

Vertical Agreements

The regulation of distribution practices
in 39 jurisdictions worldwide

2011

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China

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Antitrust law

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

China's main competition legislation is the Anti-Monopoly Law of the People's Republic of China (PRC) (2007), which entered into force on 1 August 2008.

Vertical restraints are classed as a type of 'monopolistic conduct' under the Anti-Monopoly Law, and the two enforcement agencies having power in relation to monopolistic conduct, the State Administration for Industry and Commerce (SAIC) and the National Development and Reform Commission (NDRC), issued agency rules in 2009 and 2010, which are directly applicable to vertical restraints. These agency rules include:

- SAIC Rules on Procedures of Administrations for Industry and Commerce for Investigation of Monopoly Agreement and Abuse of Market Dominance Cases, promulgated on 26 May 2009 and effective on 1 July 2009;
- NDRC Rules against Pricing-related Monopolies, promulgated on 29 December 2010 and effective on 1 February 2011;
- NDRC Rules on Administrative Enforcement Procedures for Pricing-related Monopolies, promulgated on 29 December 2010 and effective on 1 February 2011; and
- SAIC Rules of Administrations for Industry and Commerce on Prohibition of Monopoly Agreement Acts, promulgated on 31 December 2010 and effective on 1 February 2011.

In addition to the Anti-Monopoly Law, certain other laws and regulations also have provisions regulating vertical restraints, including notably:

- Anti-Unfair Competition Law of the PRC (1993);
- Price Law of the PRC (1997);
- Contract Law of the PRC (1999) as amended;
- Administrative Measures for Fair Transactions Between Retailers and Suppliers (2006) (Administrative Measures);
- Provisional Measures for the Prohibition against Monopolistic Pricing (2003) (Anti-Monopolistic Pricing Measures);
- Regulation on the Prevention of Below-Cost Dumping Conduct (1999);
- Judicial Interpretation of the Law Applied to Disputes Arising from Technology Contracts (2004);
- Regulation on the Administration of Import and Export of Technologies (2001); and
- Provisions on the Prohibition of Regional Blockades in Market Economy Activities (2001).

There are also rules implementing the Anti-Unfair Competition Law issued by several local governments (including Beijing, Shanghai and Shenzhen). This chapter considers only the rules adopted at national level.

It is unclear whether the Anti-Monopoly Law will replace the pertinent provisions in prior legislation such as the Anti-Unfair Competition Law and the Price Law or will coexist with them. However, if any conflict occurs between the terms of the Anti-Monopoly Law and prior laws, the Anti-Monopoly Law (as the more recent text) should in principle prevail. For the sake of completeness, and given that the competition authorities have not at this stage issued sufficient relevant guidance on the Anti-Monopoly Law, in the remainder of this chapter we assume that the provisions in other laws continue to apply.

Where a party occupies a dominant market position on one of the markets to which the vertical agreement relates, articles 17 to 19 of the Anti-Monopoly Law may also be relevant to the antitrust assessment of a given vertical restraint. The SAIC has also promulgated an agency rule to implement these articles in the Anti-Monopoly Law. However, these provisions are considered in the *Getting the Deal Through – Dominance* publication and are therefore not covered here. A similar approach is taken in relation to the provisions in the Price Law and its implementing measures, which may apply only to companies in a dominant market position and so are not considered in detail in this chapter.

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 Anti-Monopoly Law does not define the concept of vertical restraint. Nonetheless, while the concept of 'vertical' is not further explained, the Anti-Monopoly Law contains the concept of 'horizontal' agreement (ie, an agreement between competitors). By implication, a 'vertical' agreement would be any agreement between trading partners other than horizontal agreements. Similarly, while the Anti-Monopoly Law does not define the concept of 'restraint', guidance is provided in the definition of 'monopoly agreement', being an agreement, decision or concerted practice that eliminates or restricts competition.

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?

The Anti-Monopoly Law pursues multiple objectives:

- to prevent and prohibit monopolistic conduct;
- to protect market competition;
- to promote efficiency of economic operations;
- to safeguard the interests of consumers and the general public; and
- to promote the healthy development of the socialist market economy.

In addition, article 15 of the Anti-Monopoly Law provides the possibility to exempt 'monopoly' agreements, including vertical ones, if certain conditions are fulfilled. Many of these conditions are not purely economic. They include, for example, social interests (such as energy saving, environmental protection and disaster relief), alleviation of serious decreases in sales volumes or overcapacities during recession and the safeguard of legitimate interests in foreign trade and foreign economic cooperation.

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?

According to notices issued by the State Council, the National Development and Reform Commission (NDRC) and the State Administration of Industry and Commerce (SAIC) are responsible for enforcing the prohibitions on anti-competitive vertical restraints under the Anti-Monopoly Law. NDRC is in charge of investigating and sanctioning anti-competitive vertical restraints related to pricing. At present, the only prohibition explicitly provided for in the Anti-Monopoly Law is resale price maintenance and the fixing of minimum resale prices. SAIC has jurisdiction over anti-competitive vertical restraints not related to pricing. SAIC has delegated some powers to its local bureaux, and it is possible that NDRC will do likewise.

Different ministries and bodies enforce the competition provisions contained in other laws. For example, SAIC and its local bureaux are responsible for enforcing the provisions of the Anti-Unfair Competition Law and the Several Provisions for the Prohibition of Public Utilities Enterprises from Restricting Competition, while a number of bodies share the competence to enforce the provisions of the Administrative Measures.

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?

The Anti-Monopoly Law applies to monopolistic conduct in economic activities within China's territory and to conduct outside China which eliminates or restricts competition within the Chinese market. At the time of writing, there had not been any published decision in which the jurisdictional reach of the Anti-Monopoly Law in a pure internet context had been considered in detail.

Agreements concluded by public entities

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

In principle, the Anti-Monopoly Law and the competition provisions in other laws and regulations (including provisions relating to vertical agreements) apply irrespective of the ownership of an entity.

Most laws containing competition provisions, including the Anti-Monopoly Law, the Anti-Unfair Competition Law and the Price Law, stipulate that any 'undertaking' is subject to those provisions. The Anti-Monopoly Law defines an undertaking as a natural person, legal person or other organisation that engages in the manufacture or sale of products or the provision of services. No reference is made to the ownership of the undertaking.

The Anti-Unfair Competition Law contains a similar definition, but refers to commercial operations related to goods or 'profitable'

services. In the past, the State Administration of Industry and Commerce (SAIC), its local bureaux and the courts have held hospitals and universities to be undertakings for the purposes of the Anti-Unfair Competition Law. It is possible that the National Development and Reform Commission (NDRC), SAIC and the courts will reach a similar finding in relation to the Anti-Monopoly Law.

The Anti-Monopoly Law also prohibits administrative authorities and organisations from taking certain steps that might restrict competition, including the imposition of exclusive dealing obligations. However, it is unclear whether these provisions apply to public or state-owned companies or, rather, only to government bodies.

Article 7 of the Anti-Monopoly Law establishes a particular system for state-owned enterprises in industries vital to the national economy and national security and industries subject at law to exclusive operations and sales. This complex provision seems to make the pricing policy of such enterprises subject to government intervention and, possibly, exempt them from the Anti-Monopoly Law.

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.

Sectors subject to specific rules include, inter alia, certain defined public utilities, telecommunications, civil air transport and international maritime transport. The sector-specific sources relevant to those industries are:

- Several Provisions for the Prohibition of Public Utilities Enterprises from Restricting Competition (1993), which apply to public utilities enterprises (such as postal services, certain telecommunications services, transport, water supply, energy supply, etc);
- Telecommunication Regulation of the PRC (2000), which applies to the telecommunications industry;
- Regulation on the Prohibition of Anti-Unfair Competition Practices in Civil Air Transportation Market (1996), which applies to the civil air transport industry; and
- Regulation of the PRC on International Ocean Shipping (2001), which applies to international maritime transport.

General exceptions

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

Article 15 of the Anti-Monopoly Law lists the circumstances under which an agreement containing a vertical restraint can be exempted from the prohibition of article 14. These circumstances are:

- improving technology or research and development (R&D) of new products;
- improving product quality, reducing costs, enhancing efficiency, harmonising product specifications and standards, or dividing work based on specialisation;
- improving the operational efficiency and enhancing competitiveness of small and medium-sized enterprises;
- serving social public interests such as energy saving, environmental protection and disaster relief and aid;
- alleviating serious decreases in sales volumes or significant production overcapacities during economic recession; and
- safeguarding legitimate interests in foreign trade and foreign economic cooperation.

Other circumstances may be added to this list in the future.

If a company wishes to argue that the prohibition of article 14 should be disappplied, it has the burden of proof to show that the agreement in question fulfils one of these circumstances. If it claims

that one of the first five circumstances exists, the company must also prove that the agreement does not significantly restrict competition in the relevant market and allows consumers a share of the resulting benefit.

Agreements

- 9** Is there a definition of ‘agreement’ – or its equivalent – in the antitrust law of your jurisdiction?

The Anti-Monopoly Law and the competition provisions in other laws or regulations do not contain a precise definition of an ‘agreement’. Nonetheless, article 13 of the Anti-Monopoly Law defines a ‘monopoly agreement’ as an ‘agreement, decision or other concerted practice which eliminates or restricts competition’. The SAIC Rules of Administrations for Industry and Commerce on Prohibition of Monopoly Agreement Acts further provide that a monopoly agreement may be entered into between business undertakings either directly or through the coordination of industry associations.

- 10** In order to engage the antitrust law in relation to vertical restraints, is it necessary for there to be a formal written agreement or can the relevant rules be engaged by an informal or unwritten understanding?

The SAIC Rules of Administrations for Industry and Commerce on Prohibition of Monopoly Agreement Acts explicitly provide that a ‘monopoly agreement’ may be in written, oral and tacit forms (ie, a ‘concerted practice’).

These rules provide that the ‘concerted practice’ means a practice where coordination and concordance exist between the relevant business undertakings although there is no explicit written or oral agreement or decision, and also list the factors in determining a concerted practice as follows:

- whether the practices in the market taken by the business undertakings have concordance;
- whether the business undertakings conducted communications or exchange of information; and
- whether the business undertakings have reasonable justifications for their coordinated practice.

These rules further provide that in determining what constitutes a concerted practice, other factors need to be taken into consideration, including the structure of the relevant market, the competition situation, changes in the market and the situation of the industry.

The NDRC Rules against Pricing-related Monopolies contain similar provisions on what constitutes a ‘monopoly agreement’.

Parent and related-company agreements

- 11** 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)?

It is unclear whether the Anti-Monopoly Law and the competition provisions in other laws or regulations apply to agreements between a parent and a related company. However, because one aim of the competition laws and regulations is to maintain fair market competition and since such intra-company agreements would not adversely affect the wider competitive environment, it appears unlikely that Chinese competition laws and regulations would apply to such agreements.

Agent–principal agreements

- 12** 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 sales-based commission payment?

There are no provisions in the Anti-Monopoly Law or the competition provisions in other laws or regulations that specifically address this question.

- 13** Where antitrust rules do not apply (or apply differently) to agent–principal relationships, are there rules (or is there guidance) on what constitutes an agent–principal relationship for these purposes?

The Anti-Monopoly Law does not address this issue.

Intellectual property rights

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

In principle, the provisions of the Anti-Monopoly Law do not apply differently if an agreement grants an IPR. Article 55 of the Anti-Monopoly Law states that application of the law is not precluded as a matter of principle on the grounds that an IPR is involved. Where a company restricts or eliminates competition by abusing an IPR, the provisions of the Anti-Monopoly Law apply.

In contrast, the competition provisions in the Contract Law and the Judicial Interpretation on Technology Contracts apply to technology contracts only. Similarly, the Regulation on the Administration of Import and Export of Technologies applies only to the import and export of technology as defined by that regulation. Article 10 of the Judicial Interpretation on Technology Contracts prohibits the inclusion in agreements of clauses restricting the freedom of a technology recipient to undertake R&D or clauses imposing inequitable conditions for sharing improvements of the technology.

Analytical framework for assessment

- 15** Explain the analytical framework that applies when assessing vertical restraints under antitrust law.

There is no uniform analytical framework that applies to the assessment of all vertical restraints under Chinese antitrust law. Rather, the various legal instruments provide limited information on the analytical approach that should be expected in relation to the specific types of conduct they cover. The instruments set out below cover the potential infringements identified. Where appropriate, explanations of likely analytical frameworks are provided.

Anti-Monopoly Law

Article 14 of the Anti-Monopoly Law identifies as illegal:

- resale price maintenance – the fixing of resale prices of products sold to third parties; and
- fixing of minimum resale price – the fixing of minimum resale prices of products sold to third parties.

Article 14 of the Anti-Monopoly Law also empowers NDRC and SAIC to prohibit other vertical restraints, which they consider to be anti-competitive.

The general analytical framework underpinning the assessment of vertical restraints under the Anti-Monopoly Law is the following: if NDRC or SAIC finds that an agreement fixes resale prices or minimum resale prices, it is likely to conclude that article 14 of the Anti-Monopoly Law is breached. However, the parties can still

argue that the prohibition in article 14 should be disapplied on the grounds that the agreement fulfils one of the circumstances listed in article 15 of the Anti-Monopoly Law, or has other beneficial effects which are not explicitly listed. In addition, the parties must prove, as a general rule, that the agreement does not significantly restrict competition in the relevant market and allows consumers a share of the resulting benefit. This same analysis would, in principle, apply for all types of vertical restraints examined under the Anti-Monopoly Law, whether the explicitly prohibited resale price maintenance and minimum resale price fixing, or additional yet unspecified restraints which NDRC or SAIC finds to be in breach of article 14.

