Vertical Agreements Block Exemption Order

CMA guidance

12 July 2022
CMA166

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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] Vertical agreements are agreements entered into by businesses operating at different levels of the supply chain. The Guidance describes the application of the Vertical Agreements Block Exemption Order (VABEO), which came into force on 1 June 2022.[2] It is intended to help businesses assess their vertical agreements and establish whether they benefit from the block exemption provided by the VABEO, or otherwise comply with competition law.

1.2 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.

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

1.4 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 businesses the unnecessary burden of scrutinising a large number of essentially benign agreements. It also helps to ensure that the CMA is able to concentrate resources on other matters giving rise to significant competition concerns.

1.5 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

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

[2] The Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022. Before the UK's withdrawal from the EU, 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 applied in the UK. The EU regulation was retained in UK law when the transition period for the withdrawal of the UK from the EU came to an end on 31 December 2020.

parties would need to scrutinise the agreement to see if it fulfils the section 9 exemption.

1.6 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. Furthermore, unless stated otherwise, the term 'end user' includes undertakings and final consumers, namely natural persons who are acting for purposes which are outside their trade, business, craft or profession.

1.7 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] The principles set out in this Guidance should be applied with due consideration for the specific circumstances of each case and each agreement must be assessed in the light of its own facts.

1.8 The Guidance is without prejudice to the case law of the UK courts and EU retained case law (to the extent relevant and binding) 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 agreements.[5] The CMA will keep under review the application and effectiveness of the VABEO 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 evolving experience.

1.9 The remainder of this Guidance is structured as follows:

— Part 2 – Legal Framework;

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

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[3] Guidelines on Vertical Restraints, European Commission, OJ C 130, 19.5.2010.
[4] OFT, Vertical agreements (OFT419, 1 December 2004). Adopted by the CMA Board
[5] Guidance on the functions of the CMA after the end of the Transition Period (CMA125). 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'. In particular, 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. 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 Court of Justice of the EU 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.

— 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 VABEO);

— Part 9 – Excluded restrictions (Article 10 VABEO);

— 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 VABEO);

— Part 12 – Duration of the VABEO;

— Part 13 – Cancellation of the block exemption.

1.10 In this Guidance we use a number of abbreviations:

CA98	Competition Act 1998.
Chapter I prohibition	The prohibition on anti-competitive 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 exemption	Section 9(1) of the CA98 which sets out the conditions for an agreement to be exempt from the Chapter I prohibition.
Guidance	The CMA Guidance on the Vertical Agreements Block Exemption Order 2022
VABEO	The Competition Act 1998 (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), regardless of its legal status and the way it is financed.

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) The section 9 exemption.

(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 CA98) 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 UK and which may affect trade within the UK.

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 UK 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 UK does not also affect trade within the UK.

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] For example, suppliers may enter into similar exclusive purchasing arrangements with networks of distributors that resell the suppliers' goods. Where there is a network of similar agreements concluded by the same supplier, 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 sub-sections set out the framework for the application of the section 9 exemption and block exemptions.

The section 9 exemption

2.9 The CA98 provides that some agreements that restrict competition are exempt from the Chapter I prohibition where they satisfy certain conditions.

2.10 Section 9(1) CA98 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 need to

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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.

satisfy themselves, based on a self-assessment, that the agreement fulfils the conditions for exemption under section 9(1).

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

Block exemption

2.13 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 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 each of the conditions in the section 9 exemption. The benefits of such a block exemption include minimising the burden of assessing compliance with UK competition law for the parties to the agreement.

2.14 An agreement that falls within a category specified in a 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. In the case of vertical agreements, that is 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 VABEO, consideration will need to be given by the parties to the following questions:

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

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

2.16 The Chapter I prohibition only applies to agreements implemented, or intended to be implemented, in the UK.[10] However, an agreement between parties located outside the UK may be found to infringe UK competition law if the agreement is implemented, or intended to be implemented, in the UK and has as its object or effect the restriction of competition within the UK. Such an

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[10] Section 2(3) CA98. Note that the UK government has committed to amending the Chapter I prohibition so that it can apply to agreements, concerted practices and decisions which are implemented outside of the UK, depending on the effects of the conduct within the UK. See: Department for Business, Energy, and Industrial Strategy (2022), *Reforming competition and consumer policy: government response.*

agreement will need to fall within the terms of the VABEO in order to benefit from the block exemption provided by the VABEO.

2.17 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.

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

2.19 Further details on the application of the Chapter I prohibition and the VABEO to vertical agreements are provided in the remainder of this Guidance.

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 that fall within the prohibition can benefit from the block exemption provided by the VABEO or require exemption under section 9 CA98. Part 4 of this Guidance explains that some types of vertical agreements may be considered to 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 next step is to assess whether the agreement may nonetheless benefit from the block exemption provided by the VABEO. Part 5 sets out an overview of the various steps for assessment under the VABEO. Part 6 explains the definition of vertical agreements, the scope of the VABEO and the various legal conditions which the VABEO imposes in order to provide a block exemption for vertical agreements. Further 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 exemption under the section 9 exemption. Part 10 sets out guidance for assessments carried out under this legal provision.

[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 falls 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 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 circumstances in which certain vertical restrictions may fall outside of the scope of the Chapter I prohibition, such as in the context of selective distribution or franchise agreements.

Lack of effect on trade and agreements of minor importance

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

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 regard to the European Commission's approach as set out in the Notice on Agreements of Minor Importance.[14]

[12] See for example Case 1124/1/1/09 *North Midland Construction v OFT* [2011] CAT 14, paras 35–63.
[13] See for example: *Carewatch Care Services Ltd v Focus Caring Services Ltd* [2014] EWHC 2313 (Ch), paras 149–150, and *P&S Amusements v Valley House Leisure* [2006] EWHC 1510 (Ch), para 20-26. 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] The European Commission's Notice on Agreements of Minor Importance is a statement of the European Commission for the purposes of section 60A CA98.

4.6 Unless an agreement has the object of restricting competition 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.[15] 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 the effect of appreciably restricting competition within the meaning of the Chapter I prohibition.[16] 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 Court of Justice of the EU is relevant in this respect.[17] It may also be necessary to assess positive and negative effects of hardcore restrictions as described in particular Part 8 of this Guidance.

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.[18] Agents may be classed as undertakings, but the Chapter I prohibition does not apply to agency agreements where the agent is considered to form an integral part of its principal and they are 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

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

[16] 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.

[17] 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.

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

part of the principal's undertaking,[19] 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 natural 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.[20]

4.11 The Chapter I prohibition applies to agreements between two or more undertakings. 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 any or only insignificant financial or commercial risks associated with the contracts concluded or negotiated on behalf of the principal, as further explained below.[21] 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.

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[19] 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.

[20] 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 an agent for the purposes of competition law on the basis that the price comparison website did not negotiate or conclude contracts on behalf of home insurance providers.

[21] 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.

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 that falls outside the scope 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 that falls outside the scope of the Chapter I prohibition if the agent bears none of the three types of risk set out in the previous paragraph or where it bears such risks only to an insignificant extent. The significance of any such risks assumed by the agent is generally to be assessed by reference to the remuneration earned by the agent from providing the agency services, for example its commission 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, an agreement will generally be categorised as an agency agreement that falls outside the scope of the Chapter I prohibition where:

(a) the agent does not acquire the property in the goods bought or sold under the agency agreement and does not itself supply the services bought under the agency agreement;[22]

(b) the agent does not contribute to the costs relating to the supply or purchase of the contract products, including the costs of transporting the goods;[23]

(c) the agent does not maintain at its own cost or risk stocks of the contract goods, including the cost of financing the stock and the cost of lost stock and can return unsold goods to the principal without charge;[24]

(d) the agent does not take responsibility for the customers' non-performance of the contract, with the exception of the loss of the agent's commission;[25]

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

(f) the agent is not, directly or indirectly, obliged to invest in sales promotion, including through contributions to the advertising budget of the principal or to advertising or promotional activities specifically relating to the contract products;[26]

(g) the agent does not make market-specific investments in equipment, premises or training of personnel;[27]

(h) the agent does not undertake other activities within the same product market required by the principal under the agency relationship;[28]

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

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[22] 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 the existence of an agency agreement that falls outside the scope of the Chapter I prohibition, provided that the agent does not incur any costs or risks related to the transfer of property.
[23] This does not preclude the agent from carrying out the transport service, provided that the costs are covered by the principal.
[24] Unless the agent is at fault (for example, by failing to comply with reasonable security or anti-theft measures to avoid loss of stocks).
[25] Unless the agent is at 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 it on the customer's financial reliability).
[26] Unless these costs are fully reimbursed by the principal.
[27] Unless these costs are fully reimbursed by the principal.
[28] Unless these activities are fully reimbursed by the principal.

(j) the agent 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) the agent 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.[29]

Identifying which party bears the 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 that falls outside of the scope of the Chapter I prohibition.[30] 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 of the agreement. 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 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 cover 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

[29] Unless these activities are fully reimbursed by the principal.
[30] In particular, under an agency agreement that falls within the scope of the Chapter I prohibition, the agent must remain free to reduce the effective price paid by the customer, by sharing its remuneration with the customer.

percentage of the revenues generated from the sale of the goods or services sold in accordance with the agency agreement.

4.18 To ensure that all relevant risks and costs are covered, the method used by the principal should allow the agent to easily distinguish between the amount(s) intended to cover the relevant risks and costs and any other amount(s) paid to the agent, for example that intended to remunerate the agent for providing the agency services. Otherwise, the agent may not be able to verify whether the method chosen by the principal covers its costs. 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.

4.19 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 such costs in a timely manner in order for the agreement to be categorised as an agency agreement for the purposes of applying the Chapter I prohibition.

Other relevant factors

4.20 Other factors may also be 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.[31] These factors should be assessed on a case-by-case basis as part of the consideration of the nature of the agent's relationship with each principal and 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;[32]

(b) the unity of conduct on the market of the principal and the agent, including the extent to which an agent undertakes a very considerable

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[31] See, for example, CMA decision in Price comparison website: use of most favoured nation clauses, 19 November 2020, section 4.A.II and Annex G.

[32] For example, in *DaimlerChrysler*, the General Court of the EU considered that whether an agent was in a position to determine, or at the very least influence, the terms on which the sales are made was relevant to the assessment of whether an agent can be considered an auxiliary organ of its principal. See T-325/01 DaimlerChrysler AG v European Commission, EU:T:2005:322, paragraph 118.

amount of business for its own account on the market for the product in question, as an independent dealer;[33]

(c) the extent to which the agent acts for a large number of principals, which may indicate that the agent is independent and not an integral part of its principal's undertaking;[34]

(d) whether the principal and agent are perceived by third parties and on the market as forming one and the same economic unit.[35]

Applying the concept of agency agreements to the online platform economy

4.21 Agreements entered into by undertakings active in the online platform economy are generally unlikely to meet the conditions to be categorised as agency agreements that fall outside the scope of the Chapter I prohibition.

4.22 Such undertakings generally act as independent economic operators and not as part of the undertakings for which they provide services. In particular, undertakings active in the online platform economy often serve a very large number of sellers, which prevents them from effectively becoming part of any of the sellers' undertakings. In addition, 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 contracting parties. This can result in a situation where the conditions under which goods or services are sold and the commercial strategy are determined by the undertaking active in the online platform economy rather than by the sellers of the goods or services.

4.23 In addition, undertakings active in the online platform economy typically make significant market-specific investments, for example, in software, advertising and after-sales services, indicating that those undertakings bear significant financial or commercial risks associated with the transactions that they intermediate.

Applying the concept of agency agreements to dual role agents

4.24 An independent distributor of some products of a supplier may 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

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[33] See Case T-66/99 *Minoan Lines AG v European Commission*, EU:T:2003:337, paragraph 128.
[34] See *ASBL Vereniging van Vlaamse Reisbureaus contre ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* (Flemish Travel Agents), Case 311/85, EU:C:1987:418, paragraph 20.
[35] See Case T-66/99 *Minoan Lines AG v European Commission*, EU:T:2003:337, paragraph 129.

effectively delineated (for example because they concern products presenting additional functionalities or new features). For the agreement to be considered an agency agreement that falls outside the scope of 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). Similarly, the principal must not directly or indirectly impose on the agent an activity as an independent distributor, unless such activity is fully reimbursed by the principal. Moreover, 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.

4.25 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 supplier (not required by that supplier) at its own risk, it is possible that the obligations imposed on the agent for its agency activity will influence its incentives and limit its decision-making independence 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 that relate solely 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 may therefore be particularly complex.[36]

4.26 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 relevant market. Conversely, those risks are less likely to arise if the other activities the agent undertakes as an independent distributor concern a different relevant market.[37] More generally, the less interchangeable the products sold under the agency agreement and the products sold independently by the agent, the less likely it is that those risks will arise. Where any objective differences between the characteristics of the products, such as higher quality, novel features or

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[36] 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.
[37] Case T-325/01 *DaimlerChrysler AG v Commission*, ECLI:EU:T:2005:322, paragraphs 100 and 113.

additional functions are insignificant, it may be more difficult to delineate the agent's two types of activity, in which case there may therefore be a significant likelihood of the agent being influenced by the terms of the agency agreement, in particular regarding price setting, for the products it distributes independently.

4.27 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 principal would have to cover market-specific investments that are required in order to operate in the relevant market, including where those investments also concern differentiated products distributed outside the scope of the agency agreement but are not exclusively related to the sale of such differentiated products.

