Vertical Agreements 2021

Contributing editor
Patrick J Harrison

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Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager
Adam Sargent
adam.sargent@gettingthedealthrough.com

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Patrick J Harrison
Sidley Austin LLP

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Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Patrick J Harrison of Sidley Austin LLP, for his continued assistance with this volume.

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United Kingdom

Patrick J Harrison and Rosanna Connolly

Sidley Austin LLP

LEGAL FRAMEWORK

Antitrust law

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

The key legal source on the regulation of vertical restraints in the United Kingdom is the Competition Act 1998 (CA 1998). Notwithstanding that the United Kingdom left the European Union on 31 January 2020 (Brexit), the relevant elements of the CA 1998 still follow the structure of article 101 of the Treaty on the Functioning of the European Union (TFEU). Section 2(1) of the CA 1998 prohibits agreements between undertakings that may affect trade within the United Kingdom, and have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom (the Chapter I prohibition). Section 2(4) of the CA 1998 renders agreements falling within the Chapter I prohibition void. Section 9(1) of the CA 1998, in essence, provides that the Chapter I prohibition will not apply where the economic benefits of an agreement outweigh its anticompetitive effects, while the United Kingdom has also adopted a version of Commission Regulation (EU) No. 330/2010 (the EU Vertical Block Exemption Regulation (VBER)), exempting from the Chapter I prohibition vertical agreements that satisfy the terms of the UK's version of the VBER. In 2004, the predecessor to the Competition and Markets Authority (CMA) – the Office of Fair Trading (OFT) – also adopted guidance on the application of the CA 1998 to vertical restraints (the UK Vertical Guidelines). (Where appropriate, references in this chapter to the CMA should be understood as references to the CMA, the OFT and the Competition Commission.)

The CMA may also conduct market studies under section 5 of the Enterprise Act 2002 and may decide to conduct more detailed market investigations where it considers that restraints, including vertical restraints, are prevalent in a market and have the effect of restricting competition.

The EU-level rules on vertical restraints are also relevant in the post-Brexit United Kingdom under a new section 60A of the CA 1998, by which the CMA, various sectoral regulators and UK courts, are bound by an obligation to ensure consistency with EU competition case law that pre-dates 31 December 2020 (ie, the end of the Brexit transition period).

Where a party occupies a dominant position in a market to which the vertical agreement relates, section 18 of the CA 1998 (the Chapter II prohibition) which regulates the conduct of dominant companies will also be relevant to the antitrust assessment of a given agreement. However, the conduct of dominant companies is considered in *Lexology Getting The Deal Through – Dominance* and is, therefore, not covered here.

Types of vertical restraint

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

The UK Vertical Guidelines cite the definition of vertical agreements given in the VBER of 1999. The 1999 definition has been slightly revised in the VBER of 2010 (which has been adopted in the United Kingdom post-Brexit as a retained exemption), and it is to the revised definition that the CMA will have regard when considering vertical restraints cases. The revised definition defines a vertical agreement as:

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

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

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

Legal objective

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

In large part, the objectives pursued by the law on vertical restraints are economic.

Responsible authorities

4 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?

On 1 April 2014, the CMA became the main body responsible for enforcing the CA 1998.

Certain sectoral regulators have concurrent jurisdiction with the CMA concerning their respective industries, namely:

- the Office of Communications;

- the Gas and Electricity Markets Authority;
- the Northern Ireland Authority for Energy Regulation;
- the Water Services Regulation Authority;
- the Office of Rail Regulation; and
- the Civil Aviation Authority.

From 1 April 2013, the Financial Conduct Authority (FCA) was given certain powers (albeit short of concurrent jurisdiction) concerning the financial services sector in the United Kingdom. On 1 April 2015, the FCA gained full concurrent competition powers, and the new Payment Systems Regulator acquired concurrent competition powers concerning payment systems from that same date. Generally, references in this chapter to the CMA should be taken to include the sectoral regulators concerning their respective industries.

The role of ministers is minimal in the ordinary course of business, but the Secretary of State for Business, Energy and Industrial Strategy does retain a residual power to intervene where there are exceptional and compelling reasons of public policy. (Equivalent powers are exercised by the Secretary of State for Culture, Media and Sport concerning the media, broadcasting, digital and telecoms sectors.) For example, the secretary of state has made an order excluding the Chapter I prohibition from applying to certain agreements in the defence industry (see Competition Act 1998 (Public Policy Exclusion) Order 2006 (SI 2006 No. 605).

Jurisdiction

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

Under section 2(1) of the CA 1998, the Chapter I prohibition applies where an agreement may have an effect on trade within the United Kingdom. Section 2(3) of the CA 1998 adds that the Chapter I prohibition will only apply where the agreement 'is, or is intended to be, implemented in the United Kingdom'. However, it is not clear to what extent, if any, section 2(3) would serve to limit the number of agreements covered by the section 2(1) of the CA 1998 effect-on-trade test. The CMA's guidance does not explicitly address the interaction of sections 2(1) and 2(3) of the CA 1998 but it appears clear that some link to the United Kingdom would be needed. The CMA has clarified that it will typically presume an effect on trade within the United Kingdom where an agreement appreciably restricts competition within the United Kingdom.

The infringement decisions against Roma Medical Aids Limited (Roma) and certain of its retailers (*Mobility Scooters I*); and Private Mobility Products and certain of its retailers (*Mobility Scooters II*) give examples of the application of the CA 1998's jurisdictional test in an online context. *Mobility Scooters I* was related to prohibitions of online sales and online price advertising for Roma's mobility scooters, while *Mobility Scooters II* concerned prohibitions on online advertising of prices below the manufacturer's recommended retail price. The jurisdictional test in each case was deemed satisfied because the products were sold throughout the United Kingdom.

Agreements concluded by public entities

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

The Chapter I prohibition applies to undertakings. The term 'undertaking' can cover any kind of entity, regardless of its legal status or how it is financed, provided such an entity is engaged in economic activity when carrying out the activity in question. Thus, public entities may qualify as undertakings when carrying out certain of their more commercial functions, but will not be classed as undertakings – and so will be exempt from the Chapter I prohibition – when fulfilling their public tasks.

The CMA's December 2011 guide on the application of the CA 1998 to public bodies clarifies that public bodies are subject to the Act when they are engaged in a supply of goods or services where that supply is commercial in nature, which, according to the CMA, is likely to be the case where the supply competes with private-sector providers.

Regarding the purchasing practices of public bodies, the judgment of the Competition Appeal Tribunal (CAT) in *Bettercare II* conflicts with subsequent judgments by the EU courts in *Fenin v Commission*. In *Fenin*, the EU courts focused on the use to which the purchased products are put, while CAT, in the *Bettercare II* judgment, considered that the key issue was not the ultimate use of the products but whether the purchaser was in a position to generate the effects on competition that the competition rules seek to prevent. The CMA's guide on the application of the CA 1998 to public bodies explains that:

> *in determining whether a public body is acting as an undertaking in relation to such a purchase of goods or services in a market, the economic or non-economic nature of that purchasing activity depends on the end-use to which the public body puts the goods or services bought.*

This is an indication that the CMA will follow the approach of the Court of Justice of the European Union in *Fenin* in future cases (ie, it is likely to find that a public body purchasing products to use as part of its social function would not be an undertaking for the CA 1998). There is no reason to consider that this will change post-Brexit.

Sector-specific rules

7 Do particular laws or regulations apply to the assessment of vertical restraints in specific sectors of industry (motor cars, insurance, etc)? Please identify the rules and the sectors they cover.

