PANORAMIC

VERTICAL AGREEMENTS

European Union

LEXOLOGY

Vertical Agreements

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LEGAL FRAMEWORK

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

The key legal source is article 101 of the Treaty on the Functioning of the European Union (TFEU). Article 101(1) TFEU prohibits agreements between undertakings that may affect trade between EU member states and have as their object or effect the prevention, restriction or distortion of competition within the European Union. Article 101(2) TFEU renders these agreements void unless they satisfy the conditions for exemption under article 101(3) TFEU (ie, that the economic benefits of an agreement outweigh its anticompetitive effects).

To assist companies and their advisers in ensuring that their agreements meet the conditions for an exemption under article 101(3) TFEU, the European Commission's Directorate-General for Competition (DG Comp) published two documents of particular relevance to the assessment of vertical restraints:

- Commission Regulation (EU) No. 2022/720 of 10 May 2022 on the application of article 101(3) TFEU to categories of vertical agreements and concerted practices (Vertical Block Exemption Regulation (VBER)), which provides that certain categories of vertical agreement will be treated as fulfilling the requirements for exemption under article 101(3); and
- non-binding vertical restraints guidelines, which set out how the VBER is to be applied and give guidance on how vertical restraints falling outside the VBER will be assessed (the Vertical Guidelines).

Where a party to an agreement occupies a dominant position in one of the markets to which an agreement relates, article 102 TFEU (which regulates the conduct of dominant companies) may also be relevant to the antitrust assessment. However, conduct falling within article 102 TFEU is considered in Lexology Panoramic: Dominance and is therefore not covered here.

Law stated - 30 January 2024

Types of vertical restraint
List and describe the types of vertical restraints that are subject to antitrust law. Is the concept of vertical restraint defined in the antitrust law?

In article 1(a) of the VBER, a vertical agreement is defined as 'an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services.'

Vertical restraints are restrictions on the competitive behaviour of a party that occur in the context of these vertical agreements. Examples of vertical restraints include:

- exclusive distribution;
- certain types of selective distribution;
- territorial protection;
- export restrictions;
- customer restrictions;
- resale price-fixing;
- exclusive purchase obligations; and
- non-compete obligations.

Law stated - 30 January 2024

Legal objective
Is the only objective pursued by the law on vertical restraints economic, or does it also seek to promote or protect other interests?

One of the key identifying features of EU competition policy has been its pursuit of different goals. Although the Commission has repeatedly stated its intention to focus more closely on the protection of competition as a means of enhancing consumer welfare and the pursuit of strictly economic goals in its application of article 101 TFEU, the Vertical Guidelines, as updated in May 2022, also state that 'sustainable development is a core principle of the Treaty [of the Functioning of the European Union] and a priority objective for the policies of the Union.' In addition, the supranational nature of the European Union dictates that the Commission and the EU courts have also prioritised the furtherance of a single, integrated European market across the EU's 27 member states. This is reflected in paragraph 7 of the Vertical Guidelines, which states that: 'Companies should not be allowed to recreate private barriers between Member States where State barriers have been successfully abolished.'

Law stated - 30 January 2024

Responsible authorities
Which authority is responsible for enforcing prohibitions on anticompetitive vertical restraints? Where there are multiple responsible authorities, how are cases allocated? Do governments or ministers have a role?

The Commission is the main administrative body responsible for applying article 101 TFEU at an EU level. However, national courts and national competition authorities in each of the EU's 27 member states also have jurisdiction to apply article 101 TFEU.

At an EU level, the College of Commissioners (ie, the 27 commissioners appointed by the EU's 27 member states) adopts infringement decisions under article 101 TFEU. In practice, however, it is only at the very final stage of the process leading to an infringement decision that the College of Commissioners is formally consulted. At all stages before that, decisions are driven by officials at the Commission's Directorate-General for Competition (DG Comp). However, the Advisory Committee on Restrictive Practices and Dominant Positions, which is composed of national competition authority representatives, will also be consulted before an infringement decision is put to the College of Commissioners.

Law stated - 30 January 2024

Jurisdiction

What is the test for determining whether a vertical restraint will be subject to antitrust law in your jurisdiction? Has the law in your jurisdiction regarding vertical restraints been applied extraterritorially? Has it been applied in a pure internet context and if so, what factors were deemed relevant when considering jurisdiction?

Article 101 TFEU applies to agreements that 'may affect trade between [EU] member states'. Where agreements do not affect trade between member states but have an impact on trade within a given EU member state, they may be considered under that member state's national competition rules. The concept of 'effect on trade between member states' is interpreted broadly and includes 'actual or potential' and 'direct or indirect' effects (see the Commission Notice – Guidelines on the effect on trade concept contained in articles 81 and 82 of the Treaty, OJ C101, 27 April 2004 (Guidelines on the effect on trade concept)). Where vertical restraints are implemented in just a single EU member state, they may also be capable of affecting trade between EU member states by imposing barriers to market entry for companies operating in other EU member states. In a 2023 preliminary ruling in*Super Brock v Autoridade da Concorrência,* the CJEU confirmed that a vertical agreement that fixed minimum resale prices in just one member state could still affect trade between EU member states. The question of whether a given agreement will affect trade between EU member states is addressed case by case. However, the Guidelines on the effect on trade concept clarify that, in principle, vertical agreements relating to products for which neither the supplier nor the buyer has a market share exceeding 5 per cent and for which the supplier does not generate EU-wide revenues exceeding €40 million should not be considered capable of having the requisite effect on trade.

Law stated - 30 January 2024

Agreements concluded by public entities

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

Article 101 TFEU applies to undertakings. The term 'undertaking' can cover any kind of entity, regardless of its legal status or how it is financed, provided such an entity is engaged in economic activity when carrying out the activity in question. Thus, public entities may qualify as undertakings, and be subject to article 101 TFEU, when carrying out certain of their more commercial activities. However, where the economic activity in question is connected with, and inseparable from, the exercise of public powers, the entity will not be treated as an undertaking for purposes of article 101 TFEU.

Law stated - 30 January 2024

Sector-specific rules

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.

Distribution agreements relating to either the purchase, sale or resale of new motor vehicles or spare parts or to the provision of repair and maintenance services by authorised repairers, were covered by a separate sector-specific block exemption. However, as of 1 June 2013, vertical agreements relating to the purchase, sale or resale of new motor vehicles have been analysed under the general VBER, meaning that only agreements for the distribution of spare parts and the provision of repair and maintenance services continue to benefit from a separate sector-specific block-exemption regulation. This regulation was due to expire on 31 May 2023, but its duration was extended until 31 May 2028. The Commission also updated its supplementary guidelines for the sector in April 2023. Other industry-specific block exemption regulations exist, but none is focused specifically on vertical restraints.

Law stated - 30 January 2024

General exceptions

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

For article 101 TFEU to apply, a vertical restraint must have an appreciable effect on competition. In June 2014, the Commission published an updated version of its Notice on agreements of minor importance that do not appreciably restrict competition under article 101(1) TFEU (the De Minimis Notice). The De Minimis Notice sets out the circumstances in which agreements (including vertical agreements) will not be viewed by the Commission as infringing article 101(1) TFEU.

The De Minimis Notice provides that, in the absence of certain hardcore restrictions such as resale price-fixing or clauses granting absolute territorial protection, and in the absence of parallel networks of similar agreements, the Commission will not consider that vertical agreements have an appreciable effect on competition, provided the parties' market shares for the products in question do not exceed 15 per cent. Although binding on the Commission itself, the De Minimis Notice is not binding on member-state courts or competition authorities when applying article 101 TFEU, as confirmed by the Court of Justice of the European Union (CJEU) in *Expedia*.

Law stated - 30 January 2024

TYPES OF AGREEMENT

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

The Commission and the EU courts have consistently interpreted the concept of 'agreement' under article 101 of the Treaty on the Functioning of the European Union (TFEU) in a broad manner. In the Court of Justice of the European Union (CJEU) judgment of 2004 in *Bayer v Commission*, it was held that, 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. This 'concurrence of wills' language has been used in several subsequent judgments regarding vertical agreements, including the CJEU's 10 February 2011 judgment in *Activision Blizzard v Commission*.

Law stated - 30 January 2024

Agreements
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' reflecting an informal or unwritten understanding will suffice. The form in which that 'concurrence of wills' is expressed is, therefore, unimportant, so long as the parties' intention is clear.

