



Vertical Agreements

The regulation of distribution practices
in 34 jurisdictions worldwide

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1 What are the legal sources that set out the antitrust law applicable to vertical restraints?

The key source on the regulation of vertical restraints in the United Kingdom is the Competition Act 1998 (the CA), available at: www.opsi.gov.uk/acts/acts1998/19980041.htm. Section 2(1) of the CA prohibits agreements between undertakings that may affect trade within the UK and have as their object or effect, the prevention, restriction or distortion of competition within the UK (the chapter I prohibition). Section 2(4) of the CA renders agreements falling within the chapter I prohibition void. Section 9(1) of the CA in essence provides that the chapter I prohibition will not apply where the economic benefits of an agreement outweigh its anti-competitive effects.

The EU-level rules on vertical restraints (see EU chapter) are also relevant in the following ways:

- Regulation 1/2003 provides that the Office of Fair Trading (OFT), the various sectoral regulators (see question 5) and the UK courts must apply article 81 of the EC Treaty when the chapter I prohibition is applied to agreements which may affect trade between member states.
- Section 60 of the CA imposes on the OFT, the various sectoral regulators and the UK courts an obligation to determine questions arising under the CA ‘in relation to competition within the [UK] ...in a manner which is consistent with the treatment of corresponding questions arising in [EU] law in relation to competition within the [EU].’ The effect of section 60 is that, in applying the chapter I prohibition, the OFT and the UK courts will typically follow the case law of the EU courts on article 81 of the EC Treaty. By section 60(3), the OFT and the UK courts must also ‘have regard to’ relevant decisions or statements of the European Commission.
- Section 10(2) of the CA provides for a system of ‘parallel exemption’. Under this system, an agreement that would fall within the safe harbour created by an EU block exemption regulation (see EU chapter) if it had an effect on trade between EU member states, will also be exempt from the chapter I prohibition;
- When applying section 9(1) of the CA, the Vertical Agreements Guidelines (UK Vertical Guidelines) issued by the OFT (www.of.gov.uk/NR/rdonlyres/FA88C6D0-6CFB-4A7A-8DE2-C16A0251BEC1/0/OFT419.pdf) state that the OFT will also ‘have regard to’ the European Commission’s De Minimis notice and its Vertical Guidelines (EU Vertical Guidelines) (see EU chapter).

Where a party occupies a dominant position on a market to which the vertical agreement relates, section 18 of the CA (the chapter II prohibition) or article 82 of the EC Treaty (which both

regulate the conduct of dominant companies) will also be relevant to the antitrust assessment of a given agreement. However, conduct falling within the chapter II prohibition is considered in the *Getting the Deal Through – Dominance* publication and is therefore not covered here.

Finally, the OFT may conduct market studies under section 5 of the Enterprise Act 2002 (Enterprise Act) (www.opsi.gov.uk/acts/acts2002/20020040.htm) and refer markets for investigation to the Competition Commission under section 131 of the Enterprise Act where, for example, it considers that vertical restraints are prevalent in a market and have the effect of restricting competition.

2 List and describe the types of vertical restraints that are subject to antitrust law. Are those terms defined and how? Is the concept of vertical restraint itself defined in the antitrust law?

The UK Vertical Guidelines cite the definition of vertical agreements given in article 2(1) of the EU’s Vertical Block Exemption – ‘agreements or concerted practices entered into between two or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services’. Vertical restraints are restrictions on the competitive behaviour of a party that occur in the context of such vertical agreements. Examples of vertical restraints include exclusive distribution, selective distribution, territorial protection, export restrictions, customer restrictions, resale price-fixing, exclusive purchase obligations and non-compete obligations. The EU courts have clarified that, in order for a restriction to be reviewed under article 81, there must be a ‘concurrence of wills’ among the two parties to conclude the relevant restriction (*Bayer v Commission*). The UK’s Court of Appeal adopted the same ‘concurrence of wills’ language in *Argos Ltd and Littlewoods Ltd v OFT* and *JJB Sports Plc v OFT* in relation to disputes involving the chapter I prohibition. Leave to appeal the Court of Appeal’s judgment to the House of Lords was subsequently refused. Note, however, that the chapter II prohibition and article 82 of the EC Treaty regulate the unilateral conduct of companies occupying a dominant position on the market in question – see *Getting the Deal Through – Dominance*.

3 Are there particular rules or laws applicable to the assessment of vertical restraints in specific sectors of industry? If so, please identify the sectors and the relevant sources.

Yes. Under section 10(1) of the CA, an agreement affecting trade between EU member states but exempt from the article 81(1)

prohibition by virtue of an EU regulation must also be considered by any UK court and by the OFT as similarly exempt from the chapter I prohibition. Section 10(2) extends that same analysis to agreements that do not affect trade between EU member states but which would otherwise be exempted under an EU regulation were they to have such effect. Thus, certain motor vehicle distribution and repair agreements falling within the commission's Motor Vehicle Block Exemption (see EU chapter) will be exempt from the chapter I prohibition (see, for example, OFT press release of 24 January 2006, in relation to TVR).

