

# Vertical Agreements

in European Union

Report generated on 16 March 2020

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

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

- Commission Regulation (EU) No. 330/2010 of 20 April 2010, on the application of article 101(3) of the TFEU to categories of vertical agreements and concerted practices (the Vertical Block Exemption), providing that certain categories of vertical agreement will be treated as fulfilling the requirements for exemption under article 101(3); and
- non-binding vertical restraints guidelines, setting out the manner in which the Vertical Block Exemption is to be applied and giving guidance on how vertical restraints falling outside the Vertical Block Exemption will be assessed (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 Getting the Deal Through – Dominance and is therefore not covered here.

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

an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services.

Vertical restraints are restrictions on the competitive behaviour of a party that occur in the context of such vertical agreements. Examples of vertical restraints include exclusive distribution, certain types of selective distribution, territorial protection, export restrictions, customer restrictions, resale price fixing, exclusive purchase obligations and non-compete obligations.

### Legal objective

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

One of the key identifying features of EU competition policy has been its pursuit of a variety of different goals. In recent times, the Commission has openly 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. However, the supranational nature of the EU dictates that the Commission and the EU courts have also prioritised the furtherance of a single, integrated European market across the European Union's 27 member states. This is reflected in paragraph 7 of the Vertical Guidelines, which states that: '[c]ompanies should not be allowed to re-establish private barriers between member states where state barriers have been successfully abolished'.

### Responsible authorities

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's Directorate General for Competition is the main administrative body responsible for applying article 101 at an EU level. However, national courts and national competition authorities in each of the European Union's 27 member states (plus the United Kingdom until 31 December 2020) also have jurisdiction to apply article 101.

At an EU level, the College of Commissioners (ie, the 27 commissioners appointed by the European Union's 27 member states) adopts infringement decisions under article 101. In practice, however, it is only at the very final stage of the process leading to an infringement decision that the College of Commissioners is formally consulted. At all stages prior to that, decisions are driven by officials at the Directorate General for Competition. 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.

### 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 applies to agreements that 'may affect trade between [EU] member states'. Where agreements do not affect trade between member states, but nonetheless have an impact on trade within a given EU member state, they may be considered under that member state's national competition rules. 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 member state, they may also be capable of affecting trade between member states by imposing barriers to market entry for companies operating in other EU member states. The question of whether a given agreement will affect trade between member states 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.

### Agreements concluded by public entities

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

Article 101 applies to undertakings. The term 'undertaking' can cover any kind of entity, regardless of its legal status or the way in which it is financed, provided such entity is engaged in an economic activity when carrying out the activity in question. Thus, public entities may qualify as undertakings, and be subject to article 101, when carrying out certain of their more commercial activities. 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.

### 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.

Until recently, 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 Vertical Block Exemption Regulation, meaning that only agreements for the distribution of spare parts and for the provision of repair and maintenance services continue to benefit from a separate sector-specific block exemption regulation. Other industry-specific block exemption regulations exist, but none are focused specifically on vertical restraints.

### 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 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) (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).

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, as confirmed by the Court of Justice of the European Union (CJEU) in *Expedia*.

## 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 in a broad manner. In the 2004 judgment of the CJEU in *Bayer v Commission*, it was held that, for a restriction to be reviewed under article 101, there must be a 'concurrence of wills' among the two parties to conclude the relevant restriction. This 'concurrence of wills' language has been used in a number of subsequent judgments regarding vertical agreements, including the CJEU's 10 February 2011 judgment in *Activision Blizzard v Commission*.

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 the purpose of article 101. The Vertical Guidelines state that:

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

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 an electronic notice of such restriction, regardless of whether it could prove that the party had read it. This was characterised by the CJEU's Advocate General Szpunar 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.

### Parent and company-related 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 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 related to another. In certain cases regarding vertical agreements, the Commission has not accepted the defence of single economic entity. For example, in the case of *Gosme/Martell – DMP*, the Commission found that DMP, a 50:50 joint venture between Martell and Piper-Heidsieck, was a separate economic entity from Martell, so that article 101 did apply to vertical restraints agreed between DMP and its 50 per cent shareholder Martell.

### 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 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.

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

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

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

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

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

- contribute to the costs relating to the supply or purchase of the contract goods or services;
- maintain at its own cost or risk stocks of the contract goods;
- undertake responsibility towards third parties for damage caused by the product sold (save in relation to the agent's own fault);
- take responsibility for customers' non-performance of the contract, unless the agent is liable for fault;

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- accept an obligation to invest in sales promotion;
- make market-specific investments in equipment, premises or training of personnel (unless these costs are fully reimbursed by the principal); or
- undertake other activities within the same product market required by the principal, unless these activities are fully reimbursed by the principal.

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

What constitutes genuine agency is a particularly difficult question in the online environment. In 2012 and 2013, the European Commission closed a formal investigation into alleged anticompetitive practices in the supply of e-books by accepting commitments from Apple and five international publishers.

The commitments accepted by the Commission included that Apple and the publishers would terminate e-book agency agreements that provided for publishers – as principals – to determine consumer prices and that included most-favoured customer clauses.

Although the Commission's investigation appears to have considered issues relating to the concept of genuine agency, the fact that the case was closed by the Commission accepting commitments means that there is no detailed discussion of the concept of genuine agency in an online environment. In relation to the Commission's consultation in light of the review of the Vertical Agreements Block Exemption, which closed at the end of May 2019, the national competition authorities, as well as the Bundeskartellamt (in a separate position paper) have criticised the current definition of 'agent'. In particular, they criticise that the current definition does not successfully capture the distinction between independent traders and agents acting on behalf of suppliers, and have requested clarification on the circumstances in which online platforms are genuine agents under the Vertical Agreements Block Exemption Regulations. As a result, the Block Exemption Regulation and guidance replacing the existing one is expected to clarify the concept of genuine agency in an online environment.

