Vertical Agreements

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1 Introduction

UK competition law and policy towards vertical agreements has developed significantly over the 20 years since the Competition Act 1998 (CA98) came into force.

First, policy has developed from a more laissez-faire, to a more interventionist, one.[1] At the time of the enactment of the CA98 the UK authorities took a permissive approach towards vertical agreements. This led, in rejection of the more heavy-handed approach adopted at that time in the EU under Article 101 TFEU, to the exclusion of most vertical agreements from the Chapter I prohibition of restrictive agreements. However, the dramatic modernisation of the EU attitude towards vertical agreements between 1997-2004, combined with the UK government's decision to withdraw the exclusion for vertical agreements in 2005, resulted both in vertical agreements being more closely scrutinised under the CA98 and the UK and EU approach towards them becoming closely aligned. One important distinction between EU and UK law in this sphere nonetheless results from the operation of the market investigation provisions of the Enterprise Act 2002 (EA02), which allows for the investigation of markets where it appears that competition is being prevented, restricted, or distorted, but where there is no obvious breach of the CA98 provisions (for example, where parallel but non-collusive courses of conduct are being pursued by undertakings operating in an oligopolistic market).[2] These provisions have proved helpful to scrutinise some vertical arrangements, in particular, where similar practices are widespread across a market or access to it is foreclosed to new competitors (perhaps as a result of the cumulative effects).

Secondly, some evolution has been demanded as a result of the exponential growth in the last 20 years of e-commerce which, as in other parts of the world, has had enduring effects on the way that goods and services are distributed in the UK. Numerous products are now sold online or through platforms, and price comparison websites exist to facilitate consumers' buying choices. This creates both opportunities, and challenges, for manufacturers and retailers and has fuelled new distribution practices – for example, more manufactures integrating vertically into online distribution, greater use of selective distribution systems (SDSs, selecting the type or number of outlets in which the supplier's products are sold and precluding dealers from selling to unauthorised distributors outside the network) and restraints on online selling.[3] Like other

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1 See *infra* Section 2.

2 Market investigations are discussed more fully in Chap 6 (see also *infra* Section 3.2).

3 See *infra* Chap 14 and the CMA's market study into Online Markets and Digital Advertising, Interim Report published 18 December 2019. See also the European Commission's Final Report on the E-commerce Sector Inquiry and accompanying Staff Working Document ('the Final Report', which summarises the main findings of the ecommerce sector inquiry and incorporates comments submitted by stakeholders during the public consultation) on 10 May 2017 SWD(2017) 154 final which recognises that e-commerce has led: a) more manufacturers to integrate vertically b) to wider use of SDSs; c) to increasing use of vertical restraints that allow for a greater control over the distribution of products, for example, through pricing restrictions, marketplace (platform) bans, restrictions on the use of price comparison tools and the exclusion of pure online players from distribution networks.

competition agencies, the CMA has therefore had to consider how traditional competition law rules, designed in a different era, apply to this new context.

This chapter charts these developments, focussing on Chapter I and the EA02 and leaving Chapters 4 and 5 to consider how the Chapter II prohibition applies to vertical agreements concluded by dominant undertakings. It commences in Section 2 by outlining how Chapter I and the EA02 have evolved to deal with vertical agreements and in particular how substantive assessment under the CA98 has come to parallel that conducted under EU law. Section 3 appraises some of the core UK jurisprudence and, in the light of this discussion Section 4 considers how the law could, or should, develop in the future, especially at the end of the transition period following the UK's departure from the European Union. An important issue considered is whether, post-Brexit, the UK authorities should continue to follow the EU jurisprudence in this sphere which has, arguably, been more significantly influenced by internal market considerations (and a particular concern about restraints that prohibit and limit the opportunities for parallel or cross-border trade and perpetuate price differences between Member States) than pure competition ones, or whether it should take a different course. Section 5 concludes that despite the developments in the UK jurisprudence more could be done to develop a coherent approach to vertical agreements, through guidelines and cases focussing on scenarios were presumptions of illegality do not apply.

2 Outline and Evolution of the Law

2.1 The Verticals Exclusion Order

At the time of the enactment of the CA98, the UK authorities were rarely concerned about vertical agreements in the absence of one of the parties having market power or the existence of networks of agreements. Even though the CA98 was modelled on Articles 101 and 102 and designed to align domestic law with it,[4] the government was consequently unwilling to follow the then strict EU approach taken to vertical agreements, according to which numerous agreements were, unless de minimis or block exempted, prohibited following a broad, form-based interpretation of Article 101(1).[5] To avoid having to follow EU law, the Government excluded all vertical agreements (agreements between undertakings which operated, for the purposes of the agreement, at a different level of the production or distribution chain) from the Chapter I prohibition, other than those that had the effect of fixing resale or minimum resale prices (RPM).[6] The early cases, between 2000-

4 See e.g., B Rayment, '4 The Consistency Principle: Section 60 of the Competition Act 1998' in B Rodger (ed) *Ten Years of UK Competition Law Reform* (Edinburgh University Press, 2010).

5 For a discussion of this approach and the modernisation process see e.g., A Jones, B Sufrin and N Dunne, *Jones and Sufrin's EU Competition Law: Text, Cases, and Materials* (Oxford University Press, 7th edn, 2019), Chap 5.

6 See CA98. s 50(1) and Competition Act 1998 (Land and Vertical Agreements Exclusion) Order 2000, SI 2000/310, Arts 2-4 (the exclusion did not apply to the Chap II prohibition or the EA02 however). Although the DGFT was conferred with power to withdraw the exclusion, this was never exercised. Indeed, in Case CP/1288-02, *Lucite International UK Ltd and BASF plc*, 29 November 2002, the DGFT declined to exercise his power to withdraw the exclusion from an agreement for the sale of hydrogen cyanide (HCN) concluded between BASF and Lucite (also a producer of HCN) and for the construction of a plant to convert HCN to acetone cyanohydrin (ACH). Although both parties produced HCN, and would jointly be producing ACH in the new plant, the agreement was covered by the order because it related to the conditions for the sale and purchase of HCN and the parties operated, for the purposes of the agreement, at different levels of the production or distribution chain. The DGFT concluded that even if withdrawn the agreement would, given the environmental benefits produced, have been likely to receive an exemption from the Chap I prohibition. He also declined with withdraw the exclusion order in Case CA98/3/2001, *Dixon Stores Group Ltd/ Compaq Computer Ltd/ Packard Bell Nec Ltd*, 6 April 2001.

2004, dealing with vertical agreements thus generally concerned RPM, hub and spoke agreements (see further Chapter 2), or the scope of the Verticals Exclusion Order (see further section 3).

One problem with the UK's initial approach was its (albeit deliberate) lack of consistency with EU law. Even though section 60 CA98 only provided for consistency with corresponding principles of EU law in so far as is possible and having regard to relevant differences in law and, prior to 2004, the OFT like many national competition authorities (NCAs) did not have power to apply Article 101, it was clear that, according to the EU legal order and the principle of supremacy of EU law, national law could not authorise an agreement which was prohibited under EU law.[7] A more permissive approach to vertical agreements under the CA98 could not therefore save an agreement which infringed Article 101. The difficulties resulting from this divergence became starker as modernisation approached, the EU approach to vertical agreements evolved significantly (following a recognition that appraisal of vertical agreements should be based not on their content and form, but taking account of their competitive effects) and it became evident that NCAs would be obliged to apply EU competition law when applying their own national competition laws to agreements that had an effect on trade between Member States.

Another concern was that the approach might be too permissive leading to a risk that some anticompetitive vertical agreements were going unchecked (a risk of Type II errors or false negatives, arising from an under-inclusive rule); the fact that vertical restraints might provide procompetitive effects did not mean that they would inevitably result in distributive efficiency. On the contrary vertical agreements can create both collusion risks and, by raising barriers to entry or expansion, exclusionary ones.[8]

2.2 Modernisation of EU law and Removal of the Verticals Exclusion Order

In the light of the concerns identified above the Government decided, following consultation and an impact assessment,[9] to remove the exclusion order for vertical agreements from April 2005.[10] This change, together with Regulation 1/2003[11] and the CA98 parallel exemption procedure,[12] allowed the OFT (and subsequently the CMA) to apply both Articles 101 and the Chapter I prohibition to vertical agreements and for UK competition law to become aligned with 'modernised' EU law. Consequently since 2005, substantive assessment of vertical agreements under Chapter I has closely mirrored that adopted under Article 101 (see the *Guidance on Vertical*

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7 See e.g., Case 14/68, *Walt Wilhelm v Bundeskartellamt* EU:C:1969:4 and Case C-360/92 P, *Publishers' Association* EU:C:1995:6,

8 It is not possible to regard them 'as per se beneficial for competition', European Commission, Green Paper on Vertical Restraints in EC Competition Policy, COM(96) 721, para. 54. See also the CMA's no grounds for action decision in Case CE-9531/11, *Paroxetine*, 12 February 2016 where the CMA concluded that an agreement between GSK and IVAX, one agreement in a broader investigation into pay-for-delay agreements, had been excluded from the Chap I prohibition by the Verticals Exclusion Order.

9 See especially its 2001 White Paper, A World Class Competition Regime Cm 5233, July 2001 and DTI Modernisation – A consultation on the Government's proposals for exclusions and exemption from the Competition Act 1998 in light of Regulation 1/2003, April 2003.

10 Land and Vertical Agreements Exclusion Order, *supra* note 6 excluded all vertical agreements, with the exception of those imposing minimum or fixed resale prices, from the Chap I prohibition from March 2000 until 30 April 2005

11 [2003] OJ L1/1.

