GETTING THE DEAL THROUGH

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GLOBAL COMPETITION REVIEW

Vertical Agreements

The regulation of distribution practices in 42 jurisdictions worldwide

2010

Contributing editor: Stephen Kinsella OBE

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Vertical Agreements 2010

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Vertical Agreements 2010
Published by
Law Business Research Ltd
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London, W11 1QQ, UK
Tel: +44 20 7908 1188
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ISSN 1753-9250

Printed and distributed by
Encompass Print Solutions
Tel: 0870 897 3239

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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 on the regulation of vertical restraints in the United Kingdom is the Competition Act 1998 (the CA). The relevant elements of the CA follow the structure of article 101 of the Treaty on the Functioning of the European Union (TFEU) (formerly article 82 of the EC Treaty – see EU chapter). 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 No. 1/2003 provides that the Office of Fair Trading (OFT), the various sectoral regulators (see question 4) and the UK courts must apply article 101 TFEU when the chapter I prohibition is applied to agreements that may also 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 101 TFEU. Pursuant to 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' whereby an agreement that would fall within the 'safe harbour' created by an EU block exemption regulation (see EU chapter) will also be exempt from the chapter I prohibition.
- When applying section 9(1) of the CA, the Vertical Agreements Guidelines (UK Vertical Guidelines) state that the OFT will also 'have regard to' the European Commission's De Minimis Notice and Vertical Guidelines (EU Vertical Guidelines) (see EU chapter). The OFT has engaged with the European Commission in relation to its review of the EU Vertical Block Exemption Regulation (see OFT's Annual Report for 2008-2009 and for further details of the possible substantive changes, see EU chapter).

Where a party occupies a dominant position in a market to which the vertical agreement relates, section 18 of the CA (the chapter II prohibition) and potentially article 102 TFEU (which both regulate the conduct of dominant companies), will also be relevant to the antitrust assessment of a given agreement. However, the conduct of dominant companies 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 to the Competition Commission for investigation under section 131 of the Enterprise Act where, for example, the OFT considers that vertical restraints are prevalent in a market and have the effect of restricting competition.

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?

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.

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?

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

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 OFT is the main body responsible for enforcing the CA (and for enforcing consumer protection laws in the UK). The Competition Commission can also review vertical restraints in the context of market investigations (see question 1). There are also certain sectoral regulators who 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 in the ordinary course but the secretary of state for business, innovation and skills does retain a residual power to intervene where there are exceptional and compelling reasons of public policy. By way of example, the secretary of state has made orders excluding the chapter I prohibition from certain agreements in the defence industry (see Competition Act 1998 (Public Policy Exclusion) Order 2006, SI 2006/605, and Competition Act 1998 (Public Policy Exclusion) Order 2007, SI 2007/1896).

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?

Pursuant to section 2(1) of the CA, the chapter I prohibition applies where an agreement may have an 'effect on trade' within the UK. Section 2(3) of the CA adds that the chapter I prohibition will only apply where agreements are, or are intended to be, implemented in the UK. However, it is not clear to what extent, if any, section 2(3) would serve to limit the number of agreements covered by the section 2(1) CA effect on trade test. The OFT's guidance does not explicitly address the interaction of sections 2(1) and 2(3) of the CA but it appears clear that some link to the UK would be needed.

Where an agreement also has an effect on trade between EU member states, the OFT and UK courts must apply article 101 TFEU 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 foreclosing effect.

The CA's jurisdictional test has yet to be applied in detail in a pure internet context.

Agreements concluded by public entities

6 To what extent does antitrust law apply to vertical restraints in agreements concluded by public 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 in the *Bettercare II* judgment 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 Court of Justice of the European Union (CJEU) in *Fenin*, the OFT will presumably follow the CJEU's approach in future cases (ie, it is likely to find that a public body purchasing products to use as part of its social function would not be an 'undertaking' for the purposes of the CA).

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.

Yes. Under section 10(1) of the CA, an agreement affecting trade between EU member states but exempt from the article 101(1) TFEU prohibition by virtue of an EU regulation must 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 that would otherwise be exempted under an EU regulation were they to have such effect. Thus, certain motor vehicle distribution and repair agreements whose provisions fall within the European 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).

