GETTING THE DEAL THROUGH

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GLOBAL COMPETITION REVIEW

Vertical Agreements

The regulation of distribution practices in 42 jurisdictions worldwide

2010

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Antitrust law

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

The key source is article 101 of the Treaty on the Functioning of the European Union (TFEU) (previously article 81 of the EC Treaty). Article 101(1) prohibits agreements between undertakings that may affect trade between EU member states and have as their object or effect the prevention, restriction or distortion of competition within the EU. Article 101(2) TFEU renders such agreements void unless they satisfy the conditions for exemption under article 101(3): essentially, where the economic benefits of an agreement outweigh its anti-competitive effects.

In order to assist companies and their advisers in ensuring that their agreements meet the conditions for an 'exemption' under article 101(3), the European Commission's Directorate General for Competition (Commission) has published two documents of particular relevance to the assessment of vertical restraints:

- Commission Regulation (EC) No. 2790/1999 of 22 December 1999 on the application of article 81(3) of the EC Treaty (now article 101(3) TFEU) to categories of vertical agreements and concerted practices (Vertical Block Exemption), providing that certain categories of vertical agreement will be treated as fulfilling the requirements for exemption; and
- non-binding Vertical Guidelines, setting out the manner in which the Vertical Block Exemption is to be applied and giving guidance on how vertical restraints falling outside the Vertical Block Exemption will be assessed.

The Vertical Block Exemption expires on 31 May 2010. The Commission intends to replace both the Vertical Block Exemption and the Vertical Guidelines and has published and publicly consulted on drafts of both. The new regulation will likely enter into force on 1 June 2010, but may provide for a transitional period until 31 May 2011 during which it would not apply to agreements already in force on 31 May 2010.

Where a party to an agreement occupies a dominant position on one of the markets to which an agreement relates, article 102 TFEU (which regulates the conduct of dominant companies (previously article 82 of the EC Treaty)) will also be relevant to the antitrust assessment. However, conduct falling within article 102 TFEU is considered in the *Getting the Deal Through – Dominance* publication and is therefore not covered here.

Types of vertical restraint

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

In article 2(1) of the Vertical Block Exemption, vertical agreements are defined as:

> *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, put simply, restrictions on the competitive behaviour of a party that occur in the context of such vertical agreements. Examples of vertical restraints include: exclusive distribution, certain types of selective distribution, territorial protection, export restrictions, customer restrictions, resale price fixing, exclusive purchase obligations and non-compete obligations.

Legal objective

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

One of the key identifying features of EU competition policy has been its pursuit of a variety of different goals. In recent years, the Commission has openly stated its intention to focus more closely on consumer welfare and the pursuit of strictly economic goals in its application of article 101. However, the supranational nature of the EU dictates that the Commission and the community courts have also prioritised the furtherance of a single, integrated European market. This is reflected in paragraph 7 of the Vertical Guidelines, which recognises that market integration is an additional goal of EU competition policy.

Responsible authorities

4 Which authority is responsible for enforcing prohibitions on anti-competitive vertical restraints? Where there are multiple responsible authorities, how are cases allocated? Do governments or ministers have a role?

The Commission's Directorate General for Competition is the main administrative body responsible for applying article 101 at an EU level. However, since 1 May 2004, national courts and national competition authorities in each of the EU's 27 member states also have jurisdiction to apply article 101 in its entirety (ie, including article 101(3)). At an EU level, the College of Commissioners (ie, the 27 commissioners appointed by the EU's 27 member states) adopts infringement decisions under article 101. In practice, however, it is only at the very final stage of an infringement decision that the College of Commissioners is formally consulted. At all stages prior to that, decisions are driven by officials at the Directorate General for Competition, though it is worth noting that the 'Advisory Committee' of national competition authority representatives will also be consulted before an infringement decision is put to the College of Commissioners.

Jurisdiction

5 What is the test for determining whether a vertical restraint will be subject to antitrust law in your jurisdiction? Has the law in your jurisdiction regarding vertical restraints been applied extraterritorially? Has it been applied in a pure internet context and if so what factors were deemed relevant when considering jurisdiction?

Article 101 applies to agreements that 'may affect trade between [EU] member states'. Where agreements do not affect trade between member states, but nonetheless have an impact on trade within a given EU member state, they may be considered under that member state's national competition rules (see relevant national chapters). The concept of 'effect on trade between member states' is interpreted broadly and includes 'actual or potential' and 'direct or indirect' effects (see the Commission Notice – Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ C101, 27 April 2004). For example, where vertical restraints are implemented in just a single member state, they may also be capable of affecting trade between member states by imposing barriers to market entry for companies operating in other EU member states. The question of whether a given agreement will affect trade between member states has to be addressed on a case-by-case basis. However, the Commission's Effect on Trade Notice does clarify that, in principle, vertical agreements relating to products for which neither the supplier nor the buyer has a market share exceeding 5 per cent and for which the supplier does not generate EU-wide revenues exceeding €40 million should not be considered capable of having the requisite effect on trade.

The authors are not aware of jurisdictional issues having been considered in detail in a pure internet context, such as, for example, sales on internet sites situated wholly outside the EU.

Agreements concluded by public entities

6 To what extent does antitrust law apply to vertical restraints in agreements concluded by public entities?

Article 101 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 and will therefore be subject to the provisions of article 101 in relation to those activities, but will be immune from the application of article 101 when fulfilling their public tasks.

Sector-specific rules

7 Do particular laws or regulations apply to the assessment of vertical restraints in specific sectors of industry (motor cars, insurance, etc)? Please identify the rules and the sectors they cover.

The Commission has issued a Block Exemption Regulation (Commission Regulation No. 1400/2002) on the application of article 101(3) to categories of vertical agreements in the motor vehicle sector and a related Commission Notice ('Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles').

The regulation creates a 'safe harbour' for certain motor vehicle distribution and repair agreements, exempting them from the prohibition laid down in article 101(1). For a recent example of the Commission's enforcement practice in relation to vertical agreements in the motor vehicle sector, see its September 2007 press release on the decisions taken against DaimlerChrysler, Toyota, General Motors and Fiat. Other industry-specific Block Exemption Regulations exist but none of these are targeted specifically at vertical restraints.

The motor vehicle regulation expires in May 2010. The Commission intends to replace it and has published a draft replacement regulation and notice.

