

GETTING THE DEAL THROUGH

Vertical Agreements

in 35 jurisdictions worldwide

2014

Contributing editor: Stephen Kinsella OBE



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Stephen Kinsella OBE
Sidley Austin LLP

Getting the Deal Through is delighted to publish the eighth edition of *Vertical Agreements*, a volume in our series of annual reports that provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 35 jurisdictions featured. New jurisdictions this year include Indonesia, Norway, Russia and Sweden. There is also a new chapter on most-favoured-nation clauses.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually. Please ensure you are referring to the latest print edition or to the online version at www.GettingTheDealThrough.com.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would also like to extend special thanks to contributing editor Stephen Kinsella OBE of Sidley Austin LLP for his continued assistance with this volume.

Getting the Deal Through

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Increased Scrutiny of Most Favoured Nation Clauses in Vertical Agreements Noëlle Lenoir, Marco Plankensteiner and Elise Créquer Kramer Levin	3	European Union	79
Stephen Kinsella OBE, Stephen Spinks, Patrick Harrison and Rosanna Connolly Sidley Austin LLP		France	92
Argentina	6	Muriel Perrier Vivien & Associés	
Julián Peña Allende & Brea		Germany	100
Australia	13	Markus M Wirtz and Silke Möller Glade Michel Wirtz	
Wayne Leach and Sharon Henrick King & Wood Mallesons		Greece	110
Austria	21	Christos Golfopoulos Golfopoulos Law Office	
Gunter Bauer and Robert Wagner Wolf Theiss		Hungary	119
Brazil	29	Chrysta Bán Bán, S Szabó & Partners	
Alexandre Ditzel Faraco, Ana Paula Martinez and Mariana Tavares de Araujo Levy & Salomão Advogados		India	127
Chile	37	Amit Kapur, Farhad Sorabjee and Amitabh Kumar J Sagar Associates	
Julio Pellegrini and Pedro Rencoret Pellegrini & Cía		Indonesia	136
China	45	Fahrul S Yusuf and Meta N Mustikaningrum Soewito Suhardiman Eddymurthy Kardono (SSEK)	
Chen Yang and Lei Li Sidley Austin LLP		Ireland	143
Colombia	54	Helen Kelly Matheson	
Javier Cortázar-Mora Cortázar Urdaneta & Cía – Abogados		Israel	151
Czech Republic	61	William B Korman and Nachum Oren Korman & Oren	
Katerina Schenkova Baker & McKenzie		Italy	162
Denmark	70	Fabio Ferraro and Andrew G Paton De Berti Jacchia Franchini Forlani	
Christina Heiberg-Grevy and Malene Gry-Jensen Accura Advokatpartnerselskab			