Yes. Under section 10(1) of the Competition Act 1998, an agreement affecting trade between EU member states but exempt from the article 101(1) TFEU prohibition by virtue of an EU regulation must be considered by any UK court and by the Competition and Markets Authority (CMA) as similarly exempt from the Chapter I prohibition. Section 10(2) extends that same analysis to agreements that do not affect trade between EU member states but that would otherwise be exempted under an EU regulation were they to have such effect. Thus, certain motor vehicle repair and maintenance agreements whose provisions f

Yes. Under the Competition (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019 No. 93) (the Competition SI), certain motor vehicle repair and maintenance agreements whose provisions fall within the European Commission's Motor Vehicle Block Exemption will be exempt from the Chapter I prohibition (see, eg, the CMA press release of 24 January 2006, concerning a complaint made against the motor manufacturer TVR Engineering Ltd).

Other industry-specific block exemption regulations exist but none are targeted specifically at vertical restraints.

all within the European Commission's Motor Vehicle Block Exemption will be exempt from the Chapter I prohibition (see, for example, the CMA press release of 24 January 2006, in relation to a complaint made against the motor manufacturer TVR Engineering Ltd).

On 1 February 2012, the Restriction on Agreements and Conduct (Specified Domestic Electrical Goods) Order 1998, which applied to suppliers of specified domestic electrical goods (making it unlawful for such suppliers to recommend or suggest retail prices for specified

goods, and unlawful for a supplier to make an agreement that restricted a buyer's ability to determine the prices at which he or she advertised or sold), was lifted.

Other industry-specific block exemption regulations exist but none are targeted specifically at vertical restraints.

General exceptions

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

The Chapter I prohibition will only apply to a vertical restraint that has an appreciable effect on competition within the United Kingdom. Paragraph 2.18 of the CMA's Guidance Note on Agreements and Concerted Practices states that, in determining the appreciability of a restraint, the CMA will have regard to the European Commission's De Minimis Notice, which provides that, in the absence of certain hardcore restrictions such as price-fixing or clauses granting absolute territorial protection, and in the absence of parallel networks of similar agreements, the European Commission will not consider that vertical agreements have an appreciable effect on competition provided market shares of the parties' corporate groups do not exceed 15 per cent for the products in question.

There are also several Competition Act (Public Policy Exclusion) Orders (including those enacted in 2006, 2008 and 2012) exempting from the Chapter I prohibition certain agreements in the defence sector and certain agreements regarding the distribution of fuel in the event of a fuel-supply disruption.

Also, while not constituting a full exemption from the application of the Chapter I prohibition, parties to small agreements will be exempt from administrative fines under section 39 of the Competition Act 1998 (eg, no fines were imposed in the *Mobility Scooters I* and *Mobility Scooters II* cases). However, price-fixing agreements are excluded from the scope of the small agreements exemption under section 39(1)(b) of the CA 1998, and the CMA has discretion under section 39(3) of the CA 1998 to withdraw the benefit of the small agreements exemption in a given case, a discretion it exercised in August 2017 in its investigation of *TGA Mobility*.

TYPES OF AGREEMENT

Agreements

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

EU courts have clarified that, for a restriction to be reviewed under article 101 of the Treaty on the Functioning of the European Union (TFEU), there must be a concurrence of wills among the two parties to conclude the relevant restriction (*Bayer v Commission*). The Court of Appeal expressly adopted the EU courts' 'concurrence of wills' language in *Argos Ltd and Littlewoods Ltd v Office of Fair Trading* and *JJB Sports plc v Office of Fair Trading*.

10 | In order to engage the antitrust law in relation to vertical restraints, is it necessary for there to be a formal written agreement or can the relevant rules be engaged by an informal or unwritten understanding?

It is not necessary for there to be a formal written agreement. Rather, a concurrence of wills will suffice.

Parent and company-related agreements

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

Paragraph 2.6 of the Competition and Markets Authority (CMA) Guidelines on Agreements and Concerted Practices states that the Chapter I prohibition will not apply:

> *to agreements where there is only one undertaking: that is, between entities which form a single economic unit. In particular, an agreement between a parent and its subsidiary company, or between two companies which are under the control of a third, will not be agreements between undertakings if the subsidiary has no real freedom to determine its course of action on the market and, although having a separate legal personality, enjoys no economic independence.*

Agent–principal agreements

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

Generally, the Chapter I prohibition will not apply to any agreement between a principal and its genuine agent insofar as the agreement relates to contracts negotiated or concluded by the agent for its principal. However, the concept of genuine agency is narrowly defined. Also, the EU Vertical Guidelines (to which the CMA will have regard) explain that, where a genuine agency agreement contains, for example, a clause preventing the agent from acting for competitors of the principal, article 101 of the TFEU (or, in the United Kingdom, the Chapter I prohibition) may apply if the arrangement leads to exclusion of the principal's competitors from the market for the products in question. Further, the EU Vertical Guidelines note that a genuine agency agreement that facilitates collusion between principals may also fall within article 101(1) of the TFEU (or, in the United Kingdom, the Chapter I prohibition). Collusion could be facilitated where:

> *a number of principals use the same agents while collectively excluding others from using these agents, or when they use the agents to collude on marketing strategy or to exchange sensitive market information between the principals.*

Where agency agreements are concluded, agents in the United Kingdom may benefit from significant protection under the Commercial Agents (Council Directive) Regulations 1993 (SI 1993 No. 3053).

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

For purposes of the Chapter I prohibition, an agreement will be qualified as an agency agreement if the agent does not bear any, or bears only insignificant, risks concerning the contracts concluded or negotiated on behalf of the principal. The exact degree of risk that an agent can take without the Chapter I prohibition being deemed applicable to its relationship with a principal will largely be a question of fact. However, the EU Vertical Guidelines (to which the CMA will have regard) give guidance on the kinds of risk that, if accepted by an agent, will prevent it

from being considered a genuine agent for purposes of article 101 of the TFEU (or, in the United Kingdom, the Chapter I prohibition).

In a 2002 case involving a complaint alleging resale price maintenance by Vodafone Ltd concerning pre-pay mobile phone vouchers, the Director-General of Telecommunications found that the agreements in question were not genuine agency agreements because, inter alia, the risk of loss or damage was borne by the buyers.

What constitutes a genuine agency is a particularly difficult question in the online environment. In January 2011, the CMA's predecessor, the Office of Fair Trading (OFT), opened an investigation under the Competition Act 1998 into agency agreements for the sale of e-books. The OFT closed its investigation in December 2011 as the European Commission had initiated formal proceedings of its own concerning alleged anticompetitive practices in the sale of e-books.

Intellectual property rights

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

Paragraphs 3.12 to 3.16 of the UK Vertical Guidelines reflect the provisions of the EU Vertical Block Exemption (now adopted into UK domestic law as a retained exemption for the post-Brexit period), providing that agreements having as their centre of gravity the licensing of IPRs will fall outside the EU Vertical Block Exemption. The relevant considerations go beyond the scope of this publication and include the application of the European Commission's Technology Transfer Block Exemption. The EU Vertical Block Exemption and the EU Vertical Guidelines will apply to agreements granting IPRs only where these grants are not the primary object of the agreement and provided that the IPRs relate to the use, sale or resale of the contract products by the buyer or its customers.

ANALYTICAL FRAMEWORK FOR ASSESSMENT

Framework

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

The Chapter I prohibition may apply to vertical restraints, provided they are not:

- certain agreements covered by a Competition Act (Public Policy Exclusion) Order;
- concluded by public entities carrying out non-economic activities;
- genuine agency arrangements; or
- concluded among related companies.