The Commission's Vertical Guidelines also provide guidance on when the explicit or tacit acquiescence of one party in the other's unilateral policy may amount to an agreement between undertakings for article 101 TFEU. The Vertical Guidelines state that if there is 'no explicit agreement expressing the concurrence of wills, the Commission will have to prove that the unilateral policy of one party receives the acquiescence of the other party'. The acquiescence can be either explicit, for example, if the terms of a separate agreement give one party the unilateral power to impose conditions on the other, or tacit, which requires an authority or party alleging an infringement to show that the party imposing the condition requires the cooperation of the acquiescing party, and the acquiescing party is cooperating with that requirement.

In *Eturas* (2016) the CJEU affirmed that the Commission and national competition authorities may establish that a party acquired knowledge of a restriction of competition, to which it became party by remaining on the relevant market, simply by proving that the party in question had received electronic notice of such a restriction, regardless of whether it could prove that the party had read it. This was characterised by Advocate General Szpunar (of the CJEU) as appropriate in a context where the addressee could be deemed to appreciate that the sender of the notice would consider silence an approval and rely on mutual action, even in the absence of a positive response.

In a 2023 preliminary ruling in ***Super Brock v Autoridade da Concorrência***, the CJEU ruled that there is an 'agreement' within the meaning of article 101(1) TFEU in the context of an imposition of minimum resale prices of the products by a supplier on a distributor:

> if the imposition of those prices by the supplier and compliance with them by the distributors reflects the expression of the concurrence of wills of those parties. That concurrence of wills may be shown from the terms of the distribution contract at issue, where it contains an express invitation to comply with minimum resale prices or authorises, at the very least, the supplier to impose those prices, as well as from the conduct of the parties and, in particular, from any explicit or tacit acquiescence on the part of the distributors to an invitation to comply with minimum resale prices.

Law stated - 30 January 2024

Parent and related-company agreements

In what circumstances do the vertical restraints rules apply to agreements between a parent company and a related company (or between related companies of the same parent company)?

Article 101 TFEU does not apply to agreements between companies that form part of a single economic entity. In determining whether companies form part of the same single economic entity, the EU courts, in cases such as ***Viho v Commission***, have focused on the concept of 'autonomy'. Where companies do not enjoy real autonomy in determining their course of action on the market but instead carry out instructions issued to them by their parent company, they will be seen as part of the same economic entity as the parent company. However, the case-law of the EU courts is not clear on exactly what degree of control is necessary for a company to be considered as related to another. In certain cases regarding vertical agreements, the Commission has not accepted the defence of a single economic entity. For example, in the case of ***Gosme/Martell*** – DMP, the Commission found that DMP, a 50:50 joint venture between Martell and Piper-Heidsieck, was a separate economic entity from Martell so that article 101 TFEU did apply to vertical restraints agreed between DMP and its 50 per cent shareholder Martell.

Law stated - 30 January 2024

Agent–principal agreements

In what circumstances does antitrust law on vertical restraints apply to agent–principal agreements in which an undertaking agrees to perform certain services on a supplier's behalf for a sales-based commission payment?

In general, article 101 TFEU will not apply to an agreement between a principal and its genuine agent insofar as the agreement relates to contracts negotiated or concluded by the genuine agent on behalf of its principal. However, the concept of a 'genuine agent' is narrowly defined – indeed, the Vertical Guidelines indicate that an agency agreement will fall outside the scope of article 101 TFEU where the agent 'no longer acts as an independent economic operator'.

The Commission's Vertical Guidelines also explain that, where a genuine agency agreement contains, for example, a clause preventing the agent from acting for competitors of the principal, article 101 TFEU may apply if the arrangement leads to the exclusion of the principal's competitors from the market for the products in question.

The Vertical Guidelines also note that even a genuine agency agreement that facilitates collusion between principals may also fall within article 101(1) TFEU. 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.'

The Vertical Guidelines further make it clear that online intermediation service providers will be considered suppliers rather than agents.

Where agency agreements are concluded, agents in the European Union may benefit from significant protection under Directive 86/653/EEC (self-employed commercial agents) and from the member state-level implementing measures adopted in relation thereto.

Law stated - 30 January 2024

Agent–principal agreements

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?

An agreement will be qualified as an agency agreement if the agent does not bear any, or bears only insignificant, risk concerning its activities on behalf of the principal. The Vertical Guidelines list the three types of risk in question:

- 'contract-specific risks' – relating directly to the contracts concluded by the agent on behalf of the principal;
- 'risks relating to market-specific investments' – consisting of, inter alia, the costs of operating on the market in question; and
- 'risks related to other activities undertaken on the same product market' – incurred by virtue of the other activities required by the principal.

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

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

A principal may minimise the risk held by their agent by using various methods to cover the costs mentioned above including reimbursement, fixed lump sum or fixed percentage of revenues generated. The Vertical Guidelines indicate that the method used should allow the agent to easily distinguish the relevant amounts from other amounts paid to the agent. Where an agent incurs one or more of the above risks to a degree that is more than insignificant, the Vertical Guidelines indicate the Commission would consider that the agreement would not qualify as a genuine agency agreement and that article 101 TFEU may therefore apply as if the agreement were a standard distribution agreement.

Law stated - 30 January 2024

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

Where the 'centre of gravity' of a given vertical agreement is the licensing of IPRs, EU competition rules are applied somewhat differently. The relevant considerations go beyond the scope of this publication and include the application of the Commission's Technology Transfer Block Exemption (which was renewed in March 2014 and is due to expire on 30 April 2026). The VBER and the Commission's Vertical Guidelines will apply to agreements granting IPRs only where these 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.

Law stated - 30 January 2024

ANALYTICAL FRAMEWORK FOR ASSESSMENT

Framework
Explain the analytical framework that applies when assessing vertical restraints under antitrust law.

Article 101 of the Treaty on the Functioning of the European Union (TFEU) may apply to vertical restraints provided they are not:

- concluded by public entities carrying out non-economic activities;
- 'genuine agency' arrangements; or
- concluded among related companies.

If none of the above criteria is met, then an agreement containing a vertical restraint may be subject to review under article 101 TFEU. There are a series of steps to be taken in determining whether and how article 101 TFEU may apply to a vertical restraint.

First, does the agreement lead to an appreciable effect on trade between EU member states? If there is no effect on trade between EU member states, then article 101 TFEU will not apply (but member-state level competition rules may apply).

Second, if there is an appreciable effect on trade between EU member states, does the vertical agreement contain a hardcore restraint? Hardcore vertical restraints are:

- the fixing of minimum resale prices, which incorporates certain minimum advertised price policies;
- certain types of restriction on the customers to whom, or the territories into which, a buyer can sell the contract goods;
- certain restrictions on members of a selective distribution system supplying each other or end users;
- restrictions on component suppliers selling components as spare parts to the buyer's finished product; and
- those restraints that prevent the effective use of the internet by the buyer or its customers to sell the contact goods or services by restricting the customers to whom, or the territories into which, the goods may be sold.

If the agreement contains a hardcore restraint, it:

- will not benefit from the safe harbour created by the Commission's De Minimis Notice;
- will not benefit from the safe harbour created by the VBER; and
- is highly unlikely to satisfy the conditions of article 101(3) TFEU.

The Commission's Vertical Guidelines also explain that the inclusion of a hardcore restraint in a vertical agreement effectively gives rise to a reversal of the burden of proof. Unless the parties involved can demonstrate that the hardcore restraint gives rise to pro-competitive efficiencies, the Commission is entitled to assume – rather than having to prove – negative effects on competition under article 101(1) TFEU.

Third, if the agreement contains no hardcore vertical restraints, are the parties' positions on the relevant markets sufficiently minor such that the Commission's De Minimis Notice may apply? If the criteria of the De Minimis Notice are met, then the Commission will not consider that the agreement falls within article 101(1) TFEU as it does not appreciably restrict competition.

Fourth, does the agreement fall within the VBER? If the agreement falls within the scope of the VBER, it will benefit from a safe harbour and thus not be deemed to infringe article 101 TFEU. This safe harbour will apply concerning decisions taken not only by the Commission but also by member state competition authorities and courts in their application of article 101 TFEU.