### 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). The Vertical Block Exemption and the Commission's Vertical Guidelines will apply to agreements granting IPRs only where such grants are not the primary object of the agreement, and provided that the IPRs relate to the use, sale or resale of the contract products by the buyer or its customers.

## ANALYTICAL FRAMEWORK FOR ASSESSMENT

### Framework

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

Article 101 may apply to vertical restraints provided they are not:

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- concluded by public entities carrying out non-economic activities;
- 'genuine agency' arrangements; or
- concluded among related companies.
- If none of the above criteria are met, then an agreement containing a vertical restraint may be subject to review under article 101. There are a series of steps to be taken in determining whether and how article 101 may apply to a vertical restraint.
- First, does the agreement lead to an appreciable effect on trade between member states of the European Union? If there is no effect on trade between member states, then article 101 will not apply (but member-state level competition rules may apply).
- Second, if there is an appreciable effect on trade between member states, does the vertical agreement contain a hardcore restraint? Hardcore vertical restraints are:
  - the fixing of minimum resale prices;
  - certain types of restriction on the customers to whom, or the territories into which, a buyer can sell the contract goods;
  - restrictions on members of a selective distribution system supplying each other or end-users; and
  - restrictions on component suppliers selling components as spare parts to the buyer's finished product.

The Vertical Guidelines also state that certain restrictions on online selling can qualify as hardcore restraints.

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 Vertical Block Exemption's safe harbour; and
- is highly unlikely to satisfy the conditions of article 101(3).

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).

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) as it does not appreciably restrict competition.

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

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

### 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 a number of factors in its analysis. The factors routinely taken into account in determining whether restraints in vertical agreements fall within article 101(1) are set out in the Commission's Vertical Guidelines, namely: supplier market position; buyer market position; competitor market positions; barriers to entry; market maturity; the level of trade affected by the agreement; and the nature of the product concerned. Supplier market position is arguably the single most important of these factors.

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

- whether the agreement will lead to efficiencies through the improvement of production or distribution or promoting technical or economic progress;
- whether the efficiencies accruing as a result of the agreement accrue to consumers, rather than to the parties themselves;
- whether the restrictions imposed are greater than necessary to achieve the efficiencies in question; and
- whether the restriction affords the parties the possibility of eliminating competition in respect of a substantial part of the products in question.

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

The Commission will also normally take into account the cumulative impact of a given supplier's agreements in a relevant market when assessing the impact of a vertical restraint on competition. In addition, the assessment of a given vertical restraint can vary depending on the vertical restraints concluded by that supplier's competitors. If the vertical restraints imposed by the supplier and its competitors have the cumulative effect of excluding others from the relevant market, then any vertical restraints that contribute significantly to that exclusion may be found to infringe article 101. This kind of analysis has frequently been employed in relation to the brewing industry. Article 6 of the Vertical Block Exemption allows the Commission, by regulation, to disapply the Vertical Block Exemption to parallel networks of similar vertical restraints where they cover more than 50 per cent of a relevant market. This means that all undertakings whose agreements are defined in the Commission's regulation would be excluded from the scope of the Vertical Block Exemption. However, this is a power to which, to the authors' knowledge, the Commission last had recourse in 1993.

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

Arguably the most significant amendment to the assessment of vertical restraints arising out of the Commission's

2010 review of its Vertical Block Exemption and Vertical Guidelines was the introduction of a new requirement that, for an agreement to benefit from the safe harbour provided for under the Vertical Block Exemption, neither the supplier nor the buyer can have a market share in excess of 30 per cent.

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

In relation to supplier market shares, the Commission may also take into account the cumulative impact of a buyer's agreements when assessing the impact of vertical restraints on competition in a given purchasing market. In addition, the assessment of a given vertical restraint can vary depending on the vertical restraints concluded by that buyer's competitors. If the vertical restraints imposed by the buyer and its competitors have the cumulative effect of excluding others from the market, then any vertical restraints that contribute significantly to that exclusion may be found to infringe article 101. Article 6 of the Vertical Block Exemption also allows the Commission, by regulation, to disapply the Vertical Block Exemption to parallel networks of similar vertical restraints where they cover more than 50 per cent of a relevant market.

### BLOCK EXEMPTION AND SAFE HARBOUR

#### 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.

The Commission's Vertical Block Exemption provides a safe harbour for certain agreements containing vertical restraints. The safe harbour means that, if an agreement satisfies the conditions of the Vertical Block Exemption, neither the Commission nor member state competition authorities or courts can determine that the agreement infringes article 101, unless a prior decision (having only prospective effect) is taken to withdraw the benefit of the Vertical Block Exemption from the agreement. The explanatory recitals to the new version of the Vertical Block Exemption (adopted in 2010) also clarify that, provided the relevant market share thresholds are not exceeded, vertical agreements can (in the absence of hardcore restrictions) be presumed to lead to an 'improvement in production or distribution and allow consumers a fair share of the resulting benefits'.

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

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

Where one or more of the relevant market shares moves above 30 per cent during the course of the agreement, the Vertical Block Exemption still applies for a certain time but, if the market shares remain above 30 per cent, then the Vertical Block Exemption will cease to apply to the agreement.

Where the agreement contains hardcore restraints, the safe harbour created by the Vertical Block Exemption 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 Vertical Block Exemption will not be able to benefit from such protection.

If certain lesser restraints are included in the vertical agreement (ie, non-compete obligations 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 Vertical Block Exemption's safe harbour.

Finally, the Vertical Agreements Block Exemption Regulation will expire at the end of May 2022. As part of the revision of the current exemption regulation, the Commission has launched a public consultation, the results of which are expected to influence the future Exemption Regulation.

### 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), will fall outside the safe harbours of the De Minimis Notice and the Vertical Block Exemption, and is generally considered unlikely to qualify for exemption under article 101(3).