Other industry-specific block exemption regulations exist but none of these is targeted specifically at vertical restraints.

- 4 Is the only objective pursued by the law on vertical restraints economic, or does it also seek to protect other interests?

In large part, the objectives pursued by the law on vertical restraints are economic.

- 5 What entity or agency is responsible for enforcing prohibitions on anti-competitive vertical restraints? Do governments or ministers have a role?

The OFT is the main body responsible for enforcing the CA. Where the OFT initiates 'market investigations' under the Enterprise Act, it has the power to refer cases to the Competition Commission for a more detailed investigation. There are also certain sectoral regulators which have concurrent jurisdiction with the OFT in relation to their own particular industry; namely, the Office of Communications (Ofcom); the Gas and Electricity Markets Authority (Ofgem); the Northern Ireland Authority for Energy Regulation (Ofreg NI); the director general of Water Services (Ofwat); the Office of Rail Regulation (ORR); and the Civil Aviation Authority (CAA). In general, references in this chapter to the OFT should be taken to include these sectoral regulators in relation to their respective industries. The role of ministers is minimal but the secretary of state for business, enterprise and regulatory reform does retain a residual power to intervene where particular public interest concerns arise.

- 6 What is the relevant test for determining whether a vertical restraint will be subject to antitrust law in your jurisdiction?

The chapter I prohibition applies where an agreement has an effect on trade within the UK. Where an agreement also has an effect on trade between EU member states, the OFT and UK courts must apply article 81 concurrently. The OFT has clarified that it will typically presume an effect on trade within the UK where an agreement appreciably restricts competition within the UK (see question 8). In general, the OFT is unlikely to take enforcement action in respect of a vertical restraint unless at least one of the parties has a degree of market power or the restraint forms part of a network of similar restraints having a foreclosure effect.

- 7 To what extent does antitrust law apply to vertical restraints in agreements concluded by public or state-owned entities?

The chapter I prohibition applies to 'undertakings'. The term 'undertaking' can cover any kind of entity, regardless of its legal status or the way in which it is financed, provided such entity is engaged in an 'economic activity' when carrying out the activity in question. Thus, public entities may qualify as undertakings when carrying out certain of their more commercial functions,

but will not be classed as undertakings – and so will be exempt from the chapter I prohibition – when fulfilling their public tasks.

As regards the purchasing practices of public bodies, the judgment of the UK's Competition Appeal Tribunal (CAT) in *Bettercare II* conflicts with subsequent judgments by the EU courts in *FENIN v Commission*. The EU courts focused in *FENIN* on the use to which the purchased products are put while the CAT considered that the key issue was not the ultimate use of the products but whether the purchaser was in a position to generate the effects on competition which the competition rules seek to prevent. Following the judgment of the European Court of Justice (ECJ) in *FENIN*, the OFT is considering its position and will presumably follow the ECJ's judgment in future cases.

- 8 Are there any general exceptions from antitrust law for certain types of vertical restraints? If so, please describe.

The chapter I prohibition will only apply to a vertical restraint that has an 'appreciable' effect on competition within the UK. Paragraph 2.18 of the OFT's Guidance Note on Agreements and Concerted Practices (www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft401.pdf) states that, in determining the appreciability of a restraint, the OFT will 'have regard to' the European Commission's De Minimis notice (see EU chapter). The De Minimis notice provides that, in the absence of certain 'hard-core' restrictions such as price-fixing or clauses granting absolute territorial protection, and in the absence of parallel networks of similar agreements, the Commission will not consider that vertical agreements have an 'appreciable' effect on competition provided market shares of the parties' corporate groups for the products in question do not exceed 15 per cent.

The Competition Act 1998 (Land Agreements Exclusion and Revocation Order, SI 2004/1260) (the Land Agreements Exclusion) provides that the chapter I prohibition will not apply to an agreement between undertakings which creates, alters, transfers or terminates an interest in land (land agreements).

Further, while not constituting a full exemption from the application of the chapter I prohibition, parties to 'small agreements' will be exempt from administrative fines under section 39 of the CA (see, for example, in relation to conduct of minor significance under the chapter II prohibition on abuse of a dominant market position, the OFT press release of 15 May 2007 in relation to the Cardiff Bus Company).

- 9 When assessing vertical restraints under antitrust law (or when considering the application of exceptions from antitrust law) does the relevant agency take into account that some agreements may form part of a larger, interrelated, network of agreements or is each agreement assessed in isolation?