4.28 The only case in which the principal would not have to cover market-specific investments on the relevant market would be when those investments relate exclusively to the sale of differentiated products that are not sold under the agency agreement, but are distributed independently. This is because the agent would incur all market-specific costs to operate on the market, but would not incur the market-specific costs that relate exclusively to the sale of the differentiated products if it did not also act as an independent distributor for those products (provided that the agent can operate on the relevant market without selling the differentiated products in question). To the extent that the relevant investments (for example, investments in activity-specific equipment) have already been depreciated, the reimbursement may be adjusted proportionately. Similarly, the reimbursement may also be adjusted if the market-specific investments made by the independent distributor significantly exceed the market-specific investments that are necessary for an agent to start operating on the relevant market, as a result of its activity as independent distributor.

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 for the relationship to be categorised as one of agency:

(a) An independent distributor sells products A, B and C. Products A and B belong to the same relevant market, but are differentiated products and present objectively different characteristics. Product A features a new functionality. Product C belongs to a different relevant market.

(b) A supplier that generally distributes its products using independent distributors decides to use an agency agreement for the distribution of its product A. It offers the opportunity of entering into an agency agreement to its independent distributors (for product B) which are already operating in the same relevant market without legally or factually 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 relevant market. For example, the 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 relating to specific storage equipment 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 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 relevant 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 relevant 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. 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 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 by selling only product A.

Applying the Chapter I prohibition to agency agreements

4.29 Where a relationship between two undertakings is characterised as an agency agreement and therefore falls outside of the scope of the Chapter I prohibition, the selling or purchasing function of the agent forms part of the principal's activities. 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.[38] 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

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

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 geographical area 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.

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

4.31 Even if the agent bears no significant risks of the type described in paragraphs 4.11 to 4.14, 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.[39] If within scope of the Chapter I prohibition, such provisions may benefit from the block exemption provided by the VABEO.[40] If such provisions do not benefit from the block exemption they require an individual assessment under the Chapter I prohibition as described in Section 10 of this Guidance and they may satisfy the conditions for exemption under section 9(1). For instance, an agency agreement may contain a provision preventing the principal from appointing other agents in respect of a given type of transaction, customer or geographical area (an exclusive agency provision) or a provision preventing the agent from acting as an agent or distributor for undertakings which compete with the principal (a single branding provision). 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 restrict competition within the meaning of the

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

Chapter I prohibition if, in isolation or by way of contribution to a cumulative effect, they result in foreclosure of the relevant market where the contract goods or services are sold or purchased.[41]

4.32 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.

4.33 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 4.24 to 4.28 of this Guidance has to be carefully considered. This is necessary to avoid a misuse of the agency model in scenarios where the supplier does not actually become active at the retail level via the agency agreement and take all associated commercial decisions and assume all related risks in accordance with the principles set out in paragraphs 4.11 to 4.14, but rather uses the agency model to control retail prices for those products that allow high resale margins.

Subcontracting agreements

4.34 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 section 60A 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 (subcontracting notice). [42] 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 provided that the technology or equipment is necessary to enable the subcontractor to produce the products.[43] However, other restrictions imposed on the subcontractor such as the obligation not to conduct or exploit its own

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[41] With regards to single branding provisions and post-term non-compete provisions, please refer to paragraphs 10.37 to 10.56 and 9.7 of this Guidance.
[42] OJ C 1, 3.1.1979, p. 2. The European Commission's subcontracting notice is a statement of the European Commission for the purpose of section 60A CA98.
[43] The Commission notice refers to Article 101 TFEU which is the equivalent of the Chapter I prohibition under EU law.

research and development or not to produce for third parties in general may fall within the scope of the Chapter I prohibition.[44]

[44] 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 involved in the analysis of a vertical agreement that falls within the scope of the Chapter I prohibition and may benefit from the block exemption provided by the VABEO.[45]

Methodology for assessing a vertical agreement

5.2 The assessment of a vertical agreement that falls within the scope of the Chapter I prohibition generally involves the following four steps:[46]

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

(b) If the agreement is within the scope of the VABEO it is then necessary to establish the market shares of the supplier and the buyer on the relevant market where they respectively sell and purchase the contract products (Article 6 VABEO) – see Part 7 of this Guidance.

(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 (Article 8 VABEO) and excluded restrictions (Article 10 VABEO) – see Parts 8 and 9 of this Guidance.

(d) If the relevant market share of the supplier or the buyer exceeds the 30% threshold or the agreement contains one or more hardcore restrictions or non-severable excluded restrictions, it is necessary to assess whether the vertical agreement fulfils the conditions for exemption under section 9(1) CA98 – see Part 10 of this Guidance.

Article 6 VABEO – 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. The first legal condition for the VABEO to apply is that the supplier's and the buyer's market share must each not exceed 30%. Not

[45] 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.
[46] There is no requirement for the steps to be done in this order.

complying with this condition will have the effect of cancelling all of the block exemption in relation to a particular agreement.[47]

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 when assessing a vertical agreement. Above the market share threshold of 30%, there is no presumption that vertical agreements fall within the scope of the Chapter I prohibition or do not fulfil the conditions of the section 9 exemption.

Article 8 VABEO – hardcore restrictions

5.5 This second legal condition for the VABEO to apply 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.

Article 10 VABEO – excluded restrictions

5.6 This third legal condition for the VABEO to apply 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. As set out in Article 11 VABEO, the remainder of the agreement continues to benefit from the block exemption in the VABEO, provided that the excluded restriction is capable of being severed from the rest of the agreement. Part 9 of this Guidance provides guidance on excluded restrictions.

[47] Article 9 VABEO.

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 and 'dual distribution'.

(c) Vertical agreements in the online platform economy.

(d) Associations of retailers.

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

(f) Relationship to other block exemptions.

Definition of vertical agreements

6.3 Article 3(2) of the VABEO defines 'vertical agreements' as '*agreements or concerted practices entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice concerned, 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,[48] 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

[48] Section 18 CA98.

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 terms 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 that basis.[49]

(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.[50]

(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 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 its policy in practice.

The agreement or concerted practice is between two or more undertakings

6.6 Vertical agreements with natural persons who are not operating as undertakings are not covered by the VABEO. This is because 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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[49] Case C-74/04 P *Commission v Volkswagen AG* [2006] ECR I-6585.
[50] 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 for the purposes of the agreement.

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 3(2) 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.[51] 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 within the scope of the VABEO.

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)(a) to (d) of the VABEO.

Application of the exceptions for non-reciprocal agreements between competitors

6.14 Where a vertical agreement entered into between competing undertakings is non-reciprocal and meets one of the conditions in Article 3(5)(a) to (d) of the VABEO it should be assessed by reference to this Guidance, including to determine whether it benefits from block exemption provided by the VABEO.

6.15 Vertical agreements between competitors that are reciprocal or do not meet one of the conditions listed in Article 3(5)(a) to (d) of 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.[52]

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, it would on realistic grounds and not just as a mere theoretical

[51] See Article 3(6)(b). This does not conflict with the 'end user' status for motor vehicle leasing companies as explained in fn.101.
[52] 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, to which the CMA has regard under section 60A CA98.

possibility, in case of a small but permanent increase in relative prices, be likely to within a short period of time undertake the necessary additional investments or incur other necessary switching costs to enter the relevant market on which the other company is active.[53] 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.[54]

6.17 Article 3(5)(a) to (d) of the VABEO identifies four forms of non-reciprocal vertical agreement between competitors that, by exception, 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 considered a manufacturer of such own-brand goods and therefore is not a competitor of the manufacturer for the purpose of applying Article 3(5) of the VABEO. Consequently, the exemption in Article 3(1) VABEO applies to a vertical agreement entered between (i) a distributor selling own-brand goods manufactured by a third party (and not in-house) and (ii) a manufacturer of competing branded goods. In contrast, distributors that manufacture goods in-house for sale under their own brand name are manufacturers. This means that the exemption in Article 3(1) of VABEO does not apply to vertical agreements entered into between such distributors with manufacturers of competing branded goods. The horizontal effects of such agreements must therefore be assessed under relevant current guidance on horizontal agreements.

6.19 The exceptions for non-reciprocal vertical agreements entered into by competing undertakings provided by Article 3(5)(a), (c), and (d) of the VABEO concern situations where the supplier is either a manufacturer, wholesaler or

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[53] 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*'. Generics (UK) and Others v Competition and Markets Authority C-307/18, ECLI:EU:C:2020:52, paragraph 39: '*the assessment of whether there is potential competition must be carried out having regard to the structure of the market and the economic and legal context within which it operates*.'
[54] 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.

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 exception provided by Article 3(5)(b) VABEO concerns situations where the supplier is a provider of services operating at several levels of trade, while 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 Accordingly, the benefit of the block exemption provided by the VABEO in the context of dual distribution 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. However, in principle, if any of the conditions in Article 3(5) VABEO are fulfilled in respect of a non-reciprocal vertical agreement between competing undertakings then the benefit of the block exemption includes the exchange of information that is required to implement that vertical agreement. Guidance on information exchange in the context of dual distribution is set out below. This guidance is provided to assist undertakings with their self-assessment, but it is important that such an assessment requires consideration of the particular facts of the vertical agreement on a case-by-case basis.

Information exchange in the context of dual distribution

6.23 For the purposes of applying Article 3(5) of the VABEO and 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.

6.24 Whether an exchange of information is required to implement the vertical agreement (and therefore is to be considered 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 geographical areas 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.[55] 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 and any restrictions on sales to unauthorised distributors.

6.25 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 one of the conditions in Article 3(5) of the VABEO, can (subject to the points set out in paragraph 6.26) generally be considered to be unlikely to constitute a restriction by object and are likely to be genuinely vertical because they are required to implement the vertical agreement. 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, handling, use, maintenance, repair, upgrading or recycling of the contract products, notably when such information is required to comply with regulatory measures, and information that enables the supplier or buyer to adapt the contract products to the requirements of the customer.

(b) Logistical information relating to the production and distribution of the contract products at the upstream or downstream levels, including information relating to production processes, inventory, stocks, and sales volumes and returns.

(c) Information relating to customer purchases of the contract products, customer preferences and customer feedback, provided that the exchange of such information is not used to restrict the geographical area into which or the customers to whom the buyer may sell the

[55] 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.

contract products within the meaning of Article 8(2)(b), (c) or (d) of the VABEO.

(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.

(f) Subject to point (e) of this paragraph, information relating to the marketing of the contract products, including information on new products to be supplied under the vertical agreement and information on promotional campaigns for the contract products.

(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.

6.26 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 because it is not required to implement the vertical agreement.

(a) Information relating to the actual future prices at which the supplier or buyer will sell the contract products downstream.56

(b) Information relating to identifying end users of the contract products, unless the exchange of information is necessary:

— to enable the supplier or buyer to satisfy the requirements of a particular end user, for example to adapt the contract products to the requirements of the customer, to grant the end user special

[56] Note that in certain limited circumstances the exchange of such information may be justified where it is necessary to organise a coordinated short-term low-price campaign (see paragraph 8.21(b) below).

conditions (including under a customer loyalty scheme), or to provide pre- or after-sales services (including guarantee services); or

— to implement or monitor compliance with a selective distribution agreement or an exclusive distribution agreement under which particular end users are allocated to the supplier or buyer.[57]

(c) Information relating to goods sold by a buyer under its own brand name exchanged between the buyer and a manufacturer of competing branded goods, unless the manufacturer is also the producer of the own-brand goods.

6.27 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. The other provisions of the vertical agreement between the supplier and buyer may nonetheless benefit from the exemption provided by Article 3(1) of the VABEO, provided that the agreement otherwise complies with the conditions set out in the VABEO.

6.28 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.[58]

6.29 Where competing undertakings enter into a vertical agreement and engage in exchanges of information that does not benefit from the block exemption provided by the VABEO, they may take precautions to minimise the risk that the information exchange will raise competition 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

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[57] The guidance provided in this Guidance is without prejudice to the application of the Data Protection Act 2018.

[58] 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. See also *Lexon (UK) Limited v CMA* [2021] CAT 5, paragraph 187(6), as well as *Balmoral v CMA* [2019] CAT paragraphs, 40, 44, 46 and 119.

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. However, the use of such precautions does not bring within the scope of the VABEO information exchanges that would otherwise fall outside the block exemption.

Vertical agreements in the online platform economy

6.30 Undertakings active in the online platform economy play an increasingly important role in the distribution of goods and services. They enable new ways of doing business, some of which are not easy to categorise using the concepts applied to vertical agreements in the brick and mortar environment.

6.31 Undertakings active in the online platform economy are often qualified as agents in contract or commercial law. However, this qualification is not material for the categorisation of their agreements under the Chapter I prohibition. Vertical agreements entered into by undertakings active in the online platform economy will only be categorised as agency agreements that fall outside the scope of the Chapter I prohibition where they fulfil the conditions set out in paragraph 4.14. The factors mentioned in paragraphs 4.21-4.23 mean that those conditions will generally not be fulfilled in the case of agreements entered into by undertakings active in the online platform economy.

6.32 Where a vertical agreement entered into by an undertaking active in the online platform economy does not meet the conditions to be categorised as an agency agreement falling outside the scope of the Chapter I prohibition, it is necessary to consider whether the agreement relates to the provision of online intermediation services. Article 2(1) VABEO defines online intermediation services as a service that allows undertakings to offer goods or services to other undertakings or to end users with a view to facilitating direct transactions between such undertakings or between such undertakings and end users, irrespective of whether and where those transactions are ultimately concluded and that constitutes an information society service.[59] Examples of online intermediation services may include online marketplaces, app stores, price comparison tools and social media services used by undertakings.