General exceptions

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

In order for article 101 to apply, a vertical restraint must have an 'appreciable' effect on competition. The Commission has published a De Minimis notice setting out the circumstances in which agreements (including vertical agreements) will not be viewed by the Commission as infringing article 101(1).

The De Minimis notice provides that, absent certain hard-core restrictions such as price fixing or clauses granting absolute territorial protection, and absent parallel networks of similar agreements, the Commission will not consider that vertical agreements have an 'appreciable' effect on competition provided the parties' market shares for the products in question do not exceed 15 per cent. Although binding on the Commission itself, the De Minimis notice is not binding on member state courts or competition authorities when applying article 101.

Agreements

9 Is there a definition of 'agreement' – or its equivalent – in the antitrust law of your jurisdiction? When assessing vertical restraints under antitrust law does the authority take into account that some agreements may form part of a larger network of agreements or is each agreement assessed in isolation?

The Commission and the community courts have consistently interpreted the concept of 'agreement' in a broad manner. In the Court of Justice of the European Union's (CJEU) 2004 judgment in *Bayer v Commission*, it was held that, in order for a restriction to be reviewed under article 101, there must be a concurrence of wills among the two parties to conclude the relevant restriction.

A novelty in the Commission's draft vertical guidelines for May 2010 (see 'Updates and trends') is the guidance on when, in the absence of an explicit agreement expressing a concurrence of wills, the explicit or tacit acquiescence with a particular unilateral policy may amount to an 'agreement' between undertakings for the purpose of EU competition policy.

As regards the effect of a given restraint, the Commission 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 article 101. This kind of analysis has frequently been employed in relation to the brewing industry. Article 8 of the Vertical Block Exemption (article 7 of the draft vertical regulation for May 2010 (see 'Update and trends')) allows the Commission, by regulation, to disapply the Vertical Block Exemption to parallel networks of similar vertical restraints where these cover more than 50 per cent of a relevant market. This means that all undertakings whose agreements are defined in the regulation would be excluded from the scope of the Vertical Block Exemption. This is a power that, to our knowledge, the Commission has not yet used.

Parent- and related-company agreements

10 In what circumstances do the vertical restraints rules apply to agreements between a parent company and a related company (or between related companies of the same parent company)?

Article 101 does not apply to agreements between companies that form part of a single economic entity. In determining whether one company is part of the same economic entity as another, the community courts, in cases such as *Viho v Commission*, have focused on the concept of 'autonomy'. Where companies do not enjoy real autonomy in determining their course of action on the market, but instead carry out the instructions issued to them by their parent company, they will be seen as part of the same economic entity as the parent company. However, the case law of the community courts is not clear on exactly what degree of control is necessary in order for a company to be considered related to another. In certain cases, the Commission has not allowed the defence of single economic entity. For example, in the case of *Gosme/Martell – DMP*, the Commission found that DMP, a 50/50 joint venture between Martell and Piper-Heidsieck, was a separate economic entity to Martell, so that article 101 applied to vertical restraints concluded between Martell and DMP.

Agent–principal agreements

11 In what circumstances does antitrust law on vertical restraints apply to agent–principal agreements in which an undertaking agrees to perform certain services on a supplier's behalf for a commission payment?

In general, article 101 will not apply to any agreement between a 'principal' and its 'genuine agent' insofar as the agreement relates to contracts negotiated or concluded by the agent for its principal. However, the Commission's Vertical Guidelines explain that, where a genuine agency agreement contains, for example, a clause preventing the agent from acting for competitors of the principal, article 101 may apply if the arrangement leads to foreclosure of the principal's competitors from the market for the products in question. In addition, a genuine agency agreement that faciliates collusion between principals may also fall within article 101(1).

Article 101 may also apply where an agency agreement goes beyond 'genuine agency' and includes provisions according to which an agent accepts non-negligible commercial and financial risks (of the kind normally accepted by a distributor) in selling the principal's contract products. The exact degree of risk that an agent can take without article 101 being deemed applicable to its relationship with a principal will largely be a question of fact. The judgments of the General Court (GC) in *Daimler Chrysler v Commission* and the CJEU in *CEPSA v Compania de Petroleos SA* provide helpful guidance, directing parties to consider factors such as: ownership of the goods; contributions to distribution costs; responsibility for safe-keeping; liability for any damage caused; and the making of investments specific to the sale of the goods. For their part, the Commission's Vertical Guidelines suggest that an agency agreement falls outside article 101 only if the agent bears 'insignificant' risks.

It should also be noted that where agency agreements are concluded, agents in the EU may benefit from significant protection under the EU's Commercial Agents Directive and the member state-level implementing measures adopted in relation thereto.

Intellectual property rights

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

Where the 'centre of gravity' of a given vertical agreement is the licensing of IPRs, EU competition rules are applied somewhat differently. The relevant considerations go beyond the scope of this publication and include the application of the Commission's Technology Transfer Block Exemption. The Vertical Block Exemption and the Commission's Vertical Guidelines will apply to agreements granting IPRs only where such grants are not the 'primary object' of the agreement, and provided that the IPRs relate to the use, sale or resale of the contract products by the buyer or its customers.

Analytical framework for assessment

13 Explain the analytical framework that applies when assessing vertical restraints under antitrust law.

Article 101 may apply to vertical restraints (as defined in question 2) provided they are not:
- concluded by public entities carrying out non-economic activities (see question 6);
- 'genuine agency' arrangements (in most cases – see question 11); or
- concluded among related companies (see question 10).

If none of the above criteria is met, then an agreement containing a vertical restraint may be reviewed under article 101. There are a series of steps to be taken in determining whether and how article 101 may apply to a vertical restraint.

First, does the agreement lead to an appreciable effect on trade between member states of the EU? (See question 5.) If there is no effect on trade between member states, then article 101 will not apply (but member state level competition rules may apply – see national chapters).

Second, if there is an appreciable effect on trade between member states, does the vertical agreement contain a hard-core restraint? If the agreement contains a hardcore restraint, it:
- will not benefit from the safe harbour created by the Commission's De Minimis notice (even if the agreement would ordinarily benefit from the safe harbour by virtue of its not having an appreciable effect on trade);
- will not benefit from the Vertical Block Exemption's safe harbour; and
- is highly unlikely to satisfy the conditions of article 101(3).

The Commission's draft vertical guidelines for May 2010 (see 'Update and trends') also explain that the inclusion of a hard-core restraint in a vertical agreement effectively gives rise to a reversal of the burden of proof – that is, unless the parties involved can demonstrate that the restraint gives rise to efficiencies, the Commission is entitled to assume – rather than having to prove – negative effects on competition under article 101(1).