The OFT will normally take into account the cumulative impact of a supplier's agreements when assessing the impact of vertical restraints on competition in a given market. In addition, the assessment of a given vertical restraint can vary depending on the vertical restraints concluded by that supplier's competitors. If the vertical restraints imposed by the supplier and its competitors have the cumulative effect of foreclosing market access, then any vertical restraints that contribute significantly to that foreclosure may be found to infringe the chapter I prohibition or article 81. In the recent judgment in *Calor Gas Ltd v Express Fuels (Scotland) Ltd & Anor* in the Scottish Court of Sessions, the Court rendered unenforceable a vertical restraint agreed between Calor

Gas Ltd and two of its distributors in part because Calor Gas had a network of similar restraints that served to foreclose the distribution market.

Further, under section 131 of the Enterprise Act, the OFT has extensive powers to refer markets to the UK's Competition Commission for an in-depth 'market investigation'. The OFT may initiate this process where it has 'reasonable grounds for suspecting that any feature, or combination of features, of a market in the United Kingdom for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom.' Networks of parallel vertical agreements in given industries are among the issues that can cause the OFT to refer a market for investigation.

10 In what circumstances does antitrust law apply to agency agreements in which an undertaking agrees to perform certain services on a supplier's behalf in consideration of a commission payment?

In general, the chapter I prohibition will not apply to any agreement between a 'principal' and its 'genuine agent' (ie, one who bears no substantial financial risk in respect of the transactions in which it acts as agent) insofar as the agreement relates to contracts negotiated or concluded by the agent for its principal. In this regard, the application of the chapter I prohibition tracks that of article 81 (see EU chapter).

11 Is antitrust law applied differently when the agreement containing the vertical restraint also contains provisions granting intellectual property rights (IPRs)?

Paragraphs 3.12 to 3.16 of the UK Vertical Guidelines track the provisions of the Vertical Block Exemption, providing that agreements which have as their 'centre of gravity' the licensing of IPRs will fall outside the Vertical Block Exemption. In such cases, the antitrust analysis is different. The relevant considerations include the application of the European Commission's Technology Transfer Block Exemption.

12 In what circumstances does antitrust law apply to agreements between a parent and a related company?

Paragraph 2.6 of the OFT's Guidelines on Agreements and Concerted Practices states that the chapter I prohibition will not apply: 'to agreements where there is only one undertaking; that is, between entities which form a single economic unit. In particular, an agreement between a parent and its subsidiary company, or between two companies which are under the control of a third, will not be agreements between undertakings if the subsidiary has no real freedom to determine its course of action on the market and, although having a separate legal personality, enjoys no economic independence. Whether or not the entities form a single economic unit will depend on the facts of each case.'

13 Can the legality under antitrust law of a given vertical restraint change over time?

Yes, this can occur in several ways. Notably, as the Vertical Block Exemption refers extensively to market share thresholds, a change in the market position of, for example, the supplier, can result in an agreement that was originally permissible becoming prohibited. For example, article 9 of the Vertical Block Exemption states that an agreement may benefit from a safe harbour

where the supplier has a market share below 30 per cent at the time of agreeing the restraint in question but will lose such benefit where the supplier's market share subsequently exceeds 30 per cent for a given period. Such an issue was examined in Ofcom's 2007 decision in relation to BBC Broadcast Limited's agreement with Channel 4 Television Corporation in relation to television access services (at: www.ofcom.gov.uk/shared_ofcom/ca98_public_register/decisions/bbcbroadcast.pdf).

Further, in a market characterised by a network of similar agreements containing vertical restraints, a given agreement may become illegal where other similar agreements covering a significant percentage of the market are entered into, since the cumulative effect of the similar agreements may be that certain parties are foreclosed from the market (see question 9). Such a scenario may lead to the OFT taking a decision to remove the benefit of the safe harbour created by the Vertical Block Exemption. Such withdrawal is effected by decision addressed to the relevant parties and has only prospective effect.

14 Briefly explain the analytical framework that applies when assessing vertical restraints under antitrust law.

The chapter I prohibition may apply to vertical restraints (as defined in question 2) provided they are not:

- land agreements (see question 8);
- concluded by public entities carrying out non-economic activities (see question 7);
- 'genuine agency' arrangements (in most cases – see question 10); or,
- concluded among related companies (see question 12).

If none of the above criteria is met, then an agreement containing a vertical restraint may fall to be reviewed under the chapter I prohibition. The analytical framework in the UK is as follows. First, does the vertical agreement contain a hard-core restraint? Where an agreement contains a hardcore restraint, it:

- will not benefit from the exemption created by the commission's De Minimis notice to which the OFT and the UK courts will have regard when considering vertical restraints;
- will not benefit from the safe harbour under the Vertical Block Exemption, which is legally binding on the OFT and the UK courts; and
- is highly unlikely to satisfy the conditions for exemption under section 9 of the CA.