If none of the above exceptions applies, then an agreement containing a vertical restraint may be reviewed under the Chapter I prohibition. The analytical framework in the United Kingdom is as follows.

First, does the vertical agreement contain a hardcore restraint? According to the UK Vertical Guidelines, hardcore vertical restraints are those listed in the EU Vertical Block Exemption (now adopted into UK domestic law as a retained exemption for the post-Brexit period), namely:

- the fixing of minimum resale prices;
- certain types of restriction on the customers to whom, or the territory into which, a buyer can sell the contract goods;
- restrictions on members of a selective distribution system supplying each other or end-users; and
- restrictions on component suppliers selling components as spare parts to the buyer's finished product.

The EU Vertical Guidelines also explain that certain restrictions on online selling can qualify as hardcore restraints (see, eg, in the United Kingdom, the *Mobility Scooters I* case).

Where an agreement contains a hardcore restraint, it:

- will not benefit from the exemption created by the European Commission's De Minimis Notice (to which the Competition and Markets Authority (CMA) and UK courts will have regard when considering vertical restraints), as confirmed by the Court of Justice of the European Union in *Expedia*;
- will not benefit from the safe harbour under the EU Vertical Block Exemption (now adopted into UK domestic law as a retained exemption for the post-Brexit period); and
- is highly unlikely to satisfy the conditions for exemption under section 9 of the Competition Act 1998 (CA 1998).

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

Third, does the agreement fall within the EU Vertical Block Exemption (now adopted into UK domestic law as a retained exemption for the post-Brexit period), or another applicable block exemption, which, under section 10 of the CA 1998, creates a safe harbour from the Chapter I prohibition? If the agreement falls within the scope of the EU Vertical Block Exemption, it will benefit from a safe harbour. This safe harbour will be binding on the CMA and on any UK court that is asked to determine the legality of the vertical restraint.

Finally, where the vertical agreement does have an appreciable effect on competition within the United Kingdom and does not fall within the terms of the De Minimis Notice or the EU Vertical Block Exemption ((as adopted into domestic law in the United Kingdom) or any other applicable safe harbour), it is necessary to conduct an individual assessment of the agreement to determine whether the conditions for an exemption under section 9 of the CA 1998 are satisfied.

The UK Vertical Guidelines set out a number of factors that will be taken into account in assessing, first, whether a vertical agreement falls within the Chapter I prohibition and, second, whether an agreement satisfies the requirements for exemption under section 9 of the CA 1998. This latter question is determined by reference to the following factors:

- whether the agreement will lead to efficiencies through the improvement of production or distribution or promoting technical or economic progress;
- whether the efficiencies accruing as a result of the agreement accrue to consumers, rather than to the parties themselves;
- whether the restrictions being imposed are necessary to achieve the efficiency in question; and
- whether the restriction affords the parties the possibility of eliminating competition in respect of a substantial part of the products in question (ie, the same as article 101(3) of the Treaty on the Functioning of the European Union (TFEU)).

Market shares

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

Supplier market shares will be relevant to consideration of whether a restraint creates an appreciable restriction on competition and whether a restraint might fall within the safe harbours created by the EU De Minimis Notice or the EU Vertical Block Exemption (as adopted into UK domestic law as a retained exemption for the post-Brexit period). The UK Vertical Guidelines state that:

> *vertical agreements do not generally give rise to competition concerns unless one or more of the parties to the agreement possesses market power on the relevant market or the agreement forms part of a network of similar agreements.*

The CMA will normally take into account the cumulative impact of a supplier's relevant vertical agreements when assessing the impact on a market of a given vertical restraint. For example, in 2015, the then Office of Rail Regulation, which had concurrent jurisdiction with the CMA, accepted undertakings from Freightliner, following a two-year investigation of its commercial practices. The undertakings prohibited certain restrictions that had been agreed with Freightliner's customers and that limited potential resellers from entering the market, thus reinforcing Freightliner's large market share in six ports and inland terminals.

Also, the assessment of a given vertical restraint can vary depending on the vertical restraints concluded by that supplier's competitors. If the vertical restraints imposed by the supplier and its competitors have the cumulative effect of foreclosing market access, any vertical restraints that contribute significantly to that foreclosure may be found to infringe the Chapter I prohibition or article 101 of the TFEU. In the 2008 judgment in *Calor Gas Ltd v Express Fuels (Scotland) Ltd & Anor* in the Scottish Court of Sessions, the Court rendered unenforceable vertical restraints agreed between Calor Gas and two of its buyers (whereby the buyers agreed to purchase and sell only Calor cylinder liquefied petroleum gas for five years and not to handle the cylinders after termination) in part because Calor Gas had a network of similar restraints that served to foreclose the distribution market.

Under the Enterprise Act 2002, the CMA has extensive powers to conduct market studies and, ultimately, more detailed market investigations. Networks of parallel vertical agreements in given industries are among the issues that can cause the CMA to initiate a market study (of which there have been several in recent years) or, subsequently, to initiate a market investigation (see, eg, the Market Investigation by the CMA's predecessor, the Competition Commission (CC), into the supply of bulk liquefied petroleum gas for domestic use (final report published in 2006) and the CC market investigation into movies on pay-TV (final report published in 2012)). Also, the remedies in the recent private motor-insurance market investigation suggest that the existence of parallel networks of most-favoured-customer clauses in agreements between insurers and price comparison websites might be capable of softening price competition in the market for private motor insurance.

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

Arguably the most significant amendment to the assessment of vertical restraints arising out of the European Commission's 2010 review of its EU Vertical Block Exemption (now adopted into UK domestic law as a retained exemption for the post-Brexit period) was the introduction of a new requirement that, for an agreement to benefit from the safe harbour provided for under the EU Vertical Block Exemption, neither the supplier nor the buyer can have a market share more than 30 per cent.

Buyer market share must, therefore, be assessed each time the application of the EU Vertical Block Exemption is under consideration.

The CMA may also take into account the cumulative impact of a buyer's relevant vertical agreements when assessing the impact of vertical restraints on competition in a given purchasing market. Also, the assessment of a given vertical restraint can vary depending on the vertical restraints concluded by that buyer's competitors. If the vertical restraints imposed by the buyer and its competitors have the cumulative effect of excluding others from the market, then any vertical restraints that contribute significantly to that exclusion may be found to breach the Chapter I prohibition.

BLOCK EXEMPTION AND SAFE HARBOUR

Function

18 Is there a block exemption or safe harbour that provides certainty to companies as to the legality of vertical restraints under certain conditions? If so, please explain how this block exemption or safe harbour functions.

Under the Competition (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019 No. 93) (the Competition SI), the EU Vertical Block Exemption (and the EU Motor Vehicle Block Exemption) have been adopted (removing the references to the European Union) into UK domestic law. Consequently, agreements that would fall within the safe harbour created by the EU Vertical Block Exemption if they affected trade between EU member states will also be exempt from the Chapter I prohibition. Where an agreement satisfies the conditions of the EU Vertical Block Exemption, the safe harbour means that neither the Competition and Markets Authority (CMA) nor UK courts can determine that the agreement infringes the Chapter I prohibition, unless a prior decision (having a prospective effect only) is taken by the CMA to withdraw the benefit of the EU Vertical Block Exemption from the agreement.

The explanatory recitals to the new version of the EU 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 to allow consumers a fair share of the resulting benefits.