6.33 In order to qualify as a provider of online intermediation services, an undertaking must facilitate the initiation of direct transactions between two

[59] Within the meaning of Article 1(1)(b) of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information on the field of technical regulations and of rules on Information Society Services.

other parties. In principle, the functions performed by the undertaking must be assessed separately for each vertical agreement that the undertaking enters into, notably because undertakings active in the online platform economy often apply different business models in different sectors or even within the same sector. For example, in addition to providing online intermediation services, such undertakings may buy and resell goods or services, in some cases performing both functions vis-à-vis a single counterparty.

6.34 The fact that an undertaking collects payments for transactions that it intermediates or offers ancillary services in addition to its intermediation services, for example, advertising services, rating services, insurance or a guarantee against damage, does not preclude it from being categorised as a provider of online intermediation services.

6.35 For the purpose of applying the VABEO, undertakings that are party to vertical agreements are categorised as either suppliers or buyers. Pursuant to Article 2(1) VABEO, an undertaking that provides online intermediation services is categorised as a supplier in respect of those online intermediation services and an undertaking that offers or sells goods or services via online intermediation services is categorised as a buyer in respect of those online intermediation services, irrespective of whether it pays to use them. This has the following consequences for the application of the VABEO:

(a) The undertaking that provides the online intermediation services cannot be categorised as a buyer within the meaning of Article 2(1) of the VABEO in respect of the goods or services offered by third parties using those online intermediation services.

(b) For the purpose of applying the market share threshold set out in Article 6(1) of the VABEO, the market share of the undertaking that provides the online intermediation services is calculated on the relevant market for the supply of those online intermediation services. The scope of the relevant market depends on the facts of the case, in particular the degree of substitutability between online and offline intermediation services, between intermediation services used for different categories of goods or services, and between intermediation services and direct sales channels.

(c) Restrictions imposed by the undertaking that provides the online intermediation services on buyers of those online intermediation services relating to the price at which, the geographical areas to which, or the customers to whom the intermediated goods or services may be sold, including restrictions relating to online advertising and online selling, are subject to the provisions of Article 8 of the VABEO (hardcore restrictions). For example, pursuant to Article 8(2)(a) of the VABEO, the exemption provided by the VABEO does not apply to an agreement under which a provider of online intermediation services imposes a fixed or minimum sale price for a transaction that it facilitates between another undertaking (the buyer of the online intermediation services) and an end user.

6.36 Undertakings active in the online platform economy that do not provide online intermediation services within the meaning of Article 2(1) of the VABEO may be categorised as either suppliers or buyers for the purpose of applying the VABEO. For example, such undertakings may be categorised as suppliers of upstream input services or as (re)sellers of goods or services downstream. This categorisation may affect, in particular, the definition of the relevant market for the purpose of applying the market share thresholds set out in Article 6(1) of the VABEO, the applicability of Article 8 of the VABEO (hardcore restrictions), and the applicability of Article 10 of the VABEO (excluded restrictions).

Associations of retailers

6.37 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.

6.38 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.[60] 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 geographical areas to the members must first be assessed as a horizontal agreement. If that

[60] 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.

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)

6.39 Article 3(4) of the VABEO provides that vertical agreements containing certain provisions relating to the assignment or use of intellectual property rights (IPRs) to or by the buyer can benefit from the block exemption provided by the VABEO.[61] All other vertical agreements containing IPR provisions are therefore excluded from the VABEO.

6.40 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;[62] 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.

6.41 These 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.

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[61] In accordance with Article 3(7) VABEO, intellectual property rights include industrial property rights, know-how, copyright and neighbouring rights.
[62] 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.

6.42 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.

6.43 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 does not fall within the scope of application of the VABEO.[63] 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.

6.44 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.

6.45 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

[63] See the subcontracting notice (referred to in paragraph 4.34).

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.

6.46 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 excluded restrictions listed in Article 10 VABEO.

6.47 IPRs 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

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

Copyright

6.49 Resellers of goods covered by copyright (for example, books and software) may be obliged by the copyright holder only to resell under the condition that the buyer, whether another reseller or the end user, does 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.

6.50 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.

6.51 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

6.52 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, or financial planning. The licence and the assistance are integral components of the business method being franchised.

6.53 Licensing contained in franchise agreements is covered by the VABEO where all five conditions listed in paragraph 6.40 above are fulfilled. This is usually the case, 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.

6.54 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

6.55 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 or of any block exemption order, unless otherwise provided for in such a regulation or order’ (as defined in section 10(12) and section 6(2) of the CA98). 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.[64]

6.56 Accordingly, the VABEO does not apply to vertical agreements covered by the following retained block exemption regulations or any future block exemption orders relating to the types of agreements mentioned in the following sub-paragraphs, unless otherwise provided for in the respective regulation:[65]

(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;66

(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

[64] 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.
[65] The regulations listed in this paragraph remain in force in the UK post implementation period as EU retained law.
[66] OJ L 93, 28.3.2014, p. 17.

European Union to certain categories of research and development agreements;67

(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.68

6.57 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 the retained 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 categories of vertical agreements and concerted practices in the motor vehicle sector, and accompanying guidelines, or any future block exemption relating to the motor vehicle sector that may be adopted in the UK.

[67] Currently under review by the CMA. OJ L 335, 18.12.2010, p. 36.
[68] Currently under review by the CMA. OJ L 335, 18.12.2010, p. 43.

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.[69] 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.

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%.

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[69] 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, which is a statement of the European Commission for the purpose of section 60A CA98.

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, taking into account all sources of revenue generated by the sale of the goods or services (including sales to all 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 production, namely the production or 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.[70]

[70] 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) geographical area and customer group restrictions;

(d) restriction of the sales of spare parts; and

(e) 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.[71]

8.4 Hardcore restrictions pursuant to Article 8(2) VABEO are generally restrictions of competition by object which fall within the Chapter I prohibition.[72] 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.[73] 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.[74]

8.5 However, to say that a restriction is a hardcore restriction for the purposes of the VABEO is not the same as saying that it is a restriction by object for the

[71] Article 9 of the VABEO.
[72] 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.
[73] Case C-8/08 *T-Mobile Netherlands,* EU:C:2009:343, paragraphs 29 and 31.
[74] Case C-67/13 *Groupement des Cartes Bancaires,* EU:C:2014:2204, paragraph 49.

purposes of the Chapter I prohibition.[75] 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. It must then be examined individually to determine whether it has the object or effect of restricting competition and if so whether it can benefit individually from the application of the section 9 exemption.

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 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.

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

8.7 Hardcore restrictions do not necessarily fall within the scope of the Chapter I prohibition.[76] If a hardcore restriction under the VABEO is objectively necessary for the implementation of a particular vertical agreement, for instance, to ensure compliance with a public ban on selling dangerous substances to certain customers for reasons of safety or health, such an 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 of the section 9 exemption in an particular case and the CMA will carefully consider these efficiency justifications in any investigations under the CA98.[77] For this purpose, the undertaking has to substantiate that efficiencies are likely and that these efficiencies are likely to result from including the

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[75] *Ping Europe Limited v Competition and Markets Authority* [2020] EWCA Civ 13, paragraph 29.
[76] For further details on vertical agreements which generally fall outside of Chapter I prohibition see Part 4.
[77] See in particular paragraph 10.10 describing in general possible efficiencies related to vertical restraints and paragraphs 8.10 to 8.25 on resale price restrictions. See for general guidance on the application of the conditions for 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. The Guidelines on the application of the Article 101(3) of the Treaty is a statement of the European Commission for the purpose of section 60A CA98.

hardcore restriction in the agreement, when demonstrating that all the conditions of the section 9 exemption 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 of the section 9 exemption 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 exemption under section 9(1).

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 paragraph 8.69). However, if it is necessary for authorised wholesalers located in different geographical areas to invest in promotional activities in the geographical area 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' geographical areas to overcome possible free-riding may, in an individual case, fulfil the conditions for exemption under section 9(1).

Example of genuine testing

In the case of genuine testing of a new product in a limited geographical area 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 from making active sales outside the test market or to markets or customer groups where the product has not yet been introduced. Such restrictions may fall outside 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[78] having as their direct or indirect object the restriction of the buyer's ability to determine its onward sale price, including the establishment of a fixed or minimum resale price or a fixed or minimum price level to be observed by the buyer. 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 set the retail price that the buyer must charge to its customers and therefore result in clear-cut restrictions.[79] 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) imposing minimum advertised prices (MAPs), which prohibit the distributor from advertising below a level set by the supplier;

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[78] See paragraphs 6.3 to 6.5 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. See also CMA's guidance Resale price maintenance: advice for retailers - GOV.UK (www.gov.uk) and case studies published on Business cartels: case studies - GOV.UK (www.gov.uk).

[79] 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).

(e) linking the prescribed resale price to the resale prices of competitors; or

(f) threats, intimidations, warnings, penalties, 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 by the supplier of a maximum retail price or the determination by the supplier of a resale price recommendation does not in itself amount to RPM. However, if the supplier combines such a maximum price or resale price recommendation with incentives to apply a certain price level or disincentives to lower the sale price, this can amount to RPM. An example of an incentive to apply a certain price level would be the reimbursement by the supplier of promotional costs incurred by the buyer subject to the condition that the buyer complies with the maximum resale price or the recommended resale price. An example of a disincentive to lower the sales price would be where a supplier threatens to cut further suppliers in response to a deviation by the buyer from the maximum or recommended resale price.

8.14 Although in principle MAPs leave the distributor free to sell at a price that is lower than the advertised price, they disincentivise the distributor from setting a lower sale price by restricting its ability to inform potential customers about available discounts. A key parameter for price competition between retailers is thereby removed. For the purpose of applying Article 8(2)(a) of the VABEO, MAPs will therefore be treated by the CMA as an indirect means of applying RPM.

8.15 Direct or indirect means of achieving RPM 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.[80]

[80] 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.

This software increases price transparency in the market and allows manufacturers to track the resale prices in their distribution network. It also allows retailers to track the prices of their competitors and report price decreases to the manufacturer. While price monitoring and price reporting may allow manufacturers to intervene swiftly in case of price decreases and allow retailers to request such intervention by manufactures, it does not, on its own, constitute RPM. However, such price monitoring and reporting is commonly a feature of arrangements that do amount to RPM and which have been found to infringe the Chapter I prohibition.[81]

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 4.29 to 4.33 of the Guidance), an obligation preventing or restricting the agent from sharing its remuneration with the customer, irrespective of whether the remuneration 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 due to the principal.[82]

8.18 Under a fulfilment contract, the supplier enters into a vertical agreement with a buyer for the purpose of executing (fulfilling) a supply agreement concluded previously between the supplier and a specific customer. Where the supplier selects the undertaking that will provide the fulfilment services, the imposition of a resale price by the supplier is not RPM. In that case, the resale price imposed in the fulfilment contract does not restrict competition for the supply of the goods or services to the customer or competition for the supply of the fulfilment services. For example, this applies where customers purchase goods from an undertaking active in the online platform economy which is operated by a group of independent retailers under a common brand and that undertaking determines the price for the sale of the goods and forwards orders to the retailers for fulfilment.[83] By contrast, where the undertaking that

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[81] 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.
[82] 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.
[83] This is without prejudice to the assessment under the Chapter I prohibition of horizontal agreements between the retailers that set up and operate such a fulfilment model.

will provide the fulfilment services is selected by the customer, the imposition of a resale price by the supplier may restrict competition for the provision of the fulfilment services. In that case, the imposition of a resale price may amount to RPM. 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 in respect of those online intermediation services and therefore Article 8(2)(a) VABEO applies to restrictions imposed by that undertaking on buyers of the online intermediation services relating to the sales price of goods and services that are sold via the online intermediation 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 price or to reduce their prices, the imposition by the provider of online intermediation services of a fixed or minimum sales price for the transaction that it intermediates is a hardcore restriction within the meaning of Article 8(2)(a) of the VABEO.

8.19 It is well established in the decisional practice of the CMA and case law 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 the Chapter I prohibition.[84] However, as mentioned in paragraphs 8.4 to 8.9 of this Guidance, the qualification of a restriction as a hardcore restriction or as a by object restriction, does not mean that agreements that amount to RPM can never fulfil the conditions for exemption under section 9(1). Where undertakings consider that RPM to be efficiency enhancing in an individual case, they may rely on efficiency justifications showing that the conditions for exemption under section 9(1) are fulfilled in that case.

8.20 RPM is generally considered a serious restriction of competition because it can restrict intra-brand and inter-brand competition in various ways:

[84] 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 Court of Justice of the European Union 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.

(a) RPM may facilitate collusion between suppliers, by enhancing price transparency in the market, thereby making it easier to detect whether a supplier is deviating from the collusive equilibrium by cutting its price. This negative effect is more likely 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.

(b) RPM may facilitate collusion between buyers at the distribution level, in particular when the RPM is driven 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.

(c) In some cases, RPM may also soften competition between manufacturers and/or between retailers, in particular when manufacturers use the same distributors to distribute their products and RPM is applied by all or many of them.

(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 preventing price competition between distributors, RPM may prevent or hinder the entry and expansion of new or more efficient 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 incentivise 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.

(g) The direct effect of RPM is the elimination of intra-brand price competition, by preventing some or all distributors from lowering their sale price for the brand concerned, thus resulting in a price increase for that brand.

8.21 However, RPM may also lead to efficiencies, in particular where it is supplier driven. If undertakings seek to rely on the section 9 exemption for RPM 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 exemption under section 9(1) are satisfied in the individual case.[85] Three examples of such potential efficiencies 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 in promoting that product. Section 9(1) requires that there are no realistic and less restrictive alternative means of incentivising the distributors to promote the product. To meet that 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 in such a case may be considered on balance pro-competitive.