According to the UK Vertical Guidelines, hard-core vertical restraints are those listed in the Vertical Block Exemption, ie: the fixing of minimum resale prices; certain types of restriction on the customers to whom, or the territory into which, a buyer can sell the contract goods; restrictions on members of a selective distribution system supplying each other or end users; and restrictions on component suppliers selling components as spare parts to the buyer's finished product.

Second, does the agreement have an 'appreciable' effect on competition within the UK? Where an agreement contains a hard-core restraint, it is likely that it will be deemed to have an appreciable effect on competition within the UK. Where an agreement does not contain a hard-core restraint, however, the OFT will have regard to the European Commission's De Minimis notice in determining whether the agreement has an appreciable effect on competition in the UK. If the criteria of the De Minimis notice are met (see question 8), then the OFT will likely consider that the vertical restraint falls outside the chapter I prohibition

as it does not appreciably restrict competition.

Third, does the agreement fall within the Vertical Block Exemption (see question 15) which, by virtue of section 10 of the CA, creates a safe harbour from the chapter I prohibition? If the agreement falls within the scope of the Vertical Block Exemption, it will benefit from a 'safe harbour'. This safe harbour will be binding on the OFT and on any UK court that is asked to determine the legality of the vertical restraint.

Finally, where the vertical agreement does have an appreciable effect on competition within the UK and does not fall within the terms of the De Minimis notice or the Vertical Block Exemption (or any other applicable safe harbour), it is necessary to conduct an 'individual assessment' of the agreement in order to determine whether the conditions for an exemption under section 9 are satisfied.

The UK Vertical Guidelines set out a number of factors that will be taken into account in assessing first, whether a vertical agreement falls within the chapter I prohibition and, second, whether an agreement satisfies the requirements for exemption under section 9. This latter question is determined by reference to the following factors: whether the agreement will lead to efficiencies; whether the benefits accruing as a result of the agreement accrue to consumers, rather than to the parties themselves; whether the restrictions being imposed are greater than necessary to achieve the efficiency in question; and, finally, whether the restriction affords the parties the possibility of eliminating competition in respect of a substantial part of the products in question.

- 15** Is there a block exemption or safe harbour that provides certainty to companies as to the legality of vertical restraints in certain conditions? If so, please explain how this block exemption or safe harbour functions.

Under the system of parallel exemption created by section 10 of the CA, agreements that would fall within the safe harbour created by the Vertical Block Exemption (see EU chapter) if they had an effect on trade between EU member states will also be exempt from the chapter I prohibition. Where an agreement satisfies the conditions of the Vertical Block Exemption, the 'safe harbour' means that neither the OFT nor the UK courts can determine that the agreement infringes article 81, or the chapter I prohibition, unless a prior decision (having only prospective effect) is taken to 'withdraw' the benefit of the Vertical Block Exemption from the agreement (see EU chapter).

- 16** What are the consequences of an infringement of antitrust law for the validity, or enforceability by one of the parties, of a contract containing prohibited vertical restraints?

Under section 2(4) of the CA, any agreement that falls within the chapter I prohibition and does not satisfy the conditions for exemption under section 9(1) of the CA (or does not benefit from a parallel exemption by virtue of section 10) will be void and unenforceable. However, where it is possible to sever the offending provisions of the contract from the rest of its terms, the latter will remain valid and enforceable. As a matter of English contract law, severance of offending provisions is possible unless, after the necessary excisions have been made, the contract 'would be so changed in its character as not to be the sort of contract that the parties entered into at all' (*Chemidus Wavin Ltd v Societe pour la Transformation*). Such assessment will depend on the exact terms and nature of the agreement in question.

- 17** How is the restricting of the buyer's ability to determine its resale price assessed under antitrust law?

In line with the policy of the European Commission, the OFT considers that the setting of fixed or minimum resale prices constitutes a hard-core restriction of competition. As such, it will almost always infringe the chapter I prohibition, will fall outside the safe harbours of the De Minimis notice and the Vertical Block Exemption and will hardly ever qualify for exemption under section 9 of the CA. Such arrangements often lead to enforcement action by the OFT. For example, in 1999, the OFT secured assurances from the English Football Association, the English Premier League football clubs and the Scottish Football Association that they would cease their practice of fixing the retail prices for replica football kits. In a related decision in 2003 involving agreements containing both horizontal and vertical aspects, the OFT imposed fines totalling £18.6 million on Manchester United, the Football Association and various sports retailers for fixing the retail price of replica football kits. In December 2003, the OFT imposed fines of £17.28 million and £5.37 million respectively on retailers Argos and Littlewoods, and £15.59 million on manufacturer Hasbro (reduced to nil for leniency) for resale price maintenance and price-fixing agreements in relation to Hasbro toys and games. It is possible to seek immunity from fines for the setting of fixed or minimum resale prices under UK competition law (see *Getting the Deal Through – Cartel Regulation*).