The adjustment of the EU Vertical Block Exemption's safe harbour so that it only applies where neither buyer nor supplier market shares exceed 30 per cent may have significant consequences in the United Kingdom in light of the relatively high levels of concentration in the retail and distribution sectors.

TYPES OF RESTRAINT

Assessment of restrictions

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

The Competition and Markets Authority (CMA) considers that the setting of fixed or minimum resale prices constitutes a hardcore restriction of competition. As such, it will almost always infringe the Chapter I prohibition, will fall outside the safe harbours of the De Minimis Notice and the EU Vertical Block Exemption and is generally considered unlikely to qualify for exemption under section 9 of the Competition Act 1998 (CA 1998). Indeed, in the CMA's March 2014 update of its investigation procedures guidance, the CMA restates that, for its leniency programme, price-fixing concerning which leniency from fines can be sought includes resale price maintenance (RPM).

The fixing of resale prices often led to enforcement action by the CMA's predecessor, the Office of Fair Trading (OFT). For example, in November 2002, the OFT fined Hasbro £9 million (reduced to £4.95 million for leniency) for the imposition of minimum resale prices. More recently, in May 2017, the CMA fined three companies active in the light fittings sector, as well as their common parent company, £4.9 million (reduced to £2.7 million for leniency and settlement) for preventing buyers from setting their own prices for online sales and for requiring them to sell at or above a minimum price. (The CMA exercised its discretion not to impose fines on the buyers themselves, however.) In October 2018, the CMA fined Heathrow Airport £1.6 million (including a 20 per cent reduction for settling) for entering into a lease agreement by which the lessee, the operator of the Sofitel Heathrow, was restricted from offering non-guests using the Sofitel Heathrow's car park prices that were lower than the prices charged in the car parks operated by the lessor, Heathrow Airport.

Communicating maximum or recommended resale prices from which the distributor is permitted to deviate without penalty tends to be permissible. However, the CMA is likely to view these arrangements with suspicion on concentrated markets, as these practices may facilitate collusion. In its 2016 decision in *Bathroom Fittings*, for example, the CMA found that a price recommended by the supplier constituted a minimum resale price, notwithstanding that the supplier's guidelines expressly described the price as a recommendation because the CMA found that the supplier had threatened distributors that deviated from the recommended price with a reduction of supplies or revocation of the copyright licence necessary for advertising the affected products, and had regularly monitored distributors' websites to verify compliance.

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

More recently, in August 2019, the CMA issued an infringement decision against Casio Electronics Co Ltd (Casio) for RPM, in which it imposed a fine of £3.7 million (including a 20 per cent discount for Casio's admission and cooperation). Between 2013 and 2018, Casio implemented a policy that restricted retailers from freely setting prices online by imposing a minimum price. Casio ensured compliance with its pricing policy by using software that enabled it to monitor online resale prices in real-time and by pressuring retailers to raise prices if they were found to be in breach of the pricing policy.

In 2020, the CMA adopted four separate fining decisions – concerning guitar manufacturer Fender (January 2020), synthesizer and hi-tech music equipment manufacturer Korg UK (June 2020), electronic drum manufacturer Roland UK (July 2020) and digital keyboard manufacturer Yamaha and reseller GAK (also July 2020) – regarding (largely online) RPM. Fines in each case were significant, with the £4.5 million fine on Fender, and the £4.0 million fine on Roland UK being the largest.

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

The CMA's predecessor, the OFT, considered several cases in which suppliers attempted to oblige retailers to inform them of any intended price discounts before the imposition of these discounts.

The OFT also considered issues specific to RPM at the launch of a new brand or product. When John Bruce (UK) Limited introduced its MEI brand of automatic slack adjusters (safety devices fitted to the braking system of trucks, trailers and buses) into the UK market to compete with the then market leader, Haldex, it asked distributors to keep retail prices for MEI slack adjusters around 20 to 25 per cent lower than those for Haldex (and stated that deviation from the agreed pricing policy was not allowed and that special deals needed to be controlled 'through marketing so John [Bruce] can be [kept] in the loop on the reasons for the request and whether he wants to agree to it'). John Bruce argued that its conduct could not breach competition law since it was developing competition where none existed. However, in its 2002 decision, the OFT found that John Bruce had infringed the Chapter I prohibition and a fine of 3 per cent of John Bruce's relevant turnover was imposed.

The EU Vertical Guidelines (to which the CMA will continue to have regard post-Brexit) contain a reference to the possibility of RPM being permissible in certain circumstances, for example, where these restrictions are of limited duration and relate to the launch of a new product or a short-term low-price campaign. It seems possible, therefore, that the John Bruce case might be subject to a different assessment were it to be considered under the provisions of the 2010 EU Vertical Guidelines.

Relevant decisions

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

A number of the higher-profile RPM cases brought by the CMA's predecessor, the OFT, involved additional elements.

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

In 2011, the OFT fined four supermarkets and five dairy processors a total of £49.51 million for coordinating increases in the retail prices of milk and cheese (as explained in the OFT's press release, 'the coordination was achieved by supermarkets indirectly exchanging retail pricing intentions with each other via the dairy processors – A-B-C information exchanges'). Further, the agreements investigated in the context of the OFT's recent *Hotel Online Booking* case were found to contain retail rate most-favoured-nation (MFN) clauses in addition to agreements not to discount. The commitments accepted by the European Commission in

the *e-books* case (which started with the OFT in the United Kingdom) also suggest a possible link between resale price restrictions and most-favoured-customer clauses.

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

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

However, the OFT gave these arguments less credence in its decision of 8 November 2004 in *UOP Limited/UKae Limited/Thermoseal Supplies Ltd/Double Quick Supplyline Ltd/Double Glazing Supplies Ltd*, a case involving an arrangement to fix the minimum resale price for desiccant (used in double glazing). In that case, the parties raised arguments regarding the claimed efficiencies of RPM but the OFT stated that it was 'extremely hard, if not impossible' to see how the fixing of prices for UOP's desiccant would contribute to an improvement in the production of goods, or allow consumers a fair share of the resulting benefit because consumers were deprived of discounts and obliged to pay higher prices.

In the 2002 *John Bruce* case, the supplier argued that its price restriction was pro-competitive because it facilitated competition against the incumbent market leader; nevertheless, the OFT found that the agreements fell within the Chapter I prohibition. However, the starting amount of the fine was set at a comparatively low level because the OFT took into account that:

> *John Bruce had successfully introduced a new product into a market which other suppliers of automatic slack adjusters had found difficult to penetrate, increasing inter-brand competition; that John Bruce was a small new entrant competing in a market where one supplier (Haldex) had a very large share; and that purchasers of automatic slack adjusters benefited because the prices of MEI slack adjusters were some 25 per cent below that of the leading product in the market.*

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

Any agreement amounting to RPM will almost always be deemed to infringe the Chapter I prohibition, will fall outside the safe harbours of the De Minimis Notice and the EU Vertical Block Exemption (as adopted into UK domestic law as a retained exemption for the post-Brexit period), and will generally be considered unlikely to qualify for exemption under section 9 of the CA 1998. In 2010, the CMA's predecessor, the OFT, fined 10 retailers and two tobacco manufacturers a total of £225 million for fixing retail prices across competing brands and competing retail outlets. The arrangements in question were alleged to involve setting the retail price for one supplier's brand of cigarettes by reference to the price for another supplier's competing brand of cigarettes. The Competition Appeal Tribunal (CAT) quashed the OFT's decision concerning the five retailers and one manufacturer who had appealed the findings to the CAT after hearing evidence from multiple witnesses whose evidence did not support the OFT's findings of fact. The CAT did not decide on whether the agreements or restraints as the OFT had understood them would have infringed the Chapter I prohibition.