Hard-core vertical restraints are: 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. According to the draft vertical guidelines for May 2010 (see 'Update and trends'), certain restrictions on online selling into territories or to customer groups also qualify as hard-core restraints .

Third, if the agreement contains no hard-core vertical restraints, are the parties' positions on the relevant markets sufficiently minor such that the Commission's De Minimis notice may apply? If the criteria of the De Minimis notice are met (question 8), then the Commission will not consider that the agreement falls within article 101(1) as it does not 'appreciably' restrict competition.

Fourth, does the agreement fall within the Vertical Block Exemption? (See question 15.) If the agreement falls within the scope of the Vertical Block Exemption, it will benefit from a 'safe harbour'. This 'safe harbour' will apply in relation to decisions taken not only by the Commission but also by member state competition authorities and courts in their application of article 101.

Finally, where the vertical agreement does have an effect on trade between member states and does not fall within the terms of the Commission's De Minimis notice or the Commission's Vertical Block Exemption, it is necessary to conduct an 'individual assessment' of the agreement in order to determine whether it falls within article 101(1) and, if so, whether the conditions for an exemption under article 101(3) are satisfied. The Vertical Guidelines and the Commission Notice ('Guidelines on the application of Article 81(3) [now 101(3)]') provide guidance on how to conduct this individual assessment.

14 To what extent does the authority consider market shares, market structures and other economic factors when assessing the legality of individual restraints? Does it consider the market positions and conduct of other suppliers and buyers in its analysis? Does it analyse whether certain types of agreement or restriction are widely used in the market?

The Commission takes an increasingly economic approach when assessing individual restraints. As such, it takes into consideration a number of factors in its analysis. The factors routinely taken into account in determining whether restraints in vertical agreements fall within article 101(1) are set out in the Commission's Vertical Guidelines, namely: supplier market position; buyer market position; competitor market positions; barriers to entry; market maturity; the level of trade affected by the agreement; and the nature of the product concerned. Where an agreement falls within article 101(1), the Vertical Guidelines also set out the issues that will determine whether an agreement satisfies article 101(3), namely:

- whether the agreement will lead to efficiencies accruing to consumers, rather than to the parties themselves;
- whether the restrictions 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.

Naturally, the positions of other suppliers or buyers will be particularly relevant in determining the last of these issues. By way of example, in its 2009 judgment in *GlaxoSmithKline v Commission* concerning distribution, the CJEU confirmed the GC's finding that the Commission had erred in failing to take into account in its article 101(3) assessment the specific structural features of the pharmaceutical sector.

Insofar as concerns widely used agreements or restrictions, the Commission may take into account cumulative market effects (question 9). These may be particularly important in relation to single branding obligations and selective distribution.

Block exemption and safe harbour

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

The Commission's Vertical Block Exemption provides a 'safe harbour' for certain agreements containing vertical restraints. The 'safe harbour' means that, if an agreement satisfies the conditions of the Vertical Block Exemption, neither the Commission nor the member state competition authorities or courts can determine that the agreement infringes article 101, unless a prior decision (having only prospective effect) is taken to 'withdraw' the benefit of the Vertical Block Exemption from the agreement.

The Vertical Block Exemption requires that the agreement in question be vertical (ie, the parties operate at different levels of the market 'for the purposes of the agreement'). Parties to an agreement who compete on other product markets, but not the contract product market, can benefit from the Vertical Block Exemption, provided they are not both 'actual or potential suppliers' in the relevant economic market which includes the contract products.

The Vertical Block Exemption will not apply where the agreement falls within the scope of another of the Commission's Block Exemption Regulations (notably, the Technology Transfer Block Exemption, see question 12).

In general, the supplier's market share must not exceed 30 per cent on the relevant market for the products in question in the most recent calendar year prior to commencement of the agreement. (In the case of supply to only one distributor for the entire EU, it is the buyer's market share that must not exceed 30 per cent, not the supplier's.) Where the relevant market shares exceed 30 per cent during the course of the agreement, the Vertical Block Exemption still applies for a certain time but, if the market shares remain above 30 per cent, then the Vertical Block Exemption will cease to apply to the agreement. The draft vertical regulation for May 2010 (see 'Update and trends') proposes a 30 per cent market share threshold on both the supplier and the buyer for all vertical agreements. If reflected in the final version of the regulation, this may appreciably limit the number of agreements that benefit from the safe harbour created by the Vertical Block Exemption.

Where the agreement contains any hard-core restraints (see question 13), the 'safe harbour' created by the Vertical Block Exemption will not apply at all. This means that lesser restraints in the agreement that would otherwise have benefited from the certainty of protection provided by the Vertical Block Exemption will not be able to benefit from such protection.

Finally, if certain lesser restraints are included in the vertical agreement (ie, non-compete clauses exceeding five years in duration, post-term non-compete obligations, and restrictions on members of a selective distribution system being obliged not to stock the products of an identified competitor of the supplier), these restraints themselves may be unenforceable. However, where these lesser restraints are included, they will not prevent the rest of the agreement benefiting from the Vertical Block Exemption's safe harbour.

Types of restraint

16 How is restricting the buyer's ability to determine its resale price assessed under antitrust law?

The Commission considers that the setting of minimum resale prices constitutes a hard-core restriction of competition. As such, it will almost always fall within article 101(1), will fall outside the safe harbours of the De Minimis notice and the Vertical Block Exemption, and is generally considered unlikely to qualify for exemption under article 101(3).

Setting maximum resale prices or 'recommended' resale prices from which the distributor is permitted to deviate without penalty may be permissible, although the Commission views such arrangements with suspicion on concentrated markets, as it considers that such practices may facilitate collusion among suppliers.

The draft vertical guidelines for May 2010 (see 'Update and trends') provide details on the possible negative and positive effects (ie, efficiencies) associated with resale price restrictions. Examples of situations in which resale price restrictions may lead to efficiencies are: the introduction of a new brand or entry on a new market; the coordination of a short term low price campaign in a franchise system; and the avoidance of large buyers using a particular brand as a loss leader.

17 Have the authorities considered in their decisions resale price maintenance restrictions that apply for a limited period to the launch of a new product or brand, or to a specific promotion or sales campaign; or specifically to prevent a retailer using a brand as a 'loss leader'?

