investment. Where the supplier provides the loan to the buyer, this may lead to the imposition of a non-compete obligation or quantity forcing on the buyer. Where the buyer provides the loan to the supplier, this may be the reason for imposing exclusive supply or quantity forcing on the supplier.

10.12 The situations listed in the previous paragraph show that generally vertical agreements are likely to help realise efficiencies and develop new markets, and that this may offset possible negative effects. The case is in general strongest for vertical restraints that help the introduction of new and complex products, or protect relationship-specific investments. A vertical restraint is sometimes necessary for as long as the supplier sells its products to the buyer (see in particular the situations described in (a), (b), (f), (g) and (h) of the previous paragraph).

10.13 There is a large degree of substitutability between the different vertical restraints. This means that the same inefficiency problem can be solved by different vertical restraints. For instance, it may be possible to achieve economies of scale in distribution by using exclusive distribution, selective distribution, quantity forcing or exclusive sourcing.[96] However, the negative effects on competition may differ between the various vertical restraints, which plays a role when indispensability is assessed under section 9(1).

Negative effects of vertical agreements on competition

10.14 The negative effects on competition which may result from vertical agreements and which UK competition law aims to prevent include the following:

(a) Anti-competitive foreclosure of other suppliers or other buyers by raising barriers to entry or expansion.

(b) The softening of competition between a supplier and its competitors or the facilitation of (explicit or tacit) collusion between suppliers,[97] often referred to as the reduction of inter-brand competition.

(c) The softening of competition between a buyer and its competitors or the facilitation of (explicit or tacit) collusion between buyers. However, a reduction of intra-brand competition (competition between distributors of the products of the same supplier) is by itself unlikely to lead to negative effects for consumers if inter-brand competition (competition between distributors of the goods or services of different suppliers) is strong.

(d) The creation of limitations on consumer choice or ability to purchase products in any part of the UK.

10.15 Foreclosure, softening of competition and collusion at the supplier level may harm consumers in particular by increasing the wholesale prices of products (which in turn may lead to higher retail prices), limiting the choice of products, lowering their quality or reducing the level of innovation at the supplier level.

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[96] These vertical restraints are further explained in Part 10 of the Guidance.

[97] As regards the notions of explicit and tacit collusion, see judgment in joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others v Commission,* EU:C:1993:120.

Foreclosure, softening of competition and collusion at the distributor level may harm consumers in particular by increasing the retail prices of products, limiting the choice of price-service combinations and distribution formats, lowering the availability and quality of retail services and reducing the level of innovation at the distribution level.

10.16 In a market where individual retailers distribute the brand(s) of only one supplier, a reduction of competition between the distributors of the same brand will lead to a reduction of intra-brand competition between these distributors, but may not have a negative effect on competition between distributors in general. In such a case, if inter-brand competition is strong, it is unlikely that a reduction of intra-brand competition will have negative effects for consumers.

10.17 Possible negative effects of vertical restraints are reinforced when several suppliers and their buyers organise their trade in a similar way, leading to so-called cumulative effects.[98]

Relevant factors for the assessment under the Chapter I prohibition

10.18 In assessing cases above the market share threshold of 30%, the CMA will undertake a full competition analysis. The following factors are particularly relevant to establishing whether a vertical agreement brings about an appreciable restriction of competition under the Chapter I prohibition:

(a) nature of the agreement;

(b) market position of the parties;

(c) market position of competitors (upstream and downstream);

(d) market position of buyers of the contract products[99];

(e) entry barriers;

(f) level of trade;

(g) nature of the product;

[98] Cumulative effects can justify the cancelation of the benefit of block exemption provided by the VABEO.
[99] The notion of ‘products’ includes both goods and services.

(h) dynamics of the market.

10.19 The importance of individual factors may vary depending on the circumstances of the case. For instance, a high market share of the parties is usually a good indicator of market power, but in the case of low entry barriers market power may be sufficiently constrained by actual or potential entry. It is therefore not possible to provide firm rules on the general applicability of the individual factors.

10.20 Vertical agreements can take many shapes and forms. It is therefore important to analyse the nature of the agreement in terms of the restraints that it contains, the duration of those restraints and the percentage of total sales on the market affected by those restraints. It may be necessary to go beyond the express terms of the agreement. The existence of implicit restraints may be derived from the way in which the agreement is implemented by the parties and the incentives that they face.

10.21 The market position of the parties provides an indication of the degree of market power, if any, possessed by the supplier, the buyer or both. The higher their market share, the greater their market power is likely to be. This is particularly so where the market share reflects cost advantages or other competitive advantages vis-à-vis competitors. Such competitive advantages may, for instance, result from being a first mover on the market (having the best site, etc.), from holding essential patents or having superior technology, from being the brand leader or having a superior portfolio. The degree of product differentiation can also be a relevant indicator for the presence of market power.

10.22 The market position of competitors is also important. The stronger the competitors are and the greater their number, the less risk there is that the parties will be able to individually exercise market power and foreclose the market or soften competition. It is also relevant to consider whether there are effective and timely counterstrategies that competitors would be likely to deploy. However, if the number of competitors is small and their market position (size, costs, R&D potential, etc.) is rather similar, such a market structure may increase the risk of collusion. Fluctuating or rapidly changing market shares are in general an indication of intense competition.

10.23 The market position of the parties' customers provides an indication of whether or not one or more of those customers possess buyer power. The first indicator of buyer power is the market share of the customer on the purchase market. That share reflects the importance of its demand for possible suppliers. Other indicators focus on the position of the customer on its resale market, including characteristics such as a wide geographic spread of its outlets, own brands including private labels and its brand image amongst final consumers. In some circumstances, buyer power may prevent the parties from exercising market power and thereby solve a competition problem that would otherwise have existed. This is particularly so when strong customers have the capacity and incentive to bring new sources of supply on to the market in the case of a small but permanent increase in relative prices

10.24 Entry barriers are measured by the extent to which incumbent companies can increase their price above the competitive level without attracting new entry. In the absence of entry barriers, easy and quick entry would render price increases unprofitable. When effective entry, preventing or eroding the exercise of market power, is likely to occur within a short period of time, entry barriers can, as a general rule, be said to be low. Entry barriers may result from a wide variety of factors such as economies of scale and scope (including network effects of multi-sided businesses), government regulations, especially where they establish exclusive rights, state aid, import tariffs, intellectual property rights, ownership of resources where the supply is limited due to for instance natural limitations essential facilities, a first mover advantage and brand loyalty of consumers created by strong advertising over a period of time. The question of whether certain of those factors should be described as entry barriers depends particularly on whether they entail sunk costs. Sunk costs are costs that have to be incurred to enter or be active on a market but cannot be recovered upon exiting the market. Advertising costs to build consumer loyalty are normally sunk costs, unless an exiting firm could either sell its brand name or use it somewhere else without a loss. When entry requires high sunk costs, the threat of fierce competition by incumbents post-entry may deter such entry, as potential entrants cannot justify the risk of losing their sunk investments. Entry barriers may be present only at the supplier or buyer level or at both levels.

10.25 As entry in general requires at least some sunk costs, actual competition is in general more effective and will weigh more heavily in the assessment of a case than potential competition.

10.26 Vertical restraints and vertical integration may also work as an entry barrier by making access more difficult and foreclosing (potential) competitors. For instance, a non-compete obligation that ties distributors to a supplier may have a significant foreclosing effect if setting up its own distributors will impose sunk costs on the potential entrant. The level of trade is linked to the distinction between intermediate and final products. Intermediate products are sold to undertakings for use as an input to produce other products and are generally not recognisable in the final goods or services. The buyers of intermediate products are usually well-informed customers, able to assess quality and therefore less reliant on brand and image. Final goods are, directly or indirectly, sold to final consumers that often rely more on brand and image.

10.27 The nature of the product plays a role in particular for final products in assessing both the likely negative and the likely positive effects. When assessing the likely negative effects, it is important to determine whether the products on the market are more homogeneous or heterogeneous, whether the product is expensive, taking up a large part of the consumer's budget, or is inexpensive and whether the product is a one-off purchase or repeatedly purchased.

10.28 The dynamics of the market have to be carefully assessed on a case-by-case basis. While in some dynamic markets potential negative effects of certain vertical restraints may be unproblematic as inter-brand competition from dynamic and innovative rivals acts as a sufficient constraint, in other cases vertical restraints may afford an incumbent in a dynamic market a lasting competitive advantage and hence result in long term effects on competition. This may be the case when a vertical restraint deprives rivals from benefiting from network effects or when a market is prone to tipping.

10.29 In the assessment of particular restraints other factors may have to be taken into account. These can include cumulative effects deriving from the coverage of the market by similar agreements of other suppliers, whether the agreement is 'imposed' in the sense that mainly one party to the agreement is subject to the restrictions or obligations or 'agreed' in the sense that both parties to the agreement accept the restrictions or obligations, the regulatory environment and behaviour that may indicate or facilitate collusion like price leadership, pre-announced price changes and price discussions, price rigidity in response to excess capacity, price discrimination and past collusive behaviour.

Relevant factors for the assessment of vertical agreements under section 9(1)

10.30 Certain restrictions in vertical agreements may also produce pro-competitive effects in the form of efficiencies, which may outweigh their anti-competitive effects. Such an assessment takes place within the framework and conditions of section 9(1), which provides an individual exemption from the Chapter I prohibition. For that individual exemption to be applicable the following conditions must be fulfilled:

(a) the vertical agreement must produce objective economic benefits;

(b) the restrictions on competition must be indispensable to attain the efficiencies;

(c) consumers must receive a fair share of the efficiency gains; and

(d) the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products concerned.

10.31 The assessment of vertical agreements under section 9(1) is made within the actual context in which they occur[100] and on the basis of the facts existing at any given point in time.[101] The assessment is sensitive to material changes in the facts. The individual exemption in section 9(1) applies as long as the four conditions are fulfilled and ceases to apply when that is no longer the case.[102] When applying section 9(1) in accordance with these principles it is necessary to take into account the investments made by any of the parties and the time needed and the restraints required to commit and recoup an efficiency enhancing investment. Section 9(2) CA98 provides that an undertaking claiming the benefit of section 9(1) bears the burden of proving that its agreement fulfils the conditions of that provision.

10.32 The first condition of section 9(1) requires an assessment of the objective benefits in terms of efficiencies produced by the agreement (ie improving production or distribution, or promoting technical or economic progress). In this respect, vertical agreements often have the potential to help realise efficiencies, as explained in paragraphs 10.7 to 10.13, by improving the way in which the parties conduct their complementary activities.

10.33 Regarding the second condition, that the restriction must be indispensable to obtaining any efficiency benefits, the CMA will in particular examine whether individual restrictions make it possible to perform the production, purchase, sale or resale of the contract products more efficiently than would have been the case in the absence of the restriction concerned. In making such an assessment, the market conditions and the realities facing the parties must be taken into account. Undertakings invoking the benefit of individual exemption

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[100] See Joined Cases 25/84 and 26/84 *Ford* [1985] ECR 2725.

[101] In *Sainsbury's v Visa and Sainsbury's v Mastercard* [2020] UKSC 24, the Supreme Court held that the standard of proof under section 9(1) is the usual civil standard of balance of probabilities and that '*cogent empirical evidence is necessary in order to carry out the required evaluation of the claimed efficiencies and benefits*' and to satisfy that standard (see paras 106–138, and in particular paras 109 and 116).

[102] See An agreement that falls within the Chapter I prohibition might fall outside that prohibition over time following a change in circumstance (and vice versa). See: Passmore v Morland plc [1999] 3 All ER 1005.[103] See paragraph 85 of Communication from the Commission - Notice – Guidelines on the application of Article 101(3) of the Treaty, OJ C 101, 27.4.2004, p. 97. For the application of the third condition in the context of sustainability agreements, please see Environmental sustainability and the UK competition and consumer regimes: CMA advice to the Government and any subsequent publications.

under section 9(1) are not required to consider hypothetical and theoretical alternatives. They must, however, explain and demonstrate why seemingly realistic and significantly less restrictive alternatives would be significantly less efficient. If the application of what appears to be a commercially realistic and less restrictive alternative would lead to a significant loss of efficiencies, the vertical restraint in question is treated as indispensable.

10.34 The third condition, that consumers must receive a fair share of the benefits, implies that consumers of the products purchased, sold or resold under the vertical agreement must at least be compensated for the negative effects of the agreement.[103] In other words, the efficiency gains must fully off-set the likely negative impact on prices, output and other relevant factors caused by the agreement.

10.35 The fourth condition of section 9(1), according to which the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products concerned, presupposes an analysis of remaining competitive pressures on the market and the impact of the agreement on such sources of competition. The vertical agreement must not eliminate effective competition, by removing all or most existing sources of actual or potential competition. Rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the form of innovation. Where there is no residual competition and no foreseeable threat of entry, the protection of rivalry and the competitive process outweighs possible efficiency gains. A vertical restraint which maintains, creates or strengthens a market position approaching that of a monopoly can normally not be justified on the grounds that it also creates efficiency gains.

Analysis of specific vertical restraints

10.36 The most common vertical restraints and combinations of vertical restraints are analysed in the remainder of this Guidance following the framework of analysis developed in paragraphs 10.1 to 10.29. Other restraints and combinations exist for which no direct guidance is provided in this Guidance. They will, however, be treated, where appropriate, according to the same principles and with the same emphasis on their effects on the market.

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[103] See paragraph 85 of Communication from the Commission - Notice – Guidelines on the application of Article 101(3) of the Treaty, OJ C 101, 27.4.2004, p. 97. For the application of the third condition in the context of sustainability agreements, please see Environmental sustainability and the UK competition and consumer regimes: CMA advice to the Government and any subsequent publications.

Single branding

10.37 Under the heading of ‘single branding’ fall those agreements which have as their main element the fact that the buyer is obliged or induced to concentrate its orders for a particular type of product with one supplier. That requirement can be found amongst others in non-compete and quantity-forcing on the buyer. A non-compete arrangement is based on an obligation or incentive scheme which makes the buyer purchase more than 80% of its requirements on a particular market from only one supplier. It does not mean that the buyer can only buy directly from the supplier, but that the buyer will de facto not buy and resell or incorporate competing goods or services. Quantity-forcing on the buyer is a weaker form of non-compete, where incentives or obligations agreed between the supplier and the buyer make the latter concentrate its purchases to a large extent with one supplier. Quantity-forcing may for example take the form of minimum purchase requirements, stocking requirements or non-linear pricing, such as conditional rebate schemes or a two-part tariff (fixed fee plus a price per unit). A so-called ‘English clause’, requiring the buyer to report any better offer and allowing him only to accept such an offer when the supplier does not match it, can be expected to have the same effect as a single branding obligation, especially when the buyer has to reveal who makes the better offer.

10.38 The possible competition risks of single branding are foreclosure of the market to competing suppliers and potential suppliers, softening of competition and facilitation of collusion between suppliers in case of cumulative use and, where the buyer is a retailer selling to final consumers, a loss of in-store inter-brand competition. Such restrictive effects have a direct impact on inter-brand competition.