Suppliers

24 | Explain how a supplier warranting to the buyer that it will supply the contract products on the terms applied to the supplier's most-favoured customer, or that it will not supply the contract products on more favourable terms to other buyers, is assessed.

It is not clear whether a most-favoured customer or a MFN restriction at the wholesale level – in isolation – will constitute a restriction infringing the Chapter I prohibition. If such a restriction were deemed to infringe the Chapter I prohibition, it should nonetheless fall within the safe harbour created by the EU Vertical Block Exemption (as adopted into UK domestic law as a retained exemption for the post-Brexit period), provided the other criteria for its application are met.

The parties involved in the *Hotel Online Booking* investigation had agreed to MFN clauses. As the CMA's predecessor, the OFT, explained in that case:

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

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

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

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

Recent cases indicate that a retail MFN clause like that described could potentially constitute a restriction of competition falling within the Chapter I prohibition.

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

The recent findings in the private motor insurance market investigation also included concerns relating to MFNs included in agreements between insurers and price comparison websites. In September 2017, the CMA opened an investigation into the use of MFNs by price comparison websites in the home insurance sector, and in November 2018, sent a statement of objections to Compare the Market in connection

with the investigation (a final decision on that case is currently expected in spring 2020).

Similarly, in November 2016, the CMA opened an investigation into alleged exclusionary and restrictive pricing practices, including MFNs in respect of online sales, in the supply by ATG Media of auction services. The CMA formally accepted commitments in June 2017, under which ATG Media agreed to end its MFNs in respect of online sales, as well as exclusive purchasing obligations and prohibitions on customers' promotion of rival platforms, for five years.

26 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.

In its March 2014 decision concerning *Mobility Scooters II*, the CMA's predecessor, the OFT, found that an arrangement by which a supplier prevented a buyer from advertising its products online for sale below a certain minimum price (a minimum-advertised-price policy (MAPP) constituted a by object restriction of competition for purposes of the Chapter I prohibition. The OFT arrived at this conclusion although the buyers in question remained free to discount away from the minimum prices and that no equivalent prohibition applied to advertising in brick-and-mortar shops or local print and broadcast media or both. In May 2016, the CMA similarly imposed fines concerning Commercial Refrigeration Products, where a supplier's MAPP applied to both sales online and sales from brick-and-mortar shops. The CMA's decision in *Commercial Refrigeration Products* sets out the CMA's view that MAPPs can be equivalent to and sanctioned as, RPM. In June 2016, the CMA also published an open letter, explaining that it considered that MAPPs could amount to RPM.

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

As with most-favoured-customer clauses, it is not clear whether such a restriction will infringe the Chapter I prohibition. However, the CMA is likely to follow the European Commission, which has suggested that where it considers market power to be concentrated among relatively few suppliers, and where the buyer warrants to the supplier that, if it pays one of the supplier's competitors more for the same product, it will pay that same higher price to the supplier, then these arrangements may increase prices and may increase the risk of price coordination.

Restrictions on territory

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

As territorial restrictions can lead to market partitioning, the CMA's predecessor, the OFT, had tended to see these restraints as hardcore restraints that would almost always infringe the Chapter I prohibition, would fall outside the safe harbours of the De Minimis Notice and the EU Vertical Block Exemption (as adopted into UK domestic law as a retained exemption for the post-Brexit period), and would seldom qualify for exemption under section 9 of the CA 1998.

There is one important exception to this. Where a supplier sets up a network of exclusive distributorships and prevents each buyer from selling actively into a territory granted exclusively to another buyer (or reserved to the supplier itself), it is generally accepted that this may lead to an increase in inter-brand competition. These arrangements will fall within the safe harbour provided the other conditions of the EU Vertical Block Exemption are met (including supplier and buyer market share less than 30 per cent), provided the restrictions relate only to active sales (ie, they do not cover passive or unsolicited sales) and provided the restrictions cover only active sales into territories granted on an exclusive basis to another buyer (or to the supplier itself).

Where restrictions on active sales into territories reserved exclusively to another buyer (or the supplier itself) are imposed by suppliers having a market share more than 30 per cent, these arrangements may still qualify for individual exemption under section 9 of the CA 1998.

In October 2008, the OFT published an opinion in the long-running *Newspaper and Magazine Distribution* case, which dealt with the assessment of territorial sales restrictions under section 9 of the CA 1998. The 2008 opinion outlines that while preventing passive sales by wholesalers of newspapers and magazines is likely to restrict competition on the retail level (because retailers are not able to switch wholesalers), a ban on passive sales may at least concerning newspapers, make more efficient the competition between wholesalers competing for the right to supply in a particular geographic market. The OFT considered that this would enable newspaper publishers to reduce their costs and would be likely to lead to reduced prices to end-consumers. Another factor considered by the OFT was that absolute territorial protection 'may support the wide availability of newspapers, in particular by enabling publishers to include in their contracts with wholesalers an obligation to supply all retailers (within reason) in a territory'.

29 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?

Concerning restrictions concerning the territory into which, or the customers to whom, a buyer may sell, the CMA Guidelines on Vertical Agreements (OFT419) provide that, as a general principle, a buyer must remain free to decide where and to whom it sells any contract goods or services.

Under the Competition (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019 No. 93) (Competition SI), agreements that would fall within the safe harbour created by the EU Vertical Block Exemption if they affected trade between EU member states will also be exempt from the Chapter I prohibition.

Restrictions on customers

30 Explain how restricting the customers to whom a buyer may resell contract products is assessed. In what circumstances may a supplier require a buyer not to resell products to certain resellers or end-consumers?

Customer restrictions give rise to issues similar to those arising in territorial restrictions and will tend to be viewed by the Competition and Markets Authority as hardcore restrictions. As such, limitations on a buyer's sales to particular classes of customer will almost always infringe the Chapter I prohibition, will fall outside the safe harbours of the De Minimis Notice and the EU Vertical Block Exemption (as adopted into UK domestic law as a retained exemption for the post-Brexit period), and will seldom qualify for exemption under section 9 of the CA 1998. However, there are certain key exceptions to this rule, namely:

- where the restriction applies only to active sales to customers of a class granted exclusively to another buyer (or reserved to the supplier itself), the arrangement may fall within the safe harbour created by the EU Vertical Block Exemption, provided the applicable conditions are met (including supplier and buyer market share less than 30 per cent);

- restrictions on a buyer's ability to sell components, supplied for incorporation, to customers who would use them to manufacture the same type of products as those produced by the supplier may also fall within the safe harbour created by the EU Vertical Block Exemption;
- restrictions on a wholesaler selling directly to end-users may also fall within the safe harbour created by the EU Vertical Block Exemption; and
- distributors appointed within a selective distribution system can be restricted from selling to unauthorised distributors.

Restrictions on use

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

Objectively justifiable restrictions on the uses to which a buyer or subsequent buyer puts the contract goods are permissible and will not fall within the Chapter I prohibition (eg, restrictions on the sale of medicines to children). However, for these restrictions to be objectively justifiable, the supplier would likely have to impose the same restriction on all buyers and adhere to these restrictions itself.

Restrictions on online sales

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

Broadly speaking, the UK rules follow the principles set out in the Commission's EU Vertical Guidelines. Several recent investigations have indicated as to how these principles will be applied in the United Kingdom.