Anti-Unfair Competition Law

The Anti-Unfair Competition Law identifies as illegal:

- predatory pricing – below-cost sales with the aim to exclude competitors (except for fresh and live goods, perishable goods before expiry date and reduction of excessive stock, seasonal sales, or clearance of debts and change or suspension of business operations); and
- tie-in sales – tying the sale of certain products to the sale of other products, with the result that a purchaser is forced to purchase goods against its will, or attaching other unreasonable conditions to the sale of a product.

At present, it is not clear whether these provisions in the Anti-Unfair Competition Law continue to apply after the entry into force of the Anti-Monopoly Law. The latter law censures predatory pricing and tie-in sales only where the company at issue is in a dominant market position.

Contract Law and Judicial Interpretation on Technology Contracts

The Contract Law and the Judicial Interpretation on Technology Contracts identify the monopolisation of technology and the restriction of technological improvements as illegal. This includes the following practices:

- restricting technological improvements made by one party to a technology contract or providing for an inequitable sharing of such technological improvements;
- restricting a technology recipient's procurement of technology from other sources;
- unfairly limiting the volume, variety, price, sales channels, or export markets of the technology recipient's products and services;
- requiring the technology recipient to purchase other unnecessary technology, raw materials, products, equipment, services, etc;
- unjustly restricting the technology recipient's options for sourcing supplies of raw materials, parts or equipment; or
- prohibiting or restricting the technology recipients' ability to challenge the IPR at issue in the technology contract.

For technology import-export contracts, the Regulation on the Administration of Import and Export of Technologies contains similar prohibitions to the Judicial Interpretation on Technology Contracts.

Administrative Measures

The Administrative Measures only apply to certain types of vertical agreements, that is, where the buyer is a retailer selling to end-consumers and where its sales are above 10 million renminbi. They prohibit:

- price restrictions upon suppliers – where the retailer restricts the prices at which the supplier can sell products to other companies or consumers;
- exclusive dealing imposed upon suppliers – where the retailer restricts the supplier's sales to other retailers;
- tie-in sales imposed upon retailers – where the supplier ties the

sale of a product with other products that the retailer did not order; and

- exclusive dealing imposed upon retailers – where the supplier restricts the retailer's freedom to purchase from other suppliers.

In addition, if a retailer is in an 'advantageous position', it is prohibited from imposing an obligation upon its suppliers to purchase products designated by it.

However, according to article 23, the Administrative Measures only apply where no law or regulation regulates the same conduct. It remains to be seen how the Administrative Measures will be deemed to interact with the Anti-Monopoly Law and, in particular, with articles 14 and 15 thereof.

Provisions on the Prohibition of Regional Blockades in Market Economy Activities

The Provisions on the Prohibition of Regional Blockades in Market Economy Activities essentially aim to curb barriers to entry into regional markets that are erected by local governments and public authorities. They may also apply to the conduct of companies, in particular prohibiting: territorial restrictions on sales within China – restricting the 'import' of products and construction services originating in other regions within China. However, the exact scope of this prohibition remains unclear.

-
- 16** To what extent are supplier market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other suppliers relevant? Is it relevant whether certain types of restriction are widely used by suppliers in the market?

As a general rule, the Anti-Monopoly Law and the competition provisions in other laws or regulations do not require the enforcement agencies to take account of market shares, market structures and other economic factors in their assessment of the legality of individual restraints. For example, article 14 of the Anti-Monopoly Law prohibits resale price maintenance and the fixing of minimum resale prices without referring to these factors. Nonetheless, under article 15, the availability of exemptions for agreements containing vertical restraints refers, inter alia, to economic factors such as the improvement of product quality, cost reductions and efficiencies and requires that the agreements do not significantly restrict competition in the relevant market. To a certain extent, these conditions may be interpreted as an implicit requirement upon the enforcement agencies to take into account economic factors including market shares when assessing the legality of vertical restraints.

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- 17** To what extent are buyer market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other buyers relevant? Is it relevant whether certain types of restriction are widely agreed to by buyers in the market?

The Anti-Monopoly Law does not address these issues.

Block exemption and safe harbour

- 18** 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 Anti-Monopoly Law, the Anti-Unfair Competition Law and its implementing measures do not contain any safe harbours, and there are currently no block exemptions.

Types of restraint

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

Article 14 of the Anti-Monopoly Law prohibits a supplier from fixing the buyer's resale price or minimum resale price. Nonetheless, an agreement containing such a restriction can be exempted if the conditions of article 15 are met. The adoption of measures implementing articles 14 or 15 may give further guidance on the circumstances in which exemptions might be available.

In addition, article 10(3) of the Judicial Interpretation on Technology Contracts and article 29(6) of the Regulation on the Administration of Import and Export of Technologies prohibit the inclusion in vertical agreements of clauses restricting the price the technology recipient can charge to its customers in relation to products or services developed from the transferred technology.

20 Have the authorities considered in their decisions or guidelines 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'?

At the time of writing, there does not appear to be a decision published by NDRC or SAIC that addresses resale price maintenance.

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

At the time of writing, there does not appear to be a decision or guideline published by NDRC or SAIC that specifically addresses these questions.

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

At the time of writing, there does not appear to be a decision or guideline published by NDRC or SAIC that addresses resale price maintenance.

23 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?

The Anti-Monopoly Law and the Anti-Unfair Competition Law do not explicitly censure territorial restrictions in a vertical agreement between companies. The SAIC Rules of Administrations for Industry and Commerce on Prohibition of Abuse of Market Dominance prohibit a business undertaking from imposing unreasonable transaction terms on the other party to the transaction 'without justifiable cause', and one such unreasonable transaction term is the imposition of 'unreasonable restrictions on the geographic area into which the goods may be sold'.

The Provisions on the Prohibition of Regional Blockades in Market Economy Activities prohibit companies from restricting the import of products and construction services originating in other regions within China, but the exact scope of this prohibition is unclear.

24 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?

The SAIC Rules of Administrations for Industry and Commerce on Prohibition of Abuse of Market Dominance prohibit the imposition

of 'unreasonable transaction terms' by a business undertaking with dominant position 'without justifiable cause'. The rules list two factors to be assessed in determination of a 'justifiable cause', namely:

- whether the action in question is carried out on the basis of the operator's own ordinary business activities and its ordinary benefits; and
- the action's effects on the efficiency of the economy's operation, social and public interests, and economic development.

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

At the time of writing, neither the Anti-Monopoly Law nor the competition provisions in other laws or regulations contain general rules on such use restriction clauses contained in vertical agreements.

26 How is restricting the buyer's ability to generate or effect sales via the internet assessed?

At the time of writing, neither the Anti-Monopoly Law nor the competition provisions in other laws or regulations contain rules addressing this issue.

27 Have decisions or guidelines on vertical restraints distinguished in any way between different types of internet sales channel?

The Anti-Monopoly Law, its implementation rules and enforcement decisions do not address this issue.

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

There are no rules either in the Anti-Monopoly Law or the competition provisions in other laws or regulations that specifically address selective distribution systems.

29 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?

Not applicable – see question 28.

30 In 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?

Not applicable - see question 28.

31 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?

Not applicable – see question 28.

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

Not applicable – see question 28.

33 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?

Not applicable – see question 28.

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

Article 13(5) of the Anti-Monopoly Law prohibits competing business undertakings from 'jointly boycotting transactions'. The SAIC Rules of Administrations for Industry and Commerce on Prohibition of Monopoly Agreement Acts provide further clarification on this article, prohibiting competing business undertakings from jointly restricting specific business undertakings from dealing with other business undertakings that compete with the business undertakings that impose such restriction.

Article 10(5) of the Judicial Interpretation on Technology Contracts and article 29(5) of the Regulation on the Administration of Import and Export of Technologies can be viewed as prohibiting the inclusion in technology contracts or technology import-export contracts of clauses that restrict the possibility for the technology recipient to obtain the supplier's products from alternative sources. Similarly, although the text is not entirely clear, article 18(2) of the Administrative Measures may be interpreted as prohibiting a supplier from restricting the retailer's freedom to purchase products, including the supplier's own products, from other sources.

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

There are no rules either in the Anti-Monopoly Law or the competition provisions in other laws or regulations that specifically address this issue. However, the Anti-Monopoly Law is written in a very general manner, prohibiting not only enumerated forms of monopolistic conduct but also 'other forms of' unspecified monopolistic conduct. The SAIC Rules of Administrations for Industry and Commerce on Prohibition of Monopoly Agreement Acts set forth that the SAIC shall have the authority to determine other forms of monopoly agreements that are not explicitly provided for in the rules. Therefore, there is a possibility the SAIC, following the general principles of the Anti-Monopoly Law, may determine that it is a violation of the law to restrict the buyer's ability to sell non-competing products that the supplier deems 'inappropriate'.

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

The Anti-Monopoly Law does not contain any provision on such clauses where they occur in vertical agreements between parties with no dominant market position.

Article 18(2) of the Administrative Measures prohibits a supplier from restricting the retailer's freedom to purchase competing products from other suppliers. Furthermore, article 10(5) of the Judicial Interpretation on Technology Contracts and article 29(5) of the Regulation on the Administration of Import and Export of Technologies prohibit the inclusion in technology contracts or technology import-export contracts of clauses limiting the freedom of the technology recipient to purchase competing products.

37 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?

There are no provisions in the Anti-Monopoly Law or the competition provision in other laws or regulations that explicitly address this question. However, some provisions may be interpreted so as to apply to clauses of this kind. In particular, the establishment of a minimum amount, or minimum percentage, purchase requirement can have a similar effect to the exclusive dealing provisions discussed in the replies to questions 34 and 36. As such, it is possible that the provisions identified in these replies apply.

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

The Anti-Monopoly Law does not contain any provision on such clauses where they occur in vertical agreements between parties with no dominant market position.

Article 7 of the Administrative Measures prohibits a retailer from restricting sales of products or services by its supplier to other retailers. This provision also contains a prohibition on the retailer restricting the price that the supplier can charge when selling directly to consumers or to other companies.

39 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?

There are no provisions in the Anti-Monopoly Law or the competition provisions in other laws and regulations that explicitly address this question. For a discussion on the impact of clauses granting IPRs in vertical agreements, see question 14.

Nonetheless, according to article 5 of the Administrative Measures on Commercial Franchising, franchisors are prohibited from 'causing' a monopoly in the market or from restricting fair competition through franchising. Article 10(4) of these Administrative Measures prohibits a franchisor from obliging the franchisee to purchase products from it, except where it is necessary to guarantee the quality of the franchise product. Nonetheless, the franchisor is entitled to require that the purchased products comply with certain quality standards or to list a number of suppliers from which the franchisee can choose its supplier.

40 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.

There are no provisions in the Anti-Monopoly Law or the competition provisions in other laws and regulations that specifically address this question.

41 Explain how a buyer's warranting to the supplier that it will purchase the contract products on terms applied to the buyer's most-favoured supplier or that it will not purchase the contract products on more favourable terms from other suppliers is assessed.

The Anti-Monopoly Law does not address this issue.

Notifying agreements

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

Neither the Anti-Monopoly Law nor the competition provisions in other laws and regulations provide for a notification system for agreements. However, depending on the adoption of measures implementing the Anti-Monopoly Law and the enforcement practice of NDRC and SAIC, it is possible that a formal or informal consultation procedure may be adopted.

Authority guidance

- 43** 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?

It is possible that NDRC or SAIC may adopt a formal or informal consultation procedure in respect of vertical restraints.

Companies can also attempt to informally consult the government authorities that are competent to enforce the competition provisions in other laws and regulations.

Complaints procedure for private parties

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

According to the Anti-Monopoly Law, any organisation or individual is entitled to report conduct that he or she suspects is an infringement of the law. This includes vertical agreements containing clauses fixing the resale price or setting a minimum resale price.

NDRC and SAIC must keep the identity of the complainant confidential. If the complaint is made in writing and is supported by sufficient evidence, NDRC and SAIC are in principle under an obligation to conduct an investigation.

There are no detailed provisions on reporting procedures under the Anti-Unfair Competition Law or the competition provisions in other laws and regulations (although the Administrative Measures mention the possibility for entities and individuals to report illegal conduct to the authorities). More generally, government authorities may accept complaints filed by private parties.

Enforcement

- 45** 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?

At the time of writing, there had not yet been any published decision adopted under the Anti-Monopoly Law that relates to vertical restraints.

SAIC and its local bureaux have reportedly dealt with over 6,000 competition cases in the past 10 years or so, although not all of these cases involved competition rules in the strict sense. Decisions relating to vertical restraints are not counted separately, and details of the decisions are not published. Therefore, it is not possible to determine exactly how many vertical restraints cases have been dealt with by SAIC and its local bureaux.

There is no detailed statistical data on competition law enforcement by other government agencies with regard to vertical agreements.

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

The Anti-Monopoly Law does not itself stipulate the consequences of an infringement of article 14 for the validity and enforceability of a contract that contains a prohibited vertical restraint. Nonetheless, according to articles 52 and 56 of the Contract Law, such a contract is null and void, and has no legally binding force from the beginning.

However, article 56 of the Contract Law also stipulates that invalid portions of a contract will not affect the validity or enforceability of the rest of the contract if such portions can be severed or separated from the whole.

- 47** 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?

NDRC and SAIC can directly impose penalties without the involvement of other agencies or the courts.

If NDRC or SAIC finds that a vertical agreement violates article 14 of the Anti-Monopoly Law, it must order that the parties to the agreement cease giving effect to the illegal clause of the agreement, and confiscate the gains obtained through the illegal conduct.

Furthermore, NDRC and SAIC are in principle under an obligation to impose a fine of 1 per cent to 10 per cent of a company's annual turnover, unless:

- the agreement is not implemented (in which case a fine of up to 500,000 renminbi will be imposed);
- the company has filed a leniency application (in which case NDRC and SAIC can grant immunity or impose a reduced penalty); or
- the company makes specific commitments that eliminate the negative effects of the agreement (in which case, in principle, no fine will be imposed).

