

## The Competition Act 1998 (UK Vertical Agreements Block Exemption) Order 2022 (UK Order)

<b>Lead department</b>	<b>Department for Business, Energy and Industrial Strategy</b>
<b>Summary of proposal</b>	To replace the retained EU Vertical Agreements Block Exemption Regulation (VABER) with the UK Vertical Agreements Block Exemption Order 2022 (UK VABEO). The current retained EU VABER expires on 31 May 2022.
<b>Submission type</b>	Impact assessment (IA) – 24 March 2022
<b>Legislation type</b>	Secondary legislation
<b>Implementation date</b>	1 June 2022
<b>Policy stage</b>	Final
<b>RPC reference</b>	RPC-BEIS-5174(1)
<b>Opinion type</b>	Formal
<b>Date of issue</b>	5 May 2022

### RPC opinion

<b>Rating<sup>1</sup></b>	<b>RPC opinion</b>
<b>Fit for purpose</b>	The evidence and analysis supporting the EANDCB and the SaMBA are sufficient. There are areas for strengthening, in particular the assessment of wider impacts, including competition and innovation impacts.

### Business impact target assessment

	<b>Department assessment</b>	<b>RPC validated</b>
<b>Classification</b>	Non-qualifying provision	Non-qualifying provision ( <i>de minimis</i> )
<b>Equivalent annual net direct cost to business (EANDCB)</b>	£1.07 million	<i>De minimis</i>
<b>Business impact target (BIT) score</b>	Not applicable	Not applicable
<b>Business net present value</b>	-£24.1 million	
<b>Overall net present value</b>	-£5.9 million	

<sup>1</sup> The RPC opinion rating is based only on the robustness of the EANDCB and quality of the SaMBA, as set out in the [Better Regulation Framework](#). RPC ratings are fit for purpose or not fit for purpose.

## RPC summary

Category	Quality	RPC comments
EANDCB	<b>Green</b>	The EANDCB is based upon proportionate evidence and reasonable assumptions. The IA establishes an appropriate counterfactual to consider the costs and benefits of the time-limited measure. The main direct costs of the proposal arise from compliance costs. The IA's classification of impacts into direct and indirect is appropriate.
Small and micro business assessment (SaMBA)	<b>Green</b>	The IA provides a sufficient SaMBA and is based upon proportionate evidence. The costs of the measure are more likely to fall on large businesses.
Rationale and options	<b>Good</b>	The IA sets out the rationale clearly, explaining how competition law protects UK businesses by preventing market failures. It also explains why a non-regulatory option would not achieve the benefits of the proposed measure.
Cost-benefit analysis	<b>Good</b>	The Department has included academic evidence and evidence from the CMA consultation, enabling it to strengthen the narrative around indirect benefits arising from the proposal.
Wider impacts	<b>Satisfactory</b>	The IA includes a section on consumer impacts. Some areas of wider impacts, such as assessment of competition and innovation impacts, could be strengthened.
Monitoring and evaluation plan	<b>Satisfactory</b>	The IA explains that the CMA will oversee implementation of the VABEO and monitor its application, and effectiveness in achieving the policy objectives.

## Summary of proposal

Chapter I of The Competition Act 1998 prohibits agreements<sup>2</sup> between firms that prevent, restrict or distort competition – certain agreements may be exempt from prohibition if they are pro-competitive. This requires businesses to self-assess to consider whether they meet the criteria. Following EU exit, the UK retained EU block exemption regulations, including the retained Vertical Agreements Block Exemption (retained VABER) under UK law. The retained VABER provides a legal safe haven for vertical (e.g. supplier-distributor) agreements that meet specified criteria, thus allowing businesses to avoid having to self-assess whether their agreements comply with competition law.

The retained VABER expires on 31 May 2022 - this means businesses' vertical agreements will not be automatically exempt from competition law even if the agreements previously met the conditions set by the block exemption. The Government intend to replace the retained VABER with a UK Vertical Agreements Block Exemption Order (UK VABEO) following recommendation from the CMA. The IA outlines the sections of the VABEO that are unchanged and explains that three sections in the UK VABEO will differ from the EU VABER; territorial and customer restrictions, indirect measures restricting online sales and parity obligations. The first two of these differences will provide greater freedoms for businesses operating in the UK, whereas the third (on parity clauses) will reduce scope of the block exemption. The order will expire after six years to allow the CMA to review its operation and provide a further recommendation on whether to replace or vary the UK VABEO.