Publisher

Gideon Robertson
gideon.roberton@lbresearch.com

Subscriptions

Rachel Nurse
subscriptions@gettingthedealthrough.com

Business development managers

George Ingledeu
george.ingledeu@lbresearch.com

Alan Lee
alan.lee@lbresearch.com

Dan White
dan.white@lbresearch.com



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CONTENTS

<u>Japan</u>	<u>174</u>	<u>Romania</u>	<u>224</u>	<u>Switzerland</u>	<u>271</u>
Nobuaki Mukai Momo-o, Matsuo & Namba		Carmen Peli and Manuela Lupeanu Peli Filip SCA		Franz Hoffet, Marcel Dietrich, Gerald Brei and Barbara Wächli Homburger	
<u>Malaysia</u>	<u>183</u>	<u>Russia</u>	<u>235</u>	<u>Ukraine</u>	<u>280</u>
Sharon Tan Zaid Ibrahim & Co		Alexander Egorushkin and Igor Panshensky Antitrust Advisory		Igor Svechkar and Oleksandr Voznyuk Asters	
<u>Mexico</u>	<u>191</u>	<u>Serbia</u>	<u>243</u>	<u>United Kingdom</u>	<u>288</u>
León Ricardo Elizondo Castro Legal and Economic Avantgarde SC		Guenter Bauer and Maja Stanković Wolf Theiss		Stephen Kinsella OBE, David Went, Patrick Harrison and Rosanna Connolly Sidley Austin LLP	
<u>Netherlands</u>	<u>199</u>	<u>Slovakia</u>	<u>251</u>	<u>United States</u>	<u>301</u>
Minos van Joolingen and Martijn Jongmans Banning NV		Katarína Pecnová Dentons Europe CS LLP		Joel Mitnick Sidley Austin LLP	
<u>Norway</u>	<u>208</u>	<u>Spain</u>	<u>258</u>		
Thomas Sando and Aksel Joachim Hageler Advokatfirmaet Steenstrup Stordrange DA		Luis Blanquez and Manuel Contreras Herbert Smith Freehills LLP			
<u>Portugal</u>	<u>216</u>	<u>Sweden</u>	<u>265</u>		
Joana Gomes dos Santos Caiado Guerreiro & Associados		Mats Johnsson and Elsa Arbrandt Ashurst Advokatbyrå AB			

United Kingdom

Stephen Kinsella OBE, David Went, Patrick Harrison and Rosanna Connolly

Sidley Austin LLP

Antitrust law

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

The key legal 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. In 2004, the UK's Office of Fair Trading (OFT) adopted guidance on the application of the CA to vertical restraints (UK Vertical Guidelines). The OFT may also conduct 'market studies' under section 5 of the Enterprise Act 2002 (Enterprise Act) and refer markets to the Competition Commission (CC) 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. Note that by virtue of the reforms implemented by the Enterprise and Regulatory Reform Act 2013, from 1 April 2014 the Competition and Markets Authority (CMA) will take over the competition functions of the OFT and the functions of the CC.

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 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 UK Vertical Guidelines state that the OFT will also 'have regard to' the European Commission's De Minimis Notice and Vertical Guidelines (EU Vertical Guidelines) (see the European Union chapter).

Where a party occupies a dominant position in a market to which the vertical agreement relates, section 18 of the CA (the Chapter II prohibition) and potentially article 102 TFEU (which both regulate the conduct of dominant companies), will also be relevant to the antitrust assessment of a given agreement. However, the conduct of dominant companies is considered in *Getting the Deal Through – Dominance* 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?

The UK Vertical Guidelines cite the definition of vertical agreements given in the European Commission's 1999 Vertical Block Exemption (Regulation 2790/1999). The 1999 definition has been slightly revised in the European Commission's 2010 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). From 1 April 2014, a single new body, the Competition and Markets Authority (CMA), will bring together the competition functions of the OFT and the functions of the CC as amended by the Enterprise and Regulatory Reform Act 2013.

There are also certain sectoral regulators that 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 Water Services Regulation Authority (Ofwat); the Office of Rail Regulation (ORR); and the Civil Aviation Authority (CAA). From 1 April 2013, the Financial Conduct Authority (FCA) has had certain powers (albeit short of concurrent jurisdiction) in relation to the financial services sector in the UK. The FCA will gain full concurrent competition powers from 1 April 2015, and the new Payment Services Regulator (PSR) will also have concurrent competition powers in relation to payment systems. In general, references in this chapter to the OFT should be taken to include the sectoral regulators in relation to their respective industries and the OFT's successor body, the CMA, which will assume the OFT's competition functions from 1 April 2014. 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, 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 the agreement 'is, or is 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 OFT's recent infringement decision against Roma Medical Aids Limited (Roma) and certain of its retailers gives an example of the application of the jurisdictional test in an online context. The case related to prohibitions of online sales and online price advertising for Roma's mobility scooters. The jurisdictional test was deemed satisfied in this case because the products were sold throughout the UK. The evidence presented to the OFT also indicated that there were no material cross-border retail sales of mobility scooters, meaning that the OFT considered that it had no grounds for action under article 101 TFEU.