Of equivalent effect to clear-cut price-fixing restrictions are agreements fixing the maximum level of discount 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 such arrangements with suspicion in concentrated markets, as it considers that such practices may facilitate collusion among suppliers.

Since the adoption of the Vertical Guidelines in 2010, the Commission has not adopted any decisions imposing fines in relation to resale price maintenance. However, in the 2012 to 2013 e-books case, the Commission appears to have considered whether the publishers' ability to determine prices for e-books sold via online platforms might have constituted resale price maintenance. However, since the case was closed by way of the Commission accepting commitments, rather than adopting a full decision, the extent to which resale price maintenance might have been relevant to the Commission's case is not clear.

Have the authorities considered in their decisions or guidelines resale price maintenance restrictions that apply for a limited period to the launch of a new product or brand, or to a specific promotion or sales campaign; or specifically to prevent a retailer using a brand as a 'loss leader'?

No Commission decisions have focused on this specific area. However, the Vertical Guidelines suggest that the Commission will actively consider arguments as to the efficiencies associated with resale price maintenance restrictions where such restrictions are of a limited duration, and relate to the launch of a new product or the conduct

of a short-term low-price campaign. Nevertheless, since there have not been any recent Commission decisions focusing on resale price maintenance, it remains to be seen how the Commission's new approach in this area might be put into practice.

### Relevant decisions

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

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

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

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

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

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

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

The Commission's Vertical Guidelines also note that there may be efficiencies associated with resale price maintenance restrictions, 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; or
- the sale of 'experience' or 'complex' products in relation to which it is necessary for the supplier to support retailers providing desirably high levels of pre-sales service.

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 or a fixed or minimum price level to be observed by the buyer' constitutes a hardcore restriction of competition and that such fixing of resale prices can be achieved through indirect means, including 'an agreement linking the prescribed resale price to the resale prices

of competitors'. Thus, such 'pricing relativity' agreements will almost always fall within article 101(1), will fall outside the safe harbours of the De Minimis Notice and the Vertical Block Exemption, and will be generally considered unlikely to qualify for an individual exemption under article 101(3).

### 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.

It is not clear whether a most-favoured customer or most-favoured nation (MFN) restriction at the wholesale level – in isolation – will constitute a restriction of competition falling within article 101(1). If such restriction were deemed to fall within article 101(1), it should nonetheless fall within the safe harbour created by the Commission's Vertical Block Exemption, provided that the other criteria for its application are met. However, there are indications that the Commission considers that wholesale MFN clauses might serve to restrict competition in certain circumstances. In 2005, the Commission closed its investigation into E.ON Ruhrgas/Gazprom when the parties agreed to remove territorial restrictions imposed on Ruhrgas, and a most-favoured customer provision that obliged Gazprom to offer gas to Ruhrgas on similar conditions to the conditions on which Gazprom offered gas to Ruhrgas's competitors. The Commission's rationale for insisting on the removal of the most-favoured customer clause was that it wanted competition to develop between distributors purchasing gas from Gazprom.

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.

It is not clear whether a retail most-favoured nation (MFN) clause such as that described would – in isolation – constitute a restriction of competition falling within article 101(1). However, the agreements that were the subject of the Commission's recent e-books investigation included a retail price MFN whereby publishers agreed to match the prices for the titles they sold via Apple's iBookstore to the prices for the same titles when sold via other online platforms. Although the Commission's investigation focused more on alleged collusion among the publishers and Apple, the commitments that the Commission accepted when closing the case included a commitment to remove the retail MFN for a period of five years. This aspect of the outcome to the e-books case suggests that the Commission considered that retail MFNs, when taken together with other consumer price-related restrictions, may be capable of restricting competition.

In June 2015, the Commission opened a second investigation into e-books that concerned Amazon's right to be informed of different or more favourable terms offered by publishers to competing online platforms and to be offered terms at least as favourable. In December 2016, the Commission expanded its investigation to include several subsidiaries of Amazon, and in January 2017, the Commission opened a consultation on commitments proposed by Amazon to end the practices at issue. The Commission formally accepted Amazon's commitments in May 2017.

In April 2017, the Commission, working with the national competition authorities in 10 EU member states, published a report on the online hotel booking sector. The report assesses the impact of antitrust enforcement measures adopted in recent years in respect of MFN clauses by which hotels must provide an online travel agent with the lowest room price and best room availability, or in any event must not provide a lower price or better room availability on their own websites.

The National Competition Authorities have criticised the guidance on the legal qualification and assessment of retail MFNs. While the national competition authorities are in favour of retaining a distinction between narrow and wide

MFNs, they criticise that the regulation and guidance do not successfully capture that wide MFNs are generally less likely to be justified than narrow MFNs.

**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.**

It is not clear whether such an arrangement – in isolation – would constitute a restriction of competition falling within article 101(1). On the one hand, the buyer is prevented from advertising low prices in the way that it might want to; on the other hand, the buyer is not actually prevented from applying discounts. Any investigation of such an arrangement would likely turn on the effects that such an arrangement had in practice on prices and discounting. If it served to prevent all discounting and increase prices across the board, it may well be deemed as constituting a restriction of competition falling within article 101(1).

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

The Commission has suggested that, in sectors where it considers market power to be concentrated among relatively few suppliers, and where the buyer warrants to the supplier that, if it pays one of the supplier's competitors more for the same product, it will pay that same higher price to the supplier, then such arrangements may increase prices overall and may increase the risk of price coordination, as well as increasing the risk of foreclosure on the upstream market. In the context of the Vertical Block Exemption, this might be an instance warranting a withdrawal or disapplication of the Vertical Block Exemption.

Arguably, the most interesting example of a Commission investigation into such 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 a number of 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.

### **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, attracting Commission fines of €102 million in 1998 for car manufacturer Volkswagen (reduced to €90 million on appeal) and €149 million in 2002 for computer games manufacturer Nintendo (reduced to €119 million on appeal).