## EANDCB

The Department estimates an EANDCB of £1.07 million over a six-year appraisal period. The IA establishes an appropriate counterfactual to consider the costs and benefits of the time-limited measure. Rather than using a standard 'do nothing' counterfactual, the IA effectively assumes the measure will continue to run beyond the expiry date. This appropriately identifies the differences between the proposal and existing arrangements. The IA's approach is in line with the RPC's guidance on counterfactuals (page 5)<sup>3</sup> and consistent with better regulation framework treatment of time-limited measures.

The IA explains which sections of the VABEO are unchanged and considers the impacts of three specific sections that will change: territorial and customer restrictions, indirect measures restricting online sales and parity obligations. Territorial and customer restrictions and indirect measures restricting online sales

---

<sup>2</sup> Vertical agreements are agreements, for the sale and purchase of goods or services, between businesses operating at different levels of the production chain.

<sup>3</sup> RPC guidance on counterfactuals: <https://www.gov.uk/government/publications/rpc-case-histories-counterfactuals-september-2020--2>

will no longer be treated as hardcore restrictions<sup>4</sup> under the UK VABEO, which will expand the scope of the block exemption and allow businesses more flexibility. The impacts of these two changes are correctly assessed as indirect (pages 13 to 16). The UK VABEO will add wide retail parity obligations<sup>5</sup> to the list of hardcore restrictions – this could affect a variety of businesses that distribute their products via online platforms, and is expected in particular to affect travel agencies (page 2). This means agreements containing wide retail parity clauses will no longer be block exempted. Businesses will no longer be able to benefit from this coverage and relevant businesses imposing these clauses may need to self-assess their agreements.

The IA's classification of impacts into direct and indirect appears to be appropriate. The direct cost of the proposal arises from an increase in compliance costs (mainly consisting of one-off legal costs) for businesses currently operating wide retail parity obligations (paragraph 162). The assessment would be improved from clarifying whether compliance costs include the need for businesses to self-assess for exemptions. The IA explains that ongoing costs of legal advice are expected to be minimal – it could provide additional information on how the ongoing costs will be mitigated.

The direct costs and benefits to business section (page 29) could be improved by providing additional information on why the direct and indirect treatment of the impacts is appropriate - perhaps by referring explicitly to how RPC's guidance on direct and indirect impacts<sup>6</sup> has been applied to the impacts considered. For example, the removal of wide retail parity obligations from the block exemption could lead to lower prices charged by travel agencies, which could encourage direct competition through increased price differentiation (paragraph 144). It appears this has been considered appropriately as an indirect benefit through hotels preserving their revenues (paragraph 145). However, a little additional information on how the benefit arises and how the Department has established the indirect nature of the benefit would improve the IA. The IA might also do more to assess the benefits to business and consumers arising from the two areas in which the UK VABEO will provide greater commercial freedom for UK businesses that operate dual online and bricks-and-mortar distribution systems.

## SaMBA

The Department's SaMBA is proportionate. The IA states that price parity clauses exist in the travel and tourism sector (paragraph 37). It recognises that some of the cost burden of treating wide retail parity obligations as hardcore restrictions could fall on small businesses but explains that they are likely to be affected to a much lesser

---

<sup>4</sup> 'Hardcore restrictions' are provisions in agreements that are presumed to be anti-competitive. If they are included in an agreement that would otherwise be covered by the block exemption, it falls out of scope of the block exemption and would be covered by competition law.

<sup>5</sup> Parity obligations affect businesses that impose restrictions on sales platforms that sell through them, which prevent the businesses from selling more cheaply through other routes.

