

# EU and UK Revamp Antitrust Rules on Distribution Arrangements

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One Manhattan West  
New York, NY 10001  
212.735.3000

Significantly updated antitrust rules governing common distribution practices took effect in both the European Union and U.K. on June 1, 2022. These constitute a significant change in policy and provide greater clarity to companies about the application of the rules, broadening some exemptions (safe harbors) while limiting others. This is the U.K.'s first post-Brexit amendment to its antitrust regime. Some arrangements may be subject to both regulatory regimes.

Key changes include:

- Compliance safeguards are spelled out regarding the sharing of information within dual distribution sales channels;
- Most-favored-nation (MFN) clauses for retailers are subject to stricter assessment, with the U.K. treating certain retail MFNs as presumptively illegal;
- Additional clarity is provided on the legality of online sales restrictions (including sales made through online marketplaces), bidding on certain search terms and online quality standards; and
- A more lenient approach is taken to certain distribution practices, including: (i) fixing the resale price with an end user under a fulfillment contract; (ii) supporting in-store sales over online sales; and (iii) flexibility in setting up exclusive and authorized dealer networks.

Companies will need to consider both whether their distribution agreements comply with the revised rules and whether there are opportunities to benefit from more lenient treatment under them. It will generally be necessary to consider EU and U.K. rules in parallel, because both have extraterritorial application where agreements are implemented in the U.K. and have a material impact in the EU.

## Background

The European Commission (EC) adopted a revised [Vertical Block Exemption Regulation \(VBER\)](#) and [Vertical Guidelines](#) on May 10, 2022, to replace its 2010 rules. The U.K. had retained the EU rules post-Brexit but took this opportunity to revise the equivalent U.K. block exemption order, [The Competition Act 1998 \(Vertical Agreements Block Exemption\) Order 2022 \(VABEO\)](#), and [accompanying guidance](#).

The new EU and U.K. rules grant a transition period to agreements entered into place before June 1, 2022. However, such agreements need to be compliant with the new regime by the end of May 2023.

## Dual Distribution

In recognition of the increased use of direct-to-consumer distribution, the EC introduced new rules intended to prevent collusion between a supplier's direct and indirect resale channels.

The EU law states that communications between the supplier and its indirect channel are only exempt if directly related to and necessary to improve distribution. The Vertical Guidelines list the information that may lead to unlawful collusion, particularly on future pricing, promotional campaigns or customer strategy. The new rules also state that no exemption applies between an online marketplace and third-party retailers using that marketplace.

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As a practical matter, it will be important to consider issuing guidance for employees dealing with the supplier's direct and indirect sales channels. In some cases, it may be appropriate to institute information barriers to prevent collusion.

## MFN Clauses

Under the former rules, within the 30% market share safe harbor, MFN clauses — which guarantee a retailer the best price available to any other retailer — were an exempt price-setting/assurance mechanism. Scrutiny of the alleged anticompetitive effects of MFNs led the EC to remove the block exemption for wide MFNs used by retail e-commerce platforms. (MFNs are qualified as “wide” when a seller promises a reseller/platform the best terms available to any indirect distribution channel.) The restrictions require justification based on the economic context.

The U.K. takes a stricter view, holding offline or online wide-retail MFNs presumptively illegal under the VABEO. But both the EU and U.K. make clear that “wholesale” MFNs, common in long-term supply agreements where a business buyer seeks assurances on price from its supplier, remain exempt.

## Resale Price Maintenance

Resale price maintenance (RPM) — when retailers commit to their suppliers not to resell a product below an agreed price — remains strictly illegal under the EU's revised rules, with very limited exceptions for new product launches, addressing complex product free-rider concerns or preventing a specific dealer's incentive to charge lower prices.

However, the revised EU and U.K. rules clarify that the RPM prohibition does not apply to fulfillment contracts, where a supplier has already agreed to a price in a separate agreement with the customer and the dealer fulfills the sale at the agreed price — provided that the supplier has already selected (or can select) the dealer that will fulfill the contract.