The Commission has tended to see absolute territorial restrictions as hardcore restraints that will almost always fall within article 101(1), will fall outside the safe harbours of the De Minimis Notice and the Vertical Block Exemption and will seldom qualify for exemption under article 101(3). Judgments of the CJEU in *Football Association Premier League Ltd & Others v QC Leisure & Others* (2011), *GlaxoSmithKline v Commission* (2009) and *Sot Léloukas & Others* (2008) have confirmed that an agreement intending to limit trade between EU member states must in principle be considered a restriction of competition 'by object'. Since such restrictions are classed as 'by object' restrictions of competition, the Commission is not obliged to conduct an analysis of the competitive effects of the agreement before concluding that it falls within article 101(1).

However, the CJEU's *GlaxoSmithKline* judgment also underlines that the Commission is required to carry out a proper examination of the arguments and evidence put forward by a party in the context of the assessment under article 101(3) of whether the agreement should benefit from an exemption from the prohibition set out in article 101(1).

Furthermore, where a supplier sets up a network of exclusive distributorships and prevents each buyer from actively selling into a territory granted exclusively to another buyer (or reserved to the supplier itself), the Commission has accepted that this may be pro-competitive since it may lead to an increase in inter-brand competition. In January 2016, the Commission emphasised in *Aquatrend* that there is no presumption that exclusive distribution agreements are caught by the prohibition in article 101(1).

However, as illustrated by the Commission's €12.5 million fine on Nike in March 2019 for banning traders from actively and passively selling licensed merchandise to other countries within the EEA, and the Commission's €6 million fine on Sanrio for banning traders from selling licensed merchandise to other EEA countries, restrictions on active sales are also hardcore restrictions in the context of non-exclusive distribution systems.

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

The Commission's Vertical Guidelines also set out two specific cases in which seemingly hardcore territorial sales restrictions may, on closer inspection, be deemed to fall outside the scope of article 101(1) or fulfil the conditions for exemption under article 101(3). First, restrictions on passive sales by other buyers where one buyer is the first to sell a new brand – or the first to sell an existing brand in a new market – and has to make substantial investments to do so, may fall outside article 101(1) for the first two years for which the buyer sells the contract goods. Second, where a buyer is engaged in genuine testing of a new product in a limited territory, restrictions on active sales outside that territory may not fall within article 101(1) for the period of genuine testing. However, under article 6 of the Geo-Blocking regulation, which came into force in December 2018, all clauses restricting passive sales on grounds of the customer's nationality, or place of residence or establishment are automatically void. A transition period was introduced for agreements concluded before 2 March 2018 to allow for the few exceptional cases where passive sales restrictions are permitted under competition law, as they fall outside the scope of article 101(1) or are exempt under article 101(3). Article 6 of the Geo-Blocking regulation will only apply to those clauses from 23 March 2020 onwards.

On 13 January 2014, the Commission announced that it had opened formal proceedings examining licensing agreements between several major US film studios and the largest European pay-TV companies on the basis that the

licensing agreements might hinder the provision of pay-TV services across EU borders. In July 2016, the Commission accepted commitments from one of the US film studios under investigation, Paramount, not to prohibit passive sales by any European pay-TV company outside its licensed territory or to afford absolute territorial protection in such territory for five years. In its decision, the Commission concluded that the contested clauses in Paramount's licensing agreements had an anticompetitive object because they were designed to prohibit or to limit cross-border passive sales and to grant absolute territorial exclusivity in relation to Paramount content. The Commission's investigation continued in respect of several other major US film studios and the largest European pay-TV companies, including Canal Plus, which in December 2016 lodged an application with the General Court for annulment of the Commission's decision to accept Paramount's commitments. In December 2018, however, the General Court dismissed the action, concluding that the licensing agreements at issue, by restricting each pay-TV company from making passive sales to customers located outside its allocated territory, imposed restrictions that went beyond merely protecting the studio's intellectual property rights, and so constituted restrictions of competition by object. By the end of 2018, the Commission had opened consultations on similar commitments offered by the five other studios under investigation. In March 2019, the Commission accepted commitments by the five other studios and the proceedings were closed in July 2019.

Finally, the National Competition Authorities criticise the lack of guidance provided in the Vertical Agreements Block Exemption Regulations and guidance thereto on the distinction between active and passive sales. The authorities consider that the guidance on whether internet sales constitute active or passive sales is potentially insufficient, especially regarding the increasing ability to target online advertisement. Notably, the Bundeskartellamt advocates that online sales should, in principle, remain characterised as passive sales to prevent foreclosure and allow for full use of the potential of e-commerce.

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. Such agreements face heightened scrutiny by the Commission because they tend to restore the divisions between national markets that the EU aims to abolish. Nonetheless, in its final report in the e-Commerce Sector Inquiry in May 2017, the Commission stated that more than 11 per cent of retailers indicated that they had in place contractual cross-border sales restrictions in at least one product category in which they were active in the European Union.

In relation to content, the CJEU considered in *Karen Murphy v Media Protection Services* (2011) whether distribution agreements between broadcasters licensing content from the Football Association Premier League infringed article 101. The agreements in question required broadcasters to encrypt their signals in order to prohibit potential customers outside the broadcasters' respective territories from accessing the matches. The CJEU held that agreements that are designed to prohibit or limit the cross-border provision of services are deemed to have as their object the restriction of competition, unless other circumstances justify the finding that such an agreement is not liable to impair competition.

However, a supplier may by agreement restrict a buyer from making active sales into a territory allocated exclusively to another buyer 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 territory-based website banners and advertisements within search engines displayed specifically to users in a particular territory. Restrictions on these activities are permissible under the Vertical Block Exemption, subject to the rule that similar restrictions apply to equivalent forms of active selling of the same goods or services offline by that distributor (*Pierre Fabre Dermo-Cosmétique*).