Finally, where the vertical agreement does have an effect on trade between member states and does not fall within the terms of the Commission's De Minimis Notice or the Commission's VBER, it is necessary to conduct an individual assessment of the agreement to determine whether it falls within article 101(1) TFEU and, if so, whether the conditions for an exemption under article 101(3) TFEU are satisfied. The Vertical Guidelines and the Commission Notice (Guidelines on the application of article 81(3) of the Treaty (now article 101(3) TFEU)) provide detailed guidance on how to conduct this individual assessment.

Law stated - 30 January 2024

Market shares

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

The Commission has taken an increasingly economic approach when assessing individual restraints. As such, it considers several factors in its analysis. The factors routinely taken into account in determining whether restraints in vertical agreements fall within article 101(1) TFEU are set out in the Commission's Vertical Guidelines, namely:

- supplier market position;
- buyer market position;
- competitor market positions;
- barriers to entry;
- market maturity;
- the level of trade affected by the agreement; and
- the nature of the product concerned.

Supplier market position is arguably the single most important of these factors. 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 greater than 30 per cent.

Where an agreement falls within article 101(1) TFEU, the Vertical Guidelines also set out the factors that will determine whether an agreement satisfies article 101(3) TFEU (and, therefore, qualifies for exemption from the prohibition in article 101(1) TFEU):

- whether the agreement produces objective economic benefits;
- whether consumers receive a fair share of the resulting benefit of the agreement;
- whether the restriction of competition is indispensable for the attainment of those benefits; and
- whether the agreement allows the parties the possibility of eliminating competition in respect of a substantial part of the goods or services concerned.

The Commission will also normally take into account the cumulative impact of a given supplier's agreements in a relevant market when assessing the impact of a vertical restraint on competition. Also, the assessment of a given vertical restraint can vary depending on the vertical restraints concluded by that supplier's competitors. If the vertical restraints imposed by the supplier and its competitors have the cumulative effect of excluding others from the relevant market, then any vertical restraints that contribute significantly to that exclusion may be found to infringe article 101 TFEU. This kind of analysis has frequently been employed concerning the brewing industry. Article 6 of the VBER allows the Commission, by regulation, to disapply the VBER to parallel networks of similar vertical restraints. This means that all undertakings whose agreements are defined in any such Commission regulation would be excluded from the safe harbour of the VBER. However, this is a power to which, to the authors' knowledge, the Commission last had recourse in 1993.

Law stated - 30 January 2024

Market shares

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?

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 greater than 30 per cent.

The relevant market on which the buyer's share must be assessed is that for the purchase of the contract goods and their substitutes or equivalents.

Concerning supplier market shares, the Commission may also take into account the cumulative impact of a buyer's agreements when assessing the impact of vertical restraints on competition in a given purchasing market. Also, 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 TFEU. Article 6 of the Vertical Block Exemption also allows the Commission, by regulation, to disapply the Vertical Block Exemption to any agreement which would usually benefit from the Vertical Block Exemption, but is otherwise incompatible with article 101(3) TFEU. However, this is a power to which, to the authors' knowledge, the Commission last had recourse in 1993.

Law stated - 30 January 2024

BLOCK EXEMPTION AND SAFE HARBOUR

Function

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.

Commission Regulation (EU) No. 2022/720 of 10 May 2022 (Vertical Block Exemption Regulation) (VBER) provides a safe harbour for certain agreements containing vertical restraints. The safe harbour means that, if an agreement satisfies the conditions of the VBER, neither the Commission, nor EU member-state competition authorities or courts, can determine that the agreement infringes article 101 of the Treaty on the Functioning of the European Union (TFEU) unless a prior decision (having a prospective effect only) is taken to withdraw the benefit of the VBER from the agreement. The recitals to the VBER also clarify that, provided the relevant market share thresholds are not exceeded, vertical agreements can (in the absence of hardcore restrictions) be presumed to lead to an 'improvement in production or distribution and allow consumers a fair share of the resulting benefits'.

The VBER requires that the agreement in question be vertical (ie, the parties operate at different levels of the market 'for the purposes of the agreement'). Parties to an agreement who compete in other product markets, but not the contract product market, can benefit from the VBER, provided they are not 'actual or potential competitors' in relation to the contract products.

If the VBER is to apply, neither the supplier's nor the buyer's market share can exceed 30 per cent of the relevant market for the products in question.

Where one of the relevant market shares temporarily moves above 30 per cent during the agreement, the safe harbour under the VBER still applies but, if the market shares remain above 30 per cent, then the VBER will cease to apply.

Where the agreement contains hardcore restraints, the VBER safe harbour will not apply at all. This means that other, lesser, restraints in the agreement that would otherwise have benefited from the certainty of protection provided by the VBER will not be able to benefit from that protection.

If certain lesser restraints are included in the vertical agreement (ie, non-compete obligations with a fixed term exceeding five years in duration, post-term non-compete obligations, and restrictions obliging members of a selective distribution system not to stock the products of an identified competitor of the supplier), these restraints themselves may be unenforceable. However, unlike hardcore restraints, these lesser restraints can be severed from the agreement, and so the inclusion of these lesser restraints will not preclude the rest of the agreement from benefiting from the VBER's safe harbour.

Law stated - 30 January 2024

TYPES OF RESTRAINT

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

The Commission considers that the setting of minimum resale prices constitutes a hardcore restriction of competition. As such, it will almost always fall within article 101(1) of the Treaty on the Functioning of the European Union (TFEU), but outside the safe harbours of the De Minimis Notice and Commission Regulation (EU) No. 2022/720 of 10 May 2022 (Vertical Block Exemption Regulation) (VBER), and is generally considered unlikely to qualify for exemption under article 101(3) TFEU.

Of equivalent effect to clear-cut price-fixing restrictions are agreements fixing the maximum level of discount, fixing the resale margin, or making the grant of rebates or reimbursement of promotional costs conditional on adhering to certain price levels, among others. Setting maximum resale prices or recommended resale prices from which the distributor is permitted to deviate without penalty may be permissible (provided these do not amount to fixed or minimum selling prices as a result of pressures from, or the offer of incentives by, the seller). However, the Commission can view these arrangements with suspicion in concentrated markets, as it considers that these practices may facilitate collusion among suppliers.

The Vertical Guidelines, as updated in May 2022, now clarify that, as a general rule, minimum advertised pricing policies (MAPPs) that prohibit a distributor from advertising prices below a level set by the supplier will be treated as a form of resale price maintenance (RPM), and therefore will not be able to benefit from the safe harbour of the VBER. However, the Vertical Guidelines also state that a MAPP may be able to avoid falling foul of article 101(1) TFEU by demonstrating that it fulfils the conditions of article 101(3) TFEU. This may be the case, for example, where a MAPP is used to prevent a particular distributor 'loss leading' or selling below cost to the detriment of competition between distributors.

Law stated - 30 January 2024

Assessment of restrictions

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 Vertical Guidelines suggest that the Commission will consider arguments as to the efficiencies associated with RPM restrictions where these restrictions are of limited duration (of two to six weeks in most cases) and relate to the launch of a new product or the conduct of a short-term low-price campaign, or consist of a supplier using a targeted minimum resale price or MAPP to prevent a particular distributor from using the supplier's product as a loss-leader. However, the Vertical Guidelines state that any efficiency defence will need to be substantiated with concrete evidence to demonstrate that the conditions set out in article 101(3) TFEU are met.

Law stated - 30 January 2024

Relevant decisions

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

Yes, in several cases and in its Vertical Guidelines, the Commission has highlighted the possible links between RPM and other forms of restraint.

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

Also, in its 2003 *Yamaha* decision, the Commission noted that the distribution agreements in question, 'by restricting sales outside the territories and limiting the dealer's ability to determine its resale prices, were complementary and pursued the same object of artificially maintaining different price levels in different countries.'

The Vertical Guidelines also note that direct or indirect means of price-fixing can be made more effective when combined with measures such as a price-monitoring system, or price reporting of other distributors.

The Vertical Guidelines acknowledge that price monitoring software is often used for legitimate purposes in e-commerce, but also that it can be used as a method of applying, or enforcing, RPM.