At a UK level, regard should also be had to the Restriction on Agreements and Conduct (Specified Domestic Electrical Goods) Order 1998 which applies to suppliers of specified domestic electrical goods. By that Order, it is unlawful for such suppliers to recommend or suggest retail prices for specified goods, and unlawful for a supplier to make an agreement that restricts a buyer's ability to determine the prices at which he advertises or sells the specified goods (see general rules on resale price determination at question 16). Other industry-specific block exemption regulations exist but are not targeted specifically at vertical restraints.

General exceptions

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 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), which 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 that creates, alters, transfers or terminates an interest in land (land agreements). However, following a consultation by the Department of Business, Innovation and Skills, the UK government has decided to revoke the Land Agreements Exclusion during 2010. The revocation is due to come into force on 6 April 2011 and will mean that parties will have to assess their land agreements to ensure that they comply with the CA. There are also a number of Competition Act (Public Policy Exemption) Orders (including those enacted in 2006, 2007 and 2008) exempting from the chapter I prohibition certain agreements in the defence sector.

In addition, 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, the OFT press release of 18 November 2008 in relation to the Cardiff Bus Company). Note, however, that price fixing agreements are excluded from the scope of the 'small agreement' definition under section 39 of the CA.

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 EU courts have clarified that, in order for a restriction to be reviewed under article 101 TFEU, 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 expressly adopted the EU courts' 'concurrence of wills' language in *Argos Ltd and Littlewoods Ltd v OFT* and *JJB Sports Plc v OFT*. 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 102 TFEU regulate the unilateral conduct of companies occupying a dominant position on the market in question – see *Getting the Deal Through – Dominance*.

As regards larger, interrelated networks of agreements, the OFT will normally take into account the cumulative impact of a supplier's agreements when assessing the impact on a market of a given vertical restraint. 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 101. In the 2008 judgment in *Calor Gas Ltd v Express Fuels (Scotland) Ltd & Anor* in the Scottish Court of Sessions, the Court rendered unenforceable vertical restraints agreed between Calor Gas Ltd and two of its buyers (whereby the buyers agreed to purchase and sell only Calor cylinder liquefied petroleum gas for five years and not to handle the cylinders after termination) in part because Calor Gas had a network of similar restraints that served to foreclose the distribution market.

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 (see, for example, the 2005 Competition Commission Market Investigation into the supply of bulk liquefied petroleum gas for domestic use).

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)?

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.*

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, 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 is similar to that of article 101 (see EU chapter). In a 2002 case involving a complaint alleging resale price maintenance by Vodafone Ltd in relation to pre-pay mobile phone vouchers, the director general of telecommunications found that the agreements in question were not agency agreements because, inter alia, the risk of loss or damage was borne by the buyers.

Intellectual property rights

12 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 mirror 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 where the agreements fall outside the Vertical Block Exemption, the antitrust analysis is different. The relevant considerations include the application of the European Commission's Technology Transfer Block Exemption.

Analytical framework for assessment

13 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 or defence agreements (see question 8);
- concluded by public entities carrying out non-economic activities (see question 7);
- genuine agency arrangements (in most cases – see question 11); or
- concluded among related companies (see question 10).

If none of the above exceptions applies, then an agreement containing a vertical restraint may 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 hard-core restraint, it:

- will not benefit from the exemption created by the European 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, namely:

- 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) (or another applicable block exemption) 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 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 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 (ie, the same as article 101(3) TFEU (see EU chapter)).

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?

Market shares will be relevant to the consideration of whether a restraint creates an appreciable restriction on competition and whether a restraint might fall within the safe harbours created by the De Minimis Notice or the Vertical Block Exemption. The UK Vertical Guidelines state that: 'vertical agreements do not generally give rise to competition concerns unless one or more of the parties to the agreement possesses market power on the relevant market or the agreement forms part of a network of similar agreements.'

Since regard may be had to networks of similar agreements, the market shares of other suppliers and other buyers (and the overall market structure) may also be relevant to the analysis of a given restraint.