12 CA98 s10 allows the Verticals Block Exemption, currently Regulation 330/2010 [2010] OJ L102/1 to apply to agreements affecting trade within the UK even if they do not affect trade between Member States.

agreements[13] and further Section 3), which applies in the following way, relying on certain presumptions and safe harbours.

2.2.1 Object restrictions

Vertical agreements found to restrict competition by object are presumed to be incompatible with Article 101 – they are assumed to restrict competition appreciably under Article 101(1)[14] and the European Commission's view is that they are presumed not to satisfy the conditions of Article 101(3). Because hard-core restraints in the Verticals Block Exemption, currently Regulation 330/2010,[15] are aligned closely with likely object restrictions, the block exemption does not generally provide a safe harbour for such agreements (see 2.2.2. below). Further, the Commission's view is that provisions so severely restricting rivalry between firms are unlikely individually to satisfy the conditions of Article 101(3).[16] Because in most cases such conduct is, when uncovered, treated as a serious infringement of the competition rules that attracts fines, firms generally avoid incorporating these restraints in their distribution agreements and having to advance efficiency justifications for them.[17]

Object restraints, which are by their very nature injurious to competition, are identified only through a flexible characterisation process involving an analysis of the agreements content, objective and context.[18] Consequently even seemingly severe restraints on competition (such as horizontal price restraints) will not restrict competition by object where the objective and context reveals a plausible efficiency rationale for the conduct.[19] Nonetheless, jurisprudence clarifies that agreements containing certain 'established' clauses in vertical agreements are highly likely, or liable in principle, to be found to pursue a restrictive objective, including provisions:

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13 See OFT 419, December 2004 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284430/oft419.pdf.

14 Case C-226/11, *Expedia Inc v Authorité de la concurrence* EU:C:2012:795. For a full discussion of object restraints and the literature discussing the topic, see e.g., Jones, Sufrin and Dunne, *supra* note 5, Chap 5.

15 [2010] OJ L102/1, replacing Reg 2790/1999 [1999] OJ L336/21. For a full discussion of this block exemption and the modernisation process that led to its adoption, see Jones, Sufrin and Dunne, *supra* note 5, Chap 11.

16 They are unlikely to create objective economic benefits for consumers or to be indispensable to the attainment of any efficiencies created by the agreement in question (efficiencies generated can generally be achieved by less restrictive means), see e.g., Guidelines on the application of Article 81(3) [now 101(3)] [2004] OJ C 101/97, paras 46, 79, 105. But see discussion of Case 50230, *Ping* 24 August 2017, *infra* note 71 and text, where the CMA did consider whether an online sales ban was objectively necessary to the agreement or met the exemption criteria (but ultimately found that it did not create objective economic benefits and that the restraints were not indispensable).

17 Such restraints are generally perceived by business to be de facto illegal. Although therefore it is frequently argued that the object category in the EU is distinct from the per se rule in the US (which does not allow any justifications for the conduct to be raised), this distinction is in practice more theoretical than real. There is extremely limited guidance as to when agreements incorporating object restraints may exceptionally satisfy the four onerous conditions of Article 101(3) in fact and it seems unclear how parties can do so.

18 See *supra* Chap 1, Jones, Sufrin & Dunne, *supra* note 5, Chap 5 and e.g., Cases C-501, 513, 515, & 519/06 P, *GlaxoSmithKline Services Unlimited v Commission* EU:C:2009:610, para. 58,

19 See further Section 4.

- involving RPM[20] (and online RPM);[21]
- conferring absolute territorial protection (ATP) on a distributor[22] or otherwise aimed 'at prohibiting or limiting parallel trade';[23]
- banning online selling (which reduces the ability of a distributor to sell outside its territory, see *Pierre Fabre v Président de l'Autorité de la concurrence*)[24] (but not restraints prohibiting only certain forms of internet selling, such as via a platform, see *Coty*);[25] and, it seems,
- certain selective distribution systems (SDSs – which restrict the number or type of dealers and prohibits sales from authorized to non-authorized distributors).[26]

Indeed, where such restraints have been uncovered EU authorities have, save in the most exceptional circumstances, generally refused to accept that the context of a case supports a finding that the overarching objective is to, for example, enhance efficiency of the supply chain to the benefit of the parties and end customers, rather than to restrict competition.[27] This category of restraints is thus ordinarily found to restrict competition by object irrespective of (i) the rationale for the incorporation of the restraint, (ii) the intensity of interbrand competition and/or (iii) the degree of market power of the parties.

The strict approach towards these vertical restraints – all of which constitute restraints on intra-brand competition (that is competition between distributors of a supplier's product or service) – has attracted considerable controversy over the years. Although rules or presumptions of illegality

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20 See e.g., Case 161/84, *Pronuptia de Paris v Schillgallis* EU:C:1986:41, para 25 and Case 26/76, *Metro-SB-Grossmärkte GmbH v Commission (Metro I)* EU:C:1977:167, para. 21.

21 See e.g. Case AT/40.465, *Asus* 26 September 2018, IP/18/4601

22 Where the supplier and no other distributor is entitled to sell within the territory, see e.g., Cases 56 and 58/64, *Établissements Consten S.à.R.L. & Grundig-Verkaufs-GmbH v Commission (Consten and Grundig)* EU:C:1966:41.

23 '[I]n principle, agreements aimed at prohibiting or limiting parallel trade have as their object the prevention of competition', Case C-501/06 P, GlaxoSmithKline n 21, para 59, Cases C-403 and 429/08, *Premier League Ltd v QC Leisure and Murphy v Media Protection Services Ltd* EU:C:2011:631 and Case AT40428, *Guess* 17 December 2018 (€40 million fine for geo-blocking, including through a prohibition of selling online without specific authorisation) and Case AT40023, *US film studios* (commitments given to resolve the Commission's concerns about restraints on cross-border competition in film licensing contracts for Pay-TV, appeal challenging the commitments given by Paramount dismissed, Case T-873/16, *Groupe Canal+ v Commission* EU:T:2018:904).

24 Case C-439/09, EU:C:2011:277 and *Guess* ibid.

25 Case C-230/16 EU:C:2017:941. But see the settlement reached by the Bundeskartellamt (the German NCA) following its investigation into Adidas, Case B3 137/12, 27 June 2014 (English summary available at <http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2014/B3-137-12.pdf? blob=publicationFile&v=2>). See also discussion of *BMW/Carwow*, https://www.gov.uk/government/news/bmw-changes-policy-on-car-comparison-sites-following-cma-action, *infra* note 87 text.

26 Ibid.

27 Rather, as is illustrated by Consten and Grundig, *supra* note 22, in these cases the Court tends to focus on the restraints imposed and simply assumes that they are disproportionate to any objective pursued. In this case the Court of Justice rejected the parties' argument that the vertical sole distributorship agreement, conferring ATP upon the distributor, was necessary to prevent freeriding and to encourage competition between similar products of different makes (inter-brand competition). Instead, focusing on the mechanism the parties adopted to achieve their objective – the isolation of the French market – the Court held that clauses which result in the segregation of a national market, and/or in maintaining separate national markets, were liable to have as their object the restriction of competition. See also *infra* Section 3.1.2.

serve important ends in antitrust systems – particularly the attainment of procedural economy and the clear prohibition, and deterrence, of patently anticompetitive behaviour[28] – it is argued by some that the EU attitude is overly rigid and requires adjustment.[29] Indeed, it is argued that because procompetitive justifications – and an increase in interbrand competition – could be the driving economic motivation for them,[30] the application of a broad and, in practice virtually irrebuttable,[31] presumption of illegality applied to them is not justified and creates a risk of Type I errors (or false positives, arising from an over-inclusive rule which sometimes condemns conduct that is competitive, benign or beneficial). Nevertheless, the approach, heavily influenced by market integration concerns, remains entrenched in the EU jurisprudence.[32]

2.2.2 De minimis and the Verticals Block Exemption

Agreements that do not contain by object, or hard-core, restraints may be compatible with Article 101 where the parties' market shares do not exceed certain market share thresholds. Thus, agreements which do not incorporate object restraints fall outside of Article 101(1) altogether where they do not appreciably restrict, or have a de minimis impact on, competition – likely where the parties' market shares do not exceed 15% on the upstream or downstream market.[33] Further, since modernisation the Verticals Block Exemption (like its predecessor Regulation 2790/1999)[34] provides a broad, overarching exemption from Article 101(1) for vertical agreements involving parties that: (i) are considered unlikely to have market power – proxied by use of a 30 per cent market share threshold;[35] and (ii) do not contain hard-core restraints, including RPM provisions and, with limited exceptions, restrictions on the territories into which, or the customers to whom,

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28 In such circumstances, the administrative savings may outweigh the cost of small false positives and exceed the efficiencies that can be derived from moving to a more comprehensive antitrust analysis, see A Jones and WE Kovacic, 'Identifying Anticompetitive Agreements in the United States and the European Union: Developing a Coherent Antitrust Analytical Framework' (2017) 62(2) *Antitrust Bulletin* 254.

29 See e.g., A Jones and M de la Mano, 'Vertical Agreements Under EU Competition Law: Proposals for Pushing Article 101 Analysis, and the Modernization Process, to a Logical Conclusion' available at SSRN: https://ssrn.com/abstract=2930943.