Communicating maximum or recommended resale prices, from which the distributor is permitted to deviate without penalty, may be permissible. However, in line with the policy of the European Commission, the OFT is likely to view such arrangements with suspicion on concentrated markets, as such practices may facilitate collusion.

- 18** Have there been any developments in your jurisdiction in light of the landmark 2007 judgment by the US Supreme Court in *Leegin Creative Leather Products Inc v PSKS Inc*? If not, is any response or development anticipated?

It is too early to be certain what impact, if any, the Supreme Court's *Leegin* judgment will have on the OFT's enforcement practice in relation to agreements that fix minimum resale prices. There is a long history of enforcement action against such agreements, both at EU and UK level. Indeed, two of the OFT's most high-profile decisions (*Hasbro/Argos/Littlewoods* and *Replica Football Kits*) have related to conduct that included the fixing of minimum resale prices. The *Leegin* judgment does seem, however, to have provoked a debate on enforcement priorities within the OFT. In a November 2007 paper prepared for the OFT by Deloitte ('The deterrent effect of competition enforcement by the OFT'), consideration is given to the possible 'business chilling' effect of the vigorous enforcement of the chapter I prohibition as regards the fixing of minimum resale prices. The paper comments as follows:

In this context, we note the US Supreme Court's recent decision in Leegin v PSKS to reverse the long-standing rule that minimum resale price maintenance is per se illegal. The Department of Justice and the Federal Trade Commission both recommended that the per se rule against minimum resale prices should be abandoned, on the grounds that vertical price restraints, even those establishing minimum resale prices, can have pro-competitive effects.

- 19** How is the restriction of the territory into which a buyer may resell contract products assessed under antitrust law? In what circumstances (if any) may a supplier require a buyer of its products not to resell the products in certain territories?

As territorial restrictions can lead to market partitioning, the OFT has tended to see such restraints as hard-core restraints that will almost always infringe the chapter I prohibition, will fall outside the safe harbours of the De Minimis notice and the Vertical Block Exemption and will hardly ever qualify for exemption under section 9 of the CA.

There is one important exception to this. Where a supplier sets up a network of exclusive distributorships and prevents each buyer from selling into a territory granted exclusively to another buyer (or reserved to the supplier itself), it is generally accepted that this may lead to an increase in inter-brand competition. Provided the other conditions of the Vertical Block Exemption are met (including that the supplier's market share is below 30 per cent), and provided the restrictions relate only to 'active' sales (ie, they do not cover 'passive' or unsolicited sales) into territories granted on an exclusive basis to another buyer or to the supplier itself, such arrangements will fall within the safe harbour.

Where restrictions on active sales into territories reserved exclusively to another buyer, or the supplier itself, are imposed by suppliers having a market share in excess of 30 per cent, such arrangements may still qualify for individual exemption under section 9 of the CA.

The OFT's long-running 'Newspaper and Magazine Distribution' case deals in detail with the application of the chapter I prohibition to vertical agreements containing territorial restrictions.

- 20** Explain how restricting the customers to whom a buyer may resell contract products is assessed under antitrust law. In what circumstances (if any) may a supplier require a buyer of its products not to resell the products to certain customers?

Customer restrictions give rise to issues similar to those arising in territorial restrictions (see question 19) and tend to be viewed by the OFT as hard-core restrictions. As such, limitations on a buyer's sales to particular classes of customer will almost always infringe the chapter I prohibition, will fall outside the safe harbours of the De Minimis notice and the Vertical Block Exemption and will hardly ever qualify for exemption under section 9 of the CA. There are certain key exceptions to this rule.

First, where the restriction applies only to 'active' sales to customers of a class granted exclusively to another buyer (or reserved to the supplier itself), the arrangement may fall within the safe harbour created by the Vertical Block Exemption, provided the various conditions are met (including supplier's market share below 30 per cent). However, according to the EU Vertical Guidelines, to which the OFT has regard in applying the chapter I prohibition, where such restrictions are imposed by suppliers having a market share in excess of 30 per cent, they are unlikely to qualify for individual exemption under section 9 of the CA. Second, restrictions on a buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of products as those produced by the supplier may also fall within the safe harbour created by the Vertical Block Exemption, as may restrictions on a wholesaler selling direct to end-users.

- 21** How is the restricting of the uses to which a buyer (or a subsequent buyer) puts the contract products assessed under antitrust law?

Objectively justifiable restrictions on the uses to which a buyer (or subsequent buyer) puts the contract goods are permissible and will not fall within the chapter I prohibition. However, for such restrictions to be objectively justifiable, the supplier would likely have to impose the same restriction on all buyers and adhere to such restrictions itself.