There have not been any Commission decisions focusing on this specific area. However, going forward, the text of the draft vertical guidelines for May 2010 (see 'Update and trends') suggests that the Commission will actively consider arguments as to the efficiencies associated with resale price maintenance restrictions in such circumstances. See question 16.

18 Have there been any developments in your jurisdiction in relation to resale price maintenance restrictions in light of the landmark US Supreme Court judgment in *Leegin Creative Leather Products Inc v PSKS Inc* or the European Commission's review of its Vertical Block Exemption Regulation and associated guidelines?

The prohibition on the setting of minimum resale prices continues to be treated as a hard-core restriction by virtue of the Commission's Vertical Block Exemption. In preparation for the Commission's Vertical Block Exemption review, a number of articles were authored on the likely impact of the *Leegin* judgment in the EU and on the desirability of the preservation of resale price maintenance as a hard-core restriction. One particularly interesting article on the subject, by Commission official Luc Peeperkorn, points out that hard-core restrictions in the EU are exceptions to an exemption and not the same as per se infringements in the US (since efficiency arguments can be advanced in support of hard-core restrictions but not in support of per se infringements). Peeperkorn concludes that the economic arguments advanced in favour of resale price maintenance do not appear very strong (see European Competition Journal, June 2008, p 201). The Commission's draft vertical guidelines for May 2010 (see 'Update and trends') closely reflect Luc Peeperkorn's discussion on possible positive and negative effects of resale price maintenance (see questions 16 and 17).

19 Have decisions relating to resale price maintenance addressed the possible links between such conduct and other forms of restraint?

Though somewhat limited in scope, the case law of the community courts does provide some guidance in these areas. In particular, in the 2008 *CEPSA v Compania de Petroleos SA* case, the CJEU ruled that, in the context of an exclusive distribution agreement, if a supplier fixed the retail price at which the contract products were resold, the agreement would not benefit from the safe harbour created by the Vertical Block Exemption and, in the absence of any efficiency arguments under article 101(3), the agreement would be void under article 101(2). Thus, the CJEU accepted the possibility that successful efficiency arguments could be raised in relation to the fixing of retail prices.

However, such efficiency arguments have not yet been successful before the Commission. Rather, the Commission has highlighted the possible links between resale price maintenance and other forms of restraint. In its 2000 decision in *Nathan-Bricoloux*, the Commission noted that the restriction of the freedom of distributors to sell outside their exclusive territory was supplemented and reinforced by the distributor's limited ability to grant discounts or rebates and so determine the final resale price of Nathan-branded goods.

In 2002, the Commission received complaints about a suspected concerted embargo on the supply of books to internet retailers selling to final consumers in Germany at prices far below those set by the German book price fixing system. The Commission accepted undertakings from the German publishers' and booksellers' association, and some German publishers, guaranteeing retailers' freedom to sell to consumers in Germany over the internet. In its 2003 *Yamaha* decision, the Commission noted that the distributor agreements in question, 'by restricting sales outside the territories and limiting the dealer's ability to determine its resale prices, were complementary and pursued the same object of artificially maintaining different price levels in different countries.'

20 Have decisions relating to resale price maintenance addressed the efficiencies that can arguably arise out of such restrictions?

To the authors' knowledge, no Commission decisions or EU court judgments relating to standard types of resale price maintenance have focused on efficiencies. The Commission's draft vertical guidelines for May 2010 (see 'Update and trends') are the most detailed Commission resource in this area. However, it has been recognised in certain EU court judgments, such as *Metro v Commission* (1977) and *AEG-Telefunken v Commission* (1983), that there may be a causal link between the maintenance of a certain price level within a selective distribution system and the survival of a specialist trade. In such a scenario, the EU courts considered that the detrimental effect on competition caused by the price restriction may be counterbalanced by improved competition as regards the quality of the services supplied to customers.

21 How is restricting the territory into which a buyer may resell contract products assessed? In what circumstances may a supplier require a buyer of its products not to resell the products in certain territories?

In general, export restrictions that prevent a buyer selling the contract products from one EU member state into another are among the most serious infringements of article 101, attracting Commission fines of €102 million in 1998 for car manufacturer Volkswagen (reduced to €90 million on appeal) and €149 million in 2002 for computer games manufacturer Nintendo (reduced to €119 million on appeal). The Commission has also been particularly vigorous in its enforcement activities in relation to territorial sales restrictions in the gas sector. Its 2007 settlement with Algerian gas producer Sonatrach followed similar actions against Gazprom in relation to its distribution contracts with ENI in Italy and OMV in Austria.

As territorial restrictions can lead to market partitioning, the Commission has tended to see such restrictions as hard-core restraints that will almost always fall within article 101(1), will fall outside the safe harbours of the De Minimis notice and the Vertical Block Exemption, and will hardly ever qualify for exemption under article 101(3). Recent judgments of the CJEU in *GlaxoSmithKline v Commission* (2009) and *Sot. Lélos kai Sia and Others* (2008), confirm that an agreement intending to limit trade between EU member states must in principle be considered a restriction of competition 'by object'. As such, the Commission is not obligated to conduct an analysis of the pro- or anti-competitive effects of the agreement under article 101(1). However, the 2009 *GlaxoSmithKline* judgment also underlines that the Commission is required to carry out a proper examination of the factual arguments and evidence put forward by an undertaking in the context of its assessment under article 101(3) of whether the agreement should benefit from an exemption (see question 14).

Note, however, that where a supplier sets up a network of exclusive distributorships and prevents each buyer from actively selling into a territory granted exclusively to another buyer (or reserved to the supplier itself), the Commission has accepted that this may lead to an increase in inter-brand competition. Provided the other conditions of the Vertical Block Exemption are met (including the supplier's (and, under the draft Regulation, also the buyer's) market share 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 market shares in excess of 30 per cent, such arrangements may still qualify for individual exemption under article 101(3) but will not fall within the Vertical Block Exemption's safe harbour. In the course of the Commission's 2008 to 2010 Vertical Block Exemption review process, there was much discussion of the appropriateness of a distinction between active and passive sales in an internet sales context. The Commission's draft vertical guidelines for May 2010 maintain the prior position that the use of the internet is not considered a form of active sales unless it specifically targets certain customers (eg, online advertising specifically addressed to certain customers).

22 Explain how restricting the customers to whom a buyer may resell contract products is assessed. In what circumstances may a supplier require a buyer not to resell products to certain resellers or end-consumers?

