

Verticals update

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The basics



Policy framework

Vertical agreement:

- an **agreement** or concerted practice
- between undertakings at **different levels** of the production or distribution chain
- which relates to the conditions under which the parties may **purchase, sell or resell certain goods or services**
- not an IP licence

Vertical agreements inherently **less likely to restrict competition** than horizontal agreements, except where they:

- Restrict retail prices
- Restrict resale territory or customer group (especially so as to partition the EU Single Market)
- Prevent online sales



Legal framework (1)

Generous EU block exemption (**Vertical Agreements Block Exemption Regulation/VBER**)

2010 VBER excludes all vertical agreements from Article 101 prohibition, provided that:

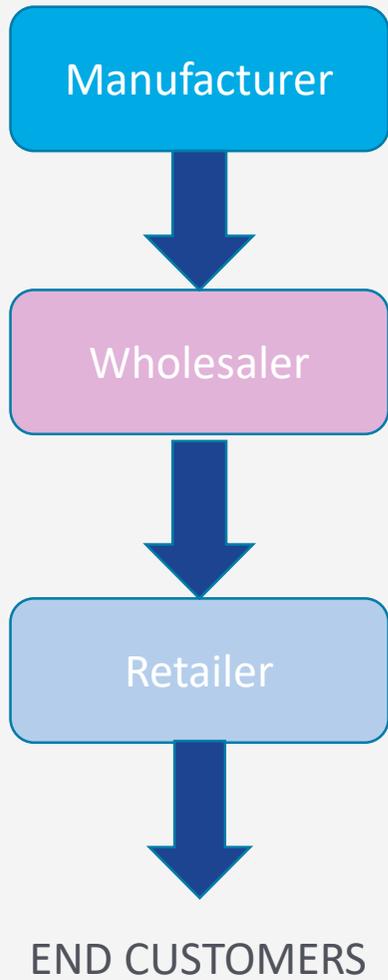
- parties are **not competitors** (subject to dual distribution exception)
- parties' market shares **do not exceed 30%**
- agreement does not contain any **hardcore restrictions**:
 - RPM
 - Territorial or customer restrictions (restrictions on 'where and to whom sold') (with limited exceptions – can prohibit active sales into exclusive territories, can prohibit wholesalers from selling to end customers)
 - Resale restrictions (with exceptions)
 - Restrictions on sales within SDS

Legal framework (2)

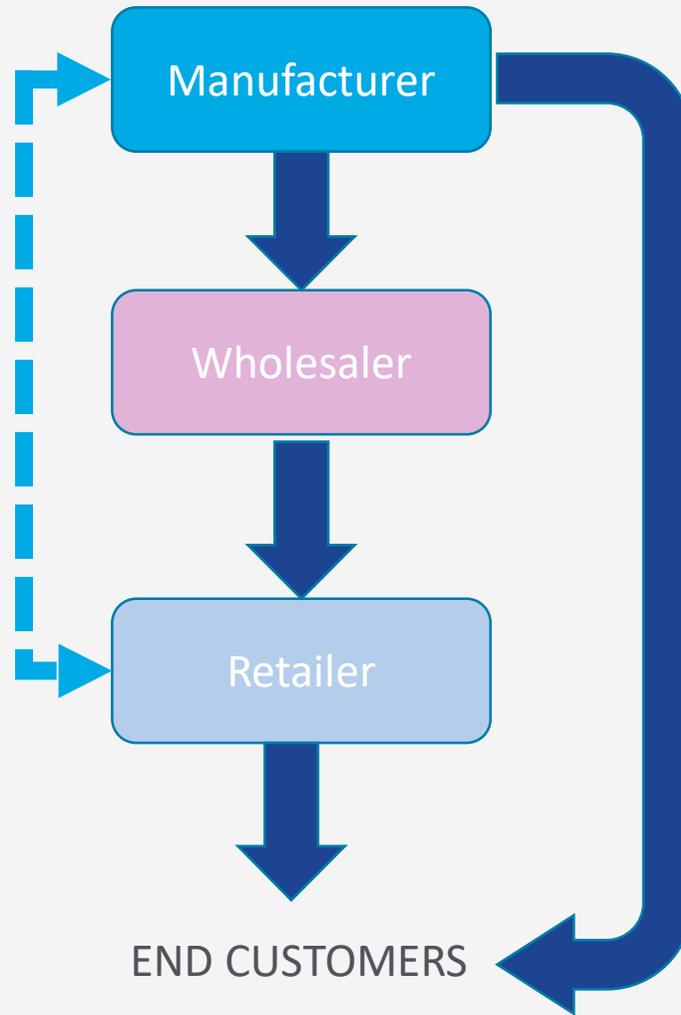
- **Hardcore** restrictions presumptively unlawful and remove agreement from safe harbour
- **Excluded restrictions** (non-competes imposed on buyers) not protected but not presumptively unlawful
- Restrictions on suppliers (including non-competes) generally permitted
- Significant freedom to craft distribution systems within safe harbour (eg SDS)
- Agreements within safe harbour **immune from challenge**
- Authorities able to remove agreements from safe harbour but courts cannot
- Agreements outside safe harbour must be assessed on case by case basis, with aid of Verticals Guidelines