In a 2008 paper, 'Stimulating or chilling competition', John Fingelton and Ali Nikpay, at the time respectively chief executive and senior director of policy at the OFT, noted a gradual shift towards increased economic analysis in vertical restraints cases:

> *Over the last ten years, the European approach towards vertical agreements has fundamentally changed. Authorities have increasingly incorporated into their assessment of vertical agreements both the need to show market power and the fact that such agreements can generate significant pro-competitive efficiencies.*

In addition, the Competition Commission considered the relevance of buyer power, buyer market shares and market structure in the 2008 Final Report of its Market Investigation into the supply of groceries in the UK. The Competition Commission observed in its Annual Report and Accounts for 2008/09 that: 'there are an overwhelming number of suppliers that experience a lack of negotiating power when entering discussions with a retailer which can result in the supplier bearing excessive risk and unexpected costs.' The remedies proposed by the Competition Commission included a revised code of practice for the major grocers, and an ombudsman (see 'Update and trends').

In addition, in July 2009 the Campaign for Real Ale (CAMRA) submitted a super complaint to the OFT arguing inter alia that the cumulative impact of beer supply ties resulted in small brewers being foreclosed from the market. The OFT found that there were no competition concerns on the market that were having an adverse effect on consumers and decided not to refer the market for investigation by the Competition Commission.

When CAMRA appealed to the CAT for a review of the decision not to refer, the OFT, mindful of the resources required to litigate the case, launched a consultation on its findings in response to the super-complaint. Consequently, the CAT has ordered a stay in proceedings until August 2010.

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.

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 101, or the chapter I prohibition, unless a prior decision (having only prospective effect) is taken by the OFT or the European Commission to 'withdraw' the benefit of the Vertical Block Exemption from the agreement (see EU chapter). In the context of its review of the Vertical Block Exemption (see EU chapter), the European Commission has proposed that the market share ceiling for application of the Vertical Block Exemption's safe harbour should be applied in relation to buyers as well as suppliers. This may have significant consequences in the UK in light of the relatively high levels of concentration in the retail and distribution sectors. Any such change at EU level would, of course, apply equally in relation to the chapter I prohibition by virtue of the parallel exemption system.

Types of restraint

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

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 is generally considered unlikely to qualify for exemption under section 9 of the CA. The fixing of resale prices has often led 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. The leading case in which the OFT has imposed fines for vertical restraints involved the imposition of minimum resale prices by toy manufacturer Hasbro on 10 of its UK distributors. Hasbro was fined £9 million, reduced to £4.95 million for leniency. However, a more recent case involving the supply of sunglasses by Oakley to the House of Fraser department stores was closed by the OFT in 2007 without the imposition of fines when the alleged resale price maintenance was ceased and the parties implemented compliance policies to avoid future infringements. It is possible to seek immunity from fines by informing the OFT of resale price maintenance practices under the OFT's leniency policy (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 (except for specified domestic electrical goods – see question 7). However, the OFT is likely to view such arrangements with suspicion on concentrated markets, as such practices may facilitate collusion.

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'?

The OFT has considered a number of cases in which suppliers attempted to oblige retailers to inform them of any intended price discounts prior to the imposition of such discounts (see question 20 in relation to *Swarovski* and *Lladró*). The OFT has also considered issues specific to resale price maintenance at the launch of a new brand or product. When John Bruce (UK) Limited introduced into the UK market its MEI brand of automatic slack adjusters (safety devices fitted to the breaking system of trucks, trailers and buses) to compete with the then market leader, Haldex, it asked distributors to keep retail prices for MEI slack adjusters around 20 to 25 per cent lower than those for Haldex (and stated that deviation from the agreed pricing policy was not allowed and that special deals needed to be controlled 'through marketing so John [Bruce] can be [kept] in the loop on the reasons for the request and whether he wants to agree to it'). John Bruce argued that its conduct could not breach competition law since it was developing competition where none existed. However, in its 2002 decision, the OFT found that John Bruce had infringed the chapter I prohibition and a fine of 3 per cent of John Bruce's relevant turnover was imposed. See question 30 in relation to Umbro's new football kit launch practices.