The OFT's recent *Hotel Online Booking* investigation provides a further example of jurisdiction being asserted in an online setting. The OFT closed its investigation after receiving commitments from the parties that addressed the OFT's competition concerns. Although the OFT did not reach a conclusion on jurisdiction in the case, the commitments decision indicates that the relevant agreements affected prices offered to consumers located in the UK and beyond.

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*. In *Fenin*, the EU courts focused 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 that the competition rules seek to prevent. The OFT's 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 repair and maintenance 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 a complaint made against the motor manufacturer TVR Engineering Ltd).

With effect from 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 are 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, 2008 and 2012) exempting from the Chapter I prohibition certain agreements in the defence sector and certain agreements regarding the distribution of fuel in the event of a fuel supply disruption.

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 (for example, no fines were imposed in the recent *Roma Medical Aids* case regarding mobility scooters – see question 30). Note, however, that price-fixing agreements are excluded from the scope of the 'small agreements' exemption under section 39(1)(b) 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' 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.'

It should also be noted that where agency agreements are concluded, agents in the United Kingdom may benefit from significant protection under the Commercial Agents (Council Directive) Regulations 1993.

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 I 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.

What constitutes genuine agency is a particularly difficult question in the online environment. 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 the 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 reflect 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. The relevant considerations go beyond the scope of this publication and include the application of the European 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.

The Chapter I prohibition may apply to vertical restraints (as defined in question 2) provided they are not:

- certain agreements covered by a Competition Act (Public Policy Exemption) Order (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? 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.

The EU Vertical Guidelines also explain that certain restrictions on online selling can qualify as hard-core restraints (see, for an example in the UK, the discussion of the *Roma Medical Aids* case regarding mobility scooters, at question 30, below).

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.

Second, does the agreement have an 'appreciable' effect on competition within the United Kingdom? Where an agreement contains a hard-core restraint, it is likely that it will be deemed to have an appreciable effect on competition within the United Kingdom. Where an agreement does not contain a hard-core restraint, however, the OFT will have regard to the European Commission's De Minimis Notice in determining whether the agreement has an appreciable effect on competition in the United Kingdom. If the criteria of the De Minimis Notice are met (see question 8), then the OFT is likely to consider that the vertical restraint falls outside the Chapter I prohibition as it does not appreciably restrict competition.

Third, does the agreement fall within the Vertical Block Exemption (see question 18) (or another applicable block exemption) which, by virtue of section 10 of the CA, creates a safe harbour from the Chapter I prohibition? If the agreement falls within the scope of the Vertical Block Exemption, it will benefit from a safe harbour. This safe harbour will be binding on the OFT and on any UK court that is asked to determine the legality of the vertical restraint.

Finally, where the vertical agreement does have an appreciable effect on competition within the United Kingdom and does not fall within the terms of the De Minimis Notice or the Vertical Block Exemption (or any other applicable safe harbour), it is necessary to conduct an 'individual assessment' of the agreement in order to determine whether the conditions for an exemption under section 9 of the CA are satisfied.

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

- whether the agreement will lead to efficiencies through the improvement of production or distribution or promoting technical or economic progress;
- 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 the 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 (CC) for an in-depth 'market investigation'. (As of 1 April 2014, these extensive powers will be added to and transferred to the CMA, the single new body replacing the OFT and the CC.) 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 CC for detailed investigation (see, for example, the CC Market Investigation into the supply of bulk liquefied petroleum gas for domestic use (final report published in 2006) and the CC Market Investigation into movies on pay-TV (final report published in 2012). In addition, the proposed remedies in the CC's recent private motor insurance Market Investigation suggest that the existence of parallel networks of most-favoured-customer clauses in agreements between insurers and price comparison websites might be capable of softening price competition in the market for private motor insurance (see question 25).

