GETTING THE DEAL THROUGH

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GLOBAL COMPETITION REVIEW

Vertical Agreements

The regulation of distribution practices in 36 jurisdictions worldwide

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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 (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 EU 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).

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 *Getting the Deal Through – Dominance* 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 the forthcoming Enterprise and Regulatory Reform Act will bring together in a single new body – the Competition and Markets

Authority (CMA) – the functions of the Competition Commission and the competition functions of the OFT.)

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). (Note also that, from 1 April 2013, the newly formed Financial Conduct Authority (FCA) will have certain powers (albeit short of concurrent jurisdiction) in relation to the financial services sector in the UK.) In general, references in this chapter to the OFT should be taken to include the 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 an order 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).

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. 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).

Where an agreement also has an effect on trade between EU member states, the OFT and UK courts must apply article 101 TFEU concurrently. 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, though the OFT's recent investigations into the *Hotel Online Booking Sector* (2010), *E-books* (2011), the online sale of *Mobility Aids* (2012) and *Online Retail* (2012) suggest that the OFT considers the CA's jurisdictional test would be satisfied in a number of different online contexts.

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. The OFT's December 2011 guide on the application of the CA to public bodies clarifies that public bodies are subject to the CA when they are engaged in a supply of goods or services where that supply is of a 'commercial' nature, which, according to the OFT, is likely to be the case where the supply is in competition with private sector providers.

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. The OFT's recent guide on the application of the CA to public bodies explains that 'in determining whether a public body is acting as an undertaking in relation to such purchase of goods or services in a market, the economic or non-economic nature of that purchasing activity depends on the end use to which the public body puts the goods or services bought'. This is an indication that the OFT will follow the approach of the Court of Justice of the European Union (CJEU) in *Fenin* 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, the OFT press release of 24 January 2006, in relation to TVR).

Effective 1 February 2012, the Restriction on Agreements and Conduct (Specified Domestic Electrical Goods) Order 1998, which applied to suppliers of specified domestic electrical goods (making it unlawful for such suppliers to recommend or suggest retail prices for specified goods, and unlawful for a supplier to make an agreement that restricted a buyer's ability to determine the prices at which he advertised or sold), was lifted.

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.

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 agreements' 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*.

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 only insignificant financial or commercial risks in respect of the transactions in which it acts as agent) insofar as the agreement relates to contracts negotiated or concluded by the agent for its principal. However, the concept of 'genuine agency' is narrowly defined (see also question 13). In addition, 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. Further, 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, is there guidance (or are there recent authority decisions) 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 the chapter 1 prohibition 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.

In January 2011, the OFT opened an investigation under the CA into agency agreements for the sale of e-books. The OFT closed its investigation in December 2011 as the European Commission had initiated formal proceedings of its own in relation to alleged anti-competitive practices in the sale of E-books (see European Union chapter and the discussion of the *E-books* case therein).

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 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 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 the Enterprise Act, the OFT has extensive powers to conduct market studies and, ultimately, to refer markets to the UK's Competition Commission for an in-depth 'market investigation'. Networks of parallel vertical agreements in given industries are among the issues that can cause the OFT to initiate a market study (of which there have been several in recent years) or refer a market to the Competition Commission for detailed 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). In addition, although the OFT's *E-books* investigation was passed to the European Commission in December 2011, the nature of the commitments accepted by the European Commission in December 2012 (see European Union chapter) suggests that the existence of parallel networks of most-favoured customer clauses in publisher-agent agreements was among the matters under investigation.

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 insofar 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. Indeed in the OFT's October 2012 update of its investigation procedures guidance, 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 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 2011 fining four supermarkets and five dairy processors a total of £49.51 million for co-coordinating increases in the retail prices of milk and cheese (as explained in the OFT's press release 'the co-ordination was achieved by supermarkets indirectly exchanging retail pricing intentions with each other via the dairy processors – so called A-B-C information exchanges'). In 2010 the OFT fined 10 retailers and two tobacco manufacturers a total of £225 million for fixing retail prices across competing brands and competing retail outlets (note however that the UK's Competition Appeal Tribunal (CAT) quashed this decision in relation to five retailers and one manufacturer who had appealed it to the CAT). However, a case involving the supply of sunglasses by Oakley to 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. 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*, the OFT considered that 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. (Note, however, that the UK's Competition Appeal Tribunal quashed this decision in relation to the five retailers and one manufacturer who appealed.) Separately, in the *Dairy Products* decision, the OFT considered that supermarkets had engaged in indirect exchanges of strategic information via dairy producers. 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 late 2012, the OFT issued a statement of objections in its *Online Hotel Booking Sector* investigation. Although the OFT has not published a detailed summary of its investigation, the OFT's press releases and other statements indicate that it is investigating, inter alia, the link between resale price restrictions and networks of most-favoured customer clauses. In addition, the commitments accepted by the European Commission in the *E-books* case (which started with the OFT in the UK) also suggest a possible link between resale price restrictions and most-favoured customer clauses (see further European Union chapter, question 13).