30 A rich literature explains that a number of vertical restraints, including RPM, territorial restrictions or selective distribution, may be used as mechanisms to allow suppliers to elicit optimal service levels (for example, pre-sale services, quality certification and the building of brand reputation) and to counter free riding or designed to prevent retailers from lowering retail prices in circumstances where they simply attract customers from competing retailers, but without increasing output or the brand manufacturer's profits, see e.g., P Ippolito 'Resale price maintenance: empirical evidence from litigation' (1991) 34 *Journal of Law & Economics* 263, JC Cooper, LM Froeb, D O'Brien and MG Vita, 'Vertical antitrust policy as a problem of inference' (2005) 23 *International Journal of Industrial Organization* 639, S Dutta et al., 'Vertical Territorial Restrictions and Public Policy: Theories and Industry Evidence' (1999) 63 *Journal of Marketing* 121, 122 ('our results suggest that efficiency arguments should play an important role in the public policy debate on vertical restraints'), F Lafontaine and ME Slade, 'Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy' Chap 11 in Buccirossi, *Handbook of Antitrust economics* (MIT Press, 2008) but cf A MacKay and D Aron Smith 'The Empirical Effects of Minimum Resale Price Maintenance', available at http://home.,uchicago.edu/mackay/files/The%20Empirical%20Effects%20of%20MRPM.pdf.

31 See *supra* note 17.

32 See further discussion *infra* in Section 3.1.2.

33 European Commission's Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice), C(2014) 4136 final.

34 See *supra* note 15.

35 Reg 330/2010 [2010] OJ L102/1, Art. 3.

buyers can sell the product.[36] As the benefit of the Regulation can only be withdrawn prospectively,[37] it provides legal certainty and operates as an important safe harbour for a large group of vertical agreements whose efficiencies are presumed to offset any anticompetitive effects which might arise.

2.2.3 Agreements within a single economic unit

Agreements between a parent and its subsidiary (where the subsidiary does not enjoy real autonomy in determining their course of action in the market)[38] and certain agency agreements[39] fall outside of Article 101 as a result of the single economic unit concept; they are treated as arrangements within a single undertaking and not joint conduct falling within the scope of Article 101.

2.2.4 Fuller effects analysis

It is only where these rules, or presumptions, do not apply that fuller analysis of the agreements impact on competition under Article 101(1) or (3) is required. Under the modernized regime this is a question for 'self-assessment'. One consequence, however, of the EU system's significant reliance on presumptions of illegality, legality, and safe harbours is that, although providing desirable legal certainty where applicable, little jurisprudence post-modernization, and guidance, has emerged to clarify the law in the scenarios where they do not apply.[40] Although case law on effects analysis does exist, it is sparse and now mainly relatively old, see in particular *Société Technique Minière v Maschinenbau Ulm GmbH (STM)*,[41] *Metro-SB Grossmärkte GmbH v Commission (Metro 1)*,[42] *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis (Pronuptia)*,[43] and *Delimitis*.[44]

In *Delimitis*, dealing with a single branding agreement (in this case a beer supply agreement in which the buyer was induced to concentrate orders for beer with the supplier),[45] the Court indicates that the inquiry under Article 101(1) should focus on the question whether or not the agreement, alone or in conjunction with a network of similar agreements, would be likely to have an appreciable impact on the parameters of competition, allow the parties to foreclose the market to competitors, and exercise market power. A different approach is taken in cases dealing with intrabrand restraints; incorporated in, for example, exclusive distribution agreements granting each dealer an exclusive sales territory or perhaps allocating it an exclusive customer group (exclusive customer allocation), franchising agreements, or SDSs. In these latter cases greater weight has

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36 Ibid, Art 4. Certain restraints listed in Art 5 are also not exempt but do not stop the block exemption from applying if they do not infringe Art 101 or, even if they do, can be severed from the remainder of the agreements.

37 See Regulation 1/2003 [2003] OJ L1/1, Art 29 and Reg 330/2010 [2010] OJ L102/1, recital 15 and Art 6.

38 See, e.g., Case C-73/95P *Viho Europe BV v Commission* EU:C:1996:405.

39 See e.g., Case C-279/06, *CEPSA* EU:C:2008:485.

40 In particular, the Commission has not adopted either an infringement decision involving an analysis of the restrictive effects of a vertical agreement, or a non-infringement decision or published a 'guidance letter'.

41 Case 56/65, EU:C:1966:38.

42 *Supra* note 20.

43 *Ibid.*

44 Case C-234/89, EU:C:1991:91.See also Case 23/67, *Brasserie de Haecht v Wilkin* EU:C:1967:54.

45 E.g. where the buyer is precluded from manufacturing, buying, marketing, and/or selling competing products or services (non-compete or non-competition obligations) or required to purchase a specific percentage or a specific amount of its requirements of a type of product from the supplier (quantity forcing or requirements contracts).

been attached to the importance of the structure of competition and undistorted competition in all market segments (including at the distributor level) than to their impact on interbrand competition. They thus reflect a greater suspicion of intrabrand restraints on rivalry between a supplier's dealers than on interbrand ones on rivalry between a supplier and its competitors, treating the former as restrictive of competition unless objectively necessary to achieve a legitimate objective – for example, the penetration of a new market, to prevent free riding, to encourage non-price competition between dealers, or to ensure the commercial success of a franchise agreement. Not only are these cases not entirely easy to reconcile with the general, modernised approach advocated in the Commission's Vertical Guidelines but they shed little light on the question of how certain new vertical restraints – especially those arising in the context of online selling[46] – should be assessed. Rather, a transparent structure for analysing and balancing the competitive harms and benefits of vertical arrangements has not developed.[47]

3 UK Jurisprudence

3.1 Vertical Agreements and the Competition Act

3.1.1 Overview

In line with the CMA's guidance and the EU approach, a majority of public enforcement in relation to vertical agreements has, since the withdrawal of the Verticals Exclusion Order, focused on vertical agreements[48] containing severe and established restrictions of competition by object – mainly RPM, online RPM or other restraints on online selling. Many of these cases have resulted in the imposition of fines on infringing undertakings.

A number of UK cases have, however, also examined vertical arrangements involving restraints which are not 'established' object restraints. For example; price relationship agreements or contracts that reference rivals' prices - where a supplier requires a reseller to set the resale price of its product at a price related to the price set for a competitor's product; most favoured nation

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46 Although in COMP/39.847, *e-books* [2013] OJ C378/25 the Commission investigated a situation where five principal publishers agreed to sell their electronic books (e-books) directly to the consumer via an agent/platform using an agency, as opposed to a wholesale or reseller, model, the question of whether the vertical agency relationships were caught by Art 101(1) was not central to the case (the Commission's concern was that the five publishers had engaged, with Apple, in a concerted practice to raise retail prices in breach of Article 101(1)). Further, the proceedings were concluded when the publishers agreed to terminate their agency agreements with Apple and offer other retailers the opportunity to end their agency agreements too. (See also Case CE/9440-11, *e-books*, 1 December 2011, (OFT investigation into e-books and arrangements between certain publishers and retailers was closed on grounds of administrative priorities and in particular because the OFT considered the European Commission was well placed to arrive at a comprehensive resolution of this matter). In AT40153, *Amazon* 28 July 2017, the Commission also accepted commitments to address concerns that certain clauses, especially price parity and most favoured nation provisions, in distribution agreements (some of which constituted agency arrangements) between Amazon and e-book publishers, infringed Art. 102, rendering it more difficult for other e-book platforms to compete with Amazon, see also *infra* note 102.

47 This is in stark contrast to the relative advances that have occurred in the economic and legal assessment of vertical mergers and abuse of dominance (often involving the analysis of similar competitive effects), see Jones and de la Mano, *supra* note 29.

48 Although there have been no UK cases involving the applicability of Chap I to an agreement between a parent and its subsidiary, in OFTEL decision, *Vodafone*, 5 April 2002 an issue arising was whether agreements entered into between Vodafone and its distributors that fixed the retail prices of pre-pay mobile phone vouchers were agency agreements. In the end, however, no decision had to be made on this point as Chap I was found not to apply in this case on the basis that Vodafone was found to have acted not autonomously but pursuant to a regulatory obligation.

clauses (MFNs) where the supplier constrains its ability to price discriminate amongst customers by promising to treat a customer no less favourably than other customers;[49] and, exclusivity provisions.

3.1.2 Resale price maintenance and online selling restraints

A relatively large proportion of the OFT's early Chapter I decisions involved RPM, the only vertical restraint not covered by the Verticals Exclusion Order.[50] For example, in May 2002, the DGFT issued a decision finding that three undertakings had infringed the CA98 by entering into agreements for the supply of MEI automatic slack adjusters which incorporated RPM provisions.[51] The DGFT found that the Verticals Exclusion Order did not apply, the agreements had as their object the restriction of competition within the UK (thus, there was therefore no need to prove that this was their effect) and the impact on competition was appreciable,[52] before imposing fines totalling £33,737. In addition, a fine of £4.95 million was imposed on *Hasbro*[53] for agreeing with its distributors that toys and games should not be sold below its list prices. In *Lladró Comercial SA*[54] the DGFT concluded that agreements containing provisions requiring retailers to inform the supplier of proposed discounts, allowing the supplier to repurchase discounted products, and prohibiting the advertising of discounts amounted to RPM which did not benefit from the Exclusion Order.[55] In *Toys & Games: Hasbro UK Ltd, Argos Ltd and Littlewoods Ltd*[56] and *Replica Football Kit*[57] much higher fines, totalling £22.65 and £18.6 million respectively, were imposed for RPM (although both fines were reduced on appeal).[58] In each of these cases, however,

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49 E.g., that it will not provide its products to other customers at lower prices (and/or if it does it will also reduce the price to that customer) (wholesale MFNs) or that it will not sell its products on the agent's platform at a price higher than on which it sells on other platforms or which it sells itself (retail MFNs or Across Platform Parity Agreements (APPAs)).

50 Land and Vertical Agreements Exclusion Order, *supra* note 6, arts 3 and 4.

51 DGFT Decision, *Price Fixing Agreements involving John Bruce (UK) Limited, Fleet Parts Limited and Truck and Trailer Components*, 13 May 2002.