In August 2013, the CMA's predecessor, the OFT, issued an infringement decision in its *Mobility Scooters I* case against Roma Medical Aids Limited (Roma) and certain of its retailers. The OFT found that Roma entered into arrangements with seven UK-wide online retailers that prevented them from selling Roma-branded mobility scooters online, and from advertising their prices for Roma-branded mobility scooters online. The OFT considered that these practices limited consumers' choice and obstructed their ability to compare prices and get value for money. No fines were imposed in this case as Roma and each of the seven retailers involved benefited from immunity under the small agreement exemption. The OFT expressed similar reasoning and reached the same result in *Mobility Scooters II*. More recently, following the initiation of an investigation into the sports equipment sector in November 2015, the CMA sent a statement of objections to Ping Europe in June 2016, alleging that Ping Europe had operated an online sales ban in respect of its golf clubs. The CMA issued an infringement decision in the case in August 2017, finding that an online sales ban, by its very nature, reduces the ability and the incentives of buyers to attract and to win customers' business, because buyers cannot attract customers located outside their catchment areas to purchase their products online by offering better prices or a quality online service. The CMA found that the ban at issue, which prohibited online sales but permitted online advertising, limited the ability of customers to make use of price comparison websites and restricted passive sales to customers. In September 2018, an appeal by Ping Europe was dismissed by the Competition Appeal Tribunal, subject to a reduction in the fine. In January 2020, the Court of Appeal dismissed a subsequent appeal by Ping against the CAT's judgment.

The OFT also expressed concern in its earlier *Yamaha* case that a scheme awarding discounts to Yamaha dealers based upon the ratio of face-to-face sales as opposed to distance and internet sales was designed to target internet-only retailers and discounters, and acted as a disincentive for dealers to engage in distance and internet sales. The OFT closed its investigation in September 2006, indicating that Yamaha had cooperated with the OFT and had withdrawn the scheme in question. In May 2016, these divergent provisions for face-to-face and online sales by retailers did lead to fines in the *Bathroom Fittings* case, in which the CMA determined that a supplier had breached competition law by preventing retailers from discounting online prices beyond a proportion of the in-store recommended price. In *Commercial Refrigeration Products*, decided in the same month, the CMA found that similar restrictions on prices advertised by retailers were unlawful, notwithstanding that they applied to both sales online and sales from brick-and-mortar shops. According to the CMA, the supplier concerned had designed its policy expressly to reduce competitive pressure from online sales and took steps to enforce such a policy by monitoring advertised prices and threatening online distributors that deviated with a reduction of supplies.

Although the CMA imposed fines only on the suppliers in the *Bathroom Fittings* and *Commercial Refrigerator Products* cases, it noted in the press release accompanying its decision in *Bathroom Fittings* that retailers should be aware that they can also be fined for entering into these arrangements. Also, the CMA sent warning letters to other businesses in the affected sectors suspected to have been involved in similar practices, and, in June 2016, published new written guidance on online price restrictions.

33 | 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 CMA (and its predecessor, the OFT) has carried out several investigations of vertical restraints concerning the differential treatment of different types of internet sales channel. In October 2012 the OFT launched a formal investigation into price-parity clauses used by Amazon, which the OFT alleged had restricted sellers using Amazon from offering lower prices on other online sales channels. (The OFT ended its investigation in November 2013 after Amazon announced that it would cease using these price-parity clauses in the European Union.)

In July 2012, the OFT stated objections alleging that Booking.com BV and Expedia Inc had each entered into agreements with Intercontinental Hotels Group plc that restricted the ability of online travel agents to discount the price of hotel rooms. The OFT's acceptance of commitments from the parties was subsequently annulled by the Competition Appeal Tribunal owing to a procedural impropriety. After re-opening the investigation in October 2014, the CMA closed it in July 2015, following acceptance of commitments from Booking.com by the French, Italian and Swedish competition authorities in April 2015 and Booking.com's announcement that it would abandon price parity provisions concerning online travel agents across Europe. (In August 2015, Expedia similarly waived its rate, conditions and availability parity clauses with hotel partners for five years.)

More recently, in its January 2019 judgment in *Gascoigne Halman v Agents' Mutual*, the Court of Appeal affirmed a CAT decision, holding that online marketplace rules, which prohibited sellers who had purchased access to the marketplace at issue from listing their products on more than one other online marketplace and promoting any other online marketplace, did not constitute restrictions of competition by object (albeit noting that the lack of market power of the Agents' Mutual online platform was relevant to finding that there was no by object infringement).

Selective distribution systems

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

Following the Court of Justice of the European Union (CJEU) judgment in *Metro v Commission*, and under the obligation imposed on the CMA and UK courts under section 60A of the CA 1998, selective distribution systems will fall outside the Chapter I prohibition where distributors are selected on objective criteria of a purely qualitative nature. To fall outside the Chapter I prohibition:

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

Where selective distribution systems do not satisfy the above criteria, they will fall within the Chapter I prohibition but may benefit from safe-harbour protection (irrespective of the nature of the goods or any quantitative limits) under the De Minimis Notice or the EU Vertical Block Exemption (as adopted into UK domestic law as a retained exemption for the post-Brexit period), provided they do not incorporate certain further restraints. In particular, these systems may benefit from exemption under the EU Vertical Block Exemption, provided that:

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

Separately, the EU Vertical Guidelines (to which the CMA will have regard) 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 concerning online sales that are not equivalent to the obligations imposed concerning sales from a brick-and-mortar shop. Also, where selective distribution systems incorporate obligations on members not to stock the products of an identified competitor of the supplier, this particular obligation itself may be unenforceable. However, this last restriction should not affect the possibility of the system overall benefiting from the safe harbour.

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

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

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

According to the CJEU's judgment in *Metro v Commission*, and under the obligation imposed on the CMA and UK courts under section 60A of the CA 1998, in purely qualitative selective distribution systems, restrictions may fall outside the Chapter I prohibition, inter alia, where the contract products necessitate after-sales service.

Also, the EU Vertical Guidelines (to which the CMA will have regard) provide that the nature of the contract products may be relevant to the assessment of efficiencies under article 101(3) of the Treaty on the Functioning of the European Union (TFEU), to be considered where selective distribution systems fall within the prohibition under article 101(1) of the TFEU. In particular, the European Commission notes that efficiency arguments under article 101(3) of the TFEU may be stronger concerning new or complex products or products whose qualities are difficult to judge before consumption (in the case of experience products) or after consumption (in the case of credence products).

Additionally, the CMA's predecessor, the OFT, recognised in the *Newspaper and Magazine Distribution* case (Opinion of the Office of Fair Trading – guidance to facilitate self-assessment under the CA 1998) the advantages of selective distribution concerning newspapers, since newspapers can be sold only during a limited period (ie, the newspapers must be delivered and sold on the day of production, with most demand for newspapers expiring by midday).

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

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

Given the CJEU's decision in *Pierre Fabre Dermo-Cosmétique* in October 2011, which the CMA followed in August 2017 (and the Competition Appeal Tribunal upheld in September 2018) in the *Ping Europe* case, restrictions amounting to an outright ban on internet sales to end-users by approved buyers will fall within article 101 of the TFEU, will not benefit from the safe harbour of the EU Vertical Block Exemption but may be eligible for an individual exemption under article 101(3) of the TFEU.

Regarding UK enforcement, in its investigation of Yamaha's selective distribution system, the OFT was concerned that Yamaha should take steps to remove any discrimination against Yamaha's distance sellers in its discount scheme. However, the issue has not yet been considered in great detail in the United Kingdom. Likewise, in its recent decisions concerning *Mobility Scooters I* and *Mobility Scooters II*, the OFT emphasised the importance of buyers being able to advertise products and make sales, via the internet. The CMA has maintained this emphasis in its recent *Bathroom Fittings* and *Commercial Refrigeration Products* decisions.