Under the competition provisions in other laws and regulations, the enforcement authorities normally impose two types of sanctions, that is, the cessation of the illegal conduct and the imposition of penalties. If a company has obtained illegal gains, the authorities may also confiscate those gains. In addition, if the illegal conduct is serious, the authorities may suspend the company's business licence.

Courts can also hear cases alleging the illegality of clauses inserted in vertical agreements in actions for damages.

Investigative powers of the authority

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

Under the Anti-Monopoly Law, NDRC and SAIC have the following powers when investigating alleged infringements, including those relating to vertical agreements:

- to conduct on-the-spot-inspections at the business premises of the companies under investigation or other relevant places;
- to interrogate the companies under investigation, interested parties and other relevant parties, and request that they explain all relevant circumstances;
- to examine and take copies of the relevant documents and information of the companies under investigation, interested parties or other relevant entities or individuals, such as agreements, accounting books, faxes or letters, electronic data, and other documents and materials;
- to seal and retain relevant evidence; and
- to investigate the companies' bank accounts.

The investigation must be carried out by at least two of NDRC's or SAIC's enforcement officials who are to present their credentials for the investigation. The officials must keep a written record of the inspection to be signed by the companies being investigated. NDRC and SAIC must maintain the confidentiality of any business secrets collected during the investigation.

Among the other laws and regulations containing competition rules, only the Anti-Unfair Competition Law specifies the agency's investigative powers. The Anti-Unfair Competition Law provides SAIC and its local bureaux with the following powers when investigating unfair competition practices:

- to interrogate companies, interested parties and witnesses and require them to supply evidence or other documents related to the alleged unfair practices;

- to examine and take copies of agreements, accounting books, documents, records, faxes or letters and other materials related to the alleged unfair practices; and
- to examine property connected with the suspected infringements and, where necessary, order the companies under investigation to suspend sales and to provide details on the source and quantity of products obtained. Pending examination, such property cannot be removed, concealed or destroyed by the company.

Private enforcement

49 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?

Both parties and non-parties to an agreement can bring damages claims if they have suffered losses due to an anti-competitive clause contained in a vertical agreement. Such cases are generally expected to be decided by the intermediate courts. Injunctions and damages can be granted.

Generally, the adjudication is to be made within six months from the acceptance by the court of the case, with the possibility of

Update and trends

With five new implementation rules having become effective on 1 February 2011, we do not expect significant changes to the Anti-Monopoly Law or the promulgation of new, important implementation rules that may address vertical restraint issues in the near future.

The Anti-Unfair Competition Law is in being amended, and it may contain certain provisions relating to vertical restraint issues. However, it remains unknown when the amended law will be promulgated.

extension for another six months upon approval. For expedited summary procedures, adjudication is made within three months without a possibility of extension. Successful parties can also recover from losing parties the legal costs charged by the court.

Other issues

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

Not applicable.

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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). 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 European Union. Article 101(2) TFEU renders such agreements void unless they satisfy the conditions for exemption under article 101(3) (ie, that 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 (EU) No. 330/2010 of 20 April 2010 on the application of article 101(3) of the Treaty on the Functioning of the European Union) to categories of vertical agreements and concerted practices (Vertical Block Exemption), providing that certain categories of vertical agreement will be treated as fulfilling the requirements for exemption under article 101(3); 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.

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) may 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 1.1(a) of the Vertical Block Exemption, a vertical agreement is defined as:

an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, 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, 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 European Union dictates that the Commission and the EU courts have also prioritised the furtherance of a single, integrated European market across the EU’s 27 member states. This is reflected in paragraph 7 of the Vertical Guidelines, which states that: ‘[c]ompanies should not be allowed to re-establish private barriers between member states where state barriers have been successfully abolished.’

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 European Union’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 European Union’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. It is worth noting, however, 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). 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 clarifies 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.

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 activities and will therefore be subject to 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.

In 2010, the Commission issued a Motor Vehicle Block Exemption Regulation (Commission Regulation No. 461/2010) 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) on the application of article 101(3) to categories of vertical agreements in the motor vehicle sector.

The Motor Vehicle Block Exemption Regulation creates a safe harbour for certain motor vehicle distribution and repair agreements, exempting them from the prohibition laid down in article 101(1). Note, however, that the 2002 version of the Motor Vehicle Block Exemption Regulation (Commission Regulation 1400/2002) continues to apply to agreements for the purchase, sale and resale of new motor vehicles until 31 May 2013. Agreements for the distribution of spare parts and for the provision of repair and maintenance services,

however, are governed by the terms of the 2010 Motor Vehicle Block Exemption Regulation.

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 Daimler-Chrysler, Toyota, General Motors and Fiat. Other industry-specific Block Exemption Regulations exist but none of these is targeted specifically at vertical restraints.

General exceptions

- 8 Are there any general exceptions from antitrust law for certain types of agreement containing 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, in the absence of certain hard-core restrictions such as resale 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 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?

The Commission and the EU courts have consistently interpreted the concept of ‘agreement’ under article 101 in a broad manner. In the 2004 judgment of the Court of Justice of the European Union (CJEU) 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. This ‘concurrence of wills’ language has been used in a number of subsequent judgments regarding vertical agreements, including the CJEU’s 10 February 2011 judgment in *Activision Blizzard v Commission*.

- 10 In order to engage the antitrust law in relation to vertical restraints, is it necessary for there to be a formal written agreement or can the relevant rules be engaged by an informal or unwritten understanding?

It is not necessary for there to be a formal written agreement. Rather, a ‘concurrence of wills’ (see question 9) reflecting an informal or unwritten understanding will suffice. The Commission’s Vertical Guidelines also provide guidance on when explicit or tacit acquiescence of one party in the other’s unilateral policy may amount to an ‘agreement’ between undertakings for the purpose of article 101. The Vertical Guidelines state that:

there are two ways in which acquiescence with a particular unilateral policy can be established. First, the acquiescence can be deduced from the powers conferred upon the parties in a general agreement drawn up in advance. If the clauses of the agreement [...] provide for or authorise a party to adopt subsequently a specific unilateral policy which will be binding on the other party, the acquiescence of that policy by the other party can be established on the basis thereof. Secondly, in the absence of such an explicit acquiescence, the Commission can show the existence of tacit acquiescence. For that it is necessary to show first that one party requires explicitly or implicitly the cooperation of the other party for the implementation of

its unilateral policy and second that the other party complied with that requirement by implementing that unilateral policy in practice. For instance, if after a supplier's announcement of a unilateral reduction of supplies in order to prevent parallel trade, distributors reduce immediately their orders and stop engaging in parallel trade, then those distributors tacitly acquiesce to the supplier's unilateral policy.

Parent and related-company agreements

- 11** 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 companies form part of the same 'single economic entity', the EU 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 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 EU 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 part of a separate economic entity to Martell, so that article 101 applied to vertical restraints agreed between DMP and its 50 per cent shareholder Martell.

Agent–principal agreements

- 12** 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 sales-based commission payment?

In general, article 101 will not apply to an agreement between a 'principal' and its 'genuine agent' in so far as the agreement relates to contracts negotiated or concluded by the agent on behalf of its principal (on the concept of genuine agents and genuine agency, see also question 13). 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 exclusion of the principal's competitors from the market for the products in question.

In addition, the Vertical Guidelines note that a genuine agency agreement that facilitates collusion between principals may also fall within article 101(1). Collusion could be facilitated where: 'a number of principals use the same agents while collectively excluding others from using these agents, or when they use the agents to collude on marketing strategy or to exchange sensitive market information between the principals.'

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

- 13** Where antitrust rules do not apply (or apply differently) to agent–principal relationships, are there rules (or is there guidance) on what constitutes an agent–principal relationship for these purposes?

For the purposes of applying article 101, an agreement will be qualified as an agency agreement if the agent does not bear any, or bears

only insignificant, risks in relation to the contracts concluded and/or negotiated on behalf of the principal. The exact degree of risk that an agent can take without article 101 being deemed applicable to its relationship with a principal will be assessed on a case-by-case basis. The Vertical Guidelines state that an agreement will generally be considered an agency agreement where property in the contract goods does not vest in the agent and where the agent does not do any of the following:

- contribute to the costs relating to the supply or purchase of the contract goods or services;
- maintain at its own cost or risk stocks of the contract goods;
- undertake responsibility towards third parties for damage caused by the product sold (save in relation to the agent's own fault);
- take responsibility for customers' non-performance of the contract, unless the agent is liable for fault;
- accept an obligation to invest in sales promotion;
- make market-specific investments in equipment, premises or training of personnel (unless these costs are fully reimbursed by the principal); or
- undertake other activities within the same product market required by the principal, unless these activities are fully reimbursed by the principal.

Where an agent incurs one or more of the above risks to a degree that is more than insignificant, the Vertical Guidelines indicate that the Commission would consider that the agreement would not qualify as a genuine agency agreement and that article 101 may therefore apply as if the agreement were a standard distribution agreement.

Intellectual property rights

- 14** 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

- 15** 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 questions 12 and 13); or
- concluded among related companies (see question 11).

If none of the above criteria is met, then an agreement containing a vertical restraint may be subject to review 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 European Union? (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 hard-core restraint, it:

- will not benefit from the safe harbour created by the Commission's De Minimis Notice (see question 8);
- will not benefit from the Vertical Block Exemption's safe harbour (see question 18); and
- is highly unlikely to satisfy the conditions of article 101(3).

The Commission's Vertical Guidelines 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. Unless the parties involved can demonstrate that the hard-core restraint gives rise to pro-competitive 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 territories 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. The Vertical Guidelines also state that certain restrictions on online selling can qualify as hard-core restraints (see questions 26 and 28 to 33).

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 18.) If the agreement falls within the scope of the Vertical Block Exemption, it will benefit from a safe harbour and thus not be deemed to infringe article 101. 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 detailed guidance on how to conduct this individual assessment.

16 To what extent are supplier market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other suppliers relevant? Is it relevant whether certain types of restriction are widely used by suppliers in the market?

The Commission has taken an increasingly economic approach when assessing individual restraints. As such, it considers 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. Supplier market position is arguably the single most important of these factors.

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) (and therefore qualifies for exemption from the prohibition in article 101(1)), namely:

- whether the agreement will lead to efficiencies accruing to consumers;
- whether the restrictions imposed are greater than necessary to achieve the efficiencies 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.

The market position of the supplier, the market positions of other suppliers and the structure of the relevant market will be particularly important in determining whether the restriction affords the parties to the agreement the possibility of eliminating competition.

The Commission will also normally take into account the cumulative impact of a given supplier's agreements in a relevant market when assessing the impact of a vertical restraint on competition. 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 excluding others from the relevant market, then any vertical restraints that contribute significantly to that exclusion may be found to infringe article 101. This kind of analysis has frequently been employed in relation to the brewing industry. The Vertical Block Exemption allows the Commission, by regulation, to disapply the Vertical Block Exemption to parallel networks of similar vertical restraints where they cover more than 50 per cent of a relevant market. This means that all undertakings whose agreements are defined in the Commission's regulation would be excluded from the scope of the Vertical Block Exemption. This is a power that, to the authors' knowledge, the Commission has not yet used.

17 To what extent are buyer market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other buyers relevant? Is it relevant whether certain types of restriction are widely agreed to by buyers in the market?

Arguably the most significant amendment to the assessment of vertical restraints arising out of the Commission's 2010 review of its Vertical Block Exemption and Vertical Guidelines was the introduction of a new requirement that, in order for an agreement to benefit from the safe harbour provided for under the Vertical Block Exemption, neither the supplier nor the buyer can have a market share in excess of 30 per cent.

The previous version of the Vertical Block Exemption stated that the buyer's market share was relevant only in so far as concerns arrangements pursuant to which a supplier appointed just one buyer as distributor for the entire European Union. Such arrangements were relatively rare in practice, meaning that buyer market share was seldom determinative of the application of the Vertical Block Exemption. Now, however, buyer market share must be assessed each time the application of the Vertical Block Exemption is under consideration. One consequence of the imposition of the additional requirement regarding buyer market share is that a significant number of agreements that had previously benefited from safe harbour protection under the old Vertical Block Exemption will now need to be assessed outside the context of the Vertical Block Exemption and under the more general provisions of the Vertical Guidelines. The relevant market on which the buyer's share must be assessed is that for the purchase of the contract goods and their substitutes or equivalents.

As noted in question 16 in relation to supplier market shares, the Commission may also take into account the cumulative impact of a buyer's agreements when assessing the impact of vertical restraints on competition in a given purchasing market. In addition, the assessment of a given vertical restraint can vary depending on the vertical restraints concluded by that buyer's competitors. If the vertical restraints imposed by the buyer and its competitors have the cumulative effect of excluding others from the market, then any vertical

restraints that contribute significantly to that exclusion may be found to infringe article 101. Article 6 of the Vertical Block Exemption also allows the Commission, by regulation, to disapply the Vertical Block Exemption to parallel networks of similar vertical restraints where they cover more than 50 per cent of a relevant market.

Block exemption and safe harbour

18 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 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 explanatory recitals to the new version of the Vertical Block Exemption (adopted in 2010) also clarify that, provided the relevant market share thresholds are not exceeded, vertical agreements can (in the absence of hard-core restrictions) be presumed to lead to an improvement in production or distribution and to allow consumers a fair share of the resulting benefits.

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 competitors' in the market which includes the contract products.

If the Vertical Block Exemption is to apply, neither the supplier's nor the buyer's market share can exceed 30 per cent on the relevant market for the products in question. The extension of this threshold to include buyer market shares in all cases (see further question 17) has significantly reduced the number of vertical agreements that will qualify for protection under the Block Exemption Regulation's safe harbour.

Where one or more of the relevant market shares moves above 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.

Where the agreement contains any hard-core restraints (see question 15), 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 obliging members of a selective distribution system 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

19 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 can view such arrangements with suspicion on concentrated markets, as it considers that such practices may facilitate collusion among suppliers.