52 See especially *ibid*, paras 35-37, 68-72 and 73-75.

53 DGFT Decision, *Agreements between Hasbro UK Ltd and distributors fixing the price of Hasbro toys and games*, 28 November 2002. No fines were imposed on the distributors as Hasbro took the initiative for the agreement and the distributors had no choice but to accept the restrictive terms.

54 DGFT Decision, *Agreements between Lladró Comercial SA and UK retailers fixing the price of porcelain and stoneware figurines*, 31 March 31 2003.

55 *Id*. para 107. No fine was imposed in this case however as Lladró had received a comfort letter from the European Commission that the agreement did not infringe Article 101(1). As this letter had been issued on the basis that the agreement did not substantially affect trade between Member States it did not have any relevance to the question of whether the DGFT could proceed to an infringement decision or whether the agreement contained anticompetitive provisions

56 DGFT Decision, *Agreements between Hasbro UK Ltd, Argos Ltd and Littlewoods Ltd fixing the price of Hasbro toys and games*, 21 November 21 2003.

57 OFT Decision, 1 August 2003.

58 Cases 1014 and 1015/1/1/03 Argos Ltd and Littlewoods Ltd v OFT [2005] CAT 13, upheld on appeal [2006] EWCA Civ 1318, Cases 1021/1/1/03 and 1022/1/1/03, *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, *aff'd Argos Ltd and Littlewoods Ltd v Office of Fair Trading; JJB Sports plc v Office of Fair Trading* [2006] EWCA Civ 1318

the price fixing also had a much more serious horizontal price fixing component (a hub and spoke type agreement).[59] These cases are consequently discussed in greater detail in Chapter 2.

Since 2005, investigations have more frequently focused on online pricing or selling restrictions (perhaps filling a gap left by the European Commission which between 2005–2018 stood back from enforcement of Article 101 in relation to vertical agreements).[60] Although e-commerce has rapidly transformed distribution and retailing methods and, arguably, can exacerbate free riding risks, especially where consumers rely on retail services – for example in the case of complex products, experience goods, or one off purchases of durable goods – the CMA has not treated online RPM differently from other cases of RPM. Rather, it is clearly concerned that e-commerce can enhance the effectiveness of RPM, especially by making monitoring easier. Its decisional practice thus establishes that it generally considers that online RPM constitutes a serious infringement of the CA98 which is likely to attract fines, unless it is a small agreement between SMEs.[61] In a number of cases, however, fines have been reduced where firms have applied for leniency,[62] settled,[63] cooperated, or agreed to introduce competition law training or compliance programmes.[64] In some cases the CMA has found vertical agreements or concerted practices to exist based on policies announced by a supplier and accepted, or acquiesced in, by its retailers[65] (although the CMA has on occasions decided not to impose fines on retailers).[66]

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59 In the former the OFT found an overall agreement between the three parties, comprised of two bilateral vertical price-fixing agreements (which themselves constituted infringements of the Act) concluded between Hasbro and Argos and Hasbro and Littlewoods respectively. Although there was no evidence that Argos or Littlewoods had directly contacted the other, the OFT decided that each had agreed with Hasbro to adhere to recommended retail prices on the clear understanding that they would also be adhered to by the other, and confidential information was exchanged between them with Hasbro acting as their middleman. The Director thus found evidence of collusion between the three parties that had the common objective of fixing the price of Hasbro toys and games. Because of the serious nature of the infringement, the DGFT imposed penalties of £17.28 million and £5.37 million on Argos and Littlewoods respectively. Hasbro, however, received no fine, reflecting 100 percent leniency granted due to its cooperation with the OFT. See also Case CE/2464-03, *UOP desiccant* 8 November 2004 eg Case CE/9161-09, *Distribution of Mercedes-Benz commercial vehicles (van)*, 27 March 2013 and Case CE/3094-03, *Dairy* 10 August 2011.

60 The first vertical case decided after COMP/36.623, 36.820, and 37.275, *Peugeot* 5 October 2005 was Case AT/40.465, *Asus* 26 September 2018, IP/18/460

61 CA98, s 39(3) was applied in the cases of *Pride* and *Roma*, *infra* notes 71 and 72.

62 The UK leniency system applies to RPM as well as to cartel arrangements, see OFT 1495, *Applications for leniency and no-action in cartel cases*, July 2013 https://www.gov.uk/government/publications/leniency-and-no-action-applications-in-cartel-cases, para 2.3 and has been applied in a number of RPM cases e.g., *Toys and Games, supra* note 56, Case 50565-3 *Fender* 20 January 2020, and Case 50343, *Light fittings*, 3 May 2017, Case 50565-5, *Electronic drum sector*, 29 June 2020.

63 See e.g., Case CE/9857/14, *Ultra Finishing Ltd (Bathroom Fittings)*,10 May 2016, *Light fittings* and *Electronic drums* ibid, Case 50565-4, *Synthesizers and high-tech equipment*, 29 June 2020 and 50565-6, *Digital keyboards and guitars*, 17 July 2020 (fine of £278,945 for RPM).

64 Especially where the firms are SMEs and appear to have limited knowledge of competition law, see e.g., *Ultra Finishing*, ibid and Case CE/9856/14, *Foster Refrigerator UK (Commercial Refrigeration)*, 24 May 2016.

65 See e.g., *infra* note 74 and text and Case T-41/96, *Bayer AG v Commission* EU:T:2000:242, *aff'd* Cases C-2 and 3/01 P, EU:C:2004:2. But see e.g., Case CP/1709-02, *Elite Greenhouses Limite*d where no RPM agreement was found.

66 See e.g. Case 50230, *Ping* 24 August 2017 and *Fender* and *Casio infra* notes 67 and 69.

In *Fender Musical Instruments*,[67] for example, the CMA imposed a £4.5 million fine on Fender following a finding that it had implemented and enforced a pricing policy designed to ensure that musical instrument resellers would not advertise or sell its guitars online below a specific minimum specified price (enforced through the sending of price lists, monitoring, including through the use of an auto-tracking software, and complaints) that breached Chapter I and Article 101. The CMA concluded that the agreement, which reduced downward pressure on online prices, reduced price competition and stabilised prices between resellers, increased the attractiveness of the Fender brand to resellers, and secured, maintained, or improved Fender's position in the market, appreciably restricted competition by object. In so finding the CMA stressed the importance of the internet as a retail channel and that price was one of the main factors on which resellers competed.[68] The facts and reasoning adopted in this case were very similar to those involved in *Casio Electronics*,[69] decided six months before it. In this case the CMA imposed a £3.7 million fine on Casio in relation to its market-wide pricing policy, designed to ensure that resellers would not advertise or sell digital pianos or digital keyboards online below a specified price (also monitored through installed software).

In a series of cases the CMA has also dealt with restrictions on online advertising of prices; including *Foster Refrigerator UK (Commercial Refrigeration*),[70] *Roma Medical Aids Ltd*,[71] *Pride Mobility Products Ltd*,[72] and *TGA Mobility Ltd.*[73] The latter was ultimately closed on administrative priority grounds after TGA removed the restrictions and agreed to introduce competition law training and a compliance programme. In *Foster*, the CMA concluded that a policy, which prohibited resellers from advertising Foster products below minimum advertised prices (both online and offline) amounted to RPM infringing Chapter I and Article 101. It found that an agreement or concerted practice between Foster and its resellers could be established in this case as the policy was clear, the policy was monitored and enforced with sanctions for non-compliance (in some cases through ceasing supply or closing accounts), and each reseller acquiesced to the policy by changing their online prices when requested to do so by Foster.[74]

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67 Case 50565-3, 20 January 2020. On 26 March 2019 the CMA also fined Fender £25,000 for hiding documents during the investigation.

68 Ibid, para. 4.208

69 Case 50565-2, 1 August 2019. See also *Synthesizers and high-tech equipment*, *supra* note 63 (fine of around £1.5 million for provisions prohibiting advertising and selling online below minimum prices), *Electronic drums*, *supra* note 62 (fine of just over £4 million for RPM), *Digital keyboards and guitars*, *supra* note 63 (fine of £278,945 for RPM), *Light fittings*, *supra* note 62 (imposing fines totaling £2,763,000), *Ultra Finishing Ltd (Bathroom Fittings)*, *supra* note 63, and Case CE/9856/14, *Foster Refrigerator UK (Commercial Refrigeration)*, 24 May 2016, *infra* note 70 and text. The CMA has also issued a number of advisory and warning letters alerting recipients to the illegal nature of RPM and prompting action to ensure compliance. See also e.g., Case 50523, *Heathrow Airport* 25 October 2018 (condemning a provision in a lease agreement between Heathrow and Arora preventing the latter from charging lower prices to non-guests for the T5 Sofitel car park than the equivalent rates from those charged elsewhere at Heathrow airport. Given that this protected Heathrow's car parking from price competition the parties were competitors and this was not a vertical agreement, see also CAA decision in *East Midlands International Airport/Prestige Parking Ltd* 20 December 2016).

70 Case CE/9856/14, 24 May 2016**.**

71 Case CE/9578-12, 5 August 2013.

72 Case CE/9578-12, 27 March 2014. Although a claimant tried to bring a follow-on, opt-out collective action for damages on behalf of pensioners (see CA98, s47B) who may have suffered harm as a result of the price restrictions; the action was ultimately withdrawn, see Case 1257/7/16 *Gibson v Pride Mobility Products Ltd*.