(c) A MAP can be used to prevent a particular distributor from using the product of a supplier as a loss leader. Where a distributor regularly resells a product below the wholesale price, this can damage the brand image of the product and, over time, reduce overall demand for the product and undermine the supplier's incentives to invest in quality and brand image. In that case, preventing that distributor from selling below the wholesale price, by imposing on it, a targeted minimum resale price or MAP may be considered on balance pro-competitive.

8.22 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.

[85] Under section 9(2) CA98 the undertaking claiming the benefit of the exemption bears the burden of proving that the conditions in section 9(1) CA98 are satisfied.

8.23 The possible competition risk associated with recommended and maximum prices is that they may act as a focal point for resellers and may 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.

8.24 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.

8.25 Where recommended or maximum resale prices produce appreciable anti-competitive effects, the question of possible 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.

Geographical area and customer group restrictions

8.26 Article 8(2)(b) to (d)) VABEO sets out a list of hardcore restrictions relating to the geographical areas and customer groups to which the buyer can sell that apply depending on the distribution system operated by the supplier. These hardcore restrictions, subject to exceptions set out in Article 8(3) to (5) VABEO, cover situations where the supplier operates:

(a) an exclusive distribution system – see Article 8(2)(b) and Article 8(3) VABEO;

(b) a selective distribution system – see Article 8(2)(c) and Article 8(4) VABEO; or

(c) neither an exclusive nor a selective distribution system – see Article 8(2)(d) and Article 8(5) VABEO.

8.27 The hardcore restrictions in Article 8(2)(b), (c)(i) and (d) VABEO 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 geographical areas into which or the customer groups to whom the buyer or its customers may sell the contract goods or services.

8.28 In addition, Article 8(2)(c)(ii) and (iii) of the VABEO provide that in a selective distribution system the following constitute hardcore restrictions:

(a) the restriction of cross-supplies between the members of the selective distribution system operating at the same or different levels of trade (Article 8(2)(c)(ii) VABEO); and

(b) the restriction of active or passive sales to end users by members of the selective distribution system operating at the retail level of trade (Article 8(2)(c)(iii) VABEO), subject to the exception in Article 8(4)(a).

8.29 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.

8.30 Under EU retained case law, absolute geographical area and customer group 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,[86] the Competition Appeal Tribunal held on appeal that a ban on selling on the internet (a form of geographical area and customer group restriction) amounted to a restriction of competition by object.[87] 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 sales to customers beyond their geographic range, there is a diminution in price competition'.[88]

8.31 Vertical agreements containing hardcore restrictions relating to restrictions on geographical area and customer group fall within the scope of the Chapter I

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[86] Case 50230, Decision of the CMA: *Online sales ban in the golf equipment sector*, 24 August 2017.
[87] *Ping Europe Limited v Competition and Markets Authority,* [2018] CAT 13.
[88] See *Ping Europe Limited v Competition and Markets Authority* [2020] EWCA Civ 13, paragraph 81. Note also that 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. 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).

prohibition if they may affect trade within the UK and are implemented, or intended to be implemented, in the UK.

8.32 Insofar as the Chapter I prohibition is engaged, where a vertical agreement only concerns restrictions relating to exports outside the UK or imports/re-imports from outside the UK, the CMA is unlikely to regard it as having the object of restricting competition within the UK. The CMA would instead assess whether such a vertical agreement has the effect of restricting competition within the UK, taking into account the nature of the products or services, as well as the real operating conditions and the structure of the market concerned.

8.33 The hardcore restrictions in Article 8(2)(b) to (d) VABEO apply irrespective of the sales channel used (whether this is bricks and mortar or online). Vertical agreements that have as their object preventing the buyers or their customers from effectively using the internet for the purposes of selling their products online, operate to restrict the geographical areas 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.[89]

8.34 As far as geographical area and customer group 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). As set out in Article 8(6)(a) VABEO the references to restrictions of active sales or passive sales includes a restriction that, directly or indirectly, in isolation or combination with other factors, has as its object the prevention of buyers or their customers effectively using the internet for the purposes of selling their goods or services online or from effectively using one or more online advertising channels.

8.35 A vertical agreement containing one or more restrictions of online sales or online advertising which prohibit the buyer from using the internet to sell the contract goods or services has the object of restricting passive sales to end users wishing to purchase online and located outside the buyer's physical trading area. The same applies to vertical agreements which do not directly prohibit, but have the object of preventing the effective use of the internet by a buyer or its customers to sell the contract goods or services to particular geographical areas or customers. For instance, this is the case for vertical agreements which have the object of significantly diminishing the aggregate

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

volume of online sales of the contract goods or services or the possibility for end users to buy the contract goods or services online. Similarly, this is the case for vertical agreements that have the object of preventing the use of one or more entire online advertising channels by the buyer, such as search engines or price comparison services, or of preventing the buyer from establishing or using its own online store.

8.36 The assessment of whether a restriction is a hardcore restriction may take into account the content and context of the restriction, but it cannot depend on market-specific circumstances or the individual characteristics of the parties to the vertical agreement. Such hardcore restrictions may be the result of direct obligations, including the obligation not to sell to certain customers or to customers in certain geographical areas 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) requiring the buyer to request the supplier's prior approval for sales to such customers[90];

(b) refusing or reducing bonuses or discounts, if the buyer sells to such customers or making compensatory payments to the buyer if it stops selling to such customers;[91]

(c) terminating the supply of products if the buyer sells to such customers;

(d) limiting or reducing the volumes supplied, for instance, so that the volumes correspond to the demand from customers in certain geographical areas or the demand from certain customer groups;

(e) threatening to terminate the vertical agreement or not to renew it if the buyer sells to such customers;[92]

(f) charging a higher price to the distributor for products that are to be sold to such customers;[93]

(g) limiting the proportion of sales made by the buyer to such customers;

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[90] See for example Case T-77/92 *Parker Pen v Commission,* EU:T:1994:85, paragraph 37.
[91] See for example Case T-450/05 *Peugeot Nederland v Commission,* EU:T:2009:262, paragraph 47.
[92] See, for example, judgment of 6 July 2009, *Volkswagen v Commission*, Case T-62/98, EU:T:2000:180, paragraph 44.
[93] See, for example, Commission Decision in AT.40433 - *Film merchandise*, recital 54.

(h) preventing the buyer from using additional languages on the packaging or for the promotion of the products;

(i) supplying another product in return for the buyer stopping its sales to such customers;

(j) paying the buyer to stop selling to such customers;

(k) obliging the buyer to pass-on to the supplier profits from such customers;

(l) excluding from a UK-wide guarantee service, reimbursed by the supplier, in relation to products that are resold outside the buyer's geographical area or products that are sold by buyers located in other geographical areas.

8.37 Measures that allow a manufacturer to verify the destination of the supplied goods, such as the use of differentiated labels, specific language clusters or serial numbers, or the threat or performance of audits to verify the buyer's compliance with other restrictions are not in themselves restrictions of competition.[94] However, they may be considered to form part of a hardcore restriction of the buyer's sales when used by the supplier to control the destination of the supplied goods, for instance when used in conjunction with one or more of the practices mentioned in paragraphs 8.34 and 8.36.

8.38 In addition to the direct and indirect restrictions referred to above, hardcore restrictions specifically relating to online sales may similarly be the result of direct or indirect obligations. Besides a direct prohibition of the use of the internet to sell the contract goods or services, the following are examples of obligations that indirectly have the object of preventing the effective use of the internet by the buyer to sell the contract goods or services to particular geographic areas or customers within the meaning of Article 8(2)(b), (c) and (d) of the VABEO:

(a) requiring the buyer to prevent customers located in another geographical area from viewing its website or online store or to re-route customers to the online store of the manufacturer or of another seller. However, obliging the buyer to offer links to the online stores of the supplier or of other sellers is not a hardcore restriction;

[94] See, for example, Commission Decision in AT.40436 - *Nike*, recitals 71 and 72; Commission Decision in AT.40433 - *Film merchandise*, recitals 65 and 66.

(b) requiring the buyer to terminate consumers' online transactions where their credit card data reveal an address that is not within the buyer's geographic area;

(c) requiring the buyer to sell the contract goods or services only in a physical space or in the physical presence of specialised personnel;

(d) requiring the buyer to seek the supplier's prior authorisation before making individual online sales transactions;

(e) prohibiting the buyer from using the supplier's trademarks or brand names on its website or in its online store;

(f) prohibiting the buyer from establishing or operating one or more online stores, irrespective of whether the online store is hosted on the buyer's own server or on a third-party server;

(g) prohibiting the buyer from using an entire online advertising channel, such as search engines or digital comparison tools, or restrictions which indirectly prohibit the use of an entire online advertising channel, such as an obligation not to use the supplier's trademarks or brand names for bidding to be referenced in search engines, or a restriction on providing price-related information to price comparison services.

8.39 The restrictions referred to in paragraph (g) above have the object of preventing the effective use of the internet by the buyer to sell the contract goods or services to particular geographical areas or customer groups, as they limit the buyer's ability to target customers beyond its physical trading area, inform them about its offers and attract them to its online store or other sales channels. Prohibiting the use of particular price comparison services or search engines is generally not a hardcore restriction, as the buyer may use other online advertising services to raise awareness of its online sales activities. However, prohibiting the use of the most widely used advertising services in the particular online advertising channel may amount to a hardcore restriction, if the remaining services in that advertising channel are not capable of attracting customers to the buyer's online store.

8.40 Contrary to the restrictions referred to in paragraph 8.36, requirements imposed by the supplier on the buyer relating to the manner in which the contract goods or services are to be sold can benefit from the exemption provided by the VABEO, irrespective of the type of distribution system. In particular, the supplier may impose requirements relating to quality. For example, in a selective distribution system, the supplier may impose requirements relating to the minimum size and appearance of the buyer's shop (for example, relating to fixtures, furnishings, design, lighting and floor coverings) or the presentation of the product (for example, the minimum number of products of the brand to be displayed or the minimum space between products).

8.41 Similarly, the supplier may impose requirements on the buyer relating to the manner in which the contract goods or services are to be sold online. Restrictions relating to the use of particular online sales channels, such as online marketplaces, or the imposition of quality standards for online sales can generally benefit from the exemption provided by the VABEO, irrespective of the type of distribution system, provided that they do not indirectly have the object of preventing the effective use of the internet by the buyer to sell the contract goods or services to particular geographical areas or customers. Online sales restrictions generally do not have such an object where the buyer remains free to operate its own online store and to advertise online. In such cases, the buyer is not prevented from making effective use of the internet to sell the contract goods or services. The following are examples of requirements relating to online sales that can benefit from the exemption provided by the VABEO:

(a) requirements intended to ensure the quality or a particular appearance of the buyer's online store;

(b) requirements regarding the display of the contract goods or services in the online store (such as the minimum number of items displayed or the way the supplier's trademarks or brands are displayed);

(c) a direct or indirect ban on the use of online marketplaces;

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

(e) a requirement that the buyer sells a minimum absolute amount of the contract goods or services offline (in value or volume, but not as a proportion of its total sales) to ensure the efficient operation of its brick and mortar shop. This requirement can be the same for all buyers, or it can be set at a different level for each buyer, based on objective criteria, such as the buyer's size relative to other buyers, or its geographic location.

8.42 A requirement that the buyer pays a different wholesale price for products sold online than for products sold offline (dual pricing) can benefit from the exemption provided by the VABEO, as it may incentivise or reward an appropriate level of investments in online or offline sales channels, provided that it does not have the object of restricting sales to particular geographic areas or customer groups within the meaning of Article 8(2)(b), (c) or (d) of the VABEO. However, where the difference in the wholesale price has the object of preventing the effective use of the internet by the buyer to sell the contract goods or services to particular geographical areas or customer groups, it is a hardcore restriction within the meaning of Article 8(2)(b), (c) or (d) of the VABEO. This would, in particular, be the case where the difference in the wholesale price makes selling online unprofitable or financially unsustainable, or where dual pricing is used to limit the quantity of products made available to the buyer for sale online. Conversely, dual pricing can benefit from the exemption provided by the VABEO where the difference in the wholesale price is reasonably related to differences in the investments and costs incurred by the buyer to make sales in each channel. Similarly, the supplier may charge a different wholesale price for products that are to be sold through a combination of offline and online channels, where the price difference takes into account investments or costs related to that type of distribution. The parties may agree an appropriate method to implement dual pricing, including, for example, an ex post balancing of accounts on the basis of actual sales.

8.43 Online advertising restrictions can benefit from the exemption provided by the VABEO, provided that they do not have the object of preventing the use of an entire advertising channel by the buyer. Examples of online advertising restrictions that can benefit from the exemption include:

(a) a requirement that online advertising meets certain quality standards or includes specific content or information;

(b) a requirement that the buyer does not use the services of particular online advertising providers that do not meet certain quality standards; and

(c) a requirement that the buyer does not use the brand name of the supplier in the domain name of its online store.