If a vertical restraint amounts to a restriction on passive sales via the internet, however, it will be deemed a hardcore restriction (apart from in exceptional cases where passive sales restrictions are permitted under competition law, as

they fall outside the scope of article 101(1) or are exempt under article 101(3) of the Geo-Blocking Regulation).

As part of its current Digital Agenda for Europe, the Commission has identified better online access to goods and services as one of the three pillars of its Digital Single Market strategy. In particular, the Commission has described as 'unjustifiable' the practice of geo-blocking within the EU (ie, prohibiting customers from certain territories from accessing goods or services in other territories or redirecting them to a local supplier with different prices), and its increased focus in this area has been reflected in enforcement. In March 2015, the Commission confirmed that it was investigating geo-blocking of certain video games sold online for personal computers, and in April 2019 the Commission announced that it had sent statements of objections to Valve and five video game publishers, as the Commission is concerned that Valve and the five video games publishers used geo-blocked activation keys to prevent cross-border sales.

The Commission announced in February 2017 that it was investigating agreements regarding holiday pricing concluded between the largest European tour operators and Melia hotels, which the Commission considers may discriminate between customers based upon their nationality or country of residence. In June 2017, the Commission announced that it was investigating licensing agreements concluded between Nike, Sanrio and Universal Studios and their respective licensees. In March 2019, the Commission imposed a fine of €12.5 million on Nike for preventing traders from making both active and passive sales of licensed merchandise to other EEA countries under non-exclusive licensing agreements. Similarly, in July 2019, the Commission imposed a €6 million fine on Sanrio for restricting traders from selling licensed merchandise out-of-territory. In January 2020, the European Commission fined NBC Universal €14.3 million for restricting traders from selling licensed merchandise within the EEA to territories and customers beyond those allocated to them.

Following unannounced inspections on 10 March 2015, the Commission announced in February 2017 that it was formally investigating Asus, Denon & Marantz, Philips and Pioneer. In a decision adopted in July 2018, the Commission considered certain practices by Pioneer, including the use of its serial 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, to be restrictions of competition by object and ordered Pioneer to pay €10 million in fines.

In July 2015, the Commission issued a statement of objections to several major US film studios and one of the largest European pay-TV companies on the basis that the licensing agreements between them hinder the provision of pay-TV services across EU borders, both via satellite and online. In July 2016, the Commission accepted commitments to end the investigation in respect of one of the major US film studios, and an action to annul the Commission's decision, brought by one of the studio's exclusive licensees, was dismissed by the General Court in December 2018.

In June 2017, the Commission opened a formal investigation into the distribution agreements and practices of Guess. The Commission's press release in relation to the infringement decision adopted in December 2018 indicated that, through its selective distribution system, Guess unlawfully restricted buyers from:

- using its brand names for online search advertising;
- selling online without Guess's prior authorisation;
- selling outside their allocated territories;
- cross-selling to the other members of the selective distribution system; and
- independently deciding their prices.

The Commission ordered Guess to pay €40 million in fines, following a 50 per cent reduction for Guess's cooperation. The Commission also stated that its enforcement action would complement the EU rules adopted in 2018 to prohibit geo-blocking, the enforcement of which is the responsibility of the individual EU member states.

For example, in May 2016, the Commission submitted a proposal to the Council and European Parliament to prohibit

geo-blocking and certain other practices that differentiate the price or the terms of goods or services supplied on the basis of the nationality, or the place of residence or establishment, of a customer. Following inter-institutional negotiations opened in 2017, the proposal was adopted in February 2018 and entered into force in December 2018. A similar regulation entered into force in April 2018, which permits customers resident in an EU member state to access the portable online content to which they have subscribed, such as online film or music streaming services, when such customers travel or stay temporarily in another EU member state.

### 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 in relation to 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), will fall outside the safe harbours of the De Minimis Notice and the Vertical Block Exemption, and will seldom qualify for exemption under article 101(3).

There are certain key exceptions to this rule. First, as with territorial restrictions, 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 (or reserved to the supplier itself), the arrangement may fall within the Vertical Block Exemption's safe harbour, provided its various conditions are met (including supplier and buyer market share below 30 per cent). However, according to the Commission's Vertical Guidelines, if those customer restrictions are imposed by suppliers having a market share in excess of 30 per cent, they are unlikely to qualify for individual exemption under article 101(3). Nevertheless, the Vertical Guidelines state that the case for an individual exemption in such cases is 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 may also fall within the Vertical Block Exemption's safe harbour.

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

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.

### 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). (See, for example, the EU Court judgment in *Kerpen & Kerpen* (1983) and the Commission decision in *Sperry New Holland* (1985).)

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

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

### Restrictions on online sales

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

The Commission's Vertical Guidelines state that, in principle, every buyer must be allowed to use the internet to sell its products.

The Vertical Guidelines provide examples of the types of internet-related restrictions that will be deemed to amount to a hardcore restriction on passive sales outside of a buyer's allocated territory or customer group and that will therefore prevent the application of the safe harbour set out in the Vertical Block Exemption. Such hardcore internet restrictions include:

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

However, in selective distribution systems, the Vertical Guidelines clarify that a supplier may require a buyer to:

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

The Commission will regard as a hardcore restriction any obligation in a selective distribution system that dissuades authorised dealers from using the internet by imposing criteria for online sales that are not overall equivalent to criteria imposed for offline sales. Criteria imposed for online sales need not be identical to those imposed for offline sales, but they should pursue the same objectives and should achieve comparable results. Further, any differences between the criteria for online and offline sales must be justified by the different nature of the two distribution methods.

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

In its 2001 *Yves Saint Laurent Parfums* investigation, the Commission noted in a press release that a ban on internet

sales, even in a selective distribution system, was a restriction on passive sales to consumers that could not be covered by the Vertical Block Exemption. However, Yves Saint Laurent Parfums' selective distribution system was approved as it allowed authorised retailers already operating a physical sales point to sell via the internet.