In 2012, the OFT decided to focus its Hotel Online Booking investigation on a small number of major companies, but in doing so noted that 'the investigation is likely to have wider implications as the alleged practices are potentially widespread in the industry.' In its decision accepting commitments in order to close the investigation, the OFT indicated that while it had 'not investigated the extent to which similar discounting restrictions are replicated in the market, the OFT understands that the alleged practices are potentially widespread in vertical distribution arrangements in the industry. In principle, a market in which discounting restrictions are prevalent is likely to be characterised by significant limits to price competition and barriers to entry.'

- 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 used 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.

Communicating maximum or recommended resale prices from which the distributor is permitted to deviate without penalty tends to be permissible. However, the OFT is likely to view such arrangements with suspicion on concentrated markets, as such practices may facilitate collusion.

The fixing of resale prices has often led to enforcement action by the OFT. In November 2002, the OFT fined Hasbro £9 million (reduced to £4.95 million for leniency) for the imposition of minimum resale prices.

There have also been a number of OFT cases that have combined examination of vertical restraints with examination of allegations of horizontal collusion. In 2013, the OFT issued infringement decisions against Mercedes-Benz and five of its commercial vehicle dealers in relation to the distribution of Mercedes-Benz commercial vehicles. The OFT noted that the ‘nature of the infringements vary but all contain at least some element of market sharing, price coordination or the exchange of commercially sensitive information’. Other examples include the 2003 *Replica Football Kits* case, where the OFT identified an element of horizontal collusion among buyers, and the 2011 *Dairy Products* decision, where the OFT considered that the supermarkets had engaged in indirect exchanges of strategic information via dairy producers (see question 21).

More recently, the OFT decided to close its Hotel Online Booking investigation without reaching a final decision because it had received commitments from the parties that addressed the OFT’s concerns. Nonetheless, the OFT’s provisional view was that the agreements under which each online travel agent (OTA) agreed to offer hotel accommodation at the Intercontinental Park Lane Hotel (ILPL) at a ‘day-to-day room rate set and/or communicated by ILPL and not to offer rooms at a lower rate, for instance by funding a promotion or discount from its own margin or commission’ were likely to limit competition on room rates between OTAs, and between OTAs and ILPL. The OFT agreed to close its investigation when the parties agreed to modify their behaviour according to principles that would allow OTAs and hotels to offer discounts to headline room rates that were funded by accepting reductions in their commission revenue or margin.

The OFT continues to investigate resale price maintenance in other areas. In September 2013, the OFT issued a Statement of Objections to DB Apparel UK Limited and three department stores (John Lewis plc, Debenhams Retail plc and House of Fraser (Stores) Limited) alleging that between 2008 and 2011 the parties sought to increase the retail price of the Shock Absorber brand of sports bras in department stores. At the time of writing, no decision had been handed down in the case.

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 37 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 now contain reference to the possibility of resale price maintenance being permissible in certain circumstances, for example where such restrictions are of a limited duration and relate to the launch of a new product or a short-term low-price campaign. 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.

In 2003, the OFT identified an element of horizontal collusion among buyers in the *Replica Football Kits* case. Also in 2003, the OFT adopted a decision concerning Lladró Comercial SA’s agreements (see question 37), which not only obliged buyers to inform Lladró of any proposed discount prices but also imposed restrictions on buyer advertising.

In 2011, the OFT fined 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 coordination was achieved by supermarkets indirectly exchanging retail pricing intentions with each other via the dairy processors – A-B-C information exchanges’). Further, the agreements investigated in the context of the OFT’s recent *Hotel Online Booking* case were found to contain retail rate most-favoured-nation (MFN) clauses (see question 24) in addition to agreements not to discount. 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 the European Union chapter and question 13).

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

Yes. In its 2014 decision to accept commitments in order to close its Hotel Online Booking investigation without reaching a final decision, the OFT acknowledged that, in the specific factual context of that case, there were efficiencies in enabling hotels to have control over the headline rate for their hotel rooms, and so to restrict discounting by online travel agents.