Customer restrictions give rise to issues similar to those arising in territorial restrictions (see question 21) and tend to be viewed by the Commission as hard-core restrictions. As such, limitations on a buyer's sales to particular classes of customer will almost always fall within article 101(1), will fall outside the safe harbours of the De Minimis notice and the Vertical Block Exemption and will hardly ever qualify for exemption under article 101(3). 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 Vertical Block Exemption's safe harbour, provided the various conditions are met (including supplier's market share below 30 per cent). However, according to the Commission's Vertical Guidelines, 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 article 101(3).

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 Vertical Block Exemption's safe harbour, as may restrictions on a wholesaler selling direct to end-users.

Third, certain objectively justifiable customer restrictions will be permitted. For example, clauses preventing sales of medicines to children, will not fall within article 101(1).

Fourth, distributors appointed within a selective distribution system can be restricted from selling to unauthorised distributors (see question 25).

23 How is restricting the uses to which a buyer puts the contract products assessed?

In general, a restriction on the buyer's freedom to use the contract products as he sees fit amounts to a restriction of competition within the meaning of article 101(1). (See, for example, the EU Court judgment in *Kerpen & Kerpen* (1983) and the Commission decision in *Sperry New Holland* (1985).) Likewise, an obligation on the buyer to impose territorial or customer restrictions on his customers would amount to a hard-core restriction. This latter issue has been clarified in paragraph 50 of the Commission's draft vertical guidelines for May 2010 (see 'Update and trends').

Objectively justifiable restrictions on the uses to which a buyer (or subsequent buyer) puts the contract goods are permissible, however, and will not fall within article 101(1). The Commission's draft vertical guidelines for May 2010 suggest that this may be the case where the aim of a restriction is to implement a public ban on selling dangerous substances to certain customers for reasons of safety or health. Nonetheless, for such restrictions to be objectively justifiable, the supplier would most likely have to impose the same restrictions on all buyers and adhere to such restrictions itself.

24 How is restricting the buyer's ability to generate sales via the internet assessed? Have the authorities issued decisions or guidance in relation to restrictions on using the internet for advertising or selling? Has there been antitrust-based litigation resulting in court judgments regarding restrictions on internet sales? If so, what are the key principles encapsulated in such guidelines and judgments?

No specific mention is made of internet sales in the Vertical Block Exemption. In its Vertical Guidelines, the Commission states that buyers in exclusive or selective distribution networks must be free to use the internet to advertise or to sell products. In its 2001 *YSL Perfume* investigation, the Commission noted in a press release that a ban on internet sales, even in a selective distribution system, is a restriction on sales to consumers which cannot be covered by the Vertical Block Exemption. However, YSL Perfume's selective distribution system (see question 25) was approved as it allowed authorised retailers already operating a physical sales point to sell via the internet. In its 2002 *B&W Loudspeakers* decision, the Commission approved a selective distribution system only after B&W had deleted a prohibition on internet selling. The system approved by the Commission provided for a mechanism whereby retailers requested B&W's approval to commence distance selling (including selling over the internet), and B&W was only allowed to refuse such requests in writing and on the basis of concerns regarding the need to maintain the contract products' brand image and reputation. B&W's internet sales policy also had to be applied indiscriminately and had to be comparable to that applicable to sales from physical sales points. However, in its 2003 *Yamaha* decision, the Commission condemned as anti-competitive an obligation imposed on dealers to contact Yamaha before exporting goods sold via the internet. The Commission considered the clause to be a hard-core restriction, the effect of such restriction being to discourage dealers in one member state from exporting products to other member states.

However, despite the significant increase in the sophistication, value and scope of internet commerce in the EU, there has been comparatively little recent enforcement by the Commission of the Vertical Guidelines' provisions on internet sales restrictions. In late 2008, as part of its scheduled review of the Vertical Block Exemption and Vertical Guidelines, the Commission established a roundtable on online commerce and published an issues paper requesting comments on how various vertical restraints should be regulated in the online environment. In July 2009, the Commission published its draft vertical guidelines for May 2010 (see 'Update and trends'), which contain more details on how the Commission will assess internet sales restrictions. (Note, however, that there is still no mention of internet selling in the draft vertical regulation for May 2010). The draft vertical guidelines provide examples of the types of internet-related practices that will amount to the hard-core restraint of preventing passive sales. In relation to selective distribution, for example, the draft vertical guidelines clarify that a supplier may require a buyer to:

- adhere to quality standards for the use of the internet site (provided that these do not dissuade online sales by not being 'equivalent' to criteria imposed for offline sales);
- have a bricks and mortar shop or showroom before engaging in online distribution; and
- sell a certain absolute amount (in value or volume) of the products offline to ensure an efficient operation of the bricks and mortar shop.

At the time of writing, it is unclear whether further changes to the draft vertical guidelines' provisions on internet selling will be made before adoption.

25 Briefly explain how agreements establishing 'selective' distribution systems are assessed. Must the criteria for selection be published?

Following the judgment of the CJEU in *Metro v Commission*, selective distribution systems will fall outside article 101(1) where distributors are selected on objective criteria of a purely qualitative nature. In order to fall outside article 101(1):

- 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 article 101(1) but may benefit from a safe harbour under the Commission's 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.

Separately, the Commission's Vertical Guidelines suggest that members of a selective distribution system must not be prevented from generating sales via the internet (see question 24). In addition, where selective distribution 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 last restriction should not affect the ability of the system overall to benefit from the safe harbour.

Certain restrictions are also expressly permitted, including the restriction of active or passive sales to non-members of the network.

In addition, the Vertical Guidelines suggest that criteria for the selection of distributors should be laid down uniformly for all potential resellers and applied in a non-discriminatory manner. There is no requirement that the selection criteria be published but, in its *Leclerc v Commission* (1996) judgment, the GC held that the application of selection criteria is not solely a matter for the supplier's discretion but must be determined objectively. The GC considered that for a selective distribution network to be lawful under article 101(1) 'an essential element is thus the possibility of obtaining independent and effective review of the application of those criteria in specific cases'. In its 1995 *Sony Pan-European Dealer Agreement* decision, the Commission cleared Sony's selective distribution system following four amendments, one of which was the introduction of an arbitration procedure allowing dealers who were refused authorisation to appeal.

26 Are selective distribution systems more likely to be lawful where they relate to certain types of product? If so, which types of product and why?