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

In a 2003 decision concerning the selective distribution agreements of Lladró Comercial SA, the CMA's predecessor, the OFT, noted, concerning Lladró's reservation of the right to repurchase goods that a retailer has proposed to sell below the recommended price level, that: '[w]hether or not Lladró Comercial has thus far exercised that ongoing contractual right is immaterial to the . . . finding of an infringement'.

In *Football Replica Kits*, the OFT did not object to Umbro's selective distribution system in itself, even though it included refusing or failing to supply major UK supermarkets. However, it did take the view that this facilitated the price-fixing arrangements, which were prohibited and concerning which fines were imposed.

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

Yes, in its UK Vertical Guidelines, the CMA states:

> *Selective distribution may foreclose a market to retail competition, where it is practised by a sufficient proportion of manufacturers. For example, if manufacturers of the most popular brands of a product have similar distribution agreements with their retailers (with the effect that relatively few retailers are authorised to stock the full range of popular brands), this may prevent unauthorised retailers from providing effective competition and thereby provide the authorised retailers with market power.*

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

The following are identified in the EU Vertical Guidelines (to which the CMA and UK courts will have regard) as hardcore restrictions of competition (ie, restrictions that, in the United Kingdom, will fall within the Chapter I prohibition, will not benefit from the safe harbour provided by the EU Vertical Block Exemption and are unlikely to benefit from an individual exemption):

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

Other restrictions

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

Such an arrangement may raise concerns regarding market partitioning. Where the supplier insists that a given buyer must buy all of its requirements of the supplier's products from, for example, the supplier's local subsidiary, this may prevent the ordinary arbitraging that would otherwise occur. On its own, however, this restriction, known as exclusive purchasing, will only infringe the Chapter I prohibition where the parties have a significant market share and the restrictions are of long duration. Further, where the supplier and the buyer each have a market share of 30 per cent or less, the restriction will benefit from the safe harbour created by the EU Vertical Block Exemption (as adopted into UK domestic law as a retained exemption for the post-Brexit period), regardless of duration.

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

Neither the CMA nor its immediate predecessors, has looked at this issue in detail. However, in a 1992 investigation by the Monopolies and Mergers Commission (MMC) (the predecessor to the Competition Commission, itself a predecessor to the CMA) concerning the sale of fine-fragrance products in supermarkets and low-cost retailers, the MMC suggested amendments to how the products were distributed, but recognised that suppliers should be able to control the distribution of their products 'in order to protect . . . brand images which consumers evidently value'.

42 | Explain how restricting the buyer's ability to stock products competing with those supplied by the supplier under the agreement is assessed.

An obligation on the buyer not to manufacture or stock products competing with the contract products (non-compete obligation) may infringe the Chapter I prohibition. The assessment of such a clause will depend on its exact effects, which will be determined by reference, inter alia, to the duration of the restraint, the market position of the parties and the ease (or difficulty) of market entry for other potential suppliers.

Providing that non-compete clauses do not have a duration exceeding five years, they may benefit from the safe harbour under the EU Vertical Block Exemption (as adopted into UK domestic law as a retained exemption for the post-Brexit period) if the other criteria for its application are met. If the criteria for the application of the EU Vertical Block Exemption are not met, non-compete clauses may, nevertheless, fall outside the scope of the Chapter I prohibition or may satisfy the conditions for exemption under section 9 of the CA 1998, depending on the market positions of the parties, the extent and duration of the clause, barriers to entry and the level of countervailing buyer power.

The CMA's predecessor, the OFT, considered long-term exclusivity provisions in several cases, including its 2011 Outdoor Advertising market study and related investigation into street furniture contracts concluded by advertising agencies Clear Channel UK and JCDecaux. The OFT closed its Clear Channel UK and JCDecaux investigation in May 2012 when the parties agreed voluntarily not to enforce certain exclusivity clauses, first-refusal clauses and tacit-renewal clauses in their long-term contracts with local authorities. Similarly, in October 2017, the CMA accepted commitments from the Showmen's Guild of Great Britain, under which it would amend its membership rules so as not to prohibit members from purchasing a licence to operate an amusement from a competing non-member. In January 2018, the Showmen's Guild of Great Britain approved these amendments to its rules.

43 | 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 CMA considers these clauses to be akin to non-compete clauses, effectively restricting the ability of the buyer to stock products competing with the contract products. They are, therefore, subject to a similar antitrust assessment. In particular, the UK Vertical Guidelines identify as equivalent to a non-compete obligation, a requirement to purchase minimum volumes amounting to substantially all of the buyer's requirements (quantity forcing).

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

In an exclusive distribution network, as a corollary of limiting the buyer's ability actively to sell the contract products into other exclusively allocated territories, the supplier often agrees:

- not to supply the products in question directly itself; and
- not to sell the products in question to other buyers for resale in the assigned territory.

The EU Vertical Guidelines, to which the CMA has regard, do not deal separately with the restrictions imposed on the supplier in this kind of arrangement. However, they do acknowledge that the restrictions on the supplier and the buyer usually go hand-in-hand. These systems should therefore be assessed under the framework regarding the assessment of territorial resale restrictions imposed on buyers.

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

The EU Vertical Guidelines, to which the CMA has regard, do not deal in much detail with the restrictions imposed on the suppliers. However, a restriction on a component supplier from selling components as spare parts to end-users or to repairers that are not entrusted by the buyer with the repair or servicing of the buyer's products is considered a hard-core restriction of competition. As such, these restrictions will almost always fall within the Chapter I prohibition will fall outside the safe harbours of the De Minimis Notice and the EU Vertical Block Exemption (as adopted into UK domestic law as a retained exemption for the post-Brexit period) and will seldom qualify for exemption under section 9 of the CA 1998.

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

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

NOTIFICATION

Notifying agreements

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

In line with the modernisation reforms effected by the European Union in May 2004, the United Kingdom abolished the notification system that previously existed under the Competition Act 1998. Subject to the making of requests for guidance in novel cases (which raise novel or unresolved questions about the application of the Chapter I prohibition and where the Competition and Markets Authority (CMA) considers there is an interest in issuing clarification for the benefit of a wider audience), a notification of a vertical restraint is not possible.

Authority guidance

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

Generally, the CMA considers that parties are well placed to analyse the effect of their own conduct. Parties can, however, obtain guidance from the CMA in the form of a written opinion where a case raises novel or unresolved questions about the application of the Chapter I prohibition (or article 101 of the Treaty on the Functioning of the European Union) and where the CMA considers there is an interest in issuing clarification for the benefit of a wider audience. However, the CMA's predecessor, the Office of Fair Trading, only issued one such opinion. In limited circumstances, the CMA will also consider giving non-binding informal guidance on an ad hoc basis.

ENFORCEMENT

Complaints procedure for private parties

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

Yes. The Competition and Markets Authority (CMA) has published a notification form that parties can use to lodge complaints. Receipt of complaints will be acknowledged but the CMA preserves its discretion to act – or not act – on receipt of a complaint.

Regulatory enforcement

50 | How frequently is antitrust law applied to vertical restraints by the authority responsible for antitrust enforcement? What are the main enforcement priorities regarding vertical restraints?

In 2020, the CMA adopted decisions imposing fines in four vertical restraints cases. All four cases related to resale price maintenance, largely in an online context.