However, the OFT gave such arguments less credence 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). In that case, the parties raised arguments regarding the claimed efficiencies of resale price maintenance but the OFT stated that it was ‘extremely hard, if not impossible’ to see how the fixing of prices for UOP’s 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 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; nevertheless, 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.

- 23** Explain how a buyer agreeing to set its retail price for supplier A's products by reference to its retail price for supplier B's equivalent products is assessed.

Any agreement amounting to resale price maintenance will almost always be deemed to infringe the Chapter I prohibition, will fall outside the safe harbours of the De Minimis Notice and the Vertical Block Exemption, and will generally be considered unlikely to qualify for exemption under section 9 of the CA. In 2010, the OFT fined ten retailers and two tobacco manufacturers a total of £225 million for fixing retail prices across competing brands and competing retail outlets. The arrangements in question were alleged to involve setting the retail price for one supplier's brand of cigarettes by reference to the price for another supplier's competing brand of cigarettes. The Competition Appeals Tribunal (CAT) quashed the OFT's decision in relation to the five retailers and one manufacturer who had appealed the findings to the CAT after hearing evidence from multiple witnesses whose evidence did not support the OFT's findings of fact. The CAT did not reach a decision on whether the agreements or restraints as the OFT had understood them would have infringed the Chapter I prohibition.

- 24** Explain how a supplier 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 an MFN restriction at the wholesale level – in isolation – will constitute a restriction infringing the Chapter I prohibition. In the event that such a restriction were deemed to infringe the Chapter I prohibition, it should nonetheless fall within the safe harbour created by the Vertical Block Exemption, provided the other criteria for its application are met.

The parties involved in the *Hotel Online Booking* investigation had agreed to MFN clauses. As the OFT explained:

Under such MFN provisions, a hotel agrees to provide an [Online Travel Agent (OTA)] with access to a room reservation (for the OTA to offer to consumers) at a booking rate which is no higher than the lowest booking rate displayed by any other online distributor. This is also known as 'Rate Parity'. This guarantees the OTA the lowest booking rate at least in relation to other OTAs (that is, it cannot be undercut). Whilst the OFT has investigated alleged restrictions on discounting, the OFT has not assessed MFN provisions as part of its investigation.

The OFT noted that it was unlikely to investigate the specific MFN provisions at issue in the case but it did note that it would be open to the OFT to consider taking further action:

In particular, the OFT would consider its options carefully if it became aware that MFN provisions were being enforced against hotels in a way that would make it practically impossible or very difficult for hotels to allow their OTA partners to offer [...] discounts or to offer discounts themselves [...]. It would also be open to the OFT/CMA to investigate MFN provisions in other sectors should the OFT/CMA have reasonable grounds for suspecting that such clauses, in their specific context, infringe UK or EU competition law.

- 25** Explain how a supplier agreeing to sell a product via internet platform A at the same price as it sells the product via internet platform B is assessed.

Although the OFT has not taken any formal decisions in this area, recent cases indicate that a retail MFN clause such as that described could potentially constitute a restriction of competition falling within the Chapter I prohibition or article 101 prohibition.

In 2013, the OFT closed its investigation into Amazon's price parity policy (which restricted sellers from offering lower prices on other online sales channels (including their own websites)) following Amazon's decision to end this policy in the EU. The OFT was concerned that 'such policies may raise online platform fees, curtail the entry of potential entrants, and directly affect the prices which sellers set on platforms (including their own websites), resulting in higher prices to consumers.'