- 22** Briefly explain how agreements establishing 'selective' distribution systems are assessed under antitrust law.

Following the judgment of the ECJ in *Metro v Commission*, and pursuant to the obligation imposed on the OFT and the UK courts under section 60 of the CA, selective distribution systems will fall outside the chapter I prohibition where distributors are selected on objective criteria of a purely qualitative nature. In order to satisfy this doctrine: the contract products must be of a kind necessitating selective distribution (eg technically complex products where after-sales service is of paramount importance and products where brand image is of particular importance); the criteria by which buyers are selected must be objective; and the restrictions imposed must not go beyond that which is necessary to protect the quality and image of the product in question.

Where selective distribution systems do not satisfy the above criteria, they will fall within the chapter I prohibition but may nonetheless benefit from a safe harbour under the De Minimis Notice or the Vertical Block Exemption, provided they do not incorporate certain further restraints. In particular, such systems may benefit from exemption under the Vertical Block Exemption provided: resale prices are not fixed; there are no restrictions on active or passive sales to end users; and there are no restrictions on cross-supplies among members of the system. Where such systems incorporate obligations on members not to stock the products of an identified competitor of the supplier, this particular obligation itself may be unenforceable. However, this should not impact on the ability of the system overall to benefit from the safe harbour.

Certain restrictions frequently incorporated into selective distribution systems are expressly permitted, including the restriction of active or passive sales to non-members of the network.

- 23** How is the restriction of the buyer's ability to obtain the supplier's products from alternative sources assessed under antitrust law?

Such an arrangement may raise concerns regarding market partitioning. Where the supplier insists that a given buyer must buy all of its requirements of the supplier's products from, for example, its national subsidiary, this may prevent the ordinary arbitraging that would otherwise occur. On its own, however, 'exclusive purchasing' will only infringe the chapter I prohibition where the parties have a significant market share and the restrictions are of long duration. Further, where the supplier has a market share of 30 per cent or less, the restriction will benefit from the safe harbour created by the Vertical Block Exemption, regardless of duration.

According to the EU Vertical Guidelines, to which the OFT has regard, 'exclusive purchasing' is most likely to contribute to an infringement of the chapter I prohibition where it is combined with other practices, such as selective distribution or exclusive distribution. Where combined with selective distribution (see question 22), an exclusive purchasing obligation would have the effect of preventing the members of the system from cross-sup-

plying to each other and would therefore constitute a hard-core restriction.

- 24** Explain how restricting the buyer's ability to stock products competing with those supplied by the supplier under the agreement is assessed under antitrust law.

An obligation on the buyer not to manufacture or stock products competing with the contract products ('non-compete') may infringe the chapter I prohibition. The assessment of such a clause will depend on its exact effects, which will be determined by reference, *inter alia*, to the duration of the restraint, the market position of the parties and the ease or difficulty of market entry for other potential suppliers.

Providing that non-compete clauses do not have a duration exceeding five years, they may benefit from the safe harbour under the Vertical Block Exemption (if the other criteria for its application are met). If the criteria for the application of the Vertical Block Exemption are not met, non-compete clauses may nevertheless fall outside the scope of the chapter I prohibition or, alternatively, may satisfy the conditions for exemption under section 9 of the CA, depending on the market positions of the parties, the extent and duration of the clause, barriers to entry and the level of countervailing buyer power.

Post-term non-compete provisions are subject to a similar analysis and will likely be permitted for a period of one year following termination of the contract, provided that certain criteria are satisfied.

- 25** How is the requiring of the buyer to purchase from the supplier a certain amount, or minimum percentage, of its requirements, of the contract products assessed under antitrust law?

The OFT considers such clauses to be akin to 'non-compete' clauses, effectively restricting the ability of the buyer to stock products competing with the contract products (see question 24). They are therefore subject to a similar antitrust assessment. In particular, the UK Vertical Guidelines identify as equivalent to a 'non-compete' obligation, a requirement to purchase minimum volumes amounting to substantially all of the buyer's requirements ('quantity forcing').

- 26** Explain how restricting the supplier's ability to supply to other buyers, or sell directly to consumers, is assessed under antitrust law.

In an exclusive distribution network, as a corollary of limiting the buyer's ability actively to sell the contract products into other exclusively allocated territories, the supplier often agrees: not to supply the products in question directly itself; and not to sell the products in question to other buyers for resale in the assigned territory. The EU Vertical Guidelines, to which the OFT has regard, do not deal separately with the restrictions imposed on the supplier in this kind of arrangement. However, they do acknowledge that the restrictions on the supplier and the buyer 'usually' go hand in hand. Such systems should therefore be assessed in accordance with the framework set out at questions 19 and 20.