Law stated - 30 January 2024

Relevant decisions

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

To the authors' knowledge, no Commission decisions or EU court judgments relating to standard types of RPM have focused on efficiencies. However, it has been recognised in certain EU court judgments, such as ***Metro v Commission*** (1977) and ***AEG-Telefunken v Commission*** (1983), that there may be a causal link between the maintenance of a certain price level and the survival of a specialist trade. In such a scenario, the EU courts considered that the detrimental effect on competition caused by the price restriction may be counterbalanced by improved competition regarding the quality of the services supplied to customers.

The Commission's Vertical Guidelines also note that there may be efficiencies associated with RPM restrictions, particularly where it is supplier-driven and where it relates to:

- the introduction of a new product;
- the conduct of a short-term low-price campaign that will also benefit consumers;
- the prevention of a particular distributor using the product of a supplier as a 'loss-leader'; and/or
- the sale of 'experience' or 'complex' products concerning which the supplier must support retailers providing desirably high levels of pre-sales service.

Law stated - 30 January 2024

Relevant decisions

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.

The Commission's Vertical Guidelines indicate that setting a fixed or minimum resale price to be observed by the buyer constitutes a hardcore restriction of competition and that such a fixing of resale prices can be achieved through indirect means, including 'linking the prescribed resale price to the resale prices of competitors'. Thus, these 'pricing relativity' agreements will almost always fall within article 101(1) TFEU, but outside the safe harbours of the De Minimis Notice and the VBER, and will be generally considered unlikely to qualify for an individual exemption under article 101(3) TFEU.

Law stated - 30 January 2024

Suppliers

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.

'Narrow' retail parity obligations can benefit from the safe harbour set out in the block exemption. Narrow retail parity obligations are those which prevent a supplier from using a particular platform to offer products to end users at lower prices or better conditions. Article 6 VBER provides that the benefit of the VBER's safe harbour may be withdrawn for narrow retail parity obligations in concentrated platform markets where there is widespread usage of narrow retail parity obligations (though, to the authors' knowledge, this power to withdraw the benefit of the safe harbour under the VBER is a power the Commission last used in 1993).

In contrast, as set out in article 5 VBER, 'wide' retail parity obligations are generally excluded from the benefit of the block exemption, meaning that they will be assessed under the standard tests under article 101(1) and 101(3) TFEU. Wide retail parity obligations are those where a supplier is prevented from offering the same products to end users at lower prices or under better conditions via competing platforms.

Law stated - 30 January 2024

Suppliers
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.

Across-platform (or 'wide') retail parity obligations will not benefit from the safe harbour under the VBER. Article 5(1)(d) of the VBER and the Vertical Guidelines make clear that the VBER's safe harbour does not apply to any direct or indirect obligation imposed by a supplier of online intermediation services that causes a buyer of those online intermediation services not to offer, sell or resell goods or services to end users under more favourable conditions via competing online intermediation services. The Vertical Guidelines explain that such obligations could be through direct means, such as a contractual restraint, or indirect means, such as through differential pricing or lower commission dependent upon the parity obligation.

Other types of parity obligation, including those that relate to the wholesale, rather than retail, level of distribution, may benefit from the block exemption provided in the VBER.

Law stated - 30 January 2024

Suppliers
Explain how a supplier preventing a buyer from advertising its products for sale below a certain price (but allowing that buyer subsequently to offer discounts to its customers) is assessed.

Under the Vertical Guidelines, such an agreement, called a minimum advertised price policy (MAP policy or MAPP) is now considered to be a form of resale price maintenance (RPM). RPM, and by extension MAPs, will therefore generally be considered to be a hardcore restriction that will infringe article 101(1) TFEU and will not be able to benefit from the safe harbour under the VBER.

In determining whether a particular MAPP amounts to RPM, there will be an assessment of whether the buyer is de facto free to set prices as it sees fit. A buyer will generally not be considered free to set its own prices where the supplier actively disincentivises the buyer from doing so (especially via punitive measures, price monitoring, etc) or incentivises adherence to a minimum advertised price (eg, through the promise of more favourable terms in the future).

Even where an MAPP does amount to RPM, the Vertical Guidelines envisage certain situations where such a MAPP may be able to qualify for an individual exemption under article 101(3) TFEU. This includes situations such as:

- the introduction of a new product;
- the conduct of a short-term low-price campaign that will also benefit consumers;
- the prevention of a particular distributor using the product of a supplier as a 'loss-leader'; and/or
- the sale of 'experience' or 'complex' products concerning which the supplier must support retailers providing desirably high levels of pre-sales service.

Outside of these narrow circumstances, MAPPs should be approached with caution.

Law stated - 30 January 2024

Suppliers

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.

Parity obligations relating to the conditions under which manufacturers, wholesalers or retailers purchase goods or services as inputs ('most favoured customer' obligations) can benefit from the block exemption (assuming that the other conditions of the VBER are met).

The Vertical Guidelines indicate that the main competition concern with these obligations is that they may raise input prices by reducing the incentives of input suppliers to compete. Relevant factors include the relative size and market power of the supplier and buyer, the share of the relevant market covered by similar obligations and the cost of the input relative to the buyer's total costs.

The Commission has also suggested that, in sectors 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 those arrangements may increase prices overall and may increase the risk of price coordination, as well as increasing the risk of a foreclosure on the upstream market.

Arguably, the most interesting example of a Commission investigation into these restrictions occurred in 2004, when the Commission investigated most-favoured-nation (MFN) clauses in agreements between six Hollywood film studios and European pay-TV companies. The agreements provided for the film studios selling their entire stock of films to the pay-TV companies for several years. The MFN clauses 'gave the studios the right to enjoy the most favourable terms agreed between a pay-TV company and any one of them. . . . According to the Commission's preliminary assessment, the cumulative effect of MFN clauses was an alignment of the prices paid to the studios as any increase agreed with one studio triggered a right to a parallel price increase for other studios. The Commission considers that such a way of setting prices is at odds with the basic principle of price competition'.

The Commission closed its investigation after the studios agreed to waive the MFN clauses in existing agreements.

Law stated - 30 January 2024

Restrictions on territory

How is restricting the territory into which a buyer may resell contract products assessed? In what circumstances may a supplier require a buyer of its products not to resell the products in certain territories?

Restrictions preventing a buyer selling the contract products from one EU member state into another can be among the most serious infringements of article 101 TFEU. Recent examples of Commission enforcement concerning cross-border sales restrictions include the fines imposed on Nike (€12.5 million in March 2019), Sanrio (€6 million in March 2019) and Universal Studios (€14.3 million in January 2020), for banning traders in one country from actively or passively selling licensed merchandise to customers in other countries within the European Economic Area. In July 2023, the Commission sent a statement of objections to Pierre Cardin and its licensee Ahlers setting out its preliminary view that the companies may have engaged in anticompetitive conduct by affording Ahlers absolute territorial protection in the countries covered by its licensing agreements with Pierre Cardin in the EEA. The companies were alleged to have restricted the ability of other Pierre Cardin licensees to sell the licensed clothing offline or online into Ahlers' EEA licensed territories, or to low-price retailers in such territories.

The Commission has tended to see absolute territorial restrictions (ie, bans on passive and active cross-border sales) as hardcore restraints that will almost always fall within the scope of the prohibition set out in article 101(1) TFEU, will fall outside the safe harbours of the De Minimis Notice and the VBER, and will seldom qualify for exemption under article 101(3) TFEU.

Judgments of the Court of Justice of the European Union (CJEU) in ***Football Association Premier League Ltd & Others v QC Leisure & Others*** (2011), ***GlaxoSmithKline v Commission*** (2009) and ***Sot Lélos kai Sia and Others*** (2008) have confirmed that an agreement intending to limit trade between EU member states must, in principle, be considered a restriction of competition 'by object'. Since these restrictions are classed as 'by object' restrictions of competition, the Commission is not obliged to analyse the competitive effects of the agreement before concluding that it falls within article 101(1) TFEU.