In its 2002 B&W Loudspeakers decision, the Commission approved a selective distribution system only after B&W had deleted an absolute prohibition on internet selling. The system approved by the Commission provided for a mechanism whereby retailers requested B&W's approval to commence distance selling (including selling over the internet), and B&W was only allowed to refuse such requests in writing and on the basis of concerns regarding the need to maintain the contract products' brand image and reputation. B&W's internet sales policy also had to be applied indiscriminately and had to be comparable to that applicable to sales from bricks-and-mortar outlets.

In a press release dated 5 December 2013, the European Commission confirmed that it had carried out unannounced inspections in several member states at the premises of companies active in the manufacture and distribution of consumer electronic products and small domestic appliances. The press release indicated that '[t]he Commission has grounds to suspect that the companies subject to the inspections may have put in place restrictions on online sales of consumer electronic products and small domestic appliances. These restrictions, if proven, may lead to higher consumer prices or the unavailability of products through certain online sales channels'. Following further unannounced inspections on 10 March 2015, the Commission announced in February 2017 that it was formally investigating Asus, Denon & Marantz, Philips and Pioneer. In July 2018, the Commission announced that it considered certain practices by the consumer electronics manufacturers, including ceasing their supply to buyers that sold via the internet and that did not adhere to the recommended resale prices, to be restrictions of competition by object, and ordered the manufacturers to pay €111 million in fines.

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 Commission's Vertical Guidelines do not distinguish between different types of internet sales channel, but they do provide some guidance on the use of third-party platforms. The Vertical Guidelines note that, in particular in a selective distribution context, a supplier may require that buyers use third-party platforms only in accordance with the standards and conditions agreed between the buyer and supplier for the buyer's use of the internet. A supplier may also require that customers do not visit the buyer's website through a site carrying the name or logo of a third-party platform if the buyer's website is hosted by that same third-party platform. To date, however, there have been no Commission vertical restraints infringement decisions distinguishing between different types of online sales channel. The Commission's investigation of Amazon's e-books business, opened in June 2015 and closed by commitment decision in May 2017, addressed differential treatment of online sales channels. That investigation focused on Amazon's contractual rights to be informed of different or more favourable terms offered by publishers to competing online platforms and to be offered terms at least as favourable. In January 2017, the Commission opened a consultation on commitments proposed by Amazon to end the contested practices, and the Commission formally accepted Amazon's commitments in May 2017.

Equally, in September 2015, the European Technology & Travel Services Association (ETTSA), which represents online travel agents, filed a complaint with the Commission, alleging that certain airlines' practice of surcharging for tickets purchased through online platforms other than their own was anticompetitive. In April 2016, the Commission sent requests for information to several air carriers, travel agents, online reservation websites and global distributors. In May 2018, the Commission rejected the complaint by ETTSA, which, in July 2018, lodged a complaint against the Commission with the European Ombudsman. In November 2018, however, the Commission opened a formal investigation into terms in the agreements between certain global distributors and travel agents, which may restrict the latter from buying ticket distribution services through alternative suppliers.

With regard to outright platform bans, the CJEU held in a December 2017 judgment in *Coty* that a supplier may prohibit members of a selective distribution system from making online sales via third parties that are discernible to the public, provided that the selective distribution system is primarily designed to preserve the luxury image of those goods and that it meets the criteria in *Metro v Commission*.

In its final report in the e-Commerce Sector Inquiry in May 2017, the Commission stated that its findings did not show that absolute marketplace bans generally amounted to a de facto prohibition to sell online, irrespective of the markets concerned. In its view, marketplace bans could not be equated to a prohibition to sell via the internet, nor did such clauses constitute hardcore restrictions for the purposes of the Vertical Block Exemption. The CJEU affirmed the Commission's findings in this regard in its *Coty* judgment in December 2017.

### Selective distribution systems

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

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

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

Where selective distribution systems do not satisfy these criteria, they will fall within article 101(1), but may benefit from safe harbour protection under the Commission's De Minimis Notice or the Vertical Block Exemption, provided they do not incorporate certain further restraints. In particular, such systems may only benefit from exemption under the Vertical Block Exemption if:

- resale prices are not fixed;
- there are no restrictions on active or passive sales to end-users; and
- there are no restrictions on cross-supplies among members of the system.

Separately, the Vertical Guidelines suggest that members of a selective distribution system must not be dissuaded from generating sales via the internet, for example by the imposition of obligations in relation to online sales that are not equivalent to the obligations imposed in relation to sales from a bricks-and-mortar shop. In addition, where selective distribution systems incorporate obligations on members not to stock the products of an identified competitor of the supplier, this particular obligation itself may be unenforceable. However, this last restriction should not affect the possibility of the system benefiting overall from the safe harbour under the Vertical Block Exemption.

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).

In its October 2011 judgment in *Pierre Fabre Dermo-Cosmétique*, the CJEU considered the application of the Metro criteria on selective distribution in the context of a ban on internet sales to consumers. The criteria for inclusion in the Pierre Fabre network of buyers were accepted to be objective and laid down uniformly for all buyers but the key question was whether a ban on internet sales could be justified by reference to the supplier's desire to protect the image of its products. The CJEU concluded that: '[t]he aim of maintaining a prestigious image of those products is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within article 101(1) TFEU'. The CJEU distinguished *Pierre Fabre* in its December 2017 judgment in *Coty*, however, holding that the goods at issue in the former had not been luxury goods and approving the aim of maintaining a prestigious image for luxury goods, provided that the selective distribution system is primarily designed to preserve the luxury image of those goods and that it meets the Metro criteria.

In June 2017, the Commission opened a formal investigation into the selective distribution system operated by Guess.