Dual distribution

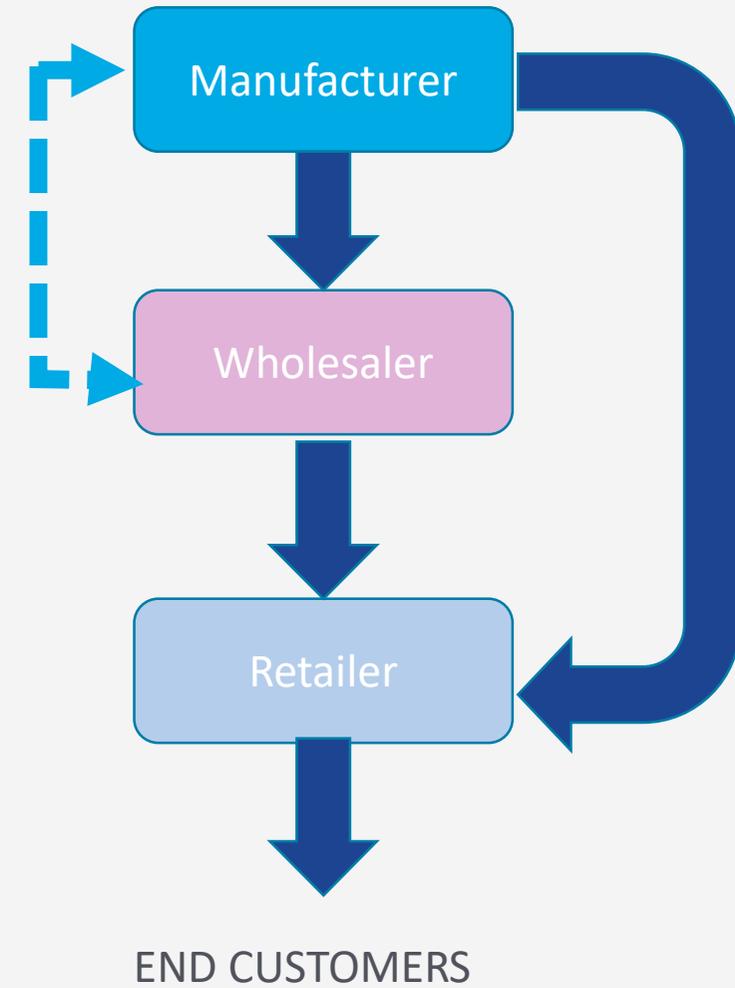
Traditional model



Dual distribution (brand website)



Dual distribution (mixed wholesale)



Recent case law



Key post-2010 case law – ECJ judgments

- *Pierre Fabre* (2011)
 - Requirement for cosmetics to be sold in pharmacy object restriction of online sales
 - Online sales equated to passive territorial sales
- *Auto 24* (2012)
 - Operator of quantitative SDS free to refuse admission within block exemption
- *Coty* (2017)
 - Operator of SDS for luxury cosmetics allowed to ban sales on third party marketplaces
 - Based on premise that marketplace sales inherently different from sales on reseller's own website ('how to sell' vs 'where/to whom')