Distinction between 'active sales' and 'passive sales'

8.44 The VABEO distinguishes between restrictions of the geographical area or customer group into which a buyer or its customers can sell the contract products based on ‘active sales’ or ‘passive sales’. Article 8(7) of the VABEO provides definitions of ‘active sales’ and ‘passive sales’.[95]

8.45 In accordance with Article 8(7) of the VABEO, ‘active sales’ means:

(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, digital comparison tools or advertising on search engines targeting customers in specific geographical areas or customer groups;

(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; or

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

8.46 In accordance with the same provision, ‘passive sales’ means:

(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[96]; or

[95] The distinction between active and passive is mainly relevant in the context of exclusive distribution systems for the purposes of determining which sales restrictions can benefit from the block exemption provided by the VABEO (Article 8(3)(a) VABEO).
[96] 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:

— in England, Wales or Northern Ireland, the Defence and Security Public Contracts Regulations 2011, the Public Contracts Regulations 2015, the Concession Contracts Regulations 2016 or the Utilities Contracts Regulations 2016; and

— in Scotland, the Defence and Security Public Contracts Regulations 2011, the Public Contracts (Scotland) Regulations 2015, the Concession Contracts (Scotland) Regulations 2016 or the Utilities Contracts Regulations 2016.[97]

8.47 Under Article 8(7) VABEO, sales to customers who have not been actively targeted by the seller are regarded as passive selling. For example, setting up one's own website or online store, 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 operation of a website may have effects that extend beyond the distributor's own physical trading area, for instance, by enabling online purchases by customers located in other geographical areas or customer groups. Nonetheless, such purchases (including delivery of the products) are passive sales, provided that the distributor does not actively target the specific customer or the specific geographical area or customer group to which the customer belongs. 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, namely tools or techniques intended to improve the visibility or ranking of on the online store in search engine results, or offering an app in an app store, are, in principle, means to enable potential customers to reach the seller and are therefore forms of passive selling.

8.48 Conversely, offering on a website or online store, language options (eg Welsh) different from the ones commonly used in the geographical area in which the distributor is established normally indicates that the distributor's activities are directed at the geographical area in which that language is commonly used and thus amounts to a form of active selling.[98] Setting up one's own website or online store with a domain name (eg .Scot, .Wales) corresponding to a geographical area other than the one in which the distributor is established is a form of active selling into that geographical area,

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[97] Or any future legislation relating to procurement that may replace these existing regulations.
[98] 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.

while offering a website or online store with a generic and non-country specific domain name is considered a form of passive selling.

8.49 Targeted online advertising or promotion is a form of active selling. In particular, online advertising services may allow the seller to select the geographical areas or customer groups for which the online advertisement will be displayed. This is the case, for example, for search engine advertising and other online advertising, for instance on websites, app stores, and social media, provided that the advertising service allows the advertiser to target customers according to their particular characteristics, including geographic location or personal profile. By contrast, where the seller addresses online advertising to customers in its own geographical area or customer group and it is not possible to prevent such advertising from being seen by customers in other geographical areas, this is a form of passive selling. An example of such general advertising includes sponsored content on the website of a local or national newspaper that may be accessed by any visitor to that website.

8.50 Participation in public procurement is a form of passive selling irrespective of the type of the public procurement procedure (eg open procedure or restricted procedure). Because a rationale of public procurement law includes facilitating intra-brand competition, a vertical agreement that restricts the ability of a buyer to participate in public procurement is a hardcore restriction under Article 8(2)(b) to (d) of the VABEO. Similarly, the CMA considers that responding to invitations to tender is also a form of passive selling. An invitation to tender is a form of unsolicited customer request addressed to multiple potential sellers and the submission of a bid in response to an invitation to tender is a form of passive selling.

Application of the exceptions in Article 8(3) to (5) VABEO

8.51 The hardcore restrictions in Article 8(2)(b), (c) and (d) are each subject to the exceptions set out respectively in Article 8(3), 8(4) and 8(5). As explained in paragraph 8.26, these hardcore restrictions and the related exceptions correspond to three different distribution models: exclusive distribution, selective distribution, and where the supplier operates neither an exclusive nor a selective distribution system (also referred to as a ‘free distribution’ model).

Application to exclusive distribution

8.52 Where a supplier operates an exclusive distribution system, the hardcore restriction set out in Article 8(2)(b) of the VABEO relates to the restriction of the geographical area into which, or of the customer groups to whom, one or a limited number of buyers, to which an exclusive geographical area or customer group has been allocated, may actively sell or passively sell the contract goods or services.

8.53 The hardcore restriction relating to exclusive distribution is subject to the five exceptions in Article 8(3) of the VABEO.

8.54 The first exception, set out in Article 8(3)(a) of the VABEO, allows a supplier to restrict active sales by the exclusive distributor to a geographical area or a customer group which has been allocated exclusively to another buyer or to a limited number of other buyers, or which the supplier has reserved to itself. In order to preserve their investment incentives, exclusively appointed distributors should be appropriately protected against active sales by the supplier's other distributors, including by being protected from targeted online advertising into their exclusive geographical area or to their exclusive customer group.

8.55 The investment incentives of exclusive distributors could also be undermined by active selling by customers of the supplier's other distributors. To protect the investment incentives of exclusively appointed distributors, Article 8(3)(a) of the VABEO allows the supplier to require that such other distributors restrict their direct customers from actively selling into exclusively allocated geographical areas or to exclusively allocated customer groups allocated by the supplier to other distributors. However, the supplier may not require the direct customers of its other distributors to pass on the active sales restrictions to customers further down the distribution chain.

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

8.57 The protection of exclusively allocated geographical areas or customer groups is not absolute. To prevent market partitioning, passive sales into such geographical areas or to such customer groups may not be restricted. However, Article 8(2)(b) of the VABEO only concerns restrictions imposed on the buyer or its direct customers. The supplier may therefore accept restrictions on sales by itself, both online and offline, into an exclusive geographical area or to some or all of the customers belonging to an exclusive customer group.

8.58 The second exception, set out in Article 8(3)(b) of the VABEO allows a supplier that operates an exclusive distribution system in a certain geographical area and a selective distribution system in another geographical area to restrict its exclusive distributors from selling actively or passively to unauthorised distributors located in any geographical area where the supplier operates a selective distribution system. This means that the supplier must have either already appointed selected distributors in the geographical area or reserved it for the application of such a selective distribution system. The supplier may also require its exclusive distributors to similarly restrict their customers from making active and passive sales to unauthorised distributors in geographical areas where the supplier operates a selective distribution system or which it has reserved for that purpose. The ability to pass on active and passive sales restrictions further down the distribution chain in this context is intended to protect the closed nature of selective distribution systems.

8.59 The third exception, set out in Article 8(3)(c) of the VABEO, allows a supplier to restrict the place of establishment of the buyer to which it has allocated an exclusive geographical area or customer group. This means that the supplier may require the buyer to restrict its distribution outlets and warehouses to a particular address, place or geographical area. As regards mobile distribution outlets, the agreement may specify an area outside which the outlet cannot be operated. However, the establishment and use of an online store by the distributor is not equivalent to the opening of a new physical outlet and may not be restricted.

8.60 The fourth exception, set out in Article 8(3)(d) of the VABEO, allows a supplier to restrict active and passive sales by an exclusive wholesaler to end users, allowing the supplier to keep the wholesale and retail levels of trade separate. This exception includes allowing the exclusive wholesaler to sell to certain end users (eg, a few large ones), while prohibiting sales to all other end users.

8.61 The fifth exception, set out in Article 8(3)(e) of the VABEO, allows a supplier to restrict a 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.

Application to selective distribution

8.62 Where a supplier operates a selective distribution system, the hardcore restriction set out in Article 8(2)(c)(i) of the VABEO relates to vertical agreements that, directly or indirectly, have as their object the restriction of the geographical area into which, or of the customer groups to whom, the members of a selective distribution system (authorised distributors) may actively sell or passively sell the contract goods or services. This hardcore restriction is subject to the five exceptions in Article 8(4) of the VABEO.

8.63 The first exception, set out in Article 8(4)(a) of the VABEO, concerns the ability of authorised distributors to sell outside the selective distribution system. It allows the supplier to restrict active sales, including targeted online advertising, by authorised distributors into other geographical areas or to customer groups that are exclusively allocated to other distributors or reserved to the supplier. The supplier may also require the authorised distributors to impose such permitted restrictions of active sales on their direct customers. However, the protection of such exclusively allocated geographical areas or customer groups is not absolute. The supplier may not restrict passive sales into such geographical areas or to such customer groups.

8.64 The second exception, set out in Article 8(4)(b) of the VABEO, allows the supplier to restrict its authorised distributors and their customers from making active or passive sales to unauthorised distributors located in any geographical area where the supplier operates a selective distribution system.

8.65 The third exception, set out in Article 8(4)(c) of the VABEO, allows a supplier to restrict the place of establishment of its authorised distributors. This means that the supplier may require its authorised distributors to restrict their distribution outlets and warehouses to a particular address, place or geographical area. As regards mobile distribution outlets, the agreement may specify an area outside which the outlet cannot be operated. However, the establishment and use of an online store by an authorised distributor is not equivalent to the opening of a new physical outlet and may not be restricted.

8.66 The fourth exception, set out in Article 8(4)(d) of the VABEO, allows a supplier to restrict active and passive sales by an authorised distributor operating at the wholesale level of trade to end users, allowing the supplier to keep the wholesale and retail levels of trade separate. This exception includes allowing the authorised wholesaler to sell to certain end users (eg, a few large ones), while prohibiting sales to all other end users.

8.67 The fifth exception, set out in Article 8(4)(e) of the VABEO, 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.

8.68 The hardcore restriction set out in Article 8(1)(c)(ii) of the 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.[99] 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 in a selective distribution system, the supplier cannot restrict sales by authorised wholesalers 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.

8.69 The hardcore restriction set out in Article 8(2)(c)(iii) of the VABEO concerns the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level. This means that the supplier may not restrict its authorised distributors from selling to end users, or to purchasing agents acting on behalf of end users, except where such end users are located in a geographical area or belong to a customer group that has been exclusively allocated to another distributor or reserved to a supplier in a geographical area where the supplier operates.[100] 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. This does not exclude the possibility of prohibiting authorised distributors from operating out of an unauthorised place of establishment, as set out above.

8.70 A supplier operating a selective distribution system may select its authorised distributors on the basis of qualitative or quantitative criteria (or both). Any qualitative criteria generally have to be set for both online and offline channels. However, taking into account 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 equivalent to those imposed for sales in brick and mortar shops, provided that the requirements imposed for online sales do not indirectly have the object of preventing the effective use of the internet by the buyer to sell the contract goods or services to particular geographical areas or customers. For example, a supplier may impose requirements to ensure quality standards for online sales, such as a requirement to set up and operate an online after-sales helpdesk, a requirement to cover the costs of customers returning purchased

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[99] See, for example, the European Commission decision in case AT.40182 *Guess*, paragraphs 65 to 78.
[100] 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.

products, or the use of secure payment systems. Similarly, a supplier may define different criteria relating to sustainable development for online and offline sales channels. For example, a supplier could require eco-responsible sales outlets or the use of delivery services using green bicycles.

8.71 A selective distribution system (defined in Article 2(1) of the VABEO) can be combined with an exclusive distribution system (defined in Article 8(7) of the VABEO) within the same geographical if they are established at different levels of the distribution chain (ie exclusive distribution at the wholesale level and selective distribution at the retail level). Further, the supplier may commit to supplying only one or a limited number of authorised distributors in a specific part of the geographical area where the selective distribution system is operated. The supplier may also commit not to make any direct sales itself into that geographical area. In addition, as noted above, in accordance with Article 8(3)(c), (4)(c) and 8(5)(c) of the VABEO, the supplier may restrict a buyer's place of establishment.

Application where the supplier operates neither an exclusive nor a selective distribution system

8.72 Where the supplier operates neither an exclusive nor a selective distribution system (also referred to as a 'free distribution' model), the hardcore restriction set out in Article 8(2)(d) relates to vertical agreements that, directly or indirectly, have as their object the restriction of the geographical area into which, or of the customer group to whom, a buyer may actively sell or passively sell the contract goods or services. This hardcore restriction is subject to the five exceptions in Article 8(5) of the VABEO.

8.73 The first exception, set out in Article 8(5)(a) of the VABEO, allows a supplier to restrict active sales by a buyer to a geographical area or a customer group which has been allocated exclusively to another buyer or to a limited number of other buyers or which the supplier has reserved to itself. The supplier may also require that a buyer restricts its direct customers from actively selling into exclusively allocated geographical areas or to exclusively allocated customer groups allocated by the supplier to other distributors. However, the protection of exclusively allocated geographical areas or customer groups is not absolute, as the supplier may not restrict passive sales into such geographical areas or to such customer groups.

8.74 The second exception, set out in Article 8(5)(b) of the VABEO, allows a supplier to restrict the buyer (and require the buyer to restrict its customers) from selling actively or passively to unauthorised distributors located in any geographical area where the supplier operates a selective distribution system or which it has reserved for that purpose.

8.75 The third exception, set out in Article 8(5)(c) of the VABEO, allows a supplier to restrict a buyer's place of establishment. This means that the supplier may require a buyer to restrict its distribution outlets and warehouses to a particular address, place or geographical area. As regards mobile distribution outlets, the agreement may specify an area outside which the outlet cannot be operated. However, the establishment and use of an online store by a buyer is not equivalent to the opening of a new physical outlet and may not be restricted.

8.76 The fourth exception, set out in Article 8(5)(d) of the VABEO, allows a supplier to restrict active and passive sales by a wholesaler to end users, allowing the supplier to keep the wholesale and retail levels of trade separate. This exception includes allowing the wholesaler to sell to certain end users (eg, a few large ones), while prohibiting sales to all other end users.

8.77 The fifth exception, set out in Article 8(5)(e) of the VABEO, allows a supplier to restrict a 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.