Many national competition authorities point out that the current Vertical Agreements Block Exemption Regulations do not capture the increasing tendency among manufacturers to apply qualitative selection criteria that are 'completely unrelated to the actual requirements of the product concerned', reducing intra-brand competition. They have urged the Commission to reassess the market share threshold of 30 per cent for the unconditional exemption of selective distribution systems. Further, they have highlighted a need for more clarification regarding the assessment of selective distribution systems, and the interplay between the Metro criteria and the requirements for block exemption under the regulation.

**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) 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) (to be considered where selective distribution systems fall within the prohibition under article 101(1) but outside the scope of the Vertical Block Exemption). In particular, the Commission notes that efficiency arguments under article 101(3) may be stronger in relation to new or complex products, 'experience' products (whose qualities are difficult to judge before purchase), or 'credence' products, whose qualities are difficult to judge even after consumption. The Commission also recognised the need for selective distribution in relation to newspapers in *Binon & Cie v Agence et Messageries de la Presse*, as newspapers can only be sold during a limited time period.

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

**In selective distribution systems, what kinds of restrictions on internet sales by approved distributors are permitted and in what circumstances? To what extent must internet sales criteria mirror offline sales criteria?**

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

In addition, a supplier may require that its buyers have one or more bricks-and-mortar shops or showrooms to become a member of a selective distribution system and that customers do not visit the buyer's website through a site carrying the name or logo of a third-party platform.

However, the Commission will regard as a hardcore restriction any obligation in a selective distribution system that dissuades authorised dealers from using the internet by imposing criteria for online sales that are not equivalent to criteria imposed for offline sales. Criteria imposed for online sales need not be identical to those imposed for offline sales but they should pursue the same objectives and should achieve comparable results. Further, any differences between the criteria for online and offline sales must be justified by the different nature of the two distribution methods.

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.

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

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

In Peugeot (1986), the Commission noted that the restrictive effects of an agreement may be 'magnified by the existence of similar exclusive and selective distribution systems operated by other vehicle manufacturers'. This followed the approach taken by the CJEU in *Metro v Commission*, in which the court pointed to the prevalence of selective distribution networks across the relevant market as being among the criteria for determining whether a given network creates a restriction of competition within article 101(1) (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').

In addition, in its 1996 *Leclerc v Commission* judgment, the EU General Court explained that article 101(1) may be applicable where most or all manufacturers in a certain sector use selective distribution and '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, in relation to individual networks of selective distribution, cumulative effects will likely not be a significant factor in the competitive assessment where the share of the market covered by selective distribution is less than 50 per cent, or where the market covered by selective distribution is greater than 50 per cent, but the five largest suppliers have an aggregate market share of less than 50 per cent.

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), which will not benefit from the safe harbour provided by the Vertical Block Exemption and are unlikely to benefit from an individual exemption under article 101(3)):

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

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

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

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

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

**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), though this will depend on the exact effects of the restriction in question that 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 such clauses can be pro-competitive because, for example, they give a guarantee of sales to the supplier and a guarantee of continuous supply to the buyer. As such, provided non-compete clauses do not have a duration exceeding five years, they may benefit from safe harbour protection under the Vertical Block Exemption (if the other criteria for its application are met). Non-compete obligations that are tacitly renewable beyond a period of five years are not covered by the Vertical Block Exemption. If the criteria for the application of the Vertical Block Exemption are not met, non-compete clauses may nevertheless fall outside the scope of article 101(1) or, alternatively, may satisfy the conditions for exemption under article 101(3), depending on the market positions of the parties, the extent and duration of the clause, barriers to entry and the level of countervailing buyer power.

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

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

The Commission considers such clauses to be akin to non-compete clauses, effectively restricting the ability of the buyer to stock products competing with the contract products. 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 the agreements between, on the 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 considers that such agreements may 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.

**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. Such systems should, therefore, be assessed in accordance with the framework regarding the assessment of territorial resale restrictions imposed on buyers.

**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), will fall outside the safe harbours of the De Minimis Notice and the Vertical Block Exemption, and will seldom qualify for exemption under article 101(3).

**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 provide guidance on upfront access payments (fixed fees paid by suppliers to distributors in order 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 Vertical Block Exemption Regulation 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 such 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, such restrictions will benefit from the safe harbour created by the Vertical Block Exemption.

In January 2017, the Commission announced that it welcomed an agreement between Audible, a subsidiary of Amazon, and Apple to end all exclusivity obligations in relation to 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.

## 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 Regulation 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 for the purposes of article 101(1) and, if so, whether it qualifies for exemption under article 101(3).

### 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.

However, the Commission is highly selective in choosing the arrangements in relation to which it will give informal guidance and, given the existence of the Vertical Block Exemption and the Vertical Guidelines, it is unlikely that the Commission would issue individual guidance in relation to vertical restraints. In general, the Commission considers that parties are well placed to analyse the effect of their own conduct. The authors are not aware of a case where the Commission has offered informal guidance to parties.

## 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 responding within a given time, which, in principle, is four months. However, the CJEU and the EU General Court have long held that the Commission has a wide discretion in choosing which complaints to pursue.

### 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?

In the 18 years from 1 January 2001 to 1 January 2019, the Commission took around 25 vertical restraints infringement decisions under article 101. This includes only cases in which the Commission:

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

Since 2013, the Commission has opened (and not yet closed) formal investigations into cross-border aspects of pay-TV, holiday pricing, licensed merchandise, video games and airline booking system providers, all of which appeared to

relate, in part, to vertical restraints. In January 2017, the Commission opened a consultation on commitments proposed by Amazon in respect of the investigation into the sale of e-books, which the Commission formally accepted in May 2017. In relation to the investigation of major US film studios and the largest European pay-TV companies, consultations were also opened in November and December 2018. The Commission formally accepted the parties' commitments in March 2019 and the proceedings were closed in July 2019.

