

## Online sales and current rules under antitrust regulators' scrutiny

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Both the importance of online sales and their scrutiny by antitrust regulators in the EU show no signs of abating. The European Commission's (EC) E-commerce [report](#), published in May 2017, highlighted the shift in the online commerce market, specifically noting an increase in the use of selective distribution models (where brand owners require their products to be resold in a particular way and potentially not resold on certain sites, such as online marketplaces). Whilst the EC has begun to question the effectiveness, efficiency, relevance and coherence of the existing EU rules for analysing these types of restrictions, the issues continue to come before the Courts, in cases including, [Ping](#) and [Guess](#).

### ***Review of the Vertical Agreements Block Exemption Regulation***

One particular set of rules in question is the Vertical Agreements Block Exemption Regulation ([VBER](#)), which provides a "safe harbour" for agreements that meet its criteria (including the market share of the parties to the agreement) and provided the agreement contains no "hardcore" restrictions of competition (e.g. price fixing, resale price maintenance). The EC believes that VBER, and its accompanying [guidelines](#) (together, the **Regulations**), should be re-evaluated in light of recent market trends and will determine whether it should let VBER "*lapse, prolong its duration or revise it*" (it is currently in force until 2022). Individuals and companies have already had an opportunity to comment on issues, and earlier this month a public consultation began, giving 'interested parties' (essentially those with business operations in the EU) the opportunity to provide further views and feedback. The deadline for comments is 27 May 2019.

### ***Responses from business***

The EC has already received comments from a number of interested parties on its evaluation of VBER. As expected, the focus of each party's comments varies, and the parties that have commented so far have vastly different views.

- Some parties state that the block exemption conditions are indispensable for achieving certain efficiencies and that any block exemption should be drafted carefully to ensure that agreements which should not be exempted are not exempted accidentally.
- Others want the Commission to address the impact of changing market conditions, especially

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increased concentration in the retail market and the growing power of distributors.

- There is some criticism that the Commission has focused on short-term lower consumer prices rather than considering long-term effects for innovation and quality competition, and criticism that the EC's role as overseer should be strengthened and that it should demand a more uniform approach from Member States.
- Others suggest that resale price maintenance should be assessed on a case by case basis (rather than an absolute prohibition), and there is also support for the current “bricks and mortar” requirements.
- Other contributions include the contention that selective distribution is fully justified as regards luxury brands and that the ability to ban resale on third-party platforms must be continued.

## ***Enforcement trends***

### ***Resale price restrictions and pricing algorithms***

Meanwhile, there have been a number of enforcement actions over the last few months: in July last year, the EC fined four consumer electronics manufacturers €111m (reduced for cooperation) for imposing fixed or minimum resale prices on their online retailers, and in September, the [CMA in the UK fined Ping](#) £1.45m (reduced on appeal) for preventing two UK retailers from selling Ping golf clubs online, a decision which was upheld by the [Competition Appeal Tribunal](#). Most recently, in December 2018, the [EC fined entities within the Guess group](#) of companies €39.8m for a breach of competition law that involved a strategy to divert online sales of Guess products towards Guess's own website and restricting intra-brand competition.

### **Retained block exemptions post Brexit**

At present, there is uncertainty as to what will happen to competition law (in general) in the UK after Brexit. In a no-deal situation, [the Competition \(Amendment etc.\) \(EU Exit\) Regulations 2019](#) will amend the existing Regulations regime to remove deficiencies (i.e. references to the TFEU and the internal market) and transfer the power to amend the Regulations (in this regard) from the EC to the Secretary of State, acting in consultation with the CMA. Once the Regulations expire (VBER expires in 2022), a retained Regulation may be replaced by domestic legislation, subject to a recommendation of the CMA, following consultation under the process set out in the [Competition Act](#). Under the deal proposed by the Prime Minister, it appears that the CMA may continue to apply EU competition law post-Brexit.

## **Conclusion**

Markets, especially e-commerce markets, change rapidly, and any Regulations need to be flexible enough to be fit for purpose throughout times of change and development. The current Regulations provide a degree of certainty as to the legality and enforceability of distribution agreements, but the Commission may not be aware of how much they are relied upon and may be surprised by the consultation responses.

As regards the UK, a large part of why the Regulations are so useful hinge on internal market membership; the relevance of the Regulations (amended, extended or otherwise) may diminish for businesses in the UK after Brexit.

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