Restrictions of the sales of spare parts

8.78 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 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 manufacturer of the spare parts is restricted in supplying technical information and special equipment that are necessary for the use of spare parts by end 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

8.79 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.

8.80 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.

8.81 As set out in Article 8(7) 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.

8.82 The wide retail parity obligation may be express as a contractual clause 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 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. For example, this may include threats (such as a threat to delist), intimidations, warnings, delay or suspension of deliveries or contract terminations in relation to the observance of a wide parity obligation.

8.83 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. 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.[101] 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.

8.84 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.

8.85 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.

8.86 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.

8.87 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

[101] 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.

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.

8.88 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.

8.89 The hardcore restriction in the VABEO relates to wide retail parity obligations and therefore only applies in relation to agreements that set the terms of the offer, sale or resale of a product to end users at the retail level. In such a situation, end users are not able to benefit from product suppliers offering lower prices or better terms on other intermediaries. Wide parity obligations that are imposed in upstream business-to-business markets are not treated as hardcore restrictions. Although wide parity obligations in upstream business-to-business markets 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.[102]

8.90 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

[102] 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).

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.

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 exemption under the section 9 exemption. 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 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.[103]

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

(a) Non-compete obligations that are indefinite or exceed five years.

(b) Post term non-compete obligations.

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

Non-compete obligations that are indefinite or exceed five years

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 to 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

[103] 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 contains 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, land or a vehicle 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, land or a vehicle 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, premises or a vehicle to the supplier for only a limited period, intended to avoid the five-year limitation cannot benefit from the block exemption provided by the VABEO.

Post term non-compete obligations

9.7 The second 'excluded restriction' is provided for in Article 10(2)(b) of the VABEO and concerns post term non-compete obligations imposed 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 2 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 'excluded restriction' 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 is excluded from the benefit of the block exemption provided by the VABEO. The rationale for 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 those outlets to distribute their products. Such a scenario could lead to 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 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 competing undertakings supplying substitutable products. In principle, this is due to the complementary nature of the activities carried out by 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. By 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 benefit consumers. Similarly, a party to a vertical agreement usually has an incentive to oppose actions by the other party that may harm consumers, as such actions will typically also reduce the demand for the goods or services supplied by the first party. Moreover, 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)[104] may provide greater scope for efficiencies, for example by optimising manufacturing or distribution processes and services.

10.5 Nevertheless, undertakings with market power may in certain cases use vertical restraints to pursue anti-competitive purposes that ultimately harm consumers. Vertical restraints can lead to foreclosure, softening of competition or collusion. 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. 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.[105]

Positive effects of vertical agreements on competition

10.6 Vertical agreements may produce positive effects on competition, including lower prices and 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.

10.7 Vertical externalities arise because the decisions and actions taken at different levels of the production or 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 those 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. This represents a positive externality bestowed on the supplier by the distributor’s sales enhancing actions. Conversely, there may

[104] A vertical restraint means a restriction on competition in a vertical agreement to which the Chapter I prohibition applies (Article 2(1) VABEO).
[105] The Chapter II prohibition is the statutory provision contained in section 18 CA98 that prohibits conduct amounting to an abuse of a dominant position.

be situations where, from the supplier's perspective, the distributor may be pricing too high[106] or making insufficient sales efforts.

10.8 Horizontal externalities may arise in particular between distributors of the same products where a distributor is unable to fully accrue the benefits of its sales efforts. For example, where demand-enhancing pre-sales 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 between the online and offline sales channels, and in both directions.[107] 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 store, 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.

10.9 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.

10.10 This Guidance seeks to provide overview of the various justifications for vertical restraints. It does not claim to be complete or exhaustive. Reasons that may justify the application of certain vertical restraints in certain circumstances include the following scenarios:

(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

[106] Sometimes referred to as the 'double marginalisation problem.

[107] 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 newly exporting to the UK, or 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 ensure that the distribution of its products is limited to such premium distributors, it runs the risk of not being listed. There may, therefore, be justifications for allowing exclusive distribution or selective distribution in this scenario.

(e) The hold-up problem: sometimes there are relationship-specific investments to be made by either the supplier or the buyer, such as investments in special equipment or training, which are sunk investments and have little or no value outside the specific vertical relationship. For instance, a component manufacturer may have to build specific machines in order to satisfy the requirements of one of its customers in circumstances where the machines may be unsuitable for use with other customers and it may be impossible to resell them. In the absence of a vertical agreement, the investing party may find itself in a weak bargaining position once it has made the relationship-specific investment, as it risks being 'held up' during negotiations with its trading partner. The threat of such opportunistic hold-up may lead to sub-optimal investments by the investing party. Vertical agreements may help remove or alleviate the scope for hold-up. For example, non-compete obligations, quantity forcing, or exclusive sourcing can lessen the hold-up problem when the relationship-specific investment is made by the supplier, whereas exclusive distribution, exclusive customer allocation or exclusive supply can lessen the hold-up problem when the investment is made by the buyer.

(f) The specific hold-up problem that may arise where there is a 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 a minimum purchasing requirement; or exclusive sourcing.

(h) Uniformity and quality standardisation: a vertical restraint may help create or promote a brand image by imposing a certain measure of uniformity and quality standardisation on the distributors. This can protect the reputation of the brand, increase the attractiveness of the products concerned for end users and increase sales. Such standardisation can, for instance, be achieved through selective distribution or 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.

10.11 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).

10.12 There is a large degree of substitutability between various 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.[108] However, the negative effects on competition may differ between the various vertical restraints, which is taken into account when indispensability is assessed as one of the conditions for exemption under section 9(1).

Negative effects of vertical agreements on competition

10.13 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,[109] 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

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[108] These vertical restraints are further explained below.
[109] 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.

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.

10.14 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. 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.

10.15 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.

10.16 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.[110]

Relevant factors for the assessment under the Chapter I prohibition

10.17 In assessing cases above the market share threshold of 30%, the CMA will undertake a full competition analysis. While other factors may be taken into account on a case-by-case basis, 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;

[110] Cumulative effects can justify the cancelation of the benefit of block exemption provided by the VABEO.

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

(d) market position of buyers of the contract products[111];

(e) entry barriers;

(f) level of trade;

(g) nature of the product;

(h) dynamics of the market.

10.18 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.

10.19 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 share 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 deduced from the way in which the agreement is implemented by the parties and the incentives that they face.

10.20 The market position of the parties provides an indication of the degree of market power, if any, held 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 (eg by having the best site), from holding essential patents or having superior technology, or 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. Branding tends to increase product differentiation and reduce the substitutability of a product, leading to reduced elasticity of demand and an increased possibility to raise prices.

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[111] The notion of 'products' includes both goods and services.

10.21 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 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.

10.22 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 the customer's demand for possible suppliers. Other indicators include 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 ability and incentive to bring new sources of supply on to the market in the case of a small but permanent increase in relative prices.

10.23 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 (IPRs), ownership of resources where the supply is limited (for instance as a result of natural limitations), a first mover advantage, and brand loyalty of consumers created by strong advertising over a period of time. The question of whether some of those factors should be considered 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 which 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.

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

10.25 Vertical restraints 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.

10.26 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 end users, which 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 relevant 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 prevents 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 the section 9 exemption

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. The assessment of efficiencies against anti-competitive effects takes place within the framework of section 9(1), which provides an exemption from the Chapter I prohibition if certain cumulative conditions are met. For that exemption to be applicable the following conditions must all be fulfilled:

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

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

(c) the restrictions on competition must be indispensable to attain the efficiencies; 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[112] and on the basis of the facts existing at any given point in time.[113] The assessment is sensitive to material changes in the facts. The 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.[114] 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.

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[112] See Joined Cases 25/84 and 26/84 *Ford* [1985] ECR 2725.
[113] 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).
[114] 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.

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 10.6 to 10.12, by improving the way in which the parties conduct their complementary activities.

10.33 The second condition of section 9(1), 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.[115] In other words, the efficiency gains must fully off-set the likely negative impact on prices, output and other relevant factors caused by the vertical agreement.

10.34 Regarding the third 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 the section 9 exemption 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.

10.35 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

[115] 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. See also the judgment of the Supreme Court in *Sainsbury's v Mastercard* [2020] UKSC 24, paragraph 174.

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.

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 the buyer to accept such an offer only if 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, 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.[116] 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 by 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

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

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 anti-competitive effect. A tied market share of less than 5% is not considered in general to contribute significantly to a cumulative anti-competitive effect.

10.43 In cases where the market share of the largest supplier is below 30% and the combined market share of the five largest suppliers is below 50%, there is unlikely to be a single or a cumulative anti-competitive effect. 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 An assessment of the scale of entry barriers is important to establish whether there is anti-competitive foreclosure. If 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 buyer 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 in that market and for consumers. It is in particular unlikely that consumers as a whole will benefit if 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 affected 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 share of demand that is contestable. Below the level of dominance an anti-competitive foreclosure effect may, however, arise in cases where there is a cumulative effect. 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, a cumulative anti-competitive effect 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 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 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 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, land or a vehicle owned by the supplier or leased by the supplier from a third party not connected with the buyer, the possibility of imposing effective remedies to address a possible foreclosure effect resulting from a single branding agreement 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 single branding produces appreciable anti-competitive effects, it is necessary to consider whether the vertical agreement meets the conditions for exemption under section 9(1). 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 10.10, may be particularly relevant.

10.53 In relation to efficiencies described in paragraph 10.10(b), 10.10(e) and 10.10(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 10.10(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 10.10(e)), a non-compete or quantity forcing obligation 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 that 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 under section 9(1) of an anti-competitive foreclosure effect on the market caused by that agreement. In the event of capital market imperfections, it may be more efficient for the supplier of a product to provide a loan rather than a bank (see paragraph10.10(i)).

However, in such a case the loan should be provided in the least restrictive way possible and the buyer should generally not be prevented from terminating the obligation and repaying the outstanding amount of the loan at any point in time and without payment of any penalty.

10.56 The transfer of substantial know-how (see paragraph 10.10(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 more densely populated areas. It has 10 competitors, but the products of some of them are only available in certain locations and they 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 and it provides its tied retailers with special stocking cabinets for its product.

This results in a situation where, 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, even though it is in those areas that they would prefer to enter the market. In addition, owing to the strong brand and product differentiation, and 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 involve special know-how and are not brand specific. Accordingly, it is unlikely that the conditions for exemption under section 9(1) are fulfilled.

Example 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 offers financing and equipment at favourable rates. The contracts have a duration of five years and the loan is to be repaid 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 amount of the 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. There are 12 competing producers, most of which are small, with the biggest having a market share of 20%, and they use 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. It appears that the resellers often have difficulty in obtaining loans from banks and are generally too small to obtain capital through other means, such as by issuing shares. In addition, producer X is able to demonstrate that concentrating its sales on a limited number of resellers allows it to plan its sales better and to save transport costs. In the light of the efficiencies generated by the purchasing obligation, on the one hand, and the 25% non-tied share in the contracts of producer X, the real possibility for early termination of the contracts, 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 exemption under section 9(1).

Exclusive distribution

10.57 In an exclusive distribution system (as defined in Article 8(7) of the VABEO), the supplier allocates a geographical area or customer group exclusively to itself or to one or a limited number of buyers, while restricting other buyers from actively selling into the exclusive geographical area or to the exclusive customer group.

10.58 Suppliers often use exclusive distribution systems to incentivise distributors to make the financial and non-financial investments needed to develop the supplier's brand in a geographical area where the brand is not well-known or to sell a new product in a particular geographical area or to a particular customer group or to incentivise distributors to focus their selling and promotional activities on a particular product (eg special marketing or display efforts). For distributors, the protection provided by exclusivity may enable them 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 geographical area or customer group. Exclusive distribution shall not be used to shield a large number of distributors from competition located outside the exclusive geographical area. To that end, the number of appointed distributors should be determined in proportion to the allocated geographical area or customer group in such a way as to preserve the incentive of the distributors to invest in promoting and selling the supplier's goods or services, while providing the supplier with sufficient flexibility to design its distribution system. If there are too many exclusive distributors, there is an increased risk that they may free-ride on each other's investments, thereby eliminating the efficiency that exclusive distribution is intended to achieve.

10.60 The appointed distributors must be protected by the supplier from active sales into the exclusive geographical area or to the exclusive customer group by the supplier's other buyers. When a supplier allocates an exclusive geographical area or customer group to more than one distributor, all these distributors must benefit from the same protection against active sales by the supplier's other buyers. However, active and passive sales within the exclusive geographical area or exclusive customer group by these distributors that have been appointed to sell to end users cannot be restricted.

10.61 The vertical agreements used for exclusive distribution should define the scope of the geographical area or customer group that is exclusively allocated to the distributors. The exclusive geographical area may cover the UK as a whole or an area that is smaller or larger in size. The exclusive customer group may be defined by using one or more criteria, for example, by the occupation or activity of the customers or by using a list of specific identified customers. Depending on the criteria used, the customer group may be limited to a single customer.

10.62 When a geographical area or a customer group has not been exclusively allocated to one or more distributors, the supplier can reserve such a geographical area or customer group for itself. In which case it must inform all its distributors. This does not require the supplier to be commercially active in the reserved geographical area or in relation to the reserved customer group since the supplier may wish to reserve the area or group for the purpose of allocating it to other distributors in the future.

10.63 The remainder of this section provides guidance for the assessment of exclusive distribution in cases where the parties market shares exceed the 30% threshold.

10.64 In an exclusive distribution system, where the supplier exclusively allocates a geographical area 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.

10.65 The number of distributors to which a geographical area or a customer group 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, but also the lower the likelihood that the exclusive distributors have an incentive to invest in order to develop that brand and promote the supplier's products.