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

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

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

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

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

In the 18 years from 1 January 2001 to 1 January 2019, 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; Nike – €12.5 million; Sanrio – €6.2 million; Yamaha – €2.56 million; and Topps – €1.59 million. In a number of cases, the Commission did not impose fines, but instead required the companies to introduce behavioural or structural remedies, or both, for example:

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

While the Commission still actively enforces its rules on vertical restraints, especially in the motor vehicle sector, it is fair to suggest that market liberalisation, the reduction of 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 member states, there has been more frequent enforcement of national and EU antitrust rules on distribution by member state-level competition authorities than by the Commission. However, in some individual cases the Commission may consider that it is better placed to enforce the EU rules on vertical restraints than individual, member

state-level competition authorities.

### **Investigative powers of the authority**

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

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

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

In March 2017, the Commission submitted a proposal to the European Parliament and to the Council of the European Union to harmonise and, in certain respects, to expand the powers of the competition authorities of the EU member states to enforce articles 101 and 102 TFEU, as well as the national competition law provisions that are applied in parallel. Following inter-institutional negotiations opened in February 2018, the Directive came into force in February 2019 and the deadline for national implementation is 4 February 2021.

### **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 EU 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 in its infancy. Private damages actions cannot be brought before the Commission or before the EU courts and must instead be brought in the relevant courts of the member states having jurisdiction to hear the case in question. National rules on jurisdiction, recovery of legal costs, remedies and who can bring a claim vary widely across the European Union, with certain jurisdictions, such as the United Kingdom, being more claimant-friendly than others. The EU Damages Directive, which EU member states were required to transpose into national law by 27 December 2016, goes some way towards harmonising rules on limitation periods, disclosure and the 'passing on' defence, although there is no EU-wide scheme for collective actions.

The Commission is required under the EU Damages Directive to publish guidelines for national courts on passing-on of overcharges to indirect purchasers, although at the date for transposition such guidelines has not been published. The Commission is also reassessing its 2013 recommendation on introducing collective redress mechanisms in the EU member states. Although the Commission indicated that it might propose further measures by July 2017, it has not yet done so.

The key case before the EU courts on private damages actions is *Courage v Crehan*, a case referred from the UK

courts, in which the CJEU states that private parties must be able to claim damages in relation to infringements of article 101. The CJEU also clarified that parties to infringing agreements are themselves able to claim damages if, as a result of their weak bargaining positions, they cannot be said to be wholly responsible for the infringement. 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 *Getting The Deal Through – Private Antitrust Litigation*.)

### 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 European Union's system for the regulation of vertical restraints are:

- the absence of per se rules;
- the remnants of a formalistic approach as seen in the application of the Vertical Block Exemption, which now stands as something of an anathema in a global antitrust environment dominated by guidelines, other 'soft laws' and more effects-based, rule-of-reason-type economic assessments;
- the importance it attaches to competition law as a tool for assisting in the development of the European Union's single market, as reflected in its decisions on territorial restrictions in cases such as *Volkswagen* and *Nintendo*; and
- the fact that the jurisprudence of the EU courts concerning the application of EU competition rules is binding on national-level enforcement agencies and courts in the European Union's 27 member states (plus the United Kingdom until 31 December 2020).

### UPDATE AND TRENDS

#### Recent developments

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

#### Recent developments

The Commission's enforcement in recent years has continued to focus on territorial and resale price restrictions, so its infringement decisions taken in March 2019, July 2019 and January 2020 against Nike, Sanrio and NBC Universal respectively are notable. Equally notable was the Commission's continuing use of settlement procedures ordinarily reserved to the cartel context.

As part of the Commission's Digital Single Market Strategy, the past 12 months also saw the entry into force of important legislative reforms intended to regulate the behaviour of online platforms towards smaller businesses and traders (the P2B-Regulation), which platforms must comply with by 12 July 2020. The P2B-Regulation seeks to ban certain unfair practices that often result in the unexplained account suspensions or unfavourable changes to the platform terms, while also increasing transparency in relation to product rankings on the platform and certain business practices.

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?

### Anticipated developments

In February 2019, the Commission published its Evaluation Roadmap for the forthcoming review of the Motor Vehicle Block Exemption and the accompanying guidelines on vertical restraints in agreements for the sale and repair of motor vehicles. The Commission is expected to launch a consultation in the second quarter of 2020, to collect the views of stakeholders on the Regulation's effectiveness, efficiency, relevance and coherence, in light of market developments since the Regulation was adopted in 2010.

The Commission's consultation in relation to the review of the Vertical Agreements Block Exemption closed at the end of May 2019. A number of national competition authorities and stakeholders focused on the failure to adequately capture online platforms in their responses. Specifically, they criticised the regulations' failure to account for the nature of the commercial relationship between businesses and platforms and, for example, requested guidance on whether online platforms are treated as 'true agents' under the Block Exemption Regulations. It is anticipated that the revision of the Block Exemption Regulations will provide clarity in this area and unify the currently diverging treatment of online platforms at the national level.

The Commission is expected to focus on regulation of the digital markets in 2020. In 2018, the Commissioner for Competition Magrethe Vestager appointed a panel of special advisers to report on future challenges of digitisation for competition policy. Their report, which was published in March 2019, most notably in the context of vertical agreements, discusses the application of competition rules to platforms. In relation to most-favoured nation clauses (MFNs) or best price clauses, the report finds that narrow MFNs can be both pro- and anti-competitive depending on how strong competition is between platforms. The advisers believe that, because of their role as regulators, platforms have a duty to ensure that their rules do not impede competition. In the context of Germany's presidency of the European Council in the second half of 2020, the German Federal Ministry for Economic Affairs and Energy commissioned recommendations for action for further development of EU competition law regarding the digital economy. The recommendations suggest the imposition of a code of conduct for dominant online platforms. This code of conduct is expected to go beyond the P2B-Regulation, which currently only captures the conduct of intermediary services and search engines in relation to commercial users and does not capture operating systems or payment platforms. Both the special adviser report and the recommendations are expected to heavily influence the Commission's legislative efforts in relation to digital services over the coming years.