10.39 Single branding is exempted by the VABEO where the supplier's and buyer's market share each do not exceed 30% and are subject to a limitation in time of five years for the non-compete obligation. Above the market share threshold or beyond the time limit of five years, single branding agreements are no longer covered by the block exemption and therefore must be individually assessed. The remainder of this section provides guidance for the assessment of individual cases above the market share threshold or beyond the time limit of five years.

10.40 The capacity for single branding obligations of one specific supplier to result in anti-competitive foreclosure arises in particular where, without the obligations, an important competitive constraint is exercised by competitors that either are not yet present on the market at the time the obligations are concluded, or that are not in a position to compete for the full supply of the customers. Competitors may not be able to compete for an individual customer's entire demand because the supplier in question is an unavoidable trading partner at least for part of the demand on the market, for instance because its brand is a ‘must stock item’ preferred by many final consumers or because the capacity constraints on the other suppliers are such that a part of demand can only be provided for by the supplier in question.[104] The market position of the supplier is therefore important to the assessment of possible anti-competitive effects of single branding obligations.

10.41 If competitors can compete on equal terms for each individual customer's entire demand, single branding obligations of one specific supplier are generally unlikely to hamper effective competition unless the switching of supplier by customers is rendered difficult due to the duration and market coverage of the single branding obligations. The higher its tied market share, that is, the part of its market share sold under a single branding obligation, the more significant foreclosure is likely to be. Similarly, the longer the duration of the single branding obligations, the more significant foreclosure is likely to be. Single branding obligations shorter than one year entered into by non-dominant companies are generally not considered to give rise to appreciable anti-competitive effects or net negative effects. Single branding obligations between one and five years entered into by non-dominant companies usually require a proper balancing of pro- and anti-competitive effects, while single branding obligations exceeding five years are for most types of investments not considered necessary to achieve the claimed efficiencies or the efficiencies are not sufficient to outweigh their foreclosure effect. Single branding obligations are more likely to result in anti-competitive foreclosure when entered into by dominant companies.

10.42 When assessing the supplier's market power, the market position of its competitors is important. As long as the competitors are sufficiently numerous and strong, no appreciable anti-competitive effects can be expected. Foreclosure of competitors is not very likely where they have similar market positions and can offer similarly attractive products. In such a case, foreclosure may, however, occur for potential entrants when a number of major suppliers enter into single branding contracts with a significant number of buyers on the relevant market (cumulative effect situation). This is also a situation where single branding agreements may facilitate collusion between competing suppliers. If, individually, those suppliers benefit from the block exemption provided by the VABEO, the cancellation of the block exemption may be necessary to address such a negative cumulative effect. A tied market

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[104] Case T-65/98 *Van den Bergh Foods v Commission* [2003] ECR II-4653, paragraphs 104 and 156.

share of less than 5% is not considered in general to contribute significantly to a cumulative foreclosure effect.

10.43 In cases where the market share of the largest supplier is below 30% and the market share of the five largest suppliers is below 50%, there is unlikely to be a single or a cumulative anti-competitive effect situation. In those circumstances, if a potential entrant cannot penetrate the market profitably, this may be due to factors other than single branding obligations, such as consumer preferences.

10.44 Entry barriers are important to establish whether there is anticompetitive foreclosure. Wherever it is relatively easy for competing suppliers to create new demand or find alternative buyers for their product, foreclosure effects are less likely to occur. However, there are often entry barriers, both at the manufacturing and at the distribution level.

10.45 Countervailing power is relevant, as powerful buyers will not easily allow themselves to be cut off from the supply of competing products. More generally, in order to persuade customers to agree to single branding, the supplier may have to compensate them, in whole or in part, for the loss in competition resulting from the exclusivity obligation. Where such compensation is given, it may be in the individual interest of a customer to enter into a single branding obligation with the supplier. However, it would be wrong to infer from this that all single branding obligations, taken together, are overall beneficial for customers on that market and for final consumers. It is in particular unlikely that consumers as a whole will benefit if there are many customers and the single branding obligations, taken together, have the effect of preventing the entry or expansion of competing undertakings.

10.46 Lastly, the level of trade is a relevant consideration. Anti-competitive foreclosure is less likely in the case of an intermediate product market. When the supplier of an intermediate product is not dominant, the competing suppliers still have a substantial part of demand that is contestable. Below the level of dominance an anti-competitive foreclosure effect may however arise in a cumulative effect situation. A cumulative anti-competitive effect is unlikely to arise as long as less than 50% of the market is tied.

10.47 Where the agreement concerns the supply of a final product at the wholesale level, the question of whether a competition problem is likely to arise depends, to a large extent, on the type of wholesaling and the entry barriers at the wholesale level. There is no real risk of anti-competitive foreclosure if competing manufacturers can easily establish their own wholesaling operation. Whether entry barriers are low depends, to some extent, on the type of wholesaling, that is, whether or not wholesalers can operate efficiently with only the product concerned by the agreement (for example ice cream) or whether it is more efficient to trade in a whole range of products (for example frozen foodstuffs). In the latter case, it is not efficient for a manufacturer selling only one product to set up its own wholesaling operation. In that case, anti-competitive effects may arise. In addition, cumulative effect problems may arise if several suppliers tie most of the available wholesalers.

10.48 For final products, foreclosure is in general more likely to occur at the retail level, given the significant entry barriers for most manufacturers to start retail outlets just for their own products. In addition, it is at the retail level that single branding agreements may lead to reduced in-store inter-brand competition. It is for these reasons that for final products at the retail level, significant anti-competitive effects may start to arise, taking into account all other relevant factors, if a non-dominant supplier ties 30% or more of the relevant market. For a dominant company, even a modest tied market share may already lead to significant anti-competitive effects.

10.49 At the retail level, a cumulative foreclosure effect may also arise. Where all suppliers have market shares below 30%, a cumulative anti-competitive foreclosure effect is unlikely if the total tied market share is less than 40% and withdrawal of the block exemption is therefore unlikely. That figure may be higher when other factors such as the number of competitors or entry barriers are taken into account. Where not all companies have market shares below the threshold of the VABEO but none is dominant, a cumulative anticompetitive foreclosure effect is unlikely if the total tied market share is below 30%.

10.50 Where the buyer operates from premises and land owned by the supplier or leased by the supplier from a third party not connected with the buyer, the possibility of imposing effective remedies for a possible foreclosure effect will be limited. In that case, intervention by the CMA below the level of dominance is unlikely.

10.51 In certain sectors, the selling of more than one brand from a single site may be difficult, in which case a foreclosure problem can better be remedied by limiting the effective duration of contracts.

10.52 Where appreciable anti-competitive effects are established, the question of a possible individual exemption under section 9(1) arises. For non-compete obligations, the efficiencies described in points (b) (free riding between suppliers), (e), (f) (hold-up problems) and (i) (capital market imperfections) of paragraph 10.11, may be particularly relevant.

10.53 In the case of an efficiency as described in paragraph 10.11(b), 10.11(e) and 10.11(i) quantity forcing on the buyer could possibly be a less restrictive alternative. A non-compete obligation may be the only viable way to achieve an efficiency as described in paragraph 10.11(f) (hold-up problem related to the transfer of know-how).

10.54 In the case of a relationship-specific investment made by the supplier (see paragraph 10.11(e) a non-compete or quantity forcing agreement for the period of depreciation of the investment will in general fulfil the conditions of section 9(1). In the case of high relationship-specific investments (a form of sunk cost), a non-compete obligation exceeding five years may be justified. A relationship-specific investment could, for instance, be the installation or adaptation of equipment by the supplier when this equipment can be used afterwards only to produce components for a particular buyer. General or market-specific investments in (extra) capacity are normally not relationship-specific investments. However, where a supplier creates new capacity specifically linked to the operations of a particular buyer, for instance a company producing metal cans which creates new capacity to produce cans on the premises of or next to the canning facility of a food producer, this new capacity may only be economically viable when producing for this particular customer, in which case the investment would be considered to be relationship-specific.

10.55 Where the supplier provides the buyer with a loan or provides the buyer with equipment which is not relationship-specific, this in itself is normally not sufficient to justify the exemption of an anti-competitive foreclosure effect on the market. In case of capital market imperfection, it may be more efficient for the supplier of a product than for a bank to provide a loan (see paragraph10.11(i)). However, in such a case the loan should be provided in the least restrictive way and the buyer should thus in general not be prevented from terminating the obligation and repaying the outstanding part of the loan at any point in time and without payment of any penalty.

10.56 The transfer of substantial know-how (paragraph 10.11(f)) usually justifies a non-compete obligation for the whole duration of the supply agreement, as for example in the context of franchising.

Example of non-compete obligation

The market leader in a geographic market for an impulse consumer product, with a market share of 40%, sells most of its products (90%) through tied retailers (tied market share 36%). The agreements oblige the retailers to purchase only from the market leader for at least four years. The market leader is especially strongly represented in the more densely populated areas like the capital. Its competitors,

10 in number, of which some are only locally available, all have much smaller market shares, the biggest having 12%. Those 10 competitors together supply another 10% of the market via tied outlets. There is strong brand and product differentiation in the market. The market leader has the strongest brands. It is the only one with regular advertising campaigns. It provides its tied retailers with special stocking cabinets for its product.

The result on the market is that in total 46% (36% +10%) of the market is foreclosed to potential entrants and to incumbents not having tied outlets. Potential entrants find entry even more difficult in the densely populated areas where foreclosure is even higher, although it is there that they would prefer to enter the market. In addition, owing to the strong brand and product differentiation and the high search costs relative to the price of the product, the absence of instore inter-brand competition leads to an extra welfare loss for consumers. The possible efficiencies of the outlet exclusivity, which the market leader claims result from reduced transport costs and a possible hold-up problem concerning the stocking cabinets, are limited and do not outweigh the negative effects on competition. The efficiencies are limited, as the transport costs are linked to quantity and not exclusivity and the stocking cabinets do not contain special know-how and are not brand specific. Accordingly, it is unlikely that the conditions for individual exemption under section 9(1) are fulfilled.

Examples of quantity forcing

A producer X with a 40% market share sells 80% of its products through contracts which specify that the reseller is required to purchase at least 75% of its requirements for that type of product from X. In return X is offering financing and equipment at favourable rates. The contracts have a duration of five years in which repayment of the loan is foreseen in equal instalments. However, after the first two years buyers have the possibility to terminate the contract with a six-month notice period if they repay the outstanding loan and take over the equipment at its market asset value. At the end of the five-year period the equipment becomes the property of the buyer. Most of the competing producers are small, twelve in total with the biggest having a market share of 20%, and engage in similar contracts with different durations. The producers with market shares below 10% often have contracts with longer durations and with less generous termination clauses. The contracts of producer X leave 25% of requirements free to be supplied by competitors. In the last three years, two new producers have entered the market and gained a combined market share of around 8%, partly by taking over the loans of a number of resellers in return for contracts with these resellers.

Producer X's tied market share is 24% (0.75 × 0.80 × 40%). The other producers' tied market share is around 25%. Therefore, in total around 49% of the market is foreclosed to potential entrants and to incumbents not having tied outlets for at least the first two years of the supply contracts. The market shows that the resellers often have difficulty in obtaining loans from banks and are too small in general to obtain capital through other means like the issuing of shares. In addition, producer X is able to demonstrate that concentrating its sales on a limited number of resellers allows him to plan its sales better and to save transport costs. In the light of the efficiencies on the one hand and the 25% non-tied part in the contracts of producer X, the real possibility for early termination of the contract, the recent entry of new producers and the fact that around half the resellers are not tied on the other hand, the quantity forcing of 75% applied by producer X is likely to fulfil the conditions for individual exemption under section 9(1).

Exclusive distribution

10.57 In an exclusive distribution system, the supplier allocates a territory or customer group exclusively to one or a limited number of buyers and/or reserves it to itself, while restricting its other buyers within the UK from actively selling into the exclusive territory or to the exclusive customer group.[105]

10.58 Suppliers often use this type of system to incentivise distributors to make the financial and non-financial investments needed to develop their brand in a territory where it is not well-known or to sell a new product in a particular territory or to a particular customer group or to increase the focus of the distributors' activities on a particular product (eg special marketing or display efforts). As for distributors, through the size of the territory or the customer group exclusively allocated and the protection provided by exclusivity, they seek to secure a certain volume of business and a margin that justifies their investment efforts.

10.59 In line with this rationale, the number of exclusive distributors should be restricted to one or a limited number (ie shared exclusivity) for a particular territory or customer group. Exclusive distribution shall not be used to shield a large number of distributors from competition located outside the exclusive territory. To that end, the number of appointed distributors should be determined in proportion to the allocated territory or customer group in such a

[105] See VABEO, Article 8 (2)(b)(i).

way as to secure a certain volume of business that preserves their investment efforts.

10.60 The appointed distributors are protected from active sales into the exclusive territory or to the exclusive customer group by other buyers from the supplier. When a supplier allocates an exclusive territory or customer group to more than one distributor, all these distributors benefit from the same protection against active sales from other buyers, while active and passive sales between these distributors cannot be restricted.

10.61 The vertical agreements used for exclusive distribution should define the scope of the territory or the customer group exclusively allocated to the distributors. The exclusive territory may cover the territory of the UK as a whole or an area that is smaller or larger in size. The exclusive customer group can be defined, for instance, by the occupation of the customers or through a list of specific customers selected on the basis of one or more objective criteria. Depending on those criteria, the customer group may be limited to a single customer.

10.62 When a territory or a customer group has not yet been exclusively allocated to one or more distributors, the supplier can reserve such a territory or customer group for itself and should inform its other distributors. This does not require the supplier to be commercially active in the reserved territory or towards the reserved customer group since the supplier may wish to reserve them for the purpose of allocating them to other distributors in the future.

10.63 In a distribution system where the supplier exclusively allocates a territory or a customer group to one or more buyers, the main possible competition risks are market partitioning, which may facilitate price discrimination, and reduced intra-brand competition, in particular in the context of sole exclusivity. When most, all, or the strongest of the suppliers active in a market operate an exclusive distribution system, this may also soften inter-brand competition and facilitate collusion, both at the supplier and the distribution level. Lastly, exclusive distribution may lead to the foreclosure of other distributors and thereby reduce intra-brand competition at the distribution level. Exclusive distribution agreements are exempted by the VABEO where both the supplier's and the buyer's market share each do not exceed 30% and where they do not contain any hardcore restrictions. An exclusive distribution agreement can still benefit from the block exemption provided by the VABEO if combined with other non-hardcore vertical restraints, such as a non-compete obligation limited to five years, quantity forcing or exclusive purchasing. However, where the number of exclusive distributors is not limited and 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, such a distribution system is unlikely to bring about efficiency-enhancing effects. Where appreciable anti-competitive effects occur, the benefit of the block exemption provided by the VABEO is likely to be cancelled.

10.64 The remainder of this section provides guidance for the assessment of exclusive distribution in individual cases above the 30% market share threshold.