20 Have the authorities considered in their decisions or guidelines 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, the Vertical Guidelines suggest that the Commission will actively consider arguments as to the efficiencies associated with resale price maintenance restrictions where such restrictions relate to the launch of a new product or the conduct of a short-term low-price campaign.

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

In a number of cases, the Commission has highlighted the possible links between resale price maintenance and other forms of restraint.

First, 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.

Second, 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 individual German publishers, guaranteeing retailers' freedom to sell to consumers in Germany over the internet.

Finally, in its 2003 *Yamaha* decision, the Commission noted that the distribution 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'.

The Vertical Guidelines also note that direct or indirect means of price-fixing can be made more effective when combined with measures such as a price monitoring system, the printing of a recommended resale price on the product itself or the enforcement of a most-favoured-customer clause (see further, question 40).

22 Have decisions or guidelines 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. 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.

The Commission's Vertical Guidelines also note that there may be efficiencies associated with resale price maintenance restrictions:

- where a new product is being introduced;
- where a short-term low-price campaign is being conducted; or
- in the case of 'experience' or complex products, where resale price maintenance may be necessary in order to support retailers providing desirably high levels of pre-sales service.

23 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?

Restrictions preventing a buyer selling the contract products from one EU member state into another can be 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 tended to see absolute territorial 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 seldom qualify for exemption under article 101(3). Judgments of the CJEU in *GlaxoSmithKline v Commission* (2009) and *Sot Lélou kai Sia and Others* (2008) have confirmed that an agreement intending to limit trade between EU member states must in principle be considered a restriction of competition 'by object'. The same approach was taken by Advocate General Kokott in a February 2011 opinion in the *Football Association Premier League Ltd & Others v QC Leisure & Others* case (judgment pending at the time of writing). Since such restrictions are classed as 'by object' restrictions of competition, the Commission is not obligated to conduct an analysis of the competitive effects of the agreement before concluding that it falls within article 101(1). However, the CJEU's *GlaxoSmithKline* judgment also underlines that the Commission is required to carry out a proper examination of the arguments and evidence put forward by a party in the context of the assessment under article 101(3) of whether the agreement should benefit from an exemption from the prohibition set out in article 101(1).

However, 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 be pro-competitive since it may lead to an increase in inter-brand competition. Provided the other conditions of the Vertical Block Exemption are met (including supplier and buyer market shares below 30 per cent), provided the restrictions relate only to active sales (ie, they do not restrict passive or unsolicited sales), and provided the restrictions relate only to sales into territories granted on an exclusive basis to another buyer (or to the supplier itself) such arrangements will fall within the safe harbour created by the Vertical Block Exemption. As such, they will not be deemed to infringe article 101. Where restrictions on active sales into territories reserved exclusively to another buyer (or to the supplier itself) are imposed in agreements between a supplier or buyer having a market share in excess of 30 per cent, such arrangements will not fall within the Vertical Block Exemption's safe harbour but may still qualify for individual exemption under article 101(3).

The Commission's Vertical Guidelines also set out two examples of individual cases in which seemingly hard-core territorial sales

restrictions may, on closer inspection, be deemed to fall outside the scope of Article 101(1) or fulfil the conditions for exemption under Article 101(3). First, restrictions on passive sales by other buyers where one buyer is the first to sell a new brand – or the first to sell an existing brand in a new market – and has to commit substantial investment in order so to do, may fall outside article 101(1) for the first two years for which the buyer sells the contract goods. Second, where a buyer is engaged in genuine testing of a new product in a limited territory, restrictions on active sales outside that territory may not fall within article 101(1) for the period of genuine testing.

In the course of the Commission's Vertical Block Exemption review process, there was much discussion of the appropriateness in an internet sales context of the key distinction between active and passive sales. The Commission's revised Vertical Guidelines maintain the prior position that the use of the internet is not generally to be considered a form of active sales unless it specifically targets certain customers (eg, online advertising specifically addressed to certain customers).

24 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 relation to territorial restrictions (see question 23) and tend to be viewed by the Commission as hard-core restrictions. As such, absolute restrictions 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 seldom qualify for exemption under article 101(3). There are certain key exceptions to this rule.

First, as with territorial restrictions (see question 23), if the customer 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 its various conditions are met (including supplier and buyer market share below 30 per cent). However, according to the Commission's Vertical Guidelines, if such customer 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 wholesaler selling direct to end-users and 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.

Third, distributors appointed within a selective distribution system can be restricted from selling to unauthorised distributors (see question 27).

Fourth, certain objectively justifiable customer restrictions will be permitted: for example, clauses preventing sales of medicines to children.

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

In general, a restriction on a 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).)

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 Vertical Guidelines 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 be likely to have to impose the same restrictions on all buyers and adhere to such restrictions itself.

26 How is restricting the buyer's ability to generate or effect sales via the internet assessed?

The Commission's Vertical Guidelines state that, in principle, every buyer must be allowed to use the internet to sell its products. The Vertical Guidelines provide examples of the types of internet-related restrictions which will be deemed to amount to a hard-core restriction on passive sales outside of a buyer's allocated territory or customer group (see questions 23 and 24) and which will therefore prevent the application of the safe harbour set out in the Vertical Block Exemption. Such hard-core internet restrictions include:

- automatic rerouting of customers to the manufacturer's or other exclusive distributors' website(s);
- automatic termination of a customer transaction on the basis that the customer's credit card data reveal an address not within the distributor's (exclusive) territory;
- limiting the proportion of sales made over the internet; or
- applying different pricing for goods sold online as opposed to offline.

In selective distribution systems, however, the vertical guidelines clarify that a supplier may require a buyer to:

- adhere to quality standards regarding its internet site (provided that these do not dissuade buyers from engaging in online sales by not being overall equivalent to the criteria imposed for offline sales);
- maintain one or more bricks-and-mortar shops or showrooms before engaging in online distribution; and
- sell a certain absolute amount (in value or volume) of the products offline in order to ensure an efficient operation of the bricks-and-mortar shop.

There has been comparatively little recent enforcement activity in relation to internet sales restrictions, despite the significant increase in the sophistication, value and scope of internet commerce in the European Union. 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, was a restriction on passive sales to consumers that could not be covered by the Vertical Block Exemption. However, YSL Perfume's selective distribution system (see question 27) 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 an absolute 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 bricks-and-mortar outlets. 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 of competition, the effect of such restriction being to discourage dealers in one member state from exporting products to other member states.

27 Have decisions or guidelines on vertical restraints distinguished in any way between different types of internet sales channel?

The Commission's Vertical Guidelines do not distinguish between different types of internet sales channel, but they do provide some guidance on the use of third party platforms. The Vertical Guidelines note that, in particular in a selective distribution context, a supplier may require that buyers use third-party platforms only in accordance with the standards and conditions agreed between the buyer and supplier for the buyer's use of the internet. A supplier may also require that customers do not visit the buyer's website through a site carrying the name or logo of a third-party platform if the buyer's website is hosted by that same third-party platform. To date, however, there have been no Commission vertical restraints decisions distinguishing between different types of online sales channel.

In the offline environment, in *Leclerc v Commission*, the EU General Court did examine vertical restraints that had the effect of distinguishing between different sales channels. The court noted that a requirement for a shop front with shop windows lent itself to being applied in a discriminatory fashion against certain retail outlets that do not have windows, for example, hypermarkets. The court also found that a requirement that perfumes (being the type of products that the supplier sold to the buyers in that case) should not represent a minority of the buyer's shop's total activities was discriminatory because it tended to favour specialist perfume buyers at the expense of multiple-product stores.

28 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 buyers 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 safe harbour protection 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 generally 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 Commission's Vertical Guidelines suggest that members of a selective distribution system must not be prevented from generating sales via the internet (see question 26). 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 possibility of the system overall benefiting from safe harbour protection under the Vertical Block Exemption.

Certain restrictions are also expressly permitted, including the restriction of active or passive sales to non-members of the network within a territory reserved by the supplier to operate that selective

distribution system (ie, where the system is currently operated or where the supplier does not yet sell the contract products).

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 EU General Court held that the application of selection criteria is not solely a matter for the supplier's discretion but must be determined objectively.

29 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 (see question 28). The Commission also 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) but outside the scope of the Vertical Block Exemption). In particular, the Commission notes that efficiency arguments under article 101(3) may be stronger in relation to new or complex products or so-called 'experience' products whose qualities are difficult to judge either before, or immediately after, purchase. Finally, the Commission has also recognised the need for selective distribution in relation to newspapers, as newspapers can only be sold during a limited time period.

30 In 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: '[w]ithin a selective distribution system the dealers should be free to sell, both actively and passively, to all end users, also with the help of the internet'. However, this section of the Vertical Guidelines should be read in light of an earlier section, which states that 'the supplier may require quality standards for the use of the internet site to resell his goods'.

In addition, a supplier may require that its buyers have one or more bricks-and-mortar shops or showrooms in order to become a member of a selective distribution system and that customers do not visit the buyer's website through a site carrying the name or logo of a third-party platform. However, 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 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. Further, any differences between the criteria for online and offline sales must be justified by the different nature of the two distribution modes.

31 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 Parfums* decision considered 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.

32 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, leading to so-called cumulative effects'. 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 EU General Court 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.

However, the Commission's Vertical Guidelines also note that in relation to individual networks of selective distribution, cumulative effects will likely not be a significant factor in the competitive assessment 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.

33 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 Loudspeakers' selective distribution system, the Commission insisted on the removal of provisions that it considered imposed minimum resale prices by prohibiting loss-leader or '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 motor vehicle industry. For example, in a 2005 judgment, the EU General Court upheld the part of a Commission fine on DaimlerChrysler (€9.8 million of the overall fine of €72 million) that related to resale price maintenance within DaimlerChrysler's selective distribution network. The General Court held that DaimlerChrysler had entered into agreements with its Belgian dealers limiting the rebates on its Mercedes E-Class cars and had restricted supplies to dealers granting rebates higher than the agreed 3 per cent maximum.

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

On its own, 'exclusive purchasing' will only fall within article 101(1) where the parties have a significant market share and the restrictions are of long duration. Where the supplier and buyer have market shares of 30 per cent or less, the restriction will benefit from the safe harbour of the Vertical Block Exemption, regardless of duration. However, 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.

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 arrangements, such as selective distribution or exclusive distribution. Where combined with selective distribution (see question 28), 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, falling within article 101.

35 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 EU General Court (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 General Court 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.

36 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 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 safe harbour protection 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.

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.

37 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 36). 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).

38 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 to 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, the Vertical Guidelines 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 question 23.

There are two supplier-specific restrictions that are dealt with in detail in the Commission's Vertical Guidelines. 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 seldom qualify for exemption under article 101(3).

The second supplier-specific restriction is termed 'exclusive supply' and covers the situation in which a supplier agrees to supply only to one buyer in the entire European Union. The main anti-competitive effect of such arrangements is the potential exclusion of competing buyers, rather than competing suppliers. As such, the Vertical Guidelines explain that it is the buyer's market share that is most important in the assessment of such restrictions. However, where the buyer and supplier market shares are below 30 per cent, such restrictions will benefit from the safe harbour created by the Vertical Block Exemption.

39 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 23 and 36). 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)]'.

- 40** 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.

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.

- 41** Explain how a buyer's warranting to the supplier that it will purchase the contract products on terms applied to the buyer's most-favoured supplier or that it will not purchase the contract products on more favourable terms from other suppliers is assessed.

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 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, then such arrangements may increase prices overall and 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

- 42** 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 41) a notification of a vertical agreement is therefore neither necessary nor, in general, advisable.

Authority guidance

- 43** 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. The authors 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 sales restrictions and on the alleged efficiencies of resale price maintenance in the Commission's Vertical Guidelines, the Commission may be minded to offer informal guidance in such areas.

Complaints procedure for private parties

- 44** 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). However, the CJEU and the EU General Court 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

- 45** 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 10 years from 1 January 2001 to 1 January 2011, the Commission took around 16 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
- 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 in large part on territorial and resale price restrictions.

- 46** 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.

- 47** 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 EU courts.

In the 10 years from 1 January 2001 to 1 January 2011, 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.

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. Since suppliers often organise distribution at a national level within individual member states, there has been more frequent enforcement of national and EU antitrust rules on distribution by member state-level competition authorities than by the Commission.

Investigative powers of the authority

- 48** 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 European Union (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 the European Union, provided the information is accessible from the premises of the EU-domiciled subsidiary.

Private enforcement

- 49** 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 EU competition rules, private enforcement is still in its infancy. Private damages actions cannot be brought before the Commission or before the EU 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 European Union, with certain jurisdictions, such as the United Kingdom, being more claimant-friendly than others. The key case before the EU 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 February 2011, the Commission published a consultation paper on how best to facilitate a coherent EU-wide approach to collective redress.

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

Other issues

- 50** 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 European Union's system for the regulation of vertical restraints are:

- the absence of per se rules;

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Update and trends

Following the adoption by the Commission of its revised Vertical Block Exemption and Vertical Guidelines in 2010, it was anticipated that 2011 would be a period of relative stability in the European Union's regulation of vertical agreements. However, there continue to be significant lobbying efforts in relation to the application of the Vertical Block Exemption and Vertical Guidelines in relation to internet sales restrictions. One particular area of interest is the requirement for buyers to have 'one or more bricks-and-mortar shops'. The inclusion of the requirement was challenged by the online community right up until the adoption of the 2010 Vertical Guidelines in April 2010.

Those challenges seem set to continue. On 21 September 2010 the European Parliament published an own-initiative report in which it set out its views on how best to create a single market for e-commerce in the European Union. In its report, the parliament calls on the Commission: 'to begin formulating European standards to facilitate cross-border e-commerce, to bridge variations between the

laws in force within the various member states and to remove the obligation within a selective distribution network of having an offline shop prior to selling online, where it is shown that such an obligation is in contradiction with competition law, or is not justified by the nature of the contract for goods and services sold, thus enabling consumers and small and medium-sized enterprises to fully exploit the internal market's potential in the electronic environment.' The report also calls on the Commission 'to remove the obligation of having an offline shop prior to selling online, as this requirement radically hampers online sales'.