Both the EU and U.K. address whether it is legitimate to fix the price at which online platforms sell products under the “genuine agency” exception to the usual rule against RPM. The exception applies where an intermediary is not economically independent and acts as an extension of the supplier, taking no material commercial and financial risk. Under the new rules, online platforms are not considered genuine agents because they generally act as independent economic operators.

It will therefore be important for companies to review any existing agency agreements with online platforms to see if they need to be amended.

## Restrictions on Resellers' Use of the Internet

The new rules also address common internet sales practices.

Following European Court of Justice precedent, notably the *Coty* judgment, the EC states that suppliers are permitted to prevent channels using online marketplaces where there is no contractual relationship between the supplier and the marketplace operator. No special provision is made for luxury versus other brand products. But companies will need to assess whether objectives such as brand protection or service quality can be achieved by less restrictive means, such as with an own-brand shop within the online marketplace.

Both the EU and U.K. relaxed the rule that a supplier generally should not have different wholesale prices depending on whether a retailer sells in-store or online. Previously, this was considered a presumptively illegal penalty on selling via the internet. Recognizing that offline retailers should have incentives to invest in in-store promotions and that they face higher overheads than online retailers, the new rules allow suppliers to offer retailers better pricing for in-store sales, provided these are not *de facto* a prohibition on internet sales.

While this is welcome flexibility, it will be important to consider carefully how to calibrate any price differential to reflect in-store/online overheads and incentives.

## Exclusive and Authorized Dealer Distribution Arrangements

The new EU and U.K. rules also introduce the concept of “shared exclusivity,” where a supplier allocates an exclusive territory or a customer group to more than one distributor (up to five in the EU, but no limit in the U.K.) and protects these shared exclusive distributors from active sales.

The rules also permit the use of various distribution arrangements tailored for specific territories, for example, allowing a supplier to appoint several authorized dealers in one territory (and prevent sales from dealers outside that territory to unauthorized in-territory dealers) and exclusive dealers in another (that is, preventing ex-territory dealers from soliciting business in the exclusively allocated territory).

The U.K. goes a step further and allows a combination of authorized and exclusive arrangements, for example, by appointing a distributor to serve authorized retailers within an exclusive distribution territory. This mix of an exclusive distributor (who focuses on investing in logistics and cultivating retailer relationships in a territory) and authorized retailers (who focus on a quality customer retail experience) can be an attractive one for, among others, suppliers of branded or complex goods.

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## Takeaways

In conforming the EU and U.K. rules to the digital age, the updates provide additional flexibility for suppliers to optimally structure their distribution arrangements. At the same time, the rules increase compliance costs around parallel direct and indirect channels, as companies will need to put in place guidance and train employees how to avoid sharing sensitive information.

Similarly, the rules on MFNs — particularly the U.K.'s *per se* prohibition — will require a review of current arrangements with intermediaries, particularly online platforms, as will the increased risk of resale price maintenance in respect of online platforms that can no longer benefit from the agency exception.

Companies should consider carefully their compliance steps and take both the EU and U.K. rules into account, as most material distribution arrangements are likely to be subject to parallel jurisdictions.

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## Contacts

### Bill Batchelor

Partner / Brussels  
32.2.639.0312  
bill.batchelor@skadden.com

### Frederic Depoortere

Partner / Brussels  
32.2.639.0334  
frederic.depoortere@skadden.com

### Aurora Luoma

Partner / London  
44.20.7519.7255  
aurora.luoma@skadden.com

### Giorgio Motta

Partner / Brussels  
32.2.639.0314  
giorgio.motta@skadden.com

### Ingrid Vandenborre

Partner / Brussels  
32.2.639.0336  
ingrid.vandenborre@skadden.com

### Thorsten C. Goetz

Counsel / Brussels  
32.2.639.4502  
thorsten.goetz@skadden.com

### Antonio Adriano Cammalleri

Associate / Paris  
32.2.639.2152  
antonio.cammalleri@skadden.com

### David M. Goldblatt

Associate / Brussels  
32.2.639.2156  
david.goldblatt@skadden.com

### Melissa Healy

Associate / Brussels  
32.2.639.0337  
melissa.healy@skadden.com