Despite the above, there are some types of restriction on cross-border sales that are unlikely to represent breaches of article 101 TFEU. Most notably, provided the other conditions of the VBER are met (including supplier and buyer market shares less than 30 per cent), provided the restrictions at issue only relate to active sales (ie, they do not restrict passive or unsolicited sales), and provided the restrictions only relate to sales into territories allocated on an exclusive basis to another buyer (or to the supplier itself), restrictions on cross-border sales will fall within the safe harbour created by the VBER. As such, they will not be deemed to infringe article 101 TFEU. Where restrictions on active sales into territories reserved exclusively to another buyer (or to the supplier itself) are imposed in agreements between a supplier or buyer having a market share greater than 30 per cent, these arrangements will not fall within the VBER's safe harbour but may still qualify for individual exemption under article 101(3) TFEU. As of June 2022, the VBER extends this protection to shared exclusivity agreements, allowing the restrictions on active sales into territories reserved to up to a maximum of five 'exclusive' (or limited) distributors per territory or customer group. Where more than one distributor is appointed for an exclusive territory or customer group, although active sales by distributors appointed in other territories (or for other customer groups) can be prevented, neither active nor passive sales by the distributors appointed within the same 'exclusive' territory (or customer group) can be restricted. Additionally, a supplier may require its other distributors to oblige their direct customers not to make active sales into an exclusive territory or to an exclusive customer group, or territory or group reserved to itself. However, the supplier may not require such other buyers to pass on the active sales restrictions to customers further down the distribution chain.

The Commission's Vertical Guidelines also set out that, where a buyer is engaged in genuine testing of a new product in a limited territory, or in a staggered introduction of a new product, restrictions on active sales outside that territory may not fall within article 101(1) TFEU for the period of the genuine testing or staggered introduction.

Law stated - 30 January 2024

Restrictions on territory

Have decisions or guidance on vertical restraints dealt in any way with restrictions on the territory into which a buyer selling via the internet may resell contract products?

This is an area of considerable Commission focus. Restraints preventing a buyer from selling contract products from one EU member state into another can be among the most serious infringements of article 101 TFEU. These agreements face heightened scrutiny because they tend to restore the divisions between national markets that the European Union aims to abolish.

However, a supplier may by agreement restrict a distributor from making active sales into a territory allocated exclusively to another distributor or which the supplier has reserved exclusively to itself. The Commission's Vertical Guidelines identify as examples of active selling in an online context both offering a language option in an online store that is different from the languages commonly used in the sellers' territory of establishment (with the exception of the English language) and establishing an online store with a top-level domain corresponding to a territory other than the one in which the seller is established (whereas non-country specific domain names are a form of passive selling).

The Commission has been particularly active in its enforcement of restrictions amounting to passive sales via the internet, with recent cases including:

- a January 2021 decision (upheld by the General Court in 2023) imposing fines totalling €7.8 million on Valve – owner of the online PC gaming platform Steam – and five video game publishers Bandai Namco, Capcom, Focus Home, Koch Media and ZeniMax for engaging in geo-blocking of certain video games sold online for personal computers;
- a February 2020 decision whereby the Commission fined Melia hotels €6.7 million for causing a number of its distributor travel agencies to discriminate on pricing as between customers in the different EU member states and to agree not to sell at the rate for customers in one country to customers in another country;
- a July 2018 decision whereby the Commission imposed a fine of €10 million on Pioneer for various practices including the use of a tracking system to monitor sales by buyers to customers outside specified territories, and the adoption of measures to discourage or prevent buyers from making cross-border and online sales; and
- a December 2018 decision whereby the Commission imposed a fine of €40 million on fashion chain Guess for unlawfully restricting its buyers from (among other things) selling outside their allocated territories or cross-selling to other buyers.

Law stated - 30 January 2024

Restrictions on customers

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 concerning territorial restrictions and tend to be viewed by the Commission as hardcore restrictions. As such, absolute restrictions on a buyer's sales to particular classes of customer will almost always fall within article 101(1) TFEU, will fall outside the safe harbours of the De Minimis Notice and the VBER, and will seldom qualify for exemption under article 101(3) TFEU.

There are certain key exceptions to this rule.

First, as with territorial restrictions, if the customer restriction applies only to active sales (ie, it does not restrict passive or unsolicited sales) to customers of a class allocated exclusively to another buyer (up to a maximum of five distributors per exclusive territory) (or reserved to the supplier itself), the arrangement may fall within the VBER's safe harbour, provided the VBER's various conditions are met (including supplier and buyer market shares less than 30 per cent). However, according to the Commission's Vertical Guidelines, if such customer restrictions are imposed by suppliers having a market share greater than 30 per cent, they are unlikely to benefit from individual exemption under article 101(3) TFEU (although the Vertical Guidelines state that the arguments for an individual exemption in these cases are strongest where the dealer invests in specific equipment, skills or know-how, for new or complex products and where products require adaptation to the needs of individual customers).

Second, restrictions on a wholesaler selling directly to end users can also fall within the VBER's safe harbour.

Third, restrictions on a buyer's ability to sell components, supplied for incorporation, to customers who would use them to manufacture the same type of products as those produced by the supplier can fall within the VBER's safe harbour.

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

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

Law stated - 30 January 2024

Restrictions on use

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

In general, a restriction on a buyer's freedom to use the contract products as he or she sees fit amounts to a restriction of competition within the meaning of article 101(1) TFEU. (See, eg, the EU court judgment in ***Kerpen & Kerpen*** (1983) and the Commission decision in ***Sperry New Holland*** (1985).)

However, objectively justifiable restrictions on the uses to which a buyer (or subsequent buyer) puts the contract goods are permissible and will not fall within article 101(1) TFEU.

The Commission's Vertical Guidelines also suggest that this may be the case where a restriction aims to implement a public ban on selling dangerous substances to certain customers for reasons of safety or health. Nonetheless, for such restrictions to be objectively justifiable, the supplier would likely have to impose the same restrictions on all buyers and adhere to these restrictions itself.

Law stated - 30 January 2024

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

Article 4(e) of the VBER provides that restrictions on online sales are hardcore – and therefore prevent an agreement from benefitting from the safe harbour under the VBER – when they, directly or indirectly, in isolation or combination with other factors, have the object of preventing buyers or their customers from effectively using the internet to sell the contract goods or services. This includes restrictions that have the object of preventing the use of one or more entire online advertising channels. The Vertical Guidelines provide examples of the types of internet-related restrictions that will be deemed hardcore restrictions and will therefore prevent the application of the safe harbour set out in the VBER. These hardcore internet restrictions include:

- automatic re-routing of customers to the online store of the manufacturer of another seller;
- requiring sales to be made in a physical store only;
- banning the use of a supplier's brand name or trademarks online;
- requiring the supplier's prior authorisation before making individual online sales transactions;
- prohibiting the buyer from establishing or operating online stores;
- prohibiting the buyer from using an entire online advertising channel, such as the most widely used search engines or price comparison services; or
- automatic termination of a customer transaction on the basis that the customer's credit card data reveal an address outside the distributor's (exclusive) territory.

However, the Vertical Guidelines clarify that a supplier may require a buyer to:

- adhere to quality standards regarding its internet site;
-

limit online advertising only insofar as such a restriction does not amount to a de facto ban on the use of an entire advertising channel (eg, bans on search engine advertising would not be permitted);

- refrain from using online marketplaces;
- maintain one or more brick-and-mortar shops or showrooms before engaging in online distribution; and
- sell a certain absolute amount (in value or volume) of the products offline to ensure an efficient operation of the brick-and-mortar shop.

The Commission no longer, under the Vertical Guidelines, requires restrictions on online sales to be equivalent to those imposed on brick-and-mortar sales, so long as such conditions do not have the object of preventing the effective use of the internet to sell the product or service in question.

Law stated - 30 January 2024

Restrictions on online sales

Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel? In particular, have there been any developments in relation to 'platform bans'?

The VBER and Guidelines were updated in May 2022 and have specifically addressed vertical restraints and internet sales channels and platform bans.

The Commission's Vertical Guidelines do not distinguish between different types of internet sales channel, but they do provide some guidance on the use of third-party platforms. The Guidelines also make clear that price comparison services are not a distinct online sales channel, but are an online advertising channel.

Article 4(e) of the VBER excludes from the benefit of the block exemption any vertical agreements that 'have as their object … the prevention of the effective use of the internet by the buyer or its customers to sell the contract goods or services … '. Recital 15 of the VBER states that any online sales restriction that has as its object the restriction of the aggregate volume of online sales or the possibility for customers to buy goods and services online is a hardcore restriction.