Key post-2010 case law – Commission decisions

- *Movies on Pay-TV (2016, 2019)*
 - Territorial restrictions
- *Consumer electronics (Denon/Marantz, Philips, Pioneer, Asus) (2018)*
 - RPM
 - Aided by price monitoring software
- *Guess? (2018)*
 - Restriction of online sales
 - Restriction of territory and customer
 - Restriction of cross-supplies within SDS
 - RPM
 - Restriction of use of trade mark for search advertising
 - €40 million fine
- *Licensing (Sanrio, Nike, NBC Universal) (2019,2020)*
 - Territorial restrictions
 - Online sales restrictions
- *Meliá (2020)*
 - Territorial restrictions

Key post-2010 case law – NCA decisions

- **German *Bundeskartellamt***
 - *Adidas* (2014)
 - Removal of ban on search advertising
 - *ASICS* (2015)
 - Restriction on use of price comparison sites and search advertising *de facto* ban on online sales
- **French *Autorité de la concurrence***
 - *Stihl* (2018)
 - Hand delivery requirement *de facto* ban on online sales
 - Marketplace ban permitted
 - €7 million fine
 - *Mobotix* (2021)
 - Restrictions on price advertising and exclusion of majority online retailers
 - €1.4 million fines
- **UK CMA**
 - *Ping* (2017)
 - requirement for in-store fitting *de facto* ban on online sales
 - £1.45 million fine