73 Case 50469, 19 October 2017.

74 See also e.g., *Ultra Finishing Ltd (Bathroom Fittings) supra* note 63.

Further, that the agreement restricted competition by object. In so doing the CMA rejected, on the facts, Foster's argument that the object of the policy was not to restrict competition but to protect its brand and reputation by ensuring that dealers had the incentive to invest in the brand and pre- and post-sale services and to prevent misleading advertising. Rather, the evidence indicated that the purpose of the policy was to prevent discounting and maintain reseller margins and not to tackle unprofessional conduct.

In *Roma* the CMA also found that a restriction on online sales by certain retailers infringed the rules, an issue which also arose in the case of *Ping*.[75] In the latter keenly contested case, Ping was found to have infringed the Chapter I prohibition and Article 101 by introducing a policy which prevented retailers from selling its golf clubs online. The core issues arising in this case were whether the arrangements should be characterised as restrictive of competition by object and, if so, whether they were capable of satisfying the legal exception/exemption criteria set out in the CA98 and Article 101(3). Ping vociferously contended that its selective distribution arrangements did not infringe the rules. Rather, the policy was designed to protect its brand and confine sales to brick and mortar stores that could increase club quality and consumer choice by providing buyers with custom fitting, and to protect retailers from others free-riding on their efforts; the restraints on internet selling where thus justified because they pursued legitimate aims. Further, that given the high levels of interbrand competition, customers that wished to buy golf clubs without custom fitting could easily purchase a different brand.

The CMA, whose decision was upheld by both the CAT[76] and Court of Appeal,[77] rejected this argument finding that prohibiting online sales is liable to restrict, and is by its very nature restrictive of, competition – eliminating a modern means of distribution incentivising and enabling retailers to attract, and consumers to purchase, a product outside of their normal catchment area.[78] Further, the CMA rejected Ping's argument that the ban was either necessary - clubs could be, and were, sold online without a custom fitting - or proportionate to the commercial aim of promoting in-store custom fitting - other less restrictive, technically achievable and viable alternatives were available to meet Ping's legitimate objectives.

The reasoning of the CMA, the CAT and the Court of Appeal differed and each present difficulties in places.[79] Nonetheless, none of them were prepared to find that the objective and the context of the agreement in this case – designed in this case to improve customer satisfaction and the appeal of Ping golf clubs – meant that the contractual ban on internet selling (a de facto territorial restraint) did not have as its object the restriction of competition. Consequently, the burden was not shifted to the CMA to establish a restrictive effect before justifications under the exemption criteria had to be proffered and considered. Rather, the approach adopted by the CMA and courts closely follows, without expressly acknowledging the internal market perspective, the hardline attitude

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75 Case 50230, 24 August 2017.

76 Case 1279/1/12/17 *Ping Europe Ltd v CMA* [2018] CAT (although the CAT found that the CMA had erred in the law in some respects it nonetheless held that the agreement did restrict competition by object. It also reduced the level of fine).

77 [2020] EWCA Civ 13.

78 Relying in Part II of its decision on the Court of Justice's and the opinion of Advocate General Mazac in C-439/09, *Pierre Fabre* EU:C:2011:277.

79 See e.g., Professor Pablo Ibanez Colomo's analysis of the CMA, CAT and Court of Appeal rulings in Chillincompetition, at https://chillingcompetition.com/2018/05/15/on-the-cmas-ping-case-objective-justification-and-object-restrictions-under-article-1011-tfeu/

towards territorial restraints and prohibitions, or limitations, on parallel trade between Member States set out by the Court of Justice in *Pierre Fabre*[80] and the European Commission in its Vertical Guidelines and other communications. Because such restraints impinge on market integration goals, they are almost invariably considered to be incompatible with EU competition law, irrespective of any efficiency or other justification for the agreement.[81] Indeed, eliminating these private obstacles to free movement is considered necessary to achieve the maximum possible level of EU market integration;[82] so adding 'an extra dimension to the analysis of vertical restraints'[83] in the EU.[84] The promotion of online sales is also considered to be 'extremely important for the internal market in Europe because it broadens the market, improves the choices for customers, and generally speaking, enhances competition';[85] online selling can therefore be restricted only in exceptional circumstances.[86] Given the strong internal market impact on this line of cases, it is debateable whether it should be so influential on UK competition law (see further Section 4).

In *BMW/Carwow*[87] the CMA also indicated that it was concerned about the impact on competition of BMW's decision not to allow dealers to list their cars on a new car comparison website, 'carwow': 'Online comparison tools can promote competition in many markets and help consumers make informed choices.'[88] However, in the light of its prioritisation principles the CMA decided not to open a formal investigation after BMW UK informed the CMA of its decision to change its policy in order to allow its dealers to work with carwow and other internet-based new car portals.

3.1.3 Price relationship agreements and MFNs

No EU law yet sheds light on the question of how price relationship agreements should be analysed under Article 101.[89] Key questions arising include: (i) whether any such 'newer' vertical restraints or business practices, in particular ones which may resemble RPM, are sufficiently deleterious to be treated as a restriction by object; or (ii) whether, given the relative lack of experience with these provisions and their potential to give rise to efficiencies (by e.g., facilitating customer investment or market entry and/or reducing transaction costs), effects analysis should be conducted to ensure

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80 Case C-439/09, EU:C:2011:277.

81 See *supra* notes 23-27 and text.

82 Removal of non-tariff barriers is not sufficient for the full development of parallel trade, arbitrage and changes in distribution across Europe. For the complete success of economic integration it is necessary that producers, distributors and consumers, find it profitable to move towards the new market situation and not take actions to avoid or counteract the effects of the Single Market measures The elimination of barriers to trade may not achieve its objective if producers and/or distributors introduce practices contrary to integration

83 Green Paper on Vertical Restraints in EC Competition Policy, COM(96) 721, para 70.

84 Companies have not been allowed to recreate private barriers between Member States where State barriers have been successfully abolished or to seal off territories.

85 'Interview with Dr. Alexander Italianer, Director General for Competition, European Commission' theantitrustsource April 2011, 1, 6.

86 See e.g.,P Ibáñez Colomo, 'Article 101 TFEU and Market Integration' (2016) 12 Journal of Competition Law & Economics ***.

87 See https://www.gov.uk/government/news/bmw-changes-policy-on-car-comparison-sites-following-cma-action and *supra* note 25.

88 Ann Pope, CMA Senior Director of Antitrust, *ibid*.

89 See *supra* notes 40-46 and text.

a fuller understanding of the clauses is accumulated and, if so, how that analysis is to be conducted.[90]

In *Tobacco*[91] the OFT controversially found that a series of agreements between two tobacco manufacturers and 10 retailers, under which retailers agreed to set prices for tobacco products in accordance with set 'parity and differential' requirements relating to competing linked brands, restricted competition by object. Although it did not find horizontal or vertical price fixing (or other 'established' object restraints), it concluded relying on the Court of Justice's judgment in *T-Mobile Netherlands*[92] that the scope of object infringements should not be interpreted narrowly,[93] and that taking account of the nature, objectives and context of the agreements they were by their very nature injurious to competition. Further, and in spite of the complexity of the decision (which exceeded 700 pages), it imposed the largest aggregate fines it had levied in a single decision, totalling £225 million.

Although the OFT's decision was set aside on appeal, the CAT did so on procedural grounds.[94] This meant that it did not have to rule on the substantive question of whether the OFT had correctly found the arrangements to be restrictive of competition by object. It seems unlikely nonetheless that this finding would have been upheld. Not only were key elements of the OFT's reasoning in its decision related to the theory of harm abandoned during the appeal hearings, but the OFT's statements on the breadth of the object category seemed out of line with EU case law. This latter view is now reinforced by the Court of Justice's subsequent, and important, judgment in *Groupement des cartes bancaires v Commission (CB)*.[95] In this case the Court stressed that because a finding that an agreement restricts competition by object exempts a claimant from its ordinary burden of demonstrating a restriction of competition, the category of object restrictions is a narrow one, confined to agreements which obviously harm the proper functioning of

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90 See e.g., UK's Office of Fair Trading (OFT) and prepared by Laboratorio di Economia, Antitrust, Regolamentazione (LEAR), OFT 1438, 'Can "Fair" Prices be Unfair? A Review of Price Relationship Agreements': September 2012, A. Fletcher and M. Hviid, 'Retail Price MFNs: Are they RPM "At Its Worst"', CCP Working Paper 14-5.

91 Case CE/2596–03, *Tobacco*, 15 April 2010. See e.g., A Jones and A Turati 'The UK Tobacco Case: Restrictions by Object in Vertical Agreements', (2012) 3 *Journal of European Competition Law and Practice* 287.

92 Relying on Case C-209/07, *Competition Authority v Beef Industry Development Society Ltd (BIDS)* EU:C:2008:643.

93 Holding that an agreement could be regarded as having an anticompetitive object, where 'it has the potential to have a negative impact on competition. In other words, the concerted practice must simply be capable in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition', Case C-8/08, *T-Mobile Netherlands BV v Raad van beestuur van de Nederlandse Mededingingsautoriteit* EU:C:2009:343, para. 31

94 Cases 1160–5/1/1/10 [2011] CAT 41. The CAT only set aside the Decision insofar as it applied to the appellants. This raised the difficult issue of how the annulment of a decision affected the position of the parties that entered into 'early resolution' agreements with the OFT and which elected not to appeal the Decision (could they continue to be found to have infringed the CA98 by entering an agreement with another party where the other party to the agreement had been found not to have committed such an infringement)? Although the Court of Appeal held that two companies that did not appeal the Tobacco decision could recover the fines imposed on them, on the basis that requirements of fairness and equal treatment had been breached (the OFT reached a settlement agreement with another party to the agreement whereby the penalty imposed was repaid with a contribution to interest), see *Gallaher Group Ltd v CMA* [2016] EWCA Civ 719, this judgment was reversed by the Supreme Court, [2018] UKSC 25.