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

Under section 2(4) of the Competition Act 1998 (CA 1998), any agreement that falls within the Chapter I prohibition and does not satisfy the conditions for exemption under section 9(1) of the CA 1998 (or does not benefit from a safe harbour under the De Minimis Notice, or the EU Vertical Block Exemption (as adopted into UK domestic law as a retained exemption for the post-Brexit period)) will be void and unenforceable. However, where it is possible to sever the offending provisions of the contract from the rest of its terms, the latter will remain valid and enforceable. As a matter of English contract law, severance of offending provisions is possible unless, after the necessary excisions have been made, the contract 'would be so changed in its character as not to be the sort of contract that the parties entered into at all' (*Chemidus Wavin Ltd v Société pour la Transformation*). Such an assessment will depend on the exact terms and nature of the agreement in question.

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

The CMA's enforcement powers are set out in sections 31 to 40 of the CA 1998. The CMA can apply the following enforcement measures itself:

- give directions to bring an infringement to an end;
- give interim measures directions during an investigation;
- accept binding commitments offered to it; and
- impose financial penalties on undertakings.

Where the above measures are not complied with by the parties, the CMA can bring an application before the courts resulting in a court order against the parties to fulfil their obligations. Where any company fails to fulfil its obligations under a court order, its management may be found to be in contempt of court, the penalties for which in the United Kingdom include imprisonment. Under sections 9A to 9E of the Company Directors Disqualification Act 1986, the CMA also has the power to apply to the court for a disqualification order to be made against the director of a company that has breached competition law or to accept a disqualification undertaking from such a director, for a maximum of 15 years. The CMA first exercised this power in December 2016 and has been exercising it increasingly in recent years.

Where the CMA has taken a decision finding an infringement of the Chapter I prohibition, it may impose fines of up to 10 per cent of the infringing undertaking's worldwide revenues for the preceding year. In practice, however, fines in vertical restraints cases have tended to be well below the 10 per cent maximum. In May 2017, the CMA fined three companies active in the light fittings sector, as well as their common parent company, £4.9 million (reduced to £2.7 million for leniency and settlement) for online resale price maintenance (RPM), while in August 2017, the CMA imposed a fine of £1.45 million on Ping Europe (reduced to £1.25 million on appeal) for preventing two UK retailers from making online sales. Most recently, in August 2019, the CMA imposed a fine of £3.7 million on Casio Electronics Co Ltd for RPM, and, in 2020, fines of £4.5 million on Fender and £4.0m on Roland UK for (online) RPM.

Many of the other cases involving vertical restraints in which higher fines have been imposed have included both horizontal and vertical elements.

The CMA's remedies can require positive action, such as informing third parties that an infringement has been brought to an end and reporting back periodically to the CMA on certain matters such as prices charged. In some circumstances, the directions appropriate to bring an infringement to an end may be (or may include) directions requiring an undertaking to make structural changes to its business. Positive directions were given to Napp Pharmaceutical Holdings in a 2001 dominance case. Similarly, concerning compensatory measures, the OFT agreed in its 2006 decision in *Independent Schools* a settlement that included the infringing schools paying a nominal fine of £10,000 each, reduced in the case of six of the schools by up to 50 per cent for leniency, and contributing £3 million to an educational trust for the benefit of those pupils who had attended the schools during the period of infringement.

Investigative powers of the authority

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

The CMA's investigation powers are set out in sections 25 to 30 of the CA 1998. In outline, where the CMA has reasonable grounds for suspecting an infringement of either the Chapter I prohibition, it may by written notice require any person to provide specific documents or information of more general relevance to the investigation. The CMA may also conduct surprise on-site investigations, requiring the production of any relevant documents and oral explanations of these documents.

Concerning vertical agreements not involving allegations of resale price-fixing, the CMA is more likely to investigate a case through written notice.

In exercising these powers, the CMA must recognise legal professional privilege and the privilege against self-incrimination under the European Convention on Human Rights.

Private enforcement

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

Private actions for damages for breaches of the Chapter I prohibition (or pre-Brexit, article 101 of the Treaty on the Functioning of the European Union (TFEU)) may be brought in the High Court or the specialist competition court, the Competition Appeal Tribunal, regardless of whether an infringement decision has been reached by the CMA, another sectoral regulator or the European Commission. Several actions have been brought including the ground-breaking case of *Courage v Crehan* concerning which, on reference, the Court of Justice of the European Union confirmed that a party to an agreement infringing article 101 of the TFEU must be able to bring an action for damages if, as a result of its weak bargaining position, it cannot be said to be responsible for the infringement. Also, non-parties to agreements can challenge their validity directly before the courts (see, eg, *Football Association Premier League Ltd & Others v LCD Publishing Limited*). Though relatively few cases have proceeded to final awards of damages, many private damages actions brought in the United Kingdom have been settled out of court.

Following the December 2020 judgment of the Supreme Court in *Merrick v Mastercard,* the number of private damages cases in the United Kingdom is expected to rise, owing to the interpretation by the Supreme Court of the requirements for certifying a 'class' of claimants for purposes of the UK's opt-out collective redress scheme under the Consumer Rights Act 2015.

Outside the opt-out collective redress scheme, the Consumer Rights Act 2015 also created a fast-track procedure for more straightforward cases brought by individuals and small and medium-sized entities before the Competition Appeal Tribunal (CAT). The second of these cases before the CAT, brought in February 2016 by a supplier of certain lands to Tesco, concerned a restrictive agreement against the supplier in respect of its use of retained lands, including a prohibition on sales to the buyer's competitors.

In March 2017, the United Kingdom formally implemented the EU Damages Directive through the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017, which amended the rules on limitation periods, disclosure, and the passing-on of overcharges to indirect purchasers.

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

OTHER ISSUES

Other issues

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

No.

UPDATE AND TRENDS

Recent developments

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

The Competition and Markets Authority's (CMA) four vertical restraint-related decisions in 2020 all related to resale price maintenance (RPM), largely concerning online sales. RPM has long been a focus for the CMA and there is no reason to believe this will cease to be the case going forward.

Another 2020 development of note is the Supreme Court's decision in *Merricks v Mastercard*, which is thought likely to facilitate the bringing of 'opt-out' class actions in the United Kingdom.

Anticipated developments

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

The UK's departure from the European Union will begin to have impacts in the field of competition law following the end of the Brexit transition period (on 31 December 2020). The substance of UK competition laws regarding vertical agreements is likely to remain the same, at least in the short term, but divergence between the substance of EU and UK competition laws may develop in due course. Most notably insofar as concerns vertical agreements, the United Kingdom has adopted the EU Vertical Block Exemption into domestic law until its expiry in May 2022, but, with the EU Vertical Block Exemption being reviewed and potentially revised by the European Commission in 2021, the CMA has announced that it will consider whether to adopt – or amend – any revised version of the EU Vertical Block Exemption for application in the United Kingdom.

Insofar as concerns enforcement, after the end of the Brexit transition period, there will be an increased likelihood of parallel investigations of vertical agreements, including concerning practices with a pan-European dimension that would previously have been investigated exclusively by the European Commission.

Coronavirus

58 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

No emergency legislation (or other measure) that is specific to vertical agreements has been implemented.

SIDLEY

Patrick J Harrison
pharrison@sidley.com

Rosanna Connolly
rconnolly@sidley.com

70 St Mary Axe
London
EC3A 8BE
United Kingdom
Tel: +44 20 7360 3600
Fax: +44 20 7626 7937
www.sidley.com

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