However, online sales restrictions may be permissible in the following circumstances:

- if online sales restrictions or platform bans are necessary to maintain the quality of a particular product;
- where the ban relates to a particular marketplace;

- where there is a restriction on online advertising, to the extent that such a restriction does not amount to the banning of the use of an entire advertising channel (eg, search engine advertising);
- where there is a requirement to operate an offline store; and
- where there is a requirement to make a certain volume of sales offline.

The following online restrictions will remain unlawful hardcore restrictions under the updated VBER and Vertical Guidelines:

- a complete ban on online sales;
- banning the use of a supplier's brand on a website;
- blocking online sales in a particular territory (via re-routing, banning foreign credit cards, etc); and
- requiring a certain proportion of sales to be made offline (however, it is permissible to require a certain minimum absolute amount (in value or volume) of the goods or services be sold offline to ensure the efficient operation of offline shops).

Law stated - 30 January 2024

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

Following the CJEU's judgment in ***Metro v Commission***, selective distribution systems will fall outside article 101(1) TFEU where buyers are selected on objective criteria of a purely qualitative nature. To fall outside article 101(1) TFEU:

- the contract products must be of a kind necessitating selective distribution to preserve their quality and ensure their proper use (eg, technically complex products where after-sales service is of paramount importance);
- the criteria by which buyers are selected must be objective, laid down uniformly for all potential buyers and not applied in a discriminatory manner (though there is no necessity that the selection criteria be published); and
- the restrictions imposed must not go beyond that which is necessary to protect the quality and image of the product in question.

However, in any event, a selective distribution system will be block exempted under the VBER, regardless of compliance with the ***Metro*** criteria above where neither party to the agreement has a market share exceeding 30 per cent and the agreement does not contain any hardcore restrictions. Such hardcore restrictions that may mean a selective distribution system cannot benefit from the block exemption include where:

- resale prices are fixed;
- active or passive sales to end-users are restricted; and
- cross-supplies among members of the system are restricted.

Separately, the Vertical Guidelines, state that a selective distribution system must not prevent distributors effectively using the internet to sell goods or services, except in limited circumstances, such as to maintain the quality of a product or by demanding that an offline store is also operated. Also, 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 benefiting overall from the safe harbour under the VBER.

Certain restrictions frequently incorporated into selective distribution systems are also expressly permitted, including the restriction of active or passive sales to non-members of the network within a territory reserved by the supplier to operate that selective distribution system (ie, where the system is currently operated or where the supplier does not yet sell the contract products).

Law stated - 30 January 2024

Selective distribution systems

Are selective distribution systems more likely to be lawful where they relate to certain types of product? If so, which types of product and why?

According to the CJEU's judgments in ***Metro v Commission*** and ***Pierre Fabre Dermo-Cosmétique***, selective distribution systems may fall outside the prohibition in article 101(1) TFEU where the contract products are of types that necessitate selective distribution to preserve their quality or ensure their proper use. The Commission also states in its Vertical Guidelines that the nature of the contract products may be relevant to the assessment of efficiencies under article 101(3) TFEU (to be considered where selective distribution systems fall within the prohibition under article 101(1) TFEU but outside the scope of the VBER). In particular, the Commission notes that efficiency arguments under article 101(3) TFEU may be stronger concerning new or complex products, 'experience' products (whose qualities are difficult to judge before purchase), or 'credence' products, whose qualities are difficult to judge even after consumption. The Commission has also recognised the need for selective distribution concerning newspapers in***Binon & Cie v Agence et Messageries de la Presse***, as newspapers can only be sold during a limited period.

Law stated - 30 January 2024

Selective distribution systems

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?

There is no requirement for internet sales criteria to mirror offline sales criteria, so long as such criteria do not have the object of preventing the effective use of the internet to sell the product or service in question.

Article 4(e) VBER states that the Vertical Block Exemption shall not apply to agreements that have, as their object, the prevention of the effective use of the internet to sell contract goods or services. This is without prejudice to the possibility of imposing on the buyer other restrictions of online sales or restrictions of online advertising that do not have the object of preventing the use of an entire online advertising channel.

The Vertical Guidelines provide examples of the types of internet-related restrictions that will likely be permissible regardless of the type of distribution system. As such, approved distributors in a selective distribution system can be required:

- to adhere to quality standards regarding internet sites;
- to limit online advertising (albeit only insofar as such a restriction does not amount to a de facto ban on the use of an entire advertising channel (eg, bans on search engine advertising would not be permitted));
- to refrain from using online marketplaces;
- to maintain one or more brick-and-mortar shops or showrooms before engaging in online distribution; and
- to sell a certain absolute amount (in value or volume) of the products offline to ensure an efficient operation of the brick-and-mortar shop.

Law stated - 30 January 2024

Selective distribution systems
Has the authority taken any decisions in relation to actions by suppliers to enforce the terms of selective distribution agreements where such actions are aimed at preventing sales by unauthorised buyers or sales by authorised buyers in an unauthorised manner?

The Commission's 1991 *Yves Saint Laurent Parfums* decision considered enforcement and monitoring measures in selective distribution systems. The decision sets out the Commission's view that it is not in itself a restriction of competition for a supplier to check an authorised distributor's sales invoices, provided the monitoring is expressly limited to cases in which the supplier has evidence that the distributor has been involved in reselling to unauthorised distributors.

Law stated - 30 January 2024

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

Yes. The Commission's Vertical Guidelines state that 'possible negative effects of vertical restraints are reinforced when several suppliers and their buyers organise their trade in a similar way, leading to so-called cumulative effects.'

In *Peugeot* (1986), the Commission noted that the restrictive effects of an agreement may be 'magnified by the existence of similar exclusive and selective distribution systems operated by other vehicle manufacturers'. This followed the approach taken by the CJEU in *Metro v Commission*, in which the court pointed to the prevalence of selective distribution networks across the relevant market as being among the criteria for determining whether a given network creates a restriction of competition within article 101(1) TFEU (since the pervasiveness of the systems 'does not leave any room for other forms of distribution . . . or [result] in a rigidity in price structure which is not counterbalanced by other aspects of competition between products of the same brand and by the existence of effective competition between different brands').

Also, in its 1996 *Leclerc v Commission* judgment, the EU General Court explained that article 101(1) TFEU may be applicable where most or all manufacturers in a certain sector use selective distribution and 'the selective distribution systems at issue have the effect of constraining distribution to the advantage of certain existing channels or that there is no workable competition, in particular as regards price, taking account of the nature of the products at issue'.

However, the Commission's Vertical Guidelines also note that, concerning individual networks of selective distribution, cumulative effects will likely not be a significant factor in the competitive assessment where the share of the market covered by selective distribution is less than 50 per cent, or where the market covered by selective distribution is greater than 50 per cent, but the five largest suppliers have an aggregate market share of less than 50 per cent.

Law stated - 30 January 2024

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

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

- restricting an approved buyer's ability to actively or passively sell to a territory or customer group, except:
  - where such a territory or customer group is allocated exclusively to the supplier or allocated by the supplier exclusively to other exclusive distributors;
  - where the excluded customer group consists of unauthorised distributors;
  - restrictions on the distributor's place of establishment;
  - where the restriction is on the wholesale level; or
  - where the restriction is on the sale of components to customers who would use those components to manufacture a product similar to the one produced by the supplier;
- restricting buyers that are part of the same selective distribution system trading between each other (ie, cross supplies between approved buyers); and
- restricting active or passive sales to end users by approved members operating at the retail level of trade, except as outlined above.

As updated in May 2022, article 4(c) of the VBER grants selective distribution systems enhanced protection in that suppliers may now prohibit buyers and their customers from selling to unauthorised distributors located in a territory where the supplier operates a selective distribution system, regardless of whether those buyers and customers are themselves located inside or outside that territory.

Law stated - 30 January 2024

Other restrictions

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

Such an arrangement may raise concerns regarding market partitioning. Where the supplier insists that a given buyer must buy all of its requirements of the supplier's products from, for example, the supplier's local subsidiary, this may prevent the ordinary arbitraging that would otherwise occur. On its own, however, this restriction, known as 'exclusive purchasing' will only fall within article 101(1) TFEU where the parties have a significant market share and the restrictions are of long duration. Where the supplier and buyer have market shares of 30 per cent or less, the restriction will benefit from the safe harbour of the VBER, regardless of duration.