10.65 The number of distributors to which a territory or a customer groups has been exclusively allocated is important for the assessment of the exclusive distribution system. The higher the number of distributors, the lower the reduction of intra-brand competition is but also the lower the likelihood that the exclusive distributors have an incentive to invest in order to develop that brand and promote the product(s) of the supplier.

10.66 The market position of the supplier and its competitors is of major importance, as the loss of intra-brand competition will only be problematic if inter-brand competition is limited. The stronger the position of the supplier, notably above the 30% threshold, the higher the likelihood that inter-brand competition is weak and the greater the risk for competition resulting from the reduction in intra-brand competition.

10.67 The position of the supplier's competitors can have a dual significance. The existence of strong competitors will generally indicate that any reduction in intra-brand competition, which may be particularly important in the context of sole distribution, is outweighed by sufficient inter-brand competition. However, if the number of competitors is small and their market position is similar in terms of market share, capacity and distribution network, there is a risk of collusion and/or softening of competition. The loss of intra-brand competition can increase that risk, especially when several suppliers operate similar distribution systems. Multiple exclusive dealerships, that is, when different suppliers appoint the same exclusive distributor(s) in a given territory, may further increase the risk of collusion and/or softening of competition both at supplier and distributor level. If one or more distributors are granted the exclusive right to distribute two or more important competing products in the same territory, inter-brand competition may be substantially restricted for those brands, especially in the case of linear wholesale tariffs.

10.68 The higher the cumulative market share of the brands distributed by the exclusive multiple brand dealers, the higher the risk of collusion and/or softening of competition and the more inter-brand competition will be reduced. If one or more retailers are the exclusive distributor for a number of brands, there is a risk that the reduction of the wholesale price by one supplier for its brand will not be passed on by any exclusive retailer to the final consumer, as it would reduce the retailers' sales and profits made with the other brands. Hence, compared to the situation without multiple exclusive dealerships, suppliers will have a reduced incentive to enter into price competition with one another. Such cumulative effects situations may be a reason to cancel the benefit of block exemption provided by the VABEO where the market shares of the suppliers and buyers are below the 30% threshold of the VABEO.

10.69 Entry barriers that may hinder suppliers from creating their own integrated distribution network or finding alternative distributors are less important in assessing the possible anti-competitive effects of exclusive distribution, especially in the context of shared exclusivity. Foreclosure of other suppliers does not arise as long as exclusive distribution is not combined with single branding, which obliges or induces the distributor to concentrate its orders for a particular type of product with one supplier. Although single branding does not require the distributor to purchase the products from the supplier itself, the combination of exclusive distribution and single branding can make it more difficult for other suppliers to find alternative distributors.

10.70 Foreclosure of other distributors is not an issue where the supplier which operates the exclusive distribution system appoints a large number of exclusive distributors on the same market and those exclusive distributors are not restricted in selling to other non-appointed distributors. Foreclosure of other distributors may however become an issue where there is buying power and market power downstream, in particular in the case of very large territories where the exclusive distributor becomes the exclusive buyer for a whole market. An example would be a national supermarket chain which becomes the only distributor of a leading brand. The foreclosure of other distributors may be aggravated in the case of multiple exclusive dealerships.

10.71 Buyer power may also increase the risk of collusion on the buyer side when the exclusive distribution arrangements are imposed by important buyers, possibly located in the same or different territories, on one or several suppliers.

10.72 Assessing the dynamics of the market is important as growing demand, changing technologies and changing market positions may make negative effects less likely than in mature markets.

10.73 The level of trade is important as possible negative effects may differ between the wholesale and retail level. Exclusive distribution is mainly applied in the distribution of final products. A loss of intra-brand competition is especially likely at the retail level if coupled with large territories, since final consumers may be confronted with reduced choice (ie having to choose between a high price/high service and a low price/low service distributor for an important brand).

10.74 A manufacturer that chooses a wholesaler to be its exclusive distributor will normally do so for a larger territory, such as the whole of the UK. As long as the wholesaler can sell the products without limitation to downstream retailers appreciable anti-competitive effects are unlikely. A possible loss of intra-brand competition at the wholesale level may be easily outweighed by efficiencies obtained in logistics and promotion, especially when the manufacturer is based in a different country. The possible risks for inter-brand competition of multiple exclusive dealerships are however higher at the wholesale than at the retail level. Where one wholesaler becomes the exclusive distributor for a significant number of suppliers, not only is there a risk that competition between these brands is reduced, but also that there is foreclosure at the wholesale level of trade.

10.75 The assessment of an exclusive distribution system by which a customer group is exclusively allocated by a supplier to one or more buyers is subject to the same factors as those mentioned in paragraphs 11.42 to 11.59 of this Guidance and should also take account of the following guidance.

10.76 As for exclusive allocation of territory, the exclusive allocation of a customer group normally makes arbitrage by the customers more difficult. In addition, as each appointed distributor has its own class of customers, distributors that have not been exclusively allocated any customer group may find it difficult to obtain the products from the supplier. Consequently, possible arbitrage by other distributors will be reduced.

10.77 An exclusive distribution system that restricts competition in the meaning of the Chapter I prohibition may nevertheless create efficiencies that fulfil the conditions for individual exemption under section 9(1).

10.78 As set out in paragraph 11.54 of this Guidance, foreclosure of other suppliers is unlikely to arise unless exclusive distribution is combined with single branding. However, even when exclusive distribution is combined with single branding, anti-competitive foreclosure of other suppliers appears unlikely, except possibly when single branding is applied to a dense network of exclusive distributors with small territories or in case of a cumulative effect. In such a scenario, the principles on single branding set out from paragraph 11.22 of this Guidance should be applied. However, where the combination of exclusive distribution and single branding does not lead to significant foreclosure, it may actually be pro-competitive by increasing the incentives for the exclusive distributor to focus its efforts on a particular brand. Therefore, in the absence of such a significant foreclosure effect, the combination of exclusive distribution with single branding may fulfil the conditions for individual exemption under section 9(1) for the whole duration of the agreement, particularly if applied at the wholesale level.

10.79 The combination of exclusive distribution with exclusive sourcing, which requires the exclusive distributors to buy their supplies for the supplier’s brand directly from the supplier, increases the competition risks associated with reduced intra-brand competition and market partitioning, which may in particular facilitate price discrimination. Exclusive distribution already limits arbitrage by customers, as it limits the number of distributors and is typically combined with active sales restrictions imposed on other distributors in order to protect the investments made by exclusive distributors in the exclusive territory. Exclusive sourcing eliminates in addition possible arbitrage by the exclusive distributors, which are prevented from buying from other distributors in the exclusive distribution system. As a result, the supplier's possibilities to limit intra-brand competition by applying dissimilar conditions of sale to the detriment of consumers are enhanced, unless the combination of exclusive distribution with exclusive sourcing allows the creation of efficiencies leading to lower prices.

10.80 The nature of the product can be relevant to the assessment of possible anti-competitive effects of exclusive distribution. Those effects will be less acute in sectors where online sales are more prevalent. It is also relevant to an assessment of possible efficiencies, that is, after an appreciable anti-competitive effect is established.

10.81 Exclusive distribution may lead to efficiencies, especially where investments by the distributors are required to protect or build up the brand image. In general, the case for efficiencies is strongest for new products, complex products, and products whose qualities are difficult to judge before consumption (so called experience products) or even after consumption (so-called credence products). In addition, exclusive distribution may lead to savings in logistic costs due to economies of scale in transport and distribution.

10.82 The efficiencies that result from shared exclusivity may outweigh any possible negative effects that such a system can generate provided that the supplier can demonstrate that the number of exclusive distributors has been determined in proportion to the allocated territory or customer group and operates in such a way as to secure a certain volume of business that preserves the investment effort for the distributors.

10.83 Exclusive distribution systems based on the allocation of exclusive customer groups that restrict intra-brand competition may also fulfil the conditions for individual exemption under section 9(1). Exclusive customer allocation may lead to efficiencies where the investments of the distributors are necessary to build the brand image or where the distributors are required to invest in, for instance, specific equipment, skills or know-how to adapt to the requirements of the exclusive customer group that has been allocated to them or when these investments to lead economies of scale or scope in logistics (for instance, having a dedicated retailer dealing with public administrations' tenders for computers or office supplies). The depreciation period for these investments is an indication of the duration for which an exclusive distribution system based on the allocation of exclusive customer groups may be justified. In general, the justification for exclusive customer allocation is strongest for new or complex products and for products requiring adaptation to the needs of the individual customer. Identifiable differentiated needs are more likely for intermediate products that are sold to different types of professional buyers. Allocation of final consumers is unlikely to lead to efficiencies.

Example of multiple exclusive dealerships in an oligopolistic market

On a geographic market for a final product, there are four market leaders, which each have a market share of around 20%. Those four market leaders sell their product through exclusive distributors at the retail level. Retailers are given an exclusive territory which corresponds to the town in which they are located or a district of the town for large towns. In most territories, the four market leaders happen to appoint the same exclusive retailer ('multiple dealership'), often centrally located and rather specialised in the product. The remaining 20% of the geographic market is composed of small local producers, the largest of these producers having a market share of 5% on the geographic market. Those local producers sell their products in general through other retailers, in particular because the exclusive distributors of the four largest suppliers show in general little interest in selling less well-known and cheaper brands. There is strong brand and product differentiation on the market. The four market leaders have large geographic advertising campaigns and strong brand images, whereas the fringe producers do not advertise their products at the geographic level. The market is rather mature, with stable demand and no major product and technological innovation. The product is relatively simple.

In such an oligopolistic market, there is a risk of collusion between the four market leaders. That risk is increased through multiple dealerships. Intra-brand competition is limited by the territorial exclusivity. Competition between the four leading brands is reduced at the retail level, since one retailer fixes the price of all four brands in each territory. The multiple dealership implies that, if one producer cuts the price for its brand, the retailer will not be eager to transmit this price cut to the final consumer as it would reduce its sales and profits made with the other brands. Hence, producers have a reduced interest in entering into price competition with one another. Inter-brand price competition exists mainly with the low brand image goods of the fringe producers. The possible efficiency arguments for (joint) exclusive distributors are limited, as the product is relatively simple, the resale does not require any specific investments or training and advertising is mainly carried out at the level of the producers.

Even though each of the market leaders has a market share below the threshold, the conditions for individual exemption under section 9(1) may not be fulfilled and cancellation of the block exemption may be necessary for the agreements concluded with distributors whose market share is below 30% of the procurement market.

Example of exclusive customer allocation

A company has developed a sophisticated sprinkler installation. The company has currently a market share of 40% on the market for sprinkler installations. When it started selling the sophisticated sprinkler it had a market share of 20% with an older product. The installation of the new type of sprinkler depends on the type of building that it is installed in and on the use of the building (office, chemical plant, hospital etc). The company has appointed a number of distributors to sell and install the sprinkler installation. Each distributor needed to train its employees for the general and specific requirements of installing the sprinkler installation for a particular class of customers. To ensure that distributors would specialise, the company assigned to each distributor an exclusive class of customers and prohibited active sales to each others' exclusive customer classes. After five years, all the exclusive distributors will be allowed to sell actively to all classes of customers, thereby ending the system of exclusive customer allocation. The supplier may then also start selling to new distributors. The market is quite dynamic, with two recent entries and a number of technological developments. Competitors, with market shares between 25% and 5%, are also upgrading their products.

As the exclusivity is of limited duration and helps to ensure that the distributors may recoup their investments and concentrate their sales efforts first on a certain class of customers in order to learn the trade, and as the possible anti-competitive effects seem limited in a dynamic market, the conditions for individual exemption under section 9(1) are likely to be fulfilled.

Selective distribution systems

Definition of selective distribution systems

10.84 As set out in Article 2(1) of the VABEO, in a selective distribution system, the supplier undertakes to sell the contract products, either directly or indirectly, only to distributors selected on the basis of specified criteria and these distributors undertake not to sell such products to unauthorised distributors within the territory reserved by the supplier to operate that system.

10.85 The criteria used by the supplier to select distributors can be qualitative and/or quantitative in nature. Qualitative criteria are objective criteria required by the nature of the product, such as the training of sales personnel, the service provided at the point of sale, and the product range being sold.[106] Quantitative criteria limit the potential number of dealers more directly by, for instance, requiring minimum or maximum sales or fixing the number of dealers. These criteria can be changed throughout the duration of the selective distribution agreement.

10.86 Selective distribution systems are comparable to exclusive distribution systems in that they restrict the number of authorised distributors and the possibilities of resale. The difference with exclusive distribution is the restriction of the number of dealers based on specific selection criteria. Another difference with exclusive distribution is that the restriction on resale associated with selective distribution is not a restriction on active sales into an exclusive territory or to an exclusive customer group, but a restriction on active and passive sales to non-authorised distributors, leaving only authorised distributors and final customers as possible buyers.

Application of the Chapter I prohibition to selective distribution systems

10.87 The possible competition risks of selective distribution systems are a reduction in intra-brand competition and, especially in case of cumulative effect, the foreclosure of certain type(s) of distributors, as well as the softening of competition and potentially the facilitation of collusion between buyers due to limiting their number. Suppliers who adopt a selective distribution model must therefore take particular care to ensure that the implementation and/or

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[106] See eg Case T-88/92 *Groupement d'achat Édouard Leclerc v Commission,* EU:T:1996:192, paragraphs 125 and seq.

enforcement of any selective distribution arrangement does not lead to any infringement of the Chapter I prohibition.[107]

10.88 The assessment of the possible anti-competitive effects of selective distribution should focus first on compliance of the selective distribution systems with the Chapter I prohibition. To that end, a distinction needs to be made between purely qualitative selective distribution and quantitative selective distribution.

10.89 Purely qualitative selective distribution where dealers are selected only on the basis of objective criteria required by the nature of the product does not put a direct limit on the number of dealers. Provided that the three conditions laid down by the European Court of Justice in the *Metro* judgment[108] ('Metro criteria') are fulfilled, purely qualitative selective distribution is generally considered to fall outside the scope of the Chapter I prohibition, as it can be assumed that the restriction of intra-brand competition associated with selective distribution is offset by an improvement in inter-brand quality competition.[109] First, the nature of the products in question must necessitate a selective distribution system. This means that, having regard to the nature of the product concerned, such a system must constitute a legitimate requirement to preserve its quality and ensure its proper use. For instance, a

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[107] Selective distribution is a tool which may, in some cases, serve to facilitate the implementation and monitoring of other types of vertical restraints, some of which may raise competition concerns. Many restrictions to online sales are mainly found in the context of selective distribution systems. For example, within a selective distribution system, it may be easier for a manufacturer to control pricing, effectively engage in resale price maintenance or prohibit (certain forms of) online sales or advertisement.

[108] See judgments in Case 31/80 *NV L'Oréal and SA L'Oréal v PVBA*, EU:C:1980:289, paragraphs 15-16; Case 26/76 *Metro SB-Großmärkte GmbH & Co. KG v Commission ("Metro I"),* EU:C:1977:167, paragraphs 20-21;Case C-439/09 *Pierre Fabre Dermo-Cosmetique SAS v Président de l'Autorité de la concurrence*,EU:C:2011:649, paragraph 41; Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH*, EU:C:2017:941, paragraph 24.