According to the CJEU's judgment in *Metro v Commission*, in purely qualitative selective distribution systems, restrictions may fall outside the prohibition in article 101(1) where the contract products necessitate after-sales service or where brand image is of particular importance. Selective distribution agreements that fall within the scope of the Vertical Block Exemption are covered irrespective of the type of product they are used for. Nevertheless, the Commission states in its Vertical Guidelines that the nature of the contract products may be relevant to the assessment of efficiencies under article 101(3), to be considered where selective distribution systems fall within the prohibition under article 101(1). In particular, the Commission notes that efficiency arguments under article 101(3) may be stronger in relation to new or complex products or products whose qualities are difficult to judge either before, or immediately after, consumption. Additionally, the Commission has recognised the need for selective distribution in relation to newspapers, as newspapers can only be sold during a limited time period.

27 Regarding selective distribution systems, what kinds of restrictions on internet sales by approved distributors are permitted and in what circumstances? To what extent must internet sales criteria mirror offline sales criteria?

The Commission's Vertical Guidelines state that: 'in a selective distribution system the dealer should be free to advertise and sell with the help of the internet'. This should be read in light of an earlier section of the Vertical Guidelines, which states that 'the supplier may require quality standards for the use of the internet site to resell his goods'. Indeed, the Commission's draft vertical guidelines for May 2010 (see 'Update and trends') explicitly state that 'the supplier may require quality standards for the use of the internet site to resell his goods, just as the supplier may require quality standards for a shop or for advertising and promotion in general'.

The Commission's Vertical Guidelines are silent on specifics as to the nature of any restrictions that might be permissible in this regard. The draft vertical guidelines for May 2010, however, clarify that the Commission will regard as a hard-core restriction any obligation in a selective distribution system which dissuades authorised dealers from using the internet by imposing criteria for online sales which are not equivalent to the criteria imposed for offline sales. Criteria imposed for online sales need not be identical to those imposed for offline sales but they should pursue the same objectives and should achieve comparable results and any differences between the criteria for online and offline sales must be justified by the different nature of the two distribution modes.

28 Has the authority taken any decisions in relation to actions by suppliers to enforce the terms of selective distribution agreements where such actions are aimed at preventing sales by unauthorised buyers or sales by authorised buyers in an unauthorised manner?

The Commission's 1991 *Yves Saint Laurent Parfumes* decision touched on enforcement and monitoring measures in selective distribution systems. The decision sets out the Commission's view that it is not in itself a restriction of competition for a supplier to check an authorised distributor's sales invoices, provided the monitoring is expressly limited to cases in which the supplier has evidence that the distributor has been involved in reselling to unauthorised distributors.

29 Does the relevant authority take into account the possible cumulative restrictive effects of multiple selective distribution systems operating in the same market?

Yes. The Commission's Vertical Guidelines state that '[p]ossible negative effects of vertical restraints are reinforced when several suppliers and their buyers organise their trade in a similar way. These so-called cumulative effects may be a problem in a number of sectors'. In *Peugeot* (1986), the Commission noted that the restrictive effects of an agreement may be 'magnified by the existence of similar exclusive and selective distribution systems operated by other vehicle manufacturers'. This followed the approach taken by the CJEU in *Metro v Commission* in which the Court pointed to the prevalence of selective distribution networks across the relevant market as being among the criteria for determining whether a given network creates a restriction of competition within article 101(1). In addition, in its 1996 *Leclerc v Commission* judgment, the GC explained that article 101(1) may be applicable where most or all manufacturers in a certain sector use selective distribution and this has the effect of restricting distribution to the advantage of certain existing channels or leading to an absence of workable competition.

The Commission's Vertical Guidelines also note that in relation to individual networks of selective distribution, cumulative effects will likely not be a factor in and of themselves where the share of the market covered by selective distribution is less than 50 per cent, or where the market covered by selective distribution is greater than 50 per cent, but the five largest suppliers have an aggregate market share of less than 50 per cent.

30 Has the authority taken decisions dealing with the possible links between selective distribution systems and resale price maintenance policies? If so, what are the key principles in such decisions?

The Commission has taken a number of decisions imposing fines for resale price maintenance practices in the context of selective distribution systems. In 2003, the Commission imposed a fine of €2.56 million on Yamaha for, inter alia, fixing the resale prices charged by certain of its appointed distributors. Similarly, in its 2002 assessment of B&W Loudspeaker's selective distribution system, the Commission insisted on the removal of provisions that it considered imposed minimum resale prices by prohibiting 'bait pricing' (ie, prices which would entice customers to the sales outlet). In addition, a number of Commission decisions and Court judgments have dealt with resale price maintenance allegations in selective distribution networks in the automotive industry. For example, in a 2005 judgment, the GC upheld the part of a Commission fine on Daimler Chrysler (€9.8 million of the overall fine of €72 million) that related to resale price maintenance within Daimler Chrysler's selective distribution network. The GC held that Daimler Chrysler had entered into agreements with its Belgian dealers limiting the rebates on the Mercedes E-Class and had restricted supplies to dealers granting rebates higher than the agreed 3 per cent maximum. (See also question 20.)

31 How is restricting the buyer's ability to obtain the supplier's products from alternative sources assessed?

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, the supplier's local subsidiary, this may prevent the ordinary arbitraging that would otherwise occur. On its own, however, 'exclusive purchasing' will only fall within article 101(1) 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 of the Vertical Block Exemption, regardless of duration.

According to the Commission's Guidelines, 'exclusive purchasing' is most likely to contribute to an infringement of article 101 where it is combined with other practices, such as selective distribution or exclusive distribution. Where combined with selective distribution (see question 25), an exclusive purchasing obligation would have the effect of preventing the members of the system from cross-supplying to each other and would therefore constitute a hard-core restriction, infringing article 101.

32 How is restricting the buyer's ability to sell non-competing products that the supplier deems 'inappropriate' assessed?

In a selective distribution context, the Commission (in *Yves Saint Laurent Parfums* (1991)) and the GC (in *Leclerc v Commission* (1996)) have accepted as permitted under article 101 a requirement that lower-quality products or products that may detract from a certain brand or luxury image are not sold near luxury products (eg, that foodstuffs or cleaning products are sufficiently separated from luxury cosmetics). However, the GC clarified that the sale of other products (in the case at hand, products typically found in a hypermarket) is not in itself capable of harming the luxury image of the products at issue provided that the place or area devoted to the sale of the luxury products is laid out in such a way that they are presented in enhancing conditions.

33 Explain how restricting the buyer's ability to stock products competing with those supplied by the supplier under the agreement is assessed.