<sup>6</sup> Available at: <https://www.gov.uk/government/publications/rpc-case-histories-direct-and-indirect-impacts-march-2019>

extent than large businesses. The IA explains that most online agencies that impose parity obligations are likely to have relatively large market shares to establish these arrangements (paragraph 172) which is supported by evidence presented from the academic references (pages 18-22). The assessment could be improved by discussing further the likelihood of the costs and benefits falling on small and micro businesses (SMBs) disproportionately and, in relation to costs, by discussing any possible mitigations for SMBs, linking as appropriate to the CMA market studies.

## **Rationale and options**

In its discussion of the rationale, the Department explains that competition law ensures market failures are prevented or remedied by prohibiting agreements between businesses that prevent, restrict or distort competition. For example, price-fixing or certain obligations to supply a product exclusively to a particular buyer are prohibited. However, agreements where the benefits outweigh any potential costs are considered beneficial and not anti-competitive, and these are exempt from the rules that would otherwise prohibit them. The IA explains that a block exemption such as the current measure is proportionate because it disapplies unnecessary prohibitive regulation to any agreement that can be shown to meet certain, clearly specified criteria. It also explains that expiry of the current block exemption would lead to increased uncertainty among businesses.

The Department explains that there is no alternative to the proposal that could produce the desired outcome, as a non-legislative invention is not available and the benefits would not be replicated without legislation.

## **Cost-benefit analysis**

The Department's approach to the analysis in the IA appears proportionate given that the majority of the impacts are assessed correctly as indirect. The Department estimate impacts over a six-year appraisal period, which reflects the expiry of the proposed UK VABEO to allow the CMA to review its operation and recommend further changes if required. The IA includes a thorough discussion on the impacts of parity obligations and uses academic evidence to estimate the potential indirect benefits within the insurance and travel sectors (pages 18 to 25). For example, the removal of wide retail parity obligations from the block exemption could lead to an annual indirect benefit of £10 million to businesses in the travel sector (paragraph 145).

## **Wider impacts**

### *Competition assessment*

The IA refers to competition throughout the assessment given the linkage to the policy intent to protect businesses from anti-competitive behaviour. The IA would benefit from further discussion of competition impacts by discussing how the changes within the UK VABEO, compared to the retained EU VABER, could have an

impact on competition. For example, by expanding upon the discussion in paragraph 103, where it states that wide retail parity obligations in vertical agreements may impose barriers to entry (page 18). It could also link the discussion to small and micro businesses.

### *Innovation*

The Department refers to innovation in the IA, stating that the changes in the UK VABEO will offer increased business opportunities and foster innovation through allowing businesses to design a broader range of distribution (paragraph 42, page 9). The innovation consideration would be improved by discussing the avenues in which the measure could enable innovation.

### *Sectoral impacts*

Annex A of the IA summarises stakeholder responses to the CMA consultation (page 33). In relation to trade associations, it states that impacts will vary depending on sector and the proposals could raise compliance and complexity issues for some businesses. The IA would benefit from including more detail on the consultation responses – for example, by highlighting how these issues could, potentially, be mitigated.

### *Impacts on international businesses*

The IA observes that divergence from EU rules may involve “...complexities...with two sets of rules” (paragraph 154), noting that the European Commission is reviewing the VABER in parallel (paragraph 180). The IA would benefit from discussing potential ongoing costs to UK business from having a UK approach to vertical restraints that differs from the EU approach, including possible additional legal costs. In doing so, the IA could helpfully identify areas where the proposed UK VABEO is likely to differ from the new EU VABER when it takes effect from 1 June 2022, and any plans the Government have for reviewing the implications of such divergence for UK businesses that operate internationally.

## **Monitoring and evaluation plan**

The IA explains that the CMA will oversee implementation of the UK VABEO and continuously monitor its effectiveness in achieving the policy and operational objectives (paragraph 181). It also describes the importance of reviewing the block exemption after a short time frame given that developments such as the growth in online sales, for example, are often fast moving. The monitoring and evaluation plan could be improved by including any possible detail on how the CMA might review implementation of the VABEO. For example, by setting out information that the CMA might collect on an ongoing basis.

For further information, please contact [regulatoryenquiries@rpc.gov.uk](mailto:regulatoryenquiries@rpc.gov.uk).