In addition, a number of important cases will either come before, or be decided by, the CJEU in the course of 2011. Those cases include: *Pierre Fabre Dermo-Cosmetique* (regarding a blanket internet sales ban in a selective distribution system); and *Football Association Premier League v QC Leisure* (regarding absolute territorial restrictions in relation to the sale of sports rights).

- 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, rule-of-reason-type economic assessments;
- the importance it attaches to competition law as a tool for assisting in the development of the European Union's single market, as reflected in its decisions on territorial restrictions in cases such as *Volkswagen* and *Nintendo*; and
- the fact that the jurisprudence of the EU courts concerning the application of EU competition rules is binding on national-level enforcement agencies and courts in the European Union's 27 member states.

United Kingdom

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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) (see European Union chapter). Section 2(1) of the CA prohibits agreements between undertakings that may affect trade within the United Kingdom and have as their object or effect, the prevention, restriction or distortion of competition within the United Kingdom (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 European Union 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 European Union 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 European Union 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 (published in December 2004) cite the definition of vertical agreements given in the European Commission’s 1999 Vertical Block Exemption. The 1999 definition has been slightly revised in the European Commission’s 2010 version of the Vertical Block Exemption and it is to the revised definition that the OFT will have regard when considering vertical restraints cases. The revised definition defines a vertical agreement as ‘an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, 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 United Kingdom). The Competition Commission can also review vertical restraints in the context of market investigations (see question 1). (Note, however,

that at the time of writing, the UK government was considering bringing the functions carried out by the OFT and the Competition Commission under the auspices of one overall competition agency.)

There are also certain sectoral regulators which have concurrent jurisdiction with the OFT in relation to their own particular industry, namely: the Office of Communications (Ofcom); the Gas and Electricity Markets Authority (Ofgem); the Northern Ireland Authority for Energy Regulation (Ofreg NI); the director general of Water Services (Ofwat); the Office of Rail Regulation (ORR); and the Civil Aviation Authority (CAA). In general, references in this chapter to the OFT should be taken to include these sectoral regulators in relation to their respective industries. The role of ministers is minimal 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. Equivalent powers are exercised by the secretary of state for culture, Olympics, media and sport in relation to the media, broadcasting, digital and telecoms sectors. By way of example, the secretary of state has made orders excluding the chapter I prohibition from applying to 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 United Kingdom. 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 United Kingdom. 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 United Kingdom 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 United Kingdom where an agreement appreciably restricts competition within the United Kingdom (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 an anti-competitive 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 European Union 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 United Kingdom 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 19). (Note, however, that at the time of writing, the OFT was consulting on the possible withdrawal of the Specified Domestic Electrical Goods Order.) Other industry-specific block exemption regulations exist but none is targeted specifically at vertical restraints.

General exceptions

- 8 Are there any general exceptions from antitrust law for certain types of agreement containing 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 United Kingdom. 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 European Union 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 do not exceed 15 per cent for the products in question.

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, the UK government has decided to revoke the Land Agreements Exclusion with effect

from 6 April 2011, meaning 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' exemption under section 39 of the CA.

Agreements

9 Is there a definition of 'agreement' – or its equivalent – in the antitrust law of your jurisdiction?

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.

10 In order to engage the antitrust law in relation to vertical restraints, is it necessary for there to be a formal written agreement or can the relevant rules be engaged by an informal or unwritten understanding?

It is not necessary for there to be a formal written agreement. Rather, a 'concurrence of wills' (see question 9) will suffice. The EU Vertical Guidelines provide guidance (to which the OFT will have regard) on when, in the absence of an explicit agreement expressing a 'concurrence of wills', explicit or tacit acquiescence of one party in the other's unilateral policy may amount to an 'agreement' between undertakings for the purpose of article 101 (see European Union chapter).

Parent and related-company agreements

11 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

12 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 sales-based 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) in so far 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 European Union chapter).

However, the EU Vertical Guidelines (to which the OFT will have regard) explain that, where a genuine agency agreement contains, for example, a clause preventing the agent from acting for competitors of the principal, article 101 (or, in the United Kingdom, the chapter I prohibition) may apply if the arrangement leads to exclusion of the principal's competitors from the market for the products in question.

In addition, the EU Vertical Guidelines note that a genuine agency agreement that facilitates collusion between principals may also fall within article 101(1) (or, in the United Kingdom, the chapter I prohibition). Collusion could be facilitated where: 'a number of principals use the same agents while collectively excluding others from using these agents, or when they use the agents to collude on marketing strategy or to exchange sensitive market information between the principals.'

13 Where antitrust rules do not apply (or apply differently) to agent–principal relationships, are there rules (or is there guidance) on what constitutes an agent–principal relationship for these purposes?

For the purposes of applying the chapter I prohibition, an agreement will be qualified as an agency agreement if the agent does not bear any, or bears only insignificant, risks in relation to the contracts concluded and/or negotiated on behalf of the principal. 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. However, the EU Vertical Guidelines (to which the OFT will have regard) give guidance on the kinds of risk that, if accepted by an agent, will prevent it from being considered a 'genuine agent' for purposes of article 101 and the chapter I prohibition.

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 genuine agency agreements because, inter alia, the risk of loss or damage was borne by the buyers. It is also worth noting that, in early 2011, the OFT initiated an investigation in relation to agency agreements for the sale of e-books. Although in its early stages, the OFT's e-books case may provide further guidance on the OFT's interpretation of the concept of genuine agency.

Intellectual property rights

14 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

15 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:

- defence agreements (see question 8);
- concluded by public entities carrying out non-economic activities (see question 6);

- genuine agency arrangements (in most cases – see questions 12 and 13); or
- concluded among related companies (see question 11).

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 United Kingdom 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 United Kingdom? 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 United Kingdom. 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 United Kingdom. If the criteria of the De Minimis Notice are met (see question 8), then the OFT is likely to 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 18) (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 United Kingdom 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 of the CA are satisfied.

The UK Vertical Guidelines set out a number of factors that will be taken into account in assessing first, whether a vertical agreement falls within the chapter I prohibition and, second, whether an agreement satisfies the requirements for exemption under section 9. This latter question is determined by reference to the following factors:

- whether the agreement will lead to efficiencies;
- whether the efficiencies 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
- 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 European Union chapter)).

- 16** To what extent are supplier market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other suppliers relevant? Is it relevant whether certain types of restriction are widely used by suppliers in the market?

Supplier 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.'

The OFT will normally take into account the cumulative impact of a supplier's relevant vertical 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 and the 2010 Competition Commission Market Investigation into Movies on Pay TV).

- 17** To what extent are buyer market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other buyers relevant? Is it relevant whether certain types of restriction are widely agreed to by buyers in the market?

Arguably the most significant amendment to the assessment of vertical restraints arising out of the European Commission's 2010 review of its Vertical Block Exemption and the EU Vertical Guidelines was the introduction of a new requirement that, in order for an agreement to benefit from the safe harbour provided for under the Vertical Block Exemption, neither the supplier nor the buyer can have a market share in excess of 30 per cent.

The previous version of the Vertical Block Exemption stated that the buyer's market share was relevant only in so far as concerns arrangements pursuant to which a supplier appointed a sole buyer as distributor for the entire European Union. Such arrangements were relatively rare in practice, meaning that buyer market share was seldom determinative of the application of the Vertical Block Exemption. Now, however, buyer market share must be assessed each time the application of the Vertical Block Exemption is under consideration. One consequence of the imposition of the additional requirement regarding buyer market share is that a significant number of agreements that had previously benefited from safe harbour protection

under the old Vertical Block Exemption will now need to be assessed outside the context of the Vertical Block Exemption and under the more general provisions of the EU and UK Vertical Guidelines. This may be particularly relevant in the United Kingdom where markets are often reasonably concentrated at the buyer (or retail) level.

As noted in question 16 in relation to supplier market shares, the OFT may also take into account the cumulative impact of a buyer's relevant vertical agreements when assessing the impact of vertical restraints on competition in a given purchasing market. In addition, the assessment of a given vertical restraint can vary depending on the vertical restraints concluded by that buyer's competitors. If the vertical restraints imposed by the buyer and its competitors have the cumulative effect of excluding others from the market, then any vertical restraints that contribute significantly to that exclusion may be found to infringe article 101.

Block exemption and safe harbour

18 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 European Union 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 European Union chapter). The explanatory recitals to the new version of the Vertical Block Exemption (adopted in 2010) also clarify that, provided the relevant market share thresholds are not exceeded, vertical agreements can (in the absence of hard-core restrictions) be presumed to lead to an improvement in production or distribution and to allow consumers a fair share of the resulting benefits.

The adjustment of the Vertical Block Exemption's safe harbour such that it applies only where neither buyer nor supplier market shares exceed 30 per cent may have significant consequences in the United Kingdom in light of the relatively high levels of concentration in the retail and distribution sectors.

Types of restraint

19 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. In a case that had horizontal as well as vertical elements, the OFT issued a decision in 2010 fining 10 retailers and two tobacco manufacturers a

total of £225 million for fixing retail prices across competing brands and competing retail outlets. However, a 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 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 (save in relation to specified domestic electrical goods – see question 7 and 'Update and trends'). However, the OFT is likely to view such arrangements with suspicion on concentrated markets, as such practices may facilitate collusion.

20 Have the authorities considered in their decisions or guidelines 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 22 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 braking 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. The EU Vertical Guidelines adopted in 2010 now contain reference to the possibility of resale price maintenance being permissible in certain circumstances where a new product is being brought to market. It seems possible, therefore, that the John Bruce case might be subject to a different assessment were it to be considered under the provisions of the 2010 EU Vertical Guidelines.

21 Have decisions or guidelines 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 *Tobacco Products*, part of the infringement related to agreements between manufacturers and retailers to set the price of tobacco products with reference to the brands of competing manufacturers. The case also concerned the indirect exchange of information between retailers through manufacturers. In addition, the OFT's 2003 decision concerning *Lladró Comercial SA* (see question 33) related to an agreement which not only obliged buyers to inform Lladró of any proposed discount prices but also imposed restrictions on buyer advertising. In an August 2010 consultation on a guide to the OFT's Competition Act 1998 investigation procedures, the OFT restates that for the purposes of its leniency programme, price-fixing in relation to which leniency from fines can be

sought includes resale price maintenance. The OFT has also recently commenced an investigation into the online hotel room booking sector. Although the OFT has not published a detailed summary of its investigation, there are press reports indicating that it relates to resale price maintenance by hotels selling rooms via online resellers.

22 Have decisions or guidelines 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 20), the supplier argued that its price restriction was pro-competitive because it facilitated competition against 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 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 OFT also noted in its decision that ‘in most circumstances RPM is a very serious infringement of the Chapter I prohibition and a starting point [for a fine] at or near [twice that set for *John Bruce*] is likely to be imposed’.

However, since the 2010 EU Vertical Guidelines acknowledge that resale price maintenance may, in certain circumstances, be compatible with article 101 (and, therefore, with the chapter I prohibition), it is possible that the OFT may now be more persuaded by arguments as to the possible efficiencies arising out of resale price maintenance than it was at the time of the *John Bruce* and *UOP* cases (see also the European Union chapter).

23 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 seldom 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. Such arrangements will fall within the safe harbour provided the other conditions of the Vertical Block Exemption are met (including supplier and buyer market share below 30 per cent), provided the restrictions relate only to active sales (ie, they do not cover passive or unsolicited sales) and provided the restrictions cover only active sales into territories granted on an exclusive basis to another buyer (or to the supplier itself).

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 be likely to 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 2008 opinion) which would affect any remedies proposed.

24 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 23) 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 seldom 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 and buyer market share below 30 per cent).

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.

25 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 probably have to impose the same restriction on all buyers and adhere to such restrictions itself.

26 How is restricting the buyer's ability to generate or effect sales via the internet assessed?

Broadly speaking, the UK rules follow the principles set out in the Commission's EU Vertical Guidelines (see European Union 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 concluded a market study in May 2010 into online advertising and pricing. This was based on the OFT's consumer protection mandate, rather than its competition policy function, but it did provide some recommendations on self-regulation related to advertising and targeted pricing.

27 Have decisions or guidelines on vertical restraints distinguished in any way between different types of internet sales channel?

To the best of our knowledge, there have not yet been any decisions that distinguished between different types of internet sales channel. The most relevant resource in this regard is likely to be the EU Vertical Guidelines (see European Union chapter) which contain a number of observations of relevance to different types of internet sales channel (such as third-party platforms).

28 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 dissuaded from generating sales via the internet, for example by the imposition of obligations in relation to online sales that are not overall equivalent to the obligations imposed in relation to sales from a bricks and mortar shop. 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 possibility of the system overall benefiting 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 within a territory reserved by the supplier to operate that selective distribution system (ie, where the system is currently operated or where the supplier does not yet sell the contract products).

In so far 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 European Union 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. The OFT has invited comments on the Specified Domestic Electrical Goods Order with a view to its possible withdrawal – see 'Update and trends'.

29 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 'experience' products) immediately after consumption.

Additionally, the OFT has recognised the advantages of selective distribution in relation to newspapers, as newspapers can be sold only 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).

- 30** In 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 '[w]ithin a selective distribution system the dealers should be free to sell, both actively and passively, to all end users, also with the help of the internet'. However, this should 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'. See the European Union chapter for information on the nature of the restrictions that might be permissible in this regard. 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 26). However, the issue has not yet been considered in great detail in the United Kingdom.

- 31** 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 33), 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 ongoing 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 United Kingdom'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 33).

- 32** 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.

- 33** 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 Lladró'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 United Kingdom.

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.

- 34** 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 arbitrage 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 and the buyer each has a market share of 30 per cent or less, the restriction will benefit from the safe harbour created by the Vertical Block Exemption, regardless of duration.