An obligation on the buyer not to manufacture or stock products competing with the contract products (non-compete) may fall within article 101(1), though this will depend on the exact effects of the restriction in question which will be determined by reference, inter alia, to the duration of the restraint, the market position of the parties and the relative ease of market entry for other potential suppliers.

The Commission recognises that such clauses can be pro-competitive because, for example, they give a guarantee of ensured sales to the supplier and a guarantee of continuous supply to the buyer. As such, provided 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 article 101(1) or, alternatively, may satisfy the conditions for exemption under article 101(3), 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.

Also, in a selective distribution system, authorised dealers can be prohibited from selling competing brands in general. However, the Vertical Block Exemption will not cover an obligation whereby authorised dealers are prohibited from buying products for resale from specific competing suppliers.

Post-term non-compete provisions are subject to a similar analysis and those with a duration of no more than one year following termination of the contract will benefit from the safe harbour under the Vertical Block Exemption, provided certain criteria are satisfied.

34 How is requiring the buyer to purchase from the supplier a certain amount or minimum percentage of the contract products or a full range of the supplier's products assessed?

The Commission 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 33). They are therefore subject to a similar antitrust assessment. In particular, the Commission identifies as equivalent to a non-compete obligation, the following:

- obligations on the buyer to purchase 80 per cent or more of its requirements of the products in question from the supplier;
- obligations to purchase minimum volumes amounting to substantially all of the buyer's requirements (quantity forcing);
- obligations to stock complete ranges of the supplier's products; and
- various pricing practices including quantity discounts and non-linear pricing (under which the more a buyer buys, the lower the price per item).

35 Explain how restricting the supplier's ability to supply to other resellers, or sell directly to consumers, is assessed.

In an exclusive distribution network, as a corollary of limiting the buyer's ability to actively 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. Although the Commission's Vertical Guidelines do not deal separately with the restrictions imposed on the supplier in this kind of arrangement, they do acknowledge that the restrictions on the supplier and the buyer 'usually' go hand in hand. Such systems should be assessed in accordance with the framework set out at questions 21 and 22.

However, there are two supplier-specific restrictions that are identified in the Commission's Vertical Block Exemption. The first is a restriction on a component supplier from selling 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 hard-core restriction and, as such, will almost always fall within article 101(1), will fall outside the safe harbours of the De

Minimis notice and the Vertical Block Exemption, and will hardly ever qualify for exemption under article 101(3).

The second supplier restriction is termed 'exclusive supply' and covers the situation in which a supplier agrees to supply only to one buyer in the entire EU. 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 the current Vertical Block Exemption 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 Commission's Vertical Guidelines give an overview of the factors that will be relevant in determining whether the restriction falls within article 101(1) and, if so, whether it might qualify for exemption under article 101(3).

36 To what extent are franchise agreements incorporating licences of IPRs relating to trademarks or signs and know-how for the use and distribution of products assessed differently from 'simple' distribution agreements?

Where the licensing of the franchisor's IPRs is related to the use, sale or resale of the contract products, the Commission's Vertical Guidelines state 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.

The following obligations imposed on the franchisee will not prevent the application of the safe harbour created by 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, or 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 21 and 33). However, the Commission's Vertical Guidelines explain that, 'the more important the transfer of know-how, the more easily the vertical restraints fulfil the conditions for exemption [under article 101(3)]'.

37 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 that it will not supply the contract products on more favourable terms to other buyers is assessed. Would the analysis differ where the buyer commits to 'most favoured' terms in favour of the supplier?

It is not clear whether such a restriction – in isolation – will constitute a restriction falling within article 101(1). In the event that such a restriction is deemed to fall within article 101(1), 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.

However, the Commission has suggested that in sectors where it considers market power to be concentrated among relatively few suppliers (including films and reinsurance), and where equivalent clauses operate in favour of the supplier (ie, where the buyer warrants to the supplier that, if it pays one of the supplier's competitors more for the same product, it will pay that same higher price to the supplier) such arrangements may increase the risk of price coordination. In the context of the Vertical Block Exemption, this might be an instance warranting a withdrawal or disapplication of the Vertical Block Exemption.

Notifying agreements

38 Outline any formal procedure for notifying agreements containing vertical restraints to the authority responsible for antitrust enforcement.

The Commission abolished its formal prior-notification system as part of the 'modernisation' reforms implemented by Regulation No. 1/2003 on 1 May 2004. Subject to the possibility of making requests for informal guidance in novel cases (question 39) a notification of a vertical agreement is therefore neither necessary nor, in general, advisable.

Authority guidance

39 If there is no formal procedure for notification, is it possible to obtain guidance from the authority responsible for antitrust enforcement or a declaratory judgment from a court as to the assessment of a particular agreement in certain circumstances?

The Commission's Informal Guidance notice sets out the circumstances in which it will advise parties on the likely assessment of an agreement under article 101.

However, the Commission is highly selective in choosing the arrangements in relation to which it will give informal guidance and, given the existence of the Vertical Block Exemption and the Vertical Guidelines, it is unlikely that the Commission would issue individual guidance in relation to vertical restraints. We are not aware of a case where the Commission has offered any informal guidance to parties. However, in view of the inclusion of novel provisions on internet restrictions and the alleged efficiencies of resale price maintenance in the Commission's draft vertical guidelines, the Commission may be minded to offer informal guidance in such areas.

Complaints procedure for private parties

40 Is there a procedure whereby private parties can complain to the authority responsible for antitrust enforcement about alleged unlawful vertical restraints?

Yes. Private parties showing a legitimate interest (those actually or potentially suffering damage as a result of the conduct in question) can file a complaint with the Commission either formally (on the Commission's form C) or informally (including orally or anonymously). The submission of a formal complaint ties the Commission to responding within a given time (in principle, four months). The community courts have long held that the Commission has a wide discretion in choosing which complaints to pursue.

In addition, consumers can inform the Commission's Consumer Liaison Office (established in 2003) in relation to suspected competition law infringements.

Enforcement

41 How frequently is antitrust law applied to vertical restraints by the authority responsible for antitrust enforcement? What are the main enforcement priorities regarding vertical restraints?

In the eight years from 1 January 2001 to 1 January 2010, the Commission took around 15 vertical restraints infringement decisions under article 101. This includes only cases in which the Commission:
- focused its enforcement on article 101, as opposed to article 102;
- focused its enforcement on the vertical aspects of practices, rather than any horizontal aspects; and

Update and trends

The Vertical Block Exemption expires on 31 May 2010. The Commission has published a draft replacement regulation and guidelines and is expected to adopt these before end of May, although it is still uncertain what, if any, changes the Commission will make to the published drafts.