95 Case C-67/13 P, EU:C:2014:2204.

competition. No detailed market analysis should thus be conducted in object cases. If such an assessment is required, as would appear to be the case where a complex theory of harm is developed, that indicates that a fuller effects analysis is necessary.[96]

The OFT also took a robust view on object restraints in its *Hotel Online Booking*[97] investigation. In this case it adopted the provisional view that agreements between hotels (including the InterContinental Hotels Group) and Online Travel Agents (OTAs, Booking.com and Expedia Inc), restricting each OTA's ability to discount the rate at which room only hotel accommodation bookings were offered to consumers, had as their object the restriction of competition in breach of the Chapter I prohibition and Article 101 (through limiting price competition between OTAs and hotels). Again, however, the suitability of applying object analysis to new restraints in this way was never fully tested, as the OFT did not adopt a final decision but instead accepted commitments from the parties to change their behaviour.[98] Although the case was remitted back to the CMA after the commitments were quashed, in the end the CMA closed the case on the grounds of administrative priorities.[99] By this time developments were occurring in other Member States, and within the European Competition Network, leading a number of Member States (but not all)[100] to allow the OTAs to retain narrow MFNs. Permitting the hotels to give OTAs parity in respect of rates and conditions published by the hotels online, but eliminating availability parity and price/condition parity against other OTAs or through offline channels and allowing hotels to offer lower rates to, for example, loyal customers.[101]

In some later cases, investigations into price parity clauses have been closed[102] or conducted in conjunction with exclusivity provisions (see section 3.1.4 below) or within market studies or market investigations under the EA02 (see section 3.2 below). In November 2018, following a 2017 market study into digital comparison tools, the CMA also launched an investigation into the use of MFN clauses, or price parity clauses, by comparethemarket.com, providing that home insurance providers must not offer lower prices for insurance policies on other platforms.[103] The CMA is investigating whether the practice may prevent rivals platforms from offering cheaper prices and result in higher commissions, and consumers paying higher prices.

3.1.4 Other distribution arrangements

A handful of cases have also raised the compatibility of exclusive distribution, single branding and exclusivity agreements with Article 101 and Chapter I.

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96 See ibid, paras 48-92 and e.g., L Peeperkorn, 'Coherence in the Application of Articles 101 and 102: A Realistic Prospect or an Elusive Goal?' (2016) 39(3) *World Competition* 389 and Jones, Sufrin and Dunne, *supra* note 5, Chap 5.

97 Case CE/9320-10, 31 January 2014.

98 31 January 2014 (see CA98, s31A).

99 16 September 2015 (it continued to monitor developments in the sector, however).

100 See the Bundeskartellamt's decision, 20 December 2013.

101 See N. Varona and A. Hernadez Canales, 'Online Hotel Booking', *CPI Antitrust Chronicle* May 2015 and Report on the monitoring exercise carried out in the online hotel booking sector by EU competition authorities in 2016, <http://ec.europa.eu/competition/ecn/hotel_monitoring_report_en.pdf.

102 See e.g., Case CE/9692/12, *Amazon Retail* 1 November 2013 (CMA investigation closed on administrative priority grounds after Amazon ended its Marketplace price parity policy and informed third party sellers).

103 See https://www.gov.uk/cma-cases/price-comparison-website-use-of-most-favoured-nation-clauses and the CMA's market study into digital comparison tools, September 2017.

In two early CA98 cases the OFT considered the application of Chapter I to exclusive distribution agreements but found that they were covered by the Verticals Exclusion Order which in both cases the DGFT decided not to withdraw.[104] In *ATG Media*[105] the CMA also investigated exclusivity conditions and MFNs in the market for live online bidding (LOB) platforms that allow bidders to bid in real time in a live auction taking place in an auction house. Complaints were made that ATG Media prohibited auction house customers from using a competing LOB auction platform that offered bidders a lower price, from offering more favourable terms to other platforms and imposed restrictions on their ability to advertise or promote services provided by other platforms. The CMA was concerned that the restraints foreclosed the relevant market by reinforcing entry and expansion barriers. The proceedings were closed, however, after ATG Media agreed for a period of 5 years to refrain from incorporating these clauses in its agreements.

Exclusivity clauses have also been considered by the UK courts in a number of private actions. For example, in *Calor Gas Ltd v Express Fuels (Scotland) Ltd & Anor*[106] the Scottish Outer House Court of Session had to consider the compatibility with competition law (Article 101(1)) of provisions in distribution agreements obliging dealers of Calor's cylinder liquefied petroleum gas (LPG) (i) only to purchase and sell Calor LPG and (ii) not to handle Calor cylinders once the contract was terminated. Calor claimed that Express Fuel had infringed the agreement, whilst the latter contended that the restraints infringed Article 101 and were void. Applying *Brasserie de Haecht, Delimitis*[107] *and Neste Markkinointi Oy v Yotuuli Ky*[108] the Court found, given the significant share of the GB market enjoyed by Calor (of 50%), the mature nature of the market and the nature and extent of the provisions, that the restraints foreclosed new entry and infringed Article 101. 'It is not difficult to understand that if a nationwide network of principal dealers is tied to the brand leader for at least five years, this will restrict competition, especially in a mature market. When the post-termination handling restrictions are added, the defenders' case becomes even more compelling, though I would have considered the vertical restraint as sufficient in itself to amount to non-compliance with Article [101(1)].'[109] Further, in *Socrates Training Ltd v The Law Society of England and Wales*[110] the CAT had to consider Socrates' claim that a requirement imposed by the Law Society that solicitors had to obtain certain mandatory training, exclusively from the Law Society infringed both Chapters I and II CA98. In relation to Chapter I, the CAT found that the Law Society, in providing training, was an undertaking and that the arrangements

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104 See *supra* note 6. See also *Paroxetine*, *supra* note 8.

105 Case 50408, 29 June 2017. See also *Street Furniture (Outside Advertising)*, 17 May 2012, in which the OFT closed its investigation into the use of long exclusivity provisions in relation to outdoor advertising following assurances by the parties to change their behaviour.

106 [2008] ScotCS CSOH_1 [.

107 See *supra* note 44.

108 Case C-214/99, EU:C:2000:679.

109 [2008] ScotCS CSOH_1, para 35.

110 Case 1249/5/7/16, [2017] CAT 10. See also e.g., Case 1298/5/7/18, *Achilles Information Ltd v Network Rail Infrastructure Ltd* [2019] CAT 20 (finding that a scheme instituted by Network Rail preventing Achilles from providing supplier assurance services in the GB did have as its effect the restriction of competition. Further the exclusivity mandated by the schemes was not indispensable to their health and safety purposes and so was not objectively justified and did not meet the conditions for exemption. The CAT also held that, on the assumption that Network Rail had a dominant position in the market for the operation and provision of access to national rail infrastructure in GB, its conduct constituted an abuse of its dominant position. The critical issue considered under both provisions was whether the restriction on competition in a safety-critical industry was justified on health and safety grounds.)

between it and law firms constituted agreements between undertakings for the purposes of section 2.[111] Further, in line with its finding under Chapter II that the tying arrangement was abusive and not objectively justified (see further Chapter 5), it held that the agreements restricted competition and did not satisfy the conditions of Article 101(3).

In *Agents' Mutual Ltd v Gascoigne Halman Ltd*[112] the CAT had to adjudicate on the question of whether certain rules imposed by Agents' Mutual Ltd when it opened a new online portal, OnTheMarket, for the sale of properties (in competition with Zoopla and Rightmove) were compatible with the CA98. The rules at issue prevented estate agents subscribing with it from subscribing with more than one other portal, restricted membership to full-service office-based estate or letting agents, and required members to promote only OnTheMarket and no other portals. Gascoigne Halman in this case argued that as the provisions restricted competition they were void and unenforceable; the One Other Portal rule in particular operated as a boycott and restricted competition by object. The CAT rejected the claim, concluding that Agents' Mutual Ltd did not have market power either in the property portals market, where it was a new entrant, or in the estate agents' market, where its Members accounted for only a small share of relevant purchase revenues. It held that the restraint was neither restrictive by object (applying *CB*), nor by effect. Rather, the rules provided mechanisms for an entrant to launch a new product and to break into the market

The OFT, and CMA, have also provided some guidance on when distribution arrangements concluded during an emergency, or a period of crisis, might be compatible with UK competition rules. In *Memorandum of Understanding (MoU) on the supply of oil fuels in an emergency*, [113] the OFT decided that an agreement between the Government, major oil companies, oil independents, road hauliers and police and trade unions allowing the Government to direct the supplies of fuel to 'essential users' in a fuel crisis or shortage did infringe section 2(1) CA98 (by protecting supplies to defined users), but merited an exemption (in the end, the MoU was used as the basis for a public policy exclusion order).[114] In particular, the MoU improved the distribution of oil fuels during an oil fuel emergency and would benefit consumers who would benefit from the priority and benefit given directly to essential users (those providing emergency services, maintaining public safety or supplying food).

During the Covid-19 pandemic the CMA also made it clear that it is unlikely to enforce the CA against business cooperation – including horizontal or vertical arrangements – designed to ensure the supply and fair distribution of scarce products or services affected by the crisis to all consumers if: appropriate and necessary to avoid shortage or ensure security of supply; in the public interest; to the benefit of consumers; and, lasting no longer than necessary.[115] Further, in relation to section 9 the CMA set out its view that: conduct is likely to be efficiency-enhancing if: it ensures essential goods and services are made available to the public or an important sub-set of it; consumers are likely to get a fair share of the benefits if the arrangement mitigates shortages in supply; cooperation is likely to be indispensable where, in light of the circumstances and limited time available, the conduct can reasonably considered to be necessary, especially if it is temporary in

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111 *Ibid*, paras 89-92.