However, there are two particular supplier restrictions that are identified in the Vertical Block Exemption. The first is a restriction on a supplier of components which prevents that supplier from selling the components as spare parts to end-users or to repairers that are not entrusted by the buyer with the repair or servicing of the buyer's products. This is identified as a hardcore restriction and, as such, will almost always infringe the chapter I

prohibition, will fall outside the safe harbours of the De Minimis notice and the Vertical Block Exemption and will hardly ever qualify for exemption under section 9 of the CA.

The second supplier restriction is termed 'exclusive supply' and covers the situation in which a supplier agrees to supply only to one buyer. The main anti-competitive effect of such arrangements is the potential foreclosure of competing buyers, rather than competing suppliers. Therefore, this is the only instance in which the buyer's market share is of primary importance. If the buyer has a market share of less than 30 per cent, the agreement will benefit from exemption under the Vertical Block Exemption, provided the other criteria for its application are met. Where the buyer has a market share in excess of 30 per cent, the OFT will have regard to the EU Vertical Guidelines, which give an overview of the factors that will likely be relevant in the OFT's determination of whether the restriction falls within the chapter I prohibition and, if so, whether it might qualify for exemption under section 9 of the CA.

- 27** To what extent are franchise agreements incorporating licences of intellectual property rights, relating to trademarks or signs and know-how for the use and distribution of products, assessed differently from 'simple' distribution agreements under antitrust law?

Where the licensing of the franchisor's IPRs is related to the use, sale, or resale of the contract products, the UK Vertical Guidelines provide that franchise agreements will tend to be classed as vertical agreements and so will be subject to an assessment similar to that conducted in relation to other vertical agreements.

Under the EU Vertical Guidelines, to which the OFT will have regard, the following obligations imposed on the franchisee will not prevent the application of the Vertical Block Exemption (provided the various other conditions for its application are satisfied): an obligation not to compete with the franchisor's business; an obligation not to buy a stake in a competing franchisor; an obligation not to disclose the franchisor's know-how; an obligation to license to other franchisees any know-how developed in relation to the exploitation of the franchise; an obligation to assist in the protection of the franchisor's IPRs; an obligation only to use the know-how for the purposes of exploiting the franchise; and an obligation not to assign the IPRs without the franchisor's consent.

Where the franchisor's market share exceeds 30 per cent, and the franchise arrangements contain other vertical restraints such as exclusive distribution or non-compete obligations these obligations will be assessed in line with the analyses set out above (questions 19 and 24).

- 28** Explain how a supplier's warranting to the buyer that it will supply the contract products on the terms applied to the supplier's most favoured customer or warranting to the buyer that it will not supply the contract products on more favourable terms to other buyers is assessed under antitrust law.

It is not clear whether such a restriction – in isolation – will constitute a restriction infringing the chapter I prohibition. In the event that such a restriction is deemed to infringe the chapter I prohibition, it would nonetheless fall within the safe harbour created by the commission's Vertical Block Exemption, provided the other criteria for its application are met.

29 Is there a formal procedure for notifying agreements containing vertical restraints to the agency? Is it necessary or advisable to notify it of any particular categories of agreement?

In line with the modernisation reforms effected by the EU in May 2004, the UK abolished the notification system that previously existed under the CA. Subject to the making of requests for guidance in novel cases (question 31), a notification of a vertical restraint is therefore not possible.

30 If there is a formal notification procedure, how does it work? What type of ruling (if any) does the agency deliver at the end of the procedure? And how long does this take? Is a reasoned decision published at the end of the procedure?

Apart from the procedure applying to requests for opinions and informal advice (question 31), there is no formal notification procedure.

31 If there is no formal procedure for notification, is it possible to obtain guidance from the agency as to the antitrust assessment of a particular agreement in certain circumstances?

The OFT considers that parties are well placed to analyse the effect of their own conduct. Parties can, however, obtain guidance from the OFT in the form of a written opinion where a case raises novel or unresolved questions about the application of the chapter I prohibition (or article 81) and where the OFT considers there is an interest in issuing clarification for the benefit of a wider audience. The OFT has already issued a draft opinion in relation to newspaper and magazine distribution. In limited circumstances, the OFT will also consider giving non-binding informal advice on an ad hoc basis.

32 Is there a procedure whereby private parties can complain to the agency about alleged vertical restraints?

Yes. The OFT has published a note incorporating guidance on the submission of complaints (www.ofg.gov.uk/NR/rdonlyres/DB4B3133-72A5-4158-84E0-A5899704A9F2/0/oft451.pdf). Complaints can be submitted informally or formally. The submission of a formal complaint (which must satisfy criteria relating to the quality of information provided) secures certain consultation rights for the complainant going forward but may result in the complainant being held to strict deadlines for the production of information that, if missed, may lead to the OFT rejecting a complaint. The OFT has also published the criteria according to which it will decide whether to pursue a complaint (www.ofg.gov.uk/NR/rdonlyres/26B0A415-843B-4B5E-8ACD-0D9125115366/0/compcriteria.pdf).