The main changes from the 1999 Vertical Block Exemption and Vertical Guidelines include:

- the introduction in article 3 of the draft regulation of a market share threshold on the buyer side. This is motivated by the Commission's concerns about a general increase of concentration levels in distribution and retailing across the EU. The Commission appears to consider that a safe harbour based solely on the supplier's market position may fail to capture potentially harmful buyer-driven anti-competitive arrangements;
- the draft Guidelines include two new types of buyer-driven vertical restraints that are block exempted within the market share thresholds: upfront access payments and category management agreements;
- the draft Guidelines discuss restrictions on the use of the internet as a sales vehicle. They clarify that such restrictions generally amount to the hard-core restriction of prohibiting or dissuading buyers from using the internet for sales. The draft Guidelines provide examples of what would be a hard-core internet restriction, including:
  - automatic re-routing of customers;
  - termination of customer transactions once credit card data reveal an address outside a buyer's exclusive territory;
  - limits on the proportion of overall sales the buyer makes on the internet;
  - dual-pricing for products intended to be sold online and offline; and
  - selective distribution criteria for online sales with no equivalent for offline sales; and
- the draft Guidelines also list individual scenarios in which hard-core restrictions may fall outside of article 101(1) or fulfil the conditions of article 101(3). These are mainly cases in which a new product is being introduced or an established product is being introduced into a new market.

- either took a formal infringement decision or identified infringements but reached formal settlement agreements with the parties involved.

Broadly speaking, the Commission's enforcement has focused on territorial and resale price restrictions.

42 What are the consequences of an infringement of antitrust law for the validity or enforceability of a contract containing prohibited vertical restraints?

Under article 101(2), restrictions of competition infringing article 101(1) and not qualifying for exemption under article 101(3) are rendered null and void. The exact consequences of a finding of voidness will depend on the text of the agreement itself and on the provisions of the applicable national law of contract regarding severability. There are two main alternative consequences – either the entire agreement is void and unenforceable or the prohibited restriction can be severed from the rest of the agreement and the prohibited restriction alone is void and unenforceable.

43 May the authority responsible for antitrust enforcement directly impose penalties or must it petition another entity? What sanctions and remedies can the authorities impose? What notable sanctions or remedies have been imposed? Can any trends be identified in this regard?

Under Regulation No. 1/2003, the Commission itself has the ability to impose fines of up to 10 per cent of the worldwide group revenues of the infringing party (or parties) without needing to have recourse to any court or government agency. Such a decision can be appealed to the community courts.

In the eight years from 1 January 2001 to 1 January 2010, the Commission imposed the following fines on the following companies in cases relating to vertical restraints (some of which were reduced or overturned on appeal): Peugeot – €45 million; Topps – €1.6 million; Yamaha – €2.6 million; Nintendo – €149 million; DaimlerChrysler – €72 million; Volkswagen – €31 million. In a number of cases, the Commission did not impose fines but instead required the companies to introduce behavioural or structural remedies, or both, for example:

- in April 2006 the Commission required Repsol to open up certain long-term exclusive supply contracts with Spanish service stations;
- in May 2004 the Commission reached a settlement with Porsche to end the tying of after-sales service provision to the sale of new cars; and
- in April 2003 the Commission approved supply agreements between Interbrew and pubs, restaurants and hotels located in Belgium, on the condition that Interbrew amended the agreements to offer its brewer competitors access to the outlets in question.

With regard to recent trends, while the Commission still actively enforces its rules on vertical restraints, especially in the motor vehicle sector, it is fair to suggest that market liberalisation, the reduction of anti-competitive state aid and the fight against cartels have been higher enforcement priorities in recent years.

Investigative powers of the authority

44 What investigative powers does the authority responsible for antitrust enforcement have when enforcing the prohibition of vertical restraints?

Under Regulation No. 1/2003, the main investigative powers of the Commission are to request (and ultimately require) the production of documents and to conduct announced or unannounced inspections (ie, dawn raids) of business premises and employees' homes and cars. In carrying out such inspections, the Commission is often assisted by the national competition authorities of the member states in which the inspections take place. The Commission may also request national competition authorities to undertake, in their territory, the inspections which the Commission considers to be necessary.

In addition, the Commission can and does request information from parties domiciled outside the EU (it has done so in cartel investigations). It can also require that EU-domiciled subsidiaries produce information even where their parent companies are located outside of the EU, provided the information is accessible from the premises of the EU-domiciled subsidiary.

Private enforcement

45 To what extent is private enforcement possible? Can non-parties to agreements containing vertical restraints obtain declaratory judgments or injunctions and 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?

Although the Commission has launched several initiatives in order to improve the availability of damages actions for breaches of the EC competition rules, private enforcement is still in its infancy. Private damages actions cannot be brought before the Commission or before the community courts and must instead be brought in the relevant courts of the member states having jurisdiction to hear the case in question. National rules on jurisdiction, recovery of legal costs, remedies and who can bring a claim vary widely across the EU, with certain jurisdictions, such as the UK, being more claimant-friendly than others. The key case before the community courts is *Courage v Crehan*, a case referred from the UK courts, in which the CJEU states that private parties must be able to claim damages in relation to infringements of article 101. The CJEU also clarified that parties to infringing agreements are themselves able to claim damages if, as a result of their weak bargaining positions, they cannot be said to be wholly responsible for the infringement.

In April 2008, the Commission published a White Paper containing proposals on how best to facilitate private damages actions for breaches of EU competition rules.

(For more detail on private enforcement more generally, see *Getting the Deal Through Private Antitrust Litigation*.)

Other issues

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

The most significant points of the EU's system for the regulation of vertical restraints are:

- the absence of per se rules;
- the remnants of a formalistic approach as seen in the application of the Vertical Block Exemption which now stands as something of an anathema in a global antitrust environment dominated by guidelines, other 'soft laws' and more effects-based, economic assessments;
- the importance it attaches to competition law as a tool for assisting in the development of the EU's single market, as reflected in its decisions in cases such as *Volkswagen* and *Nintendo*; and
- the fact that the jurisprudence of the community courts concerning the application of EU competition rules is binding on national-level enforcement agencies and courts in the EU's 27 member states.

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