[109] See Case 31/80 *NV L'Oréal and SA L'Oréal v PVBA,* EU:C:1980:289, paragraphs 15-16; Case 26/76 *Metro SB-Großmärkte GmbH & Co. KG v Commission ("Metro I"),* EU:C:1977:167, paragraphs 20-21; Case C-439/09 *Pierre Fabre Dermo-Cosmetique SAS v Président de l'Autorité de la concurrence,* EU:C:2011:649, paragraph 41; Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH*, EU:C:2017:941, paragraph 24. In *Ping Europe Limited v Competition and Markets Authority,* [2018] CAT 13, the CAT explained at paragraph 60 how the metro criteria applies in the context of Article 101 TFEU: *'It is clear from this passage that the Court of Justice envisages that a provision may either: (i) fall outside the scope of Article 101(1) entirely, because it is necessary to the "continued existence" of the selective distribution system; or, if it is not fundamental to the existence of the system, (ii) fall within the scope of Article 101(1) but nevertheless be redeemed under Article 101(3) because it can be "reconciled with the safeguarding of objectives of a different nature*' When referring to the Metro criteria applied in the context of Coty, the CAT held at paragraph 91 '[…] *it is apparent that where a provision fulfils the Metro criteria (i.e. where a prohibition is objectively justified) it will fall outside the scope of Article 101(1) entirely. Where the provision is not objectively justified, an assessment must be made as to whether it restricts competition by object or by effect. Where there is a restriction of competition, individual exemption must then be considered'*. The Court of Appeal uphold the CMA's infringement decision and also endorsed the Metro criteria and the Coty judgment as part of the legal framework relevant to the analysis of vertical restraints imposed in the context of selective distribution, see Ping v CMA, [2020] EWCA Civ 13, paragraphs 24 and 25.

selective distribution system that falls outside the scope of the Chapter I Prohibition can be operated for high-quality or high-technology products.[110] Operating a selective distribution system may also be necessary for luxury goods. The quality of such goods may result not just from their material characteristics, but also from the aura of luxury surrounding them. Therefore, establishing a selective distribution system which seeks to ensure that the goods are displayed in a manner that contributes to sustaining this aura of luxury may be necessary to preserve their quality.[111] Second, resellers must be chosen on the basis of objective criteria of a qualitative nature, which are laid down uniformly for all potential resellers and are not applied in a discriminatory manner. Although the case law does not require that the qualitative criteria be made known to all potential resellers, such transparency may increase the likelihood of fulfilling the Metro criteria.[112] Third, the criteria laid down must not go beyond what is necessary.[113]

10.90 The assessment of selective distribution under the Chapter I prohibition also requires a separate analysis of each potentially restrictive clause of the agreement under the Metro criteria.[114] This implies, in particular, determining whether the restrictive clause is proportionate in the light of the objective pursued by the selective distribution system and whether it goes beyond what is necessary to achieve this objective.[115] Such requirements are unlikely to be met by hardcore restrictions. Conversely, for instance, a ban on the use of certain third-party online platforms by a supplier of luxury goods on its authorised distributors may be considered appropriate, as long as it allows authorised distributors to advertise via the internet on third-party platforms and to use online search engines, with the result that customers are usually able to find the online offer of authorised distributors by using such engines, and not going beyond what is necessary to preserve the luxury image of those

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[110] See Case 26/76 *Metro SB-Großmärkte GmbH & Co. KG v Commission ("Metro I"),* EU:C:1977:167, paragraphs 20-22; Case 107/82 *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission,* EU:C:1983:293, paragraphs 33, 34 and 73; Case 75/84, *Metro SB-Großmärkte GmbH & Co. KG v Commission ("Metro II"),* EU:C:1986:399, paragraph 45; Case T-88/92 *Groupement d'achat Édouard Leclerc v Commission,* EU:T:1996:192, paragraph 106.

[111] See Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH*, EU:C:2017:941, paragraphs 25 to 29.

[112] See also by analogy Case C-158/11 *Auto 24 SARL v Jaguar Land Rover France SAS*, EU:C:2012:351.

[113] See Case 31/80 *NV L'Oréal and SA L'Oréal v PVBA*, EU:C:1980:289, paragraphs 15-16; Case 26/76 *Metro SB-Großmärkte GmbH & Co. KG v Commission ("Metro I"),* EU:C:1977:167, paragraphs 20-21; Case 107/82 *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission,* EU:C:1983:293, paragraph 35; Case T-19/91 *Société d'Hygiène Dermatologique de Vichy v Commission,* EU:T:1992:28, paragraph 65.

[114] See paragraph 11.74 of this Guidance.

[115] See Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH,* EU:C:2017:941, paragraphs 43 et seq.

goods. If this is the case, it falls outside the scope of the Chapter I prohibition and no further analysis is required.

10.91 Even if they do not meet the Metro criteria, qualitative and/or quantitative selective distribution can benefit from the block exemption provided the market shares of both the supplier and the buyer each do not exceed 30% and the agreement does not contain any hardcore restrictions.[116] The benefit of the block exemption provided by the VABEO is not lost if selective distribution is combined with other non-hardcore vertical restraints. The VABEO exempts selective distribution regardless of the nature of the product concerned and regardless of the nature of the selection criteria. However, where the characteristics of the product[117] do not require selective distribution or do not require the applied criteria, such as for instance the requirement for distributors to have one or more brick and mortar shops or to provide specific services, such a distribution system does not generally bring about sufficient efficiency enhancing effects to counterbalance a significant reduction in intra-brand competition. Where appreciable anti-competitive effects occur, the benefit of the block exemption provided by the VABEO is likely to be cancelled.

10.92 The remainder of this section provides guidance for the assessment of selective distribution in individual cases which are not covered by the VABEO or in the case of cumulative effects resulting from parallel networks of selective distribution.

10.93 The market position of the supplier and its competitors is of central importance in assessing possible anti-competitive effects, as the loss of intra-brand competition can only be problematic if inter-brand competition is limited. The stronger the position of the supplier, notably above the 30% threshold, the higher the risk for competition resulting from the increased loss of intra-brand competition. Another important factor is the number of selective distribution networks present in the same market. Where selective distribution is applied by only one supplier on the market, quantitative selective distribution does not normally create net negative effects. In practice, however, selective distribution is often applied by several suppliers in a particular market.

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[116] See Case C-439/09 *Pierre Fabre Dermo- Cosmétique SAS v Président de l'Autorité de la concurrence,* EU:C:2011:649; see also by analogy Case C-158/11 *Auto 24 SARL v Jaguar Land Rover France SAS,* EU:C:2012:351.

[117] See for example case T-19/92, *Groupement d'achat Edouard Leclerc v Commission* [1996] ECR II-1851, paragraphs 112 to 123; Case T-88/92 *Groupement d'achat Edouard Leclerc v Commission* [1996] ECR II-1961, paragraphs 106 to 117, and the case law referred to in the preceding footnote.

10.94 The position of competitors can have a dual significance. On the one hand, the existence of strong competitors will generally indicate that the reduction in intra-brand competition, which can be particularly important in the context of sole distribution, is outweighed by sufficient inter-brand competition. On the other hand, in the case of a cumulative effect, when a majority of the leading suppliers in a market apply selective distribution, there could be foreclosure of certain types of distributors (ie price discounters). The risk of foreclosure of more efficient distributors has always been greater with selective distribution than with exclusive distribution, given the restriction on sales to non-authorised dealers in selective distribution. That restriction is designed to give selective distribution systems a closed character, making it impossible for non-authorised dealers to obtain supplies. Accordingly, selective distribution is particularly well suited to avoid pressure by price discounters (whether offline or pure online distributors) on the margins of the manufacturer, as well as on the margins of the authorised dealers. Foreclosure of such distribution formats, whether resulting from the cumulative application of selective distribution or from the application by a single supplier with a market share exceeding 30%, reduces the possibilities for consumers to take advantage of the specific benefits offered by these distribution formats such as lower prices, more transparency and wider access to the product.

10.95 Where the VABEO applies to individual selective distribution networks, the cancellation of the benefit of the block exemption provided by the VABEO may be considered if there are cumulative anti-competitive effects. However, a cumulative effect problem is unlikely to arise when the share of the market covered by selective distribution does not exceed 50%. Also, competition concerns are unlikely to arise where the market coverage does not exceed 50%.

10.96 Where both the five largest suppliers and the share of the market covered by selective distribution exceed 50%, the assessment may vary depending on whether or not all five largest suppliers apply selective distribution. The stronger the position of the competitors that do not apply selective distribution, the less likely that other distributors will be foreclosed. Competition concerns may arise if all five largest suppliers apply selective distribution. Such would particularly be the case if the agreements concluded by the largest suppliers contain quantitative selection criteria which directly limit the number of authorised dealers or when the qualitative criteria applied foreclose certain distribution formats, such as a requirement to have one or more brick and mortar shops or to provide specific services that can typically only be provided in a particular distribution format.

10.97 The conditions for individual exemption under section 9(1) are, in general, unlikely to be fulfilled if the selective distribution systems that contribute to the cumulative effect prevent access to the market by new distributors that are capable of adequately selling the products in question. In particular, final consumers are unlikely to benefit from efficiencies if the distribution systems only include certain existing channels while excluding from the market price discounters or pure online distributors which offer lower prices to consumers.

10.98 More indirect forms of quantitative selective distribution, resulting for instance from the combination of purely qualitative selection criteria with the requirement imposed on the dealers to achieve a minimum amount of annual purchases, are less likely to produce net negative effects, if such an amount does not represent a significant proportion of the dealer's total turnover achieved with the type of products in question and it does not go beyond what is necessary for the supplier to recoup its relationship-specific investment and/or realise economies of scale in distribution. A supplier with a market share not exceeding 5% is in general not considered to contribute significantly to a cumulative effect.

10.99 Entry barriers are mainly relevant in the case of foreclosure of non-authorised distributors from the market. Entry barriers could be significant when selective distribution is applied by manufacturers of branded products as it will generally take time and considerable investment for distributors excluded from the selective distribution system to launch their own brands or obtain competitive supplies elsewhere.

10.100 Buying power may increase the risk of collusion between distributors. Distributors holding a strong market position may induce the suppliers to apply selective criteria that would foreclose market access to new and more efficient distributors. Consequently, buying power may appreciably change the analysis of possible anti-competitive effects of selective distribution. Foreclosure of more efficient distributors from the market may especially arise where a strong dealer organisation imposes selection criteria on the supplier aimed at limiting distribution to the advantage of its members.

10.101 Article 10(2)(c) of the VABEO provides that the supplier may not impose an obligation causing the authorised distributors, either directly or indirectly, not to sell the brands of particular competing suppliers. This provision aims specifically at avoiding horizontal collusion to exclude particular brands through the creation of a selective group of brands by the leading suppliers. Such an obligation is unlikely to be exemptible when the market share of the five largest suppliers is equal to or exceeds 50%, unless none of the suppliers imposing such an obligation belongs to the five largest suppliers on the market.

10.102 Competition concerns relating to the foreclosure of other suppliers will normally not arise as long as other suppliers can use the same distributors, as, for example, when a selective distribution system is combined with single branding. In the case of a dense network of authorised distributors or in the case of a cumulative effect, the combination of selective distribution and a non-compete obligation may pose a risk of foreclosure for other suppliers. In that case, the principles set out from paragraph 10.37 on single branding apply. Where selective distribution is not combined with a non-compete obligation, foreclosure of competing suppliers from the market may still be a concern where the leading suppliers apply not only purely qualitative selection criteria, but impose on their dealers certain additional obligations such as the obligation to reserve a minimum shelf-space for their products or to ensure that the distributor's sales of the supplier's products reach a minimum share of the distributor's total turnover. Such a problem is unlikely to arise if the share of the market covered by selective distribution is below 50% or, where this coverage ratio is exceeded, if the market share of the five largest suppliers is below 50%. Assessing the dynamics of the market is important as growing demand, changing technologies and changing market positions may make negative effects less likely than in mature markets.

10.103 Selective distribution may be efficient when it leads to savings in logistical costs due to economies of scale in transport which may occur irrespective of the nature of the product (paragraph 10.11(g)). However, such an efficiency is usually only marginal in selective distribution systems. To assess whether selective distribution is justified to help solve a free-rider problem between distributors (paragraph 10.11(b)) or to help create a brand image (paragraph 10.11(h)) the nature of the product is very relevant. In general, the use of selective distribution systems is more likely to be justified for new products, complex products or products whose qualities are difficult to judge before consumption (so-called experience products) or whose qualities are difficult to judge even after consumption (so-called credence products). The combination of selective distribution with a location clause, to protect an authorised distributor against competition from other authorised distributors opening up a shop in its vicinity, may in particular fulfil the conditions for individual exemption under section 9(1) if the combination is indispensable to protect substantial and relationship specific investments made by the authorised distributor (paragraph 10.11(d)). To ensure that the least anti-competitive restraint is used, it is relevant to assess whether the same efficiencies can be obtained at a comparable cost by, for instance, service requirements alone.

Example of quantitative selective distribution

On a market for consumer durables, the market leader (brand A) with a market share of 35%, sells its product to final consumers through a selective distribution network. There are several criteria for admission to the network: the shop must employ trained staff and provide pre-sales services, there must be a specialised area in the shop devoted to the sales of the product and similar hi-tech products, and the shop is required to sell a wide range of models of the supplier and to display them in an attractive manner. Moreover, the number of admissible retailers in the network is directly limited through the establishment of a maximum number of retailers per number of inhabitants in each province or urban area. Manufacturer A has six competitors in that market. Its largest competitors, B, C and D, have market shares of respectively 25%, 15% and 10%, whilst the other producers have smaller market shares. A is the only manufacturer to use selective distribution. The selective distributors of brand A always handle a few competing brands. However, competing brands are also widely sold in shops which are not member of A's selective distribution network. Channels of distribution are various: for instance, brands B and C are sold in most of A's selected shops, but also in other shops providing a high quality service and in hypermarkets. Brand D is mainly sold in high service shops. Technology is evolving quite rapidly in this market, and the main suppliers maintain a strong quality image for their products through advertising.

On this market, the coverage ratio of selective distribution is 35%. Inter-brand competition is not directly affected by the selective distribution system of A. Intra-brand competition for brand A may be reduced, but consumers have access to low service/low price retailers for brands B and C, which have a comparable quality image to brand A. Moreover, access to high service retailers for other brands is not foreclosed, since there is no limitation on the capacity of selected distributors to sell competing brands, and the quantitative limitation on the number of retailers for brand A leaves other high service retailers free to distribute competing brands. In this case, in view of the service requirements and the efficiencies these are likely to provide and the limited effect on intra-brand competition the conditions for individual exemption under section 9(1) are likely to be fulfilled.