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 at the supplier or distributor level. 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 any reduction in intra-brand competition.

10.67 The position of the supplier's competitors can have a dual significance. The existence of strong competitors generally indicates that any reduction in intra-brand competition is likely to be 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 or softening of competition. The loss of intra-brand competition can increase that risk, especially when several suppliers operate similar distribution systems.

10.68 Multiple exclusive dealerships, that is, when different suppliers appoint the same exclusive distributor(s) in a given geographical area, may further increase the risk of collusion 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 geographical area, inter-brand competition may be substantially restricted for those brands. The higher the cumulative market share of the brands distributed by the exclusive multiple brand dealers, the higher the risk of collusion or softening of competition and the greater the reduction of inter-brand competition. If one or more retailers are exclusive distributors for a number of brands, there is a risk that a reduction of the wholesale price by one supplier for its brand will not be passed on by the exclusive retailers to the consumer, as it would reduce the retailers' sales and profits made with the other brands. Relative to a situation without multiple exclusive dealerships, suppliers will have a reduced incentive to enter into price competition with one another. Where the market shares of the suppliers and buyers are below the 30% threshold of the VABEO, such cumulative anti-competitive effects may be a reason to cancel the benefit of the block exemption provided by 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. The combination of exclusive distribution and single branding can make it more difficult for other suppliers to find alternative distributors, in particular when single branding is applied to a dense network of exclusive distributors with small geographical areas or in the case of a cumulative anti-competitive effect.

10.70 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 geographical area. 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, this increases the possibility for the supplier to limit intra-brand competition by applying dissimilar conditions of sale to the detriment of consumers, unless the combination of exclusive distribution with exclusive sourcing creates efficiencies that benefit consumers.

10.71 Foreclosure of other distributors is not an issue where the supplier that operates the exclusive distribution system appoints a large number of exclusive distributors on the same relevant 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 a very large geographical area 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.

10.72 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 geographical areas, on one or more suppliers.

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

10.74 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, as online sales may facilitate purchases from distributors beyond the exclusive geographical area or customer group.

10.75 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 when the geographical areas are large territories, since consumers may have limited choice (ie having to choose between a high price/high service distributor and a low price/low service distributor for a leading brand).

10.76 A manufacturer that chooses a wholesaler to be its exclusive distributor will normally do so for a larger geographical area, 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 level 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.

10.77 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 10.57 to 10.76 of this Guidance and should also take account of the following guidance.

10.78 As for exclusive allocation of geographical area, 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.

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

10.80 Exclusive distribution may lead to efficiencies, especially where investments by the distributors are required to protect or build up the brand image. For example, exclusivity may be necessary to incentivise distributors to invest in developing the supplier’s brand or in providing demand-enhancing services. 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.

10.81 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 geographical area 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.

10.82 Exclusive distribution systems based on the allocation of exclusive customer groups that restrict intra-brand competition may also fulfil the conditions for 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 example, where a supplier appoints a dedicated distributor to respond to invitations to tender from public authorities relating to IT equipment or office supplies). The depreciation period for these investments is an indication of the duration for which the allocation of exclusive customer groups may be justified. In general, the justification for exclusive customer allocation is strongest for new or complex products, or for products requiring adaptation to the needs of a particular customer. Identifiable differentiated needs are more likely for intermediate products, namely products that are sold to various types of professional buyers. By contrast, the allocation of 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 geographical area which corresponds to the town, or area within the town, in which they are located. In most geographical areas, the four market leaders happen to appoint the same exclusive retailer ('multiple dealership'), often centrally located and specialised in the relevant 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, mainly 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 national advertising campaigns and strong brand images, whereas the fringe producers do not advertise their products at the national level. The market is 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 geographical area 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 geographical area. 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 between 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 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 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 (eg office, chemical plant, or hospital). 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 customer. To ensure that the distributors would specialise, the company assigned to each distributor an exclusive group of customers and prohibited active sales to the others' exclusive customer groups. After five years, all the exclusive distributors will be allowed to sell actively to all groups 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 group of customers in order to learn the trade, and as the possible anti-competitive effects seem limited in a dynamic market, the conditions for exemption under section 9(1) are likely to be fulfilled.

Selective distribution systems

10.83 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 geographical area reserved by the supplier to operate that system.

10.84 The criteria used by the supplier to select distributors can be qualitative or quantitative in nature (or both). Quantitative criteria limit the potential number of dealers more directly by, for instance, fixing the number of dealers. Qualitative criteria limit the number of distributors indirectly by imposing conditions that cannot be met by all distributors, for instance the training of sales personnel, the service to be provided at the point of sale, the product range to be sold, or the advertising and presentation of the products.[117] These criteria can be changed throughout the duration of the selective distribution agreement.

10.85 Selective distribution systems are comparable to exclusive distribution systems in that they restrict the number of authorised distributors and the possibilities of resale. The main difference with exclusive distribution is the nature of the protection granted to the distributor. In an exclusive distribution system, the distributor is protected against active selling from outside its exclusive geographical area, whereas in a selective distribution system, the distributor is protected against active and passive sales by unauthorised distributors.

10.86 The possible competition risks of selective distribution systems include a reduction in intra-brand competition and, especially in case of cumulative effect, the foreclosure of certain types of distributors, as well as the softening of competition and potentially the facilitation of collusion between buyers due to the limitation of the number of buyers. Suppliers who adopt a selective distribution model must therefore take particular care to ensure that the implementation and enforcement of any selective distribution arrangement does not lead to an infringement of the Chapter I prohibition.[118]

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[117] See for example Case T-88/92 *Groupement d'achat Édouard Leclerc v Commission,* EU:T:1996:192, paragraphs 125 onward.

[118] 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.

10.87 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.

10.88 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 Court of Justice of the EU in the *Metro* judgment[119] (the '*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.[120] 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 selective distribution system that falls outside the scope of the Chapter I Prohibition may be legitimate for high-quality or high-technology products.[121] 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

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[119] 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.

[120] 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 upheld 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.

[121] 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.

goods are displayed in a manner that contributes to sustaining this aura of luxury may be necessary to preserve their quality.[122] 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. Third, the criteria laid down must not go beyond what is necessary.[123]

10.89 The assessment of selective distribution under the Chapter I prohibition requires a separate analysis of each potentially restrictive clause of the agreement under the *Metro* criteria, as well as an overall assessment.[124] This implies, in particular, determining whether each 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.[125] Such requirements are unlikely to be met by hardcore restrictions. Conversely, for instance, it may be proportionate for a supplier of luxury goods to prohibit its authorised distributors from using online marketplaces, as long as this does not indirectly prevent the effective use of the internet by the authorised distributor to sell the goods to particular geographical areas or customers. In particular, such a prohibition on the use of online marketplaces would not restrict sales to particular geographical areas or customers where the authorised distributor remains free to operate its own online store and to advertise online in order to raise awareness of its online activities and attract potential customers. If the restrictive clause is proportionate, it falls outside the scope of the Chapter I prohibition and no further analysis is required.

10.90 Irrespective of whether they do fulfil the *Metro* criteria, qualitative and quantitative selective distribution agreements 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.[126] 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

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

[123] 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.

[124] See paragraph 10.88 of this Guidance.

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

[126] 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.

of the product concerned and regardless of the nature of the selection criteria. Moreover, the supplier is not obliged to publish its selection criteria.[127]

10.91 Where in a particular case a selective distribution agreement that benefits from the block exemption restricts competition appreciably at the supplier or distributor level and does not generate efficiencies that outweigh the effects of the restriction, for example because the selection criteria are not linked to the characteristics of the product or are not necessary to improve the distribution system of the product, the benefit of the VBER is likely to block exemption may be withdrawn.

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 Where the VABEO does not apply, 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 is only likely to be problematic where 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 loss of intra-brand competition. Another important factor is the number of selective distribution networks present in the same relevant 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, which can lead to a cumulative effect.

10.94 In the case of a cumulative effect, it is necessary to take into account the market position of the suppliers that apply selective distribution. Where a majority of the leading suppliers in a market use selective distribution systems, there could be foreclosure of certain types of distributors (eg 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 a selective distribution system. 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

[127] See also by analogy judgment of 14 June 2012, Auto 24 SARL v Jaguar Land Rover France SAS, Case C-158/11, EU:C:2012:351, paragraph 31.

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 systems, the cancellation of the benefit of the block exemption provided by the VABEO (Part 13 of the Guidance) may be considered if there are cumulative anti-competitive effects arising from parallel networks of selective distribution systems. However, a cumulative anti-competitive effect is unlikely to arise if 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 of the 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 of the largest suppliers apply selective distribution. This is particularly likely to be the case if the agreements concluded by the largest suppliers contain quantitative selection criteria which directly limit the number of authorised distributors 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 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, especially price discounters or online-only distributors offering lower prices to consumers, thereby limiting distribution to the advantage of certain existing channels and to the detriment of 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 distributors to achieve a minimum amount of annual purchases, are less likely to produce net negative effects, if such a minimum amount does not represent a significant proportion of the distributor's total turnover from the type of products in question and it does not go beyond what is necessary for the supplier to recoup its relationship-specific investment 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 selection 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, in particular, 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 combined 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 10.10(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 10.10(b)) or to help create a brand image (paragraph 10.10(h)) the nature of the product is important. 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 restrictions of authorised distributors' places of establishment, 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 exemption under section 9(1) if the combination is indispensable to protect substantial and relationship specific investments made by the authorised distributor (paragraph10.10(e)). 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, by imposing 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 consumers through a selective distribution system. There are several criteria for admission to the system: 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 system 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 system. 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 large supermarkets. 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 quality image comparable 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 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 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 systems are 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 undertaking is appointed as the authorised 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 of authorised dealers. 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 dealerships. 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 geographical area.

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 likely that the block exemption will have to be cancelled because of the cumulative anti-competitive effects resulting in less choice and higher prices for consumers.

Franchising

10.104 Franchise agreements contain licences of intellectual property rights (IPRs) 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, for example selective distribution or non-compete obligations.

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 franchising can be considered as falling outside the scope of the Chapter I prohibition. This concerns, for instance, restrictions that prevent the franchisee from using the know-how and assistance provided by the franchisor for the benefit of the franchisor's competitors and non-compete obligations relating to the goods or services purchased by the franchisee that are 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%. Guidance on the licensing of IPRs contained in franchise agreements is provided in paragraphs 6.39 to 6.54 of this Guidance. Vertical restraints contained in franchise agreements will be assessed under the guidance applicable to the distribution system that most closely corresponds to the nature of the particular franchise agreement. For instance, a franchise agreement that gives rise to a closed network since franchisees are prohibited from selling to non-franchisees are to be assessed under the principles applicable to selective distribution. In contrast, a franchise agreement that does not create a closed network but which grants geographical exclusivity and protection from active sales by other franchisees shall be assessed under the principles applicable to exclusive distribution.

10.107 Franchising agreements that do not benefit from the block exemption provided by the VABEO require an assessment to see if they fulfil the conditions for 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 to protect the know-how.

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 and 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 its own retail outlets all operating under the same trade name and with the uniform fun image (eg by having a common style of lay-out in its shops and common advertising). In order to expand sales the manufacturer started a franchising system.

In order to ensure uniform product quality and shop image, 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 undertakes not to appoint another franchisee or operate a retail outlet itself in a given contract geographical area. The franchisor is also under an obligation to update and further develop its products, business outlook and 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 or overseas in addition to selling products from regional producers. On the regional market the franchisor's products compete with other brands of sweets. 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 convenience stores, newsagents, 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.

Most of the obligations contained in the franchise agreements may be deemed necessary to protect IPRs or maintain the common identity and reputation of the franchise network and fall outside the Chapter I prohibition. The restrictions on selling (ie the allocation of a contract geographical area and selective distribution) provide an incentive to the franchisees to invest in the colouring machine and the franchise concept and 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 allows 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 large number of potential outlets available to other sweet producers. The franchise agreements of this franchisor are likely to fulfil the conditions for 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. They may 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-compete obligations. 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 10.71). 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 does not have 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 buyer 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 the buyer 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 competing buyers on the upstream purchase 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 foreclosure 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 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 problem.

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 obligation may be combined with non-compete obligations. The combination with non-compete obligations brings in the principles 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 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 to the assessment of possible foreclosure. Anti-competitive foreclosure is less likely in the case of an intermediate product or where the product is homogeneous. First, 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 that needs to respond to the demand of consumers for whom brands may play an important role. Second, 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 (10.10(e) and 10.10(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 10.10(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 component (an 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. Buyer B will have to make considerable investments to incorporate the new component. It is agreed that supplier 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. Buyer B is obliged to buy the new product only from supplier A for the same period of five years. Both supplier A and buyer 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 supplier A is 35%. There are two other component suppliers with around 20-25% market share and a number of small suppliers. Given the considerable investments by both parties, the agreement is likely to fulfil the conditions for 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 a maximum of 40% of the market.

Restrictions on the use of online marketplaces

10.118 Online marketplaces connect merchants and potential customers with a view to enabling direct purchases and are generally providers of online intermediation services. Online services 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 as advertising services or digital comparison tools.[128]

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 small and medium-sized retailers that do not operate their own online store or are not well known to end users.

10.120 Suppliers may wish to restrict the use of online marketplaces by their buyers,[129] for instance to protect the image and positioning of their brand, to discourage the sale of counterfeit products, to ensure sufficient pre- and post-sale services or to ensure that the retailer maintains a direct relationship with customers. The restrictions may range from a total ban on the use of online marketplaces to restrictions on the use of online marketplaces that do not meet certain qualitative requirements. 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 in which their goods or services may be sold. 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 it requires that the domain name of any website used by the retailer contains the name of the retailer's business.