According to the EU Vertical Guidelines, to which the OFT has regard, 'exclusive purchasing' is most likely to contribute to an infringement of the chapter I prohibition where it is combined with other practices, such as selective distribution or exclusive distribution. Where combined with selective distribution (see question 28), 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.

- 35** 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'.

36 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.

37 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 36). 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').

38 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 23 and 24.

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 seldom 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. If buyer and supplier market shares are 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 buyer or supplier market share exceeds 30 per cent, the OFT will have regard to the EU Vertical Guidelines, which give an overview of the factors that are likely to 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.

39 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 either the franchisor or franchisee market share exceeds 30 per cent, or where 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 23 and 36).

40 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.

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 Vertical Block Exemption, provided the other criteria for its application are met.

41 Explain how a buyer's warranting to the supplier that it will purchase the contract products on terms applied to the buyer's most-favoured supplier or that it will not purchase the contract products on more favourable terms from other suppliers is assessed.

As with most-favoured-customer clauses (see question 40), it is not clear whether such a restriction will infringe the chapter I prohibition. The OFT is likely to follow the European Commission, which has suggested that where it considers market power to be concentrated among relatively few suppliers (including films and reinsurance), and 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, then such arrangements may increase prices and may increase the risk of price coordination.

Notifying agreements

42 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 European Union in May 2004, the United Kingdom abolished the notification system that previously existed under the CA. Subject to the making

Update and trends

Following the European Commission's issuance of a revised Vertical Block Exemption and related Vertical Guidelines in April 2010, the OFT appears to have stepped up its enforcement activity in relation to vertical agreements. Its 2010 investigation into online hotel bookings has vertical aspects (including possible resale price maintenance) as does its early 2011 investigation into the distribution of e-books. In addition, a number of recent market studies and market investigations involve possible allegations of anti-competitive vertical restraints, including the Competition Commission's ongoing market investigation into Movies for Pay TV and the OFT's market study in relation to

outdoor advertising. Finally, the OFT launched in November 2010 an invitation to comment on the possible withdrawal of the Specified Domestic Electrical Goods Order. Along with the OFT and Competition Commission's approaches to their respective ongoing cases, the OFT's approach to the possible withdrawal of this somewhat anomalous order (which bans the recommending of resale prices and which mandates, in certain circumstances, the provision to interested buyers of the supplier's criteria for selecting buyers), may give wider guidance on the assessment under UK and EU competition rules of a variety of common vertical restraints.

of requests for guidance in novel cases (question 43), 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 19).

Authority guidance

43 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

44 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

45 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 2010, 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.

46 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.

47 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 United Kingdom 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 OFT's 2010 decision imposing fines totalling £225 million in relation to its finding that 10 retailers and two tobacco manufacturers had either

linked the retail price of one brand of cigarettes to the retail price of a competing brand or had indirectly exchanged information in relation to proposed future retail prices.

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.

Investigative powers of the authority

48 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 on-site 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 United Kingdom (eg, *Lladró Comercial SA*).

Private enforcement

49 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 position, it cannot be said to be responsible for the infringement (see European Union chapter). In addition, in so far 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 United Kingdom have been settled out of court.

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

50 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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Antitrust law

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

A number of federal statutes bear directly on the legality of vertical restraints. Section 1 of the Sherman Act is the federal antitrust statute most often cited in vertical restraint cases. Section 1 prohibits ‘every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade’ (15 USC, section 1 (2006)). Section 1 serves as a basis for challenges to such vertical restraints as resale price maintenance, exclusive dealing, tying, and certain customer or territorial restraints on the resale of goods.

Unlike section 1, section 2 of the Sherman Act reaches single-firm conduct. Section 2 declares that ‘every person who shall monopolise or attempt to monopolise [...] any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony’ (15 USC, section 2 (2006)). In the distribution context, section 2 may apply where a firm has market power significant enough to raise prices or limit market output unilaterally.

Section 3 of the Clayton Act makes it unlawful to sell goods on the condition that the purchaser refrain from buying a competitor’s goods if the effect may be to substantially lessen competition (15 USC, section 14 (2006)).

Finally, section 5(a)(1) of the Federal Trade Commission Act (FTC Act) has application to vertical restraints. This declares unlawful unfair methods of competition (15 USC, section 45(a)(1) (2006)). Section 5(a)(1) violations are solely within the jurisdiction of the FTC. As a general matter, the FTC has interpreted the FTC Act consistently with the sections of the Sherman and Clayton Acts applicable to vertical restraints. In December 2009, however, the FTC filed a complaint against Intel Corp in which the FTC asserted a stand-alone claim that certain vertical restraints constituted unfair methods of competition under section 5 (in addition to conventional monopolisation claims) (see complaint, *In re Intel Corp*, FTC Dkt No. 9341 (16 December 2009), available at www.ftc.gov/os/adjpro/d9341/091216intelcmpt.pdf). In doing so, the FTC appeared to assert enforcement authority under section 5 that it viewed as entirely independent of the limits on the Sherman and Clayton Acts. Although no court has yet addressed whether such independent enforcement authority exists (the FTC reached an out-of-court settlement of its claims against Intel in August 2010), the FTC’s action against Intel suggests that it may seek to expand its powers under section 5 in the future.

Numerous states have also enacted state antitrust laws that prohibit similar conduct as the federal antitrust laws do. Nevertheless, unless otherwise specified below, these responses focus solely on federal antitrust law.

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 varying forms of vertical restraints are not expressly defined by statute. Rather, these concepts have evolved through judicial decision-making, which is commonly referred to as the ‘common law’ of antitrust. Numerous types of vertical restraints have been the subject of review under the applicable antitrust laws, the most common of which are the following:

- resale price maintenance – agreements between persons at different levels of the distribution structure on the price at which a customer will resell the goods or services supplied. Resale price maintenance can take the form of setting a specific price; but commonly it involves either setting a price floor below which (minimum resale price maintenance) or a price ceiling above which (maximum resale price maintenance) sales cannot occur;
- customer and territorial restraints – these involve a supplier or upstream manufacturer of a product prohibiting a distributor from selling outside an assigned territory or particular category of customers;
- channel of distribution restraints – these function similarly to customer or territorial restraints in that an upstream manufacturer or supplier of a product prohibits a distributor from selling outside an approved channel of distribution. Commonly, such restraints involve a luxury goods manufacturer prohibiting its distributors from selling over the internet;
- exclusive dealing arrangements – these require a buyer to purchase products or services for a period of time exclusively from one supplier. The arrangement may take the form of an agreement forbidding the buyer from purchasing from the supplier’s competitors or of a requirements contract committing the buyer to purchase all, or a substantial portion, of its total requirement of specific goods or services only from that supplier. These arrangements may to some extent foreclose competitors of the supplier from marketing their products to that buyer for the period of time specified in the agreement;
- exclusive distributorship arrangements – these typically provide a distributor with the right to be the sole outlet for a manufacturer’s products or services in a given geographic area. Pursuant to such an agreement, the manufacturer may not establish its own distribution outlet in the area or sell to other distributors; and
- tying arrangements – an agreement by a party to sell one product (the tying product), but only on the condition that the buyer also purchases a different (or tied) product. Tying can involve services as well as products. Such tying arrangements may force the purchaser to buy a product it does not want or to restrict the purchaser’s freedom to buy products from sources other than the seller.

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?

Yes, in modern federal antitrust enforcement and jurisprudence, the sole goal of antitrust is to maximise consumer welfare.

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 Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DoJ) are the two federal agencies responsible for the enforcement of federal antitrust laws. The FTC and the DoJ have jurisdiction to investigate many of the same types of conduct, and therefore have adopted a clearance procedure pursuant to which matters are handled by whichever agency has the most expertise in a particular area.

Additionally, other agencies, such as the Securities and Exchange Commission and Federal Communications Commission, maintain oversight authority over regulated industries pursuant to various federal statutes, and therefore may review vertical restraints for anti-competitive effects.

Finally, state attorneys general can enforce federal antitrust laws based upon their *parens patriae* authority and state antitrust laws based upon their respective state statutes. *Parens patriae* authority allows the state to prosecute a lawsuit on behalf of citizens or natural persons residing in its state to secure treble damages arising from any violation under the Sherman Act (see question 50).

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?

The longstanding rule in the United States is that conduct that has a substantial effect in the United States may be subject to US antitrust law regardless of where the conduct occurred (*United States v Aluminum Company of America*, 148 F2d 416, 443-44 (2d Cir 1945)). The Foreign Trade Antitrust Improvements Act of 1982 limits the subject-matter jurisdiction of the antitrust laws, however, by providing that the Sherman Act shall not apply to commerce or trade with foreign nations except where the conduct has a direct, substantial and reasonably foreseeable effect on domestic commerce (15 USC, section 6a (2006)). Analogous jurisdictional principles also apply to the extraterritorial application of both the Clayton and FTC Acts.

Agreements concluded by public entities

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

In the United States, the federal government is not subject to the Sherman Act (see *United States Postal Service v Flamingo Industries (USA) Ltd*, 540 US 736 (2004)). Litigation against federal entities thus often turns on whether the relevant entity is a 'person' separate from the United States itself. The United States Postal Service, for example, is immune from suit under the Sherman Act because it is designated, by statute, as an 'independent establishment of the executive branch of the Government of the United States' (ibid at 746).

By contrast, the Tennessee Valley Authority, which was established by Congress as an independent federal corporation, is not immune from antitrust liability, despite the fact that it maintains certain public characteristics (see *McCarthy v Middle Tennessee Electric Membership Corp*, 466 F3d 399, 413-14 (6th Cir 2006)).

As to claims against state entities, under the 'state action' doctrine, the US Supreme Court has allowed defendants to show that the operation of a state regulatory scheme precludes the imposition of antitrust liability, thereby shielding the anti-competitive conduct in question. In the landmark case of *Parker v Brown*, 317 US 341 (1943), the Supreme Court upheld, as an 'act of government which the Sherman Act did not undertake to prohibit', a Californian programme that regulated the marketing of raisins. The *Parker* doctrine has been interpreted as requiring two standards for the application of antitrust immunity (see *California Retail Liquor Dealers Ass'n v Midcal Aluminum Inc*, 445 US 97 (1980)). First, the challenged restraint must be undertaken pursuant to a clearly articulated and affirmatively expressed state policy to replace competition with regulation. And second, the policy must be actively supervised by the state itself. Departures from competition immunised by the state action doctrine can be independently authorised by state legislatures or the state's highest court. The availability of state action immunity to other lesser instrumentalities of the state varies depending upon how clearly articulated the state policy is under which the challenged activity is undertaken – namely, whether the challenged activity was a foreseeable result of a specific grant of authority.

Finally, foreign sovereigns may be shielded from US antitrust laws under the Foreign Sovereign Immunities Act (the FSIA). Under the FSIA, a foreign sovereign or any of its agents or instrumentalities is immune from suit in the United States unless, among other things, the suit involves the sovereign's commercial activities that occurred within, or directly affected, the United States (see *Republic of Argentina v Weltover Inc*, 504 US 607 (1992)).

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.

There are no particular rules or sections of the applicable federal antitrust laws that focus on a specific sector of industry. Nevertheless, in regulated industries, such as agriculture, communications, energy, and healthcare, there may be industry-specific laws enforced by the relevant regulatory agency that regulate vertical restraints or vest the agency with power to do so.

General exceptions

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

There are no such general exceptions.

Agreements

- 9 Is there a definition of 'agreement' – or its equivalent – in the antitrust law of your jurisdiction?

Under US antitrust law, an 'agreement' entails 'a conscious commitment to a common scheme designed to achieve an unlawful objective' (*Monsanto Co v Spray-Rite Service Corp*, 465 US 752, 768 (1984)).

- 10** In order to engage the antitrust law in relation to vertical restraints, is it necessary for there to be a formal written agreement or can the relevant rules be engaged by an informal or unwritten understanding?

The longstanding rule is that ‘no formal agreement is necessary to constitute an unlawful conspiracy’ (*American Tobacco Co v United States*, 328 US 781, 809 (1946)). Further, there is no requirement that the agreement be written. In *Monsanto Co v Spray-Rite Service Corp*, 465 US 752 (1984), the plaintiff alleged the existence of an unwritten agreement among a manufacturer of agricultural herbicides and various distributors to, among other things, fix resale prices of the manufacturer’s herbicides. The US Supreme Court held that, in order to prove a vertical price-fixing conspiracy in such circumstances, the plaintiff was required to present ‘evidence that tends to exclude the possibility that the manufacturer and... distributors were acting independently’ (ibid at 764).

Parent and related-company agreements

- 11** 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)?

A violation of section 1 of the Sherman Act requires a showing of concerted action on the part of the defendants. In *Copperweld Corp v Independence Tube Corp*, 467 US 752, 777 (1984), the US Supreme Court held that, as a matter of law, a corporation and its wholly owned subsidiaries ‘are incapable of conspiring with each other for purposes of section 1 of the Sherman Act’. The *Copperweld* exception has been applied by lower courts to numerous other situations including:

- two wholly owned subsidiaries of a parent corporation (sister corporations);
- two corporations with common ownership;
- a parent and its partially owned subsidiary;
- a wholly owned subsidiary and a partially owned subsidiary of the same parent corporation; and
- companies that have agreed to merge.

At least one court has extended the *Copperweld* exception to claims under section 3 of the Clayton Act where the purchaser and the seller are affiliated. Courts generally hold the *Copperweld* exception to be inapplicable to partial holdings approaching or below 50 per cent. The *Copperweld* exception, however, is inapplicable to section 2 of the Sherman Act which contains no requirement of concerted action on the part of the defendant.

Agent–principal agreements

- 12** 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 sales-based commission payment?