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 *Leegin* judgment appears to have provoked a degree of debate on enforcement priorities within the OFT. In a 2008 paper (see question 14), John Fingelton and Ali Nikpay stated as follows:

> *[…] in the authors' view, there is insufficient evidence at this stage to say with certainty that the rules on RPM should be fully relaxed. For example, UK action to remove RPM in relation to book retailing appears to have had consumer benefits. In addition, vertical RPM is often combined with horizontal restraints, which can certainly have adverse effects on competition (as, for example, was the case in relation to the OFT's decisions on price-fixing of football shirts and toys). Indeed, anecdotal evidence from the OFT's experience so far suggests that the efficiency justifications for RPM agreements, and thus the arguments for a full market assessment in relation to RPM cases, are weak. Nonetheless, the recent US judgment in Leegin and the economic criticism of a per se approach to RPM warrant further consideration. The OFT, for example, is carrying out research into the topic of RPM to consider these types of issues and to inform its competition policy going forward.*

The OFT has also been playing an active role in the European Commission's review of the Vertical Block Exemption and Guidelines on Vertical Restraints (see EU chapter).

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

A number of the OFT's higher profile resale price maintenance cases have involved additional elements. For example, in the 2003 *Replica Football Kits* case, the OFT identified an element of horizontal collusion among buyers. More recently, in the ongoing *Tobacco Products* investigation, part of the alleged infringement relates to agreements between manufacturers and retailers to set the price of tobacco products with reference to the brands of competing manufacturers. The investigation also concerns the indirect exchange of information between retailers through manufacturers. In addition, the OFT's 2003 decision concerning *Lladró Comercial SA* (see question 30), related to an agreement which not only obliged buyers to inform Lladró of any proposed discount prices but also imposed restrictions on buyer advertising.

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

The OFT addressed arguments relating to the alleged efficiencies of resale price maintenance in its decision of 8 November 2004 in *UOP Limited / UKae Limited / Thermoseal Supplies Ltd / Double Quick Supplyline Ltd / Double Glazing Supplies Ltd* (a case involving an arrangement to fix the minimum resale price for desiccant (used in double glazing)). The OFT stated that it was 'extremely hard, if not impossible' to see how the fixing of prices for UOP desiccant would contribute to an improvement in the production of goods, or allow consumers a fair share of the resulting benefit, because consumers were deprived of discounts and obliged to pay higher prices. In addition, on 4 March 2008, the OFT published a research paper 'An evaluation of the impact upon productivity of ending of resale price maintenance on books'. The OFT summarised its findings as follows:

> *[…] the ending of the RPM led to new entry from supermarkets and internet sellers [which] resulted in a positive contribution to the industry productivity, with industry productivity increasing by as much as one third between 2001 and 2005. So far, new entry has not stimulated an increase in the productivity of existing bricks and mortar retailers. On the contrary, they have suffered negative productivity changes due to their inability to downsize and consolidate in line with declining output. This may be expected to change over time.*

In the 2002 *John Bruce* case (see question 17), the supplier argued that its price restriction was pro-competitive because it facilitated serious competition for the incumbent market leader. The OFT found that the agreements fell within the chapter I prohibition. However, the starting amount of the fine was set at a comparatively low level because the director of the OFT took into account the following special circumstances:

> *[that] John Bruce had successfully introduced a new product into a market which other suppliers of automatic slack adjusters had found difficult to penetrate, increasing inter-brand competition; that John Bruce was a small new entrant competing in a market where one supplier (Haldex) had a very large share; and that purchasers of automatic slack adjusters benefited because the prices of MEI slack adjusters were some 25 per cent below that of the leading product in the market.*

The director also noted in the decision that 'in most circumstances RPM is a very serious infringement of the Chapter I prohibition and a starting point at or near [twice that set for John Bruce] is likely to be imposed'.

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?

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.

In October 2008, the OFT published an Opinion in the long-running *Newspaper and Magazine Distribution* case (Opinion of the Office of Fair Trading – guidance to facilitate self-assessment under the Competition Act 1998) which dealt with the assessment of territorial sales restrictions under section 9 of the CA. The 2008 Opinion outlines that while preventing 'passive' sales by wholesalers of newspapers and magazines is likely to restrict competition on the retail level (because retailers are not able to switch wholesalers), a ban on passive sales may, at least in relation to newspapers, make more efficient the competition between wholesalers competing for the right to supply in a particular geographic market. The OFT considered that this would enable newspaper publishers to reduce their costs and would likely lead to reduced prices to end consumers. Another factor considered by the OFT is that absolute territorial protection 'may support the wide availability of newspapers, in particular by enabling publishers to include in their contracts with wholesalers an obligation to supply all retailers (within reason) in a territory'. In 2009, the OFT decided against referring the newspaper and magazine wholesaling market to the Competition Commission for a market investigation. It concluded, inter alia, that the market was in a period of flux (in part due to a period of self-assessment of agreements following its Opinion) which would affect any remedies proposed.