112 Case 1262/5/7/16 (T), [2017] CAT 15 (transferred from the High Court 5 July 2016). The judgment was upheld on appeal, [2019] EWCA Civ 24.

113 DGFT Decision Memorandum of Understanding on the Oil Fuels in an Emergency, October 25, 2001.

114 http://www.legislation.gov.uk/uksi/2012/710/made.

115 See https://www.gov.uk/government/news/covid-19-cma-approach-to-essential-business-cooperation.

nature; and, if competition remains possible and cooperation is limited to where it is necessary. Specific public policy exclusion orders affecting distribution arrangements were also made in the groceries[116] and dairy[117] sectors in relation to qualifying activity between groceries chain suppliers (covering both retailer and suppliers) and dairy producer suppliers (including both farmers and milk processors) designed to prevent or mitigate disruption caused by Covid-19 and notified to the Secretary of State.

3.2 Vertical Agreements and the Enterprise Act

The market investigation provisions of the EA02, like the preceding monopoly provisions of the Fair Trading Act 1973 (FTA), have been used to investigate markets in which vertical agreements are prevalent, where access to the market appears to be foreclosed to new competitors, and where use of the CA98 is inappropriate (see further Chapter 6[118]). These provisions enable the CMA to concentrate on the market as a whole rather than the individual agreements concluded by each undertaking. In *New Cars*,[119] for example, the (then) Competition Commission ('CC') investigated under the FTA a market in which suppliers operated selective and exclusive distribution agreements. Even though these agreements were permitted at that time by an EU block exemption, the CC concluded that these practices restricted innovation and choice, resulted in higher prices to private customers, and operated against the public interest. It concluded further that the adverse effects resulting from the combination of the practices specified were greater than the sum of adverse effects from each of the practices individually. Recommendations made to address the adverse effects identified culminated in The Supply of New Cars Order 2000.[120] This investigation took place prior to the adoption of Regulation 1/2003, which provides that national competition authorities must apply EU law, in addition to national competition law, to agreements affecting trade between Member States and cannot apply that national competition law more strictly than Article 101 (see Article 3(1)(2)). UK Guidance under the EA subsequently clarified that although Article 3(2) of Regulation 1/2003 does not prevent a market investigation reference, it would impact on remedies that could be imposed following it.[121]

More recently in *Private motor insurance*[122] the CMA conducted a market investigation into the supply or acquisition of private motor insurance. The CMA considered whether a range or practices, including the incorporation of price parity provisions in contracts between motor insurance providers and price comparison websites, had an adverse effect on competition. In relation to the price parity provisions, the CMA found that the use by the four large price comparison websites[123] of wide MFNs, prohibiting insurers from charging lower prices on other sales channels, softened price competition between the price comparison websites regarding their services to private motor insurance providers and were likely to: raise barriers to entry into the market; reduce innovation; raise commission fees; and result in higher private insurance premiums

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116 See https://www.legislation.gov.uk/uksi/2020/369/made

117 See http://www.legislation.gov.uk/uksi/2020/481/made.

118 See also e.g., C Ahlborn and D Piccinin, 'Between Scylla and Charybdis: Market Investigations and the Consumer Interest' in Rodger (ed), *supra* note 4.

119 Cm 4660 (2000).

120 SI 2000/2088.

121 OFT511 *Market Investigation References*, March 2006, adopted by CMA in March 2014, para. 2.12.

122 24 September 2014.

123 Which had significant market power and faced no effective constraints.

for consumers. Narrow MFNs (only prohibiting lower prices being offered on the insurer's website) were, in contrast, less likely to produce anticompetitive effects and would help to drive interbrand competition by reducing the possibility of free-riding by private motor insurance providers.

The CMA proposed a package of remedies to mitigate and prevent the adverse effects on competition identified in the market, including an order that use of wide MFNs by price comparison websites and private motor insurance providers be terminated and that the parties do not adopt practices replicating the anticompetitive effects caused by the wide MFNs (and preventing lower prices being quoted on sales channels other than the PMI provider's website).[124]

4 The Future

4.1 Changes at the end of the transition period

Under the timetable at the time of writing (1 August 2020), the UK will no longer be part of the EU competition system from the end of the transition period on 1 January 2021.[125] Although vertical agreements concluded in the UK which affect trade between Member States will still of course need to comply with EU law,[126] from this point EU law will not be applied by the CMA, EU law will no longer have supremacy over UK law and the CMA will have principal responsibility for investigating agreements that affect trade within the UK, irrespective of whether or not the Commission is doing so. Further, the Competition Statutory Instrument[127] amending the CA98 and EA02 will automatically come into force (unless subsequently amended). Although this retains the EU block exemptions in UK law until their expiry (the Verticals block exemption expires on 31 May 2022), it does not seem likely that the EU exemptions will be retained beyond this point. Further, section 60 CA98 is to be omitted and reformulated; new section 60A will allow inconsistency, and divergence, between UK and EU law in defined cases, including where necessary to reflect developments in the forms of economic activity or generally accepted principles (or the application of principles) of competition analysis. Both of these developments would mean that, over time, the UK has scope, should it wish to do so, to diverge from EU law and practice in this area.

The crucial matter considered below therefore is whether UK law governing vertical agreements should continue to follow EU law or whether, especially because some of the EU jurisprudence and practice remains for historical reasons rather overly-formalistic and influenced by particular EU law goals (including market integration), the opportunity should be seized for change. In particular, whether a more permissive approach could be followed – rooted more closely in

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124 See Private Motor Insurance Market Investigation Order 2015, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/453475/Private_Motor_Insurance_Market_Investigation_Order_2015.pdf

125 See Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (the Withdrawal Agreement), Art 126.

126 An agreement precluding a UK distributor from selling into the EU could, in certain circumstances, affect trade and restrict competition within the EU, see eg Case C-306/96, *Javico* EU:C:1998:41 and Case C-413/14 P, *Intel* EU:C:2017:632.

127 See the European Union (Withdrawal) Act 2018, European Union (Withdrawal Agreement) Act 2020, the Competition (Amendment etc) (EU Exit) Regulations 2019, 22 January 2019, available at http://www.legislation.gov.uk/ukdsi/2019/9780111173930/contents, and https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/864371/EU_Exit_guidance_CMA_web_version_final_---2.pdf.

economics and aligned more closely with the interests of competition and consumers – in the analysis of vertical agreements, especially those incorporating restraints on intrabrand competition.

A first question could be whether UK should return to its original approach, excluding vertical agreements other than those incorporating RPM from the Chapter I prohibition of restrictive agreements. It is submitted however that this would not be desirable as experience, and an established body of literature, suggests that vertical agreements do have the potential to produce anticompetitive effects even when concluded by firms which are not dominant.[128] A decision to exclude vertical agreements in this way would therefore create a risk that the systems would not be flexible enough to reach all potentially problematic vertical arrangements, capable of harming competition through for example, facilitating collusion on markets (especially oligopolistic ones), or foreclosing competitors and/or the penetration of new markets.

If vertical agreements are not excluded from the Chapter I prohibition then the basic structure for analysing vertical agreements set out in EU law, and on which UK law is modelled, would remain: with strong presumptions against agreements incorporating object restraints; rules of legality or safe harbours for de minimis agreements and agreements satisfying the conditions of any relevant block exemption; and, full analysis being reserved for more complex situations where the rules and presumptions do not apply.

It has been seen that although this system developed under Article 101 provides considerable legal certainty to firms entering into vertical agreements, some problems do arise from it. For example, because of the extremely strict approach towards object and 'hard-core' restraints the system does create error risks; a possibility that some agreements designed to ensure efficient distribution across the EU will be deterred (Type I errors). In addition, because relatively few cases exist in which a full effects based analysis of a vertical agreement is conducted,[129] guidance is limited on the question of how it is determined whether a vertical agreement has as its effect the appreciable restriction of competition and/ or whether the agreement satisfies the four conditions of Article 101(3).[130] In particular, it is unclear when concerns manifest in the jurisprudence about restraints on rivalry and internal market integration prevail over analysis based on an assessment of the impact of the conduct on economic efficiency and the welfare of consumers in the EU. The lack of a clear framework for assessment has meant that it is difficult to know how new vertical models of distribution or vertical restraints emerging on online markets and platforms are to be assessed. Many of these practices are not dealt with in detail in the Commission's Vertical Guidelines and, although some proceedings have taken place at the national level, a clear picture has not yet emerged as to how EU competition law governs them.

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128 See e.g., WS Comanor, 'Vertical Price-fixing, Vertical Market Restrictions, and the New Antitrust Policy' (1984–1985) 98 *Harvard LR* 983, R Pitofsky, 'In Defense of Discounters: The No-frills Case for a Per Se Rule Against Vertical Price Fixing' (1983) 71 *Geo LJ* 1487, P Rey and T Vergé, 'Resale Price Maintenance and Horizontal Cartel', CMPO Discussion Paper 02/047 (2004), A Fletcher and M Hviid, 'Broad Retail Price MFN clauses: Are They RPM "At Its Worst"' (2016) 81 *Antitrust Law Journal* 1 and T Cheng, 'A Consumer Behavioral Approach to Resale Price Maintenance' (2017) 12(1) *Virginia Law & Business Review* 1.

129 Because most competition agency decisions involving vertical agreements have involved object infringements and firms will where possible seek to rely on the safe harbour of the block exemption. Most EU 'effects' cases have therefore involved references from national courts in the course of private litigation.

130 See e.g., O Brooks. 'Struggling with Article 101(3) TFEU: Diverging Approaches of the Commission, EU Courts, and Five Competition Authorities' (2019) 56(1) *CMLRev* 121.