Consignment and agency arrangements between a manufacturer and its dealer do not constitute a vertical pricing restraint subject to Sherman Act liability as long as they are bona fide. Where a manufacturer does not transfer title to its products but rather consigns them, the manufacturer is free to unilaterally dictate the sale prices for those products. Moreover, in light of the US Supreme Court’s recent decision eliminating the distinction between price and non-price restraints for the purposes of Sherman Act liability, see *Leegin Creative Leather Products Inc v PSKS Inc*, 551 US 877 (2007), a ‘sham’ consignment or agency arrangement will be subject to analysis under the rule of reason (see question 15). Recent press reports in the United States indicate that there are active governmental investigations into the bona fides of certain agency agreements.

- 13** Where antitrust rules do not apply (or apply differently) to agent–principal relationships, are there rules (or is there guidance) on what constitutes an agent–principal relationship for these purposes?

A court assessing the validity of an agency agreement is likely to begin by determining whether the parties intended to establish an agency arrangement and whether, under their agreement, title to goods sold transfers directly from the principal to the end-consumer, bypassing the agent. Beyond these fundamental requirements, US courts examining the bona fides of an agency agreement look to three general factors:

- whether the principal or the purported agent bears ‘most or all of the traditional burdens of ownership’;
- whether the agency arrangement ‘has a function other than to circumvent the rule against price fixing’; and
- whether the agency arrangement ‘is a product of coercion’. (*Valuepest.com of Charlotte Inc v Bayer Corp*, 561 F3d 282, 290–91 (4th Cir 2009)).

For example, in the seminal case of *United States v General Electric*, 272 US 476, 479 (1926), the government asserted that General Electric’s (GE) use of a consignment system to fix the retail price of its patented incandescent lamps ‘was merely a device to enable [GE] to fix the resale prices of lamps in the hands of purchasers’, and that ‘the so-called agents were in fact wholesale and retail merchants’. The US Supreme Court rejected the government’s position, determining instead that GE’s distributors were bona fide agents because GE:

- set retail prices for the lamps and dealers received fixed commissions;
- retained title to the lamps in the possession of dealers until the lamps were sold to end-consumers;
- assumed the risk of loss resulting from disaster or price decline; and
- paid taxes on the lamps and carried insurance on the dealers’ inventory (ibid at 481–83).

Intellectual property rights

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

Restraints involving intellectual property are analysed under the same principles of antitrust that are applied in other contexts. The DoJ and FTC have jointly issued Antitrust Guidelines for the Licensing of Intellectual Property (www.usdoj.gov/atr/public/guidelines/0558.htm), which lays out three general principles that guide the agencies’ antitrust analysis in the context of intellectual property. First, the FTC and DoJ regard intellectual property as essentially comparable to any other form of property. Second, the agencies do not presume that IPRs, particularly in the form of patents, create market power. *Illinois Tool Works Inc v Independent Ink*, 548 US 28, 42–43 (2006) (holding that there should be no presumption that a patent confers market power on the patentee). And finally, the FTC and DoJ recognise that, often, intellectual property licensing allows firms to combine complementary factors of production and, as such, is generally pro-competitive.

Analytical framework for assessment

- 15** Explain the analytical framework that applies when assessing vertical restraints under antitrust law.

In recent years, most vertical restraints have been analysed under the rule of reason. Rule-of-reason analysis begins with an examination of the nature of the relevant agreement and whether it has caused or is likely to cause anti-competitive harm. The reviewing authority,

whether it be a court, the FTC, or the DoJ, conducts a detailed market analysis to determine whether the agreement has or is likely to create or increase market power or facilitate its exercise. As part of the analysis, a variety of market circumstances are evaluated, including ease of entry. If the detailed investigation into the agreement and its effect on the market indicates anti-competitive harm, the next step is to examine whether the relevant agreement is reasonably necessary to achieve pro-competitive benefits that are likely to offset those anti-competitive harms. The process of weighing an agreement's reasonableness and pro-competitive benefits against harm to competition is the essence of the rule of reason. Where the pro-competitive benefits outweigh the harms to competition, the agreement is likely to be deemed lawful under the rule of reason. Where there is evidence that the arrangement has actually had anti-competitive effects, the rule-of-reason analysis may sometimes be shortened via a 'quick look' analysis.

Minimum resale price maintenance was long treated as per se illegal under federal antitrust law, rather than as subject to the rule of reason. In the recent case of *Leegin*, however, the US Supreme Court struck down the per se rule against minimum resale price maintenance agreements, ruling instead that such restraints will be subject to rule-of-reason analysis. The court explained that agreements should fall into the 'per se illegal' category only if they always or almost always harm competition; for example, horizontal price fixing among competitors. Minimum resale price maintenance, on the other hand, can often have pro-competitive benefits that outweigh its anti-competitive harm. The court explained that resale price maintenance agreements are not per se illegal, and suggested that such agreements might violate federal antitrust laws where either a manufacturer or a retailer that is party to such an agreement possesses market power (see question 16).

Likewise, tying arrangements, which are a type of vertical non-price restraint, are treated in a somewhat different manner by the courts. Although courts have been recently inclined to consider the business justifications for tie-ins and have analysed the economic effects of the tying arrangement, hallmarks of a rule-of-reason analysis, a tying arrangement may be treated as per se illegal (ie, irrebuttably presumed to be illegal without the need to prove anti-competitive effects) if the following elements are satisfied:

- two separate products or services are involved;
- the sale or agreement to sell one product or service is conditioned on the purchase of another;
- the seller has sufficient market power in the tying product market to enable it to restrain trade in the tied product market; and
- a substantial amount of interstate commerce in the tied product is affected.

To the extent that these conditions are not met and a tying arrangement is not found to be per se unlawful, it may still be unlawful under a full-fledged rule-of-reason analysis.

- 16** To what extent are supplier market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other suppliers relevant? Is it relevant whether certain types of restriction are widely used by suppliers in the market?

Detailed market analysis, including consideration of market shares, market structures and other economic factors, often is central to the wide-ranging analysis of vertical restraints under the rule of reason (see questions 9 and 15). Indeed, under the rule of reason, a reviewing agency or court generally will attempt to define a relevant market, one with both product and geographic dimensions, and then analyse whether the entity imposing an individual restraint exercises market power within the defined market. The Supreme Court has defined 'market power' as 'the ability to raise prices above those that would be charged in a competitive market' (*NCAA v Board of Regents*, 468 US 85, 109 n38 (1984)). An entity's market share is an important,

and sometimes decisive, element in the analysis of market power – an analysis that, by its very nature, requires consideration of the market positions of competitors. For instance, following the US Supreme Court's decision in *Leegin*, which remanded the case to the lower courts for further proceedings, the plaintiff argued that, under the rule of reason, *Leegin's* conduct caused anti-competitive harm in the market for 'women's accessories', among others (*PSKS Inc v Leegin Creative Leather Prods Inc*, 615 F3d 412, 418–19 (5th Cir 2010)). The US Court of Appeals for the Fifth Circuit rejected the plaintiff's claim, however, explaining that '[t]o allege a vertical restraint claim sufficiently, a plaintiff must plausibly allege the defendant's market power', and that 'it is impossible to imagine that *Leegin* could have power' over such a broad and vaguely defined market (ibid).

- 17** To what extent are buyer market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other buyers relevant? Is it relevant whether certain types of restriction are widely agreed to by buyers in the market?

While the significant majority of cases involve monopoly power of entities acting as sellers, a limited number of cases involve allegations of buyers' market power over prices or access, which is referred to as 'monopsony power'. (See, for example, *In re Beef Industry Antitrust Litig*, 600 F2d 1148, 1154–60 (5th Cir 1979) affirming dismissal of a price-fixing claim by cattle ranchers, who alleged that the wholesale price of beef paid by large retail chains to middlemen (ie, meatpackers) is established by the retail chains acting in concert).

Block exemption and safe harbour

- 18** 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.

There are no such block exemptions or safe harbour provisions relevant to the analysis of vertical restraints.

Types of restraint

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

Resale price maintenance agreements, whether setting minimum or maximum prices, are evaluated under a rule-of-reason analysis under federal law (*Leegin Creative Leather Products*).

- 20** Have the authorities considered in their decisions or guidelines 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'?

Research has not uncovered any recent decision addressing resale price maintenance in these circumstances. Under federal antitrust law, however, the rule of reason is used to evaluate resale price maintenance no matter the context (*Leegin Creative Leather Products*).

- 21** Have decisions or guidelines relating to resale price maintenance addressed the possible links between such conduct and other forms of restraint?

Research has not uncovered any significant post-*Leegin* decisions involving the interrelation of resale price maintenance and other forms of restraint. In *Leegin*, however, the court identified several instances where resale price maintenance may warrant heightened scrutiny in an effort to ferret out potentially anti-competitive

practices. For example, the court suggested that resale price maintenance should be subject to increased scrutiny if a number of competing manufacturers in a single market adopt price restraints, because such circumstances may give rise to illegal manufacturer or retailer cartels. Likewise, the court explained that if a resale price maintenance agreement originated among retailers and was subsequently adopted by a manufacturer, there is an increased likelihood that the restraint would foster a retailer cartel or support a dominant, inefficient retailer.

- 22** Have decisions or guidelines relating to resale price maintenance addressed the efficiencies that can arguably arise out of such restrictions?

In *Leegin*, the Supreme Court described several potentially pro-competitive benefits of resale price maintenance, including, among other things, increasing inter-brand competition and facilitating market entry for new products and brands. Research has not uncovered any decisions to date directly assessing such efficiencies in fact-specific contexts.

- 23** 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?

Territorial restrictions prohibit a distributor from selling outside an assigned territory. These restrictions may stifle intra-brand competition, but also simultaneously stimulate inter-brand competition. In light of the complex market impact of these vertical restrictions, the US Supreme Court, in *Continental TV Inc v GTE Sylvania Inc*, 433 US 36 (1977), concluded that territorial restraints should be reviewed under a rule-of-reason analysis. In order for a territorial restriction (and as referenced in question 24, a customer restriction) to be upheld under the rule of reason, the pro-competitive benefits of the restraint must offset any harm to competition. Courts have examined the purpose of the vertical restriction, the effect of such restriction in limiting competition in the relevant market, and, importantly, the market share of the supplier imposing the restraint in ascertaining the net impact on competition. So long as inter-brand competition is strong, courts typically find territorial restraints lawful under the rule of reason.

- 24** 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 of this nature are subject to the same rule-of-reason analysis detailed in question 23 regarding territorial restrictions.

- 25** How is restricting the uses to which a buyer puts the contract products assessed?

A usage restriction will be analysed under the rule of reason in a manner similar to the analysis of territorial restraints set forth in question 23.

- 26** How is restricting the buyer's ability to generate or effect sales via the internet assessed?

Research has not uncovered any recent decisions dealing with restrictions on internet selling. The FTC, however, has taken the general position that the rule of reason applies to any 'minimum advertised price' (MAP) policy, whereby a manufacturer restricts a reseller's ability to advertise resale prices below specified levels and conditions its provision of cooperative advertising funds on the reseller's

compliance with the advertising restrictions (see Statement of Policy Regarding Price Restrictions in Cooperative Advertising Programs – Rescission, 6 Trade Reg Rep (CCH) ¶39,057, at 41728 (FTC 21 May 1987)). The FTC indicated that such MAP policies should permit a reseller the freedom to decline to participate in the cooperative advertising programme and to advertise and charge its own prices. To some extent, the FTC's position on MAP policies appears to have had an impact on the manner in which resellers advertise prices on the internet.

- 27** Have decisions or guidelines on vertical restraints distinguished in any way between different types of internet sales channel?

Research has not uncovered any decisions or guidelines distinguishing between different types of internet sales channels.

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

Agreements establishing selective distribution systems are analysed under the rule of reason in a manner similar to the analysis of territorial restraints set forth in question 23.

- 29** 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?

Although research has not uncovered any decisions on this subject, it is likely that selective distribution systems are more easily justified under the rule of reason where retailers are required to provide significant point-of-sale services.

- 30** In 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?

Restrictions on internet sales by approved distributors will be analysed under the rule of reason in a manner similar to other selective distribution systems. In order for a restriction on internet sales to be upheld under the rule of reason, the pro-competitive benefits of the restraint must offset any harm to competition.

- 31** 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?

Research has not uncovered any recent decisions in this area.

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

Pursuant to the rule-of-reason analysis under which selective distribution systems are analysed, the possible cumulative effect of overlapping selective distributive systems operating in the same market may be considered in assessing harm to competition.

- 33** 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?

Research has not uncovered any recent agency decisions dealing with potential links between selective distribution systems and resale price maintenance policies.

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

Research has not uncovered any recent decisions challenging an agreement restraining a buyer's ability to purchase the supplier's products from alternative sources. Such a challenge is likely to be analysed under the rule of reason.

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

Restrictions on a buyer's ability to sell non-competing products that the supplier deems 'inappropriate' are assessed under the rule of reason.

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

Exclusive dealing arrangements as described above may harm competition by foreclosing competitors of the supplier from marketing their products to that buyer. Exclusive dealing is subject to challenge under sections 1 and 2 of the Sherman Act, section 3 of the Clayton Act, and section 5 of the FTC Act. Because section 3 of the Clayton Act is limited to arrangements involving 'goods, wares, merchandise, machinery, supplies, or other commodities', when services or intangibles are involved, exclusive dealing can be challenged only under the Sherman Act or FTC Act. Exclusive dealing arrangements have not been considered to be per se unlawful and the courts and agencies have therefore analysed such conduct under the rule of reason. In conducting such analysis, the courts and agencies have considered a number of factors, the most important being, perhaps, the percentage of commerce foreclosed within a properly defined market, and the ultimate anti-competitive effects of such foreclosure.

