

LAW SOCIETY SUBMISSION



**REVISION OF THE COMPETITION AND CONSUMER PROTECTION
COMMISSION VERTICALS DECLARATION**

COMPETITION AND CONSUMER PROTECTION COMMISSION

9 FEBRUARY 2023

1. Introduction

- 1.1 The Law Society of Ireland (the “**Law Society**”) welcomes the opportunity to contribute to the Competition and Consumer Protection Commission (the “**CCPC**”) consultation on revision of its declaration in respect of vertical agreements and concerted practices (the “**Declaration**”) and its notice in respect of vertical agreements and concerted practice (the “**Notice**”).
- 1.2 Our response is focused on assessing the compliance of the proposed Declaration and Notice with Commission Regulation (EU) 2022/720 (the “**Vertical Block Exemption Regulation**” or “**VBER**”)¹ and the Commission’s Notice – Guidelines on Vertical Restraint (the “**European Commission’s Guidelines**”).²
- 1.3 We have also reviewed the Declaration and Notice, on their face, to ensure they are both legally coherent and consistent with the Vertical Block Exemption Regulation and the European Commission’s Guidelines.

2. Substantive compliance

- 2.1 For our response, we assessed compliance under the following four key aims of the European Commission in respect of its revised approach as provided in the Vertical Block Exemption Regulation and the European Commission’s Guidelines:
1. Online marketplace and sales restrictions;
 2. Dual distribution;
 3. Resale price maintenance; and
 4. Parity (or most favoured nation clauses).
- 2.2 The Law Society welcomes the CCPC’s revisions and considers that the revised approach is in line, in all material respects, with the foregoing aims of the European Commission, as it closely resembles the Vertical Block Exemption Regulation textually, and implements the relevant changes introduced.
- 2.3 The Law Society observes that the Notice states (in paragraph 3) that the European Commission’s Guidelines “**may also**” be referred to when interpreting the Vertical Block Exemption Regulation as follows:

*Accordingly, and subject to the exceptions set out in paragraphs 4 and 5 below, the European Commission’s Guidelines on Vertical Restraints (the “EU Guidelines”), which give practical assistance on assessing whether vertical agreements conflict with the VBER, **may also** be referred to for guidance in assessing whether an agreement is likely to fall outside section 4(1) of the Act.*

¹ Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2022] OJ L 134/4.

² Commission Notice – Guidelines on vertical restraints [2022] OJ C 248/1.

The European Commission's Guidelines are important in the context of the Notice and Declaration, as they clarify the key aims of the Vertical Block Exemption Regulation and highlight many of the changes introduced in relation to online marketplace and sales restrictions, dual distribution, resale price maintenance and parity clauses.

We would ask that the CCPC consider the following:

1. That this phrase could be strengthened for legal certainty reasons;
2. For clarity, it may also be worth referring to the European Commission's Guidelines in the Declaration; and
3. That the CCPC explicitly commits itself to interpreting the Declaration and Notice in a manner that is wholly consistent with the European Commission's Guidelines.

3. Legal Coherence:

3.1 There appears to be a typographical error in the transposition of the definition of **'Connected Undertaking' in Article 1(g)(iv) of the Declaration:**

Article 1(g)(iv) states:

undertakings in which a party to the agreement, together with one or more of the undertakings referred to in (i), (ii) or (ii), or in which two or more of the latter undertakings, jointly have the rights or powers listed in (i);

The equivalent definition of 'Connected Undertaking' appears in Article 1(2)(d) of the Vertical Block Exemption Regulation as follows:

undertakings in which a party to the agreement together with one or more of the undertakings referred to in points (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in point (a);

It is suggested that the text of Article 1(g)(iv) of the Declaration is amended to the following:

undertakings in which a party to the agreement, together with one or more of the undertakings referred to in (i), (ii) or (iii), or in which two or more of the latter undertakings, jointly have the rights or powers listed in (i);

3.2 There appears to be a consistency error in the transposition of the definition of **‘Connected Undertaking’ in Article 1(g)(v) of the Declaration:**

Article 1(g)(v) states

undertakings in which the rights or the powers listed in (a) are jointly held by:

- parties to the agreement or their respective connected undertakings referred to in (i) to (iv), or

- one or more of the parties to the agreement or one or more of their connected undertakings referred to in (i) to (iv) and one or more third parties.

The equivalent definition of ‘Connected Undertaking’ is found in Article 1(2)(e) of the Vertical Block Exemption Regulation as follows:

undertakings in which the rights or the powers listed in point (a) are jointly held by:

(i) parties to the agreement or their respective connected undertakings referred to in points (a) to (d), or

(ii) one or more of the parties to the agreement or one or more of their connected undertakings referred to in points (a) to (d) and one or more third parties.

To ensure consistency within the Declaration it is suggested that Article 1(g)(v) is amended as follows

undertakings in which the rights or the powers listed in (i) are jointly held by:

- parties to the agreement or their respective connected undertakings referred to in (i) to (iv), or

- one or more of the parties to the agreement or one or more of their connected undertakings referred to in (i) to (iv) and one or more third parties.

3.3 **Dual Distribution:** we note that Recital 13 of the Vertical Block Exemption Regulation introduces an important caveat. It clarifies that the Vertical Block Exemption Regulation does not exempt an information exchange between the parties unless the information exchange is “*directly related to the implementation of the vertical agreement*” and is “*necessary to improve the production or distribution.*” This implies that an individual assessment of the purpose of such information exchange will be required to determine whether the block exemption applies.³ In addition, the European Commission

³ For reference, see paragraph on [‘Dual Distribution’ in Freshfields Burckhaus Deringer, ‘EU’s updated distribution rules’](#) (19 May 2022)

published further guidance in relation to the new section dealing with information exchange in dual distribution.⁴

The Law Society submits that it would be beneficial if the CCPC provided further clarification in its Notice as to whether an individual assessment of undertakings will now be required by the CCPC in relation to dealings concerning information exchange in dual distribution.

We hope that the CCPC will find these comments to be constructive and will be glad to engage further on any of the matters raised.

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⁴ Commission, '[Draft new section dealing with information exchange in dual distribution](#)'; and Commission Notice – Guidelines on vertical restraints [2022] OJ C 248/1, paragraph 99.