Example of selective distribution with cumulative effects

On a market for a particular sports article, there are seven manufacturers, whose respective market shares are: 25%, 20%, 15%, 15%, 10%, 8% and 7%. The five largest manufacturers distribute their products through quantitative selective distribution, whilst the two smallest use different types of distribution systems, which results in a coverage ratio of selective distribution of 85%. The criteria for access to the selective distribution networks are remarkably uniform amongst manufacturers: the distributors are required to have one or more brick and mortar shops, those shops are required to have trained personnel and to provide pre-sale services, there must be a specialised area in the shop devoted to the sales of the article and a minimum size for this area is specified. The shop is required to sell a wide range of the brand in question and to display the article in an attractive manner, the shop must be located in a commercial street, and that type of article must represent at least 30% of the total turnover of the shop. In general, the same dealer is appointed selective distributor for all five brands. The two brands which do not use selective distribution usually sell through less specialised retailers with lower service levels. The market is stable, both on the supply and on the demand side, and there is strong brand image and product differentiation. The five market leaders have strong brand images, acquired through advertising and sponsoring, whereas the two smaller manufacturers have a strategy of cheaper products, with no strong brand image.

On this market, access by general price discounters and online-only distributors to the five leading brands is denied. Indeed, the requirement that this type of article represents at least 30% of the activity of the dealers and the criteria on presentation and pre-sales services rule out most price discounters from the network of authorised dealers. Moreover, the requirement to have one or more brick and mortar shops excludes online-only distributors from the network. As a consequence, consumers have no choice but to buy the five leading brands in high service/high price shops. This leads to reduced inter-brand competition between the five leading brands. The fact that the two smallest brands can be bought in low service/low price shops does not compensate for this, because the brand image of the five market leaders is much better. Inter-brand competition is also limited through multiple dealership. Even though there exists some degree of intra-brand competition and the number of retailers is not directly limited, the criteria for admission are strict enough to lead to a small number of retailers for the five leading brands in each territory.

The efficiencies associated with these quantitative selective distribution systems are low: the product is not very complex and does not justify a particularly high service. Unless the manufacturers can prove that there are clear efficiencies linked to their network of selective distribution, it is probable that the block exemption will have to be withdrawn because of its cumulative effects resulting in less choice and higher prices for consumers.

Franchising

10.104 Franchise agreements contain licences of intellectual property rights relating in particular to trade marks or signs and know-how for the use and distribution of goods or services. In addition to the licence of IPRs, the franchisor usually provides the franchisee during the life of the agreement with commercial or technical assistance. The licence and the assistance are integral components of the business method being franchised. The franchisor is in general paid a franchise fee by the franchisee for the use of the particular business method. Franchising may enable the franchisor to establish, with limited investments, a uniform network for the distribution of its products. In addition to the provision of the business method, franchise agreements usually contain a combination of different vertical restraints concerning the products being distributed, in particular selective distribution, non-compete, exclusive distribution or weaker forms thereof.

10.105 Franchising (with the exception of industrial franchise agreements) presents some specific characteristics, such as the use of a uniform business name, the application of uniform business methods (including the licensing of IPRs) and the payment of royalties in return for the benefits granted. In view of these specificities, provisions that are strictly necessary for the functioning of such distribution systems can be considered as falling outside the scope of the Chapter I Prohibition. This concerns, for instance, restrictions that prevent the know-how and assistance provided by the franchisor from benefiting his competitors and a non-compete obligation with regard to the goods or services purchased by the franchisee that is necessary to maintain the common identity and reputation of the franchise network. In the latter case, the duration of the non-compete obligation is irrelevant as long as it does not exceed the duration of the franchise agreement itself.

10.106 Franchise agreements benefit from the exemption provided by the VABEO where both the supplier’s and the buyer’s market shares do not exceed 30%. The licensing of IPRs contained in franchise agreements is dealt with in paragraphs 6.30 to 6.45 of this Guidance. Vertical restraints contained in franchise agreements will be assessed under the rules applicable to the distribution system that most closely relates to the nature of the specific franchise agreement. For instance, a franchise agreement that gives rise to a closed network since members are forbidden from selling to non-members shall be assessed under the rules applicable to selective distribution. In contrast, a franchise agreement that grants territorial exclusivity and protection from active sales by other franchisees shall be assessed under the rules applicable to exclusive distribution.

10.107 Franchising agreements that include hardcore restrictions, including RPM, do not benefit from the block exemption provided by the VABEO. Such Agreements may fulfil the conditions for individual exemption under section 9(1). This assessment under section 9(1) should take into account that the more important the transfer of know-how, the more likely it is that the vertical restraints create efficiencies and/or are indispensable.

Example of franchising

A manufacturer has developed a new format for selling sweets in so-called fun shops where the sweets can be coloured specially on demand from the consumer. The manufacturer of the sweets has also developed the machines to colour the sweets. The manufacturer also produces the colouring liquids. The quality and freshness of the liquid is of vital importance to producing good sweets. The manufacturer made a success of its sweets through a number of own retail outlets all operating under the same trade name and with the uniform fun image (eg style of lay-out of the shops, common advertising). In order to expand sales the manufacturer started a franchising system. The franchisees are obliged to buy the sweets, liquid and colouring machine from the manufacturer, to have the same image and operate under the trade name, pay a franchise fee, contribute to common advertising and ensure the confidentiality of the operating manual prepared by the franchisor. In addition, the franchisees are only allowed to sell from the agreed premises, to sell to end users or other franchisees and are not allowed to sell other sweets. The franchisor is obliged not to appoint another franchisee nor operate a retail outlet himself in a given contract territory. The franchisor is also under the obligation to update and further develop its products, the business outlook and the operating manual and make these improvements available to all retail franchisees. The franchise agreements are concluded for a duration of 10 years.

Sweet retailers buy their sweets on a regional market from either regional producers that cater for specific regional tastes or from wholesalers which buy sweets from producers based in other parts of the UK in addition to selling products from regional producers. On that market the franchisor's products compete with other brands of sweets. The franchisor has a market share of 30% on the market for sweets sold to retailers. Competition comes from a number of regional and national brands, sometimes produced by large, diversified food companies. There are many potential points of sale of sweets in the form of tobacconists, general food retailers, cafeterias and specialised sweet shops. The franchisor's market share of the market for machines for colouring food is below 10%. The franchisor has a market share of 30% on the market for sweets sold to retailers. There are many points of sale for sweets in the form of newsagents, corner shops, general food retailers, cafeterias and specialised sweet shops.

Most of the obligations contained in the franchise agreements may be deemed necessary to protect the intellectual property rights or maintain the common identity and reputation of the franchised network and fall outside the Chapter I prohibition. The restrictions on selling (ie the determination of a contract territory and selective distribution) provide an incentive to the franchisees to invest in the colouring machine and the franchise concept and, if not necessary to, at least help maintain the common identity, thereby offsetting the loss of intra-brand competition. The non-compete clause excluding other brands of sweets from the shops for the full duration of the agreements does allow the franchisor to keep the outlets uniform and prevent competitors from benefiting from its trade name. It does not lead to any serious foreclosure in view of the great number of potential outlets available to other sweet producers. The franchise agreements of this franchisor are likely to fulfil the conditions for individual exemption under section 9(1) CA98 in as far as the obligations contained therein fall under the Chapter I prohibition.

Exclusive supply

10.108 Exclusive supply refers to arrangements that oblige or induce the supplier to sell the contract products only or mainly to one buyer, in general or for a particular use. Such restrictions may take the form of an exclusive supply obligation, restricting the supplier to sell to only one buyer for the purposes of resale or a particular use, but may for instance also take the form of quantity forcing on the supplier, where incentives are agreed between the supplier and buyer which make the former concentrate its sales mainly with one buyer. For intermediate goods or services, exclusive supply is often referred to as industrial supply.

10.109 Exclusive supply is exempted by the VABEO where both the supplier's and buyer's market shares do not exceed 30%, even if combined with other non-hardcore vertical restraints such as non-competes. The remainder of this section provides guidance for the assessment of exclusive supply in individual cases above the market share threshold.

10.110 The main competition risk of exclusive supply is anti-competitive foreclosure of other buyers. There is a similarity with the possible effects of exclusive distribution, in particular when the exclusive distributor becomes the exclusive buyer for a whole market (see paragraph 10.70). The market share of the buyer on the upstream purchase market is obviously important for assessing the ability of the buyer to impose exclusive supply which forecloses other buyers from access to supplies. The importance of the buyer on the downstream market is however the factor which determines whether a competition problem may arise. If the buyer has no market power downstream, then no appreciable negative effects for consumers can be expected. Negative effects may arise when the market share of the buyer on the downstream supply market as well as the upstream purchase market exceeds 30%. Where the market share of the buyer on the upstream market does not exceed 30%, significant foreclosure effects may still result, especially when the market share of the buyer on its downstream market exceeds 30% and the exclusive supply relates to a particular use of the contract products. Where a company is dominant on the downstream market, any obligation to supply the products only or mainly to the dominant buyer are likely to have significant anti-competitive effects.

10.111 It is not only the market position of the buyer on the upstream and downstream market that is important but also the extent to and the duration for which it applies an exclusive supply obligation. The higher the tied supply share, and the longer the duration of the exclusive supply, the more significant the foreclosure is likely to be. Exclusive supply agreements shorter than five years entered into by non-dominant companies usually require a balancing of pro- and anti-competitive effects, while agreements lasting longer than five years are, for most types of investments, not considered necessary to achieve the claimed efficiencies or the efficiencies are not sufficient to outweigh the foreclosure effect of such long-term exclusive supply agreements.

10.112 The market position of the competing buyers on the upstream market is important as it is likely that competing buyers will be foreclosed for anti-competitive reasons, that is, to increase their costs, if they are significantly smaller than the foreclosing buyer. Foreclosure of competing buyers is not very likely where those competitors have similar buying power and can offer the suppliers similar sales possibilities. In such a case, foreclosure could only occur for potential entrants, which may not be able to secure supplies when a number of major buyers all enter into exclusive supply contracts with the majority of suppliers on the market. Such a cumulative effect may lead to the cancellation of the benefit of block exemption provided by the VABEO in relation to those agreements.

10.113 The existence of entry barriers at the supplier level as well as their size are relevant to assessing whether there is real foreclosure. In as far as it is efficient for competing buyers to provide the goods or services themselves via upstream vertical integration, foreclosure is unlikely to be a real problem. However, there are often significant entry barriers.

10.114 Countervailing power of suppliers is relevant, as important suppliers will not easily allow themselves to be cut off from alternative buyers. Foreclosure is therefore mainly a risk in the case of weak suppliers and strong buyers. In the case of strong suppliers, the exclusive supply may be found in combination with non-compete obligations. The combination with non-compete obligations brings in the rules developed for single branding. Where there are relationship-specific investments involved on both sides (hold-up problem) the combination of exclusive supply and non-compete obligations that is, reciprocal exclusivity in industrial supply agreements may often be justified, in particular below the level of dominance.

10.115 Lastly, the level of trade and the nature of the product are relevant for foreclosure. Anticompetitive foreclosure is less likely in the case of an intermediate product or where the product is homogeneous. Firstly, a foreclosed manufacturer that uses a certain input usually has more flexibility to respond to the demand of its customers than the wholesaler or retailer has in responding to the demand of the final consumer for whom brands may play an important role. Secondly, the loss of a possible source of supply matters less for the foreclosed buyers in the case of homogeneous products than in the case of a heterogeneous product with different grades and qualities. For final branded products or differentiated intermediate products where there are entry barriers, exclusive supply may have appreciable anti-competitive effects where the competing buyers are relatively small compared to the foreclosing buyer, even if the latter is not dominant on the downstream market.

10.116 Efficiencies can be expected in the case of a hold-up problem (paragraph (10.11(e) and 10.11(f)) and such efficiencies are more likely for intermediate products than for final products. Other efficiencies are less likely. Possible economies of scale in distribution (paragraph 10.11(g)) do not seem likely to justify exclusive supply.

10.117 In the case of a hold-up problem and even more so in the case of economies of scale in distribution, quantity forcing on the supplier, such as minimum supply requirements, could well be a less restrictive alternative.

Example of exclusive supply

On a market for a certain type of components (intermediate product market) supplier A agrees with buyer B to develop, with its own know-how and considerable investment in new machines and with the help of specifications supplied by buyer B, a different version of the component. B will have to make considerable

investments to incorporate the new component. It is agreed that A will supply the new product only to buyer B for a period of five years from the date of first entry on the market. B is obliged to buy the new product only from A for the same period of five years. Both A and B can continue to sell and buy respectively other versions of the component elsewhere. The market share of buyer B on the upstream component market and on the downstream final goods market is 40%. The market share of the component supplier is 35%. There are two other component suppliers with around 20-25% market share and a number of small suppliers.

Given the considerable investments, the agreement is likely to fulfil the conditions for individual exemption under section 9(1) in view of the efficiencies and the limited foreclosure effect. Other buyers are foreclosed from a particular version of a product of a supplier with 35% market share and there are other component suppliers that could develop similar new products. The foreclosure of part of buyer B's demand to other suppliers is limited to maximum 40% of the market.

Restrictions on the use of online marketplaces

10.118 Online marketplaces are online platforms which connect merchants and potential customers with a view to enabling direct purchases.[118] Online platforms that offer no direct purchasing functionality, but re-direct customers to other websites where products can be purchased, are not considered online marketplaces for the purpose of this Guidance, but advertising platforms or digital comparison tools.

10.119 Online marketplaces have become an important sales channel for suppliers and retailers, providing them with access to a large number of customers, as well as for end users. Online marketplaces may allow retailers to start selling online with lower initial investments. They may also facilitate cross-border sales and increase the visibility of, notably small and medium-sized, retailers that do not operate their own online shop or are not well known to end users.

10.120 Suppliers may wish to restrict the use of online marketplaces by their buyers,[119] for instance to protect the image and positioning of their brand, to

[118] The definitions used in this Guidance are merely for the purposes of providing guidance on vertical agreements in the context of the Block Exemption and are not intended to be exhaustive or definitive with regards to all the potential functions and features of online marketplaces and online platforms generally.
[119] Final report on the E-commerce Sector Inquiry, COM(2017) 229 final, 10 May 2017; section 4.4.

discourage the sale of counterfeit products, to ensure sufficient pre- and post-sale services or to ensure that the retailer maintains direct a relationship with customers. The restrictions may range from a total ban on the use of online marketplaces to the imposition of certain qualitative requirements which the marketplaces must meet. For instance, suppliers may prohibit the use of marketplaces on which products are sold by auction, or they may require buyers to use specialised marketplaces, in order to ensure certain quality standards regarding the environment and parameters of the sale of their goods or services. Some qualitative requirements may de facto ban the use of online marketplaces, because no online marketplace is capable of meeting the requirement, for example, where the supplier requires that the logo of the online marketplace is not visible or requires that the domain name of any website used by the retailer contains the name of the retailer's business.