33 How frequently is antitrust law applied to vertical restraints by the agency?

In the years from 2004 to 2007, the OFT published details of decisions (or other, lesser, enforcement actions) in an average of around two to three vertical restraints cases per year. Outside the OFT, recent cases include Ofcom's decision in relation to BBC Broadcast Limited's agreement with Channel 4 Television Corporation.

34 May the agency impose penalties or must it petition the courts or another administrative or government agency? What sanctions and remedies can the agency or the courts impose when enforcing the prohibition of vertical restraints?

The OFT's investigation and enforcement powers are set out in sections 25-44 of the CA. The OFT can apply the following measures itself:

- give directions to bring an infringement to an end;
- give interim measures directions during an investigation;
- accept binding commitments offered to it; and
- impose financial penalties on undertakings.

Where the above measures are not complied with by the parties, the OFT will bring an application before the courts resulting in a court order against the parties to fulfil their obligations. Where any company fails to fulfil its obligations pursuant to a court order, its management may be found to be in contempt of court, the penalties for which in the UK include imprisonment.

35 What investigative powers does the agency have when enforcing the prohibition of vertical restraints?

The OFT's investigation and enforcement powers are set out in sections 25 to 44 of the CA. In outline, where the OFT has reasonable grounds for suspecting an infringement of either the chapter I prohibition or article 81, it may by written notice require any person to provide specific documents or information of more general relevance to the investigation. The OFT may also conduct surprise on-site investigations, requiring the production of any relevant documents and oral explanations of such documents. In relation to vertical agreements not involving allegations of resale price-fixing, the OFT is more likely to investigate a case by means of written notice. In exercising these powers, the OFT must recognise legal professional privilege and the privilege against self-incrimination under the European Convention on Human Rights.

36 What notable sanctions or remedies have been imposed? Can any trends be identified in this regard?

Where the OFT has taken a decision finding an infringement of the chapter I prohibition or article 81, it may impose fines of up to 10 per cent of the infringing undertaking's worldwide revenues for the preceding year. In practice, however, the number of vertical restraints cases in which the OFT has imposed fines is still relatively low and the fines have not been as significant as those imposed by the European Commission (see EU chapter). The leading case in which the OFT has imposed fines for vertical restraints involved the imposition of minimum resale prices by Hasbro UK on 10 of its distributors. Hasbro was fined £9 million, reduced to £4.95 million for leniency. Many of the other cases involving vertical restraints in which fines have been imposed have included both horizontal and vertical elements. An example is the OFT's December 2003 decision to impose a penalty of £17.28 million on Argos, £5.37 million on Littlewoods, and £15.59 million on Hasbro (reduced to nil for leniency) for resale price maintenance and price-fixing agreements for Hasbro toys and games.

37 Can sanctions or remedies be imposed on companies having no branch or office in your jurisdiction?

Yes, but how such sanctions would be enforced is not clear.

38 To what extent is private enforcement possible? Can non-parties to agreements containing vertical restraints bring damages claims? Can the parties to agreements themselves bring damages claims? What remedies are available? How long should a company expect a private enforcement action to take? Can the successful party recover its legal costs?

Private actions for damages for breaches of the chapter I prohibition or article 81 may be brought in the UK High Court, regardless of whether an infringement decision has been reached by the OFT, another sectoral regulator or the European Commission. Several actions have been brought including the ground-breaking case of *Courage v Crehan* in relation to which the ECJ confirmed that a party to an agreement infringing article 81 must be able to bring an action for damages if, as a result of its weak bargaining positions, it cannot be said to be responsible for the infringement (see EU chapter). Though relatively few cases have proceeded to final awards of damages, many private damages actions brought in the UK have been settled out of court (including *The Consum-*

ers' Association (trading as Which?) v JJB Sports plc).

Under section 47A of the CA, any person who has suffered loss or damage as a result of an infringement of either the chapter I prohibition or article 81 may bring a claim for damages before the CAT. In general, claims may only be brought before the CAT when the relevant competition authority (namely the OFT, the relevant sectoral regulator or the European Commission) has taken an infringement decision and any appeal from such decision has been finally determined or the time period for such appeal expired. The first section 47A damages claim to be based on an OFT decision (albeit made under the chapter II prohibition) was brought in April 2006 (*Healthcare at Home Ltd v Genzyme Ltd*). Finally, under section 47B, claims under section 47A may also be brought by certain specified bodies on behalf of consumers. (*The Consumers' Association (trading as Which?) v JJB Sports plc* (which recently settled) was an example of such a 'follow-on' action.)

39 Is there any unique point relating to the assessment of vertical restraints in your jurisdiction that is not covered above?

No.

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