10.121 A restriction on the use of online marketplaces in a vertical agreement is exempted by the VABEO provided (i) the agreement does not, directly or indirectly, have the object of preventing the effective use of the internet by the buyer to sell the contract goods or services to particular geographical areas or

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[128] 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.
[129] Final report on the E-commerce Sector Inquiry, COM(2017) 229 final, 10 May 2017; section 4.4.

customers, (ii) the market shares of each of the supplier and the buyer do not exceed 30% and (iii) the vertical agreement does not include any hardcore restrictions under the VABEO or any excluded restriction under the VABEO that cannot be severed from the rest of the vertical agreement.

10.122 As set out in Section 8 of this Guidance, a restriction or ban of sales on online marketplaces concerns the manner in which the buyer may sell and does not limit sales into a specific geographical area or to a specific customer group. While such a restriction or ban restricts the use of a specific online channel, other online channels remain available to the buyer.[130] Despite a restriction or a ban of sales on online marketplaces, the buyer may still sell the contract products via its own online store and other online channels and it may use search engine optimisation techniques or advertise online, including on third-party platforms to increase the visibility of its online store or other sales channels.[131] Therefore such a restriction on the use of online marketplaces may in principle benefit from the block exemption provided by the VABEO.

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 10.17 to 10.35 provide the relevant framework for this assessment. Restrictions on the use of online marketplaces for sales into geographical areas 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 agreed in selective distribution systems. Paragraph 10.83 onwards explains the criteria for establishing whether a selective distribution system may fall outside the scope of the Chapter I prohibition. In instances where the supplier does not enter into an agreement with the online marketplace, the supplier may be unable to verify that the online marketplace meets the conditions that its authorised distributors must fulfil for the sale of the contract products. If that is the case, a restriction or ban on the use of online marketplaces may 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 appoints the operator of an online marketplace as a member of its selective distribution system, or where it restricts the use of online marketplaces by some authorised distributors but not others, or where it

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

restricts the use of an online marketplace, but uses that online marketplace itself to sell the contract products, restrictions on the use of such online marketplaces are unlikely to fulfil the requirements of appropriateness and proportionality.[132]

10.125 Where a selective distribution system falls within the scope of the Chapter I prohibition, the vertical agreement and any restrictions on the use of online marketplaces must be assessed under the Chapter I prohibition.

10.126 The main risk to competition arising from restrictions on the use of online marketplaces are a reduction of intra-brand competition. For instance, certain authorised distributors, such as small and medium-sized buyers, may rely on online marketplaces to attract customers. Restrictions on the use of online marketplaces may deprive those buyers of a potentially important indirect sales channel and reduce the competitive constraint they exert on other authorised distributors.

10.127 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 a reduction of inter-brand competition is by itself unlikely to lead to negative effects for consumers if inter-brand competition is strong at the supplier and distributor levels. 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 online 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 also necessary to take into account the cumulative effect of any other restrictions on online sales or advertising imposed by the supplier.

10.128 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 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 exemption under section 9(1). This may be the case where

[132] Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH,* ECLI:EU:C:2017:941, paragraphs 43 to 58.

the online marketplace allows retailers to create their own brand shop within the online marketplace and thus exert more control over the manner in which their goods or services are sold. Any quality-related justifications relied on by the supplier will be unlikely to meet the conditions for exemption under of section 9(1) in the following situations:

(a) the supplier itself uses the online marketplace that the buyer is prevented from using;

(b) the supplier imposes the restriction on some distributors but not on others; or

(c) the operator of the online marketplace is itself an authorised member of the selective distribution system.

Restrictions on the use of digital comparison tools

10.129 Digital comparison tools (DCTs) are web-based, app-based or other digital intermediary services used by consumers to compare goods or services from a range of businesses, and which potentially lead consumers to switch to or purchase products from another business. Comparison parameters may include price, product characteristics or various measures of quality. DCTs typically do not enter into the primary contract with consumers.[133] DCTs help consumers compare goods 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).[134] DCTs enable retailers to increase their visibility and generate traffic for their online stores. In general, DCTs intensify competition between retailers and deliver benefits for consumers.[135]

10.130 Unlike online marketplaces, DCTs[136] typically do not offer sale and purchase functionality, but rather re-direct customers to the online store of the retailer, enabling a direct transaction between the customer and the retailer.[137]

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[133] Definition used in the CMA Digital Comparison Tools Market Study – Glossary.
[134] CMA Digital Comparison Tools Market Study – Final Report – page 19.
[135] See CMA Digital Comparison Tools Market Study – Final Report – in particular, Part 4.
[136] Note that DCTs fall into the category of indirect sales channel referred to in Part 9 'Wide retail parity obligations'.
[137] 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.

10.131 Suppliers may wish to restrict the use of DCTs, 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.[138] 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.

10.132 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 a ban on the use of DCTs.

10.133 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 a vertical agreement restricts the buyer's ability to reach potential customers, inform them about its offering and direct them to its online store. As set out in paragraph 8.49 of this Guidance, a ban on the use of DCTs prevents the buyer from using an entire online advertising and indirect sales channel, which is a hardcore restriction subject to the exceptions in Article 8(3), (4) and (5) VABEO. As mentioned above, banning the use of DCTs hinders the buyers from selling to customers who are located outside its area of activity and who wish to purchase online. It could therefore lead to market partitioning and reduced intra-brand competition.

10.134 Conversely, if the restriction is limited to preventing the use of DCTs to target customers in a geographical area or customer group that is reserved exclusively to the supplier or allocated exclusively to other distributors (exclusive distribution) the restriction can benefit from the block exemption. It would be covered by the exceptions in Article 8(3)(a), Article 8(4)(a) and Article 8(5)(a) VABEO because such restriction would be a restriction of active sales into an exclusive geographical area or customer group.

10.135 Vertical agreements which restrict the use of DCTs, but which do not directly or indirectly preventing the use of all DCTs, for instance a requirement that DCTs must meet certain quality standards, are unlikely to restrict sales to

[138] Final report on the E-commerce Sector Inquiry, COM(2017) 229 final, 10 May 2017; section B.4.5.

customers in a specific geographical area or customer group, but rather determine the methods of sale and may therefore generally benefit from the block exemption provided by the VABEO.[139] The following guidance is provided for the assessment of restrictions on the use of DCTs that that do not benefit from the block exemption provided by the VABEO (for instance because the market share thresholds in Article 6(1) VABEO are exceeded).

10.136 Restrictions on the use of DCTs are often imposed in selective distribution systems. Paragraph 10.83 onwards of this Guidance explains the criteria for establishing whether a selective distribution system falls outside the scope of the Chapter I prohibition. Where restrictions preventing the use of DCTs are used in a selective distribution system, it is first necessary to assess whether the restrictions are an appropriate and proportionate means to preserve the quality or ensure the proper use of contract products. In this respect, it should be noted that DCTs re-direct potential customers to the online store of the authorised distributor for the conclusion of the sales transaction and that the supplier is typically able to exert control over the authorised distributor's online store through the selection criteria and by imposing requirements in the selective distribution agreement.

10.137 Where restrictions on the use of DCTs are used in a selective distribution agreement that falls within the scope of the Chapter I prohibition or in other types of distribution agreement, it is necessary to assess whether the restriction has an appreciable restrictive effect on competition within the meaning of the Chapter I prohibition. Restrictions on the use of DCTs may soften price competition or partition markets, ultimately impacting inter-brand and intra-brand competition. For example, such restrictions may reduce price competition, by restricting the possibility for the buyer to inform potential customers about lower prices. Intra-brand competition may be particularly affected where a supplier imposes the restrictions on only some of its distributors, or where the supplier itself uses the DCTs covered by the restrictions. To the extent that buyers are limited in their ability to rely on a potentially significant online advertising channel they may only be able to exercise limited competitive pressure on the supplier or any other distributors not facing that restriction.

10.138 Relevant factors for the assessment under the Chapter I prohibition include:

(a) the market position of the supplier and its competitors;

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

(b) the importance of DCTs as an advertising and indirect sales channel in the relevant market for the sale of the contract goods or services;

(c) the type and scope of the restrictions and the relative importance of any specific DCTs whose use is restricted or banned; and

(d) whether the supplier also imposes restrictions on the buyer's ability to use other forms of online advertising.

10.139 The combined restrictive effect of the restriction on the use of DCTs and any other restrictions on online advertising imposed by the supplier should also be taken into account.

10.140 As set out in paragraph 10.129 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 exemption under section 9(1), the assessment must consider whether such efficiencies may also be achieved through less restrictive means. This may be the case where, for example, the use of DCTs is made conditional on the service also providing comparisons or reviews relating to the quality of the goods or services concerned, the level of customer service provided by the buyer, or other features of a buyer's offering. Any assessment of quality-related justifications under section 9(1) should take into account that the sale is not concluded on the DCT itself, but on the website of the distributor, which, on the basis of the agreement entered into with the supplier, should meet the supplier's quality requirements.

Upfront access payments

10.141 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[140], so-called 'pay-to-stay' fees[141], 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 shares do not exceed 30%. This section provides guidance for the assessment of upfront access payments in

[140] Fixed fees that manufacturers pay to retailers in order to get access to their shelf space.
[141] Lump sum payments made to ensure the continued presence of an existing product on the shelf for some further period.

individual cases above the market share threshold in Article 6(1) of the VABEO.

10.142 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).

10.143 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 pursuant to Article 3(5) (see section 6 of this Guidance on vertical agreements between competitors and 'dual distribution').

10.144 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 only arises where the distribution market is highly concentrated.

10.145 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.

10.146 Furthermore, due to the asymmetry in information referred to in paragraph 10.145, 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 supplier, thereby contributing to an optimal rate of product launches.

Category Management Agreements

10.147 Category management agreements are agreements under which the distributor entrusts the supplier (the 'category captain') with the marketing of a category of products, often including not only the supplier's products, but also the products of the supplier's 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.

10.148 In most cases category management agreements do not raise concerns under the Chapter I prohibition. However, they may distort competition between suppliers, and result in anti-competitive foreclosure of other suppliers, where the category captain is able to limit or disadvantage the distribution of products of competing suppliers.

10.149 In general, distributors will not have an interest in limiting their choice of products. However, where the distributor also sells competing products under its own brand, it may also have incentives to exclude certain suppliers. 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 the market coverage of the category management agreements, the possible cumulative use of such agreements, and the market position of competing suppliers and the distributor.

10.150 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. Such agreements may also facilitate collusion between suppliers through increased opportunities to exchange sensitive market information via retailers, such as information related to future pricing, promotional plans or advertising campaigns.[142]

10.151 The use of category management agreements may lead to efficiencies. Such 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 at the right time. In general, the higher the degree of inter-brand competition and the lower consumers' switching costs, the greater the economic benefits achieved through category management.

Tying

10.152 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 of a dominant position within the meaning of the Chapter II prohibition.[143] 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.

10.153 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.[144] 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[145], 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

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[142] The VABEO does not cover such direct information exchanges between competitors, see paragraph 6.13 of this Guidance.
[143] 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.
[144] Court of First Instance in Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, paragraphs 917, 921 and 922.
[145] Court of First Instance in Case T-30/89 *Hilti v Commission* [1991] ECR II-1439, paragraph 67.

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.

10.154 Tying may lead to anti-competitive 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.

10.155 Tying may also directly lead to prices that are above the competitive level, especially in three situations. First, 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 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, the tying may allow 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, in the case of long-term contracts or in the case of aftermarkets with original equipment with a long replacement time, it may be difficult for customers to calculate the consequences of the tying.

10.156 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 that 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.

10.157 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.

10.158 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.

10.159 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.

10.160 Where appreciable anti-competitive effects are established, it is necessary to assess whether the conditions for exemption under section 9(1) are fulfilled. 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 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 10.10(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 requires the buyer to purchase the tied product from designated suppliers, 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)__

10.161 Paragraphs 8.79 to 8.90 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.

10.162 As set out in 8.79, 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.

10.163 With the exception of wide retail parity obligations (as defined in Article 8(7) 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

10.164 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.

10.165 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).

10.166 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.[146] 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.

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

Parity obligations relating to non-retail conditions

10.168 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%.

10.169 In carrying out an assessment where the VABEO does not apply, it is necessary to consider that, in principle, this type of obligation is capable of disincentivising competition between intermediaries in a similar way as retail parity obligations. It is also necessary to take into account the conditions of competition downstream, that is, between the undertakings which buy the intermediated products.

10.170 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

[146] 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*', paragraph 3.36.

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 of these obligations 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)

10.171 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, pre-sales services or demand-enhancing promotion if the benefits of such investments in terms of increased sales go to competing platforms or direct sales channels which can offer the same goods or services on more favourable conditions.

10.172 Relevant factors for the assessment of the application of the section 9(1) exemption 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 link between the benefit claimed and the use of the particular type of parity obligation.

10.173 Narrow retail parity obligations 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.

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, or within such longer period of working days commencing with the relevant day as the CMA may, having regard to the particular circumstances of the case, agree with the person in writing.[147] 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 particular circumstances of the case, including 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

[147] 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, which the CMA will have regard to when exercising the power in Article 12(1) VABEO.[148]

[148] 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 1 June 2022 and will cease to have effect on 1 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 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.[149] 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.

[149] 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 11.1).

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 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 cancellation 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).[150] 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 have in place purely qualitative selective distribution while other suppliers have in place 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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[150] 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.