10.121 A restriction of sales on online marketplaces in a vertical agreement is exempted by the VABEO where the market shares of each of the supplier and the buyer do not exceed 30% and the vertical agreement does not include any hardcore restriction under the VABEO or any excluded restriction under the VABEO that cannot be severed from the rest of the vertical agreement. As set out in Article 8 VABEO and Part 9 of this Guidance, a restriction or ban of sales on online marketplaces concerns the modalities of the buyer’s online sales and does not limit sales into a specific territory or to a specific customer group. While it restricts the use of a specific online channel, other online channels remain available to the buyer.[120] For example, despite a restriction or a ban of sales on online marketplaces, the buyer may still sell the contract products via its own website and use online advertising channels to attract customers to its website.[121]

10.122 While any restriction of online sales that directly or indirectly has as its object to prevent the buyer or its customers from using the internet effectively for the purposes of selling their products online is a hardcore restriction within the meaning of Article 8(2)(b) to (d) VABEO and a restriction by object under the Chapter I prohibition, a restriction on the use of online marketplaces can generally benefit from the block exemption provided by the VABEO. As set out in paragraph 8.41 a restriction in the use of online marketplaces generally does not affect a group of online users which can be circumscribed within the group of online purchasers, and does not limit the buyer from selling the contract products via its own website or from advertising under certain circumstances via the internet on third-party platforms and from using online

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[120] Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH,* ECLI:EU:C:2017:941, paragraphs 64-69.
[121] Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH,* ECLI:EU:C:2017:941, paragraphs 52-54.

search engines to attract customers to its website, and, therefore, does not constitute a hardcore restriction under Article 8(2)(b) to (d) VABEO, to the extent that it does not de facto prevent the effective use of the internet by the buyers or their customers to sell online.

10.123 The remainder of this section provides guidance for the assessment of restrictions on the use of online marketplaces in individual cases where the 30% market share thresholds are exceeded. The general principles set out from paragraph 10.18 to 10.35 provide the relevant framework for this assessment. Restrictions on the use of online marketplaces for sales into territories or to customer groups that are reserved exclusively to the supplier or allocated exclusively to other distributors form part of an exclusive distribution system and should be assessed together with that system.

10.124 Restrictions on the use of online marketplaces are often imposed in selective distribution systems. Paragraphs 10.84 to 10.103 set out the criteria for establishing whether a selective distribution system falls outside the scope of the Chapter I prohibition, namely when (i) resellers are chosen on the basis of objective criteria of a qualitative nature that are laid down uniformly for all potential resellers and not applied in a discriminatory fashion, (ii) the characteristics of the contract products necessitate a selective distribution network in order to preserve their quality and ensure their proper use and (iii) the criteria laid down do not go beyond what is necessary.[122] Especially in instances where the supplier does not enter into an agreement with the online marketplace and is thus unable to ensure that the marketplace meets its selection criteria, a restriction or ban on the use of online marketplaces may fulfil the above criteria and thus be appropriate and not go beyond what is necessary to preserve the quality and ensure the proper use of the contract products. However, in cases where a supplier includes the operator of an online marketplace as an authorised distributor in its selective distribution system, or, where it restricts the use of online marketplaces by some authorised distributors but not others, or where it restricts the use of an online marketplace, but uses that marketplace itself to distribute the contract products, restrictions on the use of such online marketplaces would appear unlikely to fulfil the requirements of appropriateness and necessity.

10.125 The possible risks to competition arising from restrictions on the use of online marketplaces are a reduction of intra-brand competition at the distribution level and the foreclosure of distributors, notably small and medium

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[122] Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH,* ECLI:EU:C:2017:941, paragraphs 24 to 36.

ones, to the extent that distributors are deprived of a potentially important indirect sales channel.

10.126 To assess the possible anti-competitive effects of restrictions on the use of online marketplaces, it is first necessary to assess the degree of inter-brand competition. As set out in paragraphs 10.18 to 10.35 of this Guidance, sufficient inter-brand competition can in principle mitigate any loss of intra-brand competition. For this purpose, the market position of the supplier and of its competitors should be taken into account. Second, it is necessary to take into account the type and scope of the restrictions on the use of online marketplaces. For instance, a ban on all sales through online marketplaces is more restrictive than a restriction on the use of particular online marketplaces or a requirement to only use marketplaces that meet certain qualitative criteria. Third, the relative importance of the restricted online marketplaces as a sales channel in the relevant product and geographic markets should be taken into account. Lastly, it is necessary to take into account the cumulative effect of any other restrictions on online sales or advertising imposed by the supplier.

10.127 As set out in paragraph 10.119 of this Guidance, restrictions on the use of online marketplaces may lead to efficiencies, in particular linked to ensuring brand protection or a certain level of service quality or reducing opportunities for counterfeiting. To the extent that the restrictions do not already fall outside the scope of the Chapter I prohibition, the assessment must consider whether such efficiencies may be achieved through less restrictive means, in line with the conditions for individual exemption under section 9(1). This could be the case where the online marketplace allows retailers to create their own brand shop within the marketplace. Any quality-related justifications brought forward by the supplier will be unlikely to meet the conditions for individual exemption under of section 9(1) where the supplier itself uses the online marketplaces that are covered by the restrictions, or where the supplier imposes the restriction only on some distributors but not on others, or where the operator of the online marketplace is itself an authorised member of the selective distribution system.

Restrictions on the use of digital comparison tools

10.128 Digital comparison tools (DCTs) are web-based, app-based or other digital intermediary services used by consumers to compare and potentially to switch or purchase products or services from a range of businesses. Comparison parameters may include price, product. characteristics or various measures of quality. DCTs typically do not enter into the primary contract with consumers.[123] DCTs help consumers compare products and services by presenting a list of relevant offers from a panel of suppliers. The way they deliver comparison services can vary enormously between individual DCTs and across sectors (and indeed between comparisons for different products on the same DCT).[124] DCTs enable retailers to increase their visibility and generate traffic for their websites. In general, DCTs intensify competition between retailers and deliver benefits for consumers.[125]

10.129 Unlike online marketplaces, DCTs[126] typically do not offer sale and purchase functionality, but rather re-direct customers to the website of the retailer, enabling a direct transaction between the customer and the retailer.[127]

10.130 Suppliers may wish to restrict the use of DCTs,[128] for instance to protect their brand image, as DCTs typically focus on price and may not allow retailers to differentiate themselves through other features, such as the range or quality of the contract goods or services. Other reasons for restricting the use of DCTs may be to reduce opportunities for counterfeiting, or to protect business models that rely on, for instance, specialisation or quality rather than price.

10.131 Restrictions on the use of DCTs may range from a direct or indirect ban to restrictions based on quality requirements or requirements to include specific content in the offers advertised on the DCT. For example, a restriction on providing price information to DCTs, or a requirement to obtain the supplier's authorisation before using DCTs, or a restriction on the use of the supplier's brand on DCTs may amount to an indirect prevention in the use of DCTs.

10.132 Restrictions on the use of DCTs may increase consumer search costs and thereby soften retail competition. As with other online advertising restrictions, restrictions on the ability of the buyer to use DCTs may restrict the buyer from selling to customers that are located outside its physical trading area and who wish to purchase online. Preventing the use of DCTs in

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123 Definition used in the CMA Digital Comparison Tools Market Study – Glossary.
124 CMA Digital Comparison Tools Market Study – Final Report – page 19.
125 See CMA Digital Comparison Tools Market Study – Final Report – in particular, Part 4.
126 Note that DCTs fall into the category of indirect sales channel referred to in Part 9 'Wide retail parity obligations'.
127 For the purpose of this Guidance, DCTs refer to online platforms that do not enable users to conclude purchase transactions on the platform. Platforms that allow users to conclude purchase transactions on the platform are considered to be online marketplaces for the purposes of this Guidance. Restrictions on the use of online marketplaces are dealt with in paragraphs 10.118-10.127 of this Guidance.
128 Final report on the E-commerce Sector Inquiry, COM(2017) 229 final, 10 May 2017; section B.4.5.

a vertical agreement restricts the buyer's ability to target potential customers, inform them about its offering and direct them to its website. As long as the use of DCTs is not, as such, a targeted form of advertising, as set out in paragraph 8.50 of this Guidance, preventing the use of DCTs as an online advertising and indirect sales channel is capable of restricting passive sales to customers wishing to purchase online and located outside the physical trading area of the distributor and constitutes a hardcore restriction subject to the exceptions in Article 8(2)(b)(ii) and (iii) VABEO. The main possible competition risks in such case are market partitioning, which may facilitate price discrimination, and reduced intra-brand competition. Conversely, if the restriction is limited to the use of DCTs to target customers in a territory or customer group that is reserved exclusively to the supplier or allocated exclusively to other distributors (exclusive distribution) the restriction would be covered by the exception of Article 8(2)(b)(i) VABEO (ie because such restriction would be a restriction of active sales into an exclusive territory or customer group).

10.133 Restrictions on the use of DCTs which fall short of directly or indirectly preventing their use, for instance requirements that DCTs must meet certain quality standards, are unlikely to restrict sales to customers in a specific territory or customer group, but rather determine the methods of sale and therefore generally benefit from the block exemption provided by the VABEO.[129] The following guidance is provided for the assessment of such restrictions which do not benefit from the block exemption provided by the VABEO.

10.134 Restrictions on the use of DCTs are often imposed in selective distribution systems. Paragraphs 10.84 to 10.103 of this Guidance sets out the criteria for establishing whether a selective distribution system falls outside the scope of the Chapter I prohibition. However, it is unlikely that preventing the use of DCTs will be appropriate or necessary to preserve the quality or ensure the proper use of contract goods or services, because these tools typically re-direct potential customers to the website of the authorised distributor to make the purchase. The supplier is able to exert control over the distributor's website through its selection criteria and by imposing requirements in its vertical agreement with the distributor.

10.135 Restrictions on the use of DCTs which fall short of directly or indirectly preventing their use, for instance, a requirement to only use DCTs meeting certain quality standards, may, when not covered by the VABEO, significantly

[129] Except where the imposition of quality standards on price comparison tools is used as indirect means to prevent their use.

limit the ability of the buyer to use DCTs. In those instances, it may have to be assessed if the restriction leads to effects similar to those of preventing the use of DCTs, namely to consumer harm consisting in an increase of consumers' search costs and the softening of price competition or to market partitioning, which may facilitate price discrimination, ultimately impacting inter-brand, and possibly also intra-brand competition. Such restrictions may also limit intra-brand competition, for example, where a supplier does not impose the restrictions on all its distributors or where the supplier itself uses the DCTs covered by the restriction. To the extent that distributors are prevented from relying on a potentially significant indirect sales channel, they would only exercise limited competitive pressure on the supplier or any other distributors not facing this restriction.

10.136 Relevant factors for the assessment under the Chapter I prohibition include the market position of the supplier and its competitors; the importance of DCTs as an advertising and indirect sales channel in the product and geographic markets of the contract goods or services; the type and scope of the restrictions and the relative importance of any specific DCTs whose use is restricted or banned, as well as whether the supplier also imposes restrictions on the distributor's ability to use other forms of online advertising. The cumulative effect of any such other restrictions with the restriction on the use of DCTs should be taken into account.

10.137 As set out in paragraph 10.128 of this Guidance, restrictions on the use of DCTs may lead to efficiencies, in particular linked to ensuring brand protection or a certain level of service quality or reducing opportunities for counterfeiting. In line with the conditions for individual exemption under section 9(1), the assessment must consider whether such efficiencies may also be achieved through less restrictive means. This could be the case where the price comparison tool also provides for comparisons or reviews linked to the quality of the goods or services concerned, the customer service, the trustworthiness of the distributor or other features of the distributors' offerings. Any assessment of quality-related justifications under section 9(1) should take into account that the sale does not occur on the price comparison tool itself, but on the website of the distributor, which, on the basis of the distribution agreement entered into with the supplier, should meet the supplier's quality requirements.

Upfront access payments

10.138 Upfront access payments are fixed fees that suppliers pay to distributors in the framework of a vertical relationship at the beginning of a relevant period, in order to get access to their distribution network and remunerate services provided to the suppliers by the retailers. This category includes various practices such as slotting allowances[130], so-called 'pay-to-stay' fees[131], and payments to have access to a distributor's promotion campaigns. Upfront access payments are exempted under the VABEO when both the supplier's and buyer's market share does not exceed 30%. This section provides Guidance for the assessment of upfront access payments in individual cases above the market share threshold.

10.139 Upfront access payments may sometimes result in anti-competitive foreclosure of other distributors. For example, a high fee may incentivise a supplier to channel a substantial volume of its sales through one or a limited number of distributors in order to cover the costs of the fee. In such a case, upfront access payments may have the same downstream foreclosure effect as an exclusive supply type of obligation. To assess the likelihood of this type of negative effect, the guidance relating to exclusive supply obligations may be applied by analogy (in particular paragraphs 10.110 to 10.115).

10.140 Exceptionally, upfront access payments may result in anticompetitive foreclosure effects, for example, if the distributor has a strong bargaining position, or where the use of upfront access payments is widespread, such payments may increase barriers to entry for small suppliers To assess the likelihood of this type of negative effect, the guidance relating to single branding obligations may be applied by analogy (in particular paragraphs 10.40 to 10.47). The assessment must also take into account whether the distributor in question sells competing products under its own brand. In that case, horizontal concerns may also arise, with the consequence that the block exemption provided by the VABEO does not apply.

10.141 In addition to possible foreclosure effects, upfront access payments may soften competition and facilitate collusion between distributors. Upfront access payments are likely to increase the price charged by the supplier for the contract products since the supplier must cover the expense of those payments. Higher supply prices may reduce the incentive of the retailers to compete on price on the downstream market, while the profits of distributors are increased as a result of the access payments. Such reduction of competition between distributors through the cumulative use of upfront access payments normally requires the distribution market to be highly concentrated.

130 Fixed fees that manufacturers pay to retailers in order to get access to their shelf space.

131 Lump sum payments made to ensure the continued presence of an existing product on the shelf for some further period.

10.142 However, the use of upfront access payments may in many cases contribute to an efficient allocation of shelf space for new products. When suppliers launch new products, distributors often have less information than suppliers about whether the new product is likely to be successful and, as a result, they may stock sub-optimal quantities of the product. Upfront access payments may be used to reduce this asymmetry in information between suppliers and distributors by explicitly allowing suppliers to compete for shelf space. The distributor may thus receive an advance warning of which products are most likely to be successful since a supplier will normally only agree to pay an upfront access fee if it considers there is a low probability that the product launch will fail.

10.143 Furthermore, due to the asymmetry in information mentioned in paragraph 10.142, suppliers may have incentives to free-ride on distributors' promotional efforts in order to introduce sub-optimal products. If a product is not successful, the distributors will pay part of the costs of the product failure. The use of upfront access fees may prevent such free riding by shifting the risk of product failure back to the suppliers, thereby contributing to an optimal rate of product launches.

Category Management Agreements

10.144 Category management agreements are agreements by which, within a distribution agreement, the distributor entrusts the supplier (the ‘category captain’) with the marketing of a category of products including in general not only the supplier's products, but also the products of its competitors. The category captain may thus have an influence on for instance the product placement and product promotion in the shop and product selection for the shop. Category management agreements are exempted under the VABEO when both the supplier's and buyer's market share does not exceed 30% and provided that such an agreement does not include hardcore restrictions, for example restrictions of the distributor’s ability to determine its sale price.