Additional guidance on the assessment of territorial sales restrictions is to be expected when the CJEU answers the questions referred to it by the High Court in the *Football Association Premier League Ltd & Others v QC Leisure & Others* case, relating to the live broadcasting of English football matches.

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 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 applicable 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.

Also of note in this regard is that one of the questions referred to the CJEU by the High Court in *Football Association Premier League Ltd & Others v QC Leisure & Others* concerns the assessment of a contractual obligation imposed on a broadcaster by a sports rights owner to prevent the broadcaster's satellite decoder cards from being used outside its designated territory.

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

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 (eg, restrictions on the sale of medicines to children). 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.

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?

Broadly speaking, the UK rules follow the principles set out in the Commission's EU Vertical Guidelines (see EU chapter). For its part, the OFT published a report into internet shopping in 2007. The report's main focus was on consumer protection issues but a review of the economic literature on internet shopping was also carried out. The OFT concluded that this review 'did not identify significant new competition concerns arising that could not be addressed under the Competition Act 1998' but it was noted that:

> *[…] there have been some suggestions that manufacturers might seek to limit the supply of certain goods to internet outlets in order to protect traditional retailers. This is not an issue which is unique to internet shopping but has the potential to restrict competition and should be kept under review.*

As regards individual decisions, the OFT expressed concern in 2006 in the *Yamaha* case that a scheme awarding discounts to Yamaha dealers based upon the ratio of face-to-face sales as opposed to distance and internet sales, was designed to target internet-only retailers and discounters, and acted as a disincentive for dealers to engage in distance and internet sales. The OFT closed its investigation in 2006, indicating that Yamaha had cooperated with the OFT and had withdrawn the scheme in question. A further OFT case closure summary related to Nike's selective distribution system criteria, which required discounted

or out-of-season stock to be displayed on separate internet pages to non-discounted in season stock. The OFT considered that the criteria implied that in-season products were not to be discounted. The case was closed when Nike removed the ambiguous clauses from its distribution agreements and revised and updated its selection criteria.

The OFT also commenced a market study in October 2009 into online advertising and pricing, though this arises out of the OFT's consumer protection mandate, rather than its competition policy function.

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*, 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 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 the chapter I prohibition but may nonetheless benefit from a safe harbour (irrespective of the nature of the goods or any quantitative limits) 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 that: 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 EU Vertical Guidelines suggest that members of a selective distribution system must not be prevented from generating sales via the internet. 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 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.

Insofar as concerns publication of selection criteria and rights to challenge supplier decisions on acceptance into, or rejection from, selective distribution networks, the UK rules follow those applicable at the EU level (see EU chapter). Note, however, that the Restriction on Agreements and Conduct (Specified Domestic Electrical Goods) Order 1998 mandates, in certain circumstances (eg, if the supplier refuses to supply a buyer), the provision to interested buyers of a supplier's criteria for selecting buyers.

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*, and pursuant to the obligation imposed on the OFT and the UK courts under section 60 of the CA, 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. In addition, the EU Vertical Guidelines provide 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 (in the case of 'credence' products) immediately after consumption.

Additionally, the OFT has recognised the advantages of selective distribution in relation to newspapers, as newspapers can only be sold during a limited period (ie, the newspapers must be delivered and sold on the day of production, with the majority of demand for newspapers expiring by midday).

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 EU Vertical Guidelines state that 'in a selective distribution system the dealer should be free to advertise and sell with the help of the internet'. However, this should likely be read in light of an earlier section of the EU Vertical Guidelines, which states that 'the supplier may require quality standards for the use of the internet site to resell his goods'. The EU Vertical Guidelines are silent on specifics as to the nature of any restrictions that might be permissible in this regard (although note that the European Commission's draft Vertical Guidelines for May 2010 provide some clarification in this regard – see EU chapter). As regards UK enforcement, in its investigation of Yamaha's selective distribution system, the OFT was concerned that Yamaha should take steps to remove any discrimination against Yamaha's distance sellers in its discount scheme (see question 24). However, the issue has not yet been considered in great detail in the UK.