A second question therefore is whether some gradual modifications to the EU framework should be adopted in the UK to address, or temper, some of the shortcomings of EU law in this sphere. For example, should the strong presumptions of illegality applicable in EU law continue to be applied or tempered, should a UK specific verticals block exemption be adopted and should more detailed guidance on vertical agreements be developed?

4.2 Presumption of illegality

One important issue is whether the strong presumption of illegality[131] currently applied to RPM, online RPM, territorial restraints[132] and online selling restraints should remain and whether it should be extended to certain price parity provisions – for example, certain (e.g., wide) MFNs. The answer to this question depends upon an assessment of whether the UK wishes to remain bound by EU precedents influenced by single market objectives and/or whether the 'economics' alone provides sufficient justification both to assume harm to competition and to presume that they have no redeeming efficiencies or involve restraints that are generally unnecessary (or disproportionate) to the achievement of efficiencies. It could be argued, for example, that as the frequency and magnitude of positive or negative effects of newer, and especially online, vertical restraints remain relatively unexplored, the category of object restraints should not be expanded further than the current object restraints, established in both EU and UK case-law. Further that even in the case of established restraints caution should be exercised, in particular because of the influence that single market considerations have had on the EU line of cases.

Both of these cautions indicate that the general EU principles laid out in relation to object restraints should be applied carefully and rigorously and would be less contentious in the future if a fuller and more realistic characterisation process were conducted to determine if object categorisation is appropriate in any individual case involving a vertical agreement. This rigidity and problematic resort of an overly expansive object category could be mitigated, therefore, if the UK authorities were more willing, even for agreements incorporating established vertical price and territorial restraints, to consider the purpose and the context of the agreement before concluding whether object or effect analysis is required. Indeed, EU case law (including *CB*)[133] makes it clear that horizontal cooperation agreements with the potential to have mixed effects on competition – even those containing price or output restraints – do not fall within the object category unless they do not truly concern, for example, joint research and development, production, or joint purchasing, but serve as a tool to engage in a disguised cartel. Logic, and case-law, requires that a similar, robust 'characterization' exercise should be carried out in relation to vertical restraints: meaning that RPM and territorial restraints plausibly necessary to the pursuit of a legitimate procompetitive objective should not be found to restrict competition by object. Further, new restraints should not be added to the object category unless theory or experience justifies a finding that the clauses and context reveal a high probability of anticompetitive effects.[134]

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131 Although no absolute or per se rule applies against object restraints, it has been seen that a perception has been built that they are most unlikely to be compatible with Article 101, even where it has been vociferously argued by parties that the restraints at issue were necessary to enable a supplier to penetrate a new national market, prevent free-riding and so increase competition, consumer choice and market integration.

132 Although some territorial restraints will affect trade and competition within the UK, others may not (eg a ban on selling into the EU, but see note 126). An agreement between two undertakings in the EU prohibiting the EU buyer from selling into the UK may affect trade and competition within the UK, see note 126

133 See note 95. See also e.g., Commission's Horizontal Cooperation Guidelines, paras 128, 160–161, and 205–206.

134 See Jones and de la Mano, *supra* note 29 and Jones and Kovacic, *supra* note 28.

This important characterisation step would ensure that where, as in a case such as *Ping*, plausible efficiency justifications for an agreement exist, the CMA would be required to establish and consider actual or likely anticompetitive effects, as well as proffered procompetitive justifications, prior to the practice being condemned.

4.3 Verticals block exemption or another safe harbour

Another question to be resolved is whether a UK specific verticals block exemption should replace the EU Verticals Regulation once it expires in 2022. Clearly the EU block exemption provides desirable legal certainty which is highly appreciated by businesses. An alternative to adopting UK block exemptions, however, could be to provide a safe harbour in another way, perhaps through Guidelines explaining that vertical agreements are unlikely, in the absence of object restraints or networks of agreements, to have restrictive effects if the parties to the agreement lack market power (proxied, for example, by market shares of 30%). Although this latter approach would lack the same legal effect and force of an exemption valued by firms, it would have some advantages over the block exemption approach from a legal coherence perspective. First, one problem with the Verticals Regulation, which exempts agreements in case they restrict competition, is that they focus attention on the exemption criteria and, implicitly, indicate that an infringement of Chapter I (and Article 101) has occurred (or is likely to have occurred). Arguably this contributes to the lack of clarity shrouding the question of how Article 101(1), and Chapter I, analysis is to be conducted (see further 4.4 below), especially given that it seems evident that most agreements satisfying the conditions of the current Verticals block exemption are in fact highly unlikely to affect actual or potential competition to such an extent that a negative effect on prices, output, innovation, or the variety of quality of goods can be expected. Guidelines on the interpretation of section 2(1) would, in contrast, help to shed light on how effects analysis under Chapter I is to be conducted in the future. Secondly, Guidelines would be less rigid than block exemptions which provide an automatic exemption for vertical agreements that satisfy its conditions which can only be withdrawn prospectively, even if they incorporate restraints that were not specifically considered at the time of the drawing up of the exemption; for example, in relation to the current Verticals Regulation restraints on selling on the internet via a third party platform or market place[135] or price parity provisions and MFNs. Even though the benefit of the block exemption can be withdrawn this can only be done prospectively, and is rarely a priority for a competition authority. In contrast, guidance under section 2 would give the CMA greater flexibility and scope to consider a new restraint and, if appropriate, address it in a decision.

4.4 Provision of guidance

Another crucial matter is how guidance can be provided as to how agreements that are not presumed to be illegal or legal, or which do not benefit from a safe harbour, are to be appraised. This is crucial, as effective enforcement of the competition laws needs to ensure not only that breaches are halted, punished and deterred,[136] but also that the law is developed and elucidated. If the breadth of the object category is more realistically limited and block exemptions abandoned, the CMA (and claimants in private litigation) might, more frequently, be required to analyse the actual or likely anticompetitive effects of vertical agreements before an agreement is condemned under Chapter I. Although concern about the open-textured nature of full antitrust analysis has often led decision-takers to shy away from adopting it, and an anxiety that it will become

[135] See *Coty*, *supra* note 25.

[136] And where appropriate, victims compensated.

tantamount to a rule of per se legality (given the difficulty it presents for claimants) leading to Type I errors, the UK administrative system provides a flexible forum for the CMA to develop an administrable and workable framework for an assessment of vertical restraints which need not be an expensive, excessively complex or time-consuming task. For example, the UK competition agency's experience with price parity agreements and MFNs under both the CA98 and EA02 has allowed it over time to build experience in appraising their mixed effects. It also illustrates the dangers of applying object analysis to them, prior to that experience being developed. If progress is advanced in this way through close analysis and decisions, which are reviewed on appeal, it would allow the law to evolve and provide greater clarity to firms. Indeed, if the CMA were to bring a number of carefully targeted effect cases in this way, they could help to lift the perception of effects analysis being unmanageable and disorderly and shed greater light on how:

- anticompetitive effects in terms of parameters of competition can be identified under Chapter I (departing from the objective necessity test set out in many of the EU cases) i.e., whether the agreement is likely to enable or facilitate the exercise of market power through input or customer foreclosure or coordination; and
- how those anticompetitive effects can be balanced against procompetitive effects demonstrated under Section 9. For example, that the parties may enhance the ability of the firms to act procompetitively for the benefit of consumers by internalising double mark-ups, preventing free riding, encouraging investment in customer services, permitting a cost effective alternative to service contracts, facilitating market entry for new firms, and brands or otherwise aligning the incentives of the parties.

5 Conclusions

Since the adoption of the CA98 UK competition law has taken a hard-line approach towards RPM. Although the withdrawal of the Verticals Exclusion Order meant that many more vertical agreements were brought within the ambit of Chapter I, the main focus of the OFT and CMA has remained on RPM (and more recently online RPM) and other established object restrictions. Indeed, of the 20 CA98 competition agency infringement decisions adopted in relation to vertical agreements between 2000-September 2020, 19 of these related to RPM (some with hub and spoke or more serious horizontal aspects), online RPM or restraints on online selling. The other more problematic infringement decision involved complex, vertical price relationship arrangements but was annulled on appeal (*Tobacco*).

As many other vertical agreements concluded in the UK benefit from the de minimis principle of the safe harbour of the EU Verticals Regulation, relatively few other vertical agreements have been reviewed by the CMA or UK courts. Filling a lacuna left by the European Commission, however, the UK competition agency has taken interest in MFNs, especially when used in relation to platforms, examining them, both in the context of the CA 98 and the EA02 market investigation procedures. A handful of other vertical agreements containing exclusivity provisions have also been reviewed by the CMA and the UK courts in private enforcement actions.

Although the UK has greater flexibility than exists under EU competition law to examine networks of vertical agreements and new vertical practices closely under its market investigation provisions, the approach towards vertical agreements under the CA98 is based on EU law and, in line with the principle of supremacy of EU law and section 60 CA98, follows it closely and without deviation. Indeed, in *Ping* the UK authorities applied principles of EU competition law, even in circumstances where they are heavily influenced by the single market objective.

Post-Brexit, the UK authorities and businesses will no doubt be keen to ensure that UK competition law and policy remains closely aligned with EU competition rules which many firms will in any event need to continue to comply with. There is scope, however, over time for UK law to diverge from EU law if this is thought to be beneficial and necessary to improve law and policy. This chapter suggests that some helpful improvements could be made, to develop a more coherent framework for the analysis of vertical agreements under Chapter I CA98. In particular, it has proposed a more robust mechanism for identifying object restraints and much clearer guidance, set out by the CMA and developed through decisional practice, on the questions of how restrictive effects of vertical agreements should be identified under section 2 and balanced against identified efficiencies under section 9.