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 claimed 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 actively 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 likely 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. In April 2012, the OFT opened an investigation into 'suspected online restrictions' in Mobility Aids, but, at the time of writing, no further information was available on the nature of the suspected restrictions at issue. Further, in October 2012, the OFT opened an investigation into 'suspected anti-competitive arrangements relating to online retail'. At the time of writing, it was not known whether the arrangements under investigation included restrictions on internet selling in vertical agreements.

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 the chapter I prohibition: the contract products must be of a kind necessitating selective distribution (eg, technically complex products where after-sales service is of paramount 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 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).

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 chapter I prohibition, inter alia, where the contract products necessitate after-sales service. 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 section 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.) Given the CJEU's decision in *Pierre-Fabre Dermo-Cosmétique*, it seems that restrictions amounting to an outright ban on internet sales to end users by approved buyers will fall within article 101 TFEU, will not benefit from the safe harbour of the Vertical Block Exemption but may be eligible for an individual exemption under article 101(3). 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 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 following are identified in the EU Vertical Guidelines (to which the OFT and the UK courts will have regard) as hardcore restrictions of competition (ie, restrictions that will fall within article 101(1) or the chapter I prohibition, will not benefit from the safe harbour provided by the Vertical Block Exemption and are unlikely to benefit from an individual exemption):

- 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, this restriction, known as '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.

36 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'.

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 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. The OFT has considered long-term exclusivity provisions in a number of recent cases, including its *Outdoor Advertising* market study and related investigation into street furniture contracts concluded by advertising agencies Clear Channel UK and JCDecaux. The OFT closed its *Clear Channel UK and JCDecaux* investigation when the parties agreed voluntarily not to enforce certain exclusivity clauses, first refusal clauses and tacit renewal clauses in their long-term street furniture contracts with local authorites.

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 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 37). 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').

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 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.

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 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 37).

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 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. Note, however, that in the OFT's *Online Hotel Booking Sector* investigation, it appears to be considering, inter alia, possible links between resale price restrictions and networks of most-favoured customer clauses. Equally, in the European Commission's 2011–2012 *E-Books* investigation (which started with the OFT in the UK), commitments were accepted 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 European Commission considered that the MFNs, when taken together with other consumer price-related restrictions, may have been capable of restricting competition.

Finally, in September 2012, the OFT published the results of a study it had commissioned in relation to so-called 'price-relationship agreements'. The study examines the competitive effects of a number of pricing-related vertical restraints, including MFN clauses, and may inform OFT enforcement activities in this area in the future.

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?

UK competition law enforcement in relation to 'discriminatory pricing' has focused on dominant companies whose conduct can be assessed under the chapter II prohibition (see *Getting the Deal Through – Dominance*). The authors are not aware of any UK cases in which the application of differential prices (or terms) by a non-dominant company has investigated under the chapter I prohibition.

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.

As with most-favoured-customer clauses (see question 41), 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

44 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 of requests for guidance in novel cases (see question 45), 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

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?

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. However, the OFT has only issued one such opinion. In limited circumstances, the OFT will also consider giving non-binding informal advice on an ad hoc basis.

Update and trends

In 2012, the OFT issued a statement of objections in its *Online Hotel Booking Sector* investigation. In the statement of objections, the OFT alleges that online travel agents Booking.com and Expedia entered into arrangements with InterContinental Hotel Group (IHG) which restricted their ability to discount room-only hotel prices. Reports suggest that the OFT also alleges the arrangements provide for price-parity (ie, most-favoured customer clauses) in that they forbid IHG from offering lower prices to other online travel agents. The OFT stated in its July 2012 press release announcing the issuance of its statement of objections that: 'the investigation is likely to have wider implications as the alleged practices are potentially widespread in the industry'. The OFT is expected to announce the next step in its investigation in the course of 2013.

Separately, the UK Government's January 2013 announcement of measures aimed at increasing the uptake of private enforcement of competition law may have significant ramifications for vertical restraints cases. At present, the OFT only investigates a fraction of the complaints it receives in relation to internet sales restrictions and resale price maintenance. If, as proposed, aggrieved parties will have the option of bringing a claim directly before the CAT, much greater numbers of vertical restraints cases may be pursued in the future.

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. 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

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 years from 2005 to 2012, 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.

48 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 Société pour la Transformation*). Such assessment will depend on the exact terms and nature of the agreement in question.

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?

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 (note, however, that the UK Competition Tribunal quashed this decision in relation to the five retailers and one manufacturer who appealed).

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

50 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

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?

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, non-parties to agreements can challenge their validity directly before the courts (see, for example, *Football Association Premier League Ltd & Others v LCD Publishing Limited*. 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*).

Further, 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.)

Note, however, that on 29 January 2013, the UK Government's Department for Business, Innovation & Skills (BIS) published its response to an April 2012 consultation on options for reform in relation to private actions in competition law cases. In its response, BIS sets out a number of decisions, which it hopes will increase the uptake of private enforcement in the future. The changes, which may come into force in the next 12–24 months, include giving the CAT jurisdiction to hear stand-alone (as opposed to just follow-on) private actions; giving the CAT the power to grant injunctions; and introducing a limited 'opt-out' class action procedure, with cases to be heard only by the CAT.

Other issues

52 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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