GETTING THE DEAL THROUGH

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GLOBAL COMPETITION REVIEW

Vertical Agreements

The regulation of distribution practices in 36 jurisdictions worldwide

2013

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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.

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, and be subject to article 101, when carrying out certain of their more commercial activities.

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. 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.*

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 regarding vertical agreements, the Commission has not accepted the defence of single economic entity. For example, in the case of *Gosme/Martell – DMP*, the Commission found that DMP, a fifty-fifty 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.

However, the concept of a 'genuine agent' is narrowly defined (see question 13). In addition, 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. Further, 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, is there guidance (or are there recent authority decisions) 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, financial or commercial risks in relation to the contracts concluded 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.

On 1 December 2011, the European Commission opened a formal investigation into alleged anti-competitive practices in the supply of e-books. On 13 December 2012, the Commission announced that it had accepted commitments offered by Apple and four international publishers and had therefore closed its investigation insofar as concerned those parties.

The commitments accepted by the Commission included that Apple and the publishers would terminate e-book agency agreements which provided for publishers – as principals – to determine consumer prices (see questions 19–22) and which included most-favoured-customer clauses (see questions 41 and 43). Although the Commission's investigation appears to have considered issues relating to the concept of genuine agency, the Commission's communication of 19 September 2012 initiating a consultation on the proposed commitments states that the Commission's preliminary assessment in the case 'did not seek to examine the compatibility with article 101 [...] of the agency agreements concluded by the [publishers] and Apple'.

As a result of the Commission's approach to the e-books case, there remain significant open questions as to the scope of the concept of 'genuine agency' under article 101.

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. However, this is a power to which, to the authors' knowledge, the Commission last had recourse in 1993.

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 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 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'?

No Commission decisions have focused 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.

By way of example, in its 2000 decision in *Nathan-Bricoloux*, the Commission noted that a restriction on the ability of buyers to sell outside their exclusive territory was reinforced by a restriction on the buyers' ability to grant discounts or rebates and so determine the final resale price of the goods in question.

In addition, 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 question 41 and the discussion of the 2011-2012 e-books case in question 13).

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 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 *Football Association Premier League Ltd & Others v QC Leisure & Others* (2011), *GlaxoSmithKline v Commission* (2009) and *Sot Lélos 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'. Since such restrictions are classed as 'by object' restrictions of competition, the Commission is not obliged 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 procompetitive 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 very specific 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 make substantial investments 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.

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).)

However, objectively justifiable restrictions on the uses to which a buyer (or subsequent buyer) puts the contract goods are permissible 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 likely 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' websites;
- 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.

However, in selective distribution systems (see questions 28–34), 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.

Although there has been comparatively little recent enforcement activity by the European Commission in relation to internet sales restrictions, the following cases merit discussion. In its October 2011 judgment in *Pierre-Fabre Dermo-Cosmétique*, the CJEU ruled that a contractual clause that amounted to an absolute ban on buyers in a selective distribution network from selling the contract products to end-users via the internet amounted to a restriction of competition by object, which could not benefit from the safe harbour of the Vertical Block Exemption. However, the CJEU left it to the French national court to decide whether such a clause could benefit from an individual exemption if the conditions of article 101(3) TFEU were satisfied.

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 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.

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.

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 in order to preserve their quality and ensure their proper use (eg, technically complex products where after-sales service is of paramount importance);
- the criteria by which buyers are selected must be objective, laid down uniformly for all potential buyers and not applied in a discriminatory manner (though there is no necessity that the selection criteria be published); 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 Metro 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 only benefit from exemption under the Vertical Block Exemption if:

- 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.

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 its October 2011 judgment in *Pierre Fabre Dermo-Cosmétique*, the CJEU considered the application of the Metro criteria on selective distribution in the context of a ban on internet sales to consumers. The criteria for inclusion in the Pierre Fabre network of buyers were accepted to be objective and laid down uniformly for all buyers but the key question was whether a ban on internet sales could be justified by reference to the supplier's desire to protect

the image of its products. The CJEU concluded that: '[t]he aim of maintaining a prestigious image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU'.

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 judgments in *Metro v Commission* and *Pierre Fabre*, selective distribution systems may fall outside the prohibition in article 101(1) where the contract products are of types that necessitate selective distribution in order to preserve their quality or to ensure their proper use. 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. 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.

Equally, however, in a January 2012 communication titled 'A coherent framework for building trust in the Digital Single Market for e-commerce and online services', the Commission notes that concerns had been expressed over the use of selective distribution networks for unsuitable products and states that it will ensure the rules on selective distribution are rigorously applied.

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 methods. See also the cases discussed in question 26.