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?

In a 2003 decision concerning the selective distribution agreements of Lladró Comercial SA (see question 30), the OFT noted, in relation to Lladró's reservation of the right to repurchase goods that a retailer has proposed to sell below the recommended price level, that: '[w]hether or not Lladró Comercial has thus far exercised that on-going contractual right is immaterial to the Director's finding of an infringement.'

In *Football Replica Kits*, the OFT did not object to Umbro's selective distribution system in itself, even though it included refusing or failing to supply the UK's major supermarkets. However, it did take the view that this facilitated the price fixing arrangements, which were prohibited and in relation to which fines were imposed (see question 30).

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

Yes, in its UK Vertical Guidelines, the OFT states:

Selective distribution may foreclose a market to retail competition, where it is practised by a sufficient proportion of manufacturers. For example, if manufacturers of the most popular brands of a product have similar distribution agreements with their retailers (with the effect that relatively few retailers are authorised to stock the full range of popular brands), this may prevent unauthorised retailers from providing effective competition and thereby provide the authorised retailers with market power.

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?

In a 2003 decision, the OFT reviewed the selective distribution agreements of Lladró Comercial SA, which included provisions requiring buyers to inform Lladró of any proposed discounts and entitling Lladró to repurchase ornaments that buyers intended to discount. The buyers' ability to promote or advertise discounts was also restricted. Lladró's argument that the latter restriction was required to protect its trademarks was rejected by the OFT, which considered that the restriction could not be viewed as the least restrictive means of achieving trademark protection. Rather, the OFT was of the view that the foregoing elements of Lladro's selective distribution agreements amounted to an infringement of the chapter I prohibition. The OFT has also considered similar restrictions in a Swarovski standard form dealer agreement. The OFT closed the file without decision having received assurances from Swarovski that it would amend the agreement and would not seek to determine the retail prices of its products in the UK.

The OFT's *Football Replica Kits* decision also examined alleged links between selective distribution networks and resale price maintenance. Commenting on the conduct of the supplier Umbro, the OFT stated as follows:

> *Umbro's selective distribution system, and in particular its refusal or failure to supply the major supermarkets, while not objected to of itself in this decision, nevertheless facilitated and reinforced the effectiveness of the price-fixing agreements or concerted practices described in this decision and protected major retailers from external competition.*

Umbro also imposed 'embargo and launch practices' according to which a buyer was precluded from selling kit until the launch date and prevented from selling via retail outlets other than the buyer's own-branded outlets. There was also a 'kit launch protocol' that included restrictions on buyers' advertising and publicity of Replica Kits before their launch. The OFT concluded that:

> *[w]hile no objection is taken in this decision to such restrictions in themselves, the OFT regards the restrictions in Umbro's embargoes and launch protocols, including the restriction on resale, as having supported Umbro's selective distribution policy and having restricted retail supplies. This facilitated and reinforced the effectiveness of the [price-fixing] agreements described in this decision.*

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 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. (Note, however, that the Vertical Block Exemption safe harbour may become contingent on the buyer's market share also being below 30 per cent pursuant to proposals under consideration by the European Commission (see EU chapter).)

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 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.

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

The OFT has not looked at this issue in detail. However, of note is a 1992 investigation by the Monopolies and Mergers Commission (MMC) (the predecessor to the Competition Commission) in relation to the sale of fine fragrance products in supermarkets and low cost retailers. In its report, the MMC suggested amendments to the manner in which the products were distributed, but recognised that suppliers should be able to control the distribution of their products 'in order to protect [...] brand images which consumers evidently value'.

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 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.

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 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 33). 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').

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. 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 21 and 22.

However, there are two particular supplier restrictions that are identified in the 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 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, currently, this is the only instance in which the buyer's market share is of primary importance (but see the EU chapter in relation to the European Commission's draft Vertical Block Exemption for May 2010, which proposes taking into account the buyer's market share more generally). 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.

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 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, 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 (see questions 21 and 33).