The CC's recent provisional findings in the private motor insurance market investigation also included concerns relating to MFNs included in agreements between insurers and price comparison websites (PCWs). The CC identified two types of MFN clauses: a 'wide' MFN clause and a 'narrow' MFN clause. The 'wide' MFN clauses specified that the premium could not be lower on any other PCW or on the insurer's own website; the 'narrow' MFN clauses specified that the insurer's own website would not offer policies at a lower premium than available on the PCW. The CC considers that 'wide' MFN clauses may soften price competition between PCWs, which may lead to less entry, reduced innovation and higher commission fees. The CC considers that such concerns are less likely to arise with 'narrow' MFN clauses. Indeed, narrow MFNs 'may be necessary for the survival of PCWs as a business model. A narrow MFN provides some credibility to the proposition that the policies found on the PCW have prices that cannot be found more cheaply simply by going to the direct website of the provider.' As price comparison websites were considered to enhance rivalry in the car insurance sector as a whole, the CC considers that the absence of 'narrow' MFN clauses would damage competition, whereas 'wide' MFNs are not necessary for the continued existence of PCWs. One of the proposed remedies in the case is to prohibit the use of 'wide' MFN clauses in agreements between PCWs and insurers, or any other arrangements having the same effect. The provisional decision on remedies in the private motor insurance market investigation is due in May–June 2014, with the final report due to be published in September 2014.

- 26** 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 24), it is not clear whether such a restriction will infringe the Chapter I prohibition. However, 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, 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.

- 27** 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, 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'.

28 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 27) 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. However, 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.

Third, restrictions on a wholesaler selling direct to end-users may also fall within the safe harbour created by the Vertical Block Exemption.

Fourth, distributors appointed within a selective distribution system can be restricted from selling to unauthorised distributors.

29 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.

30 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). A number of recent OFT investigations have given an indication as to how the EU-level principles will be applied in the UK.

On 5 August 2013, the OFT issued an infringement decision against Roma Medical Aids Limited (Roma) and certain of its retailers. The OFT found that Roma entered into arrangements with seven UK-wide online retailers that prevented them from selling Roma-branded mobility scooters online, and from advertising their prices for Roma-branded mobility scooters online. The OFT considered that these practices limited consumers' choice and obstructed their ability to compare prices and get value for money. No fines were imposed in this case as Roma and each of the seven retailers involved benefitted from immunity under the 'small agreement' exemption (see question 8).

In the same sector (ie, mobility aids), the OFT also announced on 24 September 2013 that it had issued a statement of objections alleging that Pride Mobility Products Limited and certain of its retailers had entered into agreements that prevented the UK-wide online retailers in question from advertising online prices below Pride's recommended retail price (RRP) for certain models of mobility scooter. At the time of writing, no final decision had been adopted.

The OFT also expressed concern in an earlier *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 September 2006, indicating that Yamaha had cooperated with the OFT and had withdrawn the scheme in question.

31 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of 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).

32 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, 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 (see the European Union chapter).

Where selective distribution systems do not satisfy the above criteria, they will fall within the Chapter I prohibition but may benefit from safe-harbour protection (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).

Insofar as concerns publication of selection criteria and rights to challenge supplier decisions on acceptance into, or rejection from, selective distribution networks, the UK rules follow those applicable at the EU level (see the European Union chapter).

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- 33** 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 before consumption (in the case of 'experience' products) or after consumption (in the case of 'credence' products).

Additionally, the OFT recognised in the *Newspaper and Magazine Distribution* case (Opinion of the Office of Fair Trading – guidance to facilitate self-assessment under the Competition Act 1998) the advantages of selective distribution in relation to newspapers, since 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).

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- 34** 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*, in October 2011, 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 30). However, the issue has not yet been considered in great detail in the United Kingdom.

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- 35** 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 37), 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 [...] 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 19).

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- 36** 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.

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- 37** 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'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."

- 38** 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 hard-core 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.

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

Such an arrangement may raise concerns regarding market partitioning. Where the supplier insists that a given buyer must buy all of its requirements of the supplier's products from, for example, the supplier's local subsidiary, this may prevent the ordinary arbitrage that would otherwise occur. On its own, however, 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.