10.145 In most cases category management agreements do not raise concerns under Chapter I CA98. However, they may sometimes distort competition between suppliers, and result in anti-competitive foreclosure of other suppliers, where the category captain is able, due to its influence over the marketing decisions of the distributor, to limit or disadvantage the distribution of products of competing suppliers.

10.146 In general, distributors will not have an interest in limiting their choice of products. However, they may have incentives to exclude certain suppliers, in particular when the distributor also sells competing products under its own brand. To assess the likelihood of such an upstream foreclosure effect, the guidance relating to single branding obligations may be applied by analogy (in particular paragraphs 10.40 to 10.47) In particular, this assessment must take into account, on the one hand, the market coverage of the category management agreements and the possible cumulative use of such agreements and, on the other hand, the market position of competing suppliers and the distributor.

10.147 In addition, category management agreements may facilitate collusion between distributors when the same supplier serves as a category captain for all or most of the competing distributors on a market and provides these distributors with a common point of reference for their marketing decisions.

10.148 Category management may also facilitate collusion between suppliers through increased opportunities to exchange sensitive market information via retailers, such as for instance information related to future pricing, promotional plans or advertising campaigns.[132]

10.149 However, the use of category management agreements may also lead to efficiencies. Category management agreements may allow distributors to have access to the supplier's marketing expertise for a certain group of products and to achieve economies of scale as they ensure that the optimal quantity of products is presented timely and directly on the shelves. In general, the higher the interbrand competition and the lower consumers' switching costs, the greater the economic benefits achieved through category management.

Tying

10.150 Tying refers to situations where customers that purchase one product (the tying product) are required also to purchase another distinct product (the tied product) from the same supplier or someone designated by the latter. Tying may constitute an abuse within the meaning of the Chapter II prohibition.[133] Tying may also constitute a vertical restraint falling under the Chapter I prohibition where it results in a single branding type of obligation (see paragraphs 10.37 to 10.56) for the tied product. Only the latter situation is dealt with in this Guidance.

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[132] The VABEO does not cover such direct information exchanges between competitors, see paragraph 7.13 of this Guidance.

[133] Case C-333/94 P *Tetrapak v Commission* [1996] ECR I-5951, paragraph 37. See also Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7.

10.151 Whether products will be considered as distinct depends on customer demand. Two products are distinct where, in the absence of the tying, a substantial number of customers would purchase or would have purchased the tying product without also buying the tied product from the same supplier, thereby allowing stand-alone production for both the tying and the tied product.[134] Evidence that two products are distinct could include direct evidence that, when given a choice, customers purchase the tying and the tied products separately from different sources of supply, or indirect evidence, such as the presence on the market of undertakings specialised in the manufacture or sale of the tied product without the tying product[135], or evidence indicating that undertakings with little market power, particularly on competitive markets, tend not to tie or not to bundle such products. For instance, since customers want to buy shoes with laces and it is not practicable for distributors to lace new shoes with the laces of their choice, it has become commercial usage for shoe manufacturers to supply shoes with laces. Therefore, the sale of shoes with laces is not a tying practice.

10.152 Tying may lead to anticompetitive foreclosure effects on the tied market, the tying market, or both at the same time. The foreclosure effect depends on the tied percentage of total sales on the market of the tied product. On the question of what can be considered appreciable foreclosure under the Chapter I prohibition, the analysis for single branding can be applied. Tying means that there is at least a form of quantity-forcing on the buyer in respect of the tied product. Where in addition a non-compete obligation is agreed in respect of the tied product, this increases the possible foreclosure effect on the market of the tied product. The tying may lead to less competition for customers interested in buying the tied product, but not the tying product. If there is not a sufficient number of customers that will buy the tied product alone to sustain competitors of the supplier on the tied market, the tying can lead to those customers facing higher prices. If the tied product is an important complementary product for customers of the tying product, a reduction of alternative suppliers of the tied product and hence a reduced availability of that product can make entry onto the tying market alone more difficult.

10.153 Tying may also directly lead to prices that are above the competitive level, especially in three situations. Firstly, if the tying and the tied product can be used in variable proportions as inputs to a production process, customers may react to an increase in price for the tying product by increasing their

[134] Court of First Instance in Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, paragraphs 917, 921 and 922.

[135] Court of First Instance in Case T-30/89 *Hilti v Commission* [1991] ECR II-1439, paragraph 67.

demand for the tied product while decreasing their demand for the tying product. By tying the two products the supplier may seek to avoid this substitution and as a result be able to raise its prices. Second, when the tying allows price discrimination according to the use the customer makes of the tying product, for example the tying of ink cartridges to the sale of photocopying machines (metering). Third, when in the case of long-term contracts or in the case of aftermarkets with original equipment with a long replacement time, it becomes difficult for the customers to calculate the consequences of the tying.

10.154 Tying is exempted under the VABEO when the market share of the supplier, on both the market of the tied product and the market of the tying product, and the market share of the buyer, on the relevant upstream markets, do not exceed 30%. It may be combined with other vertical restraints, which are not hardcore restrictions, such as non-compete obligations or quantity forcing in respect of the tying product, or exclusive sourcing. The remainder of this section provides guidance for the assessment of tying in individual cases above the market share threshold.

10.155 The market position of the supplier on the market of the tying product is obviously of central importance to assess possible anti-competitive effects. In general, this type of agreement is imposed by the supplier. The importance of the supplier on the market of the tying product is the main reason why a buyer may find it difficult to refuse a tying obligation.

10.156 The market position of the supplier's competitors on the market of the tying product is important in assessing the supplier's market power. As long as its competitors are sufficiently numerous and strong, no anti-competitive effects can be expected, as buyers have sufficient alternatives to purchase the tying product without the tied product, unless other suppliers are applying similar tying. In addition, entry barriers on the market of the tying product are relevant to establish the market position of the supplier. When tying is combined with a non-compete obligation in respect of the tying product, this considerably strengthens the position of the supplier.

10.157 Buying power is relevant, as important buyers will not easily be forced to accept tying without obtaining at least part of the possible efficiencies. Tying not based on efficiency is therefore mainly a risk where buyers do not have significant buying power.

10.158 Where appreciable anti-competitive effects are established, the question whether the conditions for individual exemption under section 9(1) are fulfilled arises. Tying obligations may help to produce efficiencies arising from joint production or joint distribution. Where the tied product is not produced by the supplier, an efficiency may also arise from the supplier buying large quantities of the tied product. For tying to fulfil the conditions for individual exemption under section 9(1), it must, however, be shown that at least part of these cost reductions are passed on to the consumer, which is normally not the case when the retailer is able to obtain, on a regular basis, supplies of the same or equivalent products on the same or better conditions than those offered by the supplier which applies the tying practice. Another efficiency may exist where tying helps to ensure a certain uniformity and quality standardisation (see paragraph 10.11(h)). However, it needs to be demonstrated that the positive effects cannot be realised equally efficiently by requiring the buyer to use or resell products satisfying minimum quality standards, without requiring the buyer to purchase these from the supplier or someone designated by the latter. The requirements concerning minimum quality standards would not normally fall within the scope of the Chapter I prohibition. Where the supplier of the tying product imposes on the buyer the suppliers from which the buyer must purchase the tied product, for instance because the formulation of minimum quality standards is not possible, this may also fall outside the scope of the Chapter I prohibition, especially where the supplier of the tying product does not derive a direct (financial) benefit from designating the suppliers of the tied product.

Parity obligations (other than wide retail parity obligations)

10.159 Paragraphs 8.74 to 8.85 deal with the treatment of wide parity retail obligations as hardcore restrictions. In this section of the Guidance we set out the guidance for assessing parity obligations other than wide retail parity obligations.

10.160 As set out in 8.74, parity obligations, also known as Most Favoured Nation (MFN) clauses, require one party to an agreement to offer the other party goods or services on terms that are no worse than the terms offered to its own customers or to third parties.

10.161 With the exception of wide retail parity obligations (as defined in Article 8(2)(f) VABEO), which are treated as hardcore restrictions, the block exemption applies to all other types of parity obligation in vertical agreements, provided the market shares of the supplier and the buyer do not exceed 30%. The following guidance is provided for the assessment of those other types of parity obligations in individual cases above the market share threshold.

Narrow retail parity obligations

10.162 A narrow retail parity obligation refers to a restriction under which a supplier of a good or service (the ‘product supplier’) agrees not to offer products to end users on its direct sales channels (for example, the product supplier's own website) on better terms than those offered on an indirect sales channel by which it reaches end users (such as an online platform or other intermediary). Narrow retail parity obligations prevent product suppliers from inducing end users to switch to the direct channel by offering more favourable conditions (ie undercutting) than those available through an intermediary. Under certain conditions, in particular where competition at the intermediation level is limited, narrow retail parity obligations may harm competition by (i) replicating the effects of wide retail parity obligations or (ii) lessening or eliminating competition from the direct channel. This may allow intermediaries to maintain a higher price for their services, leading to higher retail prices for the intermediated products on all sales channels.

10.163 For the assessment of this type of restriction, relevant factors include the market position of the intermediary that imposes the narrow retail parity obligation, the relative size of the direct sales channels covered by the obligation, the substitutability of the direct channels and intermediaries from the perspective of the suppliers of the products and of end users, and whether the restrictions are imposed by multiple intermediaries (cumulative effects).

10.164 In addition, under certain conditions, narrow retail parity obligations may indirectly produce restrictive effects equivalent to those produced by wide retail parity obligations. In principle, a supplier that is subject to a narrow retail parity obligation may differentiate its offers across the intermediaries that it uses ('multi-homing'). However, in order to do so, it must offer conditions on its direct channels that are not more favourable than the conditions that it offers on the 'most expensive' intermediary with which it has a narrow retail parity agreement.[136] Where a significant share of sales takes place through the direct channel and, where narrow retail parity obligations are imposed by multiple intermediaries, these clauses are more likely to replicate the effects of wide retail parity obligations.

10.165 Narrow retail parity obligations imposed by intermediaries may produce appreciable restrictive effects where suppliers that use intermediaries representing a significant share of total demand for the intermediaries are subject to such obligations. A similar assessment may be conducted by the CMA, where the market shares of the relevant suppliers are below the 30%

[136] As explained in Paper E of the CMA DCTs market study '*A supplier that is concerned with protecting the competitiveness of its direct channel will ensure the price it sets on any DCT is no lower than its direct price. Therefore, in response to a commission increase by a DCT with a narrow [price parity obligation], the supplier will increase the price set not only on the DCT with the narrow [price parity obligation] and on its direct channel, but also on other DCTs. This effectively has the same implication as a wide [price parity obligation] by enabling a DCT to increase its commission without becoming less competitive than other DCTs*'

threshold and the CMA decides to cancel the benefit of block exemption provided by the VABEO.

Parity obligations relating to non-retail conditions

10.166 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%. However, this type of obligation is capable of disincentivising competition between intermediaries in the same way as retail parity obligations. This applies in particular where there is no significant difference between the prices or other conditions under which the intermediated products are offered at the upstream and retail levels, as may be the case where the intermediation concerns final products.[137] For the assessment of this type of parity obligation, it is also necessary to take into account the conditions of competition downstream, that is, between the undertakings which buy the intermediated products. By contrast, parity obligations relating to the conditions under which products are purchased as inputs by manufacturers, wholesalers or retailers do not directly affect the conditions under which these undertakings compete downstream. The guidance provided for the assessment of retail parity obligations is therefore less likely to be relevant. The main concern associated with parity obligations relating to the conditions under which products are purchased as inputs is that they may reduce the incentives of input suppliers to compete and thereby raise input prices. Relevant factors for the assessment include the relative size and market power of the supplier and buyer that agree the parity obligation, the share of the relevant market covered by similar obligations, and the cost of the input in question relative to buyers' total costs.

Assessment under section 9(1)

10.167 Where parity obligations do not benefit from the block exemption provided by the VABEO and produce appreciable restrictive effects, possible efficiency justifications need to be assessed under section 9(1). The most common justification for the use of these obligations by intermediaries is to address a free-rider problem. For example, intermediaries may not have an incentive to invest in the development of their platform, in pre-sales services or demand-enhancing promotion if the benefits of such investments in terms

[137] In some cases, the parity obligation may refer to conditions offered at both the upstream and retail levels.

of increased sales go to competing platforms or direct sales channels which can offer the same goods or services on more favourable conditions.

10.168 Relevant factors include whether the investments by the intermediary provide objective benefits, that is, whether they add value for consumers; whether the risk of free-riding is real and substantial, and whether the particular type and scope of parity obligation is indispensable for the objective benefits to be achieved. The likely level of free-riding must be sufficient to significantly impact the incentives to invest in the intermediation service. Evidence of the extent to which users of the intermediary multi-home is particularly relevant, though it is also necessary to consider whether their behaviour is influenced by the effects of the parity obligations. If the intermediary or its competitors operate in other comparable markets using less restrictive or no parity obligations, this may indicate that the obligations are not indispensable. Where the supply of intermediation services is highly concentrated and features significant entry barriers, the need to protect residual competition may outweigh possible efficiency gains. Other justifications relating to the general benefits provided by intermediation services, such as the pooling of suppliers' promotional expenditure, increased price transparency or reduced transaction costs will only fulfil the conditions of section 9(1) if the intermediary can show a direct causal link between the benefit claimed and the use of the particular type of parity obligation.

10.169 Narrow retail parity obligations and parity obligations relating to non-retail conditions are more likely to fulfil the conditions for individual exemption under section 9(1) than wide retail parity obligations. This is primarily because their restrictive effects are generally less severe than those of wide retail parity obligations and therefore more likely to be outweighed by efficiencies. Moreover, the risk of free riding by suppliers of products via their direct sales channels may be higher, as these suppliers generally earn a higher per unit margin on sales in their direct channel than on indirect sales.

Information exchange in dual distribution

10.170 As explained in paragraphs 6.13 to 6.21 of the Guidance, Article 3(5)(i)-(iv) of the VABEO contains four exceptions to the general rule that vertical agreements between competitors cannot benefit from the block exemption provided by the VABEO. Vertical agreements entered into between competing undertakings are specified only to the extent that they are non-reciprocal,[138] and—

(a) the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing level;

(b) the supplier is a provider of services at several levels of trade, while the buyer provides its products at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services;

(c) the supplier is a wholesaler of goods, while the buyer is a distributor and not a competing undertaking at the wholesale level, or

(d) the importer is an importer of goods, while the buyer is a distributor and not a competing undertaking at the level of trade where it purchases the goods or at the importation level.

10.171 If the conditions of Article 3(5), points (i), (ii), (iii) or (iv) are fulfilled, the exemption provided by Article 3(1) of the VABEO applies to the vertical agreement in question including, in principle, information exchange under the agreement. However, as explained in paragraph 6.22 of the Guidance, the exemption under the VABEO does not extend to horizontal restrictions of competition by object. Moreover, the VABEO only covers restraints that are genuinely vertical; it does not extend to horizontal agreements between competing undertakings even where these might be recorded or agreed in the same documents as the vertical agreement (or related documents). The benefit of the block exemption provided by Article 3(1) of the VABEO in relation to a particular vertical agreement therefore extends to information exchange only to the extent that it does not restrict competition by object and is *genuinely vertical*, which is to say that it is required to implement the vertical agreement (ie the ‘agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, 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’).