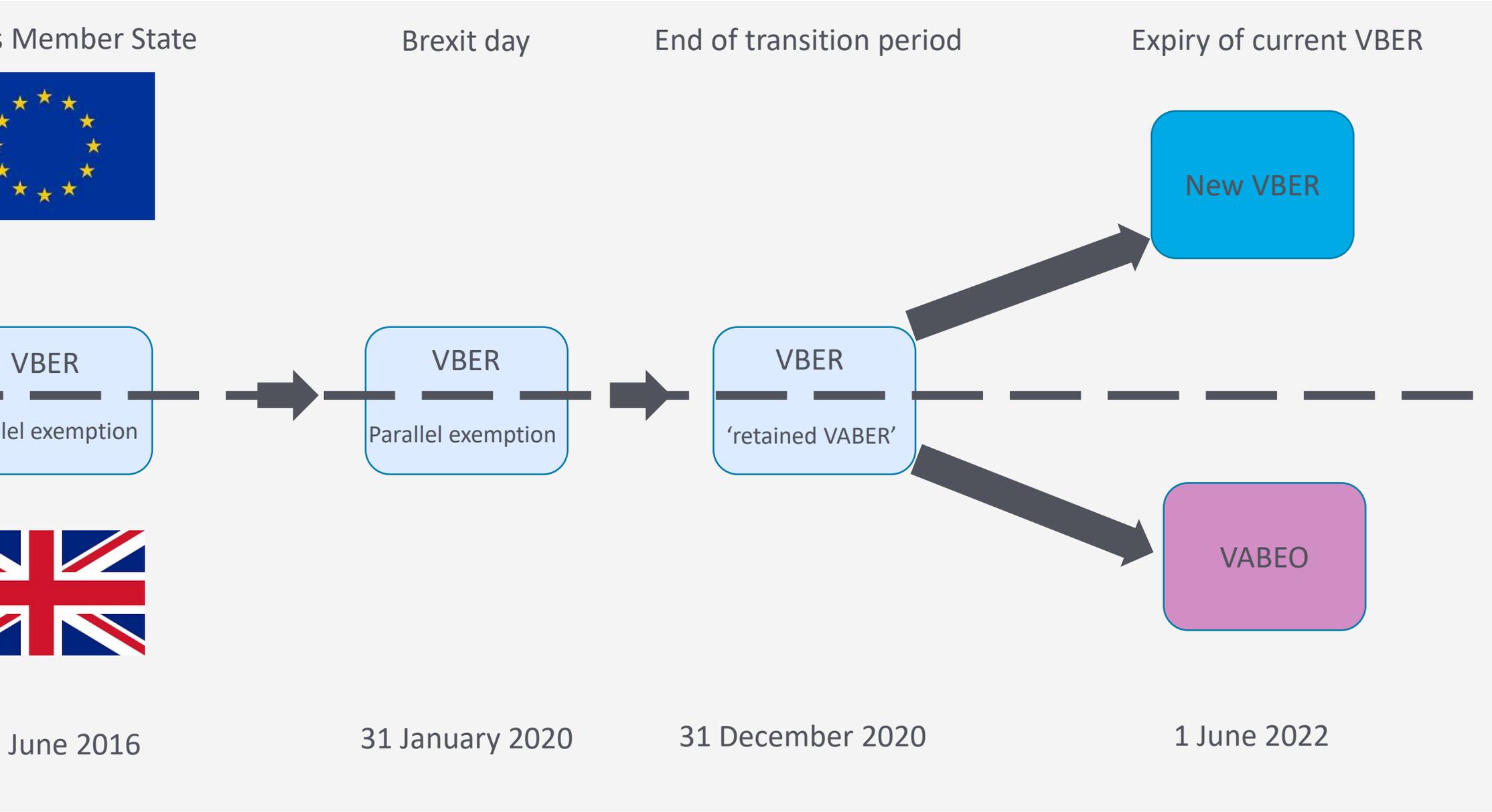
VBER Developments



The EU VBER Review

- **2015-2017** – E-Commerce Sector Inquiry
- **2018** - Launch of Evaluation Phase
- **2019** – Public consultation
- **2020** – Publication of Evaluation Results and Support Studies
 - Key conclusions:
 - Need to update VBER to take account of market developments, especially rise of online retail and platforms
 - Simply and clarify
 - Update Guidelines to take account of new case law
- **2021** – Publication of draft consultation texts of new VBER and Guidelines
- **2022** - Final text due before new VBER enters into force on 1 June

The impact of Brexit on the UK verticals framework



Common elements of EU and UK proposals

- Extension of dual distribution exception to include wholesalers and importers
- Shared exclusivity to be permitted (with limitations)
- Clarification that online intermediaries to be treated as suppliers of services, not buyers
- Enhanced protection for selective distribution territories
- Dual pricing no longer hardcore
- No change on RPM
- Lack of equivalence for online sales criteria no longer hardcore
- Further guidance on active/passive sales restrictions, territorial restrictions and online restrictions
- Additional guidance on agency rules
- Additional guidance on sustainability



Divergence points

	EU VBER	UK VABEO
Equal distribution	10% market share threshold for information exchange Exclusion of hybrid online platforms Exclusion of wholesale competition	General exception, except for information exchange outside block exemption
Treatment of hybrid online platforms	Excluded from VBER safe harbour	No specific limitation
MFNs	Wide online MFNs excluded restriction	Wide offline and online retail MFNs hardcore restriction
Flow down of restrictions	Permitted to customers of buyer who have contracted with supplier or with party given distribution rights by supplier	Not permitted
Combination of exclusive and selective distribution	Not permitted	Permitted
Facilitated renewal of non-competes	Permitted	Excluded

Open questions - EU

- Will Commission soften approach to hybrid online platforms?
- Will Commission adopt dual distribution proposals as they stand?
- Will suppliers implement shared exclusivity in practice, given uncertainties?
- How far will suppliers take advantage of ability to flow down restrictions?
- How much warning will we get of the new text before it enters into force?