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 Has the authority taken decisions (or is there guidance) concerning distribution arrangements that combine selective distribution with restrictions on the territory into which approved buyers may resell the contract products?

The Vertical Guidelines provide the most recent guidance concerning selective distribution combined with territorial resale restrictions. The following are identified as hard-core restrictions of competition (ie, restrictions that will fall within article 101(1), which will not benefit from the safe harbour provided by the Vertical Block Exemption and are unlikely to benefit from an individual exemption under article 101(3)):

- restricting approved buyers at the retail level of trade from selling actively or passively to end users in other territories;
- restricting cross supplies between approved buyers in different territories in which a selective distribution system is operated; and
- restricting the territory into which approved buyers at levels other than the retail level in a selective distribution system may passively sell the contract products.

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

Such an arrangement may raise concerns regarding market partitioning. Where the supplier insists that a given buyer must buy all of its requirements of the supplier's products from, for example, the supplier's local subsidiary, this may prevent the ordinary arbitraging that would otherwise occur. On its own, however, 'exclusive purchasing' will only fall within article 101(1) where the parties have a significant market share and the restrictions are of long duration. 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.

According to the Commission's Vertical 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.

36 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 certain products must not be sold near luxury products (for instance, that foodstuffs or cleaning products be sufficiently separated from luxury cosmetics). However, the General Court clarified that the sale of other products 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.

37 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.

38 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 37). 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).

39 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.

40 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)]'.

41 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 a most-favoured customer or 'most-favoured nation' (MFN) restriction – in isolation – will constitute a restriction falling within article 101(1). In the event that such a restriction is deemed to fall within article 101(1), it would nonetheless fall within the safe harbour created by the Commission's Vertical Block Exemption, provided the other criteria for its application are met. However, in the Commission's 2011–2012 e-books investigation (see question 13), the Commission accepted commitments pursuant to which 'the publishers agreed to terminate all existing agency agreements that include[d] retail price restrictions and a retail price MFN [and committed] not to enter into new agreements that include[d] price MFN clauses for five years'. This suggests that the Commission considered that the MFNs, when taken together with other consumer price-related restrictions, may have been capable of restricting competition.

42 Explain whether and in what circumstances a supplier may apply different prices or conditions to similarly placed buyers and explain how, in such circumstances, the application of different prices or conditions is assessed?

Although article 101(1)(d) states that it is prohibited for suppliers to apply dissimilar conditions to equivalent transactions with buyers, EU competition law enforcement in relation to 'discriminatory pricing' has focused almost exclusively on dominant companies whose conduct can be assessed under article 102 (*See Getting the Deal Through – Dominance*). One case in which the Commission arguably considered that apparently discriminatory pricing arrangements infringed article 101 was its 2001 decision in relation to Glaxo Wellcome's 'dual pricing' of pharmaceutical products supplied to its wholesalers in Spain. The Glaxo Wellcome agreements in question provided that the Spanish wholesalers would pay a lower price for product on-sold on the domestic Spanish market but a higher price for product on-sold outside of Spain. However, the Commission (and the European Courts in subsequent appeals) assessed the restrictions as export bans (ie, as restrictions preventing a buyer from selling the contract products from one EU member state into another, on which see question 23) rather than as instances of discriminatory pricing.

43 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

44 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 (see question 45), a notification of a vertical agreement is therefore neither necessary nor, in general, advisable.

Authority guidance

45 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 informal guidance to parties.

Complaints procedure for private parties

46 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, which in principle is 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.

Enforcement

47 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 12 years from 1 January 2001 to 1 January 2013, the Commission took around 17 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.

In the course of 2011 and 2012, the Commission opened formal investigations into e-books, luxury watches and aspects of the credit default swaps markets, all of which appeared to relate, in part, to vertical restraints.

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

48 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.

49 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.

Update and trends

In 2011, it was thought that the most significant 2012 development in the application of EU competition law to vertical restraints would be the Commission's decision in the e-books case (see question 13). However, the case has brought none of the expected clarity to the key question of what constitutes a 'genuine agent' for purposes of article 101. In 2013, the Commission may progress its ongoing investigation into allegations that certain luxury watch manufacturers excluded independent watch repairers from their maintenance and repair networks in breach of article 101. More generally, the Commission is expected to progress its work on encouraging private damages actions and collective redress in the course of 2013. Significant changes to legislation in these areas may have an impact on the private enforcement of article 101 regarding vertical restraints.

In the 12 years from 1 January 2001 to 1 January 2013, 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. However, in some individual cases the Commission may consider that it is better placed to enforce the EU rules on vertical restraints than individual, member state-level competition authorities.

Investigative powers of the authority

50 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

51 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.

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

Other issues

52 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;
- 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.

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