According to the Vertical Guidelines, exclusive sourcing is most likely to contribute to an infringement of article 101 TFEU where it is combined with other arrangements, such as exclusive distribution. Where combined with exclusive distribution, an exclusive sourcing obligation would have the effect of preventing the members of the system from cross-supplying to each other and would therefore constitute a hardcore restriction, falling within the prohibition under article 101 TFEU.

Law stated - 30 January 2024

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

In a selective distribution context, the Commission (in ***Yves Saint Laurent Parfums*** (1991)) and the EU General Court (in ***Leclerc v Commission*** (1996)) have accepted as permitted under article 101 TFEU a requirement that certain products must not be sold near-luxury products (for instance, that foodstuffs or cleaning products be sufficiently separated from luxury cosmetics). However, the EU's General Court clarified that the sale of other products is not in itself capable of harming the luxury image of the products at issue, provided that the place or area devoted to the sale of the luxury products is laid out in such a way that the luxury products in question are presented in 'enhancing' conditions.

Law stated - 30 January 2024

Other restrictions
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 fall within article 101(1) TFEU, although this will depend on the exact effects of the restriction in question, which will be determined by reference, inter alia, to the duration of the restraint, the market position of the parties and the relative ease of market entry for other potential suppliers.

The Vertical Guidelines indicate that the possible competition risks of non-compete obligations include foreclosure of the market for competing suppliers, softening of competition, the facilitation of collusion between suppliers and, where the buyer is a retailer, loss of in-store inter-brand competition.

However, the Commission also recognises that these clauses can be pro-competitive because, for example, they give a guarantee of sales to the supplier and a guarantee of continuous supply to the buyer. As such, provided non-compete clauses do not have a duration exceeding five years, they may benefit from safe-harbour protection under the VBER (if the other criteria for its application are met). Non-compete obligations that are tacitly renewable beyond a period of five years are now covered by the VBER, as of June 2022. If the criteria for the application of the VBER are not met, non-compete clauses may nevertheless fall outside the scope of article 101(1) TFEU or may satisfy the conditions for exemption under article 101(3) TFEU, depending on the market positions of the parties, the extent and duration of the clause, barriers to entry and the level of countervailing buyer power.

Post-term non-compete provisions are subject to a similar analysis and those with a duration of no more than one year following the termination of the contract will benefit from the safe harbour under the VBER, provided certain other criteria are satisfied.

Law stated - 30 January 2024

Other restrictions

How is requiring the buyer to purchase from the supplier a certain amount or minimum percentage of the contract products or a full range of the supplier's products assessed?

The Commission considers these clauses to be akin to non-compete clauses, effectively restricting the ability of the buyer to stock products competing with the contract products. They are, therefore, subject to a similar antitrust assessment. In particular, the Commission identifies the following as equivalent to a non-compete obligation:

- obligations on the buyer to purchase 80 per cent or more of its requirements of the products in question from the supplier; and
- incentives or obligations agreed between the supplier and the buyer that make the latter concentrate his or her purchases to a large extent with one supplier (quantity forcing), which take the form of:
    - obligations to purchase minimum volumes amounting to substantially all of the buyer's requirements;
    - obligations to stock complete ranges of the supplier's products; and
    - various pricing practices including quantity discounts and non-linear pricing (under which the more a buyer buys, the lower the price per item).

In November 2018, the Commission opened a formal investigation into agreements between, on one hand, travel agents and airlines, and, on the other hand, certain suppliers of ticket distribution systems, including Amadeus and Sabre, which aggregate information about flight schedules, seat availability and ticket prices from multiple airlines. The Commission considered that the agreements might restrict the ability of travel agents and airlines to use alternative suppliers of ticket distribution systems, thereby inhibiting entry by competing suppliers and increasing costs to airlines and travellers. On 19 July 2021, the Commission stated that it had determined that the evidence was not sufficiently conclusive to justify the continuation of its investigation.

Law stated - 30 January 2024

Other restrictions
Explain how restricting the supplier's ability to supply to other buyers is assessed.

In an exclusive distribution network, as a corollary to 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. Although the Commission's Vertical Guidelines do not deal separately with the restrictions imposed on the supplier in this kind of arrangement, the Vertical Guidelines do acknowledge that the restrictions on the supplier and the buyer 'usually' go hand in hand. These systems should, therefore, be assessed under the framework regarding the assessment of territorial resale restrictions imposed on buyers.

Law stated - 30 January 2024

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

The Commission's Vertical Guidelines do not deal in great detail with restrictions imposed on 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 hardcore restriction of competition. As such, these restrictions will almost always fall within article 101(1) TFEU, but outside the safe harbours of the De Minimis Notice and the VBER, and will seldom qualify for exemption under article 101(3) TFEU.

Law stated - 30 January 2024

Other restrictions
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 Vertical Guidelines deal with upfront access payments (fixed fees paid by suppliers to distributors to access their distribution network and remunerate services provided by the retailers), and category management agreements (where the distributor entrusts the supplier with the marketing of a category of products, including the supplier's products and the supplier's competitors' products). These arrangements will generally fall within the VBER when both the supplier's and buyer's market shares do not exceed 30 per cent.

The Vertical Guidelines also deal with a supplier-specific restriction termed 'exclusive supply', which covers the situation in which a supplier agrees to supply only to one buyer in the European Union. The main anticompetitive effect of those arrangements is the potential exclusion of competing buyers, rather than competing suppliers. As such, the Vertical Guidelines explain that it is the buyer's market share that is most important in the assessment of these restrictions. In particular, negative effects may arise where the market share of the buyer on the downstream supply 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, these restrictions will benefit from the safe harbour created by the VBER.

In January 2017, the Commission announced that it welcomed an agreement between Audible, a subsidiary of Amazon, and Apple to end all exclusivity obligations concerning audiobook supply and distribution, which required Audible not to supply audiobooks to digital platforms other than Apple's iTunes Store, and Apple to source exclusively from Audible. The Commission stated that it expected the removal to allow further competition in the fast-growing and innovative market for downloadable audiobooks.

Finally, in a change from the 2010 vertical block exemption regulation, Article 1(1)(e) VBER defines an online intermediation service (OIS) as a platform that allows undertakings to offer goods or services to other undertakings with a view to facilitating the initiating of direct transactions between those undertakings, or between undertakings and final consumers. The provision of OIS is now excluded from the VBER and an OIS provider cannot be categorised as a buyer in respect of the goods and services sold on the OIS platform. Furthermore, where an OIS provider also sells goods or services on the platform it operates, the OIS provider is considered to undertake a 'hybrid function' (under VBER article 2(6)), whereby its provision of OIS and its use of the platform for selling its own goods will be assessed independently.

Law stated - 30 January 2024

NOTIFICATION

Notifying agreements

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

The Commission abolished its formal prior notification system as part of the modernisation reforms implemented by Council Regulation (EC) No. 1/2003 on 1 May 2004. Subject to the possibility of making requests for informal guidance in novel cases, a notification of a vertical agreement is, therefore, neither necessary nor, in general, advisable. To this extent, companies are now obliged to form their own view on whether an agreement restricts competition under article 101(1) of the Treaty on the Functioning of the European Union (TFEU) and, if so, whether it qualifies for exemption under the Vertical Block Exemption Regulation (VBER).

Law stated - 30 January 2024

Authority guidance

If there is no formal procedure for notification, is it possible to obtain guidance from the authority responsible for antitrust enforcement or a declaratory judgment from a court as to the assessment of a particular agreement in certain circumstances?

The Commission's Informal Guidance notice sets out the circumstances in which it will advise parties on the likely assessment of an agreement under article 101 TFEU.

However, the Commission is highly selective in choosing the arrangements concerning which it will give informal guidance and, given the existence of Commission Regulation (EU) No. 2022/720 of 10 May 2022 (Vertical Block Exemption Regulation) (VBER) and the Vertical Guidelines, it is unlikely that the Commission would issue individual guidance concerning vertical restraints. In general, the Commission considers that parties are well placed to analyse the effect of their own conduct.

Law stated - 30 January 2024

ENFORCEMENT

Complaints procedure for private parties

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

Yes. Private parties showing a legitimate interest (those actually or potentially suffering damage as a result of the conduct in question) can file a complaint with the Commission either formally on the Commission's Form C or informally (including orally or anonymously). The submission of a formal complaint ties the Commission to respond within a given time, which, in principle, is four months. However, the Court of Justice of the European Union (CJEU) and the EU General Court have long held that the Commission has wide discretion in choosing which complaints to pursue.