Open questions - UK

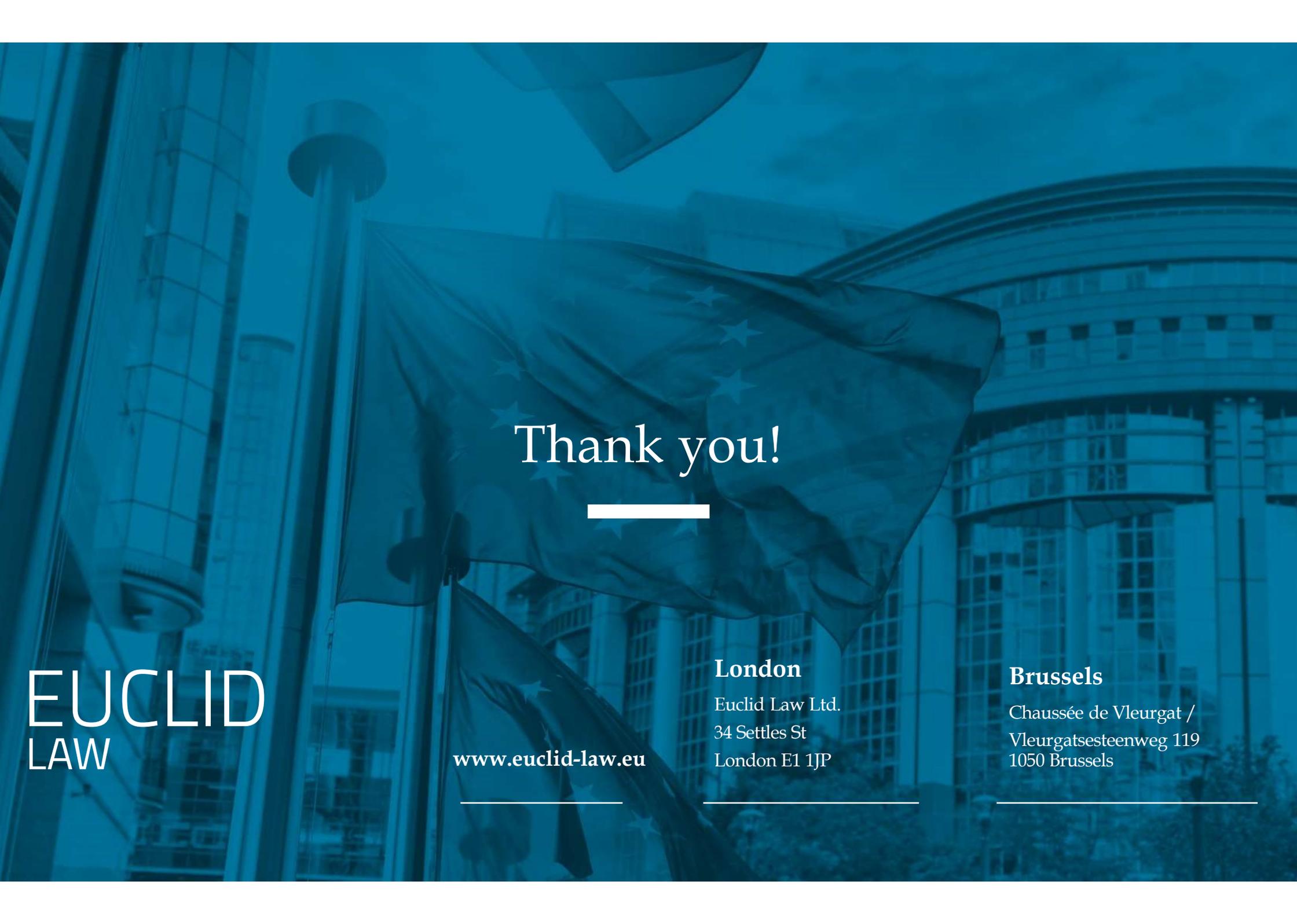


How far will Government follow CMA recommendations, given its close tracking of VBER?

How far will CMA guidance document mirror the EU Verticals Guidance (and which one)?

How will the CMA treat restrictions on **sales from EU into the UK**?

- Restrictions on sales *within* the UK (including NI/GB) will be hardcore restrictions
- Suggests treatment of restrictions on sales *into* UK as (at most) restriction by effect, rather than object (cf *Javico*)
- Chapter I prohibition applies only where the agreement **affects trade within the UK and is implemented in the UK**
- NB Government has consulted on extension of jurisdiction to include agreements that are likely to have **direct, substantial and foreseeable effects** within the UK
- Will the CMA 'go Swiss'?



Thank you!

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