- 40** 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, in 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, 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'.

- 41** 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 obligation) 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 2011 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 in May 2012 when the parties agreed voluntarily not to enforce certain exclusivity clauses, first-refusal clauses and tacit-renewal clauses in their long-term contracts with local authorities.

- 42** 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 41). 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').

- 43** 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 the franchisor and 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 27, 28 and 41). However, the EU 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)]'.

- 44** Explain how restricting the supplier's ability to supply to other buyers is assessed.

In an exclusive distribution network, as a corollary of limiting the buyer's ability actively to 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 in questions 23 and 24.

- 45** Explain how restricting the supplier's ability to sell directly to end-consumers is assessed.

As noted in question 44, the EU Vertical Guidelines, to which the OFT has regard, do not deal in much detail with the restrictions imposed on the suppliers. However, 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 is considered a hard-core restriction of competition. As such, these restrictions will almost always fall within 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.

- 46** Have guidelines or agency decisions in your jurisdiction dealt with the antitrust assessment of restrictions on suppliers other than those covered above? If so, what were the restrictions in question and how were they assessed?

The EU Vertical Guidelines, to which the OFT has regard, provide guidance on 'exclusive supply,' which covers the situation in which a supplier agrees to supply only to one buyer for the purposes of resale or a particular use. The main anti-competitive effect of such arrangements is the potential foreclosure of competing buyers, rather than competing suppliers. As such, the buyer's market share is the most important element in the assessment of such restrictions. In particular, negative effects may arise where the market share of the buyer on the downstream market as well as the upstream purchase market exceeds 30 per cent. However, where the buyer and supplier market shares are below 30 per cent, and the exclusive supply agreements are shorter than five years, such restrictions will benefit from the safe harbour created by the Vertical Block Exemption

Notifying agreements

- 47** 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 48), 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

- 48** 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 guidance on an ad-hoc basis.

Complaints procedure for private parties

- 49** 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

- 50** 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 2013, 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. With the OFT's competition functions set to transfer to the Competition and Markets Authority (CMA) on 1 April 2014, the CMA is (at the time of writing) consulting on what its own prioritisation principles will be.

- 51** 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.

52 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 enforcement powers are set out in sections 32 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 (reduced to £15 million on appeal), £5.37 million on Littlewoods (reduced to £4.5 million on appeal), and £15.59 million on Hasbro (reduced by the OFT 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 Appeals 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 Enforcement). Positive directions were given to Napp Pharmaceutical Holdings in a 2001 dominance case. Similarly, in relation to compensatory measures, the OFT agreed in its 2006 decision in *Independent Schools* a settlement that included the infringing schools paying a nominal fine of £10,000 each, reduced in the case of six of the schools by up to 50 per cent for leniency, 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

53 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 31 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 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

54 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

SIDLEY AUSTIN LLP
SIDLEY

Stephen Kinsella OBE
David Went
Patrick Harrison
Rosanna Connolly

skinsella@sidley.com
dwent@sidley.com
pharrison@sidley.com
rconnolly@sidley.com

Woolgate Exchange
25 Basinghall Street
London EC2V 5HA
United Kingdom

Tel: +44 20 7360 3600
Fax: +44 20 7626 7937
www.sidley.com

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.)

Following the UK Government's Department for Business, Innovation & Skills (BIS) April 2012 consultation on options for reform in relation to private actions in competition law cases, BIS has made a number of radical changes, which it hopes will increase the uptake of private enforcement in the future, including:

- creating a new opt-out collective actions regime for consumers and businesses;
- expanding the role of the CAT to hear stand-alone (as opposed to just follow-on) private actions;
- giving the CAT the power to grant injunctions;
- introducing a new fast-track procedure for simpler competition claims in the CAT; and
- encouraging alternative dispute resolution (ADR), and the introduction of an opt-out collective settlement regime.

Other issues

55 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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