Recently, the DoJ filed a complaint against American Express, MasterCard and Visa, seeking to enjoin an alleged form of exclusive dealing arrangement under section 1 of the Sherman Act. DoJ's complaint alleged that American Express, MasterCard and Visa each maintained rules prohibiting merchants from encouraging consumers to use lower-cost payment methods when making purchases; for example, by prohibiting merchants from offering discounts or other incentives to consumers in order to encourage them to pay with credit cards that cost the merchant less money. According to the complaint, in 2009, American Express had a 24 per cent share of the general-purpose credit card market, and American Express, MasterCard and Visa together had approximately 94 per cent market share. MasterCard and Visa reached an out-of-court settlement with DoJ, whereby they were enjoined from enforcing certain rules of this type. American Express declined to settle the claims against it, and litigation is ongoing.

37 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?

Requirements contracts are analysed under the same standards as exclusive dealing arrangements (see question 36).

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

Similar to the territorial restrictions discussed in question 23, exclusive distributorship arrangements are subject to the rule-of-reason analysis.

39 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?

Both types of agreements are subject to rule-of-reason analysis. For instance, to prevent dilution of its trademark, a franchisor may impose strict regulations on a franchisee, such as on product packaging and labelling, sourcing for product ingredients, employee appearance, and appearance of the franchised facility. Typically, these restrictions do not run foul of federal antitrust laws because they are deemed not to unreasonably restrain trade.

40 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.

Most-favoured nations clauses (MFNs) have not been found illegal by the courts. In *Blue Cross & Blue Shield United v Marshfield Clinic*, 65 F3d 1406 (7th Cir 1995), cert denied, 516 US 1184 (1996), the Seventh Circuit rejected a challenge to an MFN clause, explaining that MFNs 'are standard devices by which buyers try to bargain for low prices, by getting the seller to agree to treat them as favourable as their other customers [...] and that is the sort of conduct that the antitrust laws seek to encourage. It is not price fixing'. MFNs, however, have led to a number of enforcement actions by the FTC and DoJ, some of which have resulted in consent decrees, on the theory that they encourage coordinated pricing or discourage price-cutting to particular customers by forcing the seller to make the lower price available to one or more other customers. In a recent example, DoJ filed a civil antitrust lawsuit against the health insurer Blue Cross Blue Shield of Michigan (BCBSM), alleging that MFN clauses in its agreements with hospitals raised hospital prices, prevented other insurers from entering the marketplace and discouraged discounts. DoJ's complaint alleged that BCBSM was the largest provider of commercial health insurance in Michigan, covering more than 60 per cent of the market, and that some of its MFN clauses required that hospitals actually charge BCBSM's competitors more than they charge BCBSM. This litigation is ongoing.

41 Explain how a buyer's warranting to the supplier that it will purchase the contract products on terms applied to the buyer's most-favoured supplier or that it will not purchase the contract products on more favourable terms from other suppliers is assessed.

Research has not uncovered any instance in which a US court or governmental agency has addressed this issue. In any event, such restrictions would be subject to analysis under the rule of reason.

Notifying agreements

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

No, there is no formal notification procedure.

Authority guidance

43 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?

Parties considering a course of action may request advice from the FTC concerning their proposed activity (see 16 CFR, section 1.1 to

1.4 (2009)). Parties may seek advisory opinions for any proposed activity that is not hypothetical or the subject of an FTC investigation or proceeding and that does not require extensive investigation (see 16 CFR at section 1.3). Formal advisory opinions issued by the FTC are provided only in matters involving either a substantial or novel question of law or fact or a significant public interest. (See 16 CFR at section 1.1(a)). The FTC staff may render advice in response to a request when an agency opinion would not be warranted (see 16 CFR at section 1.1(b)). Staff opinions do not prejudice the FTC's ability to commence an enforcement proceeding (see 16 CFR at 1.3(c)). In addition to issuing advisory opinions, the FTC promulgates industry guides often in conjunction with the DoJ. Industry guides do not have the force of law and are therefore not binding on the commission. Finally, the FTC advises parties with respect to future conduct through statements of enforcement policy which are statements directed at certain issues and industries.

While the DoJ does not issue advisory opinions, it will upon request review proposed business conduct and it may in its discretion state its present enforcement intention with respect to that proposed conduct. Such statements are known as business review letters. A request for a business review letter must be submitted in writing to the assistant attorney general who heads the DoJ Antitrust Division and set forth the relevant background information, including all relevant documents and detailed statements of any collateral or oral understandings (see 28 CFR, section 50.6 (2008)). The DoJ will decline to respond when the request pertains to ongoing conduct.

Complaints procedure for private parties

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

A party who wishes to lodge a complaint with the FTC may make an 'application for complaint'. While there is no formal procedure for requesting action by the FTC, a complainant must submit to the FTC a signed statement setting forth in full the information necessary to apprise the FTC of the general nature of its grievance (see 16 CFR, section 2.2(b) (2009)). Parties wishing to register complaints with the DoJ may lodge complaints by letter, telephone, over the internet or in person. The DoJ maintains an 'antitrust hotline' to accept telephone complaints. Sophisticated parties frequently retain counsel to lodge complaints with either agency.

Enforcement

45 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?

The FTC and DoJ have filed comparatively few vertical restraint cases in the past few years. Recent examples, however, include DoJ's enforcement actions against American Express, MasterCard and Visa pertaining to exclusive dealing arrangements (see question 36), and against Blue Cross Blue Shield of Michigan pertaining to MFN provisions (see question 40). DoJ also recently brought a successful challenge to the exclusive dealing practices of a manufacturer of artificial teeth (see *US v Dentsply Int'l Inc*, 399 F3d 181 (3d Cir 2005), cert denied, 546 US 1089 (2006)). The FTC also recently resolved by settlement its enforcement action against Intel Corp, which included, among other things, the charge that Intel Corp engaged in exclusive dealing practices in an effort to thwart competition from rival computer chip makers, including by punishing its own customers for using rivals' products (see question 1). State attorneys general and private parties have been somewhat more active in challenging vertical restraints (see questions 46 and 49).

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

An agreement found to be in restraint of trade is invalid as against public policy. However, where an agreement constitutes 'an intelligible economic transaction in itself', apart from any collateral agreement in restraint of trade, and enforcing the defendant's obligations would not 'make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act', a contract containing a prohibited vertical restraint will be held enforceable (See *Kelly v Korsuga*, 358 US 516, 518–520 (1959); see also *Kaiser Steel Corp v Mullins*, 455 US 72 (1982)).

47 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 FTC can institute enforcement proceedings under any of the laws it administers, as long as such a proceeding is in the public interest (see 16 CFR, section 2.31 (2009)). If the FTC believes that a person or company has violated the law, the commission may attempt to obtain voluntary compliance by entering into a consent order. If a consent agreement cannot be reached, the FTC may issue an administrative complaint. Section 5(b) of the FTC Act empowers the FTC, after notice and hearing, to issue an order requiring a respondent found to have engaged in unfair methods of competition to 'cease and desist' from such conduct (15 USC, section 45(b) (2008)). Section 5(l) of the FTC Act authorises the FTC to bring actions in federal district court for civil penalties of up to US\$16,000 per violation, or in the case of a continuing violation, US\$16,000 per day, against a party that violates the terms of a final FTC order (15 USC, section 45(l)). Section 13 of the FTC Act authorises the FTC to seek preliminary and other injunctive relief pending adjudication of its own administrative complaint (15 USC, section 53). Additionally, section 13(b) of the FTC Act authorises the FTC in a 'proper case' to seek permanent injunctive relief against entities that have violated or threaten to violate any of the laws it administers. The FTC has successfully invoked its authority to obtain monetary equitable relief for violations of section 5 in suits for permanent injunction pursuant to section 13(b) of the FTC Act.

The DoJ has exclusive federal governmental authority to enforce the Sherman Act and shares with the FTC and other agencies the federal authority to enforce the Clayton Act. Sections 1 and 2 of the Sherman Act confer upon the DoJ the authority to proceed against violations by criminal indictment or by civil complaint, although it is unusual for the DoJ to seek criminal penalties in the vertical restraints area. Pursuant to section 4 of the Sherman Act and section 15 of the Clayton Act, the DoJ may seek to obtain from the courts injunctive relief 'to prevent and restrain violations' of the respective acts and direct the government 'to institute proceedings in equity to prevent and restrain such violations'. Pursuant to section 14A of the Clayton Act, the United States acting through the DoJ may also bring suit to recover treble damages suffered by the United States as a result of antitrust violations (15 USC, section 15a). Finally, a party under investigation by the DoJ may enter into a consent decree with the agency. Procedures governing approval of consent decrees are set forth in the Tunney Act (15 USC, section 16(b)-(h) (2008)).

In vertical restraints cases, federal agencies have tended to focus their efforts on cases where injunctive relief was necessary or where the law might be clarified, as opposed to pursuing cases seeking monetary remedies.

Investigative powers of the authority

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

The FTC may institute an investigation informally through a ‘demand letter’ which requests specific information. A party is under no legal obligation to comply with such requests. Additionally, the FTC may use a compulsory process in lieu of or in addition to voluntary means. Section 9 of the FTC Act provides that the FTC or its agents shall have access to any ‘documentary evidence’ in the possession of a party being investigated or proceeded against ‘for the purpose of examination and copying’ (15 USC, section 49; 16 CFR, section 2.11 (2009)). Section 9 of the FTC Act gives the Commission power to subpoena the attendance and testimony of witnesses and the production of documentary evidence (15 USC, section 49 (2008)).

The most common investigative power utilised by the DoJ in conducting civil antitrust investigations is the civil investigative demand (CID). The Antitrust Civil Process Act (15 USC, sections 1311–1314 (2008)), authorises the DoJ to issue CIDs in connection with actual or prospective antitrust violations. A CID is a general discovery subpoena that may be issued to any person whom the attorney general or assistant attorney general has reason to believe may be in ‘possession, custody or control’ of material relevant to a civil investigation. A CID may compel production of documents, oral testimony or written answers to interrogatories.

Neither DoJ nor FTC typically demand documents held abroad by a non-US entity. However, DoJ and FTC are likely to demand such documents from any non-US entity if the court in which an action is brought possesses subject-matter jurisdiction under US antitrust laws, as well as personal jurisdiction over the non-US entity.

Private enforcement

49 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?

Section 4 of the Clayton Act permits the recovery of treble damages by ‘any person [...] injured in his business or property by reason of anything forbidden in the antitrust laws’. Section 16 of the Clayton Act similarly provides a private right of action for injunctive relief. While sections 4 and 16 of the Clayton Act permit a private right of

action for violations arising under both the Sherman and Clayton Acts, it does not permit a private right of action under section 5 of the FTC Act. Both sections 4 and 16 of the Clayton Act provide that a successful plaintiff may recover reasonable attorneys’ fees. The amount of time it takes to litigate a private enforcement action varies significantly depending upon the complexity and circumstances of the litigation.

A private plaintiff seeking antitrust damages must establish antitrust standing, which requires, among other things, that the plaintiff show that its alleged injury is of the type that the antitrust laws were designed to protect. With certain exceptions, an indirect purchaser (ie, a party that does not purchase directly from the defendant) is not deemed to have suffered antitrust injury and is therefore barred from bringing a private action for damages under section 4 of the Clayton Act (see *Illinois Brick v Illinois*, 431 US 720 (1971)).

Both parties and non-parties to agreements containing vertical restraints can bring damage claims so long as they successfully fulfil the requirements for standing.

Other issues

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

In addition to private and federal agency enforcement of vertical restraints, section 4(c) of the Clayton Act authorises the states through their respective attorneys general to bring a *parens patriae* action, defined as an action by which the state has standing to prosecute a lawsuit on behalf of a citizen or on behalf of natural persons residing in its state to secure treble damages arising from any violation under the Sherman Act. In pursuing treble damages, state attorneys general often coordinate their investigation and prosecution of antitrust matters with other states. Additionally, pursuant to section 16 of the Clayton Act, states may bring actions for injunctive relief in their common law capacity as a *parens patriae* in order to forestall injury to the state’s economy.

Many states also have passed legislation analogous to the federal antitrust laws. For example, New York’s antitrust statute, known as the Donnelly Act, is modelled on the federal Sherman Act and generally outlaws anti-competitive restraints of trade. New York’s highest court has determined that the Donnelly Act ‘should generally be construed in light of Federal precedent and given a different interpretation only where State policy, differences in statutory language or the legislative history justifies such a result’ (*Anheuser-Busch Inc v Abrams*, 71 NY 2d 327, 335 (1998)).

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Within the past 10 years the states have commenced a number of coordinated investigations involving allegations of resale price maintenance, most of which have resulted in settlements providing for monetary and injunctive relief. Monetary settlements have ranged from as little as US\$7.2 million to as much as US\$143 million. Although the Supreme Court's decision in *Leegin* is likely to diminish the frequency of such litigation for the foreseeable future, enforcement authorities in a number of states have continued to investigate, and have brought actions attempting to prohibit resale price maintenance under both federal and state laws. In *California v Bioelements* (Cal Sup Ct 2010), for example, the attorney general of California filed a complaint against a cosmetics manufacturer asserting that the manufacturer violated California's antitrust laws by engaging in resale price maintenance. The parties entered into a settlement decree that enjoined Bioelements from reaching any agreement with a distributor regarding resale price. Likewise, in *New York v Herman Miller Inc* (SDNY 2008), the attorneys general of New York, Illinois and Michigan filed a complaint asserting that a furniture manufacturer's resale price maintenance policy violated section 1 of the Sherman Act and various state laws. The action was resolved by a settlement decree prohibiting Herman Miller from reaching any agreement with distributors regarding the resale price of its products.

Update and trends

Nearly four years after the Supreme Court's decision in *Leegin*, the rules governing minimum resale price maintenance remain in some flux in the United States. Legislation introduced in previous sessions of both the Senate and the House of Representatives would have overturned the *Leegin* decision and restored the per se rule against minimum resale price maintenance. These bills were reported out of committee to the full Senate and House, respectively, but neither came up for a floor vote prior to the end of the session. The Senate bill has been reintroduced in the current session as bill No. S.75. To date, the related House bill has not been reintroduced. It is unlikely that the Senate bill will become law in the near future.



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