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 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. However, in concentrated sectors, and where such clauses operate in favour of suppliers (ie, where the buyer warrants to Supplier A that, if it pays one of the supplier's competitors more for the same product, it will pay that same higher price to Supplier A) the OFT might be expected to follow the approach of the European Commission, which appears to consider that such clauses may increase the risk of price coordination among suppliers.

Notifying agreements

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

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 39), a notification of a vertical restraint is therefore not possible. Note, however, that it is possible to apply to the OFT for immunity from fines in relation to resale price maintenance practices (see question 16).

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?

In general, 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 101) and where the OFT considers there is an interest in issuing clarification for the benefit of a wider audience. The OFT has already issued an 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.

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. In 2006 the OFT published a note 'Involving third parties in Competition Act investigations' incorporating guidance on the submission of complaints. 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 the complaint.

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 years from 2005 to 2009, the OFT published details of decisions (or other, lesser, enforcement actions) in an average of around two vertical restraint cases per year. The OFT considers on a case-by-case basis whether an agreement falls within its administrative priorities so as to merit investigation. Guidance has been provided on these priorities in the OFT's October 2008 Prioritisation Principles.

42 What are the consequences of an infringement of antitrust law for the validity or enforceability 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 Societé pour la Transformation*). Such assessment will depend on the exact terms and nature of the agreement in question.

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?

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

Where the OFT has taken a decision finding an infringement of the chapter I prohibition or article 101, 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. 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. Examples include: 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; and the recent tobacco case in which the OFT's April 2008 Statement of Objections alleged tobacco manufacturers and retailers had either linked the retail price of one brand to the retail price of a competing brand or indirectly exchanged information in relation to proposed future retail prices. Six of the recipients of the Statement of Objections reached an early resolution with the OFT and agreed to penalties amounting to £132.3 million.

The OFT's remedies can require positive action 'such as informing third parties that an infringement has been brought to an end and reporting back periodically to the OFT on certain matters such as prices charged. In some circumstances, the directions appropriate to bring an infringement to an end may be (or may include) directions requiring an undertaking to make structural changes to its business' (see OFT Guidance on Vertical Agreements). Positive directions were given to *Napp Pharmaceutical Holdings* in a 2001 dominance case. Similarly, in relation to compensatory measures, the OFT in its 2006 decision in *Independent Schools* agreed a settlement that included the infringing schools paying a nominal fine of £10,000 each and contributing £3 million to an educational trust for the benefit of those pupils who had attended the schools during the period of infringement.

Update and trends

The revocation of the Land Agreement Exclusion is due to take effect in 2011. In addition, the revised Grocery Supply Code of Practice (GSCOP) comes into effect on 4 February 2010. As set out in the Groceries (Supply Chain Practices) Market Investigation Order 2009, all grocery retailers whose annual turnover is in excess of £1 billion will be required to incorporate the GSCOP into their agreements with suppliers. The Department for Business, Skills and Innovations has accepted in principle the establishment of a body to enforce the GSCOP and will take further steps in relation to the identification of and operation of this body in 2010. However, perhaps the most important single change in UK law regarding vertical agreements will be the adoption by the European Commission of its revised Vertical Block Exemption and Vertical Guidelines for May 2010 (see EU chapter).

Investigative powers of the authority

44 What investigative powers does the authority responsible for antitrust enforcement 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 101, 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 onsite investigations, requiring the production of any relevant documents and oral explanations of such documents. In addition, the OFT can, in certain circumstances, apply to the court for a warrant to enter domestic premises (eg, where there are reasonable grounds for suspecting that documents which have been required as part of an investigation are kept). 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. In previous cases, the OFT has obtained information from entities domiciled outside the UK (eg, *Lladró Comercial SA*).

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?

Private actions for damages for breaches of the chapter I prohibition or article 101 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, on reference, the CJEU confirmed that a party to an agreement infringing article 101 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). In addition, insofar as concerns third parties, in the *Football Association Premier League Ltd & Others v LCD Publishing Limited* case, LCD challenged the legality under chapter I of agreements between the Football Association Premier League and photographers to which LCD was not a party (albeit in defence of a copyright infringement claim). 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 Consumers' 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 101 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 has expired ('follow-on actions'). 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 settled in 2008) was one such example.)

Other issues

46 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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VERTICAL AGREEMENTS 2010 ISSN 1753-9250