Law stated - 30 January 2024

Regulatory enforcement

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?

From 1 January 2001 to 6 January 2023, the Commission took about 28 vertical restraints infringement decisions under article 101 of the Treaty on the Functioning of the European Union (TFEU). This only includes cases in which the Commission:

- focused its enforcement on article 101 TFEU, as opposed to article 102 TFEU;
- focused its enforcement on the vertical aspects of practices, rather than any horizontal aspects; and
- either took a formal infringement decision or identified infringements but reached formal settlement agreements with the parties involved.

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

Law stated - 30 January 2024

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

Under article 101(2) TFEU, restrictions of competition infringing article 101(1) TFEU and not qualifying for exemption under article 101(3) TFEU are rendered null and void. The exact consequences of a voidness fining will depend on the text of the agreement itself and the provisions of the applicable national law of contract regarding severability. There are two main alternative consequences: either the entire agreement is void and unenforceable or the prohibited restriction can be severed from the rest of the agreement and the prohibited restriction alone is void and unenforceable.

Law stated - 30 January 2024

Regulatory enforcement
May the authority responsible for antitrust enforcement directly impose penalties or must it petition another entity? What sanctions and remedies can the authorities impose? What notable sanctions or remedies have been imposed? Can any trends be identified in this regard?

Under Council Regulation (EC) No. 1/2003, the Commission itself can impose fines of up to 10 per cent of the worldwide group revenues of the infringing party (or parties) without needing recourse to any court or government agency. Such a decision can be appealed to the EU courts.

In the years from 1 January 2001 to 6 January 2023, the Commission imposed the following fines on the following companies in cases relating to vertical restraints (some of which were reduced or overturned on appeal): Nintendo – €149 million; DaimlerChrysler – €71.8 million; Asus – €63.5 million; Peugeot – €49.5 million; Guess – €39.8 million; Volkswagen – €30.96 million; Universal Studios – €14.3 million; Nike – €12.5 million; Melia Hotels – €6.7 million; Sanrio – €6.2 million; Yamaha – €2.56 million; Topps – €1.59 million; Valve – €1.6 million; Bandai Manco – €0.34 million; Capcom – €0.396 million; Focus Home – €2.888 million; Koch Media – €0.977 million; and ZeniMax – €1.664 million. In several cases, the Commission did not impose fines, but instead required the companies to introduce behavioural or structural remedies, or both, for example:

- in April 2006, the Commission required Repsol to open up certain long-term exclusive supply contracts with Spanish service stations;
- in May 2004, the Commission reached a settlement with Porsche to end the tying of after-sales service provision to the sale of new cars; and
- in April 2003, the Commission approved supply agreements between Interbrew and pubs, restaurants and hotels located in Belgium, on the condition that Interbrew amended the agreements to offer its brewer competitors access to the outlets in question.

While the Commission still actively enforces its rules on vertical restraints, it is fair to suggest that market liberalisation, the reduction of anticompetitive state aid and the fight against cartels have been higher enforcement priorities in recent years. Since suppliers often organise distribution at a national level within individual EU member states, there has been more frequent enforcement of national and EU antitrust rules on distribution by EU member-state-level competition authorities than by the Commission, and the Commission's enforcement has tended to focus on restrictions of cross-border trade within the European Union.

Law stated - 30 January 2024

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

Under Council Regulation (EC) No. 1/2003, the main investigative powers of the Commission are to request (and ultimately require) the production of documents and to conduct announced or unannounced inspections (ie, dawn raids) of business premises and employees' homes and cars. In carrying out these inspections, the Commission is often assisted by the national competition authorities of the EU member states in which the inspections take place. The Commission may also request national competition authorities to undertake, in their territory, the inspections that the Commission considers to be necessary.

Also, the Commission can and does request information from parties domiciled outside the European Union (it has done so in cartel investigations). It can also require that EU-domiciled subsidiaries produce information even where their parent companies are located outside the European Union, provided the information is accessible from the premises of the EU-domiciled subsidiary.

Law stated - 30 January 2024

Private enforcement

To what extent is private enforcement possible? Can non-parties to agreements containing vertical restraints obtain declaratory judgments or injunctions and bring damages claims? Can the parties to agreements themselves bring damages claims? What remedies are available? How long should a company expect a private enforcement action to take?

Although the European Union adopted a directive on antitrust damages actions in November 2014, with the express intention of making it easier to bring antitrust damages actions in the European Union, private enforcement of antitrust breaches is still relatively under-developed, especially when compared with the United States. Private damages actions cannot be brought before the Commission or before the EU courts and must instead be brought in the relevant courts of the EU member states having jurisdiction to hear the case in question. National rules on jurisdiction, recovery of legal costs, remedies and who can bring a claim vary widely across the European Union, with certain jurisdictions, being more claimant-friendly than others. Directive 2014/104/EU (the Damages Directive), which EU member states were required to transpose into national law goes some way towards harmonising rules on limitation periods, disclosure and the 'passing on' defence.

The Commission is required under the Damages Directive to publish guidelines for national courts on passing-on of overcharges to indirect purchasers, although at the date for transposition these guidelines have not been published. At the end of 2020, the Parliament and Council passed a directive (2020/1828) on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC. The new directive introduces a right of collective redress through representative actions in EU member states. Each member state had to adopt and publish its own national laws, regulations and administrative provisions necessary to comply with the directive by 25 December 2022 and then apply those measures by 2023.

The key case before the EU courts on private damages actions is ***Courage v Crehan***, a case referred from the courts in the UK (which was an EU member state at that time), in which the CJEU states that private parties must be able to claim damages concerning infringements of article 101 of the TFEU. The CJEU also clarified that parties to infringing agreements are themselves able to claim damages if, as a result of their weak bargaining positions, they cannot be said to be wholly responsible for the infringement. Cases concerning vertical restraints, in particular, have accompanied the growth in e-commerce, such as ***Concurrences v Samsung***, in which the CJEU, in December 2016, considered the rules governing jurisdiction in actions brought in respect of resale restrictions in selective distribution systems. (For more detail on private enforcement, see Lexology Panoramic: Private Antitrust Litigation.)

Law stated - 30 January 2024

OTHER ISSUES

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

The most significant points of the EU's system for regulating vertical restraints are:

- the absence of per se rules;
- the remnants of a formalistic approach as seen in the application of Commission Regulation (EU) No. 2022/720 of 10 May 2022 (Vertical Block Exemption Regulation) (VBER), which now stands as something of an anathema in a global antitrust environment dominated by guidelines, other 'soft laws' and more effects-based, rule-of-reason-type economic assessments;
- the importance attached to competition law as a tool for assisting in the development of the EU's single market, as reflected in its decisions on territorial restrictions in cases such as Volkswagen, Nintendo, Universal Studios and Melia Hotels; and
- the fact that the jurisprudence of the EU courts concerning the application of EU competition rules is binding on national-level enforcement agencies and courts in the EU's 27 member states.

Law stated - 30 January 2024

UPDATE AND TRENDS

Recent developments
What were the most significant two or three decisions or developments in this area in the past 12 months?

Decisions and developments include the following:

- The one-year transitional period to satisfy the conditions for exemption provided for in the 2022 VBER ended on 31 May 2023.
- The Motor Vehicle Block Exemption was renewed until 31 May 2028.
- The General Court's judgment upholding the European Commission's 2021 decision that found that Valve and five PC video game publishers had breached article 101 of the TFEU by engaging in anticompetitive geo-blocking practices is also significant in reaffirming the Commission's policy regarding restrictions related to cross-border sales within the EEA.

The EU's Digital Markets Act entered into force on 1 November 2022, and applied to designated 'gatekeepers' from May 2023. This sits alongside the current VBER, but imposes obligations on designated gatekeepers including in relation to the supply of online advertising.

Law stated - 30 January 2024

Anticipated developments

Are important decisions, changes to the legislation or other measures that will have an impact on this area expected in the near future? If so, what are they?

The Commission has launched several consultations that may have an impact on this area in 2024, including a consultation in relation to the Commission's Market Definition Notice, which gives guidance as to how the Commission will define relevant product and geographic markets in antitrust cases.

Law stated - 30 January 2024