[138] As noted above, non-reciprocal means, for instance, that while one manufacturer becomes the distributor of the products of another manufacturer, the latter does not become a distributor of the products of the first manufacturer. For example, non-reciprocal vertical agreements between competing undertakings are permitted where the supplier is a manufacturer and distributor of goods, whilst the buyer is a distributor that does not manufacture goods competing with the contract goods.

10.172 For the purposes of this Guidance, information exchange includes any communication of information by one party to the other, irrespective of the characteristics of the exchange, for instance whether the information is communicated by only one party or by both parties, or whether the information is exchanged in writing or orally. It is also immaterial whether the parties expressly agree the form and content of the information exchange or if it takes place on an informal basis, including, for example, where one party communicates information without the other party having requested it.

10.173 Restrictions of competition 'by object' are those that by their very nature have the potential to restrict competition within the meaning of the Chapter I prohibition. Information exchange between competitors that has the objective of restricting competition on the market will be considered as a restriction 'by object'. In assessing whether an information constitutes a restriction of competition by object, the CMA will take into account the legal and economic context in which the information exchange takes place and to this end, will take into account whether the information exchange, by its very nature, may lead to a restriction of competition.[139]

10.174 Whether an exchange of information is required to implement the vertical agreement (and therefore genuinely vertical) may depend on the particular distribution model. 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. Under a franchise agreement, it may be necessary for the franchisor and franchisee to exchange information relating to the application of a uniform business model across the franchise network.[140] Lastly, in a selective distribution system, it may be necessary for the supplier to obtain information from distributors relating to their compliance with the selection criteria.

10.175 The following is a non-exhaustive list of examples of information that, when exchanged by the parties to a non-reciprocal vertical agreement that fulfils the conditions of Article 3(5), points (i), (ii), (iii) or (iv) of the VABEO can

[139] See Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements Text with EEA relevance, paragraph 72, which the CMA has regard to as noted in paragraph 3.11 of its competition guidelines on Agreements and concerted practices (OFT401). The Commission guidelines also include further examples of when information exchange may amount to a 'by object' restriction.
[140] See Communication from the Commission – Notice – Guidelines on the application of Article 101(3) of the Treaty (OJ C 101, 27.4.2004, p. 97) for the European Commission's general methodology and interpretation of the conditions for applying Article 101(1) of the Treaty and in particular Article 101(3) thereof, paragraph 31.

generally be considered to be unlikely to constitute a restriction by object and are likely to be genuinely vertical. Unless indicated otherwise, the examples cover information communicated by the supplier or the buyer, irrespective of the frequency of the communication and irrespective of whether the information relates to past, present or future conduct.

(a) Technical information relating to the contract products, such as information relating to the registration, certification or handling of the contract products, notably when such goods or services must comply with regulatory measures, and information that enables the supplier or buyer to adapt the contract products to the requirements of the customer.

(b) Information relating to the supply of the contract products, including information relating to production, inventory, stocks, sales volumes and returns.

(c) Aggregated information relating to customer purchases of the contract products, customer preferences and customer feedback, without prejudice to paragraph 11.161 below.

(d) Information relating to the prices at which the contract products are sold by the supplier to the buyer.

(e) Information relating to the supplier's recommended resale prices or maximum resale prices for the contract products and information relating to the prices at which the buyer resells the products, provided that such information exchange is not used to directly or indirectly restrict the buyer's ability to determine its sale price or to enforce a fixed or minimum sale price within the meaning of Article (8)(2)(a) of the VABEO, and without prejudice to paragraph 11.161, point (a) below concerning information relating to actual future downstream sale prices.

(f) Information relating to the marketing of the contract products, including information on new products to be purchased and sold under the vertical agreement, as well as information on promotional campaigns for the contract products, without prejudice to point (e) of this paragraph or paragraph 11.161 below.

(g) Performance-related information, including aggregated information communicated by the supplier to the buyer relating to the marketing and sales activities of other buyers of the contract products, provided that this does not enable the buyer to identify the activities of particular competing buyers, as well as information relating to the volume or value of the buyer's sales of the contract products relative to the buyer's sales of competing products.

10.176 Conversely, the exchange of the following types of information is generally likely to either restrict competition by object or otherwise would be unlikely to be genuinely vertical.

(a) Information relating to the actual future prices at which the supplier or buyer will sell the contract products downstream, unless the exchange of such information is necessary to organise a coordinated short-term low price campaign in accordance with the guidance provided in paragraph 8.22(b) of the Guidance, and without prejudice to the possibility to exchange information on the supplier's recommended resale prices or maximum resale prices for the contract products, provided that such information exchange is not used to directly or indirectly restrict the buyer's ability to determine its sale price or to enforce a fixed or minimum sale price within the meaning of Article (8)(2)(a) of the VABEO.

(b) Customer-specific sales data, including non-aggregated information on the value and volume of sales per customer, or information that identifies particular customers, unless in each case such information is necessary to enable the supplier or buyer to adapt the contract products to the requirements of the customer or to provide guarantee or after-sales services or to allocate customers under an exclusive distribution agreement.[141]

(c) The exchange of information relating to goods sold by a buyer under its own brand name with a manufacturer of competing branded goods, unless the manufacturer is also the producer of the own-brand goods.

10.177 Exchanges of information between a supplier and buyer in a dual distribution scenario that do not benefit from the exemption provided by Article 3(1) of the VABEO must be assessed individually under the Chapter I prohibition, taking into account current relevant guidance on horizontal agreements.[142] The other provisions of the vertical agreement between the supplier and buyer may nonetheless benefit from the exemption provided by

[141] The guidance provided in this Guidance is without prejudice to the application of the Data Protection Act 2018.
[142] See the competition law guidelines in Agreements and concerted practices (OFT401) and EC (2011) Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements which the CMA has regard to as noted in paragraph 3.11 of OFT401.

Article 3(1) of the VABEO, provided that the agreement otherwise complies with the conditions set out in the VABEO.

10.178 Exchanges of information between a supplier and buyer in a dual distribution scenario that do not benefit from the block exemption provided by the VABEO do not necessarily infringe the Chapter I prohibition. However, such exchanges are subject to the presumptions established by relevant case law relating to exchanges of information between competitors. In particular, undertakings that participate in a concerted practice and that remain active on the market are presumed to take into account information exchanged with their competitors in determining their conduct on the market.[143]

10.179 The parties to an exchange of information that does not benefit from the block exemption provided by the VABEO may take precautions to minimise the risk that the information exchange will raise horizontal concerns. For example, they may exchange only aggregated sales information or ensure an appropriate delay between the generation of the information and the exchange. Another possible precaution is to use technical or administrative measures, such as firewalls, to ensure, for example, that information communicated by the buyer is accessible only to the personnel responsible for the supplier's upstream activities and not to the personnel responsible for the supplier's downstream direct sales activity.[144]

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[143] See Case T-180/15 *ICAP v Commission*, EU:T:2017:795, paragraph 57; Case C-8/08 *T-Mobile Netherlands and Others*, EU:C:2009:343, paragraph 51; Case C-286/13 P *Dole Food and Dole Fresh Fruit Europe v Commission*, Case C-286/13 P, EU:C:2015:184, paragraph 127; Case C-74/14 *Eturas UAB and Others*, EU:C:2016:42, paragraphs 40-44. *Lexon (UK) Limited v CMA* [2021] CAT cited this line of European cases (although not the more recent *ICAP v Commission* judgment nor the judgments prior to *Dole*) at paragraph 187(6), as well as *Balmoral v CMA* [2019] CAT paragraphs, 40, 44, 46 and 119 (these paragraphs themselves also citing *T-Mobile* and *Dole*).

[144] See guidance on information exchange in the competition law guidelines in Agreements and concerted practices (OFT401)

11. Obligation to provide information to the CMA (Article 12)

11.1 Article 12(1) VABEO requires any person (including an undertaking) to provide the CMA with such information as it may request concerning a vertical agreement to which that person is a party. This allows the CMA to monitor agreements and to require parties and others to provide information, for example if a complaint is made about the agreement.

11.2 Requests for information will be made in writing and must be complied with within ten working days commencing with the relevant day.[145] If the request is not complied with without reasonable excuse, the CMA has the power to cancel the block exemption for any vertical agreement to which the request relates (Article 12(2) VABEO) subject to:

(a) giving notice in writing of its proposal;

(b) considering any representations made to it; and

(c) by notice in writing cancelling the block exemption in respect of any vertical agreement to which the request for information relates.

11.3 In appropriate cases, the CMA will seek to give recipients of information requests advance notice and, where it is practical and appropriate to do so, the CMA may send the information request in draft. The CMA can then take into account comments on the scope of the request, the actions that will be needed to respond, and the deadline by which the information must be received. The time frame for comment on the draft will depend on the nature and scope of the request.

11.4 The process for providing representations where a response contains commercially sensitive information or details of an individual's private affairs and the sender considers that disclosure might significantly harm their interests or the interests of the individual, is explained in Chapter 7 of the Guidance on the CMA's investigation procedures in Competition Act 1998

[145] In accordance with Article 12(3) VABEO 'relevant day' means-
(a) – the day on which a person receives notice in writing to provide information under paragraph (1), or
(b) where notice to provide information under paragraph (1) is given by publication pursuant to article 14(b), the day on which the notice is published.

cases: CMA8,[146] which the CMA will have regard to when exercising the power in Article 12(1) VABEO.

[146] Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8 - GOV.UK (www.gov.uk)

12. Duration of the VABEO (Articles 15 and 16)

12.1 The VABEO applies from 31st May 2022 and will cease to have effect on 1st June 2028.

12.2 A transitional provision also ensures that the Chapter I prohibition does not apply for 12 months to pre-existing agreements which satisfied the conditions for exemption provided for in Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices (EUR 2010/330) but which do not otherwise satisfy the conditions for exemption provided for in this Order (Article 15(2) VABEO).

12.3 The CMA also has the power by virtue of section 8(3) CA98 to recommend variation or revocation of a block exemption order, if in its opinion, such a course would be appropriate. Where industry participants or public authorities call for an earlier review by the CMA, they will need to explain why the block exemption needs reviewing and the detriment that will arise in the absence of a review.

13. Cancellation of the block exemption (Article 13)

13.1 Not complying with the general conditions defined in the VABEO will have the effect of cancelling all or part of the block exemption in relation to a particular agreement. The CMA may also cancel the block exemption in relation to a specific vertical agreement.

Breach of any of the general conditions (Articles 6 to 8, and 10)

13.2 Further to Article 13 of the VABEO, failure to comply with any of the general conditions will result in the block exemption being cancelled in relation to all or part of the vertical agreement to which the breach relates. This means that all or part of the vertical agreement will no longer benefit from the block exemption provided by the VABEO and the undertakings must ensure that the agreement does not infringe the Chapter I prohibition either by removing any relevant infringing provision or by ensuring its agreement fulfils the conditions for individual exemption under section 9(1).

Cancellation of the block exemption in individual cases

13.3 In accordance with section 6(6)(c) CA98 a block exemption order may provide that if the CMA considers that a particular agreement is not an exempt agreement, it may cancel the block exemption in respect of that agreement. This is to ensure that the VABEO is only available for those agreements that satisfy the conditions for exemption under section 9(1).

13.4 Pursuant to Article 13(1) VABEO, the CMA may cancel the block exemption in relation to a particular vertical agreement which is not one which is exempt from the Chapter I prohibition under section 9(1). In order to do so, the CMA first gives notice in writing of its proposal to those persons whom it can reasonably identify as being parties to the relevant vertical agreement.[147] This notice should state the facts on which the CMA bases its request, decision or proposal and its reasons for making it. The CMA shall consider any representations made to it.

[147] Or, where it is not reasonably practicable for the CMA to give such notice, by publishing its proposal in (i) the register maintained by the CMA under rule 20 of the CMA's rules set out in the Schedule to the CA98 (CMA's Rules) Order 2014(a); (ii) the London, Edinburgh and Belfast Gazettes; (iii) at least one national daily newspaper; and (iv) if there is in circulation an appropriate trade journal which is published at intervals not exceeding one month, in such trade journal, stating the facts on which the CMA bases the proposal, and its reasons for making it. See Article 14(b) VABEO.

13.5 Such proposal to cancel the block exemption in individual cases may happen in two situations:

(a) if the CMA considers that a particular vertical agreement, considered either in isolation or in conjunction with similar agreements enforced by competing suppliers or buyers, is not one to which section 9(1) applies (Article 13 VABEO); or

(b) in case of a failure to comply with the obligation imposed by Article 12(1) without reasonable excuse (Article 12(2) VABEO), ie not providing the CMA with the information it requires (see paragraph 12.1).

13.6 A cancellation decision can only have ex nunc effect, which means that the exempted status of the agreements concerned will not be affected until the date at which the cancellation becomes effective.

13.7 The conditions for individual exemption under section 9(1) may in particular not be fulfilled when access to the relevant market or competition therein is significantly restricted by the cumulative effect of parallel networks of similar vertical agreements practised by competing suppliers or buyers. The CMA's cancelation power under Section 6(6) CA98 and Article 13(1) VABEO only extends to individual cases (ie a particular vertical agreement). In relation to networks of agreements which do not fulfil the conditions for individual exemption under section 9(1) the CMA may however recommend to the Secretary of State the variation or revocation of the VABEO under section 8(3) CA98 (CMA recommendation).[148] Such variation or revocation by the Secretary of State would have the effect of cancelling the benefit of block exemption provided by the VABEO in relation to the network of vertical agreements at issue. We set out below set out some of the considerations that the CMA may take into account when making any such recommendation to the Secretary of State.

13.8 Parallel networks of vertical agreements are to be regarded as similar if they contain restraints producing similar effects on the market. Such a situation may arise for example when, on a given market, certain suppliers practise purely qualitative selective distribution while other suppliers practise quantitative selective distribution. Such a situation may also arise when, on a given market, the cumulative use of qualitative criteria forecloses more efficient distributors. In such circumstances, the assessment must take account of the anti-competitive effects attributable to each individual network

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[148] The Secretary of State may also vary or revoke a block exemption without any previous recommendation from the CMA (Section 8(5) CA98).

of agreements. Where appropriate, the recommendation of variation or revocation may concern only a particular qualitative criterion or only the quantitative limitations imposed on the number of authorised distributors.

13.9 Responsibility for an anti-competitive cumulative effect can only be attributed to those undertakings which make an appreciable contribution to it. Agreements entered into by undertakings whose contribution to the cumulative effect is insignificant do not fall under the scope of the Chapter I prohibition and should therefore not be subject to the cancellation mechanism. The assessment of such a contribution will be made in accordance with the criteria set out in Part 10 of this Guidance.